Supreme Court, U.S.
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Case No. 09-53

IN THE UNITED STATES SUPREME COURT

WILLIAM HAROLD KELLEY,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

[Restated]

Whether this Court should exercise its certiorari jurisdiction to review the denial of a claim under Brady v. Maryland, 373 U.S. 83 (1963), where the ruling does not conflict with any other court opinion or address any unsettled question of federal law?

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STATEMENT OF THE CASE AND FACTS

This petition seeks review of an opinion of the Florida Supreme Court denying relief requested pursuant to Brady v. Maryland, 373 U.S. 83 (1963). Petitioner, William Kelley, is currently incarcerated on Florida's death row, sentenced in 1984 following his conviction for first degree murder in the 1966 death of wealthy citrus farmer Charles Von Maxcy. Kelley v. State, 486 So. 2d 578, 579-80 (Fla.), cert. denied, 479 U.S. 871 (1986). This Court has denied certiorari review of this case on two prior occasions: following his direct appeal, when Kelley challenged the Florida Supreme Court's opinion that his due process rights were violated when the State destroyed evidence prior to trial, Kelley v. Florida, 479 U.S. 871 (1986); and again following the Eleventh Circuit Court of Appeals opinion reversing the granting of habeas corpus relief by the United States District Court for the Southern District of Florida, Kelley v. Crosby, 545 U.S. 1149 (2005).

Respondent disagrees with the Statement of the Case included in the certiorari petition as filed, which outlines both the procedural history and the factual background of Kelley's prosecution for the Maxcy murder. Among this recitation are several improper inferences and a few critical omissions, resulting in a Statement biased in Kelley's favor. For example, the Statement suggests that Kelley's trial attorneys were not aware that there was evidence collected from the crime scenes, tested by the Florida Sheriff's Bureau (FSB) in 1966 and 1967, then returned to the submitting agency, the Highlands County Sheriff's Office (HCSO). However, it is

undisputed that Kelley's attorneys had a copy of a transcript from Sweet's trial, which described the evidence that had been collected, outlined the chain of custody for the evidence that was submitted to the FSB and then returned to the HCSO, and identified the specific items of evidence which were admitted against John Sweet at his trial. In addition, this is a matter of routine procedure in Florida investigations, and at least Kelley's local attorney, an experienced criminal defense attorney, would have been familiar with this procedure. Furthermore, one of the witnesses at the postconviction evidentiary hearing testified that the evidence in this case had been returned from the lab after testing to the local sheriff's office.

Also, in the initial state court postconviction proceedings, Kelley's trial attorneys testified that they had investigated the destruction of all of the evidence prior to trial, and had learned that the State had not only destroyed the evidence which had been admitted at Sweet's trial, but had also destroyed the evidence which had been collected from the crime scenes but not admitted against Sweet (which the petition refers to as "non-Sweet crime evidence"). Both of Kelley's trial attorneys are now deceased.

Kelley's Statement of the Case is also written in a confusing manner which, rather than simply stating the facts, offers questionable conclusions and focuses more on what was not asserted in prior litigation. Kelley attempts to portray the State in a bad light, by accusing the State of failing to make arguments previously which the State would have no reason to make. For example, Kelley asserts that, in responding to the claim of evidence destruction in

Kelley's direct appeal, the State "did not advise Kelley or the court that the non-Sweet crime scene evidence had not actually been destroyed pursuant to the 1976 court order because it had instead remained in the possession of the submitted authorities" (Petition, p. 6). However, there is no basis to believe that any of this evidence still existed after the 1976 destruction order. Kelley now claims that this "non-Sweet" evidence existed after 1976 and through the time of his 1984 trial, which is the basis of his claim that the trial court's instruction to the jury that there was no additional evidence to be considered was erroneous. There is, however, absolutely no evidence to support his new personal belief that this evidence existed after the Sweet evidence was destroyed in 1976.

Kelley also takes great liberties with offering facts as to his knowledge about the evidence in his case. For example, he asserts that he filed his 2007 Brady claim for postconviction relief "having finally been told by the State for the first time that much of the crime scene evidence had *not* been included within the materials permitted to be destroyed in 1976 under the court order" (Petition, p. 10-11) (emphasis in original). Apparently Kelley feels that he was "told" the evidence still existed after 1976 by the disclosure of these "evidence disposition forms," which offered no clue as to whether the evidence existed after 1976 but merely memorialized that the evidence was returned from FSB to HCSO in 1966 and 1967. Although the State provided the forms, the State has not "told" Kelley or otherwise taken the position that this non-Sweet evidence still existed after 1976.

For these reasons, Respondent does not agree to the Statement of the Case recited in the Petition, and offers the following factual background, beginning with the facts as noted by the Florida Supreme Court in Kelley's direct appeal:

> Appellant's conviction represented the resolution of a highly unusual case, raising some unusual issues. Appellant was indicted in December of 1981 for the Maxcy murder, committed in October of 1966. An explanation of this delay in prosecution requires an examination of the figures involved and the evidence adduced at appellant's trial.
>
> John Sweet, involved in an illicit love affair with Irene, the victim's wife, planned the murder so that he and she could live together on Maxcy's inheritance. Towards this end, Sweet contacted a Walter Bennett in Massachusetts and made the necessary arrangements. A price was set, and in early October of 1966 appellant Kelley and one Von Etter carried out the sinister task.
>
> Because prosecutors found the evidence insufficient to proceed against appellant and Von Etter, and because Irene Maxcy received immunity in return for her testimony in the case, only Sweet was originally tried. His first trial resulted in a mistrial, and the conviction resulting from his second trial was reversed on appeal. Sweet v. State, 235 So.2d 40 (Fla. 2d DCA), cert. denied, 239 So.2d 267 (Fla. 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. Thus, the case lay dormant for over ten years. This standstill was broken only after Sweet, in 1981, became involved in a criminal situation he found threatening and approached law enforcement authorities in order to seek some protection by receiving immunity in return for his testimony as to a wide variety of crimes.

It was this testimony upon which appellant's indictment and prosecution in this case were centrally based. Sweet testified as to the details of the planning and execution of the murder, as well as to a purported conversation with appellant several years after the murder in which appellant allegedly said "Boy, [Maxcy] was a powerful guy. I stabbed him three or four times and he kept coming after us, so I had to shoot him in the head." The other central testimonial evidence presented in appellant's trial below was that of one Abe Namia, a private detective originally hired after the murder by Sweet's defense counsel. Namia testified as to some purported statements of Sweet's made in 1967 incriminating appellant. The statements were admitted to rebut an inference of recent fabrication established by the rigorous cross-examination of Sweet as to his extensive immunity and possible motives to fabricate.

Kelley, 486 So. 2d at 579-580.

Following the reversal of Sweet's conviction, the State's inability to proceed against him resulted in his discharge on speedy trial grounds in 1971. In 1976, the State of Florida petitioned the court and obtained permission to destroy the physical evidence which had been admitted during Sweet's trials. Sweet ultimately returned to Massachusetts and, in 1981, approached authorities there regarding criminal activity taking place in that state. With Sweet's cooperation, Florida officials obtained an indictment against Kelley for Maxcy's murder in December 1981. At that time, Kelley was "on the run" from the law and sought as a fugitive. Kelley was apprehended in Tampa, Florida, on June 16, 1983.

The principal witness against Kelley was John Sweet, who identified Kelley as one of two men that Sweet had hired to kill Maxcy. According to Sweet, the hit men stayed at a hotel in Daytona, and met him at a shopping center in Sebring on the day of the murder. Sweet drove the men to Maxcy's home in their car and dropped them off, telling them the front door was unlocked and Maxcy would be home shortly. He returned their car to the shopping center parking lot, picked up his own car, and drove around for a while until he saw Maxcy's car parked at the shopping center, signaling the mission had been accomplished. A great deal of evidence was presented to corroborate Sweet's testimony as to Maxcy's murder, including bank records, phone records, car rental and hotel records.

A deputy testified that fingerprints were lifted from the crime scene and from Maxcy's car, but that, to his knowledge, the prints were never identified.

Several crime scene photographs were admitted, showing a great deal of blood in the Maxcy house. Investigator Murdock testified, however, that no blood was found in Maxcy's abandoned car, a point emphasized in the defense closing argument.

The jury convicted Kelley and, following a penalty phase, recommended that the death sentence be imposed. Judge Bentley followed the jury's recommendation and imposed a sentence of death on April 2, 1984.

On appeal, Kelley challenged the trial court's refusal to dismiss the case based on the delay and loss of evidence. In a supplemental brief, Kelley asserted the destroyed evidence included, "hair samples, fingernail scrapings, blood samples and scrapings, carpet sections, a brake pedal and floor mat from the victim's car, the victim's clothing, a blood stained sheet alleged to have covered the victim, bullets, and other items." The Florida Supreme Court denied relief and affirmed the conviction and sentence imposed. Kelley, 486 So. 2d at 582, 586.

State postconviction proceedings were initiated when Kelley filed a motion to vacate on November 20, 1987. The motion alleged that crime scene evidence, in addition to that evidence known to have been destroyed pursuant to court order from Sweet's trial, had been destroyed. This claim was rejected as procedurally barred. Another claim, asserting that Kelley's trial attorneys provided ineffective assistance of counsel by failing to adequately investigate the destruction of the evidence, was litigated at an evidentiary hearing in July, 1988.

Kelley alleged that counsel were deficient regarding the destruction of evidence admitted at Sweet's trials, as well as other evidence collected during the investigation.

The motion to vacate offered sworn affidavits from both of Kelley's trial attorneys, specifically stating: "In preparing for the trial of William Kelley, it became clear at some point that evidence from the Sweet trial as well as the fruits of the police investigation in the case had been destroyed." These affidavits were admitted as substantive evidence during the postconviction hearing.

The postconviction motion was denied, a ruling which was affirmed on appeal. Kelley v. State, 569 So. 2d 754 (Fla. 1990). Judge Bentley's extensive factual findings were adopted and incorporated into the appellate opinion, which addressed the destruction of crime scene evidence claim as follows:

> Kelley first argues that the state's destruction of material evidence prior to his trial deprived him of his constitutional rights. In the prior appeal, this Court explained that because the case involving Maxcy's death had been closed for many years, the state obtained an order permitting the destruction of evidence. Several years later, the state initiated the prosecution of Kelley when new evidence came to light. This Court concluded that the state had not been negligent in causing the destruction of evidence and further held that the destruction of the evidence in question did not prejudice Kelley's case.

> 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. Further, 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. The state was not at fault in the destruction of the evidence. Kelley, 486 So.2d at 581. The destruction of evidence in this case did not deprive Kelley of due process of law. See Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (unless defendant shows bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process).

Kelley, 569 So. 2d at 756. The Florida Supreme Court also denied a petition for writ of habeas corpus, which alleged that Kelley's appellate attorneys had rendered ineffective assistance in his direct appeal. Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992).

Kelley then filed a federal petition for writ of habeas corpus in the United States District Court, Southern District of Florida, asserting six issues, including a challenge to the destruction of all of the physical evidence - that admitted at Sweet's trial as well as other fruits of the police investigation. The

district court issued an Order granting habeas relief pursuant to Brady v. Maryland, 373 U.S. 83 (1963), on September 19, 2001, followed by an Order of December 30, 2001, finding that Kelley's trial attorneys provided ineffective assistance of counsel. Kelley v. Singletary, 238 F. Supp. 2d 1325 (S.D. Fla. 2002). The Dec. 30 Order also denied Kelley's claim on the destruction of evidence. Id., at 1329-31.

On appeal, the Eleventh Circuit rendered an extensive opinion reversing the grant of habeas relief, and reinstating Kelley's conviction and sentence. Kelley v. Secretary of the Department of Corrections, 377 F.3d 1317 (11th Cir. 2004). The Eleventh Circuit characterized the district court as "naive," [377 F.3d at 1340], flawed by a "hasty assumption," [377 F.3d at 1341], and "odd," [377 F.3d at 1347, n.30], finding it "obvious" that the district court was confused on the facts [377 F.3d at 1359], finding the district court's conclusion on one issue "strains credulity," "is preposterous," and contrary to the record before the district court [377 F.3d at 1359]. The Eleventh Circuit concluded that the district court committed clear error on a number of levels: by conducting a second evidentiary hearing in federal court; by granting relief on a procedurally barred claim which had never been exhausted in state court (and expressing "serious skepticism" as to whether relief could have been granted on the merits, even if the claim had been properly exhausted, see 377 F.3d at 1351); and by granting relief on a Brady claim which should have been rejected on its merits, as it had been in state court. Kelley, 377 F.3d at 1340, 1343, 1354, 1369. Kelley sought certiorari review in this Court, which was denied on June 27, 2005.

Kelley v. Crosby, 545 U.S. 1149 (2005).

Kelley filed a successive state habeas petition in the Florida Supreme Court in October, 2003, presenting a claim for relief pursuant to Ring v. Arizona, 536 U.S. 584 (2002). The petition was denied on May 4, 2004. Kelley v. Crosby, 874 So. 2d 1192 (Fla. 2004).

Thereafter, Kelley filed a motion seeking postconviction DNA testing on twenty-nine items of evidence which had been collected during the investigation, but not admitted at Sweet's trial. The circuit court denied the motion following an evidentiary hearing, specifically finding that the evidence sought to be tested no longer existed. The Florida Supreme Court's opinion affirming the denial of Kelley's DNA motion set forth the testimony presented at the evidentiary hearing:

> At the evidentiary hearing on June 6, 2006, ten witnesses testified. The first nine testified regarding their efforts to locate the evidence Kelley was seeking. These witnesses, after diligent searches, were unable to locate any of the requested items. First, Tina Barber, records custodian for the Highlands County Sheriff's Office, was unable to find any evidence in her office relating to Kelley's case. She found only a letter stating that older receipts were turned over to the attorneys in Bartow. Cecilia High, supervisor of property and evidence at the Highlands County Sheriff's Office, searched the property storage facility but could not find anything. Dr. Marta Coburn, chief medical examiner for Collier

County, found nothing. Sheli Wilson, the District 10 medical examiner's office manager, and her staff searched but found nothing related to Von Maxcy's death. Suzanne Livingston, forensic services director for the Florida Department of Law Enforcement (FDLE), found four disposition forms in the case files indicating that the evidence had been returned to the submitting agency, the Highlands County Sheriff's Office, but found none of the requested evidence. Judy Bachman, Director of Criminal Court Services for the Highlands County Clerk of Courts, found evidence relating to Kelley's case, including a sealed envelope containing poster boards, photos, hotel receipts, and paper evidence introduced as exhibits in Kelley's first trial. She also found an order releasing some evidence in a related case, but she found none of the items requested. John King, special agent supervisor for the FDLE Sebring office, searched inventory and files but found nothing. Terry Wolfe, Tenth Judicial Circuit State Attorney investigator, searched both the Sebring and Bartow evidence lockers and found nothing. Sebring Assistant State Attorney Steve Houchin retrieved the boxes of case files for this case from the Sebring file room and delivered them to Wolfe to deliver to Assistant State Attorney Victoria Avalon, who represented the State in this proceeding. Houchin confirmed that there were no other files from this case in the file room. He noted that the state attorney does not keep items of

> evidence; items that are not admitted at trial are retained by the local investigating agency.
>
> The final witness was Dr. Martin Tracey, professor of biological studies at Florida International University. He testified as Kelley's expert witness in the area of population genetics. Dr. Tracey discussed the ability of DNA testing to identify an individual to nearly a one hundred percent degree of certainty.

Kelley v. State, 974 So. 2d 1047, 1048-50 (Fla. 2007).

Suzanne Livingston testified at the hearing that, in investigating the request for DNA testing, she located the case files and found disposition forms indicating that the evidence had been returned to the submitting agency, the Highlands County Sheriff's Office. She noted that the Florida Sheriff's Bureau was the predecessor to FDLE and that the policy in 1966, as it still is today, was to not retain any evidence but return everything to the submitting agency once their lab analysis was complete.

While the DNA appeal was pending in the Florida Supreme Court, Kelley's attorneys filed a successive postconviction motion which claimed that the FSB disposition forms had been withheld from the defense in violation of Brady v. Maryland, 373 U.S. 83 (1963). The court summarily denied the successive motion, finding it "unlikely" that Kelley's trial attorneys were not aware of the information on the evidence disposition forms (Pet. App. 8a-9a), and finding that the information on the forms was "not exculpatory or impeaching in any way," (Pet. App. 9a). Most significant for Kelley's current petition, the court also

observed that "there is no reasonable probability that there would have been a different result at trial if the evidence disposition forms had been available for trial preparation or if the forms had been introduced at trial," noting "there is no reasonable probability that the forms would have led to the discovery of the actual crime scene evidence, which was destroyed prior to trial" (Pet. App. 9a).

On appeal, the Florida Supreme Court affirmed this ruling, specifically reiterating "the record demonstrates that the evidence disposition forms at issue are neither favorable nor material" (Pet. App. 17a); Kelley v. State, 3 So. 3d 970, 973 (Fla. 2009). The court held that there was no reasonable probability of a different result had the forms been disclosed, and that the court's confidence in the outcome was not undermined (Pet. App. 17a-18a). In addition, the court noted its findings from the earlier DNA appeal, that evidence had been destroyed in 1976 and could not be located, despite a diligent search, concluding, "we do not see how evidence disposition forms indicating that certain evidence was returned to local officials in 1966 and 1967 would have enabled Kelley to discover evidence that was destroyed by court order in 1976 and could not be located despite a diligent search" (Pet. App. 18a). The court also denied another state habeas petition, which disputed the court's prior findings that this evidence had been destroyed before Kelley's trial, finding the claim presented to be procedurally barred (Pet. App. 18a-19a).

This petition seeks review of that opinion.

REASONS FOR DENYING THE WRIT

THE FLORIDA SUPREME COURT'S CORRECT, FACT-SPECIFIC DENIAL OF RELIEF UNDER BRADY V. MARYLAND DOES NOT WARRANT EXERCISE OF THIS COURT'S CERTIORARI JURISDICTION

Kelley asserts that this Court must exercise certiorari review in this case to resolve a split among circuit courts as to whether Brady v. Maryland, 373 U.S. 83 (1963), requires the suppressed evidence to be material and exculpatory or whether a Brady violation occurs when the evidence is not material or exculpatory but the defendant speculates, without any substantiation, that the suppressed information could lead to material, exculpatory evidence. Review must be denied for a number of reasons; as will be seen: (1) the opinion below did not conflict with any opinions from this Court; (2) the court below did not consider or analyze Kelley's current claims regarding circuit conflicts and the alleged circuit conflicts cited are not implicated in this case; and (3) the court below properly denied Kelley's fact-specific claim.

Kelley asserts initially that the Florida Supreme Court's denial of relief conflicts with Brady itself, with Kyles v. Whitley, 514 U.S. 419 (1995), with United States v. Bagley, 473 U.S. 667, 682 (1985), and with Wood v. Bartholomew, 516 U.S. 1 (1995), by applying a "narrow" construction of the Brady materiality standard; according to Kelley, the Florida Supreme Court rejected his claim of materiality based only on the finding that the forms themselves were not exculpatory or material, and refused to

consider or analyze Kelley's claim that the forms may have led to the discovery of the original crime scene evidence, including hair and fingernail scrapings. Kelley concludes that the court below erred in applying Brady: "the court should have determined (i) whether the evidence forms would have led Kelley's counsel to locate the non-Sweet trial evidence identified by the forms and (ii) what the effect of that evidence would have been on the jury" (Petition, pp. 18-19).

The first flaw in Kelley's plea for review is that the Florida Supreme Court did exactly what Kelley claims it should have done. The Court specifically considered whether the evidence disposition forms could have led to the discovery of any crime scene evidence and held, "we do not see how evidence disposition forms indicating that certain evidence was returned to local officials in 1966 and 1967 would have enabled Kelley to discover evidence that was destroyed by court order in 1976 and could not be located despite a diligent search." Kelley, 3 So. 3d at 973; Pet. App. 18a. Clearly, as the opinion expressly indicates, the Florida court did not limit its analysis to the value of the forms themselves, but considered the effect that disclosure of the forms might have had on preparation of the defense.

There is no language in the opinion below which supports Kelley's claim that the court limited consideration of the alleged Brady forms to a "narrow" view of whether those particular documents alone could change the outcome of the trial proceedings. The court cited the correct standard, quoting Bagley and Strickler v. Greene, 527 U.S. 263 (1999). The court specifically observed that its

confidence in the outcome had not been undermined, and that there was no reasonable probability of a different result, had the forms been disclosed prior to trial.

To the extent that Kelley asserts that the decision below conflicts with Kyles because the Florida Supreme Court did not expressly consider the cumulative effect of other alleged Brady violations asserted in prior proceedings, no conflict exists because Kelley never requested that such an analysis be conducted. See Initial Brief of Appellant, Kelley v. State, Case No. SC08-608 (Resp. App. 1). In addition, no such analysis is necessary since the court found that the information was not exculpatory, and the trial court had found it was "unlikely" that Kelley's trial attorneys did not know this information prior to trial. No conflict with Brady or any other case from this Court can be discerned in the opinion below.

In asserting that certiorari review is necessary, Kelley submits that there is conflict between the federal circuits as to whether Brady is satisfied with a "narrow" review considering only the actual documents or materials that were not disclosed, or whether it requires a "broader" review which also considers the impact which disclosure of the documents or materials might have had on the defendant's ability to prepare for trial. He cites cases from the Second, Sixth, Seventh and Ninth Circuits, which "unambiguously take a broader view of the materiality inquiry" and, according to Kelley, thereby conflict with the opinion rendered below (Petition, p. 19). However, as explained above, the Florida Supreme Court also took the broader view,

specifically finding that the evidence forms could not have led to the discovery of crime scene evidence, since that evidence had been destroyed in 1976. Kelley does not cite any other cases which he claims take the impermissible narrow view, so if there is indeed conflict on this point, it is not demonstrated by Kelley's petition; the decision below does not conflict with any of the cases noted in the petition on this point.

Kelley also asserts that there is a related conflict, "that a ruling in this case would almost certainly resolve" regarding whether a viable Brady claim can be brought if the evidence alleged to have been withheld is itself inadmissible (Petition, p. 20). While the First Circuit appears to have recognized such a conflict in Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003) (en banc), again any possible conflict is not implicated on the facts of this case.[1] Kelley suggests that the Florida Supreme Court determined that the evidence disposition forms in this case were not admissible, and therefore concluded, without

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[1] Kelley and the Ellsworth court identify a Fourth Circuit case, Hoke v. Netherland, 92 F.3d 1350 (4th Cir. 1996), as a case which holds that Brady is not implicated by the failure to disclose evidence which is inadmissible. Hoke reversed a district court's decision to grant habeas relief under Brady; the court commented, in a footnote, that if the undisclosed statements were inadmissible, they may be "immaterial" under Brady, citing Wood v. Bartholomew. Id., at 1356. However, for purposes of its opinion, the court assumed that the statements would be admissible and it did not reject Brady on that basis. Whether Hoke or any other case conflicts with Wood is not relevant to Kelley's petition, since the Florida Supreme Court below did not offer any misunderstanding of Wood or any other case.

further analysis, that they could not be deemed to be exculpatory or material. While admissibility is often a factor strongly associated with materiality, the Florida Supreme Court did not make any finding as to the admissibility of these forms in denying relief. The trial court had, in fact, concluded that there was no reasonable probability of a different result "if the evidence disposition forms had been available for trial preparation or if the forms had been introduced at trial" (Pet. App. 9a). Moreover, it is clear from other cases that the Florida Supreme Court does not feel constrained to limit Brady's application to only admissible evidence. See Mordenti v. State, 894 So. 2d 161, 173 (Fla. 2004) (granting a new trial under Brady where State failed to disclose information; "even if inadmissible it was, at a minimum, at least relevant information that would have led the defense to discover evidence for the impeachment of Gail;" concluding that, by withholding information, "the State precluded Mordenti from defending himself fully and fairly").

Since neither of the Florida state courts characterized the evidence forms in this case as inadmissible or limited the consideration of materiality to the question of admissibility, any split among the circuit courts as to whether a Brady claim may be premised on the failure to disclose documents which are not themselves admissible is not implicated in this case. To the extent that such a split exists, it would clearly not be resolved in a case where the challenged legal principle was not even noted or applied.

Despite Kelley's attempt to portray it differently, the Florida Supreme Court rejected Brady in this case after due consideration of all potential implications. The court below did not conclude that the evidence disposition forms were inadmissible and therefore no possible Brady claim could be brought; it instead analyzed the "withheld" documents at face value, and considered whether the forms could have led to the discovery of any other evidence, finding that they could not. Although Kelley now disputes the state courts' finding that even the non-Sweet evidence was destroyed years before his trial, he has no evidence contrary to this finding, which is clearly supported by the extensive record.

Finally, certiorari review should be denied in this case because the Florida Supreme Court applied the correct standard and reached the correct result. Even presuming that the hair, fingernail scrapings, and bloody carpet sample were still available to be found and used in his trial, no different outcome is possible, let alone probable. Kelley asserts that the jury would have rejected John Sweet's testimony if the defense could establish that the scene was very bloody while the car driven from the victim's home after the murder had no blood, but the jury was well aware that these were the facts; the defense made this same argument, supported by the testimony, during the trial. In addition, Kelley puts much on the court's instruction to the jury that there was no "more" or "clearer" evidence, but he has failed to demonstrate that any such evidence existed in 1984.

Rule 10 of the Rules of the Supreme Court of the United States identifies the relevant considerations in determining the propriety of certiorari review: review is to be granted only for compelling reasons, such as when a decision conflicts with another opinion on an important legal principle or addresses an unsettled question of federal law. Kelley has clearly failed to demonstrate that any such compelling reasons exist for the granting of certiorari review in this case. Therefore, this Court must deny his pending petition for writ of certiorari.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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