

D.A. 8/28/01

ORIGINAL

FILED  
THOMAS D. HALL  
AUG 10 2001

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC01-363

CLERK. SUPREME COURT  
BY \_\_\_\_\_

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

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RESPONSE

The Florida Prosecuting Attorneys Association, Inc., an organization which represents the twenty state attorneys of Florida and their seventeen hundred assistants, by and through its undersigned counsel, responds to the notice inviting comments in the above styled case as follows:

The 2001-2002 Florida Legislature passed CS/CS/SB 366 Post Sentencing DNA Testing, by the Appropriations Committee; Criminal Justice Committee; and Senators Villalobos and Smith. It passed 37-0 in the Senate and 118-0 in the House.

The bill creates a new statutory section which provides that a person who has been found guilty at trial of committing a criminal offense has the right to seek testing of physical evidence collected at the time of the crime which may contain DNA evidence that would exonerate him or her, or mitigate the sentence that he or she received.

In order to seek such testing, a sworn motion must be filed in the trial court within two years of the date on which the judgment and sentence in the case becomes final if no direct appeal is taken, within two years of the date on which the conviction is affirmed on direct appeal if an appeal is taken, within two years following the date that collateral counsel is appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital case or by October 1, 2003, whichever is later. The bill also authorizes a petition being filed or considered at any time if the facts on which

the petition is predicated were unknown to the petitioner or the petitioner's attorney and could not have been ascertained by the exercise of due diligence.

The sworn petition must contain the following:

- A statement of the facts relied upon, including a description of the physical evidence which contains **DNA** and, if known, the present location or the last known location of the evidence and how it was originally obtained;
- A statement that the evidence was either not previously tested for **DNA**, or, if tested, that the results of the previous test(s) was inconclusive, and that subsequent scientific developments in DNA testing would likely produce a definitive result;
- A statement that the defendant is innocent and how the **DNA** evidence will exonerate the defendant of the crime for which he or she was convicted, or mitigate the sentence received;
- A statement that identification of the defendant is a genuinely disputed issue in the case, and why it is an issue; and
- **Any** other material facts that are relevant to the petition.

The petition must also contain a certification that the appropriate state attorney has been served with a copy of the petition.

Under the provisions of the bill, the trial court will review the petition **and** determine if the facts are sufficient to support its filing. The court has the option of denying the petition at that point if the facts are insufficient. If the court finds the facts alleged are sufficient to support the filing of the petition, the court shall then order the state attorney to respond to the petition within 30 days. After reviewing the state's response, the court may then rule on the petition or order a hearing on the matter. If the defendant is indigent, counsel may be appointed to assist the defendant if the petition proceeds to a hearing and the court deems the assistance of counsel is necessary.

In ruling on the motion, the court must find whether:

- The physical evidence that may contain **DNA** still exists;
- The results of DNA testing of that evidence would be admissible at trial and whether there is reliable proof that the evidence has not been materially altered and would be admissible at a future hearing; and
- There is a reasonable probability that the defendant would have been acquitted or would have received a lesser sentence if the **DNA** evidence had been admitted at trial.

The court's ruling on the petition may be appealed by any adversely affected party under the provisions of the bill. The defendant may appeal **an** adverse ruling within 30 days. The time for filing the appeal is tolled if a petition for rehearing is filed, until **an** order on that petition is filed. A petition for rehearing must be filed within 15 days of service of the court's order denying the original motion for **DNA** testing. The order denying relief must include notice of these time limitations.

If the petition for testing is granted, the court is required to make a determination of whether the defendant is indigent. An indigent defendant may not be required to pay for the **DNA** testing. **If the defendant is not indigent, the cost of testing the physical evidence may be assessed against him or her,** The Florida Department of Law Enforcement or its designee is directed to carry out **any** testing ordered by the court.

The bill provides that **results** of testing ordered by the court shall be provided to the court, the defendant, and the prosecuting authority.

The bill requires governmental entities **to** hold physical evidence for the time frame within which a post conviction **DNA** petition could be filed, and for **60** days after the execution of the sentence in a death penalty case.

The state attorneys of Florida feel very strongly that this court should follow very closely if not exactly the wisdom of the legislature in constructing this rule.

In *Allen v. State*, 756 So.2d 52 (Fla. 2000), The Florida Supreme Court held that the Death Penalty Reform Act of 2000 was an "unconstitutional encroachment" on the Court's "exclusive power to 'adopt rules for the practice and procedure in all courts.'" *Id.* at 54. The court rejected the State's argument that the deadlines for filing postconviction motions in the DPRA were comparable to statutes of limitations in civil cases which the court had previously considered substantive. *Id.* at 61. The court held that rule 3.850 of the Florida Rules of Criminal Procedure is a "procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus" under the Florida Constitution. *Id.* at 61, *Art. I, Sect. 13, Fla. Const.* According to the court, "[d]ue to the constitutional and quasi-criminal nature of habeas corpus proceedings and the fact that such proceedings are the primary avenue through which convicted defendants are able to challenge the validity of a conviction and sentence, we hold that article v, section 2(a) of the Florida Constitution grants this Court the exclusive authority to set deadlines for postconviction motions" *Id.* at 62.

The provisions of this bill are distinguishable from those of the DPRA due to the fact that this bill creates a new substantive right to DNA testing in limited circumstances while the DPRA restricted postconviction rights which were otherwise available through existing provisions of the state constitution. The Legislature may limit substantive rights that it **has** created. *City of Lake Mary v. Seminole County*, 419 So.2d 737 (Fla. 5<sup>th</sup> 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."); *Department of Transp. v. Fortune Federal Sav. and Loan Ass'n*, 532 So.2d 1270 (Fla. 1988)("It is only by the will of the legislature that business damages may be awarded in certain situations which are properly limited by the legislature. In other words, the legislature has

created a right to business damages, so it may also limit that right."); *Fernandez v. Florida Ins. Guaranty Ass'n Inc.*, 383 So.2d 974, 976 (Fla. 3<sup>rd</sup> DCA 1980)(holding that because absent the legislative creation of the Florida Insurance Guaranty Association, "there would be no effective remedy to recovery on any claims whatever against insolvent insurers, there can be no constitutional infirmity in the legislature's decision to limit those newly-created rights and, in effect, not to establish an additional one.")

As previously stated, the bill expands certain time limitations for seeking postconviction review, in that motions for testing of physical evidence for DNA may be filed either by October 1, 2003, or within 2 years of a judgment and sentence becoming final. For those whose review has been timed-barred, this bill opens a new window of opportunity.

We note that others are commenting on several sections of the proposed rule but we will primarily focus on Rule 3.853(a) Grounds for Motion.

(a) Grounds for Motion. A person who has been tried and found guilty of committing a crime or has entered a plea of guilty or nolo contendere, and has been sentenced by a court established by the laws of this state, may move the court to order the examination and testing of physical evidence collected at the time of the investigation of the crime for which the movant has been sentenced that may contain DNA (deoxyribonucleic acid) and that would exonerate the movant or mitigate the sentence that the movant received.

and 3.853(b)(3)

(b) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;

Across the state in courthouses before judges, with their lawyers by their side, under, oath, defendants plead guilty to crimes almost on a daily basis. These pleas are signed in open court and a colloquy between the defendant and judges ensues. In open court the following elements are

typically reviewed and stated by the defendant. (See Exhibits A & B attached hereto).

"I hereby enter my plea of guilty for the reason that I **am** guilty. Before entering such plea of guilty, I was advised **of** the nature of the charge against me, the statutory offenses including within such charge, the range of allowable punishments thereunder, the possible defenses to the charge, the circumstances in mitigation thereof, and all other facts essential to a broad understanding of the charge against me.

**1. FREE AND VOLUNTARY NEGOTIATED SENTENCE**

My attorney, the prosecutor, and I have negotiated my sentence in this case in that the prosecutor will recommend to the Judge of this Court that I be sentenced to: Prison Term

I consider this negotiated sentence to be to my advantage, and I have freely and voluntarily entered my plea of guilty. I have not been offered any hope of reward, better treatment, or certain type of sentence to get me to plead guilty-other than the sentence set forth above-nor have I been threatened, coerced, or intimidated in any way to get me to plead guilty.

**2. ADVISED OF RIGHTS**

I understand that by pleading guilty I give up the constitutional right of trial by the Judge or jury, the right to remain silent, the right to put on witnesses in my own behalf, the right to confront the witnesses against me, the right to have the State prove its charges against me, and on the charge to which I **am** pleading guilty, I give up the right against self-incrimination.

I understand that if I **am** not a United States citizen this plea may subject me to deportation pursuant to the laws and regulations governing the United States Naturalization **and** Immigration Service.

**3. DISCUSSION WITH ATTORNEY**

Before entering this plea of guilty, my attorney and I have fully discussed all aspects of this case, and (she, he) has answered all my questions and has fully explained the charge, and I **am** satisfied with the services (she, he) has rendered in this case in my behalf, and

**4. READ AND EXPLAINED BY JUDGE IN OPEN COURT**

The Judge of this Court went over this plea of guilty **form** with me in Open court. He explained it to me and asked me **if** I understood it and **if** I wanted to plead guilty and give **up** these rights. I told the judge that I understood it, understood my rights and wanted to plead guilty to this charge.

**5. TIME FOR CONSIDERATION AND REFLECTION**

I have had sufficient time to consider the charge against me, the possible defenses, the advice of my attorney, the waiver of constitutional rights by entering my plea of guilty, and to reflect upon the consequences of my plea. The Judge of this Court has advised me that I may have additional time to consider all of these matters if I wanted more time for such consideration. I have advised him that I did not need more time and that I wanted to proceed with my guilty plea at this time.

**6. NOT UNDER INFLUENCE OF ANY SUBSTANCE OF CONDITION.**

I am not under the influence of alcohol, drugs, prescription medication, substances or conditions which interfere with my understanding and appreciation of this plea and the consequences of it.

**7. PLEA TRUE AND CORRECT AND UNDERSTOOD**

I understood this plea of guilty **form** when my attorney read and explained it to me, I understood it when the Judges explained it to me, and it is true and correct.

Both my attorney and I have signed this statement **of** guilty plea and explanation **of** my rights in Open Court."

Then the judge affirms the following:

My signature as Judge of this Court is certification that I have gone over this plea form with defendant in open court and have asked (him/her) questions, heard the responses and observed (his/her) demeanor. I find the defendant has the intelligence to understand (his/her) constitutional rights, the plea, the plea form and these proceedings. I further find the plea has been entered voluntarily and freely and that the defendant is not under the influence of any medication, drug, substance or condition that would interfere with (his/her) understanding and appreciation of the plea and the consequences of it.

The same exhaustive colloquy and examination both written **and** oral is had for pleas of No Contest as well.

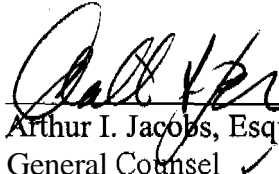
To allow a Defendant to rescind his or her plea after this exhaustive effort makes a mockery of **our** judicial system. The Fast Track Subcommittee states in their report the following:

"The rules committee has been informed that the legislation limited the application for **DNA** testing to defendants tried and found guilty because of concern by some legislators that the Florida Department of Law Enforcement (FDLE) would be unable to absorb the number of applications that agency expects to receive and not for the purpose of attempting to limit this court's authority to issue writs of habeus corpus through post conviction proceedings,"

We can find no such statement of legislative intent. The legislature made a public policy statement rightfully so, that Defendants who knowingly plead guilty or nolo contendere should not be allowed to now or in the future be allowed to gamble that perhaps some **DNA** test could somehow better their position. To insert this in the rule would make our system meaningless, and fraught with fraud,



Respectfully submitted

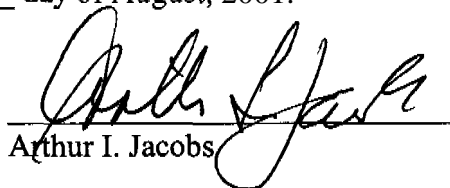


Arthur I. Jacobs, Esquire  
General Counsel

Florida Prosecuting Attorneys Association  
Post Office Box 1110  
Fernandina Beach, Florida 32035

**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 Stan R. Morris**, Circuit Judge, Eighth Judicial Circuit, Alachua County Courthouse, 201 E. University Avenue, Gainesville, Florida 32601, **The Honorable Philip J. Padovano**, 1<sup>st</sup> District Court of Appeal, 301 Martin Luther King Boulevard, Tallahassee, Florida 32399-1850, **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, **Professor Jerome C. Latimer**, Stetson University of Law, 1401 61<sup>st</sup> Street South, St. Petersburg, Florida 33707, **John F. Harkness, Jr.**, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, **Attorney General Robert A. Butterworth**, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050, **Assistant Deputy Attorney General Carolyn M. Snurkowski**, Office of the Attorney, PL-01, The Capitol, Tallahassee, Florida 32399-1050, Capital Collateral Counsel **Neal A. Dupree**, CCRC South, 101 NE 3<sup>rd</sup> Avenue, Suite 400, Ft. Lauderdale, Florida 32301, Litigation Director **Todd G. Scher**, 101 NE 3<sup>rd</sup> Avenue, Suite 400, Ft. Lauderdale, Florida 33301, Capital Collateral Counsel **Gregory C. Smith**, Northern Region, 1533 B S. Monroe Street, Tallahassee, Florida 32301, **Mark E. Olive, P.A.**, 320 West Jefferson Street, Tallahassee, Florida 32301-1608, Public **Defender Bennett H. Brummer**, 1320 NW 14<sup>th</sup> Street, Miami, Florida 33125-1609, **Public Defender Nancy A Daniels**, 301 S. Monroe Street, Suite 401, Tallahassee, Florida 32301, **Public Defender Richard Jorandby**, 15<sup>th</sup> Judicial Circuit, 421 3<sup>rd</sup> Street, West Palm Beach, Florida 33401, **Stephen Krosschell**, Esquire, 14020 Roosevelt Boulevard, Suite 808, Clearwater, Florida 33762, **Representative Tom Feeney**, 28 West Central Boulevard, Orlando, Florida 32801-2466, Mr. **Johnnie B. Byrd, Jr.**, Post Office Box TT, Plant City, Florida 33564-9040, and **Representative John Dudley Goodlette**, 3301 E. Tamiami Trail, Administration Building, Suite 203, Naples, Florida 34112 this 2<sup>nd</sup> day of August, 2001.



Arthur I. Jacobs

v.

DIVISION: CR - Q

CASE NO. \_\_\_\_\_

**PLEA OF NO CONTEST AND NEGOTIATED SENTENCE — FORM 6**

I hereby enter my plea of No Contest for the **reason** that it is in my best interest to do so. Before entering such plea of No Contest, I was advised of **the nature of the charge** against me, **the statutory offenses included** within **such charge**, the range of allowable punishments thereunder, **the possible defenses** to the charge, the circumstances in **mitigation** thereof, **and all other facts essential** to a broad understanding of the **charge** against me.

**1. FREE AND VOLUNTARY NEGOTIATED SENTENCE**

My sentence has been negotiated in **this case** in that I **will** be sentenced to: (please print) \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I consider **this negotiated sentence** to be to my advantage, and I have **freely and voluntarily entered my plea of No Contest**. I have **not been offered any hope of reward, better treatment, or certain type of sentence to get me to plead No Contest** - other **than** the Sentence **set forth above** - **nor have** I been threatened, coerced, or intimidated in **any way** to get me to plead No Contest. I **agree** that there is a factual basis for **the charges** against me.

**2. ADVISED OF RIGHTS**

I understand **that by** pleading No Contest I **give up the constitutional right of trial by the Judge or jury, the right to remain silent, the right to put on witnesses in my own behalf, the right to confront the witnesses against me, the right to have the State prove its cases against me, and on the charge to which I am pleading No Contest, I give up the right against self-incrimination**

I **understand that** if I am not a United States citizen **this plea** may subject me to deportation pursuant to the laws **and regulations governing the United States Naturalization and Immigration Service.**

**3. READ AND EXPLAINED BY MY ATTORNEY**

My attorney and I have read **this statement of my No Contest plea** together in private, **and** he has explained all parts hereof to my complete understanding. We have fully discussed all **aspects** of **this case**, and he **has answered all** of my **questions** and has **fully explained** the charge, and I am **satisfied** with the services he **has** rendered in **this case** in my behalf.

**4. TIME FOR CONSIDERATION AND REFLECTION**

I have had **sufficient time** to consider the **charge** against me, the possible defenses, the advice of my **attorney, the waiver of constitutional rights by entering my plea of No Contest, and to reflect upon the consequences of my plea.** I do not need or require more time for consideration and reflection, and I wish to proceed with my plea at **this time.**

continued on reverse

continued from obverse

**5. ACKNOWLEDGED TO THE JUDGE**

**In Open Court I have acknowledged to the Judge of this Court that:**

- A. I understand this plea of No Contest form and the rights given up by me in pleading No Contest, and**
- B. I am not under the influence of alcohol, drugs, prescription medication, substances or conditions which interfere with my understanding and appreciation of this plea and the consequences of it, and**
- C. I have entered into and signed this plea of No Contest and negotiated sentence freely and voluntarily, and**
- D. This plea of No Contest and negotiated sentence form is true and correct.**

Both my attorney and I have signed this statement of No Contest plea and explanation of my rights in Open Court, at Yulee, Nassau County, Florida, on \_\_\_\_\_

\_\_\_\_\_  
ATTORNEY FOR DEFENDANT

\_\_\_\_\_  
DEFENDANT

\_\_\_\_\_  
WITNESS, Deputy Clerk of Court

\_\_\_\_\_  
ASSISTANT STATE ATTORNEY

\_\_\_\_\_  
ALBAN E. BROOKE  
CIRCUIT JUDGE  
Div. CRQ

**My signature as Judge of this Court is certification that I have gone over this plea form with defendant in open court and have asked (him/her) questions, heard the responses and observed (his/her) demeanor. I find the defendant has the intelligence to understand (his/her) constitutional rights, the plea, the plea form and these proceedings. I further find the plea has been entered voluntarily and freely and that the defendant is not under the influence of any medication, drug, substance or condition that would interfere with (his/her) understanding and appreciation of the plea and the consequences of it.**

v.

DMSION CR - Q

CASE NO. \_\_\_\_\_

**PLEA OF GUILTY AND NEGOTIATED SENTENCE - FORM 2**

I hereby enter my plea of **guilty** for the reason that I am guilty. Before entering **such plea** of guilty, I was **advised** of the nature of the charge **against** me, the statutory offenses included within such **charge**, the range of allowable punishments **thereunder**, the **possible defenses** to the **charge**, the circumstances in mitigation thereof, **and** all other **facts** essential to a **broad** understanding of the **charge** against me.

**1. FREE AND VOLUNTARY NEGOTIATED SENTENCE**

My **attorney** the prosecutor, and I **have** negotiated my sentence in this case in that the prosecutor **will** recommend to **the** Judge of this Court that I be sentenced to: **(please print)** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I consider this negotiated sentence to be to my advantage, and I have freely and voluntarily entered my plea of **guilty**. I have not been offered any hope of reward, better treatment, or certain type of sentence to get me to plead **guilty** - other than the sentence set forth above - nor have I been threatened, coerced, or intimidated in any way to get me to plead **guilty**.

**2. ADVISED OF RIGHTS**

I understand that by pleading **guilty** I give up the constitutional right of **trial by the Judge or jury**, the right to **remain silent**, the right to put on witnesses in my own behalf, the right to **confront the witnesses against me**, the right to have the State prove its charges against me, and on the charge to which I am pleading **guilty**, I give up the right against self-incrimination.

I understand that if I **am** not a United States citizen **this** plea may subject **me** to **deportation** pursuant to **the laws and regulations governing the** United States Naturalization **and** Immigration Service.

**3. DISCUSSION WITH ATTORNEY**

Before entering **this plea** of guilty, my attorney and I **have** fully discussed all **aspects of this case**, and **(she, he)** has **answered all** my questions and has fully **explained** the charge, **and** I am satisfied with **the services** (she, he) has **rendered** in **this case** in my behalf, **and**

**EXHIBIT B**

(continued from obverse side)

**4. READ AND EXPLAINED BY JUDGE IN OPEN COURT**

The Judge of this Court went over this plea of guilty form with me in Open Court. He explained it to me and asked me if I understood it and if I wanted to plead guilty and give up these rights. I told the judge that I understood it, understood my rights **and** wanted to plead **guilty** to this charge.

**5. TIME FOR CONSIDERATION AND REFLECTION**

I **have** had sufficient **time** to consider **the** charge against me, the possible defenses, the advice of my attorney, the **waiver** of constitutional rights by entering my plea of **guilty**, and to reflect **upon** the consequences **of** my plea. The **Judge of this Court has** advised me that I may have additional **time** to consider all of these matters if I wanted more **time** for **such** consideration. I have advised him that I did not need more time **and** that I wanted to proceed with my **guilty** plea at this time.

**6. NOT UNDER INFLUENCE OF ANY SUBSTANCE OR CONDITION.**

I am not under **the** influence of alcohol; drugs, prescription medication, substances or **conditions which** interfere with my understanding **and** appreciation of **this** plea **and** the consequences of it.

**7. PLEA TRUE AND CORRECT AND UNDERSTOOD**

I understood **this** plea of **guilty** form **when my attorney read and explained** it to me, I understood it when the **Judge** explained it to me, and it is true and correct.

**Both** my attorney **and** I have signed this statement of guilty plea and explanation of my rights in Open Court, at

Yulee, Nassau County, Florida, on \_\_\_\_\_

\_\_\_\_\_  
ATTORNEY FOR DEFENDANT

\_\_\_\_\_  
DEFENDANT

\_\_\_\_\_  
WITNESS, Deputy Clerk of Court

\_\_\_\_\_  
ASSISTANT STATE ATTORNEY

\_\_\_\_\_  
ALBAN E. BROOKE  
CIRCUIT JUDGE  
Div. CR-Q

My signature as Judge of this Court is certification that I have gone over **this** plea form with defendant in open **court** and have **asked** (him/her) **questions**, heard **the** responses and observed (his/her) demeanor. I find the defendant **has** the intelligence to understand (his/her) **constitutional rights**, **the** plea, the plea **form and** these proceedings. I further **find** the plea has **been** entered voluntarily and **freely** and that **the** defendant is not under the influence of any medication, **drug, substance** or **condition** that **would** interfere with (his/her) understanding and appreciation of the plea and the **consequences** of it.