D.A. 8/28/01 ORIGINAL

FILED
THOMAS D. HALL
AUG 15 2001
CLERK, SUPREME COURT
BY_____

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-363

IN RE: AMENDMENT TO FLORIDA RULE OF CRIMINAL PROCEDURE CREATING RULE 3.853 (DNA TESTING)

_____/

COMMENTS OF THE OFFICES OF THE CAPITAL COLLATERAL REGIONAL COUNSEL FOR THE SOUTHERN AND NORTHERN REGIONS

COME NOW THE OFFICES OF THE CAPITAL COLLATERAL REGIONAL COUNSEL FOR THE SOUTHERN AND NORTHERN REGIONS, through the undersigned attorneys, and herein submit the following comments in the above-captioned case.

1. Following oral argument on June 6, 2001, and in light of the enactment of legislation with respect to postconviction DNA testing, an amended emergency rule to create Fla. R. Crim. P. 3.853 is now before the Court. Oral argument is scheduled to take place on August 28, 2001. The CCRC offices herein submit their comments to the amended rule.

A. Applicability of Testing.

2. As proposed, Rule 3.853 (a) provides that a person who has been tried and convicted or a person who pleads guilty or *nolo contendere* may petition for DNA testing. This is one of the major differences between the proposed rule and the recent legislation, which only extended the right to petition for DNA testing to persons "tried and found guilty of a committing a crime." §925.11 (1)(a), Fla. Stat. (2001). As the Amended

Petition submitted by the Florida Bar and the Criminal Procedure Rules Committee pointed out, the legislature does not have the authority to limit DNA testing to only those defendants who were "tried and found guilty." See Amended Emergency Petition Etc. at 2-3 (citing Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000).

3. The CCRCs strongly urge the application of the DNA testing provisions to those defendants who have entered guilty or *nolo contendere* pleas. There is no legitimate State interest in incarcerating an innocent person, regardless if that person entered a plea as opposed to a person who was found guilty by a judge or jury. It must be remembered that the rule at issue is one which provides a mechanism for inmates to get DNA testing. It is not, as the Florida Prosecuting Attorneys Association has noted in its comments, a provision allowing defendants to "rescind" their pleas (Response of Florida Prosecuting Attorneys Association at 5). Should DNA testing be favorable to an inmate who entered into a plea, however, there should be no prohibition on that inmate from seeking judicial relief. Defendants enter pleas for a number of reasons, and as recent events in Florida and nationwide have demonstrated, even innocent people plead guilty.

4. In other contexts, guilty pleas by defendants can still be subject to constitutional attack. See, e.g. Boykin v. Alabama, 395 U.S. 238 (1969) (to be constitutionally valid, a guilty plea must be knowing, voluntary, and intelligent); Hill v.

Lockhart, 474 U.S. 521 (1985) (Strickland[1] test for ineffective assistance of counsel applies to guilty pleas). For example, Florida inmate James Agan pled guilty to first-degree murder and received the death penalty. The Eleventh Circuit Court of Appeals, however, vacated his guilty plea due to ineffective assistance of counsel and withholding of evidence by the State. Agan v. Singletary, 12 F. 3d 1012 (11th Cir. 1994). See also Miller v. Angliker, 848 F. 2d 1312, 1320 (2d Cir. 1988) ("[A] defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case, . . . and of information that may be available to cast doubt on the fact or degree of culpability . . . [E]ven a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution"). Thus, any proposed rule providing for DNA testing should apply to any inmate regardless of whether the inmate went to trial or entered into a plea.

B. Time Limitations.

5. Amended Rule 3.853 provides that a motion for postconviction DNA testing must be filed

> within 2 years following the date that the judgment and sentence in the case became final if no direct appeal was taken; within 2 years following the date the conviction was affirmed on direct appeal if an appeal was taken; within 2 years following the date collateral counsel was appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital cases in which

[1] Strickland v. Washington, 466 U.S. 668 (1984).

the death penalty was imposed; or by October 1, 2003, whichever occurs later.

Fla. R. Crim. P. 3.853 (d)(1)(A). The rule also provides that a motion for testing can be filed "[a]t any time, if the facts on which the petition is predicated were unknown to the petitioner or the movant's attorney and could not have been ascertained by the exercise of due diligence."

6. The CCRCs agree with the previously-filed comments of the Florida Public Defender Association with respect to the issue of time limits, that is to say, that no time limits should be imposed on a defendant's request for postconviction DNA testing. That being said, should any time limits be imposed on an inmate's entitlement to seek postconviction DNA testing, the CCRCs are concerned that the language of Rule 3.853 (d) (1)(A) would foreclose the future possibility (indeed, given scientific advances, the probability), that new scientific advancements would provide new grounds for possible DNA testing. While the rule as presently written does provide "a new window of opportunity" for those defendants "whose review has been time-barred" (Comments of the Florida Prosecuting Attorneys Association at 5), the rule does not appear to allow for the possibility that new methods of scientific testing may develop which could provide the basis for DNA testing in a particular case (even where a previous "older" DNA testing methodology was performed).

7. The issue with respect to DNA testing is not simply that DNA testing as a general concept has been recognized as a

valid testing methodology, but rather whether the particular type of testing under the general rubric of "DNA testing" is available. Any time limitations should contemplate that the "clock" would begin to "run" when a new scientific method becomes available. See Sireci v. State, 773 So. 2d 34, 43-44 (Fla. 2000) ("the two-year period 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 becomes available); Zeigler v. State, 654 So. 2d 1162, 1164 (Fla. 1995) (same). The CCRCs would suggest that it should be a pronouncement by this Court of the acceptance of a new scientific methodology which should control the "availability" of a new scientific technology.[2]

C. Contents of Motion vs. Entitlement to Relief.

8. Although recognizing that DNA testing can also be requested if the evidence could "mitigate the sentence," Rule 3.853 (a), the CCRCs are concerned that the word "exonerate" as a prerequisite for making a *prima* facie showing to get evidence tested is a loaded word which could lead to the improper denial

[2]The CCRCs recognize that Rule 3.853 (d)(1)(B) does provide that a request for DNA testing can be made at "any time" if the "facts" on which the petition is predicated were unknown and could not have been ascertained through due diligence. However, it is not entirely clear that this provision would apply if and when new scientific advances become available in the future and are accepted by this Court after October 1, 2003. Such scientific advances might not be construed as previously unknown "facts" upon which the petition is predicated. Thus, the rule should be clarified to the extent that is remains an open question whether new scientific technology accepted by the Court could constitute cause for an otherwise untimely petition for DNA testing.

of some petitions for **DNA** testing. The proposed rule mentions the word "exonerate" two times, both as a ground for the motion, see Rule 3.853(a), and as one of the prerequisites to show entitlement for testing. See **3.853** (b) **(3).**

9. By requiring a movant to demonstrate "how the **DNA** testing . . . will exonerate the movant of the crime for which the movant was sentenced," this provision could result in the improper mixture of an element setting forth the *prima facie* case for the testing to be ordered with what is needed to establish the entitlement to actual relief from the judgment and/or sentence imposed on the movant.[3] Indeed, the standard for determining the entitlement to relief once the DNA testing has been conducted, *i.e.* "[w]hether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial," see Rule **3.853** (c) **(5)**(C), is a less-onerous standard than the "exoneration" standard required to be demonstrated as a prerequisite to have the testing ordered in the first instance.[4]

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[3]For example, the CCRCs are concerned that DNA testing would be rejected due to arguments by the State that the evidence at trial was "overwhelming" and thus DNA testing could not "exonerate" the defendant. Of course, this leads to absurd results. Simply because a defendant was found guilty should not translate into a failure to meet the predicate for establishing the ***prima*** *facie* elements to obtain testing. If "the defendant was found guilty" argument can defeat a request for DNA testing, then no **DNA** testing could ever be ordered where a conviction exists.

[4]The "exoneration" standard is akin to the "conclusiveness" standard for newly-discovered evidence set forth in Hallman v. State, 371 So. 2d 482 (Fla. 1979), but later rejected as being (continued...)

The term "exoneration" should be clarified or modified to the extent that it requires an even higher burden than the burden necessary to demonstrate the entitlement to relief.[5]

D. **"Identification of the Movant."**

10. As a prerequisite for testing, the rule requires "a statement that identification of the movant is a genuinely disputed issue in this case and why it is an issue." Rule **3.853** (b) **(4).** The CCRCs are concerned about the narrowness of this language. For example, in some cases, a strict "identity" defense may not have been advanced by the defendant or his attorney; rather, a "reasonable doubt" defense might have been advanced. Or no defense might have been advanced other than cursory cross-examination of prosecution witnesses. In such cases, "identification of the movant" might not have been a "genuinely disputed issue" at trial. **A** movant should not be precluded from seeking postconviction DNA testing simply because his or her trial counsel did not, for whatever reason, present a

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[4](...continued) "simply too strict." Jones v. State, 591 So. 2d 911, 915 (Fla. 1991).

[5]The CCRCs would note, for example, the Arizona statute, which has language that is a bit clearer and less restrictive on this point. Under Arizona law, a court can order DNA testing if it finds, inter alia, that a reasonable probability exists that "[t]he petitioner's verdict or sentence would have been more favorable if the results of the deoxyribonucleic acid testing had been available at trial leading to the judgment of conviction" or if the DNA testing "will produce exculpatory evidence." **§§ 13-4240** (C) **(1)**(a); (C) (1)(b), **Az.** Stat. **(2000).**

strict "lack of identification" defense at trial.[6] Satisfaction of the standard set forth in Rule 3,853 (b)(3)[7] should suffice as a prerequisite for testing, without a defendant having to meet the added burden of demonstrating that identification was a "genuinely disputed issue in the case and why it is an issue."

11. By using the phrase "exoneration," the rule creates confusion about whether the rule establishes a new claim for relief or simply allows a two-year window of opportunity to discover evidence which may establish an entitlement to relief under already well established cognizable claims. This Court in Jones v. State, 591 So. 2d 911 (1991), and its progeny have established the contours of a claim for Rule 3.850 relief based upon evidence not previously discoverable.' Surely, if the DNA testing establishes a basis for relief under Jones, an individual who has sought and obtained DNA testing can present his claim based on Jones and obtain a new trial. Since the proposed rule does not address the process once the results are provided, presumably a movant must present the results of the DNA testing in support of a cognizable claim. Accordingly, the CCRCs

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[6]This provision also conflicts with the notion that defendants who entered pleas can also avail themselves of the rule.

'With the caveat regarding the "exoneration" predicate. See Section C, supra.

[8]It is also conceivable that DNA testing will be sought to obtain evidence to support a claim of trial counsel's ineffective assistance for failing to secure the testing at trial. Such circumstances are currently before the Court in Gudinas v. State, SC 00-954.

suggest the movant's burden should be showing that the testing of **DNA** evidenc would provide a basis for obtaining Rule 3.850 from either the judgment or the sentence.

12. Moreover, limiting DNA testing to only those cases where identification of the defendant is a genuine issue could lead to unjust results in some cases. For example, there are situations where the identity of the victim, not the defendant, is at issue. There are also situations where, for example, drug paraphernalia is located at a crime scene and the defense is intoxication; **DNA** testing on the paraphernalia could link the paraphernalia to the defendant, thus buttressing an intoxication defense. It is also easy to imagine that DNA testing could establish that a witness' testimony was scientifically impossible and thus not credible.[9] Because of the remarkable advances in science, and in particular in what types of evidence can be tested, the bottom line is that testing should be available to those defendants regardless of whether identification of the defendant was a "genuinely disputed issue in the case" if the **DNA** testing could produce exculpatory results.

E. Independent Testing by the Defense.

13. Rule **3.853**(c)*(7)* provides that "[t]he 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 good cause, orders testing by another

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[9]This Court has recognized that newly discovered impeachment evidence may warrant Rule 3.850 relief. State v. Mills, SC 01-879 (Fla. June 8, 2001).

laboratory or agency.!' While the CCRCs welcome the language in the proposed rule which provides that a movant can request that another agency aside from FDLE conduct the testing on a showing of "good cause,"[10] the CCRCs remain concerned about the lack of any specific provision which provides for independent testing conducted by a defense-selected laboratory and/or procedures for preservation of the sample so that additional testing could be conducted by an independent laboratory.

14. In contrast, the CCRCs would point out, for example, the Arizona scheme, which provides that if a court orders DNA testing, "the court shall select a laboratory that meets the standards of the deoxyribonucleic acid advisory board to conduct the testing." § **13-4240** (F), Az. Stat. (2000). Another provision of the Arizona scheme provides:

> I. The court may make any other orders that the court deems appropriate, including designating any of the following:
>
> 1. The type of deoxyribonucleic acid analysis to be used.
>
> 2. The procedures to be followed during the testing.
>
> 3. The preservation of some of the sample for replicating the testing.
>
> 4. Elimination samples from third parties.

§ 13-4240 (I), Az. Stat. (2000).

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[10]The legislation only provides that FDLE or its designee can conduct the testing. **§943.3251** (1), Fla. Stat. (2001).

15. The Florida statute is silent on these issues, as is the proposed rule. The CCRCs recommend either specific language akin to the Arizona model, or some other language leaving the "technicalities" of the parameters of the testing, the need for an independent examination by a defense laboratory, the size of the sample and sample preservation, etc., to the lower courts to resolve with the participation of the parties. In short, the process should be the result of an adversarial process, with input from both sides.

F. Denial of **Motion Should be Without Prejudice.**

16. The rule provides that "[t]he court shall review the motion and deny it if it is insufficient." Rule **3.853** (c)(2). The CCRCs would propose (1) that a court be required to set forth the basis for the alleged insufficiency, and (2) that any such denial be without prejudice so that the defendant can cure the putative insufficiency identified by the court. These requirements are consistent with case law regarding denials of postconviction motions. For example, if a court is to summarily deny a Rule **3.850/3.851** motion, the court must either attach portions of the record which conclusively refute the defendant's allegations, or "state its rationale in its decision." Anderson v. State, 627 So. 2d **1170,** 1171 (Fla. 1993). Moreover, if a Rule 3.850/3.851 motion is dismissed for a technical deficiency such as a lack of an oath, such dismissal is without prejudice to cure the deficiency. Id.

G. Applicability of Rule to the State.

17. The proposed rule as well as the legislation are silent on whether the State can avail itself of postconviction DNA testing and under what circumstances. The CCRCs are currently litigating cases in which the State is seeking postconviction DNA testing. The State's position in these proceedings is that it does not need to follow the statute or any rule in order to get postconviction DNA testing performed. This issue is currently before the Court in Bogle v. State, No. SC01-1701, and will presumably be resolved in that case. The CCRCs simply wanted to point out this anomaly to the Court and advise it of the pendency of this issue in the Bogle litigation.

I HEREBY CERTIFY that the foregoing has been sent via first class mail to opposing counsel on the 15th day of August, 2001.

NEAL A. DUPREE
Capital Collateral Regional Counsel
Southern Region
Florida Bar. No. 311545
101 NE Third Avenue, Suite 400
Ft. Lauderdale, FL **33301**
(954) **713-1284**

TODD G. SCHER
Litigation Director
Florida Bar. No. 0899641

By: John T. Abatemarco FL Bar # 0112887
TODD G. SCHER

MICHAEL P. REITER
Capital Collateral Regional Counsel
Northern Region
Florida Bar No. **0320234**
1533 **S.** Monroe Street
Tallahassee, FL 32301
(850) 488-7200

JOHN P. ABATECOLA
Chief Assistant
Florida Bar. No. 0112887

By: John P. Abatecola
JOHN P. ABATECOLA

Copies furnished 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
1st District Court of Appeal
301 Martin Luther King Boulevard
Tallahassee, Florida 32399-1850

The Honorable O.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 61st 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

Carolyn M. Snurkowski
Assistant Deputy Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399-1050

Mark E. Olive, P.A.
320 W. Jefferson Street
Tallahassee, Florida 32301-1608

Hon. Bennett H. Brummer
Public Defender
1320 NW 14th Street
Miami, Florida 33125-1609

Hon. Nancy A. Daniels
Public Defender
301 S. Monroe Street
Suite 401
Tallahassee, Florida 32301

Hon. Carey Haughwout
Public Defender
421 3rd 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

Representative John Dudley Goodlette
3301 E. Tamiami Trail
Administration Building, Suite 203
Naples, Florida 34112

Gerald T. York
L1-10, The Capitol
400 South Monroe Street
Tallahassee, Florida 32399-6536

Harvey Ruvin
Dade County Courthouse
73 W. Flagler St., Ste. 242
Miami, Florida 33130

Tom Warner
T. Kent Wetherell
107 W. Gaines Street
Tallahassee, Florida 32399-6549

Hon. Scott Silverman
1351 NW 12th St., Ste. 712
Miami, Florida 33125-1627

Charles Canady
Reginald Brown
Martin P. McDonnell
Office of the Governor
400 S. Monroe Street, The Capitol
Tallahassee, Florida **32399-6356**

Robert R. Wills
P.O. Box **2356**
Ft. Lauderdale, Florida **33303-2356**

Bill Jennings
Capital Collateral Regional Counsel
- Middle Region
3801 Corporex Drive
Suite 210
Tampa, Florida 33619

Roger R. Maas
402 S. Monroe Street
Tallahassee, Florida **32399-1030**

Brad Thomas
400 S. Monroe Street
Tallahassee, Florida **32399-0001**

Helene E. Marks
P. O. Box 1110
Tampa, Florida 33601-1110

Michael R. Ramage
2331 Phillips Road
P. O. Box 1489
Tallahassee, Florida **32302-1489**

Robert Augustus Harper
Steven Brian Whittington
325 West Park Avenue
Tallahassee, Florida **32301-1413**

Judy A. Gallant
Lawrence J. Fox
American Bar Association
50 F. Street NW, Suite **8250**
Washington, DC **20001**

Arthur Jacobs
FPAA, General Counsel
P. O. **Box 1110**
Fernandina Beach, Florida **32035-1110**

James T. Miller
FACDL
233 East Bay Street, Suite 920
Jacksonville, Florida 32202

Jon H. Gutmacher
200 N. Thornton Avenue
Orlando, Florida 32801

Douglas E. Crow
Assistant State Attorney
Sixth Judicial Circuit
P. O. Box 5028
Clearwater, Florida 33758

Chet Kaufman
Paula S. Saunders
Assistant Public Defenders
Second Judicial Circuit
301 S. Monroe Street, Suite 401
Tallahassee, Florida 32301

John Skye
Chief Assistant Public Defender
Hillsborough County Courthouse Annex
Fifth Floor, North Tower
801 East Twiggs Street
Tampa, Florida 33602

Christina A. Spaulding
Assistant Public Defender
Eleventh Judicial Circuit
1320 Northwest 14th Street
Miami, Florida 33125

William P. White
Chief Assistant Public Defender
Fourth Judicial Circuit
25 N. Market Street, Suite 200
Jacksonville, Florida 32202