No. —

IN THE

Supreme Court of the United States

WILLIAM HAROLD KELLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the Florida Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Laurence H. Tribe
Hauser Hall 420
1575 Massachusetts Ave.
Cambridge, MA 02138
Of Counsel

Thomas C. Goldstein
AKIN GUMP STRAUSS
HAUER & FELD, LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Sylvia H. Walbolt
Counsel of Record
Gary L. Sasso
Kevin J. Napper
Joseph H. Lang, Jr.
CARLTON FIELDS, P.A.
Corporate Center Three
at International Plaza
4221 W. Boy Scout Blvd.
Tampa, FL 33607
(813) 223-7000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

CAPITAL CASE

NO DATE OF EXECUTION SET

QUESTION PRESENTED

Long after petitioner's trial, prosecutors for the first time disclosed "evidence disposition forms" identifying a significant amount of crime scene evidence that had never been provided to the defense. Petitioner challenged the failure to disclose the forms under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Petitioner alleged that the forms were "material" because they would have led his counsel to secure the exculpatory evidence described on the forms. The Florida Supreme Court rejected his claim, holding that *Brady* applies only to evidence that would itself be both "favorable" and "material" at trial. Under that standard, the court held that because *the forms themselves* would not have changed the jury's judgment, no *Brady* violation occurred. On this view, the materiality of the evidence described in the forms was irrelevant.

The Question Presented is:

Did the Florida Supreme Court err in holding that the prosecution's duty to disclose under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), is limited to evidence that would itself be both "favorable" and "material" at trial, without regard to whether that evidence would have led to the disclosure of material exculpatory evidence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner William Harold Kelley respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

The trial court's ruling is unpublished and reproduced at Pet. App. 1a-13a. The Florida Supreme Court's ruling affirming and rejecting petitioner's original request for habeas corpus is published at 3 So. 3d 970 and reproduced at Pet. App. 14a-19a.

JURISDICTION

The Florida Supreme Court denied petitioner's timely petition for rehearing on February 25, 2009. Pet. App. 20a-21a. Justice Thomas subsequently extended the time to file this petition to and including July 10, 2009. App. No. 08A1009. This Court has jurisdiction under 28 U.S.C. §§ 1257(a) and 2101(d).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the U.S. Constitution provides that no person shall be deprived of life or liberty without due process of law.

STATEMENT OF THE CASE

Petitioner was convicted of murder and sentenced to death after a first jury hung and a second initially deadlocked before the trial judge broke the impasse with a non-standard supplemental instruction that no "more" or "clearer" evidence existed. Petitioner unsuccessfully argued that the

prosecution violated due process by destroying crime scene evidence prior to trial pursuant to a destruction order. Two decades later, the State for the first time disclosed evidence disposition forms showing that much of the crime scene evidence had actually been transferred to other state law enforcement agencies prior to the destruction order. Petitioner claimed that the evidence was material under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), including particularly because the forms would have led to the disclosure of the crime scene evidence, which would have persuaded the closely divided jury of his innocence. The Florida Supreme Court found no *Brady* violation, however, because *the forms themselves* were not material evidence, without regard to whether they would have resulted in the disclosure of other valuable evidence.

1. The Due Process Clause of the Fourteenth Amendment can give rise to two different types of claims that the prosecution failed to provide a defendant with evidence relevant to his defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963), holds that the prosecution must disclose "evidence favorable to an accused" that is "material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution."

A different standard applies when the evidence has been destroyed. Regarding such a case, the prosecution may not in bad faith fail to preserve evidence relevant to the defense. *E.g.*, *Arizona v. Youngblood*, 488 U.S. 51 (1988).

2. In 1966, Charles Von Maxcy was murdered in Highlands County, Florida. Investigators gathered a variety of physical evidence from the crime scene that

was sent to the state crime lab in Tallahassee for testing. The evidence was then returned to the submitting offices, including the Highlands County Sherriff. The transfer was recorded on evidence disposition forms that the State would not disclose until forty years later.

The State subsequently charged John Sweet for arranging Von Maxcy's contract murder. Sweet was a career criminal who had had an affair with Von Maxcy's wife. Prosecutors apparently requested and received a limited amount of the crime scene evidence – approximately three pieces – from the submitting offices for use in the trial. We refer to this as the "Sweet trial evidence."

They did not request approximately thirty-five further pieces of evidence, which presumably remained in the possession of the submitting agencies. We refer to this as the "non-Sweet crime scene evidence."

3. The State's first prosecution of Sweet in 1967 resulted in a mistrial. A second prosecution in 1968 resulted in a conviction that was overturned on appeal. The State did not pursue a third trial.

In 1976, eight years after the second trial, the State requested and received the trial court's authorization to destroy the Sweet trial evidence, which was in the court files. The order did not authorize the destruction of the non-Sweet crime scene evidence, which had been returned to the submitting authorities and was not in the court files, although again the State would not disclose that fact for decades.

4. In 1981, Sweet cut a deal with state authorities to admit masterminding the Von Maxcy

murder but to finger petitioner William Kelley for the murder, in exchange for immunity from prosecution for the murder and for perjury. The State indicted Kelley for murder.

In response to Kelley's request, the prosecution stated that it was in possession of no evidence subject to disclosure under *Brady*. It made no mention of the non-Sweet crime scene evidence. The prosecution instead advised Kelley's counsel that evidence had been destroyed pursuant to the trial court's order.

In 1984, Kelley moved to dismiss the indictment on the ground that the prosecution violated due process by destroying the Sweet trial evidence, which was critical to his defense. The trial judge rejected Kelley's motion. The court reasoned that "there is no implication at all that the [destruction] was in bad faith." Further, "I'm reminded in other areas of law it's specifically said that everyone is entitled to a fair trial, not a perfect trial." Trial Tr., Vol. 1, at 79-80 (Jan. 12, 1984).

At trial, the prosecution rested its case almost entirely on Sweet's self-interested assertions that Kelley had committed the murder.

Kelley's first trial ended in a hung jury. In a second trial in 1984, the jury deadlocked. The trial judge broke the deadlock by instructing the jury (erroneously, it turns out) that "there is no reason to believe there is any more evidence or clearer evidence could be produced on either side." The State made no effort to correct this misstatement. The jury then finally convicted Kelley. Based on an eight-to-three recommendation by the jury, the judge sentenced him to death.

5. Kelley appealed, raising, *inter alia*, his argument that the court's deadlock instruction impermissibly coerced the jury into returning a verdict. The Florida Supreme Court disagreed because by all accounts the instruction was accurate (given that the State has not disclosed the forms revealing the non-Sweet crime scene evidence) and therefore not prejudicial: "while disapproving of such departure from Florida's Standard Jury Instructions, we can find no prejudice resulting from the instructions as given." *Kelley v. State of Florida*, 486 So. 2d 578, 585 (Fla. 1986).

Kelley also argued that the prosecution had violated due process by destroying the Sweet trial evidence. The Florida Supreme Court held that, although the destruction of that evidence was "unfortunate," petitioner's rights had not been violated because the state had not acted in bad faith, given that it had decided not to prosecute Sweet a third time and did not anticipate charging another person with the Maxcy murder. The court "emphasize[d]" that "if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." *Id.* at 582.

The court further concluded that petitioner "failed to establish a sufficient degree of prejudice" from the destruction of the Sweet trial evidence. *Id.* The court thus deemed it appropriate "to defer to the findings of the trial court," which as noted had stated (before trial) that it expected that the destruction of the Sweet trial evidence would not deprive Kelley of a fair trial. *Id.*

The Florida Supreme Court specifically limited its analysis to Kelley's challenge to the prosecution's

destruction of the Sweet trial evidence: "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.

The state Supreme Court's opinion thus did not discuss an argument that Kelley had not raised in the trial court but attempted to raise for the first time in a supplemental brief on appeal: that the prosecution had destroyed not merely the Sweet trial evidence but also non-Sweet crime scene evidence. The State, which had led Kelley to believe that *all* crime scene evidence had been destroyed, 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 submitting authorities. Instead, it objected that Kelley "ha[d] not preserved this argument," and moreover it had not acted in bad faith in supposedly *destroying* the non-Sweet crime scene evidence because the fact that "evidence might have been exculpatory does not establish that the evidence had an exculpatory value that was apparent before it was destroyed." Resp. Fl. S. Ct. Br., case no. 65,134, at 16. Notably, the State did not maintain that Kelley had not been prejudiced by the unavailability of this evidence at trial.

This Court denied Kelley's petition for certiorari, which sought review of, *inter alia*, the state Supreme Court's disposition of his destruction of evidence

claim. *Kelley v. Florida*, 479 U.S. 871 (1986) (No. 86-106).

6. Kelley sought state post-conviction review. He again asserted that the State had violated due process by destroying evidence. But Kelley now focused on what he and his counsel believed to be the *destruction* of the non-Sweet crime scene evidence – *i.e.*, the argument that he had unsuccessfully attempted to introduce in a supplemental brief on direct appeal. Kelley's attorneys thus continued to litigate on the basis of the prosecution's representations that all of the crime scene evidence had been destroyed prior to Kelley's trial.

The trial court denied relief on the same basis as it had denied Kelley's pre-trial motion: "Although there are some differences between the evidence listed in the instant Motion and that argued before the court in the Motion to Dismiss, those differences are immaterial." *Kelley v. State*, 569 So. 2d 754, 759 (Fla. 1990).

On appeal, the State reversed positions: having argued on direct appeal that Kelley could not pursue the claim in that proceeding, it now argued that Kelley had in fact litigated the issue through his supplemental brief on direct review. Alternatively, it maintained that prosecutors had not acted in bad faith in destroying the non-Sweet trial evidence. Again, the State notably did not assert that Kelley had not been prejudiced.

The Florida Supreme Court affirmed on the ground that it had already decided that the State did not destroy the evidence in bad faith. Kelley's supplemental brief on direct appeal, the court

reasoned, had discussed "many of the items" raised by his post-conviction application:

> 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. (citing the direct appeal ruling.) The *destruction of evidence* in this case did not deprive Kelley of due process of law. *See Arizona v. Youngblood*, 488 U.S. 51 (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 v. State, 569 So. 2d 754, 756 (Fla. 1990) (emphasis added).

7. A federal district court granted petitioner a writ of habeas corpus on other grounds. Emphasizing that he had granted such relief only twice before in three decades on the bench, the district judge found that "[t]his case presents many [instances] of prosecutorial misconduct. [This prosecutor] has a habit of failing to turn over exculpatory and impeachment evidence." *Kelley v. Singletary*, 222 F. Supp. 2d 1357, 1363 (S.D. Fla. 2002). For example, the prosecution suppressed a more detailed version of a report of a witness who described an individual who did not resemble petitioner, but who (it later turned out) matched a

friend of Sweet who traveled to Florida around the time of the murder, returned with a large sum of cash, and *admitted* to killing Von Maxcy. *Id.* at 1365-66 & n.6. The court also found, for example, that petitioner had been prejudiced by the prosecution's unlawful withholding of information regarding Sweet's immunity deal and a police report confirming that Kelley's fingerprints did not match any of those in Von Maxcy's house and car. *Id.* at 1364-66.

The Eleventh Circuit reversed. The court did not doubt that the State had withheld exculpatory evidence. But it held that petitioner's claim did not overcome the state court's finding that the suppression of the evidence was harmless. The court described this as an "extraordinary case" in which the prosecution's key witness, Sweet, was "a reprehensible villain who literally got away with murder." *Kelley v. Secretary for the Dep't of Corrs.*, 377 F.3d 1317, 1369 (11th Cir. 2004).

8. In 2006, Kelley moved in state court for an order that the State produce and make available for DNA testing certain evidence in the case. In response, the State for the first time disclosed the evidence disposition forms, which in turn revealed for the first time that significant crime scene evidence in the case – the non-Sweet crime scene evidence – had been returned to the submitting authorities *before* the 1976 destruction order and presumptively had *not* been destroyed pursuant to that order, which applied only to the Sweet trial evidence in the clerk's possession.

The non-Sweet crime scene evidence included:

- Blood-soaked carpet sections, a blood-soaked sheet, and other crime scene evidence showing the violent and bloody nature of the murder;
- Evidence from the victim's car (including the floor mat, steering wheel and brake pedal), which Kelley had supposedly used to escape from the bloody murder but which showed no blood at all;
- Hair and fingernail scrapings, along with samples of the victim's blood and hair for comparison; and
- The victim's clothing and personal effects.

The trial court found, however, that by the time of its ruling in 2006, the evidence no longer existed and therefore could not be subjected to DNA testing. It accordingly denied relief. It made no finding as to whether the evidence existed at the time of Kelley's trials.

The Florida Supreme Court affirmed. The court recognized that the "evidence collected in the Sweet trials was destroyed by court order in 1976," as well as that "none of the requested items were located despite a diligent search." *Kelley v. State*, 974 So.2d 1047, 1051 (Fla. 2007).

9. In 2007, Kelley brought this application for state post-conviction relief based on the State's belated disclosure of the evidence disposition forms. Kelley's previous claims had been directed at the State's apparent pre-trial *destruction* of evidence, which he maintained had occurred in bad faith in violation of due process under cases such as *Youngblood*, *supra*.

Kelley filed this 2007 application, by contrast, 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. Kelley accordingly argued that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding that evidence. As noted, a claim under *Brady*, unlike *Youngblood*, does not depend on the prosecution's good or bad faith.

Kelley argued that the crime scene evidence withheld by the prosecution was material in two separate respects. First, it would have led to the discovery of exculpatory evidence – *i.e.*, the evidence described in the forms that had not been used in the State's prosecution of Sweet. Thus, the bloody carpets and clothing, when contrasted with the blood-free wheel, floor mat, brake pedal, and other parts of the car, would have allowed petitioner not only to impeach Sweet's testimony but visually demonstrate to the jury the sheer implausibility of the State's theory of how petitioner committed the murder. Second, the forms would have precluded the trial judge's false deadlock instruction to the jury that no further or better evidence about the crime was available.

The trial court refused to hold a hearing and summarily denied petitioner's application. Pet. App. 1a-13a (*State v. Kelley*, No. CR81-0535 (Fla. 10th Cir. Ct. Dec. 20, 2007) (Order Denying Motion for Postconviction Relief); *State v. Kelley*, No. CR81-0535 (Fla. 10th Cir. Ct. Jan. 28, 2008) (Order Denying Motion for Rehearing))

Kelley appealed and also filed a parallel habeas petition directly in the Florida Supreme Court, which

affirmed. Pet. App. 14a-19a (*Kelley v. State*, 3 So. 3d 970, 974 (Fla. 2009)). The court reasoned:

> To establish a *Brady* violation, the defendant has the burden to show (1) that favorable evidence (2) was willfully or inadvertently suppressed by the State and, (3) because the evidence was material, the defendant was prejudiced. . . . To meet the materiality prong, the defendant must demonstrate a reasonable probability that, had the suppressed evidence been disclosed, the jury would have reached a different verdict.

Id. at 16a. The court concluded that "the record conclusively demonstrates that Kelley is not entitled to relief" because it

> demonstrates that the evidence disposition forms at issue are neither favorable nor material. These forms memorialize the transfer of evidence from the Florida Sheriff's Bureau to local officials after laboratory testing. They do not exculpate or exonerate Kelley; the forms do not mention Kelley or implicate someone else. Likewise, they do not offer any means of impeachment as the forms contain no information that would prove useful in attacking the prosecution's witnesses. Furthermore, there is not a reasonable probability that, had the evidence disposition forms been disclosed, the result of the proceedings would have been different. Our confidence in the outcome is not undermined. Accordingly, because the evidence disposition forms are not favorable to Kelley and because the State's failure to

> disclose them did not prejudice Kelley, no *Brady* violation occurred.

Id. at 17a-18a.

"To the extent Kelley is seeking to use the evidence disposition forms to relitigate his prior claims regarding the destroyed evidence," the court continued, "he is procedurally barred from doing so." *Id.* at 18a. The court noted its prior rulings that the destruction of the more limited set of Sweet trial evidence "did not prejudice Kelley's case." Further, the court could "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." *Id.*

The court separately denied Kelley's direct petition for a writ of habeas corpus alleging that the State had violated *Brady* by failing to *disclose* the existence of the non-Sweet crime scene evidence, which the court incorrectly characterized as alleging "a manifest injustice occurred because evidence was *destroyed* prior to Kelley's trial." *Id.* at 15a (emphasis added).

10. Kelley sought leave from the Eleventh Circuit for permission to file a successive habeas petition challenging the state courts' conclusion that the prosecution had not violated *Brady* by failing to disclose the evidence disposition forms. The court of appeals denied that request. *In re: William Harold Kelley*, No. 09-11215-P (11th Cir. Apr. 15, 2009).

REASONS FOR GRANTING THE WRIT

The Florida Supreme Court's decision upholding petitioner's conviction and death sentence rests on a profound misapplication of the principles laid down by this Court in *Brady v. Maryland* and its progeny. The ruling below equally conflicts with rulings of several circuits. By granting certiorari, this Court also will resolve a widely acknowledged and frequently recurring circuit conflict over whether the prosecution's duty to disclose evidence under *Brady* applies to evidence that is inadmissible at trial. Because this case is an ideal vehicle in which to resolve the question presented, certiorari should be granted.

1. In 2006, prosecutors for the first time provided petitioner with "evidence disposition forms" detailing the whereabouts of critical evidence in the case that the prosecution had previously led petitioner to believe had been destroyed. The forms identified roughly three dozen pieces of crime scene evidence that were returned from the state crime lab to submitting authorities prior to the 1976 order authorizing the destruction of the distinct Sweet trial evidence, which had remained in the possession of the clerk. Petitioner promptly challenged the State's previous failure to provide the forms, alleging that the prosecution had violated its duty under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), to disclose material evidence.

The Florida Supreme Court rejected petitioner's claim by artificially truncating the prosecution's duty under *Brady*. In the court's view, to establish a *Brady* violation, a defendant must prove both that the suppressed evidence itself is "favorable" and also

"a reasonable probability that, had the suppressed evidence been disclosed, the jury would have reached a different verdict." Pet. App. 16a. The court elaborated on that standard in the course of limiting its analysis to the conclusion that *the forms themselves* would have been "neither favorable nor material" at trial. *Id.* at 17a. It reasoned that the State had not violated due process because the forms merely "memorialize the transfer of evidence," they "do not mention Kelley or implicate someone else" or "offer any means of impeachment as the forms contain no information that would prove useful in attacking the prosecution's witnesses." *Id.*

Based on its rigidly narrow reading of *Brady*, the Florida Supreme Court consciously accorded no weight to the evidence identified on the forms themselves, which petitioner's trial counsel obviously would have sought to secure had they been made aware of that evidence. The court simply gave no weight to petitioner's arguments that hair and fingernail scrapings would have been very valuable in identifying potential other assailants and excluding petitioner as the attacker and that bloody carpet sections may have included footprints or other potentially relevant evidence.

Kelley also explained that the non-Sweet crime scene evidence "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." Pet. Fl. S. Ct. Br., case no. 08-608, at 31-32. In particular, the suppressed evidence would have illustrated vividly the total implausibility of the prosecution's theory

that Kelley had fled the bloody scene in Von Maxcy's car, which contained not a speck of blood, and would have dramatically undermined the credibility of the witness on whom the State's entire case turned, John Sweet, who testified as to this alleged fact.

Petitioner also argued that the incorrect deadlock instruction conveying the unmistakable impression that nothing was to be gained by dubious jurors holding out for a new trial was a direct, highly prejudicial result of the suppression of the existence of other crime scene evidence. Had the jury not been inaccurately told that no "more" or "clearer" evidence could be presented, the trial might well have ended in an acquittal or another hung jury. Moreover, given that Kelley's lawyers – hamstrung by the absence of any crime scene evidence – did not present any evidence at trial, the incorrect instruction that no other evidence existed may have subtly conveyed the message to the jurors that there simply was *no* favorable evidence the defense could have presented. On petitioner's direct appeal, the Florida Supreme Court had agreed that the instruction was unlawful, but had deemed it non-prejudicial only because at the time it was mistakenly believed to be accurate. *See supra* at 7.

But the Florida Supreme Court's interpretation of *Brady* rendered all of these arguments irrelevant as a matter of law. The court instead limited its analysis of the forms' "materiality" to their own intrinsic value to the jury's decision.

2. The Florida Supreme Court's decision conflicts with this Court's precedents. The Court's seminal decision in *Brady* held that "the suppression by the prosecution of evidence favorable to an

accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The "touchstone" of materiality is a "reasonable probability of a different result." *Kyles v. Whitley*, 514 U.S. 419 (1995).

This Court's precedents sensibly reject attempts to narrow the *Brady* materiality inquiry and instead recognize that evidence may have a sufficient effect on the outcome of the case in a number of ways. Most directly, evidence may exculpate the defendant or impeach prosecution witnesses. *E.g.*, *Kyles*, 514 U.S. at 433-34.

But evidence may be material even if its effect on the trial is less direct. Most relevant here, *United States v. Bagley*, 473 U.S. 667, 682 (1985), recognized that the failure to disclose evidence may "impair the adversary process" in violation of *Brady* if it caused the defense to "abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." The Court accordingly concluded that the materiality inquiry encompasses "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." *Id.* at 682-83.

More recently, *Wood v. Bartholomew*, 516 U.S. 1 (1995) (per curiam), addressed *Brady*'s application to a polygraph test that tended to show that key government witnesses had testified falsely but that was itself inadmissible. The Court found the evidence immaterial, but *not* merely because it could not have been admitted at trial. Instead, the Court reasoned that, unlike here, the defendant's claim that

the polygraph test would have led to the development of other admissible evidence was "based on mere speculation." *Id.* at 6.

This broader assessment of the materiality of suppressed evidence is essential to effectuate the due process guarantee protected by *Brady*. A rule limiting the prosecution's duty under *Brady* to evidence that would itself persuade the jury would open a gaping hole in the obligation to disclose evidence essential to a fair and accurate determination of the truth. To take one simple and recurring example, prosecutors would be free to withhold lists of witnesses they had interviewed. But that information may provide the defense with information essential to developing its case and providing a complete factual picture to the jury. As this Court explained in *Bagley*, "When favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact, and the trier of fact is deprived of the ingredients necessary to a fair decision." 473 U.S. at 694. Absent such disclosures, "an inexperienced, unskilled, or unaggressive attorney often is unable to amass the factual support necessary to a reasonable defense." *Id.*

The Florida Supreme Court's decision squarely conflicts with this Court's decisions. The proper assessment of the materiality of the evidence disposition forms suppressed by the State cannot be artificially limited to whether the *forms themselves* "implicate someone else" or "offer any means of impeachment." *Contra* Pet. App. 17a. Rather, 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.

In addition, the impact of the newly revealed suppressed evidence at issue here should have been considered together with the evidence previously found to have been suppressed (*see supra* at 10), an analysis no court has ever undertaken. The State should not be able to avoid a finding of a *Brady* violation by disclosing its suppression of evidence in dribs and drabs over the years and thereby avoiding judicial review of all of the suppressed evidence as a whole. *See Kyles v. Whitley*, 514 U.S. at 421 (*Brady* analysis "turns on the cumulative effect of all . . . evidence suppressed by the government").

3. The ruling below equally conflicts with rulings of the federal courts of appeals. Four circuits – the Second, Sixth, Seventh, and Ninth – all unambiguously take a broader view of the materiality inquiry. Each has held that *Brady* requires an assessment of whether suppressed items would have led the defense to uncover still further material evidence. *Price v. Thurmer*, 514 F.3d 729, 730 (7th Cir. 2008) (Posner, J.) ("There is no obligation to turn over immaterial evidence to a defendant . . . unless it is apparent that it might lead to the discovery of material evidence."); *United States v. Rodriguez*, 496 F.3d 221, 226 n.4 (2d Cir. 2007) ("The objectives of fairness to the defendant, as well as the legal system's objective of convicting the guilty rather than the innocent, require that the prosecution make the defense aware of material information potentially leading to admissible evidence favorable to the

defense."); *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991) ("Certainly, information withheld by the prosecution is not material unless the information consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes."); *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989) ("To be material under *Brady*, undisclosed information or evidence acquired through that information must be admissible.").

4. The decision below also directly implicates a closely related and recurring circuit conflict that a ruling in this case would almost certainly resolve. "The circuits are split on whether a petitioner can have a viable *Brady* claim if the withheld evidence itself is inadmissible." *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003) (en banc). Most circuits hold that suppressed evidence may be material, even if it could not be admitted at trial, if (as alleged in this case) it would lead to the discovery of other material admissible evidence. *E.g.*, *id.* at 5; *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002) ("[W]e need only satisfy ourselves that: [1] either all or part of the [evidence] is admissible; [2] the [evidence] could lead to admissible evidence . . . ."); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000) ("[I]n order to find that actual prejudice occurred . . . we must find that the evidence in question, although inadmissible, would have led the defense to some admissible material exculpatory evidence."); *Felder v. Johnson*, 180 F.3d 206, 212 & n.7 (5th Cir. 1999) (noting that the Fifth and Ninth Circuits apply the same rule, i.e., asking if disclosure of the evidence—whether admissible or not—"would have created a reasonable probability that the result of the proceeding would have been

different"); *Wright v. Hopper*, 169 F.3d 695 (11th Cir. 1999). Some states agree. *E.g.*, *Stokes v. State*, 402 A.2d 376, 380-81 (Del. 1979) ("[T]o be material under *Brady*, undisclosed evidence must be either: (a) admissible evidence . . . ; Or (b) there must be a showing on record . . . that it would have, or could have led to admissible evidence."); *State v. Spurlock*, 874 S.W.2d 602, 609 (Tenn. Crim. App. 1993) ("The prosecutor's duty to disclose is not limited in scope to 'competent evidence' or 'admissible evidence.' The duty extends to 'favorable information' unknown to the accused."); *Workman v. Commonwealth*, 636 S.E.2d 368, 376-77 (Va. 2006) ("Because of the requirement that the outcome of the proceeding be affected, we consider whether the suppressed, inadmissible evidence would have led to admissible evidence.").

Those rulings squarely conflict, however, with the holding of the Fourth Circuit and the courts of five states that admissibility is a prerequisite to materiality; those rulings (like the Florida Supreme Court's decision in this case) deem irrelevant that the inadmissible evidence would disclose other material, admissible evidence. *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (Luttig, J.) (holding that the statements that Hoke wished to admit as exculpatory "may well have been inadmissible at trial under Virginia's Rape Shield statute, and therefore, as a matter of law, 'immaterial' for *Brady* purposes"); *United States v. Sedgwick*, 345 A.2d 465, 473 (D.C. 1975) (holding that the disclosure of a police report containing another person's admission of guilt for the defendant's alleged crime was not required because "the so-called 'admission by another person' never reached the level of evidence. It was inadmissible

hearsay . . . ."); *State v. Williams*, 2008-Ohio-6842, 2008 WL 5381480, ¶ 26 (Ohio Ct. App. Dec. 19, 2008) ("Evidence is not considered material under *Brady* when the evidence is inadmissible under applicable state evidence rules."); *Commonwealth v. Lambert*, 884 A.2d 848, 857 (Pa. 2005) ("[I]nadmissible evidence cannot be the basis for a *Brady* violation."); *Lagrone v. State*, 942 S.W.2d 602, 615 (Tex. Crim. App. 1997) (en banc) ("[T]he prosecution has no duty to turn over evidence that would be inadmissible at trial."); *State v. Chu*, 643 N.W.2d 878, 886 (Wis. Ct. App. 2002) (holding that suppressed evidence "was not material because it was not admissible and, therefore, would not have affected the outcome of the trial."). Other precedent is inconsistent. *Compare People v. Pecoraro*, 677 N.E.2d 875, 882-83 (Ill. 1997) (admissibility required) *with People v. Beaman*, 890 N.E.2d 500, 511 (Ill. 2008) (admissibility not required).

The conflict arises in part from a perceived ambiguity in this Court's per curiam summary reversal in *Wood v. Bartholomew*, which as noted held that an inadmissible polygraph exam was not material, notwithstanding the defense's claim that it would have led to the discovery of other admissible evidence. The better reading of *Wood* is that this Court rejected the defense's claim because it was "based on mere speculation" (516 U.S. at 6), not merely because the polygraph exam could not have been admitted at trial. But "[r]eactions to *Wood* have been as varied as pre-*Wood* jurisprudence." *Felder v. Johnson*, 180 F.3d 206, 212 n.7 (5th Cir. 1999).

To be sure, this case arises in a slightly different factual context than those giving rise to this circuit

conflict. Here, the Florida Supreme Court did not hold that the forms were immaterial because they were inadmissible. Instead, it reasoned that the forms would not have persuaded the jury. But its logic was the same: the Florida Supreme Court construed *Brady* to deem relevant to the materiality inquiry only the effect of the suppressed forms themselves, as opposed to other evidence that the forms would have revealed; other courts similarly hold that evidence is immaterial because it could not have been presented to the jury at all. The better-reasoned opinions of the majority of courts, by contrast, properly take a broader view of the materiality inquiry.

As a consequence, a ruling by this Court correctly rejecting the Florida Supreme Court's illogically narrow assessment of materiality would almost surely resolve the conflict. By holding that the *Brady* determination must account for the persuasive effect of the non-Sweet trial evidence, the Court would establish that materiality is not limited merely to the precise evidence suppressed by the police but also extends more broadly to the effect of the suppression on the discovery of other evidence that the jury would find relevant.

5. Certiorari is also warranted because this case is an ideal vehicle in which to resolve the question presented. The Florida Supreme Court rejected petitioner's argument that the non-Sweet trial evidence was relevant to his *Brady* claim as a matter of law, not fact. Petitioner accordingly does not ask this Court to resolve the ultimate question of the evidence's materiality; that issue instead is properly left to be decided on remand. This Court need only

decide the frequently recurring, purely legal question of whether the government's duty of disclosure under *Brady* is triggered only if the evidence in question would itself be persuasive to the jury.

Further proceedings on remand would illuminate other important issues in the case. The lower courts must address the effect of the suppression on the erroneous deadlock instruction, an area in which one commentator has rightly noted that the law "can be generously characterized as complex and inconsistent [and] less charitably described as incoherent." Thomas & Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 Wm. & Mary Bill of Rights J. 893, 904 (2007). There is a substantial basis for concluding that the trial court's conduct contravened the principle that "[a]ny criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988). *Cf. Quercia v. United States*, 289 U.S. 466, 470 (1933) (a judge "may analyze and dissect the evidence, but he may not either distort it or add to it").

Petitioner's claim to relief is moreover substantial, such that there is a genuine prospect that the Florida Supreme Court would reach a different result on remand. The jury's determination that petitioner was guilty was obviously a close one. The evidence against petitioner consisted almost entirely of the self-interested claims of the crime's mastermind, presented only in exchange for prosecutorial immunity. None of the crime scene evidence was made available to the defense or presented to the jury. Petitioner was alleged to have

fled in Von Maxcy's car, but there was no blood in the car; latent fingerprints in the car did not match Kelley's and were never identified.

Petitioner's first trial ended in a hung jury. The second jury was hung as well, until the judge broke the deadlock by advising the jurors erroneously that no further evidence existed. The jury divided again in recommending that Kelley be sentenced to death. A federal district court subsequently threw out the verdict after finding that the prosecution suppressed additional significant evidence. There is accordingly no basis for dismissing petitioner's *Brady* claim on the ground that it plainly would have had no effect on the outcome of the case. *See Kyles*, 514 U.S. at 455 (Stevens, J., concurring) (grant of certiorari is particularly appropriate where, as here, "the fact that the jury was unable to reach a verdict at the conclusion of [Kelley's] first trial provides strong reason to believe the significant errors at the second trial were prejudicial").

It is furthermore essential that this Court grant certiorari on direct review. After the Florida Supreme Court issued its decision, the Eleventh Circuit rejected petitioner's request for permission to file a second or successive habeas petition raising his *Brady* claim arising from the suppression of the evidence disposition forms. Any subsequent attempt by petitioner to present this issue on federal habeas corpus would accordingly face a significant objection by respondent that further review is precluded.[1]

---

[1] In reaffirming that petitioner could not raise again his failed claim that the prosecution "destroyed evidence," the

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Laurence H. Tribe
Hauser Hall 420
1575 Massachusetts Ave.
Boston, MA 02138
Of Counsel

Thomas C. Goldstein
AKIN GUMP STRAUSS
HAUER & FELD, LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036

Sylvia H. Walbolt
Counsel of Record
Gary L. Sasso
Kevin J. Napper
Joseph H. Lang, Jr.
CARLTON FIELDS, P.A.
Corporate Center Three
at International Plaza
4221 W. Boy Scout Blvd.
Tampa, FL 33607
(813) 223-7000

July 10, 2009

Florida Supreme Court noted that the Sweet trial evidence "was destroyed by court order in 1976" and that "none of the requested items were located" thirty years later in 2006 when petitioner sought them for DNA testing. Pet. App. 19a. By contrast, petitioner's distinct claim that prosecutors suppressed evidence in violation of Brady involves his allegation that the non-Sweet trial evidence was available at the time of petitioner's trials in the 1980s.