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Florida House of Representatives

Office of the Speaker

Tom **Feeney**
Speaker

The Florida Supreme Court
Supreme Court Building
500 South Duval Street,
Tallahassee, Florida **32399-1927**

August 14,2001

Re: Amendment to Florida Rules of Criminal Procedure Creating Rule **3.853** (DNA Testing)

May It Please The Court:

I file these comments in opposition to the above mentioned proposed rule as follows:

The proposed rule's expansion of substantive grounds authorizing DNA testing beyond those which are prescribed in Chapter Law 2001-97 (formerly SB 366) would violate the separation of powers provision of the Florida Constitution, Art. 11, Sec. 3.

There are several aspects **of** the proposed rule ("Rule") that are entirely substantive in nature. "The Legislature has the authority to enact substantive law, while the Court has the authority to enact procedural law." Allen v. Butterworth, **756** So.2d **52** (Fla. 2000). The inclusion of persons who entered a plea of guilty or nolo contendere in the "Grounds for Motion" portion of the Rule is **an** expansion of a substantive right by a "procedural" rule.

In its original emergency petition, the reason for seeking review **of** this rule proposal on **an** emergency basis **was:**

> **5.** The subject of the proposed rule is **an** emergency because there is presently no mechanism for a person convicted of a crime, whether Incarcerated or not, to apply for DNA testing to establish that he or she is actually innocent of the offense. , .
>
> Emergency Petition at 2.

Actually there is a mechanism, but it ha its limits. Currently, a defendant who has been convicted of a crime and who seeks to have DNA evidence tested may utilize Fla. R. Crim. Pro. 3.850 and establish such a claim on the grounds of newly discovered evidence. Under rule 3.850 a defendant must raise the claim within two years of the discovery of evidence containing DNA. See, Adams v. State, 543 So.2d 1244 (Fla.1989).[1] Also, the Florida Supreme Court has held that the two year time limit for filing a 3.850 motion based on newly discovered evidence begins to run on a defendant's postconviction request for DNA testing when the testing method became available. For example, in Sireci v. State, 773 So.2d 34 (Fla. 2000), the Court held that the defendant's postconviction claim filed in 1993 for his 1976 conviction was time barred because "DNA typing was recognized in this state as a valid test as early as 1988." See also, Ziegler v. State, 654 So.2d 1162 (Fla. 1995). In other words, there are defendants whose time period for having evidence tested for DNA has already expired under rule 3.850. However, for those persons who meet the requisite criteria, the Rule and SB 366 provide a substantive right that is not currently available, i.e., the right to file a motion for DNA testing by October 1,2003, and the right to obtain DNA testing services from FDLE.

Another substantive aspect of the Rule is the change in purpose and availability of DNA evidence testing. Presently, in order to establish a claim of newly discovered evidence, the evidence must have been unknown by the defendant or the defendant's counsel before trial, and it could not have been ascertained by the exercise of due diligence. Also, the trial court must find that the evidence is of such a nature that it probably would produce an acquittal at trial. See, Jones. V State, 709 So.2d 512 (Fla. 1998).

Neither the Rule nor SB 366 require that the evidence must have been unknown or not ascertainable by the exercise of due diligence for any of those qualifying defendants seeking to file by the October 1,2003 deadline, or within the two year time period provided. In lieu of a due diligence requirement, the Rule and SB 366 simply require:

> 2. a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result?

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[1] **Any claim of newly discovered evidence in a death penalty case must be brought within one year of the date such evidence was discovered or could have been discovered through the exercise of due diligence. See, Glock v. Moore, 26 FLW S9 (Fla. 2001).**

Under the Rule or SB 366, due diligence would only be required for persons seeking DNA testing after October 1,2003, or outside the two year time period.

In other words, defendants and defense counsel who failed to exercise due diligence in seeking DNA evidence testing, who have no further remedy available under current law, would have a new opportunity available under the Rule or SB 366.

Also, whereas under a claim of newly discovered evidence the DNA evidence would have to be of such a nature that it would likely result in an acquittal at trial, under the Rule or SB 366 the DNA evidence can be used to mitigate a **lawfully** imposed sentence. Clearly, the utilization DNA test results, in **closed** criminal cases, to mitigate lawfully imposed sentences is purely a substantive matter, and one that the Legislature has the exclusive authority to create, restrict or eliminate as it sees fit.

In the ***Amended*** Emergency ***Petition To Create Rule 3.853 Florida Rules Of Criminal Procedure (DNA Testing)*** ["Amended Petition"], Petitioner's state: "[t]he Fast Track Subcommittee opted to vote for the broadest inclusion of certain aspects of the two proposals . . ."[3] One of the key policy considerations in the development of the final version of **SB 366** was the unknown and potentially significant fiscal impact associated with expanding the scope of the legislation to where the defendant was tried, to include cases where the defendant entered a plea of guilty or nolo contendere. Both House and Senate sponsors agreed after weighing these considerations that DNA testing should not be expanded to include cases where the defendant has entered a plea.

Despite its acknowledgment that there was concern among some legislators that the Florida Department of Law Enforcement would not be able to absorb the workload associated with expanding DNA testing to include cases where the person entered a plea, the Amended Petition noted:

> The Fast Track Subcommittee believed that the legislature did not have the authority to limit the application of DNA testing.
>
> Amended Petition at 2, citing Allen v. Butterworth, 756 So.2d 52 (Fla. 2000).

In Allen v. Butterworth, this Court held that the Legislature's attempt to set time limits for postconviction motions in death penalty cases in the Death Penalty Reform Act of 2000 was an unconstitutional encroachment of the exclusive authority of the **Court** to adopt rules of practice and procedure under Article V. Section 2 of the Florida Constitution. Allen v. Butterworth, however, did not involve the creation or expansion of **new** rights and remedies available to defendants in closed criminal cases. The belief that the legislature does not have the authority to

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[3] The amended petition erroneously refers to Chapter Law **2001-97** as merely one of two "proposals," when in fact it is law.

"limit" the application of DNA testing is fundamentally flawed. The view is premised on the mistaken assumption that both the Rule and SB 366 are merely procedural vehicles to facilitate postconviction rights that are currently available through existing provisions of the state constitution, in the same way that Rule 3.850, 3.851 are the procedural mechanisms to raise collateral attacks otherwise available by writ of habeas corpus or writ of error coram nobis. The fact is, however, that both the Rule and SB 366 create **additional substantive** rights **beyond** those that are currently available under the state constitution. "Substantive rights conferred by law can neither be diminished nor enlarged by procedural rules adopted by this Court." Ramos v. State, 505 So.2d 418,421 (Fla. 1987)(holding that a rule of appellate procedure could not grant the state a right to appeal in criminal cases that was not expressly granted by statute and therefore state's cross-appeal could not survive appellant's voluntary dismissal of main appeal).

To extent that the Rule and SB 366 authorize defendants to seek DNA testing in cases where their opportunity to seek DNA testing under existing law has already passed, the granting of **additional rights** to these same defendants enabling them to pursue those claims which would otherwise be barred is **substantive** in nature and cannot be reasonably construed to be procedural. Likewise, the use of DNA evidence to mitigate lawful sentences is a legislative creation of a new substantive right. The Legislature therefore is not limiting a matter of procedure, and is well within its right to "limit" substantive rights that they, and they alone, have the authority to create. See, City of Lake Mary v. Seminole County, 419 So. 2d 737 (Fla. 5th DCA 1982)(upholding limited right of appeal in annexation proceedings and stating, "[i]f the Legislature has the power to create a right of appeal in the circuit court where none previously existed, it is incongruous to assert that it cannot limit the scope of that review

Aside from the substantive aspects of the Rule relative to the creation of a new right, the expansion of the Rule to encompass persons who pled guilty or nolo contendere extends the substantive aspects of SB 366 beyond the Legislature's intent, direction, and fiscal planning in a number of ways.

First and most significantly, pleas involve the knowing waiver of rights to confront witnesses and challenge evidence. The ability to reopen pleas, years later, on evidentiary issues, greatly compromises the interest in finality that is essential to the continued operation our criminal justice system. It also undermines the purpose served by the current procedure for the court's acceptance of pleas. As a matter of public policy permitting pleas of guilty or nolo contendere to be set aside for the purpose of examining evidence of a crime admitted, or not contested, is tantamount to authorizing the withdrawal of a plea at an extremely late date. That is a substantive policy decision which the Legislature refused to make. A contrary substantive policy decision made by an unelected and unaccountable group of individuals, should not be substituted for that of the Legislature.

Second, the bill's provision authorizing court appointment of counsel for indigent defendants is substantive in nature. The expansion of the Rule to include persons who entered a plea is an expansion of that substantive matter to a group of individuals who are not qualified to seek relief under the bill. These individuals are outside the parameters of eligibility for the legal representation authorized by the Legislature. State funded representation for these defendants who are indigent was not authorized by the Legislature, and no appropriation has been made for such purposes.

Third, the bill's provision providing for state paid DNA testing for indigent defendants is also substantive in nature. The expansion of the Rule to include persons who entered a plea is an expansion of this substantive matter to a group of individuals who are not qualified to seek testing under the bill. State funded testing of indigent defendants who do not qualify for testing under the bill was not authorized by the Legislature, and no appropriation has been made for such purposes.

Fourth, the Rule's expansion of the bill to include persons who pled enlarges the pool of evidence that must be preserved by the governmental entities that are in possession of physical evidence. As a result, court clerks, FDLE, prosecuting authorities, and law enforcement agencies must preserve and store more evidence than required under the bill.

Fifth, the Rule's expansion of the bill to include persons who pled increases the number of persons who may seek to have a lawful sentence mitigated based on DNA evidence. State funded testing in cases involving indigent defendants who entered a plea, and who would seek DNA evidence testing for mitigation purposes, was not authorized by the Legislature, and no appropriation has been made for such purposes.

Sixth, the Rule's expansion of the bill to include persons who pled enlarges the pool of evidence subject to testing. Under SB 366, FDLE has been statutorily mandated to conduct DNA testing pursuant to the newly created section of statute s. 943.3251. That grant of statutory authority does not provide for the testing of persons who do not qualify for testing pursuant to the bill's newly created s. 925.11, and no appropriation has been made for such purposes. I find no authority for the Court to direct an agency of the executive branch of government to perform tasks that are outside the agency's statutorily defined authority, duties, and responsibilities.

Seventh, SB 366 also creates a statutory right to appeal from an adverse ruling. The Rule's expansion of the bill to include persons who pled enlarges the pool of persons who will seek to exercise that right to include persons who have not been statutorily granted any such right by the

Legislature. "A statute conferring a right to appeal upon a litigant relates to a substantive, rather than a procedural right." State v. Kelley, 588 So.2d 595,597 (Fla. 1st DCA 1991).

The Legislature exercised its prerogative to take a cautious approach in measuring the additional workload to be placed on FDLE as a result of authorizing DNA testing in limited circumstances. The Fast Track Subcommittee was of the belief that a provision of the Rule allowing DNA testing to be conducted by another laboratory or agency would "satisf[y] legislative concern that FDLE may not be able to absorb the number of cases expected by that agency." This belief is profoundly erroneous and overreaching. It presumes that the Fast Track Subcommittee is the appropriate body to evaluate and solve legislative concerns, rather than the legislators themselves who addressed these concerns to their own satisfaction. The number of tests that would be done by an independent laboratory under the Rule is unknown and speculative. Likewise, the increased workload for FDLE under the Rule is also speculative. There is no basis to support the assertion that these two unknowns would offset each other. In fact, it is far more likely that the number of persons establishing "good cause" for an independent test would be very rare, while the workload increase for FDLE as a result of the Rule's "broadest inclusion of . . . the two proposals . . ." would be significant.

Further, the Legislature has not authorized funding for the increased expenditure that will necessarily result from the Rule's broadened application. It is exclusively the province of the Legislature to fix appropriations and determine the proper amount of fiscal resources to be consumed by law enforcement agencies and the court system!

The Fast Track Subcommittee was also of the view that some non-indigent defendants may prefer testing to be done by an independent laboratory. Here again, the Fast Track Subcommittee presumes to substitute its own judgment for that of the Legislature, and to second-guess a legislative policy choice. One of the policy decisions made by the Legislature in creating this new substantive right was to condition it on a requirement that FDLE or its designee perform the testing. The Legislature did not create a statute to authorize DNA testing in otherwise closed cases by independent laboratories of the defendant's own choosing. The remedy available under this newly created substantive right is testing by Florida's state law enforcement agency or a designee it deems appropriate, and none other.

"[C]ourts cannot willy nilly strike down legislative enactments or acts of executive officers because they do not comport with judicial notions of what is right or politic or advisable." State ex rel. Second District Court of Appeal v. Lewis, 550 So.2d 522,526 (Fla. 1st DCA 1989).

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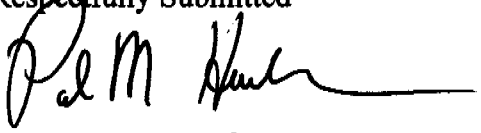
[4] **"All justices and judges shall be compensated only by state salaries fixed by general law, The judiciary shall have no power to fix appropriations." Art. V., Section 14, Fla. Const.**

For the foregoing reasons these comments are filed in opposition to the provisions of the Rule which: **1)** expand the persons eligible to seek DNA testing to include persons who entered a plea of guilty or nolo contendere; and **2)** authorize DNA testing to be conducted by an independent laboratory.

Respectfully Submitted



For Tom Feeney, Speaker
Florida House of Representatives

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a **true** and correct copy of the foregoing comments have been provided by U.S. mail to the Honorable **Oscar** H. Eaton, Jr., Chair, The Florida **Bar** Criminal Procedure Rules Committee, Seminole County Courthouse, **301** N. **Park** Avenue, Sanford, Florida **32771-1243,** and to John Harkness, Jr., Executive Director, The Florida **Bar,** 650 Apalachee Parkway, Tallahassee, Florida **32399-2300, this 14*** day of August, **2001.**

For Tom Feeney, Speaker
Florida House of Representatives