

8/28/01

Original

IN THE SUPREME COURT OF
FLORIDA

CASE NO.: SC01-363

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

~~FILED~~
THOMAS D. HALL
AUG 15 2001

COMMENTS OF FLORIDA ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS (FACDL)
IN SUPPORT OF PROPOSED RULE ON DNA TESTING,
RULE 3.853 FLA. R. CRIM. P.

CLERK, SUPREME COURT
BY _____

The Florida Association of Criminal Defense Lawyers (FACDL) by and through the undersigned attorney, hereby offers the following comments to the Proposed Rule 3.853 Fla. R. Crim. P. on DNA testing.

1. On August 10, 2001, FACDL held a Board meeting. At the Board meeting, FACDL specifically discussed the Proposed Rule pending before this Court. The Board unanimously voted to approve the Proposed Rule and recommend that this Court adopt, in toto, the Proposed Rule.
2. FACDL believes the Proposed Rule is fair and balanced and incorporates the concerns of both prosecutors and defense attorneys. The Rule covers both trial and plea cases. If the Rule provided otherwise, significant equal protection problems could exist. The Rule allows for new advances in DNA Technology to come within the scope of the Rule. The rule also allows for testing outside the Florida Department of Law Enforcement (FDLE) lab, for good cause shown. This provision will cover situations where FDLE cannot handle the test or the Defendant seeks to have alternative testing. In summary,

these provisions provide for a fair and efficient administration of the rule. These provisions also eliminate potential due process challenges to the Rule.

3. FACDL previously offered comments about the standards for allegations and proof in the proposed rule. FACDL suggested that the standards in the Rule (allegations to get DNA testing) for innocence or exoneration or an issue of identification could arguably be higher than the usual standard for newly discovered evidence. However, FACDL has reconsidered its position on this issue. The current Proposed Rule, which allows the Rule to cover cases which could result in a lesser sentence, will not necessarily conflict with the standard for newly discovered evidence. The term exonerate could encompass the newly discovered evidence standard. The requirement of an allegation of identification is appropriate because, by definition, DNA testing will always involve some proof of identity.

FACDL has received the comments of the Florida Public Defender's Association, Inc. (FPDA). FACDL shares many of the concerns expressed in the comments of the FPDA. The FPDA has raised significant questions that deserve consideration by this Court. Consequently, FACDL will address these concerns and note why the proposed Rule will be able to handle the problems outlined in the comments of FPDA.

A. Preservation of evidence. FACDL submits that is the most important potential problem with the Rule. Although the statute on DNA testing does contain preservation provisions, the Rule does not have preservation provisions. So long as the statute remains in effect, there is no need for such a provision in the Rule. Moreover, after extensive research and consideration, FACDL has concluded the preservation provisions are mostly, if not completely, substantive in nature. Therefore, this type of provision is a legislative, not judicial matter. Although this Court may possibly enact preservation rules for a case under review (to ensure subsequent testing pursuant to court decisions/orders or due to a new technique not previously available) FACDL is uncertain whether this Court has the power to require preservation in all cases.

FACDL certainly agrees that, from a practical standpoint, preservation of possible DNA evidence is critical to the actual effectiveness of proposed Rule 3.853. FACDL agrees with FPDA that this Court does have the authority to require the preservation of evidence introduced in a court proceeding. However, the question here is whether this Court has the authority to order the preservation of potential evidence that is not a part of

a court proceeding. FACDL has been unable to find another jurisdiction that requires the preservation of potential DNA material (blood, hair or other bodily fluids or materials) pursuant to a **Rule of Court**. Although FACDL strongly believes potential DNA material must be preserved, this Court need not reach this issue at this time because the statute on DNA testing requires preservation. Other states which have enacted DNA testing procedures have done so through statutes, not court rules. See Illinois Statute §725 ILCS 5/122-1-Petition for Post-Conviction Relief. See also People v. Dunn, 713 N.E. 2d 568 (111.1st DCA 1999) (Defendant had right to post-conviction DNA testing due to statutory provisions); New York Criminal Procedure Law, 5440.30 Post-Conviction Relief, statutory grant of right to DNA testing; Utah Statutes, Chapter 35A, Post-conviction remedies 578-359-301. The Utah statutory scheme is significantly similar to Proposed Rule 3.853.

- B. Amendment of motion. FACDL believes that this is not a problem because case law on Rule 3.850 already permits amendments and supplements to a motion.
- C. Identification of evidence - history and whereabouts. FACDL shares FPDA's concern that this could be a problem. However, the pleading requirements that already exist for

Rule 3.850 Fla. R. Crim. P. and for Proposed Rule 3.853 should correct this problem. Proposed Rule 3.853 requires an allegation of the whereabouts and identity of the evidence **if known**. Under Rule 3.850 Fla. R. Crim. P., a Defendant must allege a prima facie case. Under Proposed Rule 3.853, a Defendant must allege the type of DNA material and the location, if known. If the Defendant does not know the location of the evidence, then FACDL assumes that this lack of knowledge would not make a motion legally insufficient. If a trial court dismisses a motion due to legal insufficiency, then the Defendant may seek appellate review of the motion.

- D. Identification of movant is a genuinely disputed issue. FACDL, in its comments to the original Proposed Rule 3.853 agreed that this was a potential problem. However, FACDL now believes that the current proposed Rule 3.853 eliminates this problem. By definition, all DNA cases involve some proof of identity. The provisions in the current Rule that deal with exoneration for the guilt of the charged crime or which would reduce a sentence will eliminate this issue as defined by FPDA.
- E. Response by the state. FACDL does not believe this will be a significant problem due to the standards of law that govern newly discovered evidence. (Assuming a DNA testing

under Rule 3.853 provides exculpatory evidence.)

- F. Appointment of counsel. Although FACDL wishes that counsel would be appointed in all cases, this Court's current case law on appointment of counsel leaves that question to the discretion of the trial court. This issue is a matter which FACDL believes should be worked out, if problems arise, through litigation based upon individual cases.
- G. Evidence - "likely admissible at trial". FACDL believes an in pari materia reading of Rule 3.853 eliminates this potential problem. By the provisions of Rule 3.853, DNA evidence will be admissible to mitigate a sentence. The phrase "admissible at trial" would include, through an in pari materia reading, evidence used at sentencing.
- H. Reasonable probability standard. FPDA makes a valid point on this issue. There may be an inconsistency between the pleading requirement under Rule 3.853 and the ultimate standard of proof. FACDL raised this exact point during the oral argument in June. However, this problem may not arise due to the prima facie pleading requirements of Rule 3.850. This problem, if it arises, may need to be litigated in the context of a specific case.
- I. Time limits. FACDL, for the purposes of these comments,

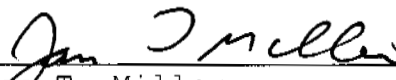
accepts the time limits in Rule 3.853 because they are consistent with similar time limitation in other post-conviction proceedings.

J. Testing by FDLE. For the purposes of these comments, FACDL accepts the provisions for testing by FDLE or by some other entity for good cause shown.

CONCLUSION

FACDL urges this Court to adopt the Proposed Rule 3.853. FACDL recognizes that the FPDA has raised significant questions about the Proposed Rule. However, FACDL believes most of these issues, if they arise, will have to be resolved in litigation based upon the context of a particular ruling based upon specific facts. It is virtually impossible to craft a Rule of Criminal Procedure that covers all potential problems which will eliminate all future litigation over the scope and meaning of the Rule. The current Proposed Rule is a fair and balanced beginning and this Court should adopt it.

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 13th day of August 2001 to: Honorable Judge Oscar H. Eaton, Jr., Seminole Courthouse, 301 N. Park Avenue, Sanford, Florida 32771-1243; Chet Kaufman, Assistant Public Defender, on behalf of Florida Public Defender's Association, Second Judicial Circuit of Florida, 301 S Monroe Street, Ste. 401, Tallahassee, Florida 32301; John F. Harkness, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399; Douglas Crow, Assistant State Attorney, Sixth Judicial Circuit, P.O. Box 5028, Clearwater, Florida 33758; Michael P. Reiter, Capital Collateral Regional Counsel - Northern Region, 1533-B S Monroe Street, Tallahassee, Florida 32301.


James T. Miller

CERTIFICATION OF TYPEFACE COMPLIANCE

Appellant certifies the type size and font used in this brief is Courier New 12.