ORIGINAL

OFFICE OF THE STATE ATTORNEY
SIXTH JUDICIAL CIRCUIT OF FLORIDA
PASCO AND PINELLAS COUNTIES

BERNIE McCABE
State Attorney

SC01-363

April 12, 2001

FILED
D. HALL
APR 16 2001
CLERK, SUPREME COURT
BY

The Honorable Thomas D. Hall
Supreme Court Clerk
Fl. Supreme Court
500 South Duval Street
Tallahassee, FL 32399-1927

In reference: Proposed Amendments creating R.Cr.P. **3.853**

Dear Mr. Hall:

I support the Committee's and this Court's efforts in creating a rule on post-conviction **DNA** testing in criminal cases but nonetheless have a number of concerns and suggestions for modification of the current proposal. The proposed rule fails to provide where, in the absence of agreement by the parties, the testing should be done or to provide for dissemination of the results to both parties and the court. I would recommend that, unless otherwise agreed to by the parties, the Florida Department of Law Enforcement should conduct the testing, Such a provision would eliminate concerns over the integrity of the testing laboratory, the costs of the testing process, and maintaining the integrity of the evidence. I also believe that providing that testing will be done by FDLE will increase the likelihood that both sides will cooperate to accomplish the testing. The rule could contain **an** exception for DNA tests that, although generally accepted by the scientific community, are not available at **any** FDLE laboratory. The rule should specifically state that all parties and the Court will be privy to the results.

I believe that in many instances prosecutors will agree to **DNA** testing and it would be appropriate for there to be a *summary* process when the prosecution and defense can agree on the tests to be performed. In such an instance the Court should be able to authorize the release of evidence in the Court's possession or to authorize testing on evidence still in law enforcement possession, If an agreement were reached, it would not be necessary for the defendant to file a lengthy pleading or for the Court to make findings as to the significance of the results. While prosecutors may continue to believe strongly in the defendant's guilt **and** therefore feel obliged to oppose any finding by the Court as to the import of DNA testing, they are public servants who are interested in seeking the truth. If evidence is still available and there are viable DNA tests that might resolve any lingering questions about a conviction, justice will be better served by

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providing for an alternate process that does not require that the State consent to or acquiesce in findings that it does not believe to be accurate.

I also have some concerns over the language of the statements and findings required by the rule. The Rule provides that the defendant must allege either that no **DNA** testing was done or that previous **DNA** testing was inconclusive and new scientific developments will allow for a definitive result. If **DNA** testing would have been available at the time of trial which would have exonerated the defendant, he should be required to provide reasonable justification for his failure to pursue such testing in a timely fashion, Additionally, the proposed rule requires that the defendant's motion contain a statement that he "is innocent and that DNA evidence will exonerate the defendant of the crime for which the defendant was convicted." I believe it is appropriate to require that such a statement be supported by a sufficient factual basis. The Court should not be required to entertain and grant motions where the underlying facts do not allow a basis for believing that the tests will yield the result which the defendant alleges.

The Rule also requires that the Court make three findings while "ruling" on the defense motion. Since the rule merely requires the Court to answer certain questions, it is not clear what findings are required in order to grant the motion or what legal effect these considerations should have on the granting or denial of the request for testing. This ambiguity should be clarified, particularly since the rule does not delineate any standard for appellate review,

One of the specific findings required is "whether there is a reasonable probability that the defendant would have been acquitted if the **DNA** evidence had been admitted at trial". Since at the time of the Motion, the testing has not been done and there are no results, it cannot actually be known what effect they would have on a previous trial or a potential new trial. I believe a more appropriate wording for this finding would be whether the scientific tests requested are capable of definitively eliminating the defendant as the source of the **DNA** and, if they did so, whether the results would be likely to produce an acquittal. In making such a determination the Court should be free to consider not only the testimony available to the State at the time of trial or plea but any new incriminating evidence that has arisen since the original disposition of the case.

The two-year statute of limitations should not be the only determinant of the timeliness of the defense motion. The interests of finality and the prevention of specious requests would be better served if, as previously suggested, the moving party were required to justify the failure to seek testing at the earliest opportunity. **DNA** evidence can degrade over time and there is no assurance that law enforcement will retain all evidence indefinitely or even for the two-year period of limitations, particularly in noncapital cases that have been affirmed on appeal or disposed of by plea. The impetus should be on a convicted defendant who is claiming that tests would have exonerated him to seek testing at his first opportunity. If he fails to do so he should bear the responsibility of explaining this failure and bear any consequences of the delay. Therefore, I would also suggest that the rule require or at least encourage a defendant to pursue his motion as

soon as possible but no later than two years after his conviction or the effective date of the rule.

By the same token a strict limit on DNA testing may, in isolated cases, work an injustice. Perhaps there should be some provision for allowing testing beyond the two year limit under extraordinary circumstances. No one is served by keeping an arguably innocent person incarcerated when scientific techniques exist to confirm his innocence or remove doubt of his guilt. Moreover, new techniques may become available after the two-year time limit.

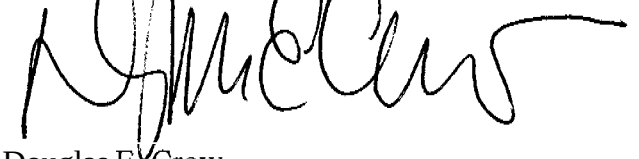
I also disagree with the additional provision that "The time limitations provided in Fla. R. Crim. P. 3.850 – 3.851 do not apply to a motion made under this rule if the motion for postconviction relief is based on the results of DNA testing." The syntax of this provision is somewhat confusing in that it refers to a Motion for Postconviction Relief filed under "this rule" when in fact Rule 3.853 is not a rule providing for Postconviction relief. Presumably, the language is intended to eliminate the statute of limitations for 3.850 Motions when the substantive basis for relief is testing authorized under this rule. The language used, however, is far broader than that. Rule 3.853 appears intended to allow testing that may show the defendant's innocence by definitively proving he was not the source of the DNA evidence. The language of 3.853(d)(2) would apply to any use of DNA testing as a basis for relief.

Thus, I disagree with the absolute negation of the normal statute of limitations for Postconviction motions in which DNA results are alleged as a basis for relief and believe traditional concepts of "newly discovered" evidence should apply to 3.850 Motions when they are based on DNA testing done subsequent to a conviction. An exceptional circumstances provision could be added allowing relief when the evidence of innocence provided by new DNA testing is so compelling as to require relief in the "interests of justice,"

Thank you for the opportunity to comment on the proposed rule.

Sincerely,

BERNIE McCABE, State Attorney
Sixth Judicial Circuit of Florida



Douglas E. Crow
Executive Assistant State Attorney

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy of the foregoing has been furnished to THE HONORABLE OSCAR H. EATON, JR., Seminole County Courthouse, 301 N. **Park** Ave., Sanford, FL 32771-1243, by U.S. Mail, this 12th day of April, 2001

BERNIE McCABE, State Attorney
Sixth Judicial Circuit of Florida

Douglas E. Crow
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