IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY,

Appellant,

v.

CASE NO.: SC06-1574
L.T. NO.: CR81-0535

STATE OF FLORIDA,

Appellee.
_____/

AMICUS CURIAE BRIEF OF THE INNOCENCE PROJECT, INC. IN SUPPORT OF APPELLANT WILLIAM HAROLD KELLEY

On Direct Review from the 18th Judicial Circuit
Court, in and for Brevard County, Florida

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Innocence Project, Inc. ("the Innocence Project") is a nonprofit organization providing free legal assistance to persons who seek access to post-conviction DNA testing, and a resource center on DNA evidence. The Innocence Project has represented or assisted more than half of the 190 persons in the United States exonerated through post-conviction DNA testing to date. It is currently handling over 200 active cases nationally, including eight in Florida.

Past clients include all six Florida men exonerated through post-conviction DNA evidence to date - Frank Lee Smith (2000) and Jerry Frank Townsend (1999) (imprisoned for capital crimes that DNA proved were all committed by the same serial murderer), Wilton Dedge (who, in 2004, was the first exonerated under the new DNA testing law, after 22 years in prison), Luis Diaz (2005), Allen Crotzer (2006) and Orlando Boquete (2006).

As the nation's leading authority on post-conviction DNA litigation, the Innocence Project has an interest in ensuring the effective use of DNA evidence, both to exonerate the innocent and to convict the guilty. This interest includes insuring that exhaustive searches for such evidence are conducted and that defendants are afforded sufficient opportunity and means to locate testable DNA evidence that has the potential to conclusively establish their actual innocence, as

well as to identify the individuals who perpetrated the crimes for which they are wrongfully incarcerated.

SUMMARY OF THE ARGUMENT

DNA evidence offers a uniquely probative tool that can help avoid miscarriages of justice in which the innocent are punished and the guilty go free. Accordingly, courts – particularly in death penalty cases – should ensure that all avenues that might lead to such evidence be exhaustively explored.

This State and the nation have witnessed a remarkable wave of post-conviction DNA exonerations of wrongfully convicted prisoners in recent years; law enforcement agencies have also been heralded for their extraordinary work in using DNA evidence to solve "cold cases," identifying the perpetrators of unsolved crimes decades after the fact. By its very nature, however, efforts to obtain DNA testing of biological evidence collected at a time when such technology was unavailable – often, a decade or two after the evidence was sent to storage – are frequently impeded by difficulties in locating the evidence given the passage of time.

Fortunately, the experience of the Innocence Project demonstrates that these barriers to locating DNA evidence are by no means insurmountable. For while the custodians of such evidence may not regularly be called upon to locate long-stored biological material in their custody, when truly diligent searches are conducted,

evidence deemed "lost" or "destroyed" is often able to be located. The Innocence Project has handled numerous such cases in its fifteen year history. This experience demonstrates that, without conclusive proof of destruction, DNA evidence capable of establishing a convicted person's guilt or innocence may well remain in existence and in State custody.

Courts should therefore afford convicted defendants the opportunity for meaningful discovery to explore all possible locations for DNA evidence and to test the State's assertions that such evidence no longer exists or cannot be located. Courts should provide defendants sufficient notice of any final hearing at which the existence of DNA evidence is to be determined. And they should decline to find that such evidence does not exist in the absence of conclusive proof of its destruction or, at a minimum, evidence that an exhaustive search was conducted without success.

ARGUMENT

Introduction: The Unique Role of DNA Testing in the Criminal Justice System

The criminal justice system, despite numerous safeguards to protect the accused, is far from perfect because it rests on human beings, who are not infallible. When citizens are wrongfully convicted of crimes they did not commit, innocent people suffer the loss of their freedom, their livelihoods and their lives.

The availability of DNA testing has now shown that these mistakes happen more often than most would have believed, even in death penalty cases, and too often for any civilized society to tolerate. In fact, as recently reported by the ABA in its assessment of Florida's death penalty system, Florida leads the nation in death row exonerations. American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report* (2006), at iv. The ABA's report also found that Florida has failed to comply with or is only in partial compliance with a number of the report's recommendations, and that many of the shortcomings are "substantial." *Id*. at iii.

DNA testing is a uniquely probative tool for preventing these miscarriages of justice visited upon innocent defendants, as well as ensuring that the guilty are not allowed to remain at large. As former United States Attorney General John Ashcroft has stated, "DNA technology has proven itself to be the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent." Naftali Bendavid, *U.S. Targets DNA Backlog-Agency To Spend $30 million To Aid State Crime Labs*, Chi. Trib., Aug. 2, 2001, at 10. In Florida Statutes Section 925.11 and Fla.R.Crim.P. 3.853, the Florida Legislature and this Court have acted to make this tool available to criminal defendants, so as to "enhance the integrity of convictions and increase the likelihood of solving crime." Fla. Exec.

Order No. 05-160 (Aug. 5, 2006), available at http://sun6.dms.state.fl.us/eog_new/eog/orders/2005/ August/05-160-dna.pdf.

The enactment of Florida's statute and rule are part of a recent wave of similar legislative actions nationally, with forty-one of our nation's fifty states now providing convicted persons with a statutory right to post-conviction DNA testing. *See http://www. innocenceproject.org/docs/DNA_Factsheet.pdf.* Made possible by a widespread consensus as to the probative value of DNA evidence, these laws constitute notable exceptions to many states' otherwise strict procedural limitations on the introduction of post-conviction evidence in criminal cases.

DNA evidence is not a cure-all for what ails the criminal justice system. It can only be utilized in those cases where biological evidence connected to the perpetrator's identity exists and can be tested. If DNA evidence is not still available for testing -- whether because it has been destroyed, or cannot be found – the "right" to access post-conviction DNA evidence is an empty one in practice. It was for this reason that in August 2005, after the Legislature had failed to timely renew the State's post-conviction DNA testing and evidence preservation statutes that were due to expire in October, then-Florida Governor Jeb Bush issued a sweeping Executive Order mandating the preservation of DNA evidence in thousands of post-conviction criminal cases statewide. As the Governor explained, if critical DNA evidence is destroyed and therefore unavailable for testing, it

would "potentially enable the innocent to be wrongly convicted and the guilty to go free." Fla. Exec. Order 05-160. Surely, the principles which apply to the State's obligation to preserve such evidence apply equally to its obligation to take all appropriate measures to ensure that DNA evidence which remains in its custody can be located and subjected to testing.

Given its highly probative nature, it is therefore critical that the State make every effort to make such evidence available to all individuals who can benefit from its unique capabilities – particularly persons who were convicted at a time when neither the State nor the defense had the benefit of this technology.

Indeed, if the criminal justice system is truly to administer justice, then a zealous search for DNA evidence cannot be left to criminal defendants and their lawyers. Instead, representatives of the State should be just as zealous in pursuing such potential evidence of the accused's innocence as they are in searching for evidence of his or her guilt. In its fifteen year history, the Innocence Project has worked with many conscientious prosecutors, court clerks, and other officials who have left no stone unturned in their efforts to locate DNA evidence for post-conviction testing; these efforts, in the highest tradition of government service, have at times directly led to the freedom of an innocent person who would otherwise have remained incarcerated for life. Unfortunately, however, in other cases, officials have cut corners or performed only cursory searches before

biological evidence is declared to be "gone" – making it essential that courts provide meaningful oversight of this process.

For this reason, our courts should ensure that all reasonable avenues that might lead to DNA evidence are pursued, so that the innocent do not languish in prison or on death row while evidence which can exonerate them languishes in government storage. This concern should be heightened in cases involving the death penalty, because this punishment, once inflicted, is irrevocable.

I. The Importance of Pre-hearing Discovery

In the instant case, Mr. Kelley identified numerous pieces of potentially testable evidence whose whereabouts had not been accounted for by the State. R1 6-7, 13-28; R9 1684-94, 1719-43. The State identified and presented as witnesses at the evidentiary hearing only *current* employees, rather than individuals who had themselves participated in the handling of evidence from the original investigation and trial of John Sweet in 1976 and Mr. Kelley's trial in 1984. The testimony of these witnesses affirmatively demonstrated that additional files could have been searched and other potential witnesses could be contacted. R10 1796-1800, 1821, 1822-26, 1827-29, 1848-49, 1856-57, 1897-1906, 1916-17, 1928-31, 1941-44; R11 1969-71, 1980, 1982, 1993-95, 2001-04, 2006, 2015, 2027-30, 2033-34. Indeed, the Innocence Project's experience teaches that it is often former employees of custodial agencies – with direct knowledge of storage procedures and policies in

effect *at the time the evidence was sent to storage*, about which current personnel may be unaware – who may be the best sources of information. Under these circumstances, the discovery should have been allowed.

The Innocence Project's experience in litigating cases involving DNA evidence suggests that it is particularly important to allow the defendant discovery to ensure that all avenues for the location of testable evidence have been explored, precisely because such evidence often turns up in unexpected places, long after the State has represented that it "no longer exists." *See Blake v. State*, 909 A.2d 1020, 1024 (Md. 2006) (prosecutors should not "conclud[e] too hastily that evidence sought by an inmate no longer exists . . . '[m]any times all parties believe that the evidence has been destroyed, when in fact it has not.'") (citing and quoting National Institute of Justice, National Commission on the Future of DNA Evidence, *Postconviction DNA Testing: Recommendations for Handling Requests* (1999), at 45).

Indeed, the Innocence Project's experience in litigating hundreds of post-conviction DNA access cases over the last fifteen years demonstrates that absent *conclusive* proof of destruction of each and every item of potential DNA evidence in a case, one or more such items -- fully capable of resolving, beyond any doubt, the petitioner's guilt or innocence -- may still be in State custody. Despite the State's report that it has been "lost" or "destroyed," such evidence is often later

discovered after a more diligent search. (For this reason, the Innocence Project will often agree to represent persons despite testimony in earlier proceedings that various items of evidence could not be located after trial; the Project also has an internal policy that no case will be closed due to lack of DNA evidence unless (a) written proof of destruction is produced, or (b) our attorneys are satisfied that a truly thorough search for evidence was performed at every relevant custodial agency).

Evidence has been ultimately located in such places as the back of a storage closet, the trial judge's locker, and between the wall and a prosecutor's desk. Sometimes evidence is labeled under the victim's name rather than the defendant's name, or is simply misfiled within or among other, unrelated case evidence boxes, but is eventually discovered when a truly diligent search is performed. Even more troublingly, "missing" evidence has also been located after a follow-up search *in its original storage location*, despite earlier sworn claims (which later proved to be false) by agency officials that those areas had previously been searched.

The last few years alone have yielded numerous such cases from the Innocence Project's docket, discussed herein.

One recent example is the case of Innocence Project client Alan Newton of New York. In June 2006, Mr. Newton was freed after serving 22 years behind bars for a rape, robbery and assault that he did not commit. For more than a decade

while serving his prison sentence, Mr. Newton requested testing of DNA evidence. The State, however, had repeatedly asserted that it searched for the evidence, but that it could not be located and must have been destroyed. Indeed, in the mid-1990s, New York City Police Department officials submitted a sworn affidavit attesting that the entire storage facility where the rape kit had been submitted after trial had been thoroughly searched. Mr. Newton's *pro se* DNA testing motion was denied as a result. Ten years later, however, thanks to a joint effort by the Innocence Project and a new, highly diligent assistant prosecutor assigned to the case who supervised a renewed search, that "missing" rape kit was located -- *in its original storage bin* at the Police Department warehouse. When subjected to DNA testing, the rape kit proved beyond any doubt that Mr. Newton was not the perpetrator, leading to his release from prison. (Court documents from Mr. Newton's case regarding this history are available at http://www.innocenceproject.org/press/Newton.php).

In Ohio, Arvil Davenport's motion for DNA testing was dismissed after State officials reported and affirmed under oath that they had diligently searched the courthouse, police department storage warehouse, coroner's office, hospital, and other locations, but could not locate the evidence. In December 2004, six months after the case was dismissed, an investigator from the prosecutor's office was in the Clerk of Courts Records Center - a location that none of the parties had

thoroughly searched - looking for evidence in another case, and discovered a manila envelope with the parties' names from the Davenport case. That envelope turned out to contain a number of swabs and slides from the original rape kit.

In Oklahoma, Roger Palmer also had filed a motion for DNA testing that was dismissed after officials reported they could not locate the evidence. When the Innocence Project filed a Freedom of Information Act request for documentation pertaining to the items' chain of custody, however, officials managed to locate the box containing the rape kit in the course of responding to that request.

In 2005 in Montgomery, Alabama, a single vaginal slide - containing spermatozoa from a rape-murder case for which Innocence Project client LaBarron Miller was convicted in 1981 - was located inside a paper file in the Department of Forensic Sciences, the agency that had conducted the autopsy. Although the lab's policy was not to preserve such slides, the lab director had agreed to pull the file to trace the items' custody/destruction, and only then discovered the preserved slide inside that file. The slide had been retained in that location a full *twenty four years* after it was supposed to have been destroyed.

Innocence Project client Calvin Johnson was convicted of rape in Georgia in 1983. The practice in Clayton County at the time was that the court stenographer would keep all evidence entered as an exhibit at trial. When the stenographer from

Mr. Johnson's case retired, he asked what he should do with the closet-full of evidence he had accumulated, and was told to throw it away. A District Attorney noticed the boxes of evidence in a parking lot dumpster outside the courthouse, and decided they should be preserved. Mr. Johnson later received DNA testing of evidence which had been thrown in the dumpster, but salvaged just before its destruction, and was exonerated in 1999 after 16 years in prison.

In the case of Kerry Kotler of New York, there were two boxes of evidence for his case, both of which displayed exactly the same labeling. Although an order to destroy the evidence had been processed, clerks had noticed and destroyed only one of the two boxes. A later search revealed the second box, and DNA testing of the evidence inside led to Mr. Kotler's exoneration in 1992, 11 years after his conviction.

When Marvin Anderson of Virginia sought post-conviction DNA testing, he also was told that the rape kit from his case had been destroyed. A special search in 2001 by Dr. Paul Ferrara, Director of the Virginia Division of Forensic Science, revealed that the criminalist who had performed the conventional serology tests in Mr. Anderson's case in 1982 had broken lab protocol, and, instead of returning the slides containing semen samples to the rape kit, had scotch-taped them into the lab notebook. The combination of this breach of procedure and dedicated search led to

the discovery of evidence which, once subjected to DNA testing, exonerated Mr. Anderson in 2001.

The evidence from Terry Chalmers' case also reappeared after law enforcement officials promised it was lost. Mr. Chalmers was convicted of rape in New York in 1987, and later sought DNA testing of the rape kit from his case. The prosecuting attorneys submitted affidavits swearing that after diligent searches they could not find the evidence. However, the evidence was later located and DNA testing exonerated Mr. Chalmers in 1995.

Another example of evidence discovered only after repeated searches comes from the case of John Willis, of Illinois. Mr. Willis was convicted of a series of rapes in 1993. One of the victims, after being orally raped by her attacker, spat semen into tissue paper, which was later recovered by the police. After being submitted for serological testing, the tissue paper had been checked out to the District Attorney. When Mr. Willis requested DNA testing, the District Attorney was unable to locate this evidence. However, further searching uncovered a slide which had been prepared during the initial serological testing; DNA testing of the slide exonerated Mr. Willis in 1999.

These examples represent only some of the cases in which evidence which was initially reported as lost or destroyed subsequently was found in State custody and subjected to DNA testing. In light of these examples, if a convicted defendant

is not allowed, thorough meaningful discovery, to probe the State's assertions and investigate potential locations for DNA evidence, a significant amount of this highly probative evidence will never come to light, and justice will not be done. And surely, the minimal bureaucratic costs of these procedures pale in comparison to the enormous human costs incurred by failing to do so when this invaluable DNA evidence may well still exist.

II. The Importance of Notice of the Final Evidentiary Hearing.

All the same points discussed above in connection with the trial court's denial of discovery apply equally to the court's failure to provide Mr. Kelley's counsel with adequate notice and time to prepare for a final hearing on the issue of the DNA evidence's existence. *See* R9 1080-83, 1676-78, 1703, 1899; SR 0033, 0037-46, 0049. Because the potential locations of such evidence are often exclusively within the State's knowledge, and because, as discussed above, such evidence may turn up in unlikely places, long after the authorities have contended that it no longer exists, a movant under Rule 3.853 ought to be given sufficient time and opportunity to conduct a thorough investigation and prepare for the final hearing.

The trial court's *sua sponte* setting of Mr. Kelley's 3.853 motion, on just a few weeks notice, particularly in conjunction with the court's denial of Mr. Kelley's request for discovery, effectively nullified the rights granted to him by the Legislature in Section 925.11 and by this Court in Rule 3.853 to have available DNA evidence tested. Nor can it be said that a rush to judgment on this potentially dispositive evidentiary issue serves any legitimate State interest – much less one that outweighs the common interest (by the State and the movant) in ensuring, through DNA testing, that the right person is on death row. Requiring nothing more than adequate notice to counsel of any final hearing, so that a movant can

meaningfully investigate the relevant facts and prepare for the hearing itself, will not in any way burden the efficient administration of justice. Indeed, it can only *advance* that common interest, by ensuring that the parties can conduct all necessary pre-hearing discovery and investigation (exchanging documents, conferring with witnesses, etc.) and narrow down areas of dispute before the court is asked to preside over the matter.

III. The State's Burden of Demonstrating that DNA Evidence No Longer Exists

As a matter of common sense, as well as the experience of the Innocence Project discussed above, simply because an item is not located in one or more places where it might have been found does not constitute evidence that the item *no longer exists*. Evidence that *some* search was conducted does not tend to establish that the item no longer exists. Absent documentary proof of the evidence's destruction (such as a signed and dated destruction order and log entry for the item in question), *only* evidence that an exhaustive search was conducted without success will truly establish that fact. At a minimum, the burden should be on the State to show that it has conducted a thorough search of all the agencies and other locations in which the evidence may have been stored, with the direct assistance and input of all persons reasonably likely to have knowledge of the relevant procedures and chain of custody. *See Blake*, 909 A.2d at 1031 (State should make an extensive search for DNA evidence and even consider testing

items not traditionally thought to contain DNA evidence, in order to carefully verify that no such evidence exists). Such a search should also be required as a matter of sound policy, given the fact that this evidence is uniquely probative, and its location is almost invariably within the exclusive control and knowledge of the State. *Id*.; *see also People v. Pitts*, 828 N.E.2d 67, 72 (N.Y. 2005) (burden of showing evidence no longer exists is placed on the State because the State is the "gatekeeper" of the evidence). As discussed above, it often turns up in unexpected places after unsuccessful searches have been conducted.

Yet, as discussed in Mr. Kelley's brief, the testimony presented at the final hearing not only failed to establish a complete and exhaustive search, it affirmatively demonstrated that the State's search for testable DNA evidence had been woefully incomplete. The witnesses who testified were all current State employees who did not have personal knowledge of what had happened to the evidence. Although these witnesses identified predecessors who would have such knowledge, those predecessors did not testify and had not even been contacted for information during the "search." The witnesses testified to the limited nature of the searches they had performed, and admitted that *other locations*, where the evidence might be found, *had not yet been searched*. *See supra*, at 7

Where, as here, there is no evidence of an exhaustive search, and the undisputed evidence instead affirmatively demonstrates that numerous possible

locations for the evidence have *not* been explored, it simply cannot be said that the facts "establish a substantial basis of fact from which the fact at issue" – the non-existence of DNA evidence – "can reasonably be inferred." *Duval Utility Co. v. Fla. Pub. Serv. Comm'n*, 380 So. 2d 1028, 1031 (Fla. 1980) (defining competent substantial evidence).

CONCLUSION

The existence and location of DNA evidence is likely to reside exclusively within the State's knowledge, and experience proves that such evidence often turns up in unlikely places, long after the State has professed an inability to locate it. Such evidence, however, presents a unique method "to enhance confidence in our criminal justice system by bringing more certainty to a determination of guilt or innocence . . . ." *In re Amendment to The Florida Bar Rules of Criminal Procedure Creating Rule 3.853*, 807 So. 2d 633, 636 (Fla. 2001) (Anstead, J., concurring in part and dissenting in part).

Accordingly, trial courts should be encouraged to fulfill the clear mandate of this rule, ensuring truly meaningful post-conviction access to DNA evidence as this Court and the Legislature clearly intended. This Court should not let pass this opportunity to ensure that justice is done, and the credibility of the criminal justice system enhanced, by reversing the trial court's order and remanding the case to the trial court for discovery and an evidentiary hearing thereafter, upon proper notice.

This Court should also issue guidance to the lower courts as to when, absent specific, documentary proof of destruction, a search for DNA evidence may truly be deemed "adequate." Such a ruling would make clear that trial courts should grant discovery where good cause is shown, should provide sufficient notice and adequate time to prepare for final hearings, and should be precluded from rushing to judgment that such evidence no longer exists.

Respectfully submitted,

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I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is Times New Roman 14-point, and that this brief fully complies with the requirements of Florida Rules of Appellate Procedure 9.142(b)(3)(4) and 9.100(l).

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