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ORIGINAL

FILED  
THOMAS D. HALL  
AUG 14 2001

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC01-363

IN RE: AMENDMENED EMERGENCY PETITION  
TO CREATE RULE 3.853, FLORIDA RULES  
OF CRIMINAL PROCEDURE (DNA TESTING)

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CLERK, SUPREME COURT  
BY \_\_\_\_\_

RESPONSE

The Florida Department of Law Enforcement (FDLE), an agency of the State of Florida, by and through its undersigned General Counsel, responds to the notice inviting comments in the above styled case, and says:

1. Section (c)(7) of the proposed Rule provides: "The court-ordered DNA testing shall be ordered to be conducted by the [FDLE] or its designee, as provided by statute, *unless the court, on a showing of good cause, orders testing by another laboratory or agency.*" (Italics supplied). FDLE submits that there is no real need for the "another laboratory or agency" option and suggests that this option be eliminated from the final rule. In the alternative, FDLE suggests this option should be allowed in only the narrowest of circumstances.

2. FDLE's labs are fully certified by the American Society of Crime Laboratory Directors (ASCLD). Any lab designated by FDLE would be certified by either ASCLD or the National Forensic Science Training Center (NFSTC), whose certifications are honored by ASCLD. For the reasons discussed hereafter, FDLE submits that the only situation which should support a court order allowing testing by a laboratory other than FDLE (or a lab designated by FDLE to

perform analyses on its behalf) would be where the demand for DNA analysis was such that neither FDLE nor its designee laboratory could perform the testing in an appropriate and timely manner. At present, FDLE has no reason to believe such a situation will develop. For this reason, FDLE believes there is no workload justification or concern for allowing the "another laboratory" option and suggests the option be eliminated.

3. If, after consideration of FDLE's position, this Court is inclined to retain the "another laboratory" option, FDLE suggests that option should be limited to extremely rare situations. The "good cause" standard in the proposed rule should be revised to make it harder to justify the use of "another laboratory." Permitting only "good cause" to justify use of substitute labs could result in the routine or frequent demand that DNA testing be performed by an independent' laboratory, rather than FDLE. Any routine or frequent designation of labs other than FDLE (or its designee) to conduct DNA testing will cause complexity in coordination of court hearings and will be significantly more expensive. Since many petitioners will be indigent, the costs of DNA testing ordered under this rule will more often than not be paid by public funds, Use of significantly more costly alternatives ought not be routine, particularly in light of the fact that the testing by FDLE meets the expectations and requirements of justice.

4. Without a doubt, the use of a lab other than FDLE (or its designee) will be significantly more costly. Based upon current information available to FDLE, there are only a small number of ASCLD or NFSTC-certified private labs that conduct DNA testing. One such lab is "Cellmark Laboratories." FDLE is familiar with Cellmark's charges for DNA testing services, and believes those charges are representative of what can be expected when utilizing a private lab to do DNA testing. The costs of private lab services are substantially more expensive than the services provided by FDLE.

5. Based on information known by FDLE, Cellmark charges \$1,000 per sample for DNA examination plus \$400 per sample to screen and determine whether there is a body fluid present. A "typical" sexual battery DNA test would include at least two submissions of crime scene evidence for testing: the victim's underwear and swabs taken from the victim's body. Cellmark would charge \$800 (2 times \$400) to determine whether there was semen present on the two samples, and then \$1,000 each to test the submitted samples. In addition to the crime scene evidence, Cellmark would charge \$1,000 each for testing the "standards" submitted for comparison (one from the defendant and one from the victim). In this example, Cellmark testing would

cost \$4,800 for a relatively limited and straightforward DNA testing request. In contrast, the FDLE costs for the same work is approximately \$1,800.

6. The costs associated with obtaining testimony regarding testing services performed is significantly higher when a private lab is utilized. Testimony from private lab personnel is significantly more costly to secure. Information known to FDLE indicates that Cellmark charges \$1,750 per day plus expenses for expert testimony of their private lab personnel. In contrast, FDLE lab personnel appear while on their regular state salary and receive state per diem and travel reimbursement, if needed.

7. As demonstrated above, in a typical case, the use of a private lab is likely to cost three or more times the cost of like testing performed by FDLE. The proposed rule indicates that the costs of testing will be assessed against the movant unless the movant is indigent. When the movant is indigent, the "state shall bear the cost of the DNA testing ordered by the court." This is consistent with the postsentencing DNA testing provision found at Chapter 2001-97, Laws of Florida. However, given the significantly higher costs associated with the use of private laboratories as noted herein, and in recognition that many if not most of the testing orders will involve indigent movants, FDLE submits that the significant extra costs associated with the use of a private lab are simply not justified, and the possibility of incurring such costs should be avoided by

eliminating (or greatly restricting) the option for use of such labs. (Proposed revisions of the rule to effect these suggestions are included hereafter.)

8. Beyond the costs of testing, additional operational concerns support the premise that private lab use should be avoided. Private lab personnel are not routinely involved in Florida criminal court proceedings; FDLE lab personnel are. FDLE laboratory personnel are involved in the Florida criminal judicial process on a regular basis, and are more familiar with that process than their private lab counterparts. Involvement of private lab personnel will likely require more time because of the unfamiliarity with how the process operates. FDLE personnel are routinely available for testimony in Florida criminal cases; such appearances are not routine for private lab personnel. Depending on the location of a hearing, FDLE lab personnel may be able to be on "stand-by" to be called in at a moment's notice; placing private lab personnel on similar "stand-by" is unlikely.

9. Consistency between the rule and Chapter 2001-97, Laws of Florida whenever possible is a laudable goal. FDLE believes there is a need to assure the rule conforms with statutory law as much as possible to prevent confusion and possible challenges based on the differences between the rule and statute. Chapter 2001-97, Laws of Florida, created Sections 925.11 and 943.3251, Florida Statutes, related to Postsentencing DNA Testing. FDLE submits that to facilitate

the orderly administration of post-conviction DNA testing and to avoid collateral challenges and controversy, this Court's rule language regarding what labs should be utilized should conform with the new statute. This will avoid confusion in implementing testing standards and processes, and will help avoid potential conflicts between the statutory scheme and the Court's procedures. Section 925.11(2)(h), Florida Statutes provides, "Any DNA testing ordered by the court shall be carried out by the Department of Law Enforcement or its designee, as provided in s. 943.3251." Section 943.3251(1), Florida Statutes, provides, "When a court orders postsentencing DNA testing of physical evidence, pursuant to s. 925.11, the Florida Department of Law Enforcement or its designee shall carry out the testing." The statutes allow no "another laboratory" option like that included in the proposed rule. Retaining the "another laboratory" option in the rule is contrary to the exclusive designation found in statute, and, under present circumstances, appears to be unnecessary to effect the ultimate purpose of obtaining timely and reliable DNA testing when ordered by a court. In short, why promote an area of potential conflict or controversy when the "another laboratory" option is not truly necessary?

10. The Fast Track Subcommittee made an unjustified assumption about FDLE testing that must be addressed. Contrary to the Fast Track Subcommittee's "opinion" that "there may be cases in which testing by FDLE would be

suspect," FDLE submits that the very nature of DNA testing is such that the test results are open to review and scrutiny, and are not susceptible to manipulation by reason of "suspect" motives or purposes. To even suggest that FDLE laboratory personnel would attempt to somehow manipulate lab results for "suspect" reasons is unjustified. Florida's criminal justice system has been well-served by the FDLE crime labs over the years. The duty of the FDLE laboratories is to perform the appropriate tests in a professional and scientifically sound method, to call the results as they develop, and to assure that justice is served. FDLE labs recognize they are not to "take sides" in their testing work. There is no rational basis to believe FDLE postconviction DNA testing would be "suspect" because of a bias against or in favor of a particular subject. Indeed, many times the laboratory personnel performing the tests know little if anything about the underlying facts or issues before the court when it ordered the testing. Even if the basis of a particular postconviction DNA testing issue related to testing previously done by FDLE, and the movant has somehow suggested that FDLE's prior DNA testing was deficient, a retest by FDLE or its designee would easily confirm or disprove such a suggestion. Any retest results would be open to the scrutiny of the attorneys involved as well as the court ordering the test. The Fast Track Subcommittee's concern that FDLE testing might be "suspect" remains merely an unsubstantiated assertion and should

certainly not be a basis for this Court determining to open the DNA testing options to private laboratories.

11. A second justification of the Fast Track Committee for its suggestion of allowing the "another lab" option is that in nonindigent cases, "private counsel may prefer testing to be done by an independent laboratory." Aside from the curious position taken that suggests that indigent movants might be of the same desire but would be denied the opportunity because they are indigent, FDLE submits this suggested justification itself should be a prime reason to resist using private labs. As proposed, the rule indeed could allow "laboratory shopping" as an option. Under present circumstances, since FDLE labs perform DNA testing professionally and competently, the likely reason for the use of a private lab would appear to be a desire to obtain something "different" from what would be obtained by FDLE testing. Such "difference" could be by reason of variations in DNA testing from accepted practices, or for any number of reasons that could open the testing process utilized by a private lab to criticism. FDLE submits that justice is better served by preventing even the remote possibility of "lab-shopping." As a public entity, FDLE is accountable to the public, and its laboratory efforts are fully accountable to those who use or monitor them. The same degree of public accountability is absent from any private lab. In contrast to the situation where a private laboratory's services are utilized, FDLE labs will not have as their ultimate



motivation, a "profit motive." Even the potential for a conflict of interest of this sort is avoided if FDLE labs are utilized instead of private labs.

12. Should this Court nevertheless decide to retain the "another laboratory" option, the rule should at least be revised to require that "another laboratory" designated by the Court should be certified by ASCLD [American Society of Crime Laboratory Directors] or NFSTC [National Forensic Science Training Center]. These organizations promote national standards of quality in laboratory efforts. The requirement of certification is important to maintaining the integrity of DNA testing. Certification helps assure that consistent testing standards will be utilized. The standards required to be utilized to obtain certification represent "best practices" as defined by various laboratories around the country. If such a requirement is not added to the final rule, it will be possible that a non-certified laboratory could be assigned to do the DNA testing. The use of any non-certified lab raises the possibility that the lab's testing procedures could produce unreliable results, the negative consequences of which, for the criminal justice system are obvious.

13. All things considered, including the fact that it is unlikely that the volume of postconviction DNA testing will exceed FDLE's ability to reasonably respond to such testing needs, the extra costs of utilizing private labs when compared to FDLE, the complexity of private lab

personnel coordination in court appearances contrasted to the use of FDLE personnel, the need to conform this rule as much as possible with Chapter 2001-97, Laws of Florida, the fact that FDLE labs perform DNA testing professionally and competently and that their efforts are not "suspect," and a need to resist even the potential of "lab shopping," FDLE suggests the "another lab" option be eliminated in its entirety. This can be done by revising the rule as follows:

***"The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute."***

14. Should this Court decide to retain the "another lab" option, even in light of the concerns and comments of FDLE, we suggest the option be significantly limited and that any lab utilized be certified. Such a limitation and certification requirement could be imposed by revising Section (c)(7) of the proposed Rule as follows:

***The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute, unless the court, on a showing of extraordinary circumstances that the Department of Law Enforcement has acknowledged that it or its designee is unable to provide the required testing in a reasonably timely fashion, and upon finding that the additional costs and complexity of using an alternative lab is justified under the totality***

of the circumstances, orders testing by another laboratory or agency. If an alternative lab is ordered to do the testing, the laboratory must be certified by the American Society of Crime Directors (ASCLD) or the National Forensic Science Training Center (NFSTC).

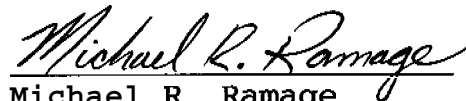
15. While not filing formal comments to the proposed rule both the Florida Sheriffs Association and the Florida Police Chiefs Association have indicated their agreement with FDLE's comments on major points:

- (a) If DNA testing is to be done by private labs, the labs should be ASCLD or NFSTC certified; and
- (b) Use of private labs will result in expenses far greater than the use of FDLE labs.

The Florida Sheriffs Association also has indicated its agreement with FDLE that coordination of private lab personnel for depositions and court appearances will be more complex than if FDLE labs are utilized, and that "use of labs other than FDLE should be the rare exception in post-conviction DNA testing." Both Associations authorized FDLE to convey their positions and copies of letters from each Association are attached hereto as Appendix A and Appendix B for this Court's review.

16. Accordingly, FDLE submits that the option for use of "another laboratory" as included in the proposed rule be eliminated in its entirety, or as an alternative, be significantly restricted along with a requirement that any lab so utilized be certified.

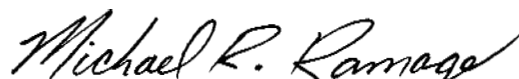
Respectfully Submitted



Michael R. Ramage  
General Counsel  
Florida Department of Law  
Enforcement  
Post Office Box 1489  
Tallahassee, Florida 32302  
(850) 410-7676  
Florida Bar No. 0261068

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished 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; John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; James T. Miller, Esq., 233 East Bay Street, Suite 920, Jacksonville, Florida 32202; Michael Reiter, Esq., P.O. Drawer 5498, Tallahassee, Florida 32314; Jon Gutmacher, Esq., 200 North Thornton, Avenue, Orlando, Florida 32801; Douglas Crow, Esq., 14250 49<sup>th</sup> Street North, Clearwater, Florida 33762; Robert Wills, Esq., P.O. Box 2356, Fort Lauderdale, Florida 33303-2356; John Skye, Esq., 801 East Twiggs Street, Fifth Floor, Tampa, Florida 33602; William White, III, 25 North Market Street, Suite 200, Jacksonville, Florida 32202-2802; Paula Saunders, Esq., Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32301-1803; Chet Kaufman, Esq., Leon County Courthouse, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32301-1803; and Christina Spaulding, Esq., 1320 N.W. 14<sup>th</sup> Street, Room 519, Miami, Florida 33125-1609; this 14th day of August, 2001.



Michael R. Ramage <sup>4</sup>  
General Counsel  
Florida Department of Law  
Enforcement  
Post Office Box 1489  
Tallahassee, Florida 32302  
(850) 410-7676  
Florida Bar No. 0261068



# Florida Police Chiefs Association

Quality Law Enforcement for the Sunshine State

August 7, 2001

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Live Oak

James T. "Tim" Moore, Commissioner  
Florida Department of Law Enforcement  
233 1 Phillips Road  
Tallahassee, FL 32302

Dear Commissioner Moore:

The purpose of **this** letter is to inform you that the Florida Police Chiefs Association supports the Florida Department of Law Enforcement (FDLE) in regards to the post-conviction DNA testing rules which are under consideration by the Florida Supreme Court.

The Association is confident that FDLE meets the **high standards** and requirements of both the American Society of Crime Directors (ASCLD) and the National Forensic Science Training Center (NFSTC). Therefore, we feel very strongly that post-conviction DNA testing should routinely be performed by FDLE. DNA testing performed by ASCLD and/or NFSTC-certified private labs are extremely expensive. Moreover, these initial expenses may be dwarfed by expert witness fees and together substantially increase the costs for the DNA testing program.

We would appreciate it if you would make our position known to the Supreme Court as they promulgate rules for post-conviction DNA testing for the state.

Sincerely,

Chief Lionel A. Cote  
President

HMR/tbm

FDLE COMMENTS - APPENDIX "A"  
(Letter from Florida Police Chiefs Association)