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THOMAS D. HALL

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CLERK, SUPREME COURT
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Supreme Court of Florida
500 S. Duval Street
Tallahassee, Fl. 32399-1925

ORIGINAL

RE: Proposed Rule 3.853 — DNA testing

To: The Honorable Chief Justice, and Justices of the Florida Supreme Court

Please accept these comments related to the proposed rule, Rule 3.853, related to DNA testing. As a preface, my comments are based **on** the following philosophical considerations:

Philosophical Basis:

1. DNA testing is a scientific process that will continuously undergo change as the science improves.
2. Testing samples, although contaminated, are still capable of scientifically reliable extraction depending on the “wash”. This too, will undergo scientific improvement over time.
3. Public Policy demands that proof of “actual innocence” by DNA testing be admissible without the imposition of artificial “time limitations”, as this serves important social considerations. Some of these are:
 - a. Reliable scientific proof of “actual innocence” overcomes any possible objection to a “lack of finality” that the court system otherwise could assert. A court system is basically a refined “system of Justice”, and Justice cannot knowingly permit an innocent person to serve a sentence where previously unavailable, and reliable scientific proof establishes actual innocence.

- b. Actual innocence, means that the true perpetrator of the crime is likely still “at large”, has escaped justice, has caused another person to be incarcerated for their crime, and is likely to continue to commit other crimes unless the innocence of the mistakenly convicted person is determined.

- c. Leaving a mistakenly imprisoned individual “without hope” of eventually proving his or her innocence serves no legitimate purpose other than to undermine confidence in the system of Justice that entered the mistaken conviction in the first place, and in some instances will act to cover-up improper, shoddy, or ill-motivated investigations and prosecutions. The deterrent effect of allowing a prisoner to have reasonable access to challenge such instances, and finally bring them to light — fulfills an important aspect of confidence in the law and the judiciary in any free society.

Based on these philosophical concepts and truths, I would respectfully suggest that the Proposed Rule undergo the following changes:

Proposed Changes:

(a) **Grounds for Motion.**

[unchanged]

- (aa) ***Preserving evidence.*** *Upon motion, the court may order the preservation of any existing evidence which has the capacity ~~for future~~ exculpatory DNA sampling, for a period of time up to that of any sentence being served by the individual. [new] **

(b) **Contents of the motion.**

[unchanged]

(c) **Procedure.**

- (1) [unchanged]
- (2) [unchanged]
- (3) [unchanged]

- (4) The court shall *make* the following findings when ruling on the motion.
- A. whether the physical evidence that may contain DNA still exists.
 - B. whether the results of DNA testing of that physical evidence would, *under current scientific developments*, have been admissible at the trial, ~~and whether there exists reliable proof to establish that the evidence has not been materially altered, and would be admissible at a future hearing;~~ and **
 - C. whether there is a reasonable possibility that the defendant would have been acquitted if the DNA evidence had been admitted at trial.

(d) **Time Limitations.**

- (1) ~~No motion shall be filed or considered more than 2 years after the date that this rule is adopted by the Supreme Court of Florida, nor more than 2 years after the judgment and sentence in the case becomes final, whichever is later.~~
- (2) [unchanged]
- (3) *Successive motions shall not be barred, upon good cause shown, supported by reliable affidavit(s), which establishes:*
 - (a) *That reliable scientific methods currently exist to retest a sample previously tested without success,*
 - (b) *That reliable scientific methods currently exist to test a sample that was not previously tested due to a reliable method of testing being then unavailable to the defendant, or ****
 - (c) *That new, and reliable, physical evidence has been located, which can be reliably tested for DNA.*

[new — as to entire section]

(e) **Appeal; Rehearing.**

An appeal may be taken by any adversely affected party from the order entered on the motion. All orders denying relief must include a statement that the defendant has the right to appeal within 30 days after the rendition of the order denying relief. *If any motion is denied for insufficiency, the court shall specifically state the basis of the insufficiency in a written order, and the movant may, within a period of fifteen (15) days of notice of such, unless granted additional time upon a showing of good cause, move for a rehearing, and may also attempt therein to correct any insufficiency in the original motion.* ~~The defendant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief.~~ The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered. The court or the clerk shall serve on all parties a copy of any order rendered with a certificate of service including the date of service. ****

Comments:

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The court should be required to order evidence preserved when there is a reasonable basis to believe that it may become testable at some point in the future, and where a favorable DNA result would present a reasonable probability that the Defendant would have been acquitted.

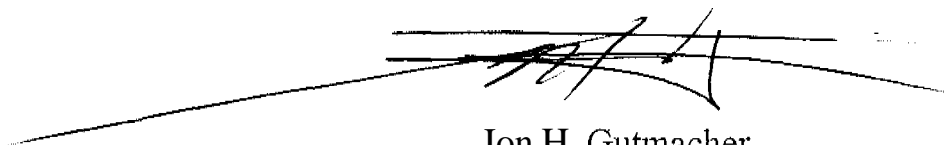
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Contamination that renders the testing process as “scientifically unreliable” should be the guideline for the court — not whether the evidence has been “materially altered”.

This provision explains that newly discovered physical evidence must also be reliable in the sense that it can be established it was not fabricated,

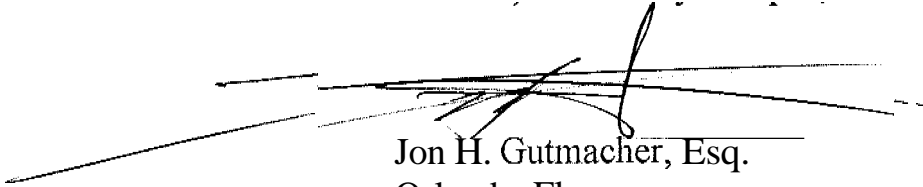
There will be times where obtaining additional affidavits to support the defendant's position will **take** time to obtain. A showing of good cause should be permitted in these instances to obtain additional time.

Respectfully submitted,



Jon H. Gutmacher
FNB:147055

I HEREBY CERTIFY that a copy of this response was served upon the committee chairperson, Hon. Judge O.H. Eaton, Jr., Seminole County Courthouse, 301 N. Park Avenue, Sanford, Fl. 32771-1243, this 3d day of April, 2001.



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