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THOMAS D. HALL
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CLERK, SUPREME COURT
BY _____

IN THE SUPREME COURT OF FLORIDA

IN RE: Amendment to Florida
Rules of Criminal Procedure
Rule 3.853 (DNA Testing)

Case No. SC 01-363

COMMENT OF HONORABLE O. H. EATON, JR., PAST CHAIR
CRIMINAL PROCEDURE RULES COMMITTEE

1. Paragraph 3.853(f) should be amended as follows:

(f) **Appeal;,** An appeal may be taken by any adversely affected party within 30 days from the ~~entry of the order on the motion~~ date the order on the motion is rendered. **All** orders denying relief must include a statement that the movant has the right to appeal within 30 days after the order denying relief is ~~entered~~ rendered.

The term "rendered" is a term of art used in other areas of the Rules, including the Rules of Appellate Procedure. The term is defined and explained in Rule 9.020(h). The term should be substituted for the word "entered" in order to provide consistency with the rules and to avoid confusion.

2. I have reviewed the Comments of the Florida Public Defender's Association and would like to respond to some of the suggestions made there. This response is to each lettered paragraph in the FPDA comments. A copy of the FPDA

Comments is attached hereto for easy reference.

a. There is no need to specifically allow for amendments to motions made under the proposed rule. While the comment suggests that amendments are "contemplated" throughout all other rules of procedure, no specific reference is made to any such "contemplation" and I have been unable to find any. Judges routinely allow amendments to motions under the discretion allowed by case law and, since this rule does not contain any restriction on amendments, a provision for amending these motions is unnecessary.

b. It is not too much to expect petitioners to provide the information requested in proposed 3.853(b). If the movant does not know the location of potential **DNA** evidence or its physical description, this information can simply be stated as "unknown." If other information in the motion establishes facts that show the movant is entitled to relief, the location and nature of the evidence can be established at the hearing.

c. The suggestions in this paragraph are well taken. Section (b)(4) should be amended as follows:

(4) a statement that identification of the movant is a genuinely disputed issue in the case, and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received.

d. Restricting the prosecutor's response is unnecessary. This is the type of problem that should be considered by the courts, if it ever arises.

e. There is no constitutional right to counsel for post conviction relief proceedings. The legislature created that right in **F.S.** 925.11(2)(e). The statute provides as follows:

> (e) Counsel may be appointed to assist the sentenced defendant if the petition proceeds to hearing and if he court determines that the assistance of counsel is necessary and makes the requisite finding of indengency.

This right is a substantive right and not a procedural one. The proposed rule follows the statute. Expansion of the right to post conviction counsel should be addressed in the legislature and not by the Court.

f. The proposed rule does not contemplate expanding Rule 3.800 to mitigate a sentence just because DNA evidence may have been discovered. The term "mitigate the sentence" contemplates mitigation of the sentence such as from first degree murder to second degree murder or from **a** death sentence to a life sentence. The proposed rule and the statute require "a reasonable probability that the sentenced defendant would have been acquitrted or would have received a lesser sentence *if the* ***DNA evidence*** *had been admitted at* ***trial.***" (Emphasis supplied.)

g. The pleading requirement of the proposed rule and the proof required at the hearing are two separate standards. One is used to get into court and the other defines the burden the movant must carry in order to be entitled to relief. The proposed rule is not inconsistent and is sufficient as stated.

h. The provisions of proposed Rule 3.853(c)(7) adequately provide for exceptional circumstances. The statute requires FDLE to perform the testing if ordered to do so. The rule recognizes that there may be certain situations (such as if FDLE's lab should be disqualified for some reason or if the defendant wishes to hire his own lab analyst) and all that is necessary is to show "good cause." The rule is adequate for that purpose. The statute is necessary because it places the substantive burden upon FDLE to provide **DNA** testing.

i. This problem is a problem that was discussed at length in the Fast Track Committee. The legislature and the prosecutors want **a** time limit for the filing **of** these motions. That is why the "escape valve" contained in 3.853(d) was proposed. (The section is entitled **Time Limitations** and is sometimes numbered 3.853(a) but that is not correct.) The "escape valve" provides for newly discovered evidence and should be sufficient to cover all but the most unusual circumstances. Some time limitation is necessary because DNA evidence will not be preserved indefinately under the provisions of 925.11(3). However, should the most unusual circumstance occur, this Court has not hesitated in the past to grant relief anyway. See, *Spaziano v. State*, 660 So.2d 1363 (Fla. 1995).

j. F. **S.** 925.11(3) provides for the preservation of **DNA** evidence and, while this Court undoubtably has the authority to regulate retention of court records

and evidentiary exhibits, Rule 2.075 already accomplishes that purpose. The statute applies to DNA material that may not be in the custody of the courts because it applies to "any governmental entity." While the provisions of the statute and Rule 2.075 may prove to need amendment in the future, **FPDA** does not suggest how the proposed rule should be amended nor what problems an amendment should be designed to cure.

Respectfully submitted,

Dated August 10,2001

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IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC 01-363

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COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC.

The Florida Public Defender Association, Inc. ("FPDA") respectfully submits the following comments to proposed Rule 3.853, Florida Rules of Criminal Procedure, as promulgated and amended by the Criminal Procedure Rules Committee of The Florida Bar ("the Committee").

1. Backmound

The Committee on January 19, 2001, approved proposed emergency rule 3.853 to establish judicial procedures for postconviction DNA testing. The Florida Bar's Board of Governors forwarded both that proposal and a proposal submitted by the FPDA to this Court for consideration, without endorsing either proposal. Meanwhile, the Legislature enacted chapter 2001-97 (CS/CS/SB366), addressing postsentencing DNA testing. The bill became law on May 31, 2001, with the most relevant portions, sections 1 and 2, scheduled to take effect on October 1, 2001. After receiving written comments on the proposed emergency

rule, including those submitted by the FPDA, but before the parties had the opportunity to address the new chapter law, this Court on June 6, 2001, heard oral argument on the rule. The Court subsequently issued an order on June 6 returning the proposed rule to the Committee for expedited reconsideration in light of chapter 2001-97. The Committee filed an amended proposed rule on July 2, 2001, and this Court solicited comments thereon. The comments below reflect the view of the FPDA with respect to the proposed rule as amended by the committee.

2. The FPDA endorses some amendments and readopts our prior comments

The FPDA supports the Committee's decision to apply the rule to prisoners who entered guilty and nolo contendere pleas. The FPDA is also pleased that the proposed rule now clearly reaches mitigation of sentence, not just exoneration of guilt. Both of these issues were of primary concern to the FPDA, as expressed in our written comments filed on April 16, 2001. Many of our comments as to those and other issues remain relevant even after the committee amended its proposal. Accordingly, the FPDA readopts and realleges our April 16 submission, and asks the Court to consider those suggestions in deciding how to proceed.

The following comments are intended to supplement the FPDA's April 16 comments to address the committee's amendments, the legislation, and comments made at the June 6 oral argument.

3. Supplemental comments on amended rule

a) Proposed rule 3.853(a) & (b) authorizes a motion by a prisoner, but there is no mention of whether a motion can be mended, either by the pro se prisoner or through counsel. Provisions allowing for amendments of motions are contemplated throughout all other rules of procedure, and the same should be done here.

b) Proposed rule 3.853(b) requires the prisoner to identify evidence subject to DNA testing, including its whereabouts, and to assert the history of DNA testing performed on that evidence. Subparagraph (c)(5) then requires judicial findings to be made from those asserted facts. However, the existence, location, and history of testing all physical evidence is peculiarly within the control and knowledge of the State and various law enforcement agencies. The prisoner should be required to make a good faith allegation that such evidence exists, but the burden of describing the physical evidence, its location, how it was obtained, and its history of examination, should be borne by the State once a good faith allegation has been made. This concern is especially applicable to prisoners acting pro se who have not had the benefit of an investigation performed by postconviction counsel at the time the motion is filed.

c) Proposed rule 3.853(b)(4) provides that a prisoner must allege that

"identification of the movant is a genuinely disputed issue in the case and why it is an issue." In some instances, however, questions as to whether the moving party's identity as a perpetrator in the commission of a crime is not a pivotal issue for DNA testing purposes. For example, where two or more persons committed a crime, DNA evidence may be probative of the nature and extent to which a particular party participated, which can directly bear on guilt, and in virtually every does directly bear on punishment. This subsection of the rule should be eliminated.

d) Proposed rule 3.853(c)(2) authorizes the trial court to order the State to respond to a facially sufficient motion. However, the rule imposes no restrictions on the prosecuting authority's response. The FPDA believes this omission is problematic. For example, it has been our experience that a case originally prosecuted under a sole-perpetrator theory, when challenged in postconviction based on DNA evidence, is sometimes reconfigured and retheorized by the State as a multiple-perpetrator case. The State should have no license to distort its theory of prosecution just to avoid the revelations of exculpatory DNA evidence. The State's response, therefore, should be predicated on the same prosecution theory the State used in its original prosecution of the movant. To do otherwise would obfuscate rather than facilitate the justice that this

rule was intended to bring about.

e) Proposed rule 3.853(c)(4) authorizes a trial court to appoint counsel only if there is a hearing and only if the trial court determines that the assistance of counsel to help an indigent prisoner is necessary. The FPDA believes this provision is inadequate. DNA issues involve investigative, legal, and scientific expertise. Counsel should always be provided when a prisoner makes a good faith allegation that DNA evidence may exonerate or mitigate the punishment in his or her case. Moreover, failure to appoint counsel for indigents when non-indigent prisoners proceed with counsel may constitute a violation of equal protection guarantees as well as due process, right to counsel, and access to court guarantees. See U.S. Const. amends. VI, XIV; *art.* I, §§ 2, 9, 16, 21, Fla. Const.

f) Proposed rule 3.853(c)(5)(B) requires the trial court to find whether the test results "likely would be admissible at trial." However, proposed rule 3.853 generally contemplates relief not just as to guilt but also as to sentencing, where the full panoply of exclusionary rules of evidence do not apply. Accordingly, proposed rule 3.853(c)(5)(B) should be moderated to address this concern.

g) Proposed rule 3.853(c)(5)(C) states that the finding should be "Whether 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." The FPDA suggests that the "reasonable probability" standard be expressly incorporated in the pleading requirements of rule 3.853(a). It makes no sense for the prisoner to have to allege that the evidence would exonerate or mitigate, see proposed rule 3.853(a), when the legal standard is arguably the lesser standard of establishing a reasonable probability that the evidence would exonerate or mitigate. The threshold burden should be no greater than the ultimate burden.

h) Proposed rule 3.853(c)(7) authorizes testing only by the Florida Department of Law Enforcement (FDLE) or its designee, as provided by statute, unless the court, on a showing of good cause, orders testing by another laboratory or agency. The FPDA suggests that prisoners should be free to seek independent testing, and if the prisoner is indigent, to have the State bear those costs. The proposed rule may be read to limit judicial discretion as well as the independent rights of the moving parties. This would be inappropriate, especially where a prisoner's motion may in some manner call into question the prior actions or omissions of the State, the FDLE, and/or its designee. Furthermore, whenever testing is done by the FDLE or its designee, the prisoner should be given the right to have counsel and experts present at all material stages of the testing.

i) Proposed rule 3.853(d) contemplates a two-year time limit on motions unless the facts on which the motion is predicated were unknown to the movant or the movant's attorney, and could not have been ascertained by the exercise of due diligence. Although the FPDA is gratified that the Committee saw the wisdom of expanding the time frame from its prior proposal, we are nonetheless concerned that any arbitrary time limit may prove to be unjust. Neither the State nor the judiciary have any legitimate interest at any time in convicting and punishing persons whose guilt should have been exonerated and/or whose punishment should have been mitigated. No interest in the finality of judgments can ever take: precedence over a legitimate claim of exoneration or mitigation. Moreover, there is a compelling State interest in disclosing the truth and finding the real perpetrator, which endures beyond the judicial interest in finality of judgment.

j) Proposed rule 3.853 contains no provision addressing the preservation of evidence. The procedure for obtaining DNA testing could be completely undermined if sufficient procedures are not set forth to provide for preservation of evidence that may contain DNA. This Court has the constitutional authority to adopt appropriate rules to govern the operation of the courts, officers of the court, and their agents, for the conduct of judicial proceedings, See generally art. V, § 2(a), Fla. Const. For example, this Court adopted Rule of

Judicial Administration 2.075 to regulate the retention of court records, including evidentiary exhibits. This Court has the obligation to take measures to ensure full access to the courts to "every person for redress of any injury, and justice shall be administered without sale, denial, or delay." Art. I, § 21, Fla. Const. This Court also has the obligation to administer the writ of habeas corpus underlying the proposed rule, which "shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const. Accordingly, the FPDA urges this Court to adopt procedures for the courts, clerks of the courts, officers of the courts, and those acting as agents to individuals under the court's oversight, to retain evidence that may contain DNA for as long as reasonably possible and in a manner that prevents the evidence from becoming tainted.

4. Conclusion

For the foregoing reasons, the FPDA asks this Court to adopt the proposed amended rule with the changes suggested above, and to create a special commission to study the problem of wrongful convictions in Florida, as we suggested in our April 16 comments.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by U.S. Mail to: The Hon. O.H. Eaton, Jr., Seminole County Courthouse, 301 N. Park Ave., Sanford, FL 32771; John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300; James T. Miller, FACDL, 233 East Bay Street, Suite 920, Jacksonville, FL 32202; Michael Reiter, CCRC-ND, 1533-B S. Monroe Street, Tallahassee, FL 32301; Jon H. Gutmacher, 200 N. Thornton Ave., Orlando, FL 32801; Douglas E. Crow, Assistant State Attorney, Sixth Judicial Circuit, P.O. Box 5028, Clearwater, FL 33758; and Robert R. Wills, P.O. Box 2356, Fort. Lauderdale, FL 33303, on this 1st day of August, 2001.

CERTIFICATE OF COMPLIANCE

I certify that this computer-generated document has been prepared with Times New Roman 14-point type, in accordance with Florida Rule of Appellate Procedure 3.210.

Respectfully Submitted,

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