IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY,

Appellant,

v.

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

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT WILLIAM HAROLD KELLEY

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

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INTRODUCTION

In affirming Kelley's conviction and death sentence in 1986, this Court was clear to say 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 578, 582 (Fla. 1986).

The State treats this Court's observation as a one-day-only event and, having narrowly escaped a reversal in 1986, treats the book as closed. Kelley asserts the 1986 opinion was a signal to future justices that prosecutorial misconduct could well have tipped the scales in this unique case. There should be no time limit on getting to the truth.

Kelley set out the facts supporting his claim of prosecutorial misconduct in the initial brief. The State simply ignores key facts in its answer brief.

- The State never refutes the fact that the first time Kelley received the evidence disposition receipts was in May 2006. The State never refutes that it had this evidence all along and never turned it over to Kelley until twenty-two (22) years after his trial.

- The State never argues that Kelley knew, before May 2006, the identities of the specific individuals to whom the fruits of the crime scene investigation were returned. Those

identities are revealed to Kelley for the first time on the evidence disposition receipts.

- The State never offers any proof or argument that Kelley's trial counsel knew of other fruits of the crime scene investigation prior to Kelley's trial in 1984. The State never offers any proof or argument that Judge E. Randolph Bentley knew of other fruits of the crime scene investigation prior to Kelley's trial in 1984. Judge Bentley never made a factual finding that all of that evidence was destroyed prior to trial or, if it was, that Kelley was not prejudiced by the destruction.

- The State never addresses the dilemma it created for itself on the issue of due diligence in its opposition papers below. There it wrote that had postconviction counsel asked the right agency for documents – the Florida Department of Law Enforcement ("FDLE") – it would have found the evidence disposition forms. Kelley filed a Notice of Correction demonstrating that his postconviction counsel in fact did ask the FDLE for documents in 1987, but never received the evidence disposition receipts in response to that request (or ever, before May 2006). The State confessed error and withdrew its assertion as to Kelley's failure to ask the FDLE for documents. But the State never acknowledges the ramifications; that is,

Kelley exercised the due diligence that the State says would have been determinative, but to no avail.

- The State never explains what happened to the other fruits of the crime scene investigation, other than to now contend they were destroyed prior to Kelley's trial. It never explains why or how that destruction happened. The State never argues that the 1976 Court Order authorized the destruction of all of the evidence.

- The State never disputes Kelley's argument that no evidentiary finding has been made by a trial court that all evidence was destroyed prior to Kelley's trial.

It is clear the State's suppression of the evidence disposition receipts until 2006 is a violation of Brady and exactly the sort of prosecutorial misconduct this Court said, in Kelley v. State, 486 So. 2d 578, 582 (Fla. 1986), likely would have caused a reversal of Kelley's conviction. [See R1 3-4]. Kelley's conviction and death sentence must be overturned. 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.

ARGUMENT[1]

I. THE TRIAL COURT ERRED IN DENYING KELLEY'S CLAIM THAT THE STATE VIOLATED BRADY V. MARYLAND.

A. This claim is not a variation of Kelley's prior destruction of evidence claims.

The State says that Kelley's Brady claim is merely a variation of his prior destruction of evidence claims. Not so. This is a Brady v. Maryland, 373 U.S. 83 (1963) claim that has never been litigated before. It never could have been litigated previously, as the evidence disposition receipts that form the basis of the claim were not disclosed to Kelley until May 2006. The State does not refute this fact.

Instead, the State's basis for arguing that this claim has been litigated previously is that it is simply a variation of a destruction of evidence claim that it says has already been rejected. That is perplexing, as the State does not disagree that no evidentiary finding has ever been made by a trial court that all evidence was destroyed prior to Kelley's trial. In the absence of such a finding, it cannot be said that Kelley is litigating that issue again.

In fact, this appeal is based on an extraordinary turn of events in this case. The entire history of this case proceeded on the defendant's and the courts' core assumption that all of

[1] Kelley will maintain the same citation and quotation conventions as were used in the initial brief.

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 State had that evidence all along and never turned it over to Kelley until twenty-two (22) years after Kelley's trial. These receipts showed that over thirty (30) pieces of physical evidence were returned by the Florida Sheriff's Bureau Crime Laboratory in 1966 and 1967 to specific officers of the submitting authorities. The State never argues that Kelley knew, before May 2006, the identities of those specific individuals to whom the fruits of the crime scene investigation were returned.

Because the return of the evidence to these officers had never before been disclosed by the State, Kelley was deprived of the opportunity prior to his 1984 trial to determine what those persons did with the physical evidence that was returned to them. Instead, Kelley and his lawyers always have been allowed by the State to believe that all of the evidence from the 1966 investigation was destroyed, and to proceed before the courts based on that premise.

In this respect, the transcript of the 1984 pre-trial hearing on the motion to dismiss the indictment against Kelley reveals the total state of confusion of Kelley's attorney

William Kunstler as to any of the physical evidence. Kunstler repeatedly says that he doesn't know what evidence was destroyed:

(a) He explained his view of what the State had done: "We'll destroy all the evidence, every statement we have, all but the defense exhibits." [R2 319].

(b) "It would be a travesty of justice if Mr. Kelley had to go to trial without the material that might totally exculpate him. I can't get it. I don't know what's in there." [R2 320].

(c) "I'm not even sure what remains of the State Attorney's file. I have no evidence of that whatsoever, whether they have all the statements they took at the time, whether they have been destroyed or not." [R2 322].

(d) "We don't know what the evidence was. We can just guess." [R2 326].

(e) "Certainly you can't say that there's nothing that would help him, because none of us have seen it." [R2 331].

(f) "I think this is a rather unique case. I never had an experience like this in my practice. I'm not sure the Court has ever had this kind of experience where you have a late prosecution of a murder case so widely spread in time, and secondly, where the evidence has been destroyed." [R2 338].

(g) "I also think that I haven't seen any lists of what was destroyed in this situation. I don't know what was destroyed." [R2 339].

In the face of Kunstler's obvious confusion, Assistant State Attorney Hardy Pickard chose to discuss only that evidence that was destroyed pursuant to the 1976 Court Order. He never

mentions that other fruits of the crime scene investigation existed at one point, were not destroyed under the authority of the 1976 Court Order, but were otherwise destroyed, according to the State in 2008. He left Kunstler and Judge Bentley in the dark as to all of those critical details.

Given Kunstler's and Judge Bentley's lack of awareness as to the nature of the potential universe of evidence in this case, it can be inferred that Pickard intentionally minimized the scope of destruction that the State now says had occurred in order to win the motion or, in the alternative, to avoid telling Kunstler that there was other evidence out there, beyond that used in the Sweet trial. Kelley submits that, either way, Pickard's silence as to the other evidence was prosecutorial misconduct under the facts of this case.

In particular, 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].

Judge Bentley understood the destroyed evidence was limited to that introduced in the Sweet trial. [R2 322; see generally R2 311-70]. The State never offers any proof or argument that Judge Bentley knew of other fruits of the crime scene investigation prior to trial in 1984. He certainly never made a finding as to whether the other evidence was destroyed or whether a destruction of that evidence would have prejudiced Kelley. And, as shown, Kunstler was certainly confused about the evidence.

Where does this all lead? By suppressing the evidence disposition receipts until May 2006, the State deprived Kunstler (and thereby Kelley) of (i) the opportunity to track down the specific individuals to whom the evidence was returned in 1966 an 1967; (ii) the opportunity to have Judge Bentley make a factual determination as to whether all the evidence was indeed destroyed (a factual finding that has never been made); and (iii) the opportunity to explain to Judge Bentley the magnitude of the destroyed evidence, if in fact it was. That is a Brady

violation, and it could not have been litigated until now. Contrary to the State's argument, see An. Br. at 16, collateral estoppel cannot possibly apply here, where the Brady material was suppressed until May 2006 and there has never been a factual finding by a trial court that all evidence was destroyed.

It remains only to note the State's chutzpa in pointing to the sworn statements of Kelley's trial attorneys – who only knew what the State led them to believe – as factual support for the proposition that all fruits of the crime scene investigation were destroyed prior to the 1984 trial. See An. Br. at 24. The transcript excerpts above show Kunstler's lack of knowledge as to the other evidence. If co-counsel Jack Edmund had known about the other evidence, Kunstler's ignorance is simply bewildering.

In the end, the State never explains what happened to the other fruits of the crime scene investigation, other than to now say it was destroyed prior to Kelley's trial. It never explains why or how that destruction happened. It simply points to the incompetent sworn statements of Kelley's attorneys.[2]

[2] The State contends that the presumption of regularity applies only where no evidence indicating otherwise is produced. An. Br. at 30. The sworn statements of Kelley's attorneys, however, do not indicate otherwise in this case. Because the sworn statements were erroneously made, they cannot be relied upon as evidence; therefore, 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, and maintained thereafter, in the absence of a Court Order allowing its destruction.

B. The State's argument that Kelley failed to exercise due diligence has no basis in fact or law.

The State argues that Kelley's claim fails for a lack of due diligence. On the law, the State is wrong. On the facts, the State must actually retrench from statements it made in opposing Kelley's motion in the trial court to even articulate its case here.

The law first. Brady does not require a showing of due diligence. 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); Owen v. State, 2008 WL 1969141, *4 (Fla. May 8, 2008).

The State recognizes that this Court "no longer recognizes a 'due diligence' prong for substantive Brady claims." [R2 200]. Nevertheless, ignoring the elements of Brady, the State now argues that the procedural vehicle Kelley must use to bring his claim, Florida Rule of Criminal Procedure 3.851(d)(2)(A),

requires a showing of due diligence in order for Kelley's Brady claim to be deemed timely.[3]

Requiring due diligence is inherently incompatible with a Brady claim, however, which is based on intentional or inadvertent non-disclosure. Thus, the State's attempt to impose this additional burden upon Kelley in an effort to defeat his Brady claim as being time-barred fails.

Indeed, the State's argument that Kelley must demonstrate due diligence is inconsistent with a Brady claim. "The defendant's duty to exercise due diligence in reviewing Brady material applies only after the State discloses it." Allen v. State, 854 So. 2d 1255, 1259 (Fla. 2003). Brady does not require that the defendant compel production of exculpatory material, or even that a defendant remind the State of its obligations. Id. Instead, it is the State's duty to disclose such evidence, 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).

[3] According to Florida Rule of Criminal Procedure 3.851(d)(2)(A), "No motion shall be filed or considered pursuant to this rule if filed beyond [1 year after the judgment and sentence become final] unless it alleges the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence."

In order to substantiate a Brady claim, the movant must show not due diligence, but only suppression by the State. Strickler, 527 U.S. at 281-82; Owen, 2008 WL 1969141, *4. Suppression includes a showing or statement that the movant was not aware of the information it alleges was suppressed or that the information was not "equally available" to the movant as to the State. See id.

Here, it is clear that Kelley was not aware of the evidence disposition receipts until May 2006. The State does not dispute that it never produced the evidence disposition receipts to Kelley until 22 years after his trial. The State had those receipts all along, yet never turned them over to Kelley.

Perhaps more importantly, the State has created a quandary for itself in arguing the facts of a due diligence inquiry, even if one were to be required by this Court. Indeed, the recitation of the State's changing position on Kelley's due diligence demonstrates that its focus is to set the bar just above Kelley's reach.

Specifically, in its opposition papers below, the State wrote that had Kelley simply asked the right agency for documents, he would have received them. Thus, the State asserts, Kelley failed to exercise due diligence. The problem for the State, however, is that Kelley did ask that agency for documents and he did not receive them.

Simply put, the State said this:

> Had Kelley's attorneys attempted to pursue the issue with due diligence, they would have obtained these forms during Kelley's initial postconviction litigation.
>
> Kelley's motion confirms this fact. Kelley acknowledges that his prior litigation included public records requests directed to the State Attorney's office and the Highlands County Sheriff's Office (Motion, p. 11). Notably, he did not request public records from FDLE. Since these documents are internal memorandum intended only for FDLE files, there would be no reason they would be available through public records requests directed to the Sheriff and State Attorney. However, they could have easily been obtained through a public records request to FDLE.

[R2 193].

In response to the State's inaccurate accusation that Kelley and his counsel had not been diligent, Kelley filed a Notice of Correction attaching the applicable requests demonstrating that postconviction counsel did indeed ask the FDLE for documents, but never received the evidence disposition receipts. [R2 228-233]. The State subsequently confessed error and withdrew its assertion as to Kelley's failure to ask the FDLE for documents. [R2 242-245].

Even in the light of that concession, though, the State continues to assert that Kelley failed to exercise due diligence. In fact, the State never grapples with the logical ramification of its concession; that is, Kelley had exercised

the due diligence that the State says would have been determinative and yet he still did not get the evidence disposition receipts. Moreover, it is apparent that the information was not "equally available" to Kelley as it was to the State.

Ignoring its concession below, the State argues that postconviction counsel's lack of due diligence in 1988 bars this motion:

> Thus, the circuit court had found in 1988 that Kelley's postconviction attorneys had not been diligent with the investigation. Had Kelley's attorneys attempted to pursue the issue with diligence, they would have obtained these forms during Kelley's initial postconviction litigation. Because a successive motion for postconviction relief cannot be brought if the claim could have been discovered previously, the failure to exercise due diligence with regard to this claim rendered Kelley's motion untimely.

An. Br. at 19. In the light of the State's concession regarding the public records request to FDLE that Kelley actually did make in 1987, it is truly amazing that the State continues this line of argument in this Court. Obviously, the FDLE's failure to disclose the disposition receipts in response to Kelley's 1987 public records requests fatally undermines the lack of due diligence finding in 1988.

Ultimately, reading Rule 3.851 and Brady in harmony, a movant's showing of suppression under Brady is akin to a showing of due diligence under Rule 3.851. If a movant alleges enough

facts to indicate suppression in that the movant was either not aware of the evidence at issue, or that it was not "equally available" to the movant as to the State, then such allegations should satisfy any due diligence requirement of 3.851 applicable to a Brady claim.

Here, Kelley has presented enough facts to show suppression under both tests. Because the factual basis for this Brady claim is the suppression of evidence unknown to Kelley, he could not have raised a claim for prosecutorial misconduct until that disclosure was finally made to him in May 2006. His claim, therefore, is not time barred, under the law or the facts.

Lastly, it must be said that the State's flawed argument that Kelley is required to show due diligence in order to bring this Brady claim is inherently unfair. If such an interpretation of the Rule were to be adopted in the context of Brady, the State would be rewarded for suppressing evidence for a lengthy period of time. If Rule 3.851 is invoked late in the procedural day, due diligence is required. On the other hand, if Brady is raised early enough (i.e., on direct appeal), no due diligence is required. This interpretation of the Rule and Brady is simply illogical and must be rejected.

C. The State suppressed evidence in violation of Brady.

The State suppressed the evidence disposition receipts in violation of Brady. The State argues that the evidence was not

suppressed because Kelley's trial attorneys knew or should have known the evidence was returned from Tallahassee to local agencies as a matter of "routine practice." An. Br. at 20. It says Kelley can offer no proof that his attorneys did not know this fact.[4] Id. at 21.

Yet, as shown in detail above, it is clear that Kunstler did not know anything about the universe of evidence that had been originally collected and that he assumed it was destroyed. Kunstler (i) makes clear that he is confused about the evidence in general, (ii) gives no indication that he knows anything about physical crime scene evidence that was not used in the Sweet trial, and (iii) says in fact he has never seen a list of the evidence destroyed from the Sweet trial. [See R2 319-339]. Of course, Kunstler's ignorance of what evidence was even collected refutes the State's assertion that he knew where to look for it.

Further, the State's argument (relying upon a finding by the trial court to this effect) that the testimony in the Sweet trial put Kelley's attorneys on notice as to where the evidence was returned fails as well. [See An. Br. at 20, 22]. A review of the Sweet transcript pages cited by the State reveals that no

[4] Kelley notes that the State's assertions as to routine practices and common knowledge has no record support. It is merely the State testifying on appeal as to its opinion as to routine practices and common knowledge.

testimony was offered about the fruits of the crime scene investigation at issue in this case. In fact, the testimony cited addresses just two pieces of physical evidence (a bullet and a sheet) used in the Sweet trial. [R2 208-226].

The testimony does not say that all evidence tested in Tallahassee is always returned to the submitting agency. It certainly doesn't identify for Kelley the names of the specific individuals to whom specific pieces of the other evidence were returned, as did the evidence disposition forms.

At bottom, the State never denies that it had a duty to produce these evidence disposition receipts. Undisputedly, it did not do so. Kelley's attorneys obviously did not find the evidence to which the receipts pointed, and did not reveal any knowledge before trial that the evidence even existed. Given these facts, it is clear that the State suppressed evidence.

D. The State's contention that the evidence disposition receipts are not exculpatory, impeaching nor material is meritless.

The suppressed disposition receipts point directly to the specific individuals to whom actual crime scene evidence was returned. They also cast an entirely different light upon the 1984 pre-trial hearing, where Pickard avoided discussing the evidence to which these evidence disposition forms are directly linked. That new light creates the hint of prosecutorial

misconduct that this Court mentioned was lacking at the time of the direct appeal.

It simply is not true that these disposition receipts forms are not exculpatory and impeaching. Indeed, in the absence of the evidence to which these forms are directly linked, Kelley faced a capital trial without access to the physical crime scene evidence that could show the jury what happened. And the State allowed Kelley's attorneys to remain confused as to the existence and whereabouts of the evidence. It takes gumption to say that rectifying those two problems would not be exculpatory or impeaching. The State is wrong.

This Court has made clear that evidence such as these disposition receipts would be exculpatory and material: "Paraphrasing federal law on the subject, this Court has stated: '[W]ithheld information, even if not itself admissible, can be material under Brady if its disclosure would lead to admissible substantive or impeachment evidence.'" Floyd v. State, 902 So. 2d 775, 781-82 (Fla. 2005)(quoting Rogers v. State, 782 So. 2d 373, 383 n.11 (Fla. 2001)).

At a minimum, the disposition forms would have led Kelley's attorneys to the specific individuals to whom the evidence was returned to in 1966 and 1967. That very well would have led to the evidence itself, which would have changed the entire complexion of a trial in which physical evidence was virtually

non-existent. The presumption of regularity leads to the conclusion that the evidence was kept and existed in 1984. See Robinson v. State, 325 So. 2d 427 (Fla. 1st DCA 1976). Even if Kelley's trial attorneys had learned that all of the evidence had been destroyed (not under the authority of any Court Order), the 1984 pre-trial hearing on the motion to dismiss the indictment would have been much different. A factual finding would have been made as to the where, how, and why of that destruction of evidence. And a factual finding as to the legal ramifications of such destruction of evidence would have been made. Those factual findings have never been made to this day. For these reasons, the disposition receipts are critical to this case.

In determining the prejudice prong of the Brady analysis, this Court has emphasized that "the evidence must be considered in the context of the entire record." Rose v. State, 787 So. 2d 786, 795 (Fla. 2001). Here, given the highly unusual circumstances – a prosecution years after the fact, a dearth of physical evidence, obvious confusion by Kelley's counsel as to what evidence even existed in 1984, silence by the prosecutor as to the existence or whereabouts of this other evidence in 1984, and a trial that turned largely on the immunized testimony of the mastermind of the very crime on trial – this record is particularly amenable to a finding of prejudice on these facts.

II. THE TRIAL COURT ERRED IN DENYING KELLEY AN EVIDENTIARY HEARING.

This Court favors evidentiary hearings in cases that are not clear on the face of the record. See Rivera v. State, 2008 WL 2369219 (Fla. June 12, 2008). This is a case that, at the very least, calls for an evidentiary hearing.

In Rivera, the trial court dismissed the defendant's Brady claims brought under Rule 3.850, Florida Rules of Criminal Procedure, without an evidentiary hearing, as being successive "because the information Rivera said he did not have was known or could have been known prior to the filing of his first postconviction motion." Id. at *4. This Court, however, disagreed with the trial court and determined that on the face of the record, the State did not conclusively demonstrate that Rivera's claims were procedurally barred.

In Rivera, this Court stated that, "[t]he bar against successive motions can be overcome if the movant can show that the grounds asserted were not known and could not have been known to the movant at the time of the previous motion." Id. Rivera alleged that he did not have the information at the time of his trial or during the prior postconviction proceedings. Because no evidentiary hearing was held, this Court said that it "must accept [Rivera's] claims as true and direct an evidentiary hearing on their validity unless the record *conclusively*

demonstrates that Rivera is not entitled to relief." Id. (emphasis in original). Because this Court found that the record did not conclusively refute Rivera's allegations that the State withheld favorable evidence in violation of Brady, it remanded the case for the trial court to conduct an evidentiary hearing. See id. at *7.

Here, if the Court determines that Kelley's Brady claim does not require an immediate reversal and vacation of his death sentence, Kelley asserts that the trial court at a minimum erred in denying Kelley an evidentiary hearing on his Brady claim. Kelley has sufficiently demonstrated that the information at issue was not known and could not have been known to him. The Kelley record certainly does not conclusively refute Kelley's allegations that the State withheld the evidence disposition receipts.

Moreover, the State never argues that an evidentiary finding has been made by a trial court that all evidence was destroyed prior to Billy's trial. For these reasons, and because this Court has encouraged courts to liberally allow such hearings on timely raised claims that are factually based and commonly require a hearing, the trial court at a minimum erred in denying Kelley an evidentiary hearing as to this Brady claim.

What would an evidentiary hearing accomplish? As explained in the initial brief, Kelley would present evidence of the

prejudice suffered at trial by the lack of physical evidence. The jury simply wasn't given the opportunity to understand the crime scene. Had it been given physical evidence from the crime scene, it would have been able to appreciate the inconsistencies in Sweet's testimony. In this respect, the State concedes that "when available, crime scene evidence can be important for the jury to assess." An. Br. at 33. Unless the Court takes that concession as a stipulation by the State that Kelley has established prejudice, Kelley should be given the opportunity to prove the prejudice he suffered because the State suppressed evidence.

Of course, the availability of crime scene evidence is a focal point of this proceeding. Hand in glove with showing the prejudice Kelley suffered by not having the crime scene evidence at trial is finding an explanation why that was so. The State would prefer to leave that inquiry to the messy past, offering only the vague explanation that the fruits of the crime scene investigation were destroyed prior to Kelley's trial in 1984.

The State does not explain the circumstances of that alleged destruction of evidence, and no factual determination has ever been made by a trial court that the evidence was indeed destroyed prior to Kelley's trial or the ramifications of such destruction of evidence (not authorized by any Court Order).

Pickard is the only person alive who can testify as to what he told Kunstler regarding the evidence at the time of Kelley's trial. Significantly, Pickard has never had to explain what happened to the evidence. Pickard has never had to testify as to what he knew at the time of Kelley's trial about the disposition of the evidence.

Notably, in granting Kelley habeas relief based on newly discovered evidence, Judge Norman C. 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 v. Singletary, 222 F. Supp. 2d at 1363 (emphasis added). More specifically, Judge Roettger found that Pickard had withheld several items from Kelley deemed to be material and exculpatory. Id. at 1364-66.

Although the Eleventh Circuit reversed Judge Roettger and reinstated Kelley's conviction on the basis 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, Kelley v. Sec'y for the Dep't of Corr., 377 F.3d 1317, 1333, 1340-43, 1369 (11th Cir. 2004), the Eleventh Circuit did not disagree that Pickard had wrongly withheld evidence from Kelley. The State never

argues that the Eleventh Circuit displaced Judge Roettger's finding of prosecutorial misconduct.

By depriving Kelley of an evidentiary hearing, the trial court denied him an opportunity to put Pickard on the witness stand to finally testify as to his knowledge of the evidence in the wake of the State's belated disclosure of the evidence disposition receipts. Clearly, an evidentiary hearing would allow the trial court to determine whether all of the fruits of the crime scene investigation were actually destroyed prior to Kelley's trial and, if so, the circumstances surrounding that destruction of evidence.

CONCLUSION

The trial court thus erred in not finding that Kelley established a Brady claim, entitling him to a new trial. 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.

Based upon a violation of Brady, Kelley's conviction should be reversed and his sentence vacated.

Dated: September 2, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Reply Brief of Defendant/Appellant William Harold Kelley has been furnished by Federal Express to the following persons this **Second** day of **September**, 2008.

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CERTIFICATE OF COMPLIANCE

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

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Joseph H. Lang, Jr.