IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY

Appellant,

v.

CASE NO.: SC08-608
L.T. NO.: CR81-0535

STATE OF FLORIDA,

Appellee.
_____________________________/

INITIAL BRIEF OF APPELLANT
WILLIAM HAROLD KELLEY

On Direct Appeal from the 10th Judicial Circuit Court, in and for Highlands County, Florida

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PRELIMINARY STATEMENT

Appellant, William Harold Kelley, will be referred to as "Kelley." Appellee, the State of Florida, will be referred to as "the State."

The record on appeal is contained in three (3) volumes. Citations to the record are referred to as "Rx y-z," where "x" is the volume number and "y-z" are the page number(s). Many of the record citations in this brief will be to the Joint Pretrial Stipulation of Facts filed by Kelley and the State in the federal habeas corpus proceeding. That Stipulation is found in this record at R2 263-79, and it in turn contains references back to the original state court records, as necessary.

As was the convention used by Kelley, the State, and the trial court below, references to Kelley's first trial transcript will be cited as "Kelley I [page number]," references to Kelley's second trial transcript will be cited as "Kelley II [page number]," references to the June 6, 2006 hearing in the Rule 3.853 DNA proceeding will be cited as "Kelley DNA [page number]," and references to the Record on Appeal in the Rule 3.853 DNA proceeding will be cited as "Kelley DNA ROA[volume] [page number]."

All emphasis in quotations has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

INTRODUCTION

William Kelley was indicted in 1981 and convicted in 1984 for the murder of Charles Von Maxcy in 1966. He has steadfastly maintained his innocence. One person who admitted to masterminding the murder, and another who admitted to participating in the murder, were granted immunity. In contrast, Kelley has spent nearly twenty-five years on Death Row. This case has reached this Court four prior times. See Kelley v. State, 974 So. 2d 1047 (Fla. 2007); Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992); Kelley v. State, 569 So. 2d 754 (Fla. 1990); Kelley v. State, 486 So. 2d 578 (Fla. 1986).

In 1976, on motion by the State made five years before Kelley was indicted, some of the physical crime scene evidence collected by the State during its 1966 investigation was destroyed pursuant to court order. [R2 305]. Although other physical evidence gathered during that investigation had been returned to other authorities, that fact was not made known to Kelley at that time. Consequently, his trial proceeded under the mistaken assumption that all of the physical evidence had been destroyed.

It was not until two years ago that the State for the first time advised Kelley, by letter dated May 10, 2006, that some of the crime scene evidence had been returned to four officers of

the submitting authorities, who acknowledged receipt of the evidence. [R1 56, 63-67]. It is undisputed that the 1976 court order only authorized evidence held by the clerk of the court in the case of State of Florida v. John J. Sweet, Case No. 3002 (Fla. 10th Cir.) to be destroyed and it did not authorize the destruction of this other crime scene evidence. [See R3 305-08]. Consequently, there is no reason to believe this evidence was destroyed when other evidence was destroyed in 1976 pursuant to that order.

To the contrary, under the presumption of regularity of business practices, which has been applied to public officials, that evidence is presumed to have existed at the time of Kelley's trial. The State has been inconsistent in its explanation as to what happened to that other evidence, saying at one point that the evidence was not accounted for, [R2 276 ¶98], but now saying it was "destroyed" prior to Kelley's 1984 trial. [R2 195]. The State has never explained, however, why, how, or exactly when the other evidence was purportedly destroyed. What is certain is that Kelley was not given information (i) about its return to investigating agencies in 1966 and 1967 or (ii) that it existed prior to his 1984 trial.

On May 9, 2007, Kelley filed a Florida Rule of Criminal Procedure 3.851(e)(2) motion contending that the State's failure to disclose any information about the existence of this evidence

prior to his 1984 trial violated Brady v. Maryland, 373 U.S. 83 (1963) and otherwise constituted prosecutorial misconduct that violated his due process rights, warranting reversal of his conviction and vacation of his sentence. [R1 1-180]. The trial court summarily denied that motion, even though Kelley asserted that the motion required an evidentiary hearing. [R3 403-10]. This appeal followed. [R3 381-82].

A. The Death Of Charles Von Maxcy

The circumstances underlying this case began with an affair between John J. Sweet ("Sweet"), a career criminal, and Irene Maxcy ("Mrs. Maxcy"), the wife of Charles Von Maxcy. See Kelley v. State, 486 So. 2d at 579. The plan was that Sweet and Mrs. Maxcy would live on Mr. Maxcy's inheritance. Id. Sweet reached out to his contacts in Boston and negotiated a contract on Mr. Maxcy's life. Id. Mr. Maxcy was found murdered on October 3, 1966, when Mrs. Maxcy and a relative entered the Maxcy residence and found Mr. Maxcy dead on the bedroom floor. [Kelley II 461].

The police examined the crime scene, took several photographs, and collected physical evidence found at the scene. [Kelley II 478-484]. J.C. Murdock, a Deputy Sheriff at the time, participated in the immediate investigation of the crime scene. [Kelley II 477-478]. According to Deputy Murdock, a significant amount of blood was found in the bedroom and the hallway leading into the bedroom. [Kelley II 479, 493-494].

Deputy Murdock also testified, however, that no blood whatever was found in Mr. Maxcy's car (which the killers allegedly took after the crime), [Kelley II 496-497], despite the absence of any evidence that the killer(s) had washed off blood before leaving Maxcy's house. [Kelley II 496].

Deputy Murdock further testified that investigators located Mr. Maxcy's car in a shopping center parking lot and examined it for evidence. [Kelley II 488]. Investigators found latent fingerprints inside the home and the car; the fingerprints do not match to Kelley and were never identified. [Kelley II 488, 490, 492].

The physical crime scene evidence was collected and placed in the custody of the Highlands County Sheriff's Office. [Kelley II 479-481, 484, 495, 707]. Some of the physical evidence was later delivered to a laboratory in Tallahassee, Florida, for further analysis. Id.

"Because prosecutors found the evidence insufficient to proceed against [Kelley] and Von Etter, and because Irene Maxcy received immunity in return for her testimony in the case, only Sweet was originally tried." Kelley v. State, 486 So. 2d 578, 579 (Fla. 1986).

B. Proceedings Against Sweet For The Crime

Sweet was tried twice for the first degree murder of Mr. Maxcy. Id. Sweet's first trial ended in a mistrial and his

second trial ended in a conviction, which was then reversed on appeal. Id.; see Sweet v. State, 235 So. 2d 40 (Fla. 2d DCA 1970). "At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony." Kelley v. State, 486 So. 2d at 579. The loss of witness testimony was the result of Mrs. Maxcy's conviction for perjury during Sweet's trial. See Wells v. State, 270 So. 2d 399, 403 (Fla. 3d DCA 1972) (affirming Irene Maxcy's conviction for perjury based upon false statements made during the Sweet trial).

C. The Authorized Destruction Of Some Evidence In 1976

In April 1976, the State Attorney for Highlands County filed a "Petition for the Disposal of Evidence," requesting that the trial court authorize the destruction of certain specified evidence and exhibits from Sweet's trials that were then in the custody of the Clerk of Court. [R2 305]. On April 30, 1976, the Court granted the petition and ordered that the specified evidence be destroyed. [See R2 305-08].

That evidence consisted of a small amount of physical evidence recovered from the crime scene and a number of original documentary exhibits, including: (1) a bloody sheet with several rips in it; (2) a section of Mr. Maxcy's shirt; (3) a bullet recovered from the crime scene; (4) a tire belonging to Mr. Maxcy's car that had been slashed several weeks before the

murder; (5) car rental agreements; (6) motel records; (7) telephone records; and (8) bank records. [R2 276 ¶96]. It is undisputed that the destruction Order did not encompass any of the other fruits of the prosecution's investigation that were not used in Sweet's trials. It is also undisputed that the Clerk would not have maintained any evidence that was not used in Sweet's trials, so an accidental destruction at that time as part of that Order would have been impossible. [See Kelley DNA 291].

D. Proceedings Against Kelley For The Crime

In 1981, nearly fifteen years after the murder, Sweet entered into negotiations with Massachusetts authorities to obtain immunity for a number of criminal activities he had been involved with there. [R2 263-64 ¶¶1-5]. Sweet in fact received immunity in Massachusetts for breaking and entering, hijacking, larceny, arson, bribery, bookmaking, counterfeiting, and drug and prostitution offenses. [R2 264 ¶7]. Sweet also received immunity in Florida for the Maxcy case and for perjury committed in his two trials. [R2 264 ¶7]. After receiving immunity, it was Sweet's testimony that was central to Kelley's indictment and prosecution. Kelley v. State, 486 So. 2d at 580.

Kelley's initial trial in January 1984 resulted in a hung jury, from which the court declared a mistrial. [R2 271 ¶9]; Id. at 580. In the second trial, the jury was again impassed until

the court gave a non-standard deadlock instruction, which highlighted that there was no other evidence that could be introduced in any future re-trial; according to the instruction, the jury had all the evidence that existed. Id. at 584. After receiving that instruction, the jury found Kelley guilty of first degree murder. In the penalty phase, the jury recommended 8-3 that he receive the death penalty. [Kelley II 985]; Kelley v. Singletary, 222 F. Supp. 2d 1357, 1360 (S.D. Fla. 2002). On April 2, 1984, Kelley was sentenced to death. [Kelley II 1007]; Kelley v. Singletary, 222 F. Supp. 2d at 1360.

As this Court recognized, this was a highly unusual case raising unusual issues. Kelley v. State, 486 So. 2d at 579. The prosecution of Kelley's case was based largely on Sweet's testimony. Kelley v. State, 486 So. 2d at 580; Kelley v. Singletary, 222 F. Supp. 2d at 1359.

The prosecution argued that, according to Sweet's story, the murder was carried out by two men who drove to the Maxcy residence with Sweet, went into the house, and waited for Mr. Maxcy to arrive home from work. [Kelley II 435, 546, 862, 890]. Significantly, the prosecution presented no other theory as to how the crime occurred or the number of persons involved. Id.

The lawyers representing Kelley during his trials chose not to present evidence in his defense and, instead, rested without presenting a case-in-chief. [Kelley II 813]. In deciding how

to defend, they were hamstrung by a lack of physical evidence to present about the crime scene and related events. While mention was made of the bloody crime scene and the lack of blood evidence connecting Kelley to the crime scene, the defense was unable to develop this theme with physical evidence and a full crime scene reconstruction. [See Kelley II 825, 833].

In closing argument, Kelley's lawyers argued that Sweet was an admitted liar and was lying about Kelley's involvement in the crime. [Kelley II 818, 840, 844-847]. The defense argued that Sweet named Kelley as a participant in the crime because everyone else who was allegedly involved was dead or missing by 1981, and Sweet accordingly had no one else to offer up to the prosecution to secure his immunity from prosecution in Florida. [Kelley II 842]. But, since the existence of the physical evidence was not disclosed to Kelley by the prosecutors, the defense was unable to present physical evidence to bolster its argument that Sweet was lying and that Kelley was not at the murder scene.

After retiring to deliberate, the jury reached an impasse. After giving the standard deadlock instruction, the trial judge gave the following additional and non-standard instructions:

> I would ask that you give it your full consideration. It is an important case.
>
> If you fail to reach a verdict, there is no reason to believe the case can be tried again any

> better or more exhaustively than it has been.
>
> There is no reason to believe there is any more evidence or clearer evidence could be produced on either side. And there is no reason to believe the case could be submitted to twelve more intelligent and impartial people than you are.
>
> In the future a jury would be selected in the same manner that you were.
> Therefore, I would ask that you retire at this time and consider whether you wish to consider the matter further.
>
> It has taken us a week to get this far, and I would ask that you retire and consider the case further.

See Kelley v. State, 486 So. 2d at 584.

The State stayed silent when this jury charge was read. In fact, the State knew there was more evidence – from the crime scene itself – that had not been disclosed to Kelley or his counsel. That evidence was presumed to still exist, since the only destruction order did not encompass this other evidence.

E. Kelley's Direct Appeal

On direct appeal, Kelley contended, among other things, that giving the non-standard deadlock language -- after the jury had deliberated for several hours and announced that it had reached an impasse -- impermissibly misled and so coerced the jury into returning a verdict that it deprived Kelley of his right to a fair trial. See Kelley v. State, 486 So. 2d at 584. This Court, however, concluded that, "while disapproving of such departure from Florida's Standard Jury Instructions, we can find

no prejudice resulting from the instructions as given." Id. at 85.

Kelley also contended on direct appeal that the State's destruction of evidence held by the Clerk of Court over five years before his indictment deprived him of due process of law and frustrated the preparation of his defense. See Kelley v. State, 486 So. 2d at 580. This Court described how, after Sweet's trial, the case file, including the evidence, had been transmitted to the clerk and then destroyed nine years later on the State's motion. This Court then stated:

> The destroyed evidence which appellant claims may have had particular exculpatory value was real evidence, principally taken from the scene of the crime -- a bullet, a bloody bedsheet purportedly used to subdue the victim during repeated stabbings, and a shred of the victim's shirt. Also destroyed were two handwritten statements by Sweet, which appellant urges would have been useful in impeachment.

Id. at 580.

That list of items in this Court's opinion refers to the evidence at Sweet's trial that was destroyed with specific authorization of the trial court. It does not make any reference to the other fruits of the prosecution's crime scene investigation. Although Kelley and the Court did not know it at the time, that other evidence had been returned by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967 to four officers of the submitting authorities. [R1 56, 63-67]. The

whereabouts of that evidence before the 1984 trial remains unknown to Kelley today, because the trial court below denied Kelley's Rule 3.851(e)(2) Motion, leading to this appeal. (See Section G, below). What is known is the destruction order did not reach that evidence and the State has come forward with no evidence suggesting it was destroyed as of 1984. Thus, as discussed at page thirty-two (32) below, that evidence is presumed under Florida law to have existed at the time of Kelley's trial.

F. Post-Conviction Proceedings

1. Kelley's Rule 3.850 Motion

On November 20, 1987, Kelley filed a motion to vacate judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850. After denying portions of the motion on May 27, 1988, the trial court held a hearing on July 18-19, 1988, and then denied the remainder of the motion. This Court affirmed. See Kelley v. State, 569 So. 2d 754 (Fla. 1990).

Among the issues addressed by this Court was whether the State's destruction of material evidence prior to Kelley's trial deprived him of his constitutional rights. This Court ruled that its prior opinion on direct appeal resolved this issue, *sub silentio*:

> Kelley now argues that certain crime scene evidence was destroyed which was not encompassed within this Court's earlier ruling. However, it

> appears that many of the items characterized as "additional evidence" were discussed in a supplemental brief in Kelley's original appeal. Thus, while our opinion did not specifically discuss such additional evidence, it is clear that the issue was decided adversely to Kelley.

Kelley v. State, 569 So. 2d at 756.

The Court also noted that "in affidavits submitted in support of the motion for postconviction relief, Kelley's trial counsel admitted knowing that the fruits of the police investigation had been destroyed." Id. We now know, however, that those affidavits were based on incomplete information, due to the failure of the State to disclose to Kelley that the fruits of the prosecution's investigation that were not used at Sweet's trial had been returned to the submitting authorities.

The record shows there never has been an evidentiary finding that such evidence was in fact destroyed prior to Kelley's trial. Nor would the record before this Court on direct appeal and in the post-conviction proceedings have supported a finding that all evidence had been destroyed. Presumably, it had not been destroyed, as no court order authorized such destruction, and the State never has come forward with any state official who could attest that this evidence was in fact destroyed after being returned to the submitting authorities and before Kelley's trial. Obviously,

information about the existence and whereabouts of this evidence was solely and peculiarly within the State's own knowledge.

In the 1990 appeal, Kelley also raised a Brady claim, but it was entirely different from the suppression of evidence at issue in the current appeal. The Brady claim in the 1990 appeal involved several specific items of evidence: (i) a transcript of the first Sweet murder trial; (ii) a latent fingerprint report; (iii) a 1967 police report showing that Kaye Carter could not positively identify Kelley; (iv) crime scene photographs; (v) the fact that Sweet received immunity in Massachusetts for his cooperation in the Maxcy case; and (vi) the agreement with Sweet that precluded Roma Trulock from testifying at Kelley's trial. Kelley v. State, 569 So. 2d at 757-58.

None of that evidence is part of the May 10, 2006 letter informing Kelley that much crime scene evidence still existed in 1966 and 1967 that was not disclosed to Kelley before trial. Its whereabouts at the time of Kelley's trial has never been explained by the State. All information about this additional evidence was kept from Kelley prior to his 1984 trial.

2. Kelley's State Habeas Petition

On April 8, 1991, Kelley filed a petition for habeas corpus relief in the Florida Supreme Court. Kelley's petition was denied on March 12, 1992. See Kelley v. Dugger, 597 So. 2d 262

(Fla. 1992). None of the issues related to evidence, or destroyed evidence.

3. Kelley's Federal Habeas Petition

On October 9, 1992, Kelley petitioned the United States District Court for the Southern District of Florida, pursuant to 28 U.S.C. § 2254, for a writ of habeas corpus. Kelley v. Singletary, 222 F. Supp. 2d at 1361. Among the six claims raised by Kelley was a Brady claim that tracked the Brady claims raised in Kelley's Rule 3.850 motion in state court. As noted above, those Brady claims are different from the claim at issue in this motion.

On August 31, 2000, the District Court denied some of Kelley's claims on the basis of the record from Kelley's trial. Kelley v. Sec'y for the Dep't of Corr., 377 F.3d 1317, 1331 (11th Cir. 2004). On November 22, 2000, the federal court held a series of evidentiary hearings. Id. Following these hearings, on September 19, 2002 the court granted Kelley federal habeas relief, reversing his conviction and ordering a new trial, based on a finding of significant Brady violations. Kelley v. Singletary, 222 F. Supp. 2d at 1366, 1367. On December 30, 2002, the court again granted Kelley federal habeas relief based on a separate finding of ineffective assistance of trial counsel. Kelley v. Singletary, 238 F. Supp. 2d 1325, 1329 (S.D. Fla. 2002).

In granting Kelley habeas relief based on newly discovered evidence, Judge Roettger stated that "[t]his case presents many incidences of prosecutorial misconduct. Hardy Pickard, Assistant State Attorney, has a habit of failing to turn over exculpatory and impeachment evidence." Kelley, 222 F. Supp. 2d at 1363. Judge Roettger further noted that "[i]n another capital murder case, Circuit Judge Barbara Fleischer, sitting by designation by the Florida Supreme Court as a temporary judge of the Tenth Circuit, ordered a new trial for a defendant because Assistant State Attorney Hardy Pickard withheld impeachment materials from the defense. State of Florida v. Melendez, No: CF-84-1016A2-XX (Tenth Judicial Circuit of Florida), slip op., filed December 5, 2001." Id. at 1363 n.3. Melendez was a 2001 Order setting aside a 1984 conviction.

More specifically, Judge Roettger found that Pickard had withheld several items from Kelley. These included information regarding Sweet's immunity deal; the transcript of Sweet's first trial; a police report in which a witness gave an inaccurate description of Kelley and was unable to positively identify him; and a fingerprint report that found Kelley's fingerprints did not match any of those lifted from Maxcy's house and car. Id. at 1364-66. Judge Roettger deemed all of this evidence to be material and exculpatory.

The State appealed the habeas relief to the Eleventh Circuit Court of Appeals, which reversed on July 23, 2004 and reinstated the conviction. Kelley v. Sec'y for the Dep't of Corr., 377 F.3d 1317, 1333, 1369. The Eleventh Circuit did not disagree that Pickard had wrongly withheld evidence. Instead, it held that Judge Roettger applied the wrong legal standard in granting an evidentiary hearing and that, in any event, the non-disclosed items could not have affected the outcome of the trial. Id. at 1333, 1340-43, 1369. Thus, Judge Roettger's findings of prosecutorial misconduct never were themselves specifically negated, only his findings that they could have affected the trial.

4. Kelley's Motion For DNA Testing

On January 17, 2006, Kelley petitioned, pursuant to Florida Rule of Criminal Procedure 3.853, for post-conviction DNA testing of physical evidence collected by law enforcement. That motion affirmatively requested, among other things, pre-hearing discovery to locate the DNA evidence that should be tested.

In his motion, Kelley acknowledged that, according to the State, certain physical evidence gathered from the crime scene had been destroyed pursuant to a court order nearly a decade before he was convicted. It was clear from the face of Kelley's motion that the evidence destroyed under the court order was not the subject of his request for postconviction DNA testing. [See

Kelley DNA ROA1 13-18]. Although Kelley and his defense attorneys had been left by the State to incorrectly assume at trial and in post-conviction proceedings that all fruits of the prosecution's investigation had been destroyed, the factual record in his case contained no finding by the court that the other items of physical evidence collected from the crime scene, but not a part of the Sweet trial, had been destroyed at the time of Kelley's trial (or ever). This motion sought to determine if all such evidence had in fact been destroyed, even though that was not authorized by the only destruction Order.

In preparing for a hearing on this motion, Kelley received the correspondence dated May 10, 2006 from Assistant State Attorney Victoria Avalon that now disclosed that, in fact, over thirty pieces of physical evidence were returned by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967 to four different officers of the submitting authorities. [R1 56, 63-67]. The State had never previously disclosed the existence or whereabouts of the physical evidence.[1]

Kelley's Motion for DNA Testing was denied on June 29, 2006. Kelley appealed that ruling to this Court. On October 25, 2007, this Court affirmed the lower court's order. Kelley v. State, 974 So. 2d 1047 (Fla. 2007).

[1] Kelley's Brady v. Maryland, 373 U.S. 83 (1963), claim addressed in this appeal was triggered as of May 10, 2006, after Kelley's DNA motion had already been filed.

G. The Current Action: Kelley's 3.851(e)(2) Motion

On May 9, 2007, pursuant to Florida Rule of Criminal Procedure 3.851(e)(2), Kelley requested the trial court to reverse his conviction and vacate his death sentence based on the State's violation of Brady v. Maryland, 373 U.S. 83 (1963) and Florida Rule of Criminal Procedure 3.220, which requires a duty of disclosure on the part of the State to provide material information in its possession to the defendant. [R1 1-180]. It is the summary denial of that Motion that led to this appeal. [See R3 403-10].

Kelley's Motion was based on an extraordinary turn of events in this case. The entire history of this case has proceeded on the defendant's and the courts' core assumption that all of the fruits of the prosecution's investigation of the 1966 crime scene were destroyed. The State's May 10, 2006 disclosures -- which attached receipts of public officials for the returned evidence -- destroyed that assumption. [See R1 56, 63-67].

The May 10, 2006 letter was the first time in the history of this case that Kelley or his lawyers -- or any court -- learned that over thirty pieces of physical evidence were returned by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967 to R. Trulock, Robert E. McCory, Don Bragg, and

Broward Coker, officers of the submitting authorities.[2] The order authorizing destruction of evidence related solely to evidence used at Sweet's trial and that was in the hands of the circuit court clerk. The May 10, 2006 letter relates to evidence in the hands of other individuals that was not used as evidence at Sweet's trial.

Because the return of the evidence to these individuals had never before been revealed by the State, Kelley was deprived of the opportunity prior to his trial to determine what those four persons did with the physical evidence that was returned to them. Instead, Kelley and his lawyers always have been allowed by the State to assume that all of the evidence from the 1966 investigation was destroyed, and to proceed before the courts based on that premise. That mistaken premise directly affected the way the trial was defended, the way a deadlocked jury was charged by the trial court with a non-standard deadlock charge, and the way the direct appeal and post-conviction proceedings were framed.

In his Motion, Kelley contended that the State's failure to disclose this evidence earlier is a violation of Brady – exactly the type of prosecutorial misconduct this Court said in Kelley

[2] The supporting documentation attached to the May 10, 2006 letter reveals the initials of a fifth person who may have received some of the returned evidence. That person has not yet been identified by name.

v. State, 486 So. 2d at 582, likely would have caused a reversal of Kelley's conviction. [See R1 3-4]. It is fundamental error infecting the very core of the proceedings. The State had information about the disposition of physical evidence, but had suppressed that information despite a duty to disclose it. That decision to suppress left Kelley and his attorneys unable to look for, much less find, that physical evidence. Given the State's lack of disclosure, Kelley's attorneys proceeded to trial on the erroneous assumption that all of the crime scene evidence was destroyed. [See R1 1-4].

Kelley's Motion also asserted that the suppressed evidence underscored the error in the non-standard deadlock charge that was given to the jury when it reached an impasse. Instead of simply giving the standard charge, the trial judge added other admonitions to the jury, including this one: "There is no reason to believe there is any more evidence or clearer evidence could be produced on either side." See Kelley v. State, 486 So.2d at 584. We now know that significant other evidence is presumed to have existed that was not the subject of the court's destruction order.

The Motion asserted that the additional, non-standard deadlock charge was in fact false. See Giglio v. United States, 405 U.S. 150 (1972) (state's knowing presentation of or failure to correct false and material information at trial violates due

process rights). [R1 at 21-22]. Had this jury not been improperly told that no more evidence ever could be produced, the Motion contended that Kelley's trial could well have ended in an acquittal, or at least another impasse.

Kelley's Motion also noted that the State had an obligation to disclose the disposition of this evidence in 1966 and 1967 pursuant to the then-current version of Florida Rule of Criminal Procedure 3.220. [R1 at 24]. As the failure to disclose undermined any confidence in the verdict returned, the Motion asserted the State's violation of this rule was an independent basis for relief. It also infected the direct appeal and all post-conviction proceedings, and the completeness of the record developed in federal habeas proceedings. The State's suppression of evidence forced Kelley to assume incorrectly in his appellate and post-conviction proceedings that the evidence at issue had been destroyed.

The State filed its Response To Successive Motion For Postconviction Relief on May 29, 2007. [R2 181-226]. That Response focused almost entirely on Kelley's supposed lack of due diligence in bringing his Motion -- even though the State admitted that "the Florida Supreme Court no longer recognizes a 'due diligence' prong for substantive Brady claims" [R2 200] –- and on the substantive elements of Kelley's Brady claim.

The State relegated its entire response to Kelley's independent fundamental error claim regarding the State's duty to disclose under Florida Rule of Criminal Procedure 3.220 to footnote five on page twenty-four of its Response. [R2 204 n.5]. The State asserted the violation of Florida Rule of Criminal Procedure 3.220 could not serve as a basis for relief because Kelley did not claim "surprise at trial" – of course, it would have been astonishing had he been able to express "surprise" about something he did not then know (i.e., that the prosecution had not fulfilled its discovery obligations). [R2 204 N.5]

The State did not address Kelley's claim based upon Giglio v. United States, 405 U.S. 150 (1972), which was directed to the presumptively false and non-standard deadlock instruction that was given to the jury. The State did not address Kelley's claim of fundamental error. Nor did the State contend that it ever produced the Brady evidence at issue to Kelley before his trial.

In his September 18, 2007 Reply, Kelley pointed out that the State convicted him eighteen years after the crime occurred, on the basis of primary testimony from the immunized mastermind of the murder for hire (an admitted liar), and without ever accounting for what happened to all of the other crime scene evidence. Kelley pointed out that the State incontestably had withheld critical evidence, and, under the presumption of regularity of business practices, the evidence presumably

existed at the time of Kelley's trial. [R2 253-82]. The State waited until 2006 to disclose this evidence to Kelley.

On December 20, 2007, the trial court entered an order denying Kelley's Motion for Postconviction Relief. [See R3 381-403]. This was a summary denial. Kelley had asked for an evidentiary hearing, but did not receive one.[3] This appeal followed. [R3 381].

Kelley has also filed contemporaneously with this appeal a Petition for Writ of Habeas Corpus. The Habeas Petition emphasizes that there has never been a factual determination that all fruits of the prosecution's crime scene investigation were destroyed prior to Kelley's trial in 1984. Yet, based upon a misapprehension of the record on appeal (left uncorrected by the State), this Court may have assumed that fact in deciding Kelley's direct appeal, see Kelley v. State, 486 So. 2d 578 (Fla. 1986), and said as much in Kelley v. State, 569 So. 2d 754 (Fla. 1990), which affirmed the denial of Kelley's first motion for postconviction relief. Although this appeal can correct

[3] That hearing would have involved, for example, an examination of evidence such as the handwritten list attached as Exhibit D to Kelley's Motion for Postconviction Relief that expressly lists Broward Coker, Robert McCoy, and Roma Trulock as potential witnesses. Undersigned counsel believes in good faith that this document came from the pre-trial files of the State Attorney's Office. Kelley believes it indicates actual knowledge, prior to Kelley's 1984 trial, by the State Attorney's Office, of the specific individuals to whom the evidence was returned in 1966 and 1967.

this manifest injustice with the grant of a new trial or, at a minimum, an evidentiary hearing to determine what happened to the evidence, Kelley filed the Habeas Petition as a precautionary measure, in the case the Court concludes that relief on the specific ground raised there is dependent upon the factual record provided in the Appendix to that original proceeding.

SUMMARY OF THE ARGUMENT

This Court has an awesome responsibility in any death penalty case, but it is especially awesome in this unusual case, where the conviction originally was upheld only with reservations and caveats that were prophetic. Kelley's first trial ended in a hung jury and mistrial. The second resulted in an impasse broken only by a non-standard and contested deadlock instruction. This Court declared it likely would have overturned the conviction if there had been even a "hint of prosecutorial misconduct."

Had it been known then that the State failed to disclose the crime scene evidence at issue in this appeal -- as is finally known now -- there can be no doubt the conviction would not have been upheld in the face of that "hint of prosecutorial misconduct." But, not only did the State not disclose that evidence to Kelley as it was obligated to do, it stood by and allowed this Court and other courts to proceed on the erroneous assumption that all of the crime scene evidence gathered by the State had been destroyed before Kelley's trial.

In fact, the State has never accounted for that evidence, and there never has been a factual determination that it was destroyed before the Kelley trial. That evidence accordingly is presumed under settled Florida law to have existed at the time of the Kelley trial. Had it been disclosed to Kelley, the trial

would have been entirely different, the erroneous deadlock instruction never would have been given, and the outcome of the trial - - which already had reached an impasse - - almost certainly would have been different.

This Court was allowed by the State to proceed on an erroneous assumption. Now that the error has been disclosed, this Court should not hesitate to take the action it said it likely would have taken had there been a "hint of prosecutorial misconduct" in the case. It has taken years to uncover that prosecutorial misconduct, but that delay cannot alter the inexorable result of its discovery. That Judge Roettger correctly assessed Pickard's conduct in the Kelley prosecution has now been confirmed by the State's belated disclosure of other, incontestably material but suppressed evidence. That brings a new light to this Court's earlier recognition, on direct appeal in 1986, of the unusual facts of this case and its emphasis that "if even the slightest hint of prosecutorial misconduct was present in this case, the result might well have been different." Kelley, 486 So. 2d at 582. This conviction and death sentence must be overturned.

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT KELLEY DID NOT ESTABLISH A BRADY v. MARYLAND CLAIM.

A. Standard of Review.

In reviewing the trial court's denial of the Brady claim made by Kelley, this Court gives deference to the trial court on questions of fact, but reviews de novo the application of the law and independently reviews the cumulative effect of the suppressed evidence. See Green v. State, 975 So. 2d 1090, 1101-02 (Fla. 2008), citing Mordenti v. State, 894 So. 2d 161, 168 (Fla. 2004); Way v. State, 760 So. 2d 903, 910 (Fla. 2000).

B. Kelley established that the State committed a Brady v. Maryland violation.

There are three components of a Brady violation: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82 (1999). In United States v. Bagley, 473 U.S. 667, 676 (1985), the United States Supreme Court disavowed any difference between exculpatory and impeachment evidence for Brady purposes.

1. The evidence was favorable to Kelley.

The trial court erred in concluding Kelley's current claim is a mere "variation of his previous challenges to the

destruction of evidence." [R3 407]. To the contrary, this is a discrete Brady claim that only was asserted when Kelley learned -- for the first time -- that the State had information about the location and disposition of over thirty pieces of physical evidence sent to the Florida Sheriff's Bureau Crime Laboratory in Tallahassee, but had suppressed that information and had never disclosed the existence of that other evidence prior to his 1984 trial.

As the extensive record in this case shows, that decision to suppress left Kelley and his attorneys unable to look for, much less find, that physical evidence. The argument of Assistant State Attorney Hardy Pickard, in January 1984 and prior to Mr. Kelley's first trial, confirms that the amount of evidence destroyed pursuant to the 1976 Order was minimal. When William Kunstler, Kelley's trial counsel, indicated confusion about the evidence, Pickard expressly limited the scope of the evidence that was destroyed pursuant to the 1976 Order:

> What actually happened is the only evidence that was destroyed was the State's exhibits that were introduced into evidence [at Mr. Sweet's trial]. There were some defense exhibits introduced into evidence in Mr. Sweet's trial which were not destroyed and are still in the Clerk's Office. There is a list of all the State's exhibits that were destroyed. I have a copy of it because I got it from the Clerk. It's in Mr. Sweet's file, it would not be in Mr. Kelley's file, the one that does exist.
>
> . . . .

> We do know what the evidence is. There is a complete list of the evidence in the Sweet file. The transcript of Mr. Sweet's trial reflects specifically what the items of evidence are. What we're talking about is ninety percent of it is documentary evidence; copies of checks, copies of rental car agreements, copies of motel registrations. There is very little actual physical evidence.

[R2 312-13; 333-34]. The pre-trial transcript shows that Judge E. Randolph Bentley understood the destroyed evidence was limited to that introduced in the Sweet trial. [R2 322; see generally R2 311-70].

There was no mention at that pre-trial hearing case that other physical evidence, not introduced at the Sweet trial, was also destroyed. The State never disclosed that other physical evidence had been returned to four public officers. Kunstler was candid that he did not know what evidence existed. The transcript shows that Judge Bentley did not make a finding that the other physical evidence from the crime scene investigation, not introduced at the Sweet trial, was destroyed.

Given the State's lack of disclosure, which it was obligated to make, Kelley's attorneys proceeded to trial on the false assumption that all evidence had been destroyed. The State left a defendant who consistently has maintained his actual innocence without critical information relating to the location and disposition of the physical evidence collected by

the State from the crime scene and related locations. This newly disclosed prosecutorial misconduct denied Kelley due process and provides the precise "hint" that this Court said would undermine the conviction.

There can be no doubt the evidence could have been both exculpatory of Kelley and impeaching of Sweet. With that crime scene evidence, Kelley's defense team would have shown the jury the sharp contrast between (i) the very bloody objects obtained at the crime scene, including the bloodied carpets and hallways runners and (ii) the absence of blood evidence connecting Kelley to the crime.

Sweet claimed the killers left the crime scene in the victim's car. [Kelley II 593-94]. Therefore, all evidence taken from the car, scrapings from the outside left car door, brake pedal, floor mat, car keys, metal door sill, left door window channel, tire and steering wheel should have yielded fingerprints, footprints, blood specimens or other specimens.

Deputy Murdock testified, however, that no blood whatever was found in Maxcy's car, [Kelley II 496-97], despite the absence of any evidence that the killer(s) had washed off blood before leaving Maxcy's house. [Kelley II 496]. In the light of Deputy Murdock's testimony, the suppressed evidence would have been exculpatory of Kelley and it would have provided a

tangible, palpable way to impeach Sweet about his self-serving version of events, well beyond mere argument of counsel.

Simply put, physical evidence would have better allowed the jury to determine whether the arguments of counsel truly matched up with the crime scene evidence. The suppressed evidence would have been critically important in showing that Sweet was lying about how the crime unfolded. Even more significantly, it would have allowed the jury to find there was "reasonable doubt" whether Kelley was involved in the crime. And, the incorrect deadlock charge would not have been given to the jury.

2. The evidence was suppressed by the State.

Kelley and his attorneys did not learn of the disposition of the evidence submitted to the Florida Sheriff's Bureau Crime Laboratory (now FDLE) until they received the May 10, 2006 letter disclosing this information for the first time. The State had the duty to disclose this evidence earlier, but did not do so. Even though Kelley specifically sought pre-trial exculpatory discovery from the State (but never received the specific documents at the center of this appeal or any information about the evidence to which they relate), see Kelley v. Singletary, 222 F. Supp. 2d at 1363, the State's duty to disclose would exist even if the defense had not made a specific request for the information. See Kyles v. Whitley, 514 U.S. 419, 433-34 (1995); see also United States v. Bagley, 473 U.S.

667, 680-81 (1985).

As a constitutional imperative, the State cannot play hide-and-seek with such critical exculpatory and impeaching evidence. See Banks v. Dretke, 540 U.S. 668, 675-76 (2004)("When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." A rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process"); Hoffman v. State, 800 So. 2d 174, 179 (Fla. 2001)(ruling the argument that the defendant is required to figure out the existence of exculpatory evidence "is flawed in light of Strickler and Kyles, which squarely place the burden on the State to disclose to the defendant all information in its possession that is exculpatory.").

The presumption of regularity of business practices attaches in this case. See Robinson v. State, 325 So. 2d 427, 429 (Fla. 1st DCA 1976)("where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and the courts presume that they have properly discharged their official duties"). Hence, it must be presumed that the evidence was in fact received by the officers of the submitting authorities when it was returned to them by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967.

The May 10, 2006 letter in fact attached receipts.

There was no court order in place then (or ever) allowing for the destruction of the evidence returned to officials by the sheriff. Absent proof to the contrary, then, and there is none, the presumption must be conclusive that the evidence still existed in the hands of the submitting authorities at the time of Kelley's trial. Even though the State asserts it has now been destroyed, there still is no evidence that it was destroyed at the time of Kelley's trial.

Instead, the State simply points to affidavits submitted by Kelley's trial counsel in support of his motion for postconviction relief stating that the fruits of the police investigation had been destroyed. The statements were erroneously made. Indeed, there is no way Kelley's trial attorneys could have known that all evidence was destroyed -- only the State would have knowledge of that. Moreover, there has never been an evidentiary finding that such is the case, and the State has never put forth any proof of such destruction, other than by pointing to these statements by Kelley's own attorneys in reliance on the State's non-disclosures.

In sum, it was the duty of the State to disclose to Kelley the fact that the four public officers received and presumptively maintained the evidence. See Rose v. State, 787 So. 2d 786, 796 (Fla. 2001)(ruling that even where prosecutor

does not know of the exculpatory material, suppression may still occur if State's agents possess exculpatory or impeaching evidence). Only then could Kelley have taken advantage of it.

The State did not make that disclosure until decades later, on May 10, 2006.

3. Kelley was prejudiced by the State's suppression of evidence.

The test for measuring the effect of the failure to disclose exculpatory or impeaching evidence is whether there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. "Reasonable probability" is defined by this Court as "probability sufficient to undermine confidence in the outcome." White v. State, 664 So. 2d 242, 244 (Fla. 1995).

As this court explained in State v. Huggins, 788 So. 2d 238, 243 (Fla. 2001) (citing Strickler, 527 U.S. at 289-90 ("in reviewing the materiality of an alleged Brady violation and whether the third prong of prejudice exists, '[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'"))

There are numerous reasons why the verdict in this case is not "worthy of confidence." First, this Court itself declared

that even a "hint" of prosecutorial misconduct would have changed the confidence it placed in the verdict. Although affirming the conviction, the Court took pains to say: "[w]e wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." Kelley v. State, 486 So. 2d at 582.

Now, we know there is a "hint" -- even more than a "hint" -- of misconduct by a prosecutor caught in the same type of misconduct on prior occasions. Indeed, in granting federal habeas relief, Judge Roettger reviewed this record and concluded that "[t]his case presents many incidences of prosecutorial misconduct." Kelley v. Singletary, 222 F. Supp. 2d at 1363. The May 10, 2006 letter discloses yet another instance of prosecutorial misconduct – in this case, one that hardly could be dismissed as immaterial to the outcome.

Second, the suppressed evidence underscores the error in the non-standard deadlock charge that was given to the jury when it reached an impasse. Instead of simply giving the standard charge, the trial judge added other admonitions to the jury, including this key directive: "There is no reason to believe there is any more evidence or clearer evidence could be produced on either side."

We now know that significant other evidence indeed is presumed to have existed. Accordingly, not only was the

additional, non-standard deadlock charge coercive in the first instance, <u>it was in fact incorrect</u>, and the State stood by and allowed the jury to be misled. Even apart from its duty to disclose this evidence to Kelley, the State had a duty of candor to the Court not to let the court give a jury charge the State knew was factually incorrect. Had this jury not been improperly told that no more evidence could be produced, Kelley's trial might well have ended in an acquittal or at least another impasse.

Third, as explained above, the defense was precluded from letting the jury <u>see</u> the bloody evidence taken from the crime scene and <u>see</u> the lack of blood on the evidence taken from the car. A reconstruction for the jury using actual evidence is worlds apart from being limited to counsel's argument based on the State's selective evidence. In a case where Kelley consistently has maintained his innocence and Sweet's account of the supposed murder was front and center at trial, the crime scene and related evidence could have persuaded the jury that Sweet was lying about Kelley, in order to save his own skin.

Finally, the suppression of the evidence about the disposition of this evidence precluded the defense from developing and presenting even more exculpatory evidence at trial. The May 10, 2006 disclosures establish that Exhibits three (3) through nine (9) were returned to Broward Coker.

Those exhibits included body hair samples and fingernail scrapings from Mr. Maxcy and wall scrapings from Mr. Maxcy's bedroom.

The State presented testimony that a violent struggle preceded Mr. Maxcy's death. [Kelley II 494]. Consequently, it is likely Maxcy's body hair samples might have been mixed with the hair of the victim's assailants, providing further identification of suspects while also indicating that Kelley was not present at the scene. The same is true of Mr. Maxcy's fingernail scrapings and the scrapings from the wall of Mr. Maxcy's bedroom.

The State's May 10, 2006 letter also discloses for the first time that the hallway carpet runners and the bedroom floor carpet section were returned to Mr. Coker. They could have yielded footprints or other evidence exculpatory as to Kelley, while identifying other suspects.

The suppression of evidence by the prosecution constitutes fundamental misconduct of the worst sort, directly affecting the trial and the subsequent appeal. Kelley and his attorneys were forced to assume that all of the evidence was destroyed by the time of trial, and they had to frame their arguments accordingly on direct appeal and in post-conviction proceedings. Had the State properly disclosed the disposition of the evidence at issue, Kelley would have either found the evidence and used it

at trial, or Kelley could have presented appellate and post-conviction arguments as to the evidence in an accurate way.

As it was, this Court was allowed by the State to proceed under the false belief that all of the evidence gathered by the State was destroyed under a court order that in fact only authorized limited destruction of evidence held by the clerk of the court from Sweet's trial. That requires this Court to step in and correct this injustice.

The ultimate test is not whether a different verdict would have been reached had the evidence (or evidence disposition forms) been disclosed timely, but whether suppression "undermine[s] confidence in the outcome." White, 664 So.2d at 244. That is, the test is whether the verdict is "worthy of confidence." Huggins, 788 So. 2d at 243. See Way, 760 So. 2d at 912; Young v. State, 739 So. 2d 553, 559 (Fla. 1999).

Here, there is certainly a reasonable question whether Kelley's trial might have reached a different outcome if the evidence had been available for trial preparation or at trial or even if only the forms themselves had been available at trial. Such reasons are undoubtedly why this Court announced on direct appeal that "[w]e wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." Kelley v. State, 486 So. 2d at 582. There was the issue of Sweet's

credibility, the hung jury at the first trial, the impasse at the second trial that was broken only by a non-standard instruction, and the concerns of prosecutorial misconduct expressed by Judge Roettger and now confirmed by the State's belated disclosure of suppressed evidence.

Any confidence in the verdict has been significantly undermined, and Kelley has been deprived of due process. Kelley has established a Brady claim, and the trial court erred in summarily ruling otherwise.

II. THE TRIAL COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING ON KELLEY'S BRADY v. MARYLAND CLAIM.

A. Standard of Review.

A court's decision whether to grant an evidentiary hearing is subject to de novo review. Owen v. State, 2008 WL 1969141 at 2 (Fla. May 8, 2008) (citing State v. Coney, 845 So. 2d 120, 137 (Fla. 2003)).

B. Kelley should have been permitted an evidentiary hearing.

The trial court erred in denying Kelley an evidentiary hearing on his claim that the State withheld evidence in violation of Brady. The trial court should not have made "findings of fact" in its Order Denying Motion for Postconviction Relief, when Kelley was deprived of an evidentiary hearing on any factual issues contested by the

State. [R3 403-10]

"Generally, a defendant is entitled to an evidentiary hearing unless the postconviction motion or any particular claim in the motion is legally insufficient or the allegations in the motion are conclusively refuted by the record." Nixon v. State, 932 So. 2d 1009, 1018 (Fla. 2006) (citing Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000)). "Additionally, where no evidentiary hearing has been held, an appellate court must accept the defendant's factual allegations as true to the extent that such allegations are not refuted by the record." Nixon, 932 So. 2d at 1018 (citing Peede v. State, 748 So. 2d 253, 257 (Fla. 1999)).

Because the factual basis for this Brady claim is unknown suppression of evidence, Kelley has not been able to raise a claim for prosecutorial misconduct until that disclosure finally was made to him by the May 10, 2006 letter from the State. Kelley is entitled to an evidentiary hearing on his Brady claim for this reason alone. The trial court erred in refusing him that process.

Furthermore, if Kelley had been provided an evidentiary hearing, he would have called certified crime scene reconstructionist Ross Gardner as a witness. Gardner would have testified that Kelley's defense team could have shown the jury the sharp contrast between (i) the very bloody objects obtained

at the crime scene, including the bloodied carpets and hallway runners, and (ii) the absence of blood evidence connecting Kelley to the crime. As Gardner stated in his affidavit, a picture is worth a thousand words. [R1 34]. The physical evidence would have better allowed the jury to determine whether the arguments of counsel truly matched up with the crime scene evidence.

At an evidentiary hearing, Kelley also would have established that he had no prior knowledge of the disposition of evidence form. His former counsel during his federal habeas proceedings, James C. Lohman, would have testified he is certain he never saw the disposition-of-evidence records at issue in this appeal. [R1 49]. Likewise, paralegal Samantha Leone would have testified that in organizing and maintaining this voluminous case file on behalf of Kelley's undersigned counsel, she is certain she has never seen the disposition-of-evidence records prior to receiving and reviewing the May 10th letter from Victoria Avalon. [R1 51-52].

Kelley also could have called officials of the FDLE to confirm the chain of custody of the physical evidence at issue, and to describe any efforts made to determine if it existed in 1984. Kelley also could have called former Assistant State Attorney Hardy Pickard to testify as to the evidence destroyed pursuant to the 1976 Order.

More specifically, in his September 18, 2007 Reply to the State's opposition to his Motion for Postconviction Relief, Kelley twice emphasized that there had never been a factual determination by a trial court that all of the fruits of the prosecution's investigation of the crime scene were destroyed prior to Kelley's trial. To be sure, as the trial court noted in footnote 2 of its Order, it had made a determination in 2006 that, as of that time, "no evidence remained in existence." [R3 404]. The court, however, ignored the critical distinction that no trial court ever determined that all evidence had been destroyed prior to Kelley's trial in 1984.

In fact, the 1976 Order authorizing the destruction of evidence from Sweet's trial makes it clear that only evidence from that trial was addressed there. In that order, the Highlands County Circuit Court authorized and directed the Clerk to "dispose of evidence in the above styled cause [State of Florida v. Sweet, Case No. 3002]." [R2 305]. There simply is no hint that the evidence returned to the submitting authorities were introduced as evidence in the Sweet trial. Not even the State has suggested, nor could it, that the returned evidence was destroyed pursuant to the 1976 Order, which did not authorize any such destruction because the returned evidence was not in the possession of the Clerk. The State simply says, without explanation, that this evidence has been destroyed.

But, the fact remains, those items indisputably were not used as evidence in the Sweet trial, and hence the 1976 Order, on its face, did not authorize their destruction. Presumably the State only destroyed evidence it was authorized to destroy.

There was no mention in 1984 prior to Kelley's trial that other physical evidence, not introduced at the Sweet trial, was also destroyed. Thus, Judge Bentley could not have made a finding that the other physical evidence covered by the withheld evidence disposition forms was destroyed.

Nor could this Court have made such an evidentiary finding in the first instance. Yet, that awful result inadvertently occurred based on the honest mistake of Kelley's counsel that the State allowed to stand uncorrected: this Court appears to have assumed that all evidence was destroyed pursuant to the 1976 Order. That was simply an assumption and was not supported by any competent evidence, much less any finding by the trial court.

And, that erroneous assumption has been repeated over the years. It has become a self-perpetuating error and the State let it stand, despite knowing otherwise until finally admitting its existence in May 2006. In its Order, the trial court pointed to Florida Supreme Court opinions to justify its conclusion that a finding has been made that the evidence at issue was destroyed prior to 1984. [R3 406-07]. But that

evidentiary finding has never been made by a trial court, and this Court's assumptions are now shown by the State's belated disclosure to have been unwarranted.

CONCLUSION

To sum up: Kelley argued to the trial court that the presumption of regularity attaches and it should now be presumed that the fruits of the prosecution's investigation of the crime scene existed at the time of his trial. Based upon a violation of Brady, his conviction should be reversed and his sentence vacated.

The trial court thus erred in not finding that Kelley established a prima facie Brady claim. At the very least, the trial court should have conducted an evidentiary hearing to determine the factual circumstances surrounding the destruction of all the evidence. It erred in not doing so.

The trial court's order should be reversed.

Dated: June 9, 2008 Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant William H. Kelley has been furnished by Federal Express to the following persons on this 9th day of June 2008.

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CERTIFICATE OF COMPLIANCE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this Petition is 12-point Courier New, and that this Petition fully complies with the requirements of Florida Rules of Appellate Procedure 9.142 and 9.210.

____
Sylvia H. Walbolt