IN THE SUPREME COURT OF FLORIDA

WILLIAM H. KELLEY,

Appellant,

v. CASE NO. SC08-608

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR HIGHLANDS COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

CAROL M. DITTMAR
Senior Assistant Attorney General
Florida Bar I.D. No. 0503843
Concourse Center #4
3507 Frontage Road, Suite 200
Tampa, Florida 33607
Phone: (813) 287-7910
Fax: (813) 281-5501

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE NO.

Cases

Other Authorities

STATEMENT OF THE CASE AND FACTS

This is an appeal from the denial of a motion for DNA testing by a capital defendant pursuant to Florida Rule of Criminal Procedure 3.853. In 1984, Appellant William Kelley was convicted of the 1966 murder of Charles vonCannon ("Von") Maxcy. The facts underlying his conviction and resultant sentence of death are outlined in this Court's opinion in Kelley's direct appeal, Kelley v. State, 486 So. 2d 578, 579-80 (Fla.), cert. denied, 479 U.S. 871 (1986):

> Appellant's conviction represented the resolution of a highly unusual case, raising some unusual issues. Appellant was indicted in December of 1981 for the Maxcy murder, committed in October of 1966. An explanation of this delay in prosecution requires an examination of the figures involved and the evidence adduced at appellant's trial.
>
> John Sweet, involved in an illicit love affair with Irene, the victim's wife, planned the murder so that he and she could live together on Maxcy's inheritance. Towards this end, Sweet contacted a Walter Bennett in Massachusetts and made the necessary arrangements. A price was set, and in early October of 1966 appellant Kelley and one Von Etter carried out the sinister task.
>
> Because prosecutors found the evidence insufficient to proceed against appellant and Von Etter, and because Irene Maxcy received immunity in return for her testimony in the case, only Sweet was originally tried. His first trial resulted in a mistrial, and the conviction resulting from his second trial was reversed on appeal. Sweet v. State, 235 So.2d 40 (Fla. 2d DCA), cert. denied, 239 So.2d 267 (Fla. 1970).
>
> At that point, the state felt unable to proceed against Sweet due to the lapse of time and the loss of certain witnesses' testimony. Thus, the case lay dormant for over ten years. This standstill was broken only after Sweet, in 1981, became involved in a criminal situation he found threatening and approached law enforcement authorities in order to seek some protection

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

As noted, the State initially prosecuted John Sweet for Maxcy's murder. Sweet testified at his trials that he had nothing to do with the murder. See generally Kelley v. Sec'y., Department of Corrections, 377 F.3d 1317, 1325 (11th Cir. 2004). Following the reversal of Sweet's conviction, the State's inability proceed against him resulted in his discharge on speedy trial grounds in 1971 (V1/49-52).[1] In April, 1976, the State of Florida petitioned the court and obtained permission to destroy the physical evidence which had been admitted during Sweet's trials (V1/54-61).

Following Sweet's discharge, he ultimately returned to Massachusetts and, in 1981, approached authorities there regarding

[1] Relevant pleadings and transcripts from Kelley's prior appeals, including his direct appeal, postconviction appeal, and federal proceedings, were admitted into evidence during the proceedings below (although not in any chronological or organized manner). Therefore, references to these records will simply cite to the volume and page as found in the instant record on appeal.

criminal activity taking place in that state. Kelley, 486 So. 2d at 580. With Sweet's cooperation, Florida officials obtained an indictment against Kelley for Maxcy's murder in December 1981. At that time, Kelley was "on the run" from the law and sought as a fugitive; Federal Bureau of Investigation agents apprehended him in Tampa, Florida, on June 16, 1983. Kelley, 377 F.3d at 1326.

Prior to Kelley's 1984 trial, a hearing was held on his motion to bar the prosecution due to the destruction of physical evidence (V5/962-96). At the hearing, Assistant State Attorney Hardy Pickard explained that the destroyed evidence consisted of the State's exhibits that had been admitted into evidence against John Sweet; copies of the documentary exhibits had been retained and provided to the defense (V5/963-64, 985). The court denied the motion to bar prosecution (V5/996). The court also considered a defense motion to dismiss the indictment due to pre-indictment delay. In conjunction with that motion, former State Attorney Glenn Darty testified that he petitioned the court for permission to destroy the evidence after the clerk's office had contacted him, indicating that it did not have sufficient storage and wanting to dispose of this evidence (V5/999-1000). Darty was not notified as to exactly what evidence may or may not have been destroyed after the court order was obtained (V5/1000). The motion to dismiss was also denied (V6/1021).

Kelley's first jury was unable to agree on a verdict, and a mistrial was declared; his retrial occurred in March, 1984. Kelley, 486 So. 2d at 580. The principal witness against Kelley was John Sweet, who identified Kelley as one of two men that Sweet had hired to kill Von Maxcy (V2/337-38). According to Sweet, the hit men stayed at a hotel in Daytona, and met him at a shopping center in Sebring on the day of the murder (V2/331-37). Sweet drove the men to Maxcy's home in their car and dropped them off, telling them the front door was unlocked and Maxcy would be home shortly (V2/338). Sweet observed that Kelley was carrying a satchel, which he opened to show Sweet several knives and guns, and Sweet further observed that Kelley was wearing a glove (V2/340-41). He returned their car to the shopping center parking lot, picked up his own car, and drove around for awhile until he saw Maxcy's car parked at the shopping center, signaling the mission had been accomplished (V2/342).

In addition, Kaye Carter [Meyer] testified about meeting Kelley, Kelley's wife, and the Von Etter family in Daytona in October, 1966 (V3/426-30). She noted that Kelley and Von Etter were gone together during the day of October 3, arriving back in Daytona later that evening (V3/426-30). Testimony was also presented corroborating Sweet's testimony as to the time and circumstances of Maxcy's murder (V1/197; V2/205-08, 218-220, 259-66, 285-87, 294); bank records and telephone calls connecting Sweet

with Maxcy's estate and with Walter Bennett and Andrew Von Etter (V3/433-454); hotel and car rental records putting Sweet in Daytona at the same time as Donald Evans and Von Etter (V3/450-54); and hotel records showing that a "Mr. and Mrs. William Kelley," with a Dorchester, Massachusetts address and driving a Chevrolet with a Massachusetts tag number G-990077 were registered at the Daytona Inn at the time of the murder (V3/452). Former Massachusetts state police officer John Kulik testified that he knew Kelley to frequent Walter Bennett's establishments and to drive Jennie Adams' car, which was the one registered at the Daytona Inn motel (SR V2/222-27). Other witnesses included FBI Special Agent Ross Davis, who noted incriminating statements Kelley made upon his arrest in Tampa in 1983 (SR V2/232-36), and private investigator Abe Namia, who testified that he had worked with John Sweet's trial defense team and that Sweet had made prior consistent statements implicating Kelley in the late 1960's (SR V2/241-47). There was testimony that Kelley's appearance had changed in the seventeen years between the time of the murder and the time of his trial (V2/338; SR V2/222-23). A deputy testified that fingerprints were lifted from the crime scene and from Maxcy's car, but that, to his knowledge, the prints were never identified (V2/228, 237, 241).

Kelley's theory of defense was that Sweet was lying. To that end, as noted in this Court's opinion, Sweet was subjected to "rigorous cross-examination." Kelley, 486 So. 2d at 580. However,

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

On appeal, Kelley challenged the trial court's refusal to dismiss the case based on the delay and loss of evidence. In a supplemental brief, Kelley asserted the destroyed evidence included, "hair samples, fingernail scrapings, blood samples and scrapings, carpet sections, a brake pedal and floor mat from the victim's car, the victim's clothing, a blood stained sheet alleged to have covered the victim, bullets, and other items" (V6/1074, see also V6/1085, 1088-89). This Court denied relief and affirmed the conviction and sentence imposed. Kelley, 486 So. 2d at 582, 586.

State postconviction proceedings were initiated by the filing of a motion to vacate on November 20, 1987 (V6/1133-V7/1208). An evidentiary hearing was conducted July 18-19, 1988 (V3/582-V4/798; SR V3). One of the claims litigated in postconviction alleged that Kelley's trial attorneys had provided ineffective assistance of counsel in failing to adequately investigate the destruction of evidence prior to trial (V6/1140). Kelley asserted that counsel were deficient regarding the destruction of evidence admitted at Sweet's trials, as well as other evidence collected during the investigation (V6/1140). The motion to vacate offered sworn affidavits from both of Kelley's trial attorneys, specifically

stating: “In preparing for the trial of William Kelley, it became clear at some point that evidence from the Sweet trial as well as the fruits of the police investigation in the case had been destroyed.” (V7/1209, 1213). These affidavits were later admitted as substantive evidence during the postconviction hearing (SR V3/494, 506-07).

Following the evidentiary hearing, Judge Bentley denied relief and, on appeal, this Court affirmed his ruling in all respects. Kelley v. State, 569 So. 2d 754 (Fla. 1990). A petition for writ of habeas corpus was later filed in, and denied by, this Court. Kelley v. Dugger, 597 So. 2d 262 (Fla. 1992).

Kelley then filed a federal petition for writ of habeas corpus in the United States District Court, Southern District of Florida, asserting six issues, including a challenge to the destruction of all of the physical evidence admitted at Sweet’s trial as well as other fruits of the police investigation (V7/1361-V9/1658, see V8/1561-89 [Issue III], V8/1569-76 [describing evidence]). An evidentiary hearing was granted as to some claims and in July, 2001, Kelley offered additional evidence to support his claim relating to the destruction of the evidence. Specifically, Kelley presented an affidavit from Fred Michelle, a public defender investigator that previously worked for the Highlands County Sheriff’s Office, opining that additional space may have been

available for storage of the evidence from the Sweet trial which had been destroyed pursuant to court order (V9/1661-63).

The district court issued an Order granting habeas relief pursuant to Brady v. Maryland, 373 U.S. 83 (1963), on September 19, 2002, followed by an Order of December 30, 2002, finding that Kelley's trial attorneys provided ineffective assistance. The Dec. 30 Order also denied Kelley's claim on the destruction of evidence. Kelley v. Singletary, 238 F. Supp. 2d 1325, 1330 (S.D. Fla. 2002). On appeal, the Eleventh Circuit rendered an extensive opinion reversing the grant of habeas relief, and reinstating Kelley's conviction and sentence. Kelley, 377 F.3d at 1369. Kelley sought certiorari review, which was denied on June 27, 2005. Kelley v. Crosby, 545 U.S. 1149 (2005).

In the fall of 2005, counsel for Kelley and counsel for then-Governor Jeb Bush corresponded regarding Kelley's intent to file a motion for DNA testing (V1/84, 86). Kelley's attorney related that he did not intend to file any motion until the deadline as provided by Florida Rule of Criminal Procedure 3.853, which at that time had just been extended to July, 2006 (V1/84). The Governor's office responded on January 5, 2006, (letter misdated 2005) that Kelley's case was under review for a death warrant as no DNA motion had been filed (V1/86).

Thereafter, on January 18, 2006, Kelley filed the motion currently at issue, seeking postconviction DNA testing, leave to

amend, and permission to obtain additional public records (V1/1-37). Kelley identified a list of thirty items on which he sought DNA testing (V1/14-15). He alleged that he would be exonerated should testing fail to reveal his DNA on these items (V1/20-21). Kelley's motion was assigned to the Honorable Belvin Perry, Circuit Judge, and on March 13, 2006, the court ordered the State to respond to the DNA motion (V5/867). The State's response was thereafter filed on March 26, 2006 (V5/869-907).

On April 3, 2006, Kelley filed a request for oral argument, asserting that preliminary issues needed to be discussed (V9/1676). The request sought a hearing in order to address: whether Kelley would be granted leave to amend the DNA motion up to July 1, 2006; whether Kelley was entitled to discovery regarding the existence and location of the physical evidence; whether Kelley would be granted leave to serve additional public records requests pursuant to Florida Rule of Criminal Procedure 3.852; and whether the State's response established that Kelley was not entitled to relief as a matter of law (V9/1676-78). In an Order dated April 19, 2006, the court denied the motion for leave to amend the DNA motion through July 1, 2006, and denied the motion for leave to file additional public records requests under Rule 3.852 (V9/1680-82). The court noted that the issue of the existence and location of the physical evidence would be addressed at a hearing on June 6, 2006, and expressly declined to make any finding as to whether the

State's response established that Kelley was not entitled to relief as a matter of law (V9/1682).

The State filed a motion to continue the June 6 hearing, citing scheduling conflicts (SR V4/595-96). A telephonic hearing was held on the motion to continue on May 10, 2006 (SR V4/598-610). At the hearing, Assistant State Attorney Victoria Avalon reiterated that she had a trial scheduled in Bartow and would not be available until June 16 (SR V4/600). She also advised that the undersigned, co-counsel from the Attorney General's Office, had a pre-existing court commitment on June 6 (SR V4/600). Judge Perry indicated that he had contacted the chief judge for the Tenth Circuit, Judge Herring, and that Judge Herring had communicated with the trial judge presiding over Ms. Avalon's trial, and that Ms. Avalon would be excused from trial on June 6 in order to attend the hearing scheduled in Kelley's case (SR V4/600-01). The court clarified that the hearing set for June 6 was intended to be "a full-blown hearing" on Kelley's motion and that the court had reserved two days for the hearing (SR V4/601).

Ms. Avalon thereafter advised that she had started some preliminary research to attempt to determine the existence of the evidence noted in the DNA motion (SR V4/604-08). She requested that any hearing be limited to the question of the existence of the evidence and noted that issues relating to the destruction of the evidence were beyond the scope of the proceeding (SR V4/605). Ms.

Avalon observed that much of the evidence collected in 1966 was sent to the predecessor laboratory to the FDLE lab in Tallahassee (SR V4/605). She had spoken with Sue Livingston, from FDLE in Tallahassee, and had confirmed that the evidence had been returned to the Highlands County Sheriff's Office in 1966 and 1967 (SR V4/605-06). Defense counsel requested a written list of all of the items that the State would maintain did not exist, and Ms. Avalon offered to provide the defense with copies of correspondence from the various records custodians (SR V4/607). Ms. Avalon also identified, for the record, the witnesses which she intended to call at the June 6 hearing (SR V4/607-08). The defense made no request at that hearing for additional time or to depose any of the witnesses identified by the State.

The same day as the May 10, 2006 telephonic hearing, Ms. Avalon furnished Kelley's attorneys with the correspondence she had received, along with a letter outlining the proposed witnesses for the hearing and summarizing the extent of her investigation into the existence of any physical evidence at that time (V9/1693-94). Several days later, Kelley filed an emergency motion to reconsider and to continue the June 6, 2006, hearing (V9/1684-92). In this motion, for the first time, Kelley identified in general terms the individuals that he wished to depose: 1) all witnesses listed in ASA Avalon's letter of May 10, 2006; 2) all witnesses that could be discovered upon deposing the witnesses listed in ASA Avalon's

letter; 3) any former custodians who maintained or processed the physical evidence either in 1966 or 1976; and 4) any expert witnesses which the State intended to present (V9/1688-89).

A telephonic hearing was conducted on Kelley's emergency motion on May 26, 2006 (SR V2/3-27). Judge Perry thereafter denied the motion (V9/1703-04).

On the morning of the evidentiary hearing, Kelley filed an exhibit list, a witness list, a supplemental exhibit, a response to the State's memo in response to a defense motion to recuse the judge, a notice of appearance, and a pre-hearing brief (V9/1705-51; V10/1771-72). The defense then questioned the eight witnesses identified in Ms. Avalon's letter of May 10, 2006, and called two additional witnesses (V10/1795-V11/2061).

Tina Barber testified that she is the current records custodian for the Highlands County Sheriff's Office (V10/1795-96). She had been requested to try to locate any records that might relate to physical evidence maintained by the sheriff's office pertaining to Kelley's trial (V10/1797). She was not able to locate any property receipts but did find a letter from 1987 indicating that everything had been turned over to attorneys in Bartow (V10/1798, 1800). Barber located other documents, such as arrest records on Kelley and John Sweet, but nothing else relating to the physical evidence or other property (V10/1806). She noted

that she did not find any evidence or property receipts from any case dating prior to 1979 (V10/1799).

Barber stated that everything relating to older cases (up to 1997) is maintained on microfiche in her office; anything since that time has been scanned, imaged, and is stored on computers (V10/1800-01). She noted that the sheriff's office does not have any off-site record storage facility (V10/1801). She searched under Kelley's name, as well as John Sweet (V10/1798-99). She has worked for the sheriff's office since 1983, when she started as a dispatcher (V10/1802).

Cecilia High testified that she is the current supervisor of property and evidence for the Highlands County Sheriff's Office (V10/1815-16). She is the one responsible for everything the sheriff's office keeps on all criminal cases, old and new (V10/1831). She had been asked to locate any evidence from Kelley's case (V10/1818). She personally searched the property storage facility; she described the facility, which is attached to her office (V10/1819-20). The items are all stored in sealed boxes by case number (V10/1822). She looked under Kelley's case number, but could not determine a case number for Sweet (V10/1822). She contacted Tina Barber to try to find anything archived related to this case that might have additional case numbers for her to check (V10/1823).

Ms. High noted that they ran case numbers differently at that time, so she went through anything that possibly had a case number different than the system they now use; she was unable to locate anything that corresponded with the Von Maxcy murder investigation (V10/1823). She physically looked through the boxes to find anything that did not correspond with the current numbering system and did not find anything (V10/1824). She looked for anything different or out of the ordinary; the oldest evidence she found was from the late 1970s (V10/1824, 1827). They only had evidence from three or four cases prior to 1985 (V10/1833). For every case prior to 1985, she physically opened the boxes and went through every piece of evidence, although she did not open sealed packages inside the boxes (V10/1834). She was looking for anything that did not relate to the case number noted on the box, in case the evidence had been mislabeled; again none of it had to do with Von Maxcy's murder investigation (V10/1833-34).

Ms. High also reviewed names on the evidence tags; she could not find anything with the names of John Sweet, Von Etter, or Von Maxcy (V10/1824-25). She noted that Highlands is not a large county and the sheriff's department is not very large; all of their physical evidence is kept in just the one storage facility (V10/1832). She did not believe there could be any evidence from the Von Maxcy murder investigation that was in the facility that she "just didn't see" (V10/1823).

Dr. Marta Coburn testified that she is the current Chief Medical Examiner for District 20, Collier County (V10/1838-39). She noted that there was no appointed medical examiner for Collier County in 1966; The first appointed medical examiner was Dr. Coirtland Berry in 1971 (V10/1840). There was a medical examiner in Miami, but in Collier County, they used private pathologists before the state system was created in 1971 (V10/1841, 1874). Dr. Coburn does not have any records in her office from before 1971; when she inherited the office, that was as far back as any records went (V10/1840).

When she received the letter from the state attorney's office asking about Kelley's case, she noted the autopsy had been conducted by Dr. Heinrich Schmid, a private pathologist in Collier, in 1966 (V10/1841). Although she was very familiar with her office records, from having moved to a new facility, she was very diligent about searching for anything related to the Von Maxcy death (V10/1842, 1874). She thought she had some physical evidence from before 1971, and enlisted her head investigator and head computer technician to assist her in a search (V10/1848-49). They went through every specimen rack, paraffin blocks, slides, x-rays and paper files that were listed from 1971 or 1972; they did locate some x-rays from 1969, but nothing related to Von Maxcy or 1966 (V10/1855-57).

Dr. Coburn described her facilities and how the files and evidence are stored (V10/1854). They have never kept anything in storage off-site (V10/1865). She did not search her office under the names of Sweet, Von Etter, or Irene Maxcy, or Dr. Schmid, but she noted that they would not have records kept under any name other than the decedent (V10/1857, 1876).

Sheli Wilson testified that she is the current office manager and records custodian for the District 10 Medical Examiner (V10/1882-83). That office had no records or evidence relating to Von Maxcy's death in 1966 (V10/1885). They typically keep biological samples from the decedent but evidence such as nail clippings is collected by law enforcement (V10/1884-85). The paper files are kept in a large storage room and the oldest files only go back to 1975 (V10/1890-92). There is a Rolodex with each case number, kept chronologically by year, with index cards which cross-reference the decedent's name, but the Rolodex only goes back to 1970 (V10/1894-97). She and her staff went through each of the index cards to make sure there was nothing on Von Maxcy; they also physically checked the actual files in the boxes of the file room as early as 1970 up to about 1980 (V10/1897, 1909, 1916). They also have logbooks, kept by year, starting in 1971 when the Medical Examiner's Act first required that the records be maintained (V10/1900-01).

Ms. Wilson consulted the current medical examiner, Dr. Nelson, as well as Dr. Drake, who had been appointed medical examiner in 1974; no one had any information about the case and she didn't know of anyone else she could ask (V10/1903, 1910). They did not maintain any evidence off-site and only stored blood in the lab for a year or two (V10/1910). They had moved the office in 2003 and Wilson knew that, at that time, each file corresponded to an index card on the Rolodex and everything was in order (V10/1913-14). She had searched under the name "Von" as well as "Maxcy" just to be sure, but did not search under the names Kelley, Sweet, Von Etter, Busias, or Irene Maxcy since they only kept files and evidence by the decedent's last name (V10/1898, 1915, 1919).

Suzanne Livingston testified that she is the current forensic services director for the Florida Department of Law Enforcement (V10/1922-23). She has been with FDLE for over 27 years (V10/1924). She received a copy of Kelley's motion directly and called Kelley's attorney, Mr. Napper to see if he could provide a case number, but was told by his secretary that due to discovery rules they could not provide that information and she needed to contact the state attorney's office (V10/1926, 1945-47). With direction from the state attorney's office, she located the case files and found four disposition forms indicating that the evidence had been returned to the submitting agency, the Highlands County Sheriff's Office (V10/1925-27, 1947).

Ms. Livingston noted that the Florida Sheriff's Bureau was the predecessor to FDLE and that the policy in 1966, as it still is today, was to not retain any evidence but return everything to the submitting agency once their lab analysis was complete (V10/1927, 1948). The only lab in 1966 was located in Tallahassee so there would not be any evidence or files on this case in any of FDLE's regional labs (V10/1927).

FDLE maintains both lab files and investigative files; Livingston did not review the paper investigative files but she did search the investigative vault for any evidence (V10/1936, 1940). She searched the vault records using their case number and also the names Kelley, Von Maxcy, and all the other names listed in the motion (V10/1940-41). She had searched the electronic records of what is maintained in the vault, which she knows to be accurate because her office audits the vault on a regular basis to insure that all of the evidence maintained corresponds with the electronic records (V10/1950-51). She found nothing relating to this case in the vault (V10/1951).

Ms. Livingston reviewed each of the disposition forms, showing what exhibits had been returned, when, and to whom (V10/1928-35). She explained that some exhibit numbers may be omitted if that item had never been submitted to the lab for analysis; in addition, some exhibit items may be identified as having been returned twice if they were re-submitted and then returned again (V10/1942-43, 1955-

56). She concluded that all of the physical evidence they had received in this case had been returned to the submitting agency (V10/1947, 1951).

FDLE Special Agent Supervisor John King works in FDLE's Sebring office and confirmed that they did not have any files or evidence on this case in the Sebring office (V11/1997-98, 2006-07, 2013). The Sebring office did not exist in 1966 (V11/1999). Any FDLE investigation at that time would have been handled by the Florida Sheriff's Bureau in Tallahassee (V11/1999-2000). When he learned of these proceedings, King tried to contact the case agent, Joseph Mitchell, but was unable to get specific contact information on Mitchell (V11/2001-02). He searched the Sebring files and evidence room but found nothing to indicate that they ever had any information on this case (V11/2006-07). He reviewed the automated inventory, which is audited every six months for accuracy, and went manually through every file on current and past cases (V11/2008). He searched under Kelley's name, as well as Von Maxcy and Sweet (V11/2010). They did not have any physical evidence in the office dating prior to 1989, when the evidence room was created (V11/2014, 2022).

Judy Bachman testified that she is the current Director of Criminal Court Services for the Highlands County Clerk of Court; among other things, she is the evidence custodian for the clerk's office (V11/1967-68). When she received the letter from the state

attorney's office, she checked the evidence vault, located the box corresponding to this case number, and inventoried everything in the box (V11/1968-69). She found a sealed envelope with poster boards, photos, receipts, and other paper evidence; she also found an order releasing some of the evidence from the Sweet case (V11/1970-71). She did not search for any disposal records because she was able to account for all of the exhibits from the trial (V11/1974, 1977). The evidence they maintain is not kept with the case file but in a separate evidence vault; she had personally moved the evidence at one point from the first floor to the second, and all of the evidence had been inventoried and labeled (V11/1973). She recently added a second vault for larger items and she recently moved some poster boards down there, but those are the only items in that vault (V11/1979-80). They do not have any evidence other than what is in these two vaults, and have never stored any evidence off-site to her knowledge (V11/1980). She did not search under Von Etter's name, but they would not maintain any evidence unless there had been a case filed in that name and a trial where the evidence had been admitted (V11/1971, 1983-84).

Terry Wolfe, Tenth Circuit State Attorney investigator, testified that the state attorney's office does not maintain any physical evidence from this case (V11/2025, 2021, 2043). Wolfe maintains evidence in Sebring in a steel locker about six by three feet; he looked there, then went to Bartow and reviewed two boxes

of the case file, but found no evidence from this case (V11/2027, 2029). He reviewed the evidence log with another investigator that was custodian of the Bartow evidence room (V11/2027). He checked prosecutor Hardy Pickard's office but again did not find any evidence (V11/2027). Wolfe was searching for anything under the names of Kelley or Sweet or their respective case numbers (V11/2030-31).

Wolfe had been with the office at the time of Kelley's trial but did not actively participate, he just assisted with witness coordination (V11/2026, 2028). He noted that Sebring did not have an evidence locker in 1984 and there was no evidence maintained in the office evidence room in Bartow dating before 1992 (V11/2031). The oldest evidence in Wolfe's Sebring locker was audiotapes from a 1989 homicide; there was no actual physical scene evidence of any kind in the locker (V11/2040-41). Generally, the evidence maintained by the state attorney relates to economic crimes investigations rather than any trial being prosecuted (V11/2039-40).

Kelley's attorneys were permitted to call Sebring Assistant State Attorney Steve Houchin, who directs the south counties office for the Tenth Circuit, and had been representing the State with Ms. Avalon at the hearing (V10/1920-22; V11/2050-51). Mr. Houchin had retrieved the boxes of case files for this case from the Sebring file room and delivered them to Investigator Wolfe to deliver to

Ms. Avalon in Bartow (V11/2052). He confirmed that there were no other files from this case in the file room (V11/2053). He noted that the state attorney does not keep items of evidence; if admitted into evidence, they are maintained by the clerk of the court, and if not admitted at trial, they are retained by the local investigating agency (V11/2055).

The defense also presented Dr. Martin Tracey, a population genetics expert, who testified that DNA testing can be conducted on any liquid tissue that contains cellular material; blood and saliva are common sources, but DNA can also be found in hair, skin cells, and even teeth and bones (V11/1959-63). Dr. Tracey offered no opinion as to the availability of DNA testing on any of the items requested to be tested in Kelley's motion.

The trial court denied the motion for DNA testing on July 5, 2006 (V9/1754-61). The court specifically found that the State had met its burden of establishing that this evidence no longer existed (V9/1760). This appeal followed.

SUMMARY OF THE ARGUMENT

The court below properly denied Kelley's motion for DNA testing. Kelley failed to offer good cause to permit pre-hearing discovery and was given adequate notice prior to the start of the hearing. His right to due process in postconviction was not violated by the litigation of his DNA motion. The court complied with the mandate of Rule 3.853 and determined, following evidentiary hearing, that no evidence which could be subject to DNA testing exists. As the evidence presented fully supports that finding, Kelley is not entitled to any relief in this appeal.

ARGUMENT

ISSUE I

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

Kelley initially challenges the trial court's ruling denying his request for pre-hearing discovery on his DNA motion. Specifically, he asserts that he provided good cause and should have been allowed to "fully discover and depose witnesses involved in this case at the time of the crime and trials." (Appellant's Initial Brief, p. 18). This claim must be denied for a number of reasons.

First of all, Kelley has not particularly identified the discovery in which he would engage if given the opportunity. In his motion for DNA testing, he requested leave to pursue public records requests under Florida Rule of Criminal Procedure 3.852, but his brief makes no claim of entitlement to additional public records and therefore he has abandoned that pursuit on appeal. His brief suggests that he should be permitted to depose *all* prior records custodians, presumably for any local or state agency that might ever have conceivably possessed the physical evidence collected in 1966 (Appellant's Initial Brief, p. 22). In the court below, Kelley requested the opportunity to depose all witnesses identified by the State as potentially having knowledge as to the existence of the evidence, as well as any other witnesses that

might be identified by the known witnesses as having potential knowledge, as well as any former custodians from 1966 or 1976 (V9/1688-89). At any rate, exactly whom he would purport to depose, and what information could be revealed, is not specifically identified.

A ruling to deny or limit discovery in postconviction is subject to an abuse of discretion standard; the burden is on Kelley to demonstrate such abuse. State v. Lewis, 656 So. 2d 1248, 1250 (Fla. 1995). Postconviction discovery should be granted only where good cause is demonstrated. Id. In this case, no good cause for the granting of pre-hearing discovery has been offered.

In Lewis, this Court identified the following factors to guide a determination as to whether to grant discovery: the issues presented, the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts. It has been twenty-three years since Kelley's conviction, and the only issue at this point is narrow and straightforward. Kelley has been free to investigate the existence of any physical evidence since before his 1984 trial, and has claimed to have done so in litigating issues relating to destruction of the evidence. The information that the witnesses had concerning their searches for any remaining evidence was provided to the defense through correspondence nearly a month

before the evidentiary hearing, and any necessary follow up could have been easily secured without the need for a formal deposition; defense counsel could have simply contacted these witnesses directly with any questions, or could have requested further information from either Ms. Avalon or undersigned counsel. There has been no suggestion that the State instructed any of these witnesses not to cooperate with defense counsel. As these witnesses needed to testify at the evidentiary hearing, the inconvenience of providing the same information under oath in a separate formal deposition is not justified by the defense's desire to prolong the litigation of his DNA motion. Thus, all of the factors identified in Lewis favor denial of his request for discovery.

In Bracy v. Gramley, 520 U.S. 899 (1997), the United States Supreme Court considered whether good cause had been demonstrated to permit discovery in a federal habeas proceeding. In Bracy, the defendant was pursuing a claim of judicial bias based on the judge's established involvement in corruption, and he wanted to depose his state court judge. The Court described the standard as having been met "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief," quoting Harris v. Nelson, 394 U.S. 286, 299 (1969). Bracy, 520 U.S. at 908-09. The Court also observed that the

accepted presumption that public officials properly discharge their duties had been soundly rebutted in that case, as the judge had been convicted of numerous bribery offenses. Id. The Court concluded that, in light of the facts presented, discovery should have been permitted.

In contrast, in the instant case, there are no specific allegations that could be developed into facts demonstrating that this evidence still exists or that Kelley may be entitled to any relief. Kelley merely asserts that the evidence was collected in 1966, and that he and his attorneys are not convinced that it does not still exist somewhere. There is no basis to suggest that any records or evidence custodian failed to discharge their official duties in any manner; to the contrary, the evidence presented below establishes that the custodians have taken their responsibilities seriously and acted professionally at all times.

The necessary predicate of good cause precludes granting discovery simply to authorize a fishing expedition based on nothing but speculation. Glock v. Moore, 776 So. 2d 243, 253-54 (Fla. 2001) (finding defendant failed to make necessary showing of good cause for public records characterized as a fishing expedition); Ward v. Whitley, 21 F.3d 1355, 1367 (5th Cir. 1994) (noting speculation will not support finding of good cause for discovery). Similarly, Rule 3.853 does not provide authority for courts to oversee unending searches for evidence which, by all accounts, no

longer exists. The court below found that, "[t]o follow the arguments of Mr. Kelley's counsel to their logical conclusion, the search would never end" (V9/1760). On these facts, granting open-ended pre-hearing discovery was not compelled and would only serve to further delay finality in a case which should have been concluded years ago.

Notably, Kelley has not even attempted to identify any possible prejudice from the denial of his request to depose witnesses. As to those witnesses that testified at the evidentiary hearing below, he has offered no showing of surprise or prejudice to the defense premised on the witnesses having testified without being deposed. Several weeks before the hearing, Kelley's attorneys were provided information as to who the witnesses would be, as well as correspondence addressing their respective searches for physical evidence. The testimony presented was consistent with the representations that had been made weeks earlier. As to any other possible witness, Kelley does not identify any particular individual with relevant knowledge or show that such a person is alive and available for deposition. No abuse of discretion can be found on these facts. See Rodriguez v. State, 919 So. 2d 1252, 1279-80 (Fla. 2005) (upholding denial of pre-hearing discovery in postconviction where defendant was provided access to witness information and was not surprised by testimony provided at subsequent evidentiary hearing).

Kelley's reliance on Spaziano v. State, 879 So. 2d 51 (Fla. 5th DCA 2004), is misplaced. Kelley suggests that Spaziano requires discovery where the defendant has reason to believe that evidence still exists, the State represents that the evidence has been destroyed, the court cannot discern what efforts have been made to find the evidence, and the record does not contain documents establishing the destruction of the evidence (Appellant's Initial Brief, pp. 20-21). However, Spaziano did not purport to set parameters for the granting of discovery in cases seeking postconviction DNA testing, but merely applied Lewis to the facts before that court. In Spaziano, the motion for DNA testing was denied upon the State's oral representation that none of the requested items existed. Because the State's representations were equivocal, the district court concluded that further consideration of that issue was warranted. The court remanded, noting it appeared that Spaziano should be entitled to conduct discovery to determine whether any physical evidence still existed. The court noted, however, that the discovery should be restricted and governed by the principles noted above from Lewis.

Even if these factors were dispositive, they support the denial of relief in this case. As to Kelley's belief that the evidence exists, that belief is based solely on the fact that there was physical evidence recovered from the scene in 1966. Given the history of this case, any belief that this evidence still exists is

not based on reason and can only be characterized, at best, as speculative. Such speculation does not equate to a reasonable belief that the evidence exists. In the instant case, the court conducted an evidentiary hearing on the issue, and therefore the record fully establishes the vast efforts undertaken to find any evidence. A remand at this time to allow depositions of unspecified persons would serve no purpose other than delay.

Kelley's claim that the denial of pre-hearing discovery "effectively deprived Kelley of his statutory right to DNA testing" (Appellant's Initial Brief, p. 23), is also not persuasive. Courts are under no obligation to permit broad discovery based on speculation which, given the history of this case, is dubious at best. Moreover, as will be seen, Kelley's motion for DNA testing failed to establish that any possible testing could exonerate him. Therefore, this case does not fall within that class of cases in which DNA testing can be required by statute or Rule 3.853.

On the facts of this case, the trial court's denial of pre-hearing discovery was not an abuse of discretion. As Kelley has failed to demonstrate any error, this Court must affirm the ruling entered below on this issue.

ISSUE II

WHETHER KELLEY WAS DENIED DUE PROCESS DUE TO INADEQUATE NOTICE OF THE EVIDENTIARY HEARING.

Kelley also disputes the trial court's refusal to continue the evidentiary hearing, asserting that he did not have sufficient notice of the hearing, resulting in a denial of his right to due process. A review of the record establishes that this argument has not been preserved for appellate review. At no time during the course of the proceedings below did Kelley inform the court that he believed that his constitutional rights were being violated due to a lack of adequate notice of the June 6 hearing. Moreover, as Kelley was provided with adequate notice and an opportunity to be heard at the evidentiary hearing, no due process violation can be found in this case.

Kelley only requested additional time before the June 6 hearing in one instance. Following the denial of the State's motion to continue the hearing after telephonic conference, Kelley filed an Emergency Motion for Reconsideration, Motion for Continuance, and Motion for Stay of Proceedings on May 15, 2006 (V9/1684-94). That motion did not allege any infringement on Kelley's due process rights, it only asserted that additional time was necessary in order to secure and complete discovery before the hearing. Kelley did not object at the beginning of the evidentiary hearing, did not indicate that he had been denied an adequate

opportunity to prepare, and did not suggest to the court that he needed additional time for any reason.[2] Thus, this argument must be denied as procedurally barred. Kokal v. State, 901 So. 2d 766, 778-780 (Fla. 2005) (finding postconviction due process claim to be procedurally barred where specific issue had not been presented to trial court).

In addition, Kelley has not offered the appropriate standard of review on this issue. Because Kelley did not present this issue, there is no lower court ruling to be reviewed. Kelley asserts that review is *de novo*, since the question presented involves the application of due process, citing Trotter v. State, 825 So. 2d 362 (Fla. 2002). The issue in Trotter was whether due process applied to Trotter's resentencing proceeding, a pure question of law. The instant case does not present a question of whether due process *applies*, but whether due process was *violated* on the facts of this case. This is necessarily a factual rather than legal question and therefore, had the question been presented, it would be reviewed for an abuse of discretion.

To the extent that this Court may review Kelley's claim for fundamental error, clearly no relief is warranted. Due process is

[2] After two witnesses had testified, Kelley objected to the proceeding, renewing his claim that a continuance should have been granted in order to allow time for depositions (V10/1837). Counsel renewed that objection during and after the hearing, requesting that the matter be continued so that discovery could be undertaken (V10/1881; V11/2064-65). Even at those times, no due process claim was ever asserted.

a flexible concept, calling only for such procedural protection as required by a particular situation. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). This Court has held that, in postconviction proceedings, "all that due process requires is that the defendant be provided meaningful access to the judicial process." Kokal, 901 So. 2d at 778. Kelley has not been denied meaningful access to the judicial process. At the hearing, he was represented by no less than four attorneys, who managed to draft a number of pleadings for filing, including a 24-page "Pre-Hearing Brief" (V9/1719-1742), as well as litigating an extraordinary writ in this Court when the lower court declined to stay the proceedings (V9/1752-53); Kelley v. State, 933 So. 2d 521 (Fla. 2006). His attorneys were able to arrange for his appearance by telephone, which was his preference over attending the hearing in person (V9/1701-02; V10/1770-71). They were also able to secure an expert witness to discuss general principles of DNA testing (V11/1959-66).

Kelley has not suggested how much notice he would consider "adequate" for the proceeding at issue, only that learning "several weeks"[3] prior to the hearing was not sufficient and violated due process. He cites three cases where due process violations were found: Borden v. Guardianship of Borden-Moore, 818 So. 2d 604 (Fla. 5th DCA 2002), where a guardian proceeding was dismissed

[3] The court's order of April 19, 2006, directed that a hearing would be held on June 6, 2006, in order to address the existence and location of any evidence (V9/1680-83).

without any notice or hearing, in violation of applicable probate rules; May v. State, 623 So. 2d 601 (Fla. 2d DCA 1993), where a juvenile contempt order was reversed as no order to show cause was ever issued, in violation of applicable juvenile rules; and Knapp v. State, 370 So. 2d 38 (Fla. 3d DCA 1979), where no facts are offered but the court merely concludes that the defendant was not given proper and adequate notice before his violation of probation hearing. In sharp contrast in the instant case, notice was not only provided to Kelley's attorneys well in advance of the hearing, but the witnesses and information to be presented were also disclosed. No due process violation has been shown in this case.

To the extent that Kelley's argument can be construed as a challenge to the lower court's denial of his May 15 motion to continue, such an issue is reviewed for an abuse of discretion. Kearse v. State, 770 So. 2d 1119, 1127 (Fla. 2000). The court's ruling must be sustained "unless no reasonable person would take the view adopted by the trial court." Scott v. State, 717 So. 2d 908, 911 (Fla. 1998). Clearly no abuse of discretion is presented with this ruling in this case.

Kelley filed his motion for postconviction DNA testing on January 16, 2006 (V1/1-38). Within the motion, Kelley asserted that he should be granted leave to amend his motion through July 1, 2006, as that was, at the time, the deadline for filing such a motion (V1/28-30). Kelley acknowledged that he would not have

filed his motion until that date, except for the fact that the Governor's office had advised it was reviewing the case for purposes of signing a warrant (V1/28-30). At every possible stage in the proceedings below, Kelley sought to delay the instant litigation. He even sought a stay of proceedings in this Court, to no avail.

On April 19, 2006, the court below issued an order denying Kelley's request for leave to amend his DNA motion and denying his request to pursue additional public records under Florida Rule of Criminal Procedure 3.852 (V9/1695-97). The order directed that a "preliminary" hearing be conducted on June 6, 2006, in order to address the "existence and location of the physical evidence at issue" (V9/1697). The State filed a motion to continue the hearing, citing scheduling conflicts (SR V4/595-96). A telephonic hearing was held on May 10, 2006, and the motion to continue was denied (SR V4/597-610). Thereafter, Kelley's motion for reconsideration and to continue the June 6 hearing was filed. The sole justification offered for the continuance was the alleged need to conduct discovery (V9/1684-98). Following another telephonic hearing, that motion was denied on May 26, 2006 (V9/1703-04).

In Kearse, this Court upheld the denial of a motion to continue which, as in this case, requested additional time to conduct postconviction discovery. This Court noted that generally, even in death penalty cases, an abuse of discretion in the denial

of a continuance will only be found where the ruling results in undue prejudice to the defense. Kearse, 770 So. 2d at 1127. In this case, Kelley has not even attempted to identify any prejudice from the trial court's ruling. The closest he comes is his assertion that he "was unable to reasonably investigate and determine the existence of relevant evidence that could exonerate him" (Appellant's Initial Brief, p. 25). Absent some indication of what such investigation would entail, this Court has no basis to find that any prejudice occurred. In fact, in the six months between the filing of his motion and the evidentiary hearing, Kelley's attorneys made no attempt to participate in the State's investigation and even refused to speak with Ms. Livingston when she attempted to get information about the case (V10/1945-47; V11/1984, 2017). Given Kelley's consistent position that he has no obligation to find this evidence and that it is the State's responsibility to explicitly account for each item of evidence collected over forty years ago, it is difficult to imagine what, if any, reasonable investigation he would undertake. See Scott, 717 So. 2d at 912 (no abuse of discretion in refusing to continue postconviction hearing to permit counsel to depose witnesses).

As no prejudice has been identified or demonstrated due to the timing of the evidentiary hearing below, no abuse of discretion can be found. Once again, Kelley is not entitled to any relief.

ISSUE III

WHETHER THE COURT ERRED IN FINDING THAT DNA EVIDENCE NO LONGER EXISTS.

Kelley's final issue disputes the trial court's finding that no DNA evidence exists to be tested in this case. This determination was made following an evidentiary hearing, and therefore the standard of review is whether there is competent substantial evidence to support that factual determination. Stephens v. State, 748 So. 2d 1028, 1031 (Fla. 1999) ("competent substantial evidence" standard applies to the trial court's factual findings). As the court's finding in this regard is fully supported by the evidence presented below, no relief is warranted on this issue.

Kelley does not provide any reasonable basis to believe that any of this evidence still exists, he simply maintains that more can be done to search for it. The record in this case demonstrates that any evidence potentially suitable for testing was destroyed many years ago, and Kelley himself was aware of that prior to filing the instant motion. In 1976, the evidence admitted into trial against John Sweet was destroyed in accordance with a court order, following Sweet's discharge on speedy trial grounds (V1/49-54). This evidence included the sheet which was wrapped around Maxcy at the time of the murder, part of Maxcy's shirt, a tire from Maxcy's car, and a bullet (V6/1151-54). The destruction of this

evidence has been a hotly contested issue since the 1984 trial, and relief has been consistently denied. See Kelley, 569 So. 2d at 756; Kelley, 377 F.3d at 1333.

Kelley's current motion sought testing on other evidence, secured during the course of the investigation and submitted to the Florida Sheriff's Bureau (predecessor to the FDLE) and described in reports generated from the lab testing previously conducted (V1/14-15, 62-76). Specifically, Kelley identified thirty exhibits noted in the lab reports, and requested testing on those items (V1/14-15, 62-76). However, Kelley has repeatedly asserted in state and federal court that this evidence was also lost or destroyed (V6/1074, 1085, 1088-89, 1135, 1140, 1151-54, 1185; V7/1209, 1213, 1244-47, 1284, 1338-39; V8/1569-76); see also Kelley, 569 So. 2d at 756.

The supplemental brief filed in Kelley's direct appeal described these items as encompassed within his original destruction of evidence claim (V6/1074, 1085, 1088-89). The investigative reports cited in Kelley's current motion had been provided to his defense team years ago, and they were submitted as exhibits to his initial motion to vacate filed in 1987. That motion noted that this evidence, like the evidence admitted against Sweet, had been destroyed prior to trial (V6/1135, 1140, 1151-54, 1185). The motion challenged both the destruction of this investigative evidence and the effectiveness of Kelley's attorneys

in investigating all of the destruction of evidence issues presented during the trial (V6/1135, 1140). At the evidentiary hearing on the motion, testimony was presented that this evidence, like that from Sweet's trial, had been destroyed prior to Kelley's trial (V7/1209-17; SR V3/494).

In his postconviction appeal, Kelley continued to maintain that this evidence was gone, and this Court affirmed the denial of postconviction relief:

> Kelley first argues that the state's destruction of material evidence prior to his trial deprived him of his constitutional rights. In the prior appeal, this Court explained that because the case involving Maxcy's death had been closed for many years, the state obtained an order permitting the destruction of evidence. Several years later, the state initiated the prosecution of Kelley when new evidence came to light. This Court concluded that the state had not been negligent in causing the destruction of evidence and further held that the destruction of the evidence in question did not prejudice Kelley's case.
>
> Kelley now argues that certain crime scene evidence was destroyed which was not encompassed within this Court's earlier ruling. However, it appears that many of the items characterized as "additional evidence" were discussed in a supplemental brief in Kelley's original appeal. Thus, while our opinion did not specifically discuss such additional evidence, it is clear that the issue was decided adversely to Kelley. Further, in affidavits submitted in support of the motion for postconviction relief, Kelley's trial counsel admitted knowing that the fruits of the police investigation had been destroyed. The state was not at fault in the destruction of the evidence. *Kelley,* 486 So.2d at 581. The destruction of evidence in this case did not deprive Kelley of due process of law. *See Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (unless defendant shows bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process).

Kelley, 569 So. 2d at 756. Moreover, as noted above, the referenced affidavits were not only offered as exhibits to the motion to vacate, but were admitted into evidence at the postconviction hearing (SR V3/494, 506-07).

Kelley's defense team continued to investigate the issue. In federal court, Kelley offered the testimony of Fred Michelle, a public defender investigator and former evidence custodian for the Highlands County Sheriff's Office (V9/1660-63). Mr. Michelle indicated that, at the time that the evidence from the Sweet trial had been destroyed, the sheriff's office had space available and may have agreed to store this evidence from the court if additional storage space was needed (V9/1661-62).

Despite this history, the court below undertook to determine whether any possible physical evidence could still exist. At the evidentiary hearing held on the DNA motion, extensive testimony was presented from representatives of the Florida Department of Law Enforcement, the Highlands County Sheriff's Office, the Medical Examiner's Offices for Districts 10 and 20, the Office of the Clerk of the Circuit Court, and the State Attorney's Office. Each of these agencies diligently conducted new searches for the described items upon request by the state attorney's office following receipt of Kelley's DNA motion in January, 2006.

From FDLE, Forensic Services Director Sue Livingston in Tallahassee and John King, Special Agent Supervisor in the Sebring

regional office, discussed their attempts to locate the evidence and any information on what may have happened to it (V10/1922-23, V11/1997-98). Ms. Livingston discovered four disposition forms which established that the physical evidence submitted to the Florida Sheriff's Bureau had been returned to the Highlands County Sheriff's Office (V10/1926-27, 1947). She noted that this has always been standard practice for any evidence received for laboratory testing (V10/1926). She also reviewed the inventory records from the evidence vault, which typically only maintains evidence in cases actually investigated by FDLE; these records are audited on a regular basis for accuracy, and established that no evidence from this case was kept in the vault (V10/1940-41, 1950-51, 1954). Agent King also searched the FDLE Sebring office, which did not exist in 1966, and confirmed that there are no files and no evidence from this case there (V11/1999, 2006).

From the Highlands County Sheriff's Office, records custodian Tina Barber and the supervisor of property and evidence, Cecilia High, both testified about their efforts to locate any evidence from the Maxcy investigation (V10/1795-96, 1815-16). In light of the FDLE records indicating the relevant items had been returned to the sheriff's office, this would seem the most likely location of any remaining evidence. Barber and High both searched extensively for the evidence or any records providing information on its existence (V10/1795-1813, 1815-36). All physical evidence

maintained by the sheriff is located in one secure storage area (V10/1820, 1832). Items are stored in sealed boxes, labeled by the sheriff's case number (V10/1822, 1836). She searched under Kelley's case number, and contacted central records to try to identify any other possible case numbers (V10/1822-23). Because the office has changed the case numbering system, she looked through everything in an attempt to locate anything using a case number that did not correspond to the current system; she could not find anything (V10/1823-24). They only have evidence on a small number of cases prior to 1985, and she physically opened the sealed boxes from those cases to make sure nothing relating to this case had been misfiled or mislabeled (V10/1833-34). None of the old cases she searched went back to 1966; the oldest evidence she found dated to the late 1970s (V10/1827, 1836).

Chief Medical Examiner Dr. Marta Coburn, from District 20, testified about her search for any evidence relevant to this case (V10/1838-39). Although the autopsy in the case had been conducted by a private pathologist and the medical examiner system was not adopted statewide until 1971, Dr. Coburn and her staff went through "absolutely everything" in her office, including the actual specimen blocks, slides, x-rays, and paper files from older cases (V10/1841-42, 1848-49, 1874). Other than some 1969 x-rays on an unrelated case, there was nothing in her office dating prior to 1971 (V10/1874).

The office manager for the District 10 Medical Examiner confirmed that no evidence from this case was in their possession (V10/1885). She searched through the Rolodex which contains index files going back to 1970; she and an assistant reviewed each card to make sure the case had not been misfiled (V10/1897, 1916). They also went manually through the older case boxes, starting in 1970, even though she had previously inventoried all of the files as cross referenced on the index cards in conjunction with an office move in 2003 (V10/1893, 1909, 1913). She noted that the lab generally only stores blood for a year or two, and that most evidence, such as fingernail scrapings, is collected by law enforcement at the time of the autopsy (V10/1885, 1910).

The evidence custodian for the Highlands County Clerk of Court was also asked to search for any physical evidence related to this case (V11/1967-68). She testified that she retrieved the box from the evidence vault related to Kelley's case and inventoried its contents; every exhibit that had been admitted at trial was accounted for, and there is no evidence which is not labeled anywhere in the vault (V11/1968-69, 1973).

State attorney investigator Terry Wolfe searched the small evidence locker he maintains in Sebring, and made two trips to the Bartow office to try to locate any physical evidence relating to this case, to no avail (V11/2025, 2027, 2034-35). Assistant State Attorney Steve Houchin, in the Sebring office, confirmed that the

state attorney did not generally maintain any evidence and that he had given all of the files in this case to Wolfe (V11/2052-53, 2055).

It is apparent from the nature of the items identified that this evidence would not be easy to overlook. For example, among the evidence collected was a car steering wheel, brake pedal, floor mat, and car door sill and window channel (V1/14-15, 62-76). Similarly, any biological specimens are not going to be simply tucked away in a paper file or cardboard box.

Kelley's position is that the State did not meet its burden of proving that this evidence no longer exists, because at the evidentiary hearing, defense counsel was able to suggest other searches that had not been conducted. Based on this, he repeatedly characterizes the searches as "incomplete" (Appellant's Initial Brief, pp. 15, 17, 27, 32). The specifics of the testimony about possible additional searches reveal the frivolity of this claim. For example, Kelley would have the medical examiners offices conduct additional searches by looking for files maintained under Kelley's name as well as the names of other individuals known at the time of the investigation, including John Sweet, Irene Maxcy, Andrew Von Etter, and Charles Busias (V10/1857, 1898). Kelley would have these additional searches undertaken although the testimony clearly established such offices only keep case files by the decedent's name (V10/1876, 1915). Similarly, Kelley would have

custodians at the circuit court clerk's office run searches for any evidence stored under other names such as Von Etter and Irene Maxcy, despite the fact that no charges were ever filed against Von Etter and Irene Maxcy had only been charged in Polk County; the clerk testified that, if a person had not been tried in Highlands County, trying to find evidence admitted under that person's name would be a waste of time (V11/1971, 1982, 1983-84).

Kelley's brief is unfortunately misleading on the nature of the searches conducted or potentially still available. For example, he asserts that Ms. Livingston "candidly admitted there could be files of evidentiary value in the Tallahassee Regional Operating Center, but she did not look there" (Appellant's Initial Brief, p. 13). In fact, Livingston testified that she did not search for any investigative files in this case because she was attempting to locate evidence, which would have been submitted and noted only in the lab files; that any evidence maintained in their investigation division would be kept in an evidence vault; that although she is in charge of the laboratory, she has access to the investigative vault and in fact her office routinely audits the vault to ensure that the records of what is stored in the vault are accurate; and that she reviewed those records and determined there was nothing from this case stored in the vault (V10/1936, 1940-41, 1950-51, 1954-55). It is readily apparent that the "complete" searches Kelley maintains should be conducted would necessarily be

fruitless. As the court below observed, the only search that would satisfy Kelley would be one which never ends.[4]

Even if it were possible that any of this evidence could still exist, the record affirmatively establishes that no relief would be warranted. The investigative reports indicate that a number of the items were previously subjected to preliminary testing. The FSB reports reveal the following about these exhibits: Ex. 3, 4, 5, and 9 provided known samples from the victim; Ex. 9 established the victim's blood type as O (V1/62, 68, 70). The carpet samples (Ex. 12, 13, 14), victim's clothes (Ex. 17, 26, 27, 28), comb (Ex. 15), and handkerchief (Ex. 16), revealed the presence of blood, type "O" (there is no typing indicated of the blood found on the victim's shirt and trousers in the paper bag, Ex. 17) (V1/62-63, 68-69, 71-72). The fingernail scrapings (Ex. 6), were microscopically examined and no material of evidentiary value was noted (V1/62, 68, 70). The scrapings from the bedroom wall (Ex. 7), included blood and a hair microscopically similar to the victim's head hair (V1/62, 68, 70). The scrapings from the hole in the wall (Ex. 8), did not contain anything which appeared to have evidentiary significance (V1/62, 68, 70). The metal fragments from Maxcy's head (Ex. 24), were five pieces of lead, and there were hairs generally similar to hair samples from the victim found on the

[4] Even if some individual were to step forward and claim to have any of this evidence at this point, it is questionable that a sufficient chain of custody could be established to permit its admission, which must be considered under Rule 3.853(c)(5)(B).

wrist watch (Ex. 33) (V1/69, 71-72). The remaining items were microscopically and/or chemically tested for the presence of blood, but no staining was observed, including the brake pedal (Ex. 10), the scrapings from outside the left car door (Ex. 21), the front floor mat (Ex. 22), the car keys (Ex. 29), the car door sill (Ex. 30), the car door window channel (Ex. 31), the steering wheel (Ex. 38), the 7" paring knife (Ex. 35), the 11" buck knife (Ex. 36), and the stainless steel pocketknife (Ex. 39) (V1/62-63, 68-70, 72).

Most of the items described would not contain any bodily fluid or tissue as necessary for DNA testing (V11/1962). Kelley presented an expert below to discuss general principles of DNA testing, but did not elicit any testimony that any of the items he has identified would be suitable for such testing. There is no reasonable suggestion that DNA testing could even be performed on Exhibits 8, 10, 21, 22, 24, 29, 30, 31, 35, 36, 38, 39, or Q-1 and K-1. There was no staining or any indication of the presence of bodily fluid or tissue on these items, and Kelley fails to offer any explanation as to how DNA testing could even be accomplished on these exhibits. The other exhibits were presumptively tested for evidentiary value at the time of the investigation, using the same screening tests available today; the only blood and hair discovered was consistent with the victim. The fact that any evidentiary value was excluded years ago further defeats Kelley’s claim.

Finally, the existence of this evidence is legally irrelevant

since, as a matter of law, it cannot exonerate Kelley. On the facts of this case, he cannot meet his burden of demonstrating that any physical evidence collected during the investigation could be subjected to DNA testing which would lead to his exoneration. See Fla.R.Crim.P. 3.853 (c)(5)(C). Because none of the physical evidence Kelley cites would be capable of exonerating him under any scenario, he is not entitled to any relief regardless of the availability of this evidence.

Pursuant to Rule 3.853, Kelley had the burden of demonstrating the probative value of each piece of evidence which he is seeking to be tested. Robinson v. State, 865 So. 2d 1259, 1264-65 (Fla.) (noting rule requires defendant to allege with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of an acquittal or a lesser sentence; "It is the defendant's burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence), cert. denied, 540 U.S. 1171 (2004); see also Cole v. State, 895 So. 2d 398, 402-03 (Fla. 2004).

Kelley attempted to meet this burden by alleging that any DNA evidence will fail to incriminate him (V1/20-21). Kelley's position is that, should DNA testing fail to substantiate his presence at the scene, he will be legally exonerated. Kelley misunderstands the meaning of exoneration; the evidence must

affirmatively prove his innocence, providing a reasonable probability of an acquittal or reduced sentence in the event of a new trial with the DNA evidence. Fla.R.Crim.P. 3.853 (c)(5)(C). His motion was insufficient because it does not explain how any DNA testing could affirmatively prove that Kelley was not involved in Maxcy's murder or otherwise lead to an acquittal or reduced sentence.

Kelley's theory of potential exoneration is pure speculation. It is well established that speculation cannot support the granting of relief under Rule 3.853. Hitchcock v. State, 866 So. 2d 23, 26 (Fla. 2004). Kelley has not provided an adequate basis to establish a "reasonable probability" that DNA testing could lead to his exoneration. In fact, no such conclusion is legally available on the facts of this case.

This case does not present a factual scenario where DNA testing could provide any benefit. There were two perpetrators at the crime scene. Mr. Kelley was observed wearing one glove, and another glove was observed in the bag he carried into the Maxcy home. The victim, Von Maxcy, was killed in his own home, and his car was then driven to a public parking lot. Unlike a murder which may involve, for example, a sexual battery where the perpetrator necessarily leaves incriminating physical evidence at the scene, the facts of this case would not permit an exoneration, regardless of what DNA left at the scene could be tied to any single

individual.

In Van Poyck v. State, 908 So. 2d 326 (Fla. 2005), this Court upheld the denial of a request for DNA testing. Van Poyck and his codefendant Valdez had both been sentenced to death for the murder of a corrections officer during an escape attempt. Van Poyck had requested postconviction DNA testing of all of the clothing worn by himself and Valdez, asserting that the DNA evidence would establish that Valdez was the triggerman, thus mitigating Van Poyck's sentence. In denying relief, the Court concluded that identity of the triggerman would not exonerate Van Poyck or mitigate his sentence. See also Sireci v. State, 773 So. 2d 34, 43-44 (Fla. 2000) (noting even if DNA on hairs found in motel room belonged to codefendant, Sireci is not exculpated).

The DNA testing that has been requested in this case can only lead to four possible results. If inconclusive, the evidence cannot provide exoneration because it has no probative value. The same is true if the evidence can only be matched to the victim. See Ross v. State, 882 So. 2d 440, 441 (Fla. 1st DCA) (finding blood and hair evidence linked only to the victim did not exclude defendant from having been present at scene and therefore did not exonerate him), rev. denied, 892 So. 2d 1014 (Fla. 2004). If the evidence included DNA that could be linked to Kelley, he would be further incriminated rather than exonerated. Finally, DNA could be located which cannot be linked to Kelley or the victim. However,

even this possibility does not exonerate Kelley. See Harris v. State, 868 So. 2d 589, 590 (Fla. 3d DCA) (finding defendant not exonerated by fact that semen in rape kit was not his), rev. denied, 880 So. 2d 1211 (Fla. 2004); Galloway v. State, 802 So. 2d 1173 (Fla. 1st DCA 2001) (denying DNA testing where it would not establish that defendant was not present at scene; "The fact that only appellant's co-defendant's [sic] may have deposited DNA at the crime scene or on the body of the victim does not mean that appellant was not there"). Particularly since Maxcy did not live alone, the presence of DNA which is not linked to him or Kelley at the residence/crime scene would be insignificant and does not raise a reasonable question as to Kelley's guilt. Compare Tompkins v. State, 872 So. 2d 230, 243 (Fla. 2003) (upholding denial of DNA testing where, even if analysis indicated a source other than victim or defendant, there is no reasonable probability of a different result); King v. State, 808 So. 2d 1237, 1247-49 (Fla. 2002) (same). Thus, Kelley cannot be exonerated under any circumstance.

Kelley asserts that, because Maxcy was engaged in a close-contact struggle with his killers, there is a reasonable probability of finding their DNA at the crime scene (V1/21). There is no basis in law or fact for this speculation. As explained above, even a lack of DNA evidence would not exonerate Kelley. The jury was aware, through Deputy Murdock's testimony, that Kelley's

fingerprints were not found at the scene, yet this lack of evidence was no more probative of innocence than an inability to place Kelley at the murder through DNA.

Although Kelley maintains his innocence, his identity as one of Maxcy's killers cannot be reasonably disputed. Further, it is well established that DNA testing should be denied where it will shed no light on the defendant's guilt or innocence. See Huffman v. State, 837 So. 2d 1147, 1149 (Fla. 2d DCA 2003); Zollman v. State, 820 So. 2d 1059, 1063 (Fla. 2d DCA 2002). Since any possible DNA testing could not exonerate Kelley on the facts of this case, his motion was subject to summary denial. However, the court below granted an evidentiary hearing to explore the threshold question of whether any of the identified items still exists. The court's finding that it does not is supported by competent, substantial evidence. This Court must affirm the resulting denial of Kelley's motion for postconviction DNA testing.

CONCLUSION

Based on the foregoing facts, arguments and citations of authority, the decision of the lower court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Kevin J. Napper and Mac R. McCoy, CARLTON FIELDS, P.A., Corporate Center Three at International Plaza, 4221 West Boy Scout Boulevard, Suite 1000, Tampa, Florida 33607-57366; Sylvia H. Walbolt, Jim Wiley and Christine R. Davis, CARLTON FIELDS, P.A., 215 South Monroe Street, Suite 500, Tallahassee, Florida 32301-1866, this ____ day of March, 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

_____
CAROL M. DITTMAR
Senior Assistant Attorney General
Florida Bar No. 0503843
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813) 287-7910
(813) 281-5501 Facsimile

COUNSEL FOR APPELLEE