IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY

Appellant,

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

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT WILLIAM HAROLD KELLEY

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES/RULES

PRELIMINARY STATEMENT

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

The record on appeal is contained in eleven volumes. Citations to the record are referred to as "Rx y-z," where "x" is the volume number and "y-z" are the page number(s). A Motion to Supplement the Record was simultaneously filed with this brief. Citations to the Supplemental Record are referred to as "SR y-z," where "y-z" are the page number(s).

All emphasis in quotations has been added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

This appeal arises from the trial court's denial of Kelley's motion for DNA testing, without giving Kelley adequate time to obtain evidence in support of his motion and to prepare for a trial. The court then accepted an admittedly incomplete investigation by the State in support of its assertion that DNA evidence related to this case no longer exists. The pertinent facts are as follows.

After the jury in his first trial could not reach a verdict, Kelley was convicted of first degree murder and sentenced to death in a second trial in 1984. This Court affirmed Kelley's conviction and sentence in 1986. Kelley v. State, 486 So. 2d 578 (Fla. 1986). Kelley's conviction was based mostly on circumstantial evidence, arising out of an alleged contract killing that involved several co-conspirators and several potential assailants. R1 4-13; R2 912-400; R3 401-33. The identity of the person who murdered Mr. Maxcy has always been a disputed issue of fact, as there were no eye witnesses to the crime and the testimony at Kelley's trials regarding the identity of those involved in the crime was highly conflicting. R1 177-79, 180-82, 184, 192; R2 294, R3 413-17; SR 0029-0032.

A. The Conflicting Evidence Surrounding Mr. Maxcy's Death

The circumstances underlying this case began with an affair between John J. Sweet ("Sweet"), a career criminal, and Irene Maxcy ("Mrs. Maxcy"), Mr. Maxcy's wife. R2 316. Fearing that her husband was planning to divorce her and leave her with no part of his $2 million estate, Mrs. Maxcy convinced Sweet to arrange for Mr. Maxcy's murder. R2 318-20. Sweet reached out to his contacts in Boston and negotiated a contract on Mr. Maxcy's life. R2 320. Mr. Maxcy was found murdered on October 3, 1966. R2 210. After a long investigation of the murder, Mrs. Maxcy finally confessed the details of the murder-for-hire, in exchange for immunity. Kelley v. Singletary, 222 F. Supp. 2d 1357, 1358-59 (S.D. Fla. 2002).

Sweet was tried twice for the murder of Mr. Maxcy. In both trials, Mrs. Maxcy was the primary witness against him. In the second trial, the jury found Sweet guilty of first degree murder, and the trial court sentenced him to life imprisonment. Id. Sweet's conviction, however, was reversed on appeal. Sweet v. State, 235 So. 2d 40 (Fla. 2d DCA 1970). Sweet was not tried a third time, due in part to the loss of Mrs. Maxcy's testimony. Kelley, 222 F. Supp. 2d at 1359 (citing Wells v. State, 270 So. 2d 399 (Fla. 3d DCA 1972) (affirming Irene Maxcy's conviction for perjury based upon false statements made during prosecution for her husband's murder)).

Nearly fifteen years after the murder, in 1981, Sweet entered into negotiations with Massachusetts authorities to obtain immunity for a number of criminal activities he had been involved with there. R2 354-57; see also Kelley, 222 F. Supp. 2d at 1359. While negotiating his immunity deal in Massachusetts, Sweet admitted for the first time his role in Mr. Maxcy's murder. Id. He thereafter entered into an immunity agreement with the Highlands County State Attorney whereby he would receive immunity in exchange for his testimony against the individuals he claimed carried out the murder-for-hire. Id. Kelley was indicted for the first degree murder of Mr. Maxcy the day after Sweet entered his immunity agreement. Kelley v. Sec'y for the Dep't of Corr., 377 F.3d 1317, 1326 (11th Cir. 2004).

B. Proceedings Against Kelley for the Crime

All of the evidence against Kelley was highly conflicting, mostly circumstantial, and grounded on the testimony of Sweet, a career criminal and admitted liar. As this Court recognized, this was a highly unusual case raising unusual issues. Kelley, 486 So. 2d at 579. Indeed, even the evidence presented against Kelley never resolved, without question, who actually was responsible for Mr. Maxcy's death.

Several witnesses were presented at Mr. Kelley's first and second trials. Chief among these witnesses was Sweet, who described his role in the crime and how the crime was planned.

Kelley, 222 F. Supp. 2d at 1359; R2 312-400; R3 401-25. According to Sweet, no fewer than five people were involved in carrying out the crime, including two assailants: (1) a man whom Sweet claimed had identified himself as "Bill Kelley," and (2) a second man identified as Andrew Von Etter. R2 327-37.

To corroborate Sweet's testimony, the State presented two additional witnesses who claimed to have met a person identified to them as "Bill Kelley" in Daytona Beach around the time of the murder. One of these witnesses testified that the "Bill Kelley" she met was about forty years old, six feet to six feet two inches tall, with dark curly hair, and a deep voice. R3 432. At the time, however, Kelley was a young-looking twenty-three year old, six feet, five inches tall, with straight blonde hair. R1 192; R3 426-32; SR 0003-0027, 0029-0032; see also Kelley, 222 F. Supp. 2d at 1366.

Moreover, in the almost twenty years between the murder and Kelley's trial, several people investigated and handled the evidence from the crime scene, which was transferred between Highlands County, where the crime occurred, and Tallahassee, where the crime laboratory was located. R1 61-76; R2 228-30, 233, 244-45.

Kelley's initial trial in January 1984 resulted in a hung jury, from which the court declared a mistrial. In the second trial, the jury found Kelley guilty of first degree murder and

recommended that he receive the death penalty. Kelley, 222 F. Supp. 2d at 1360; R3 511, 537.

Kelley moved to vacate his judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850 in 1988. That motion was denied by the trial court and affirmed by this Court. Kelley v. State, 569 So. 2d 754 (Fla. 1990). This Court denied Kelley's petition for writ of habeas corpus in 1992. Kelley v. Duggar, 597 So. 2d 262 (Fla. 1992).

On October 9, 1992, Kelley petitioned the Southern District of Florida for federal habeas relief pursuant to 28 U.S.C. § 2254. Kelley v. Singletary, 222 F. Supp. 2d 1357 (S.D. Fla. 2002). Eight years later, on August 31, 2000, the Southern District summarily denied some of Kelley's habeas claims and deferred consideration of the others pending a determination whether an evidentiary hearing was required. See Kelley v. Sec'y for the Dep't of Corr., 377 F.3d 1317 (11th Cir. 2004). On November 22, 2000, the Southern District ordered evidentiary hearings on the outstanding issues presented by Kelley's petition. Id.

After the hearings, on September 19, 2002, Judge Roettger of the Southern District granted habeas relief, reversed the conviction, and ordered a new trial based on significant Brady violations. Kelley, 222 F. Supp. 2d at 1367. The court again granted federal habeas relief on December 30, 2002, because of

ineffective assistance of counsel.[1] Kelley v. Singletary, 238 F. Supp. 2d 1325 (S.D. Fla, 2002).

On July 23, 2004, the Eleventh Circuit reversed and reinstated Kelley's conviction. Kelley, 377 F.3d at 1333. The United States Supreme Court denied certiorari. Kelley v. Crosby, 125 S. Ct. 2962 (2002).

C. Kelley's Motion for Postconviction DNA Testing

On January 17, 2006, pursuant to Florida Rule of Criminal Procedure 3.853, Kelley requested the trial court to authorize postconviction DNA testing of physical evidence collected by law enforcement in connection with the crime for which he was convicted. R1 1-39. In his motion, Kelley described specific items of physical evidence that he believes still exist that may contain DNA capable of proving his innocence -- evidence which clearly existed at one time and has not been accounted for by the State. R1 13-15. That motion affirmatively requested, among other things, pre-hearing discovery to locate the DNA evidence he seeks to test. R1 28.

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[1] Notably, on direct appeal, this Court recognized the unusual facts of this case and emphasized that "if even the slightest hint of prosecutorial misconduct was present in this case, the result might well have been different." Kelley, 486 So. 2d at 582. In granting Kelley habeas relief based on newly discovered evidence, Judge Roettger stated that "[t]his case presents many incidences of prosecutorial misconduct. Hardy Pickard, Assistant State Attorney, has a habit of failing to turn over exculpatory and impeachment evidence." Kelley, 222 F. Supp. 2d at 1363. Therefore, more than a hint of misconduct was subsequently demonstrated by Kelley.

In his motion, Kelley acknowledged that certain physical evidence gathered from the crime scene was, according to the State, destroyed pursuant to a court order nearly a decade before he was convicted. R1 13. It was clear from the face of Kelley's motion that the evidence that was supposedly destroyed was not the subject of his request for postconviction DNA testing. R1 13-14. Rather, Kelley explained that the evidence that was supposedly destroyed evidence constituted a very small subset of the total universe of physical evidence gathered from the crime scene. Kelley further explained that the factual record in his case contained no indication that the other items of physical evidence collected from the crime scene were ever in fact destroyed, nor had the State ever fully accounted for the whereabouts of this other evidence in the forty-year history of Kelley's case. Id.

The State's response contended that Kelley had failed to demonstrate the existence of physical evidence that might contain DNA that would exonerate him. R5 881-87. The State asserted in a conclusory manner that the evidence had been lost or destroyed years ago. Id. The State, however, offered no evidence or description of its efforts, if any, to determine whether the evidence in fact no longer existed.

Kelley thereafter requested that the trial court order a preliminary hearing during which the parties could present oral

argument on certain "threshold issues that [had to] be addressed before a full evidentiary hearing [could] be held." R9 1676-78. One threshold issue was whether Kelley was entitled to discovery regarding the existence and location of the physical evidence. Id.

On April 19, 2006, the trial court entered an interim order setting this matter for "preliminary hearing" on June 6, 2006, "regarding whether evidence exists and remains available for DNA testing." R9 1080-83. The court did not otherwise address Kelley's request to conduct discovery prior to a full evidentiary hearing. Id.

The State moved to continue the June 6 hearing because Victoria Avalon, the Assistant State Attorney assigned to this case, would be in a two-week trial in the Tenth Circuit Court. SR 0033. At a May 10, 2006, telephonic hearing to address that request, the court sua sponte stated that the June 6 hearing would be a two-day final evidentiary hearing. This hearing, the court stated, would include the presentation of witnesses and evidence on the merits of Kelley's Motion for Post-Conviction DNA Testing and, specifically, the existence of the DNA evidence to be tested. The court further advised that it had made arrangements through Chief Judge Herring of the Tenth Circuit Court to make Ms. Avalon available for the June 6 evidentiary hearing. SR 0037-46.

The court then orally denied the State's request for continuance. Id. Indeed, the court for the first time instructed the parties to be available on June 6-7, 2006, for a two-day final evidentiary hearing. Id. That final hearing was set even though the court had not affirmatively ruled on Kelley's request for discovery.

The trial court reduced its oral rulings to writing by entering two orders on May 12. The first order denied the motion for continuance and "denied" the preliminary hearing. SR 0049. The second order recognized that the court had originally set a preliminary hearing but, after sua sponte reconsideration, set this case for a full evidentiary hearing on June 6-7. R9 1899.

Kelley filed an emergency motion requesting that the court reconsider its discovery ruling and continue the final evidentiary hearing until after discovery on the existence of the physical evidence could be completed. R9 1084-92. Kelley pointed out that he had requested only a preliminary hearing, his motion contained an affirmative request for pre-hearing discovery that had not been addressed, the court's April 19 order had specifically stated the June 6 hearing was a "preliminary hearing," and neither party had yet requested a final evidentiary hearing. Id. The April 19 order had made no reference to the presentation of testimony or other evidence,

nor had it set deadlines or otherwise set forth standards that would normally be included in an order setting a final, full evidentiary hearing. Id.

Kelley explained that he could not have reasonably understood the court was contemplating a final, two-day evidentiary hearing on June 6. Id. Kelley also informed the court that, based upon conversations with the Assistant State Attorney, the State had not understood that the June 6 hearing would be a final one. Id.

Kelley's Emergency Motion further pointed out that the April 19 order expressly acknowledged that Kelley had requested oral argument on certain "preliminary" matters requiring resolution before a full evidentiary hearing could be held. Chief among the unresolved issues was Kelley's pending request to conduct pre-hearing discovery concerning the whereabouts of the physical evidence. Id.

On May 26, 2006, the court held a telephonic hearing on Kelley's Emergency Motion and denied it. R9 1703. Kelley petitioned this Court to review the trial court's non-final order. The State responded that the issues in Kelley's petition could be remedied on final appeal. This Court denied Kelley's petition for review of the trial court's non-final order. Kelley v. State, SC06-1043 (order filed June 5, 2006).

The evidentiary hearing proceeded, over Kelley's repeated objection, on June 6, 2006. During the hearing, Kelley examined ten witnesses who had been identified by the State as having the most knowledge regarding the search for the DNA evidence in Kelley's case. Most of these witnesses are current employees of the Highlands County Sheriff's Office, the Florida Department of Law Enforcement ("FDLE"), or the state attorney's office who were not employed at the time of either the crime or Kelley's trials.

Tina Barber, current records custodian for the Highlands County Sheriff's Office, testified generally regarding her duties as records custodian. R10 1796-1813. Her office has microfilm records for cases prior to 1997 and imaged files for any cases after 1997. R10 1801. Ms. Barber, however, has no direct dealings with the maintenance, storing, or archiving of physical evidence. R10 1797.

Ms. Barber testified that, although she was unable to find evidence in her office relating to Kelley's case, she has a letter stating that older receipts were turned over to the attorneys in Bartow. R10 1800. Ms. Barber also testified that she did not search the names of anyone other than William Kelley and John Sweet. R10 1798. Thus, she did not search under the names of the victim (Charles Von Maxcy), other possible assailants (Andrew Von Etter or Steve Busias), or other co-

conspirators (Irene Maxcy). R10 1798-99. She stated that she could conduct those searches manually, if requested. R10 1799. Finally, Ms. Barber testified that she did not attempt to contact the previous records custodian who may have knowledge of this case and the disposition of the physical evidence in question. R10 1804-06, 1813.

Cecelia ("Sissy") High, supervisor of property and evidence at the Highlands County Sheriff's Office, testified regarding her search for evidence in this case. R10 1815-73. Like Ms. Barber, she did not search under any names relating to this case other than Kelley's. R10 1822-26. She further testified that she did not contact anyone at the Sheriff's office besides Ms. Barber who may have entered evidence or who was employed with the Sheriff's office at the time of the murder, even though those people are still reachable. R10 1827-29.

Marta Coburn, chief medical examiner for Collier County, testified that she was "intimately aware" of every record in her office because she had gone through all of the evidence and documents when they moved into a new office. R10 1838-81. In discussing her search for evidence in this case, however, she admitted that she did not search under the years 1976 (when some of the evidence relating to the murder was purportedly destroyed), 1981 (the year Kelley was indicted), or 1984 (the year Kelley was convicted), nor did she search under the names

of persons related to this case under which the evidence might be stored. R10 1856-57. She testified that she could conduct such searches. Id.

Sheri Wilson, office manager for the District 10 medical examiner's office, which includes Highlands County where the murder occurred, testified regarding the storage facilities of case files in that county. R10 1881-1922. She only searched for evidence under the name of the victim and did not search for evidence under the names of other persons related to the case, although evidence could have been stored under those names. R10 1898-1906, 1916-17. She also did not search the logbooks dating back to 1971, but could do so if requested. Id. She spent only approximately 45 minutes on her search. R10 1917-19.

Suzanne Livingston, forensic services director for the FDLE, testified that she did not have documents indicating that the evidence had actually been destroyed. R10 1922-93. She did not contact other records custodians at the FDLE lab to determine where evidence relating to Kelley's case might be found. R10 1936-37. She candidly admitted there could be files of evidentiary value in the Tallahassee Regional Operating Center, but she did not look there. Id. She also did not recall searching under the names of the alleged co-conspirators in the case but would be able to do so, if requested. R10 1941-42.

Judy Bachman, Director of Criminal Court Services for the Highlands County Clerk of Courts, found evidence relating to Kelley's case. R11 1967-96. She found a sealed envelope containing poster boards, photos, hotel receipts, and paper evidence introduced as exhibits in Kelley's first trial. R11 1970-71. She also found an order releasing some evidence in a related case. Id. She did not, however, search under the names of other persons related to the case or in disposal records. R11 1969, 1970-71, 1982. She spent about thirteen minutes conducting her search. R11 1982-83. She could spend more time and search under the co-conspirators' names, if requested. Id.

Ms. Bachman did not realize that Kelley had been tried twice or that the evidence she found related only to the first trial (i.e., the trial that resulted in a hung jury and mistrial). R11 1993-95. As a result, she did not search for a second case number in the evidence log. Id.

John King, a special agent supervisor for the FDLE Sebring office, testified that he searched inventory and files for evidence relating to this case. R11 1997-2024. Although his field office had no record of Kelley's case, he knew the whereabouts of Joe Mitchell, one of the original investigators who had worked on Kelley's case, but he made no effort to contact Mr. Mitchell. R11 2003.

Steve Houchin and Terry Wolfe, both employed by the state attorney's office, testified generally regarding the storage of evidence at the state attorney's office, the individuals employed by that office in 1976 and 1984, and the search they conducted for evidence relating to this case. R11 2025-60. Neither found records relating to this case during their searches.

Dr. Martin Tracey testified as an expert on behalf of Kelley in the area of population genetics and discussed the capability of DNA testing to identify an individual to nearly a 100% degree of certainty. R11 1959-66.

The court entered its order denying Kelley's Motion for DNA Testing on June 29, 2006. R9 1754-62. Notwithstanding the fact that the testimony presented at the hearing demonstrated that the State's search for evidence was incomplete and that other individuals with direct knowledge relating to the evidence still exist and are identifiable, the trial court ruled that the State had proven that evidence relating to Kelley's case no longer exists. Id. This appeal followed.

SUMMARY OF THE ARGUMENT

1. The trial court abused its discretion in denying Kelley's request for pre-hearing discovery. This Court has held that pre-hearing discovery should be permitted when a motion for postconviction DNA testing sets forth good reason for requesting the discovery. Kelley unquestionably established good cause for needing discovery prior to the evidentiary hearing and the relevance of the discovery sought. Although some evidence had been destroyed several years ago, Kelley pointed to an abundance of other evidence gathered at the crime scene for which the State has never accounted and for which Kelley demonstrated compelling reasons to believe still exists. Kelley should have been able to test the State's purely conclusory assertions that the evidence no longer exists.

2. Although the trial court originally informed the parties that the June 6th hearing would be a preliminary hearing to address certain threshold issues before a full evidentiary hearing would be held, the court later sua sponte informed the parties that the June 6th hearing would be a full and final evidentiary hearing. The court thus scheduled the final hearing within merely weeks of noticing it. Due process requires that a party be given proper and reasonable notice of a hearing and adequate time to prepare. The trial court violated Kelley's right to due process by failing to provide adequate notice to

Kelley that the June 6th hearing would be a full and final evidentiary hearing and by failing to allow Kelley adequate time to prepare for the hearing.

3. The trial court's denial of Kelley's motion for postconviction DNA testing is wholly unsupported by the record. Indeed, the record in no way supports the State's conclusory assertion that there is no evidence to test. To the contrary, the evidence presented at the hearing demonstrated only that the State's search for DNA evidence was largely incomplete and that avenues exist under which it could easily conduct a thorough search for evidence relating to Kelley's case. The trial court therefore accepted a minimal and deficient showing by the State that DNA evidence relating to Kelley's case no longer exists. This finding, which is contrary to the evidence, must be reversed.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING KELLEY'S REQUEST FOR PRE-HEARING DISCOVERY

A. Standard of Review

This Court reviews a trial court's denial or limitation on pre-hearing discovery in postconviction DNA testing cases for an abuse of discretion. Spaziano v. State, 879 So. 2d 51, 54 (Fla. 5th DCA 2004). A trial court abuses its discretion when it denies a request for pre-hearing discovery in spite of good cause shown by the defendant. Id. at 54-55.

B. Kelley should have been permitted to fully discover and depose witnesses involved in this case at the time of the crime and trials.

A decision by a postconviction court that DNA evidence does or does not exist for testing is a factual finding that usually involves an evidentiary hearing. Thompson v. State, 922 So. 2d 383 (Fla. 2d DCA 2006). The availability of discovery prior to this evidentiary hearing is vital to a convicted defendant's ability to take full advantage of his or her right to DNA testing. Denying a convicted defendant discovery as to whether DNA evidence exists and the location of that evidence effectively nullifies that person's right to DNA testing.

Because of the unique ability of DNA evidence to exonerate convicted defendants, the need for discovery into the existence of such evidence is even greater than in the usual rule 3.850

postconviction proceeding. In most 3.850 cases the grounds for postconviction relief appear on the face of the record. State v. Lewis, 656 So. 2d 1248, 1250 (Fla. 1995). In contrast, the location of the DNA evidence sought to be tested is often unknown. Fla. R. Crim. P. 3.853(b) (recognizing that location of DNA evidence may be unknown).

"Especially in the most serious cases, law enforcement actually has an interest in preserving [DNA] evidence until the inmate has served his or her sentence to completion. This is so because there is always the possibility a case could come back for a re-trial on some issue." Fla. S. Comm. on Crim. Just., CS/CS/SB 44 (2004) Staff Analysis 3-4 (Jan. 22, 2004). Discovery is therefore necessary to determine the existence and location of such potential DNA evidence so that the merits of the motion may be properly decided.

This Court has held that pre-hearing discovery in postconviction cases should be permitted where the motion sets forth good reason for requesting the discovery. Lewis, 656 So. 2d at 1249-50. Upon that showing, the trial court may allow discovery into matters that are relevant and material. Id. (quoting Davis v. State, 624 So. 2d 282, 284 (Fla. 3d DCA 1993)). This standard has been applied in rule 3.853 DNA cases. See Spaziano v. State, 879 So. 2d 51 (Fla. 5th DCA 2004).

Kelley demonstrated good cause for discovery prior to the evidentiary hearing. R1 6-7, 13-28; R9 1684-94. While some evidence was supposedly destroyed several decades ago, laboratory reports by the former Florida Sheriffs Bureau Crime Laboratory that examined the crime scene evidence described an abundance of other physical evidence collected from the crime scene. R1 61-76. Indeed, Kelley's Motion for DNA testing and his Pre-Hearing Brief described 30 pieces of evidence that could contain DNA that proves his innocence -- physical evidence for which the State has never fully accounted. R1 6-7, 13-28; R9 1684-94, 1719-43.

Moreover, as Kelley pointed out in his motion, the evidence against him was both circumstantial and inconsistent. The identity of the person or persons who murdered Mr. Maxcy has always been a genuinely disputed issue. Id. Kelley was convicted as a second assailant in the murder. In fact, during Kelley's federal habeas proceeding, strong evidence came to light suggesting that an original suspect in the crime may have been the second assailant -- not Kelley. Id.

Pre-hearing discovery should be granted in postconviction DNA cases where (1) the defendant has reason to believe that physical evidence exists that could prove his innocence, (2) the State represents that the evidence has been destroyed, (3) the court cannot discern from the record what efforts, if any, the

custodians employed to find the evidence, and (4) the record does not contain documents conclusively establishing the destruction of the evidence. Spaziano, 879 So. 2d at 54-55. All of these factors are present here.

Kelley set forth compelling reasons to believe physical evidence exists that has never been tested for DNA and which could demonstrate he is innocent. R1 1-28; R9 1684-94. The State asserted below, in a purely conclusory manner, that the evidence had been destroyed and, even if not all of it was destroyed, the State is unable to find it. R5 881-87. But Kelley should have been permitted to test the State's conclusory assertions prior to his final, evidentiary hearing. He should have been permitted to conduct reasonable pre-hearing discovery, including depositions of the relevant records custodians, to determine whether the evidence still exists and what investigation the State has made in that regard.

That discovery was critical because the only witnesses identified and presented by the State at the evidentiary hearing were current custodians from various state agencies identified in Kelley's Motion for DNA Testing. As current custodians, these witnesses had no personal knowledge concerning the handling and disposition of the evidence relating to Kelley's case in the past. As demonstrated above, however, some of those

witnesses testified that they could identify the persons with the best knowledge about that evidence. See supra, at 10-15.

Kelley should have been permitted to depose these custodians before the evidentiary hearing so that he could have, at the very least, identified, deposed, and subpoenaed for hearing all relevant prior custodians of the evidence from (a) 1966 when the evidence was collected, (b) 1976 when some of the evidence was supposedly destroyed, and (c) 1984 when Kelley was tried and convicted. Kelley should not have learned only at his final evidentiary hearing that other individuals still exist who have knowledge regarding this evidence and could be contacted -- by which time he was foreclosed from questioning these individuals and developing and presenting relevant evidence at the hearing.

Under this Court's precedent, such discovery should be permitted upon a showing of good cause. Kelley established good cause. The pre-hearing discovery requested by Kelley was highly relevant to the central issues in this case and crucial to his ability to prepare adequately for the full evidentiary hearing. The remedies afforded by the statute and rule would be rendered meaningless if defendants are not permitted to engage in discovery on the ultimate factual questions prior to actually engaging in the final hearing. The trial court's ruling denying

discovery effectively deprived Kelley of his statutory right to DNA testing and thus constitutes an abuse of discretion.

II. THE TRIAL COURT FAILED TO PROVIDE ADEQUATE NOTICE TO KELLEY THAT THE JUNE 6TH HEARING WAS A FINAL, EVIDENTIARY HEARING

A. Standard of Review

A trial court abuses its discretion in denying relief without giving the defendant adequate notice of the final, evidentiary hearing and time to prepare for the hearing, thereby implicating the defendant's right to due process. Mato v. State, 278 So. 2d 672 (Fla. 3d DCA 1973). Whether the defendant's due process rights were violated is a question of law that is reviewed de novo. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002)

B. Kelley was not given adequate notice of his final, evidentiary hearing or a reasonable time to prepare for the hearing.

Although originally informing the parties that the hearing on June 6 would be a preliminary hearing on Kelley's request that the parties be permitted to present oral argument on certain "threshold issues that [had to] be addressed before a full evidentiary hearing could be held," R9 1080-83, the court subsequently informed the parties that this hearing would be a two-day final evidentiary hearing. R9 1899. The court thus scheduled the final hearing within merely weeks of noticing it. Consequently, the court failed to provide sufficient notice to

Kelley that the hearing would be both final and evidentiary in nature, as opposed to a true "preliminary" hearing as expressly stated in the court's earlier order.

Neither the State nor Kelley had requested the case be set for an evidentiary hearing before the preliminary issues presented in Kelley's Motion were resolved, including Kelley's request for pre-hearing discovery. It was reasonable to believe that the "preliminary hearing" as labeled by the court was just that -- a hearing on the "preliminary" issues to be determined prior to a final evidentiary hearing on the merits.

The right to reasonable notice implicates due process concerns. Due process requires that a party be given proper and reasonable notice of a hearing and adequate time to prepare. Borden v. Guardianship of Borden-Moore, 818 So. 2d 604 (Fla. 5th DCA 2002) (finding a violation of due process because party was not given adequate opportunity to show why case should not be dismissed); May v. State, 623 So. 2d 601 (Fla. 2d DCA 2001) (finding denial of due process by failing to give defendant proper notice of hearing or adequate time to prepare defense); Knapp v. State, 370 So. 2d 38 (Fla. 3d DCA 1979) (same). Neither of these requirements was met here.

By denying Kelley's request for pre-hearing discovery and requiring Kelley to go to a full evidentiary hearing without sufficient notice or adequate time to prepare, the trial court

abused its discretion and denied Kelley meaningful access to the judicial system. Kelley was unable to reasonably investigate and determine the existence of relevant evidence that could exonerate him. The trial court's ruling denying Kelley's motion for DNA testing should be reversed and the case remanded to allow for discovery and an evidentiary hearing thereafter, upon proper notice.

III. THE TRIAL COURT ERRED IN RULING THAT THE STATE MET ITS BURDEN OF ESTABLISHING THAT DNA EVIDENCE NO LONGER EXISTS

A. Standard of Review.

While this Court's standard of review following the denial of a postconviction claim after an evidentiary hearing generally affords deference to the trial court's factual findings, such deference is not afforded where, as here, the trial court's findings are not supported by competent, substantial evidence. Philmore v. State, 937 So. 2d 578, 583 (Fla. 2006); Walls v. State, 926 So. 2d 1156 (Fla. 2006). A court also should not defer to the trial court's findings when, as here, the court improperly denied pre-hearing discovery and failed to give due notice of the final evidentiary hearing. The trial court's application of the law to those facts is also reviewed de novo. Philmore, 937 So. 2d at 583.

Because the trial court's findings are not supported by competent, substantial evidence and its application of the law

to the facts of this case was incorrect, the trial court's order must be reversed.

B. The trial court erred in ruling that the State met its burden of showing that the DNA evidence no longer exists.

A prisoner's right to DNA testing to scientifically and dispositively establish innocence is of paramount importance. DNA testing "offers a unique opportunity to lend credibility and certainty to a case for guilt or innocence." Amendment to Fla. Rules of Crim. Proc. Creating Rule 3.853, 807 So. 2d 633, 636 (Fla. 2001) (Anstead, J., concurring in part and dissenting in part). Recognizing the importance and unique nature of such evidence, in 2001 the Legislature created a substantive statutory right to postconviction DNA testing. § 925.11, Fla. Stat. That statute grants those who have been convicted of a crime and sentenced by a court the right to DNA testing and prohibits governmental entities from destroying any DNA evidence that could exonerate an innocent defendant. Id. In the context of death penalty cases -- the most serious type of case -- the governmental entity cannot destroy DNA evidence until 60 days after execution of the death sentence. Id.

Florida Rule of Criminal Procedure 3.853 sets forth the procedural requirements for exercising the substantive right to DNA testing. Rule 3.853(b) provides the factors a movant must sufficiently establish in a motion for Postconviction DNA

testing. Once the movant has complied with his prima facie burden to identify the last known location of the physical evidence he seeks to have tested, the State -- not the movant -- should carry the burden of showing that the evidence no longer exists. Carter v. State, 913 So. 2d 701, 702 (Fla. 3d DCA 2005) (holding that the trial court committed reversible error by denying movant's rule 3.853 motion because "the record does not contain any documentary or testimonial evidence to support the state's assertions that there is no evidence to test . . . .").

While the trial court correctly ruled that the burden shifted to the State to show that the evidence no longer existed once Kelley satisfied his threshold burden under the rule, the court then ruled that the State satisfied its burden through evidence of searches that were largely incomplete and that affirmatively demonstrated DNA evidence could still exist. In so ruling, the trial court reversibly erred.

The purpose of section 925.11 and rule 3.853 is to provide defendants with a means by which to challenge convictions when there is a credible concern that an injustice may have occurred and DNA evidence may resolve the issue. Zollman v. State, 820 So. 2d 1059 (Fla. 2d DCA 2002). This purpose is not fulfilled by denying relief when the State's own evidence showed it conducted a wholly incomplete search and that exonerating evidence may still exist.

Courts have yet to determine the circumstances under which the State satisfies its burden of showing that DNA evidence sufficiently alleged by the defendant no longer exists. Courts have, however, considered this issue in the context of whether the court should have granted an evidentiary hearing. "[A] trial court commits reversible error in denying a motion for DNA testing when the record does not contain any documentary or testimonial evidence to support the State's assertions that there is no evidence to test." Thompson v. State, 922 So. 2d 383 (Fla. 2d DCA 2006); see also Carter, 913 So. 2d at 702.

This principle should apply regardless of the procedural posture of the motion for DNA testing. If it is clear from the record that the DNA evidence could still exist, the defendant should be entitled to a complete search for the evidence through appropriate discovery and permitted to have that evidence tested. See Hampton v. State, 924 So. 2d 34, 36 (Fla. 3d DCA 2006) (rejecting State's assertions that no DNA evidence existed because the evidence showed that more could have been done; the State never made an inquiry at a laboratory that could have possessed testable material).

The testimony of the witnesses identified by the State did not demonstrate that the DNA evidence relating to Kelley's case no longer existed. Quite to the contrary, it affirmatively demonstrated that their search for the DNA evidence was

incomplete and that avenues existed under which they could easily conduct a thorough search for evidence relating to Kelley's case. See supra, at 10-15.

The witnesses admitted they could have contacted prior custodians or other custodians to ascertain the ultimate disposition of the evidence. Id. Nonetheless, they did not do so even though the witnesses themselves had no personal knowledge as to what happened to the evidence. Most of the witnesses admitted that they had not searched for evidence archived under the names of the victim (Charles Von Maxcy), other possible assailants (Andrew Von Etter or Steve Busias), or other co-conspirators (John Sweet or Irene Maxcy). R10 1798-1800, 1822-26, 1856-57, 1898-1906, 1916-17, 1941-42; R11 1969, 1970-71, 1982. And, some of the witnesses admitted that they did not know that both Sweet and Kelley were tried twice and evidence may therefore have been stored under different case numbers for each defendant. R11 1993-95.

Some of the witnesses also testified that they were assisted by colleagues to conduct their searches. R10 1848-49, 1897-98; R11 1980, 2034. However, those colleagues were not identified to Kelley by the State before the final hearing, they were not present at the hearing, and Kelley was not given a chance to obtain testimony from them concerning their diligence in searching for the physical evidence or records concerning its

disposition. Finally, several witnesses identified individuals who were employed with the sheriff's office, FDLE, or state attorney's office at the time of the original homicide in 1966 and at the time of Kelley's trial in 1984 who could have relevant information regarding the DNA evidence. R10 1821, 1827-29, 1928-31, 1943-44; R11 2001-04, 2006, 2015, 2027-30, 2033-34. These witnesses, however, were not identified to Kelley prior to trial, and Kelley was given no opportunity to obtain testimony from them.

The State further admitted at the evidentiary hearing that it could not prove what happened to the evidence. R11 2097. This statement alone refutes the State's contention that all of the evidence was destroyed. Without a record indisputably showing that all of the evidence was in fact destroyed, the evidence obviously may still exist. By way of analogy, when a person cannot find his or her car keys, he or she does not automatically assume that the keys are lost or destroyed. The person retraces all of his or her steps until the keys are found or until the keys cannot be found in any of the places they conceivably could be.

The point is, the State attempted to show that the evidence no longer exists by presenting current employees who presently handle evidence in criminal cases in Highlands County. But in cases such as this, where the crime occurred many years before

the defendant was able to request DNA testing, it is necessary to question those who were employed at the time the evidence was submitted or allegedly destroyed. The record in this case makes clear that former employees of the sheriff's office or the FDLE are identifiable and available for questioning. Unless the State is able to track what happened to the evidence up to the point when it was purportedly lost, destroyed, or discarded by the State, the court cannot say with appropriate certainty that the evidence does not exist or is not available for DNA testing.

The State should have been required to identify those individuals who may lead to the discovery of this evidence -- not just the current employees who had no direct involvement with the evidence. If the State's burden were so minimal, it would be virtually impossible for a capital defendant with a long-standing conviction to obtain any relief through postconviction DNA testing.

The record here does not support the trial court's concern that Kelley was on a fishing expedition, and that this is not a search with no end in sight. Kelley simply seeks to depose those individuals with an admitted direct connection to the evidence at the time of the crime and Kelley's trials. These are identifiable people who may have direct knowledge as to whether the evidence was in fact destroyed or could lead to the other witnesses. In fact, they are the necessary witnesses,

rather than individuals, such as those identified by the State, who were not involved with the evidence in Kelley's case and who have no recollection of the recordkeeping practices of their respective departments in 1966 or 1984.

The trial court accepted a minimal and largely incomplete showing by the State that DNA evidence relating to Kelley's case no longer existed. Such a decision thwarts the purpose of rule 3.853 and section 925.11 and effectively denies Kelley a meaningful opportunity to assert his substantive right to DNA testing. The trial court's order should be reversed.

CONCLUSION

Based on the foregoing, the trial court's order should be reversed. First, the court erred in denying Kelley's request for pre-hearing discovery even though he had shown good cause. Second, the court required Kelley to proceed to a full and final evidentiary hearing with merely a few weeks notice and inadequate time to prepare. Finally, the trial court accepted a level of proof from the State that far from established that no DNA evidence existed relating to Kelley's case. Each of these reasons requires reversal of the trial court's order and remand to the trial court for discovery and an evidentiary hearing thereafter, upon proper notice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

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

_____
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