O.A. 8/28/01 ORIGINAL

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

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**

_______________________________________/

COMMENTS OF THE INNOCENCE PROJECT

The Innocence Project 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").

In brief, we believe this Court should reject the two year time limit in the proposed rule because: 1) It is very bad public policy that will, as a practical matter, make it impossible for the vast majority of inmates who could prove their innocence through post-conviction DNA testing to do so; and 2) It creates a serious constitutional problem in that the two year time limit might be construed to abridge an inmate's right to obtain access to exculpatory evidence that could be used to prove actual innocence or obtain executive clemency. On the other hand, we strongly support the provisions of the proposed rule that permit inmates who claim to be innocent, but nonetheless pled guilty or nolo contendere, to obtain relief if they otherwise meet the requisite criteria for a post-conviction DNA test.

1. A Two Year Time Limit On Post-conviction DNA Petitions is Very Bad Public Policy

Since the advent of forensic DNA testing eleven years ago, 93 inmates in the United States, and seven more in Canada, have been exonerated through Post-conviction DNA testing.[1] Ten walked off of death row, some of them having escaped execution by just a few days. In more than twenty of these cases the post-conviction testing has not only exonerated the wrongly convicted, but identified the real assailant, individuals who have often committed a series of rapes or murders. Over the last nine years the Innocence Project at the Cardozo School of Law has represented or assisted clients in more than fifty of these cases. We have literally reviewed thousands of requests from inmates seeking tests, we have negotiated or litigated to obtain tests in more than twenty states, and we have helped establish innocence projects at twenty-seven law schools to deal with the post-conviction DNA testing issue. Indeed, we have worked closely with prosecutors in many jurisdictions who have set up their own, in-house "innocence projects" to do post-conviction DNA testing.

Based on this unique experience, we can say with great certainty that the

---

[1]By the term "exonerated" we mean that the inmate's conviction was vacated and he was either pardoned by a governor on the grounds of actual innocence, the prosecutor dismissed the case, or, in only a handful of cases, the inmate was re-tried and acquitted.

two year time limit for those seeking testing in Proposed Rule 3.853 (d)(1)(A) and (B) would be a cruel defeat for innocent inmates and the public, who rightly expect, that whenever possible, post-conviction DNA testing should exonerate the wrongly convicted and identify the real criminal, before that person commits more crimes. **As** a simple, practical matter, the vast majority of inmates who could prove their innocence through a DNA test do not have lawyers, do not have the necessary knowledge to make a viable claim under the proposed rule, do not have access to indispensable transcripts or police and laboratory reports, do not realize the broad array of biological items that could be successfully tested, and do not understand the power of DNA databanks to prove their innocence by linking trace evidence at a crime scene to a known offender or another crime scene. In truth, most lawyers, even criminal defense lawyers and prosecutors, lack an adequate understanding of the different kinds of the DNA tests that now exist and the power of the technology to establish innocence and guilt. How can anyone who cares about justice seriously expect that by October 1,2003 the innocent inmate will be able to make a claim under the proposed rule, especially inmates who may be suffering from mental retardation or some other disability?

A. Why the Evaluation and Filing Process Will Ordinarily Take More Than Two Years, Even When An Innocence Proiect Is Involved.

A brief explanation of how the Innocence Project at Cardozo Law School has functioned for the last nine years illustrates the problem. We have maintained a relatively constant caseload of about two hundred clients, whose cases are worked on by sixteen to twenty students. But to become an official client of the Project, we must first satisfy ourselves from a review of the transcripts, police and laboratory reports, appellate decisions and briefs, that a favorable post-conviction **DNA** test would raise a reasonable probability that an inmate was wrongly convicted or sentenced. Consequently, we currently have two thousand cases in various stages of evaluation and another two thousand letters from inmates that have not even been read by a cadre of volunteers who do our initial screening.

It currently takes four to six months to even respond to an inmate's inquiry letter. Another year, at least, is consumed in the collection of information. Most matters are hampered by the age of the case, tracking down former attorneys, and gathering documents that are not available to the inmate if the inmate can afford to obtain them. In general, unless the inmate is fortunate enough to have a post-conviction attorney (and virtually none of the non-capital clients do), at least a year and a half is spent gathering enough information so we can first *begin* a meaningful evaluation process.

Once a case is accepted and assigned to a student to investigate, even more

time is consumed in tracking down transcripts and evidence, contacting and negotiating with various government offices, and drafting and filing motions. This process takes, on average, another year and a half. Co-Directors Barry Scheck and Peter Neufeld, review every case at this stage. They are assisted by Executive Director Jane Siegel Greene (an experienced lawyer) and Huy Dao, a very brilliant non-lawyer who supervises our evaluation system.

Most of our students, even with extensive training, do not always appreciate the diversity of biological samples that can be tested to prove innocence. For example, within the past three years a new assay, mitochondrial **DNA** testing, now permits the extraction of DNA directly from the shaft of a hair. Indeed, mitochondrial **DNA** testing is proving that conventional microscopic hair analysis is **junk** science. The FBI itself, in reviewing applications for post-conviction mitochondrial testing, reports that even when their own, second review confirms an "inclusion" between a crime scene hair and a suspect, subsequent mitochondrial testing proves them wrong. We have already had exonerations based on mitochondrial testing alone. William Gregory of Louisville, Kentucky, was exonerated through post-conviction mitochondrial **DNA** testing after serving more than six years for a rape that he did not commit. See *Lawmaker Calls for More Use of DNA Tests,* Butch John, The Courier-Journal, WL 7034904. Mitochondrial

testing has also provided indispensable, additional proof of innocence. *See* Exhibit **"A,"** *Actual Innocence: When Justice Goes Wrong **and** How to **Make** it **Right,*** by Scheck, Neufeld, and Dwyer (Penguin 2001), at 163-203, for an account of Ron Williamson's story. Increasingly, mitochondrial testing will become the basis for exonerations where hair has been left at a crime scene, but there is no semen or other biological evidence that can subjected to nuclear DNA tests. Most lawyers do not know of this test, much less inmates. Yet, in theory, under the proposed rule, a lawyer or inmate exercising due diligence should have known about the possibility of mitochondrial testing, and would be barred from making an application for such a test after October 1,2003.

Similarly, our students, despite extensive training, frequently do not, on their own, appreciate all the different places exculpatory biological evidence can be found. **DNA** testing can be done using skin left on the hinges of glasses, saliva on the rims of cups and bottles, cigarette butts, sweat from the headband of a cap, skin cells on shoelaces or ropes used as ligatures. See *Nat'l Instit. Just., What Every Law Enforcement Officer Should Know About DNA Evidence* (Sept. 1999).

Nor do our students **grasp** the power **of** DNA databanks to prove innocence. If an STR (Short Tandem Repeat) DNA profile is taken from saliva on a bottle at the crime scene, or a blood stain that could come from a perpetrator, **and** run

through the national **DNA** databank system, there could be a "hit" to a convicted offender who would have the opportunity and motive to commit the crime in question. Equally, the "hit" could be to another crime, still unsolved, but a crime that the inmate, who claims innocence, could not have committed because he was in prison for the wrongful conviction at the time. These are not fanciful possibilities. *See* Actual Innocence, ***supra,*** at 309-328, for the story of Marine Kevin Green, who did 17 years before being freed by a "hit" on a databank search in California. Such "hits" occur every week, especially in Florida which has, next to Virginia, the largest state **DNA** databank in the country. Yet we find our students, much less most criminal lawyers, do not fully appreciate the power of databank arguments in constructing post-conviction DNA applications.

Even more arcane, STR DNA tests can sex type biological samples. The bloodstain, saliva sample, or skin cells can be attributed to either a male or female, along with the STR **DNA** profile. In some cases, gender can be a critical evidentiary point, but most students and lawyers do not know this is possible.

The federal government is spending millions of dollars trying to educate law enforcement and crime laboratory personnel to these possibilities. Co-Directors Scheck and Neufeld have helped design some of these training modules and conduct training sessions for law enforcement and the bar across the country.

We *know* most innocent inmates on their own, in two years, will not be able to appreciate these subtle possibilities.

B. Why the National Commission on the Future of DNA Testing Opposed Time Limits on Post-Conviction DNA Applications

Four years ago, spurred by the phenomenon of post-conviction DNA exonerations, Attorney General Janet Reno set up the National Commission on the Future of **DNA** Evidence. This Commission, chaired by Wisconsin Supreme Court Justice Shirley Abrahamson, staffed by National Institute of Justice researchers, and directed by an Assistant United States Attorney, Christopher Asplan, was comprised primarily of law enforcement, prosecutors, crime laboratory directors, medical examiners, and scientists. Barry Scheck was also member of the Commission.

The Commission gave the problems posed by post-conviction DNA applications and the issue of time limits very careful review. First, the Commission set **up** a post-conviction subcommittee, chaired by Arizona judge Ronald Reinstein, which, after two years of study, issued a comprehensive report, See *Nat'l Instit. Just., Off. Just. Programs, U.S. Dep't. Just., Pub.* **No.** *NCJ 177626, Post-conviction* ***DNA*** *Testing: Recommendations for Handling Requests,* iii (Sept. 1999)(attached hereto as Exhibit "B"). This report explicitly

recommends the adoption of the protocols we use at the Innocence Project for case evaluation and further suggests how prosecutors, crime laboratories, and judges should deal with these requests as well. The more subtle and difficult problems encountered in putting together a Post-conviction **DNA** application already reviewed here are discussed at greater length. But most importantly, the Report urged "pursuit of truth over the invocation of appellate time bars." Id.

Subsequently, the Commission created a model statute *that contains no **time bars.*** This model statute has been adopted verbatim or closely followed in **16 of** the **24** states which have adopted Post-conviction DNA statutes without any time bars. See Exhibit "C". We strongly urge this Court to weigh the Commission's recommendation heavily. No group has studied this issue more carefully. The Commission members had unparalleled experience with the Post-conviction **DNA** testing process, especially from the law enforcement perspective.

C. Adopting a Two Year Time Period Without The Creation and Funding of Innocence Projects in Florida Is Unconscionable.

There is one fledgling Innocence Project at Nova University Law School that is strapped for funds and overwhelmed by requests they cannot begin to handle. The passage of a Post-conviction **DNA** statute, especially with a two year time limit, is the worst form of an unfunded mandate. In California, just this past

month, after passing a Post-conviction **DNA** bill with no time limit, the legislature allocated $850,000 to get two innocence projects off the ground in northern California (Santa Clara Law School) and southern California (California Western Law School). The San Diego District Attorney's office has started it's own in-house Innocence Project and received funding for that effort. In New **York** State, the legislature appropriated $400,000 to be used to set **up** Projects across the state. While law school Innocence Projects are a good, cost-effective way to deal with the issue, they still cost money. Florida's unfunded mandate is doomed to failure; indeed, it creates a crisis. Hopefully, the universities, law schools, and the bar in Florida will respond soon. But certainly this Court should not compound a bad situation by adopting a two year time limit before any serious organized effort to handle Post-conviction **DNA** applications gets off the ground.

D. Why the Two Year Time Limit Hurts Law Enforcement, Crime Victims, and the Public

The fact that the innocent will be left to rot in prison or die by lethal injection ought to be reason enough to reject the proposed two year time limitation. But this draconian time limit will also hurt law enforcement, crime victims, and the public. Every time an innocent person is arrested, convicted, sentenced, or executed, the real perpetrator is on street, free to commit more

crimes. Post-conviction **DNA** testing can help identify the real assailants. Increasingly, with the growth of **DNA** databanks, this is happening, most dramatically in Florida.

The Innocence Project was involved in the only two Florida **DNA** exonerations, Frank Lee Smith and Jerry Frank Townsend. For years, along with Smith's capital defense lawyers, we urged **DNA** testing, claiming that it would prove Frank Lee Smith was wrongly scheduled for execution and Eddie Lee Mosely was the real rape murderer in Smith's case and probably twenty-five other rape or rape/homicides in the Broward County Fort Lauderdale area. **As** everyone knows well, we were prevented from getting Post-conviction **DNA** testing by a time bar, and didn't get it until Frank Lee Smith died. Jerry Frank Townsend is a mentally retarded man who had no idea the **DNA** could prove him innocent; he was spared primarily because a heroic police officer took **up** his cause and assisted defense lawyers in proving his innocence. Mosely also committed the crimes attributed to Townsend. It takes little imagination based on these two cases to see how the law enforcement value to Post-conviction DNA testing. Indeed, it is of particular value in cases involving serial murderers and rapists.

How many other inmates are there in Florida's prisons who could prove their innocence with Post-conviction DNA tests? At least one hundred if we could

ever find them or prevent the destruction of crucial evidence. In 75% of Innocence Project cases where we have determined a **DNA** test could determine guilt or innocence, the evidence is reported lost or destroyed. There is little reason to believe the same won't be true in Florida. But equally, out of the cases we do get to the laboratory ***more*** *than half come back with resultsfavorable to the inmate.* **A** study by the Wall Street Journal of laboratories across the country reported 4 out of 10 Post-conviction tests exonerated the inmate. These **are** troubling statistics that compel this Court to do everything in its power to protect these inmates.

Similarly, the FBI reports that since it began DNA testing in 1989, in thousands of cases, primarily rapes and rape homicides that have been referred to them by local law enforcement after arrests or indictments, the primary suspect is excluded 25% of the time when they get results. This is a conservative statistic because the Bureau will count as once case a situation where it excludes four suspects for one crime. See *Nat'l Instit. Just., Off. Just. Programs, U.S. Dep 't. Just., Pub. No. 161258NCJ, Convicted by Juries, Exonerated by Science: Case Studies in the Use of **DNA** Evidence to Establish Innocence **After** Trial* (June 1996) at xxviii. What would have happened if these thousands of suspects excluded by DNA tests had gone to trial because DNA tests were not available? If one assumes a very small error rate (.5%) for this category of crimes, and

considers all the inmates in America's prisons who never had access to DNA testing, it seems fair to assume there are thousands in prison who could prove their innocence. Is it possible that with the fourth largest prison population in America that Florida only has two, Frank **Lee** Smith and Jerry Frank Townsend, or that all of the innocent could be found within two years? Indeed, there is little doubt that Florida's strict enforcement of time limits for newly discovered evidence of innocence claims based on Post-conviction **DNA** applications is the reason we have only two exonerations in Florida. The Ziegler case greatly impeded our efforts. We beg this Court not to let it happen again.

2. There is An Independent Constitutional Right to Access to Material Exculpatory Evidence That a Time Limit Could Be Construed to Abridge

While the statute and rule regulate state-funded Post-conviction **DNA** testing, there is an independent constitutional right of access to biological evidence, which prohibits state actors from blocking access to biological material that constitutes material exculpatory evidence.

Federal courts confronting the issue have recognized that a constitutional violation occurs when convicted persons are denied access to biological evidence for the purposes of DNA testing. See *Harvey v. Horan*, 119 F. Supp. 2d 581, 584 (E.D. Va. 2000); see *also Charles v. Greenberg, 2000* WL 1838713 (E.D. La

2000).[2] Jurisdictional challenges to inmates' § 1983 actions to gain access to biological material for DNA testing have been rejected.[3] *See Godschalk v.*

---

[2] In 1999, Charles was released from imprisonment for a 1982 aggravated rape conviction after a DNA test on the rape kit from that crime revealed that he was not the perpetrator. Charles gained access to testing after filing a § 1983 action. In an unsuccessful subsequent action for monetary damages for the defendants-district attorneys "opposition" to plaintiffs efforts for DNA testing, the court recounted:

> The plaintiff was among a number of imprisoned people to use the civil rights laws and the judicial system in the 1990's to gain the injunctive relief sought. This Court previously held that the plaintiff's request for the rape kit was not subject to dismissal for frivolousness. This led to negotiations between parties which, with the able assistance of the Magistrate Judge, resulted in an agreement and eventual freedom for the plaintiff.

Charles v. ***Greenberg,*** 2000 WL 1838713, 3 (E.D.La.)(2000).

[3] In ***Lee v. Clark County District Attorney's Office***, 2001 WL 533586 (D.Nev.)(2001), a convicted person used § 1983 in attempt to gain access to biological evidence for post-conviction DNA testing. The court stated that: "[w]hile this Court finds the decision in *Harvey* persuasive as to the ultimate question of whether an individual should be given access to biological evidence for the purposes of DNA testing, the present case is meaningfully distinguishable from *Harvey."* In that case, the biological material sought for post-conviction DNA testing was in the possession of the clerk of the district court and in that jurisdiction there exists a rule requiring an order from the Court to permit the Clerk of that court to release evidence in its custody. The court was careful to note, however:

> "In sum, this is not a case about whether Plaintiff Albert Lee should have access to biological evidence for purposes of DNA testing. It is a case about where a motion for the release of such evidence should be brought, the conditions which should apply to its release and the

Montgomery County District Attorney's Office, C.A. No. 00-5925 (E.D. Pa.) (2001)(finding that the Rooker-Feldman doctrine does not bar the federal district court from exercising subject matter jurisdiction over plaintiffs § 1983 action for access to biological evidence for post-conviction DNA testing). These convicted persons are "riding the crest of a new body of law using the latest science to free innocent men and women." *Charles* **v.** ***Greenberg,*** supra, at 3, *see also Harvey* **v.** ***Horan*** ,2001 WL 419142, 5 (E.D. Va. 2001).

For example, the plaintiff in *Harvey,* an inmate, commenced a § 1983 action seeking equitable relief including the search for and release of biological evidence for the purposes of **DNA** testing. ***Harvey v.*** *Horan,* 119 F. **Supp.** 2d 581 (E.D. Va. 2000). The court rejected the argument that the plaintiff had not alleged that the Commonwealth's Attorney violated plaintiffs rights, by denying him access to biological material for post-conviction DNA testing. *Id.* at 583. The court also rejected the argument that the plaintiff had adequate due process after two trials, an opportunity to appeal and other lawsuits seeking the same **type** of relief he sought in his § 1983 action. ***Id.*** Instead, the court held that "the denial by the Commonwealth's Attorney...to possibly exculpatory evidence states a claim of

---

testing to which it is subjected."

Id. at **3.**

denial of due process and gives this court jurisdiction under 42 U.S.C. § 1983..."

Id. at 584. In a subsequent decision granting Harvey's motion for summary judgment and ordering that the biological material be subject to **DNA** testing, the court found that pursuant to *Brady v. Maryland,* 373 U.S. *83* (1963), Harvey has a due process right of access to **DNA** evidence, as such evidence could constitute material exculpatory evidence. *Harvey* **v.** *Horan* **,** 2001 WL 419142, 5 (E.D. Va. 2001).[4]

---

[4] **A** number of state courts also recognize a due process right to post-conviction DNA tests under *Brady* including New York, Kansas, Pennsylvania, and Indiana though some of these states employ standards different from what is required under federal analysis. *See Mebane v. State,* 902 P.2d 494,497 (Kan. Ct. App. 1995); *Commonwealth v. Brison,* 618 A.2d 420,423 (Pa. Super. Ct. 1992); *Sewell v. State,* 592 N.E.2d 705,707-708 (Ind. Ct. App. Dist. 3 1992). For example, in *Matter of Dabbs v. Vergari,* 570 N.Y.S.2d *765* (1990), the defendant sought access to evidence presented at trial to perform DNA tests as a prelude to a possible motion of newly discovered evidence. The state opposed the motion on the grounds that the claim was untimely and because there was no established right to post-conviction discovery. Relying on *Brady, Moore* **v.** *Illinois,* and *Bagley,* the court rejected the state's procedural arguments:

> [W]hile it is unclear what such testing will ultimately reveal, petitioner has demonstrated an adequate foundation for the testing by showing that the victim's panties, a gauze pad and rape test slides have high exculpatory potential.
>
> * * * *
>
> [T]o deny petitioner the opportunity to prove his innocence with such evidence simply to ensure the finality of convictions is untenable. , . . Consistent with society's "overriding concern with the justice of the finding of guilt," the courts, as well as the prosecution, must be vigilant to correct a mistake. "It is the State that tries a man, and it is

It is well established that a prosecutor has a duty to seek justice and not simply win cases. See, e.g., *Kyles* **v.** *Whitley*, 514 U.S. 419,439 (1995); *Brady* **v.** *Maryland*, **373 U.S. 83, 88** (**1963).** In general, this duty to seek justice implies both an obligation to prevent the punishment of individuals who are innocent and an obligation to ensure that all individuals who come within the criminal justice system are accorded a fair process. Indeed, *Brady* **v.** *Maryland* **(1963)** established that suppression by the prosecution of evidence favorable to an accused, especially when specifically requested, violates due process where the evidence is material either to guilt or punishment. Quoting then Solicitor General (later, Judge) Simon E. Sobeloff's address before the Judicial Conference of the Fourth Circuit, the *Brady* Court squarely held that substantive truth-finding must supercede adversarial courtroom procedure:

> The Solicitor General is not a neutral, he is an advocate; but an

---

> the State that must insure that the trial is fair" Put another way, "[t]he State's obligation is not to convict, but to see that, so far as possible, truth emerges." "When evidence favorable to the defendant is known to exist, disclosure only enhances the quest for truth; it takes no direct toll on that inquiry.''

Dabbs 570 N.Y.S.2d at 849 (quoting, among others, *United States v Wade,* 388 **U.S.** 218,229; *United States* v ***Agurs,*** 427 U.S at 112; *Moore* v *Illinois,,* 408 **U.S. 786,** 810 (Marshall, J.,concurring in part and dissenting in part); *United States* v *Bagley*, 473 U.S. 667,692-693 (1985) (Marshall, J., dissenting).) DNA testing ultimately exonerated Dabbs and his conviction was vacated.

> advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.

Brady,* 373** U.S. at n.2. **As** the Supreme Court determined in *United States v.* ***Bagley, 473 U.S. 667 (1985), the due process right established in *Brady* is not limited to the traditional adversary trial process. "[The] purpose [of *Brady]* is not to displace the adversary system as the primary means by which truth is uncovered, but *to ensure that a miscarriage ofjustice does not* ***occur."*** *Bagley,* **473** U.S. at 675 (1985) (emphasis added).'

Moreover, state actors are not free to ignore their due process obligations simply because, at the time they deny access, the exculpatory potential of evidence has yet to be realized. The Supreme Court has made clear that police violate due process when they, in bad faith, fail to "preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of

---

[5] "By requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he 'is the representative not of **an** ordinary party to a controversy, but of a sovereignty . . . , whose interest . . . in a criminal prosecution is not that it shall win **a** case, but that justice shall be done.'" Id. At n.6. (citing *Brady* at 87-88, among others).

which might have exonerated the defendant." *Arizona v. Youngblood,* 488 **U.S.,** 51, 57 (1988). Youngblood, who was convicted of rape, challenged the destruction of rectal swabs that were collected from the victim in that case. There was never any dispute that Youngblood, like Plaintiff here, had a constitutional right to conduct scientific testing on the swabs if they had been preserved because the swabs constituted potentially exculpatory evidence.[6] *Id.* at 58. Indeed, under *Youngblood,* blocking access to existing evidence whose potential exculpatory value is self-evident is no different than, in bad faith, destroying it. *Youngblood* instructed that whether a police officer acted in bad faith "turn[s] on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood,* supra.

In the context of federal habeas applications, federal courts have ordered post-conviction DNA tests in order to establish predicates for other constitutional violations. See *Toney v. Gammon,* 79 F.3d 693,700 (8th Cir. 1996)(Eighth Circuit

---

[6] Youngblood was convicted of the sexual assault of a young boy and claimed serological testing of this material could prove his innocence. Notwithstanding the fact that, at the time of trial, the clothing worn by the victim was destroyed as **a** result of being stored in a humid environment, there was a swab of semen evidence that had been collected from the victim and was stored in another location. This swab contained a sample of biological material that was too small to test with the technology available in the 1980's. Given the usefulness of STR technology, last summer the parties performed STR **DNA** analysis on this swab, which resulted in a complete exclusion and Youngblood was exonerated.

explicitly rejected the lower court's determination that permitting post-conviction **DNA** tests "would open the flood gates for DNA testing . . . in every rape case where the individual is still serving time" and held that "[I]n order to prove the prejudice prong of his ineffective assistance claim, [Petitioner] is entitled to have access to this evidence [for DNA tests]. . . ."); *See also Jones v. Wood,* 114 F.3d 1002, 1010 (9* Cir. 1997). The constitutional rationale for these rulings is that access to evidence for **DNA** testing that could prove innocence and avoid a miscarriage of justice is a *Brady* obligation that survives in the post-conviction arena and often prevails over procedural defaults. *Thomas v. Goldsmith* 979 F.2d 746,749-50 (9th Cir. 1992)(In light of the obvious exculpatory potential of semen evidence in a sexual assault case, neither a specific request nor a claim of right by the petitioner is required to trigger the state's duty of disclosure.)

3. The Innocence Project Endorses Some Amendments

The Innocence Project is pleased with the Committee's decision to apply the rule to prisoners who entered guilty and nolo contendere pleas. We know from experience beyond the Jerry Frank Townsend case that people confess and even to plead guilty to crimes that they did not commit. Consider, for example, the cases of Chns Ochoa and David Vasquez. Pressured that he would be sentenced to death, Chris Ochoa confessed and pleading guilty to the 1988 rape and murder of a

Pizza Hut employee. He spent **12** years in **a** Texas jail before being exonerated through DNA testing. Hafetz, David "Man Back in Court for 1988 Killing He Didn't Commit," Austin American-Statesman, January 16,2001. Similarly David Vasquez, a retarded man, plead guilty to the 1984 murder of an Arlington, Virginia woman. DNA testing not only exonerated Vasquez, but also identified the actual perpetrator of that crime, a man who was convicted of several rape/murders. LaFay, Laura "DNA Tests Point to Innocence **of** Inmate in Case," The Virginian-Pilot, October 12, 1996.

Respectfully Submitted,

Barry C. Scheck
Co-Director
The Innocence Project
Cardozo School of Law
55 5th Avenue, 11th Floor
New York, NY 10003
212-790-0368

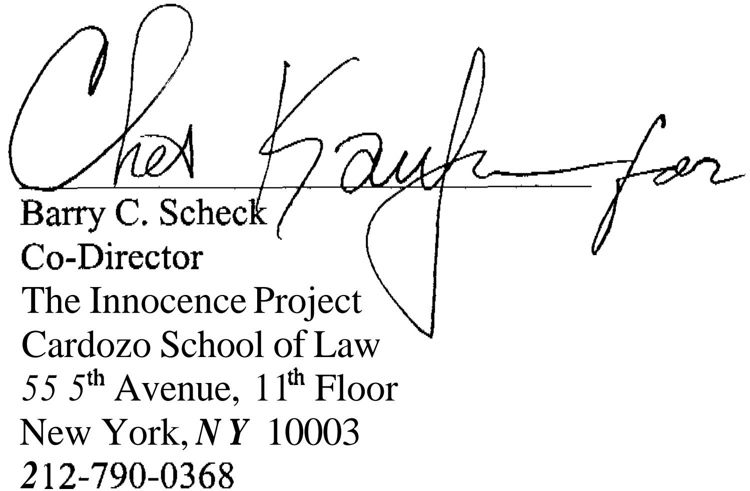
Dated: August 15,2001.

CERTIFICATE OF SERVICE

I certify that I have hand delivered 7 copies of the Comments of the Innocence Project to the Clerk of the Supreme Court on this 15th 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 Rules of Appellate Procedure 3.210.



Barry C. Scheck
Co-Director
The Innocence Project
Cardozo School of Law
55 5th Avenue, 11th Floor
New York, NY 10003
212-790-0368

FINFLORIDA.wpd

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

August 15,2001

Thomas D. Hall
Clerk of Court
Supreme Court of Florida
Tallahassee, Florida 32399

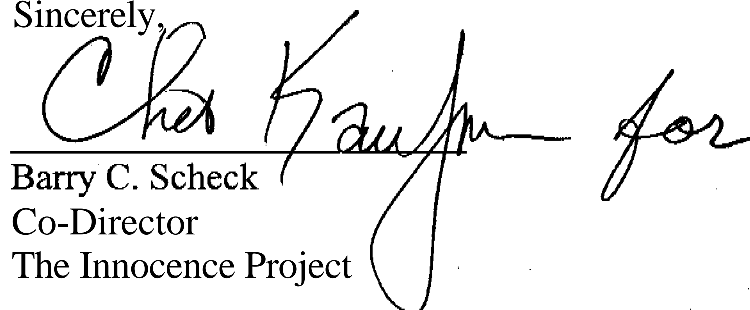
Re: **CASE** NO. **SC** 01-363

Dear Clerk:

On behalf of the Innocence Project, I respectfully submit the following comments to proposed Rule 3.853, Florida Rules of Criminal Procedure. **I** have enclosed one original and seven copies.

In addition, I request an opportunity to be heard at oral arguments. If you need any additional information, I can be reached at 212-790-0377.

Sincerely,



Barry C. Scheck
Co-Director
The Innocence Project