ORIGINAL

IN THE SUPREME COURT
OF FLORIDA

CASE NO.: SC01-363

FILED
THOMAS D. HALL
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CLERK, SUPREME COURT
BY
BY

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

COMMENTS OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL)

Pursuant *to* the notice filed in the March 15, 2001 Florida Bar News, FACDL offers the following comments about the Proposed Rule 3.853, Fla. R. Crim. P.

1. FACDL is a statewide organization of over 1,500 criminal defense lawyers. At a Board of Directors meeting, FACDL reviewed Proposed Rule 3.853. Based upon the manifest need to ensure due process, fundamental fairness and to promote judicial efficiency, FACDL supports, without reservations, the general intent of Rule 3.853 to provide a procedural mechanism to allow the testing of DNA materials.

In the context of the Rules of Criminal Procedure, DNA testing could prevent the execution or incarceration of innocent individuals. Without a rule like 3.853, a Defendant may have a valid claim but be unable to have materials (in the custody of the courts, the prosecutor or police) tested by DNA analysis without consent of the custodian or by court order.

2. FACDL suggests 3 amendments to Proposed Rule 3.853. These amendments are necessary to ensure due process and to avoid conflicts with current Supreme Court decisions.

'3. The first amendment should **be** to the language in Rule 3.853(a)(3) that "a statement that the Defendant *is* **innocent** and that DNA evidence will **exonerate** the Defendant of the crime for which the Defendant was convicted." The obvious intent of Rule 3.853 is to provide a procedural mechanism to permit DNA testing; such testing may become newly discovered evidence that may prevent an unlawful sentence.

The requirement that the Defendant allege he is innocent is inconsistent with the general standard for newly discovered evidence. The standard is evidence which would probably produce an acquittal. Kight v. State, 25 FLW 549 (Fla. 2001) This standard acknowledges that newly discovered evidence may produce an acquittal (establish a reasonable doubt) and not establish the innocence of the Defendant. The phrases innocent and exonerate are inconsistent with the newly discovered evidence standard enunciated in Kight v. State, *supra.* See also Jones v. State, 591 So.2d 911 (Fla. 1991) Consequently, Rule 3.853 should not contain the phrases discussed above.

4. The phrase "will exonerate the Defendant *of* the crime for which the Defendant was convicted" should also be changed. DNA evidence could establish degrees of culpability unrelated directly to proof of the charged crime. For example, in a murder case, there may be proof that one of two individuals actually killed the victim while the second individual was a

principal, but did not participate in the actual killing. DNA evidence (analysis of hairs or other bodily fluids) could establish this fact. This Court should extend Rule 3.853 to situations where the DNA would **be** relevant on the issue of whether the Death Penalty was an appropriate sentence.

5. The language in Rule 3.853(b)(4) should also be changed: **"a statement that identification of the Defendant is a genuine disputed issue in the case"** is also inconsistent with the standard for newly discovered evidence. This Court has never limited newly discovered evidence to claims of proof of misidentification. The standard is **any** evidence which will probably produce an acquittal. By definition, this type of proof could involve issues other than identification.

6. The time limitations delineated in 3.853(d)(1)(2) must be changed because they are inconsistent with this Court's holdings in Sireci v. State, 773 So.2d 34 (Fla. 2000) and Zeigler v. State, 654 So.2d 1162 (Fla. 1995). This Court held in these cases that the 2 year period to file a post-conviction relief based upon DNA testing began to run when the **testing method** became available. DNA testing is an ever-changing and evolving process. See Timot v. State, 738 So.2d 387 (Fla. 4th DCA 1999)(PCR testing); Murray v. State, 692 So.2d 157 (Fla. 1997)(PCR testing). Varuas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994) (RFLP testing); Brim v. State,

25 Fla. L. Weekly D2537 (Fla. 2d DCA October 11, 2000) (STR testing)

The forensic use of DNA evidence has evolved from RFLP (Restriction Fragment Length Polymorphism) to PCR (Polymerase Chain Reaction) to STR (Short Tanden Repeat) testing to possible Mitochondria1 DNA testing (MtDNA). In Bolin v. State, Case No.: SC-95,775, oral argument set on May 2, 2001, this Court will consider the issue of whether MtDNA is scientifically reliable and admissible (current DNA analysis tests nuclear not Mitochondria1 DNA). MtDNA was not even available for forensic use until recently.

The history of DNA testing in Florida is that new scientific techniques/applications will most likely replace the techniques used today. Consequently, a new testing technique may become available more than 2 years after the adoption of Rule 3.853 or 2 years after the judgment and sentence became final. Rule 3.853 should provide that the motion must be filed within 2 years from the date this Court approves of (under the Frve test) a new testing method. This Court in Sireci construed the term became available as the date when **an appellate** court upholds the DNA testing method under Frve 654 So.2d at 1164.

The provisions of Rule 3.853(D) (2) should be eliminated or clarified because they are confusing. (D) (2) states that "the time limitations provided in Fla. R. Crim. P. 3.850-3.851 do not apply

to a motion under this rule if the motion for post-conviction relief is based on the results of DNA testing." If this provision is intended to mean that this rule applies to cases of newly discovered evidence (the 2 year time period has since passed), then it should say so. The rule itself contains time limitations. Therefore, (D)(2) is superfluous.

If this Court adopts FACDL's suggestion as to the 2 year time limitation based upon the approval of new DNA testing techniques, then Section (D)(2) is unnecessary. This Court should clarify the issue as to claims based upon present DNA testing methods. This Court should require that those claims must be brought within 2 years of the adoption of the Rule.

CONCLUSION

FACDL urges this Court to adopt Rule 3.853 with the following amendments:

1. Strike the language in Rule 3.853(b)(3): " A statement that the Defendant is innocent and the DNA evidence will exonerate the Defendant of the crime for which the Defendant was convicted and substitute: "a statement that the Defendant is not guilty of the highest offense for which the Defendant was convicted or that DNA evidence will probably lead to a result other than the guilt of the Defendant for the highest offense for which the Defendant was convicted or which would, as a matter of law, establish that the Defendant is ineligible for

the death penalty." The language in Rule 3.853(a) "that would exonerate the Defendant" should be changed to: "probably lead to a result other than the guilt of the Defendant for the highest offense for which the Defendant was convicted or which would, as a matter of law, establish that the Defendant is ineligible for the death penalty."

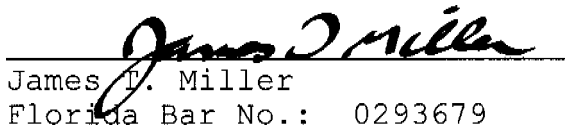
2. The language in Proposed Rule 3.853(b)(4) "a statement that identification of the Defendant is a genuine disputed issue in the case" should be eliminated. Pursuant to this Court's decisions on newly discovered evidence, there is no need for such a statement. If this Court adopts the Proposed changes by FACDL as to Rule 3.853(b)(3), then this section is unnecessary. If this Court feels that some statement of identification is necessary, then it should adopt the following addition to the current language in Rule 3.853: "a statement that identification of the Defendant is a genuine disputed issue in the case" - "identification is not limited to the question of the Defendant's participation in the crime charged; the statement of identification may include DNA evidence that leads to a result other than the guilt of the Defendant for the highest offense for which the Defendant was convicted or, as a matter of law, establish that the Defendant is ineligible for the death penalty."

3. The language of Proposed Rule 3.853(c)(4)(C) must also be

changed so that the Rule is consistent with the other proposed amendments by FACDL. The following language should be substituted for the language "whether it's a reasonable probability that the Defendant would have been acquitted" - "where there is a reasonable probability that there would have been a result other than the guilt of the Defendant for the highest offense which the Defendant was convicted or as a matter of law would establish that the Defendant is ineligible for the death penalty if the DNA evidence had been admitted at trial."

4. Proposed Rule 3.853(d)(1) should contain the following additional language: after the phrase whichever is later, provided however that a motion may be filed no more than 2 years after the date that the Supreme Court of Florida accepts any new DNA technology as admissible in the Courts of the State of Florida."

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail on this 16th day of April 2001 to: Honorable Oscar H. Eaton, Jr., Seminole Courthouse, 301 N. Park Avenue, Sanford, Florida 32771-1243.

James T. Miller