

IN THE SUPREME COURT OF FLORIDA

WILLIAM HAROLD KELLEY

Defendant/Petitioner,

v.

CASE NO.: SC06-\_\_\_\_

L.T. NO.: CR81-0535

STATE OF FLORIDA,

Plaintiff/Respondent.

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**PETITION SEEKING REVIEW OF NONFINAL ORDER  
IN DEATH PENALTY POSTCONVICTION PROCEEDING**

Petitioner, William Harold Kelley ("Kelley"), seeks review of a nonfinal order entered in a postconviction proceeding following imposition of the death penalty. Specifically, Kelley seeks review of a May 26, 2006, order of the Circuit Court of the Tenth Judicial Circuit in and for Highlands County, Florida. That order denied Kelley's request for discovery on his Fla. R. Crim. P. 3.853 Motion for DNA Testing. The final hearing on that motion was recently scheduled for June 6, 2006.

The court denied Kelley's request for pre-hearing discovery even though Kelley demonstrated good cause for needing it. Meanwhile, the court provided only a few weeks notice of the June 6 final hearing, leaving insufficient time to prepare. Only interlocutory review can correct the trial court's departure from the essential requirements of law and the resulting material harm to Kelley.

**I. BASIS FOR INVOKING THE JURISDICTION OF THIS COURT**

Kelley invokes the jurisdiction of this Court pursuant to Fla. R. App. P. 9.142(b) and Art. V, Sec. 3(b)(3) of the Florida Constitution. This Court has jurisdiction over interlocutory discovery orders issued during capital postconviction proceedings. Trepal v. State, 754 So. 2d 702 (Fla. 2000).

**II. NAME, DISPOSITION, AND DATES OF ALL PREVIOUS PROCEEDINGS RELATING TO KELLEY'S CONVICTION AND DEATH SENTENCE**

In 1984 Kelley was convicted of first degree murder and sentenced to death. This Court affirmed his conviction and sentence in 1986. Kelley v. State, 486 So. 2d 578 (Fla. 1986). The United States Supreme Court denied certiorari. Kelley v. Florida, 479 U.S. 871 (1986).

On November 20, 1987, Kelley moved to vacate the judgment and sentence pursuant to Fla. R. Crim. P. 3.850. Portions of the motion were summarily denied by the trial court on May 27, 1988. The court held hearings with respect to the remainder of Kelley's claims on July 18-19, 1988, and denied those claims on August 11, 1988. This Court affirmed in 1990. Kelley v. State, 569 So. 2d 754 (Fla. 1990).

On April 8, 1991, Kelley filed a petition for writ of habeas corpus in this Court. This Court denied the petition on March 12, 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 district court 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.2d 1317 (11th Cir. 2004). On November 22, 2000, the Southern District ordered evidentiary hearings on the outstanding issues presented by the petition. See id.

After the hearings, on September 19, 2002, the Southern District granted habeas relief, reversed the conviction, and ordered new trial based on significant Brady violations. Kelley v. Singletary, 222 F. Supp. 2d at 1367. The court again granted federal habeas relief on December 30, 2002, because of ineffective assistance of counsel. Kelley v. Singletary, 238 F. Supp. 2d 1325 (S.D. 2002).

On July 23, 2004, the Eleventh Circuit reversed and reinstated Kelley's conviction. Kelley v. Sec'y for the Dep't of Corr., 377 F.2d at 1333. The United States Supreme Court denied certiorari. Kelley v. Crosby, 125 S. Ct. 2962 (2002).

On January 17, 2006, pursuant to Fla. R. Crim. P. 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. App. A. On May 12, 2006, the trial court scheduled a final evidentiary hearing for June 6, 2006. That scheduled proceeding, without discovery and adequate notice, is the subject of this interlocutory appeal.

### **III. FACTS UPON WHICH KELLEY RELIES**

In his Motion for DNA Testing, Kelley described specific items of physical evidence that he believes still exist that may contain DNA capable of proving his innocence. That motion affirmatively requested, among other things, pre-hearing discovery to locate the DNA evidence he seeks to test. App. A.

The State's response contended Kelley failed to demonstrate the existence of physical evidence that may contain DNA that might exonerate him. App. B. The State asserted 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 exists.

Kelley thereafter requested that the 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." App. C. 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." App. D. The court did not otherwise address Kelley's request to conduct discovery prior to a full evidentiary hearing. The trial court, however, specifically declared that it was not then ruling on the merits of the request for pre-hearing discovery. Id.

Then came the order that led to this appeal. 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 Ninth Circuit Court. App. E. At a May 10, 2006, telephonic status conference 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 Ninth Circuit Court to make Ms. Avalon available for the June 6 evidentiary hearing.

The court thus orally denied the State's request for continuance. More importantly, the court for the first time instructed the parties to be available on June 6-7, 2006, for a final evidentiary hearing. The final hearing was to be held even though Kelley had not obtained the requested discovery.

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

Kelley filed an emergency motion requesting that the court reconsider its discovery ruling and continue the final evidentiary hearing. App. H. Kelley pointed out that he had requested only a preliminary hearing, the court's April 19 order had specifically stated the June 6 hearing was a "preliminary hearing," and neither party had yet requested a full evidentiary hearing. 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.

Kelley informed the court that he could not have reasonably understood that the court was contemplating that the June 6 hearing would be a final, two-day evidentiary hearing. Kelley also informed that 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. Kelley filed this appeal. App. I.

#### **IV. ARGUMENT**

##### **A. The trial court's order departs from the essential requirements of law.**

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." In re Amendment to Fla. Rule of Crim. Proc. Creating Rule 3.853, 807 So. 2d 633,

636 (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.

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 a vital component to a convicted defendant's ability to take full advantage of his or her right to DNA testing. Stated simply, denying a convicted defendant the ability to determine through discovery 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 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 needing the discovery. Lewis, 656 So. 2d at 1249-50. Upon that showing, the trial court may allow limited 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. App. A. While some evidence was destroyed several years ago, laboratory reports by the former Florida Sheriffs Bureau Crime Laboratory who investigated the crime described an abundance of other physical evidence gathered at the crime scene. Indeed, Kelley's Motion for DNA testing described 30 pieces of evidence of which he himself is aware that could contain DNA that proves his innocence -- physical evidence for which there has never been an accounting by the State. Id.; App. B.

Moreover, as Kelley pointed out in his motion, the only evidence against him was both circumstantial and inconsistent. The identity of the person(s) who murdered Mr. Maxcy has always been a genuinely disputed issue. App. A. 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. App. A. The State nonetheless has failed to conduct DNA testing on that suspect.

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 has set forth compelling reasons to believe that physical evidence exists that has never been tested for DNA, and which could demonstrate that Kelley is innocent. App. A. The State asserted below, in only a conclusory manner, that the evidence had been destroyed and, even if not all of it was destroyed, the State is unable to find it. App. B. Kelley needs to test those conclusory assertions. He needs pre-hearing discovery to determine whether the evidence still exists, where it is, and what investigation the State has made in that regard. Otherwise, he will be confronted for the first time at the hearing with whatever evidence the State chooses to present in support of its position that no evidence exists. See id.

For example, the State has identified its witnesses for the evidentiary hearing. App. J. Those witnesses appear to be current evidence custodians from various state agencies identified in Kelley's Motion for DNA Testing. Id. As current custodians, these witnesses likely have no personal knowledge concerning the handling and disposition of the evidence Kelley seeks to have tested. They may, however, have knowledge that could lead to discovery of such evidence.

Kelley should be permitted to depose these custodians before the evidentiary hearing so that he can, at the very least, identify, depose, and subpoena for hearing the 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 be required to discover through these witnesses only at his final evidentiary hearing that other individuals exist who have knowledge regarding this evidence -- a time by which he would be foreclosed from questioning these individuals and developing and presenting relevant evidence.

In short, the trial court's ruling effectively deprives Kelley of his statutory right to DNA testing. The pre-hearing discovery requested by Kelley is materially relevant to the central issues in this case, and discovery is crucial to his ability to prepare adequately for the full evidentiary hearing.

In addition, the court scheduled the final hearing within a few weeks of noticing it. The court wholly 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 presume 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.

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 departed from the essential requirements of law. See 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). Under this Court's precedent, limited discovery should be permitted upon a showing of good cause. Kelley has shown good cause. The trial court's ruling denying discovery effectively deprives Kelley of his statutory right to DNA testing.

**B. The trial court's order causes material injury for which there is no adequate remedy on appeal.**

The trial court's ruling creates material injury that cannot be adequately remedied on appeal. During the final evidentiary hearing on the merits of his motion, Kelley will be required to demonstrate:

- (1) whether evidence that may contain DNA exists;
- (2) whether the results of DNA testing of that evidence likely would be admissible at trial and whether there

exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing; and

- (3) whether there is a reasonable probability that he would have been acquitted or would have received a lesser sentence if the DNA had been admitted at trial.

Fla. R. Crim. P. 3.853(c)(5).

Without discovery to determine the existence and location of the DNA evidence, Kelley cannot establish the foregoing and his motion will be denied, thereby depriving him of his right to prove his innocence. For this, no remedy exists on appeal. Evidence may be inadvertently destroyed or disposed of in the interim, witnesses may die or otherwise disappear, and Kelley could be prevented from presenting the best evidence available in support of his Motion.

While ordinarily material harm does not result from the denial of discovery, it has been found when the discovery is crucial to the adequate preparation of the petitioner's case. Carroll Contracting, Inc. v. Edwards, 528 So. 2d 951 (Fla. 5th DCA 1988) (finding material injury from denial of discovery where there was no substitute for evidence sought). This material injury cannot be remedied on appeal "since there would be no practical way to determine after judgment" what the evidence would have been and how it would have affected the result. Travelers Indemnity Co. v. Hill, 388 So. 2d 648 (Fla. 5th DCA 1980) (finding material injury related to denial of

discovery "since there would be no practical way to determine after judgment" what the evidence would have been and how it would have affected the result); Colonial Penn Ins. Co. v. Blair, 380 So. 2d 1305 (Fla. 5th DCA 1980) (same).<sup>1</sup>

This principle is even more compelling in cases such as this, which involve the potential exoneration of a defendant and the defendant's statutory right to DNA testing. Unless Kelley can discover what evidence exists and where it is located, that evidence cannot be made part of the record supporting his motion. Such injury cannot be remedied on appeal because there would be no practical way for this Court to determine after judgment what evidence might have been elicited with proper discovery and how it would have affected the outcome.

The very deprivation of Kelley's statutory right to DNA testing itself constitutes a material injury that cannot be remedied on appeal. Under section 925.11, Fla. Stat. and rule 3.853, convicted defendants should be given a fair opportunity to demonstrate their innocence through DNA testing by being permitted to discover the existence and location of DNA evidence prior to their evidentiary hearing. The remedies afforded by

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<sup>1</sup> Because postconviction proceedings are considered civil in nature and collateral to the criminal prosecution that resulted in the conviction, courts may look to cases addressing the civil application of this rule. See Rozier v. State, 603 So. 2d 120, 121 (Fla. 5th DCA 1992) (citing State v. White, 470 So. 2d 1377, 1378 (Fla. 1985)).

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.

Moreover, every day that goes by without a step towards determining the location of the physical evidence in this case risks the loss or destruction of the evidence. Providing Kelley the opportunity to fully present his case on the merits with adequate notice and time to prepare lessens the risk that he will be unable to recover the evidence.

Finally, as this Court is keenly aware, Kelley is a prisoner who has been serving a death sentence that he maintains was improperly imposed. Each additional day that he serves an illegal sentence in prison causes unspeakable injury to him that cannot be remedied. Indeed, Kelley is in immediate danger of having a death warrant issued against him. The Governor's General Counsel has already advised that Kelley's case is under review for issuance of a death warrant. App. K.

Based on that representation, it is reasonable to believe that a death warrant may be issued as early as (1) the U.S. Supreme Court decides the Clarence Hill case (which was orally argued several weeks ago), and (2) all of Kelley's pending litigation ends (which may be as early as June 7). The imposition of a death warrant on a potentially innocent capital defendant that has been denied his statutory right to DNA

testing and not had the chance to adequately prove his innocence is the worst kind of irreparable harm.

To fully benefit from his substantive right to DNA testing, Kelley should be permitted appropriate discovery into the existence and location of physical evidence. By ruling to the contrary, the trial court departed from the essential requirements of law, deprived Kelley of the benefit of his statutory right, and caused material injury that cannot be remedied on appeal.

**V. NATURE OF RELIEF SOUGHT**

Kelley respectfully requests that this Court quash (1) the trial court's order denying his request for pre-hearing discovery and (2) the court's order setting a full, evidentiary hearing for June 6-7, 2006. Kelley requests that this Court hold that Kelley be allowed to conduct pre-hearing discovery prior to a final evidentiary hearing on his motion.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and accurate copy of the foregoing was served via Facsimile and U.S. Mail to the following persons this \_\_\_\_ day of May, 2006.

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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(b)(3)(4) and 9.100(1).

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Attorney