IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY,

Petitioner,

v.

CASE NO. SC08-1083
L.T. No. CR81-0535
DEATH PENALTY CASE

WALTER A. McNEIL, Secretary,
Florida Department of Corrections,

Respondent.
_____/

RESPONSE TO SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, Walter A. McNeil, by and through the undersigned Assistant Attorney General, and hereby responds to the successive Petition for Writ of Habeas Corpus filed herein, pursuant to this Court's Order of June 12, 2008. Respondent respectfully submits that the petition should be dismissed as procedurally barred; alternatively, the petition should be denied as meritless.

FACTS AND PROCEDURAL HISTORY

Petitioner Kelley is again seeking extraordinary relief from the murder conviction and sentence of death entered against him in 1984. Kelley's conviction and sentence were affirmed on direct appeal. Kelley v. State, 486 So. 2d 578, 579-80 (Fla.), cert. denied, 479 U.S. 871 (1986). This Court has also affirmed the denial of postconviction relief, and has denied two previous petitions for habeas relief. Kelley v. State, 569 So. 2d 754 (Fla.

1990); Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992); Kelley v. Crosby, 874 So. 2d 1192 (Fla. 2004). In addition, this Court recently affirmed the denial of a motion for DNA testing. Kelley v. State, 974 So. 2d 1047 (Fla. 2007). In that opinion, this Court noted the following facts related to Kelley's conviction:

> William Kelley was indicted for the October 3, 1966, contract murder of Charles Von Maxcy, a wealthy citrus grower and rancher from Sebring, Florida. *Kelley v. State, 486 So. 2d 578, 579 (Fla. 1986)*. John Sweet, a real estate broker with ties to Boston's criminal underworld, commissioned Kelley and Andrew Von Etter to carry out the murder. *Kelley v. Secretary for Dep't of Corrections, 377 F.3d 1317, 1324 (11th Cir. 2004)*. Originally, only Sweet was tried for the murder. After Sweet's first trial ended in a mistrial, the conviction resulting from his second trial was reversed on appeal. *See Kelley v. Singletary, 222 F. Supp. 2d 1357, 1358 (S.D. Fla. 2002), rev'd sub nom. Kelley v. Secretary for Dep't of Corrections, 377 F.3d 1317 (11th Cir. 2004); Sweet v. State, 235 So. 2d 40 (Fla. 2d DCA 1970)*.
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> At that point, the case file, including the evidence involved, was transmitted to the clerk of the court for maintenance. *Kelley, 486 So. 2d at 579*. The evidence remained there until April of 1976, nine and a half years after the murder, when the State, at the clerk's request, moved for an order requesting the court's permission to dispose of the evidence. The State's motion was granted and the evidence destroyed. *Kelley, 377 F.3d at 1325*.
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> The case was dormant until 1981 when Sweet approached law enforcement authorities seeking immunity regarding a separate criminal situation in return for his testimony pertaining to various crimes, including the Von Maxcy murder. *Kelley, 486 So. 2d at 579-80*. It was Sweet's testimony upon which Kelley's indictment and prosecution were based.

Kelley, 974 So. 2d at 1048.

While the DNA appeal was pending, Kelley filed a successive motion to vacate in the circuit court, alleging that the State had

violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose evidence disposition forms to Kelley's defense team prior to his 1984 trial. That motion was denied on December 20, 2007. The appeal is currently pending in this Court, Kelley v. State, Case No. SC08-608. Kelley filed the instant habeas petition contemporaneously with the filing of his initial brief in that successive postconviction appeal.

SUMMARY DISMISSAL OF PETITION

Kelley's current petition should be summarily dismissed. It is untimely. Florida Rule of Criminal Procedure 3.851(d)(3) provides that all petitions seeking extraordinary relief must be filed "simultaneously with the initial brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the initial motion for postconviction relief." See also Mann v. Moore, 794 So. 2d 595, 598 (Fla. 2001), cert. denied, 536 U.S. 962 (2002). Kelley's brief in his appeal from the denial of his initial motion for postconviction relief was filed on August 28, 1989 (Kelley v. State, Florida Supreme Court Case No. 73,088); therefore, this petition is nearly nineteen years late.

In addition, the petition is successive, and the only claim presented is a restatement of allegations included in the initial brief Kelley has filed in his successive postconviction appeal, Kelley v. State, SC08-608, and in prior proceedings. The facts

offered in his claim have been known or could have been known by his attorneys for years. Therefore, the claim is barred. King v. Moore, 808 So. 2d 1237, 1246 (Fla. 2002); Johnson v. Singletary, 647 So. 2d 106, 109 (Fla. 1994).

ARGUMENT

Even if Kelley's petition is not dismissed as untimely and procedurally barred, he is not entitled to any relief. Kelley seeks an order vacating his conviction and sentence, claiming that a manifest injustice has occurred which this Court must remedy. Specifically, Kelley now claims that evidence which he has alleged for years to have been destroyed was not actually destroyed prior to his 1984 trial, and that the State's failure to correct his mistaken impression that the evidence had been destroyed constitutes misconduct of epic proportions. Curiously, he then posits that the evidence was "suppressed or destroyed" and that his inability to obtain this evidence materially prejudiced his defense (Petition, pp. 30, 34), a claim which this Court rejected on direct appeal. Kelley, 486 So. 2d at 582. For many reasons, Kelley's claim for relief must be denied.

Of course, this Court previously ruled that the destruction of the physical evidence -- both the evidence admitted at Sweet's trial and destroyed pursuant to the 1976 court order AND the other fruits of the police investigation -- did not entitle Kelley to any

relief. Kelley, 486 So. 2d at 580-82; Kelley, 569 So. 2d at 756. Kelley now maintains that this Court was wrong, because his prior attorneys committed "dreadful mistakes" by alleging that this evidence had been destroyed prior to trial (Petition, pp. 5-6). He has offered affidavits from two of his prior attorneys indicating that they didn't really know the evidence was destroyed when they made those representations, and therefore he is entitled to a new trial or whatever relief this Court deems appropriate. Kelley furthermore chides the State for failing to correct his attorneys' dreadful mistakes.

Kelley's reliance on the affidavits included in his appendix is a misplaced attempt to secure fact-finding in this Court. There is no authority for requesting this Court to act on biased statements which have never been part of the record or subjected to adversarial testing. While original proceedings in this Court should include an appendix, the appendix is limited to "portions of the record or other authorities." See Rules 9.100(g), 9.220, Fla.R.App.P. The sworn affidavits provided with Kelley's petition have never been presented to the circuit court with a colorable claim for relief, and any attempted reliance on them must be rejected.

In addition, Kelley does not offer any legal or equitable theories under which this Court could grant relief. He claims that two grounds are available: due process to correct the manifest

injustice that has occurred, and ineffective assistance by his appellate and collateral attorneys. However, no manifest injustice has been demonstrated; any claim of ineffective assistance of appellate counsel is barred, having previously been rejected by this Court; and the assertion of ineffective assistance of collateral counsel provides no cognizable claim or basis for relief.

Kelley's claims of ineffective assistance of appellate and collateral counsel clearly do not merit relief. Kelley's assertion that attorney Barry Haight was ineffective in his direct appeal is procedurally barred. This Court has already considered and rejected a claim that Kelley did not receive the effective assistance of counsel in his direct appeal. Kelley, 597 So. 2d at 264. "Successive claims of ineffective assistance of counsel are not permitted." Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996). Thus, this claim must be denied.

Similarly, Kelley's claim that his collateral attorneys provided ineffective assistance is unavailing. As this Court has previously recognized, claims of ineffective assistance of collateral counsel do not offer any basis for relief. Hartley v. State, 33 Fla. L. Weekly S 352 (Fla. May 22, 2008); Zack v. State, 911 So. 2d 1190, 1203 (Fla. 2005); Lambrix, 698 So. 2d at 248.

Kelley fares no better with his claim of a manifest injustice. This claim asserts that there has never been a factual finding in

the trial court to support this Court's statement in 1990 that the fruits of the police investigation, beyond the evidence admitted at Sweet's trials, had been destroyed prior to Kelley's trial. However, a review of the record soundly defeats Kelley's current claim of injustice.

The petition is correct in acknowledging that a number of items of physical evidence were collected as part of the police investigation into Maxcy's murder in 1966 which were not admitted into evidence at John Sweet's trials, and therefore were not encompassed in the court order authorizing the destruction of the Sweet exhibits. However, contrary to the position now taken in Kelley's petition, the record establishes that Kelley's attorneys have been aware of this information for many years.

Kelley's direct appeal to this Court (Kelley v. State, Florida Supreme Court Case No. 65,134) was initiated with the filing of a Notice of Appeal on June 6, 1984. Following the filing of the record, this Court issued a briefing schedule. Kelley's trial attorneys, William Kunstler and Jack Edmund, filed an initial brief on September 26, 1984. This brief challenged the destruction of the exhibits that had been admitted at Sweet's trial and destroyed pursuant to the circuit court order authorizing such action in 1976. Kelley then decided to retain new counsel for the appeal, and attorneys Barry Haight and Donald Ferguson appeared and requested the opportunity to file a supplemental brief, asserting

that "crucial issues" had not been briefed in the initial brief filed by Edmund and Kunstler. This Court permitted the supplemental briefing, and Haight and Ferguson ultimately filed a brief which also asserted that Kelley's rights were violated by the destruction of physical evidence. In that brief, the claim was not limited to the physical exhibits from the Sweet trial but asserted that the evidence included the brake pedal, floor mats, and scrapings from the victim's car; bloodied carpets and hallway runners from the victim's home; blood and hair samples; fingernail scrapings; wall scrapings; projectiles; and latent prints (Appellant's Supplemental Brief, pp. 2, 15, 17-18).

The State's answer brief clearly asserted that, to the extent Kelley was challenging the destruction of the crime scene evidence other than that admitted at Sweet's trial, his claim was not preserved for appellate review, as such evidence was outside the scope of the court order authorizing destruction (Case No. 65,134, Answer Brief, p. 16).[1] Attached to the State's Answer Brief was a copy of part of the index from Sweet's trial transcript, reflecting

[1] The brief states: "Last, in his supplemental brief Appellant argues that failure to preserve the brake pedal and floor mats of Maxcy's car, a bloody carpet, blood and hair samples, fingernail scrapings, wall scrapings, latent prints and certain test results could have prejudiced him. (Supplemental Brief for Appellant 17 - 18). Initially, Appellant has not preserved this argument. Appellant's motion to bar the prosecution or dismiss the indictment was based on the destruction of the State exhibits introduced at Sweet's second trial. (R 1175-1179). None of these particular items was introduced at that trial."

exactly what evidence had been admitted at Sweet's 1968 trial.

Thus, Kelley's repeated accusation that the State made no effort to disclose the fact that evidence in addition to that admitted against Sweet had been collected as part of the investigation (Petition, pp. 19, 22, 27) is refuted by the briefs filed in the direct appeal. Kelley's trial attorneys had the copy of the court order authorizing the destruction of evidence admitted against Sweet; they also had the transcript from Sweet's trial indicating what exhibits had been admitted. At least by the time his direct appeal was pending, they were aware other crime scene evidence was collected but not admitted at Sweet's trial, since they detailed this evidence in the supplemental brief filed and specifically referenced the "list submitted to the police laboratory" (Appellant's Supplemental Brief, p. 15). They were also on notice from the State's appellate brief that the other crime scene evidence collected was outside the scope of the court order authorizing the destruction of the Sweet trial exhibits. As much as Kelley's current attorneys want this Court to believe that his prior attorneys never knew about the other fruits of the police investigation which were not admitted at Sweet's trials, the record in this case affirmatively establishes such knowledge.

Kelley's claim of injustice also relies on the unauthorized affidavits by his prior attorneys, Haight and Wilson, offered with the petition. In addition to being unauthorized and failing to

support any cognizable claim, the affidavits are suspect in content. As this Court has recognized previously in this case, an attorney's admission of ineffectiveness has little value. Kelley, 569 So. 2d at 761 ("an attorney's own admission that he or she was ineffective is of little persuasion"). Affiant Barry Haight, whose sworn statement is provided as Ex. 1 to the habeas petition, now swears that, "the evidence destroyed after the trial of John J. Sweet did not include the over thirty pieces of crime scene physical evidence" upon which Kelley sought DNA testing in 2006. However, Mr. Haight claims his only knowledge of the evidence comes from prior discussions with trial counsel William Kunstler, who told Haight that the prosecutor had told Kunstler that all of the evidence was destroyed, and the disposition forms which demonstrate the evidence was transmitted from the Florida Sheriff's Bureau to the Highlands County Sheriff's Office in 1966 and 1967. He apparently has no personal knowledge on this issue,[2] yet he is willing to swear today that this evidence had not been destroyed prior to trial. He claims that he "cannot believe" the four law

[2] The petition notes a distinction between "personal knowledge of what a person has been told (or not told) and personal knowledge of the actual underlying factual basis" (Petition, p. 28). It appears that Kelley's defense team has routinely believed that it is acceptable to swear to "facts" which a person only knows through hearsay. This suggests that the current affidavits may be based on nothing more than Kelley's current attorneys advising Mr. Haight and Mr. Wilson what the current attorneys believe to be true, with Haight and Wilson thereby adopting the current attorneys' theories as fact. This is another compelling reason for this Court to disregard these new, untested affidavits.

enforcement officers that received the evidence from FSB on behalf of Sheriff Coker in 1966 and 1967 "would destroy critical crime scene evidence in a pending capital case," but, of course, there was no pending prosecution between Sweet's discharge in 1971 and Kelley's 1981 indictment, and no indication that the evidence still existed at the time of the indictment in this case.

Curiously, Mr. Haight also swears that Attorney Kunstler has confirmed that the State never disclosed to Kunstler that the evidence had been returned to the sheriff, but as Mr. Kunstler has been dead for a number of years, this statement can only mean that Mr. Haight discussed this information, which the defense is now asserting to have never known, with Kunstler years ago.

Affiant Barry Wilson's sworn statement (Ex. 2) is also not credible or persuasive. For example, Wilson now avers that "The other approximately 40 pieces of physical evidence from the crime scene were never disclosed to the defense," and professes ignorance about the collection of this evidence. Yet, Mr. Wilson actually submitted the investigative reports from FSB/FDLE outlining the collection and testing of this evidence in 1966 and 1967 when he filed Kelley's initial postconviction motion in 1987 (See Record on Appeal in the postconviction appeal, Kelley v. State, Florida Supreme Court Case No. 73,088). Given his participation in the pursuit of this claim previously, his current affidavit demonstrates, at best, a reckless disregard for the truth. Yet the

prosecutor, who has not been shown to have been in error about any representation in this regard, is the one accused of misconduct.

In Kelley's initial postconviction motion, he asserted that his trial attorneys, Jack Edmund and William Kunstler, were ineffective for failing to adequately investigate the destruction of the crime scene evidence. Litigation of that claim would reasonably entail finding out 1) what the trial attorneys knew about the evidence; and 2) what information the attorneys should have known about the evidence, but did not know because they failed to investigate. According to the affidavit which Kelley's collateral attorney, Barry Wilson, has now submitted, he neglected to actually investigate this issue, beyond simply talking to trial counsel William Kunstler and preparing an affidavit for Kunstler to sign. It is ironic indeed that he failed to investigate exactly what he was accusing Kelley's trial attorneys of failing to investigate. At any rate, the record in this case fails to substantiate any claim of prosecutorial misconduct or manifest injustice.

Kelley's petition repeatedly criticizes the State for failing to correct the mistaken impression of his trial and postconviction attorneys that this evidence had been destroyed. Of course, there is no reason to believe that Kelley's attorneys were wrong, or that there was any mistake to be corrected. The most Kelley can offer is the acknowledgment that he doesn't know what happened to the

evidence, the State doesn't know what happened to the evidence, and the fact that it wasn't available for his use by his trial attorneys should now be reconsidered. There is no basis in law or equity for any further consideration of this issue.

The only new information on this old claim is the disclosure of evidence disposition forms discovered when Suzanne Livingston of FDLE investigated the existence of this evidence in conjunction with Kelley's 2006 motion for DNA testing. The evidence forms, generated by the Florida Sheriff's Bureau in 1966 and 1967, memorialize the unremarkable transmission of the physical evidence from FSB, where it had been submitted for testing, to the submitting sheriff's office in Highlands County. Kelley now claims, in this petition as well as his successive postconviction appeal, that these forms demonstrate that this evidence was not in fact destroyed prior to his 1984 trial. Relying on the "presumption of regularity" that public officials properly discharge their duties,[3] Kelley insists that the fact the evidence existed in 1966 and 1967 establishes that it also existed in 1984.

It is ironic that Kelley's "manifest injustice" can only be gleaned from application of a "presumption of regularity,"

[3] Kelley has offered no authority to demonstrate what the law required of sheriff's officials from 1967 to 1984 with regard to retention of evidence in a case where no prosecution was pending. Thus, it is not clear that the presumption of regularity would operate to support any assumption that the evidence still existed in this case in 1984.

permitting an inference that evidence collected in 1966 and 1967 still existed at the time of Kelley's 1984 trial. This Court's characterization of this case as "highly unusual" should be reason enough to rebut any presumption of regularity. However, there is more. Kelley's attorneys have maintained since at least January, 1985, that the other fruits of the police investigation were destroyed prior to Kelley's trial. The State has never had any basis to dispute that representation. Had the State been aware of any physical evidence that had not been destroyed, it would have identified such to defend against the constitutional claim being offered by Kelley at that time. Moreover, under Kelley's reasoning, application of the presumption of regularity in this case would suggest that the evidence still exists today, yet this Court recently affirmed the expressed finding of the trial court, following the 2006 evidentiary hearing, that it does not. Kelley, 974 So. 2d at 1051-52.

According to the petition, justice can only be served if Kelley is now granted a new trial because his attorneys committed "dreadful mistakes," by intentionally failing to investigate any destruction of evidence claim. According to the affiants, Kelley's attorneys routinely accepted the prosecutor's explanation that all of the evidence had been destroyed, without ever investigating the issue further. And despite the fact that there is no basis to believe that the prosecutor was mistaken in this representation,

they now seek a new trial due to alleged misconduct by the State. In sum, they seek to be rewarded for their own admitted lack of diligence, for which they conveniently blame the prosecutor.

Such does not indicate any manifest injustice has occurred in this case. Judge Bentley, after presiding over Kelley's trial and initial postconviction motion, expressed confidence in the verdict, which cannot reasonably be called into doubt by any of Kelley's accusations. Kelley, 569 So. 2d at 761. Kelley's reliance on Judge Roettger's expressed doubts in granting federal habeas relief is misplaced; Judge Roettger was reversed by the Eleventh Circuit in an extensive opinion highly critical of Roettger's factual findings as well as his legal conclusions. Kelley v. Secretary, Dept. of Corrections, 377 F.3d 1317, 1340-59 (11th Cir. 2004).

Finally, even if Kelley could establish that the other fruits of the police investigation still existed in 1984, this Court has already ruled this evidence to be immaterial, precluding any suggestion of manifest injustice. Kelley, 486 So. 2d 582. In fact, Kelley's current claim of materiality, asserting that this evidence could have provided support for the defense closing argument in contrasting the bloody crime scene with the lack of blood found in Maxcy's abandoned car, is identical to the claim of prejudice from Kelley's direct appeal supplemental brief. What was true then remains true today: the defense had testimony and crime scene photos of a very bloody murder at Maxcy's house, and testimony that

a search for blood in Maxcy's car turned up nothing. Additional evidence which, at most, corroborated the evidence already before the jury on this issue does not meet any standard of materiality. See Kelley, 569 So. 2d at 758 (rejecting Brady claim on photograph from Maxcy's house, noting it was "immaterial, because the three color photographs which were introduced depicted 'a great deal of blood', as pointed out by Mr. Kunstler during cross examination").

Kelley's petition requests a new trial, but any new trial would suffer the same "unavailability" of physical evidence as his 1984 trial. The petition also requests an evidentiary hearing to explore "whether all other evidence in fact has been destroyed and, if so, under what circumstances that destruction took place" (Petition, p. 32). However, just as in 1984, the circumstances of the destruction are irrelevant unless Kelley can show bad faith, which he has not alleged. Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988); King v. State, 808 So. 2d 1237, 1242-43 (Fla. 2002). In addition, he has failed to identify a single person with personal knowledge of the circumstances of the destruction. The granting of an evidentiary hearing where there is no relevant evidence to be offered is an exercise in futility, and clearly is not warranted on the facts of this case.

As previously noted, this petition should be dismissed as untimely and procedurally barred. Even if considered, however, the petition must be denied as the record fully establishes that no

manifest injustice or cognizable ineffective assistance of counsel has occurred in this case.

CONCLUSION

WHEREFORE, Respondent respectfully requests that this Honorable Court DISMISS and/or DENY Kelley's successive petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular mail to Sylvia H. Walbolt, Esq., CARLTON FIELDS, P.A., Corporate Center Three at International Plaza, 4221 W. Boy Scout Boulevard, Suite 1000, Tampa, Florida 33607-5736, this 18th day of July, 2008.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(l).

Respectfully submitted,

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