IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE

CASE NUMBER: 03-1630

# COMMENTS OF THE FLORIDA INNOCENCE PROJECT

## I. Introduction

On September 5, 2003 the Florida Criminal Procedure Rules Committee voted (23-10) to file an emergency petition to the Supreme Court of Florida proposing an amendment to Florida Rule of Criminal Procedure 3.853 (the DNA testing rule) to provide for an additional year in which to file motions.

This comment, provided by the Florida Innocence Project (the Project), supports the Petition of the Rules Committee and submits that any disposition of this matter should allow sufficient time for all claims of innocence based on DNA tests to be filed and that the court should adopt clear rules protecting evidence from destruction.

The Project has been screening files as rapidly as possible with the very limited resources available to it. This effort is largely the result of work by law students and volunteer lawyers. Thus, the Project also requests that the Court encourage support for the screening of files and the recruitment of pro bono counsel in order to speed the filing of meritorious claims of innocence and to eliminate legally insufficient claims.

## II. History of the Florida Innocence Project

This Project is a private, non-profit organization supported entirely by private donations and by pro bono efforts of law students, law professors and attorneys. Its mission is to screen prisoner claims of innocence based on DNA and, in some cases and where possible, after screening to secure counsel for those cases that appear to have merit.

There are two centers of operation. The first is the original Florida Innocence Project located at Nova Southeastern University, Shepard Broad Law Center ("NSU"). The second is the Florida Innocence Initiative, sponsored in part by the national Innocence Project, located at Florida State University, College of Law ("FSU"). Both organizations maintain separate and distinct caseloads.

Neither of these two organizations represents inmates in post-conviction death penalty proceedings. This is an important factual distinction because, unlike death penalty cases, there is no right to counsel in non-death penalty post-conviction proceedings. Moreover, since most cases are more than a decade old, there are no up-to-date files, no trial transcripts, or other necessary documents to use in the screening process.

### A. *Nova Southeastern University.*

Since 1999, the Florida Innocence Project at Nova Southeastern University, Shepard Broad Law Center, has provided *pro bono* legal assistance to convicted persons in non-death penalty cases whose claims of innocence can be conclusively

proved through post-conviction DNA testing. In total, the Nova project has received over 800 direct requests for assistance from inmates across the State of Florida. To date, approximately 300 cases have not been fully investigated. Of those, approximately 100 have not been reviewed at all.

B. *Florida State University.*

The Florida Innocence Initiative has been operating at the Florida State University College of Law since April, 2003. This project, supported in part by funds for two staff members provided by the national Innocence Project, began largely because so many of the files necessary for review in the screening process are located in Tallahassee. The Florida Innocence Initiative currently has 400 cases. Of those cases, approximately 80 appear viable and lawyers and other volunteers currently are in the process of investigating claims and drafting motions. However, almost 300 (297 to date) cases have not been reviewed at all.

C. *The Screening Process.*

The screening of cases often takes a great deal of time because of inadequate resources and the difficulty in assembling client files that are often fifteen or twenty years old. *See* Exhibit A. When there has been no legal representation for fifteen to twenty years, the entire file must be re-created in order to make a decision regarding its viability. Moreover, the original documents necessary to conduct that evaluation, which include transcripts, appellate briefs, police reports, laboratory records, and evidence logs, are not readily accessible to the project. Documents are often lost or

destroyed.

There is no centralized repository of information to assist in locating the evidence. Determining whether such evidence is still in existence and then locating such evidence, is an extremely tedious and time consuming process; it is also supremely important to find the evidence before drafting a Rule 3.853 motion, as specific details relating to biological materials must be incorporated into a theory of exoneration in order to produce a facially sufficient motion. Evidence location requires repeated written, telephonic, and/or in-person visits to police department property rooms and evidence lockers, court clerk's offices, private and public laboratories, and hospitals. It is not uncommon to have different employees of these government agencies provide inconsistent oral information regarding the existence of evidence in a case. The delay caused in this part of the investigation can span over many months. Moreover, when documents finally are located, most of the inmates are indigent, with no funds to pay for them.

D. *Recruitment of Lawyers.*

Once an investigation is completed, the Project, in some cases, attempts to recruit a lawyer who will handle the case on a *pro bono* basis.[1] It is important to have a lawyer who is well-versed in past and current DNA testing procedures and who is familiar with post-conviction litigation. Even if the screening process has been well done, the lawyer must spend a considerable amount of time drafting these complex

[1] The NSU project has, to date, relied on law faculty volunteers to handle the cases. The FSU project has recruited pro bono counsel.

motions.

The Project is committed to screening cases carefully before recruiting lawyers so that the cases filed have all the marks of valid claims. Sound principles of ethics and judicial administration require that competent screening be conducted before filing of motions or even the recruitment of *pro bono* attorneys.

## III. Submission in Support of the Rules Committee Recommendation.

A. *Introduction.*

This submission supports the proposed amendment to Rule 3.853 that would extend the October 1, 2003 deadline. In addition, it also requests that the Court:

1) provide a procedure for the preservation, in claims of innocence under investigation, of all DNA evidence;

2) encourage government and non-government organizations and individuals to provide funding and donated support for the Florida Innocence Project so that it may expedite the process of screening and assignment of the cases.

B. *History of the Rule.*

The history of this rule is particularly interesting because the Criminal Procedure Rules Committee and the Court were engaged in a rule making process when the legislature enacted a statute in 200l. *In re Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing),* 807 So. 2d 633, 633 (Fla. 2001). This Court then established Florida Rule of Criminal Procedure 3.853 in order to provide a procedural vehicle for prisoners with credible claims of innocence to obtain

post-conviction DNA testing on biological evidence in their cases. The rule, adopted on the model of legislation enacted in 2001, conformed to the legislation in accordance with the Court's long standing policy to avoid, where possible, confusion in legal processes that may be created when the legislature enacts laws that are in the area of practice and procedure. *Id.* at 634. The Court specifically avoided the constitutional issues relating to the power of the legislature to enact a statute. *Id*. at 635.

Embodied in the statute and therefore incorporated in the harmonizing rule, was a provision that these claims of innocence had a two-year deadline, which is set to expire on October 1, 2003.[2] This legislatively determined deadline was adopted without attention to the practical problems involved in investigating and asserting claims of innocence and has operated in a way that may not have been contemplated at the time of its enactment.

It is important to note that the legislation did not provide resources for the investigation or representation for these claims of innocence based upon complex scientific evidence. Thus, indigent prisoners had no meaningful way to pursue their claims. Some members of the bar and academy, particularly the Florida Innocence Project, have attempted to fill this void without state resources and are now confronted with an impossible challenge.

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[2] Section 925.11(1)(b)(1) of the Florida Statutes states that a motion for DNA testing may be filed

> [w]ithin 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 is appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital case in which the death penalty was imposed, or by October 1, 2003, whichever occurs later.

The time limitations set forth in Rule 3.853 are identical. *See* Florida Rules of Criminal Procedure Rule 3.853 (d)(1)(A).

For the indigent prisoner, section 925.11 and Rule 3.853 provide only the illusion of relief. However, there appears to be a growing recognition of this problem among legislative leaders. *See* Public Comment by Senator Alex Villalobos, (Exhibit B).

In addition, prosecutors have acknowledged that there is a need to continue testing. On September 10, 2003, Broward State Attorney Mike Satz publicly promised that he "won't stop testing." *See* Paula McMahon, "Broward prosecutor lifts DNA-test deadline for convicts who claim innocence," *Sun-Sentinel*, September 11, 2003 (Exhibit 2). Referring to the high profile exoneration cases of Frank Lee Smith and Jerry Frank Townsend, Carolyn McCann, head of the Broward State Attorney's Appeals Unit, stated "[s]ince that's happened, you can't look at these cases with your head in the sand or your head in the rule book. We're going to do the right thing." *See* Exhibit C. In addition, both Miami-Dade State Attorney Katherine Fernandez Rundle and Palm Beach State Attorney Barry Krischer also agreed that they would continue DNA testing should the October 1, 2003 deadline expire. *See* Noah Bierman, "Inmates get DNA-test extension," *Miami Herald*, September 12, 2003. (Exhibit 2). As Rundle correctly stated, "[h]ow can you put a deadline on innocence?"

C. *The Legal Basis for the Proposed Rule*

1. The Florida Supreme Court left open the question of substance and procedure in regard to the two-year deadline for filing in Rule 3.853.

In *In re Amendment to the Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*, this Court only confronted the issue over substance and procedure in reference to subdivisions (a) and (c)(7) of the Rule. 807 So. 2d 634 (Fla.

2001). However, this Court left the same question open in regard to subdivision (d), which provided for the deadline for filing a motion for DNA testing. Specifically, the majority expressly refused to consider the constitutional issues in this proceeding and stated that, "[a]t this time, we adhere to the two-year time limitation."[3] *Id.* at 635.

Section 925.11(1)(b) is in fact an unconstitutional encroachment on the exclusive power of the Supreme Court to adopt rules for the practice and procedure in all state courts as provided in Article V, Section 2(a) of the Florida Constitution. Accordingly, this Court is empowered to adopt the recommendations of the Criminal Procedure Rules Committee and extend the deadline for DNA testing as it sees fit.

Article II, Section 3 of the Florida Constitution provides that no members of one branch of government shall exercise the powers of another branch unless expressly

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[3] The issue of whether the time limitation on filing post conviction claims for DNA testing was procedural or substantive was discussed during oral arguments on August 28, 2001. The Florida Public Defenders argued that, at that time, 16 out of 22 states had no time limitation for filing motions for DNA testing and that the Florida Supreme Court, under *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000) has the power to hold that that the two-year time limitation should not apply because it is purely procedural. *See* Transcript of Oral Argument in *In re Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing) at* http://wfsu.org/gavel2gavel/transcript/01-363_01-1649.htm.

provided for in the Constitution. Art. I, § 3, Fla. Const. The Florida Constitution also provides that the Supreme Court "shall adopt rules of practice and procedure in all courts." *Id.* at art. V, § 2(a). While the Legislature holds the power to adopt substantive law, the judiciary has an equal duty to enforce such laws as well as the power of administration of that duty. *Johnson v. State*, 336 So. 2d 93, 95 (Fla. 1976).

This Court has defined practice and procedure as encompassing the "course, form, manner, means, method, mode, order, process, or steps by which a party enforces substantive rights or obtains redress for their invasion." *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972). Practice and procedure are the machinery of the judicial process rather than the product of that process itself. *Id.*

Like the petitioners in *Allen v. Butterworth,* this petition raises apparent constitutional infirmities with the deadline provision of section 925.11. 756 So. 2d 52 (Fla. 2000). In *Allen*, this Court held that the new time deadline in the Death Penalty Reform Act, which shortened the time for filing post conviction motions under Florida Rule of Criminal Procedure 3.850, was an unconstitutional legislative enactment that went beyond the means of legislative power and usurped the exclusive judicial power to adopt rules for practice and procedure in all of Florida's courts. *Id. at 54.*

The *Allen* Court noted that *habeas corpus* and other post conviction relief proceedings technically are civil actions but are used to challenge a conviction and sentence. *Id.* at 61. Post conviction relief proceedings are actually quasi-criminal

because they are heard under the court's criminal jurisdiction. This Court relied on the constitutional basis of not allowing for the suspension of the writ of *habeas corpus*, except in limited circumstances, to hold that it "should be available to all through simple and direct means, without needless complication or impediment and should be fairly administered in favor of justice and not bound by technicality." *Id.* The *Allen* Court concluded that *habeas corpus* and "other types of post conviction remedies are not the type of 'original civil action' . . . for which the Legislature can establish deadlines pursuant to a statute of limitations because to the constitutional and quasi-criminal nature of habeas proceedings." *Id.* at 62. This Court then concluded in its holding that because such proceedings are the primary vehicle through which convicted defendants are able to challenge the validity of a conviction and sentence, "the Florida Constitution grants this Court the exclusive authority to set deadlines for post conviction motions." *Id.*

Thus, the provisions of section 925.11(1)(b) are an unlawful encroachment on the exclusive authority of the judiciary to set deadlines in post conviction proceedings under *Allen*. The deadline in section 925.11(1)(b) goes further than merely shortening the time for filing post conviction motions under Rule 3.853. It abolishes that avenue of relief after October 1, 2003. Moreover, potential movants have a constitutional right under the Due Process Clauses of the Florida and federal Constitutions of access to genetic material for the purpose of DNA testing. *See infra* Section III.C.2. In essence, the Legislature created section 925.11 as a "new window of opportunity" for

defendants whose claims to DNA evidence under Rule 3.850 were procedurally time barred under *Zeigler v. State*, 64 So .2d 1162 (Fla. 1995), and *Sireci v. State*, 773 So. 2d 34 (Fla. 2000). However, much like Rule 3.850 has been held to be a mere procedural vehicle for enforcement of a collateral remedy otherwise available under the writ of *habeas corpus*,[4] Rule 3.853 is merely a procedural mechanism for realizing the underlying due process right of access to evidence for DNA testing. This right exists irrespective of the Legislature's recognition of this existing right or its attempt to curtail it in any way. Therefore, the deadline in section 925.11 is unconstitutional under separation of powers principles because it usurps the power of the Florida Supreme Court to create rules for practice and procedure.

Resolution of this matter ultimately may not turn on distinctions between substantive law and procedure or the relative powers of the Court and the legislature given the other important fundamental constitutional principles that provide a right to assert actual innocence at any time so long as a compelling case can be demonstrated. *See infra* Part III.C.2. However, under either approach the decision process may take some time and the Project urges the Court to adopt an amendment to Rule 3.853, which will assure the preservation of vital biological evidence and require evidence-possessing agencies to notify, at any time, prisoners and their attorneys before such evidence is destroyed.

2. Rule 3.853, Which Allows for Destruction of Evidence Once The Two-Year Deadline Expires, Impermissibly Extinguishes Constitutional Rights in Violation

[4] *Allen*, 756 So. 2d at 6.

of Both the Florida and the United States Constitutions.

*A. Federal Due Process Clause of the Fourteenth Amendment of the United States Constitution and Florida Due Process Rights under Article One, Section Nine.*

Where DNA testing of genetic material could provide material exculpatory evidence for a jury to consider, even despite countervailing inculpatory evidence, a constitutional right of access to the genetic material for the limited purpose of DNA testing exists under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[5] This right stems from the United States Supreme Court's decisions in *Brady v. Maryland,* 373 U.S. 83 (1963) and *United States v. Bagley,* 473 U.S. 667 (1985). Taken together, these two cases stand for the proposition that the "suppression of evidence . . . favorable to the accused, upon request, violates due process where the evidence is material of guilt, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87. Furthermore, the Court held that materiality is determined by whether there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* A "reasonable probability" is a "probability sufficient to undermine the confidence in the outcome [of the jury's decision]." *Bagley*, 473 U.S. at 682.

While section 925.11, *Florida Statutes,* includes the same deadline for filing post-conviction DNA testing motions as Rule 3.853, it includes an additional subsection

[5] At least one federal district court has expressly recognized this right. Godschalk v. Montgomery County Dist. Attorney's Office, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001).

regarding the preservation of evidence. *See* Fla. Stat. § 925.11(4). This subsection first requires that the various governmental agencies "shall maintain any physical evidence collected at the time of the crime for which post sentencing DNA testing may be requested." Fla. Stat. § 925.11(4)(a). Yet, the statute only

requires that this evidence be maintained until the deadline set out in subsection (1)(b)(1) expires. The deadline expires two years from the date the judgment and sentence become final, two years from the date that judgment and sentence is affirmed on direct appeal, or October 1, 2003, whichever is later. *Id.* § 925.11(4)(b).

Section 925.11 infringes on this due process right of access to genetic evidence for DNA testing in two significant ways. First, the deadline contained in section 925.11(1)(b)1 will legally foreclose this procedural vehicle for innocent prisoners, the majority of whom will be barred if the October 1, 2003 deadline is left in place.

By imposing a deadline for filing, this statute assumes that at some temporal point – October 1, 2003 in this case – biological material collected in an innocent prisoner's case no longer has a reasonable probability of providing exculpatory evidence after undergoing DNA testing. This assumption clearly violates the due process rights of innocent prisoners and the deadline is an arbitrary and capricious restriction on access to this evidence. The due process right of access to evidence for DNA testing exists irrespective of any deadline that the Legislature or the Court wishes to put on the effectuation of that right. Here, the legislature recognized a right to demonstrate innocence through DNA testing. However, imposing a rigid deadline burdens that right

unduly and unnecessarily.

Ideally, the preservation of any and all biological evidence that may be DNA tested should be preserved for as long as the prisoners who may request testing on this evidence are burdened by a conviction. Thus, this Court should adopt a proposed rule that requires that the notice procedures provided for in subsections (c)1-3 be adhered to by governmental agencies before any destruction of potentially exculpatory biological evidence.

Second, there is an even more acute problem for the prisoners who wish to effectuate this right. Virtually all of them are indigent and unrepresented. Those who would benefit from this notification procedure do not have lawyers and certainly do not have the ability to fashion a response to a notification letter.[6] In fact, according to Governor Bush's Mentoring Initiative, as of June 14, 2000, 75—percent of male prisoners in Florida correctional facilities are functionally illiterate.[7] Specifically, "while [these prisoners] may possess basic reading skills, these inmates cannot perform such a simple task as writing a letter or understanding a bus schedule." *See supra* note 5.

The only burden of a uniform notification procedure on the administration of the governmental agencies holding onto evidence is sending a total of four letters per case file that they wish to destroy. This burden already was contemplated by section

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[6] As a correlary, the same policy concerns outlined in the text accompanying this footnote also are central to the crisis that this proposed rule wishes to alleviate. A functionally illiterate indigent prisoner is not able to determine which evidence in a case can be subjected to DNA testing and are not able to properly ascertain how any testing will lay the basis for a theory of exoneration in order to craft a facially sufficient rule 3.853 postconviction motion.

[7] *See* Governor's Mentoring Initiative, *The Price of Illiteracy*, June 14,2000,*at* http://www.myflorida.com/myflorida/governorsoffice/mentoring/articles/illiteracy_price.html (last visited August 21, 2003).

925.11(4)(c)1 and, with this suggestion, would then extend only to unify the familiar procedure for any time a governmental agency wishes to destroy genetic material for which a post sentencing DNA test may be requested and performed. Should this Court choose to amend Rule 3.853, it also should direct all Clerks of the Circuit Courts, the Florida Department of Law Enforcement, and other law enforcement agencies to comply with the rule amendment by not destroying biological evidence.

Florida's Constitution contains a Due Process Clause similar to that of the Fourteenth Amendment of the federal Constitution, which states, "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. This Court has stated that "[u]nder our federalist system of government, states may place more rigorous restraints on government intrusion than the federal charter imposes; they may not, however, place more restrictions on the fundamental rights of their citizens than the federal Constitution permits." *Traylor v. State*, 596 So. 2d 957, 961 (Fla. 1992). In that opinion, then Chief Justice Shaw stated that "the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling." *Id.* at 962. Therefore, the Florida Courts can enhance the right of due process of law but may give no less of that right than what is required under the federal Constitution as stated in cases like *Brady* and *Bagley*.

*B. The Fundamental Miscarriage of Justice Exception in Habeas Corpus Proceedings.*

The United States Supreme Court previously has held that even if a state prisoner is procedurally barred from asserting a further *habeas corpus* claim, a "federal court may hear the merits of the successive claims if the failure to hear the claims would constitute a 'miscarriage of justice.'" *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). In *Sawyer*, a majority of the United States Supreme Court adopted the lower courts approach, which stated that in order to avail oneself of this "miscarriage of justice" or "actual innocence" exception, one must show by clear and convincing evidence that, based on the evidence proffered plus all record evidence, but for constitutional error there is a fair probability that a rational trier of fact would have "entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." *Id.* at 346. The Eleventh Circuit has adopted a similar standard for determining actual innocence. *Johnson v. Singletary*, 938 F.2d 1166 (11th Cir. 1991). This rule is grounded in the "equitable discretion" of "habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1992).

The central purpose of the criminal justice system is to convict the guilty and free the innocent. *United States v. Nobles*, 422 U.S. 225, 230 (1975). Furthermore, the United State Constitution prohibits the imprisonment of one who is innocent of the crime for which he was convicted. U.S. Const. amend. VIII. While the Court only applied the miscarriage of justice exception of procedural bars to death cases, the constitution protects against any unjust incarceration, whatever the length, and

therefore, the dictates of *Sawyer* and *Herrera* can fairly be imputed to claims of actual innocence in non-capital cases. In fact, Justice Rehnquist, opined that the concept of actual innocence is easier to grasp in the context of non-capital cases. *Sawyer*, 505 U.S. at 341.

The Court in *Herrera* stated that "a persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant [or any incarceration] unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such claim." *Herrera*, 506 U.S. at 417. The Court went on to qualify this by saying that the disruptive effect of these habeas claims and the burden on the State of retrying these cases makes "the threshold showing for such an assumed right would necessarily be extraordinarily high." *Id*. Although a claim of actual innocence is not a constitutional claim itself, it is a "gateway through which a habeas petitioner must pass to have to have his otherwise barred constitutional claim considered on the merits." *Id.* at 404.

Thanks to modern science, there is no evidence that is more probative of guilt, or lack thereof, than DNA evidence and demonstration of exonerating DNA evidence will almost always reach the high threshold showing that is necessary for habeas corpus relief. The "miscarriage of justice" exception exists even after one's claim has been barred by the state. This illuminates the importance of this possibly exculpatory evidence being held by the State and the potential miscarriage of justice that would be occasioned if that evidence is not preserved for future use past the October 1, 2003

deadline.

*C. Executive Clemency.*

Justice Rehnquist noted in *Herrera* that one of the greatest advantages of monarchy in general is that there is a magistrate, who "has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment." 506 U.S. at 412 (*quoting* 4 W. Blackstone, Commentaries 397).

Although the Constitution does not require states to enact a clemency mechanism, clemency is widely available in America and is held within the power of the Executive in Florida. Art. IV, § 8(a), Fla. Const. Justice Rehnquist further noted that "executive clemency has provided a 'fail safe' in our criminal justice system. . . . [and] history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence." *Id.* at 417.

With executive clemency still available as an outlet of last resort for a claim of actual innocence, allowing the destruction of potentially exculpatory evidence completely forecloses this outlet and is therefore unconscionable. It would contravene Justice Rehnquist's litany on the supreme importance of executive clemency in the scheme of criminal justice and would make executive clemency an illusion for the vast majority of prisoners in Florida. Those convicted before 2001 who have credible

biological evidence collected in their case files that is potentially exculpatory would forever be foreclosed from making a valid constitutional claim.

This highlights the need for uniform notification and preservation rules that will provide protection from making the clemency mechanism an empty vessel that would eliminate much of executive clemency's justice-minded purpose.

## IV. Conclusion

Consideration of this rule amendment requires attention to significant constitutional and policy concerns including those principles that always will require the availability of a remedy when actual innocence can be demonstrated. The imposition of a deadline for filing and allowing destruction of exculpatory biological evidence is at odds with these fundamental principles.

The current Rule allows for destruction of biological evidence[8] and hampers an orderly and necessary screening of cases, thereby threatening to place an unnecessary burden on the judicial system through the filing of unscreened claims. There has been no intentional delay by any of the pro bono attorneys and law students of the Florida Innocence Project at Nova Southeastern University or the Florida Innocence Initiative at Florida State University in processing these cases. Moreover, it does not know of a single case where a lawyer engaged in its work has sought a continuance or caused a delay in proceedings. Unlike death penalty cases where delay results in a slowing of the process leading toward the ultimate imposition of a death sentence, delay in these cases only adds to what may be the wrongful imposition of a sentence. Thus, delay is not in the best interest of this class of prisoners.

This time limit also deprives the justice system of extremely useful information about the accuracy rate of convictions and the sufficiency of protections for defendants. Just last week, DNA evidence that was used to exonerate Kirk Bloodsworth, a death row inmate, of a rape/murder in Maryland in 1993, was entered into a national DNA databank and the real perpetrator was apprehended. Prosecutors in Maryland have charged the new perpetrator for the almost twenty- year- old crime.[9] If a deadline like the one found in Rule 3.853 had been in place, Mr. Bloodsworth

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[8] Moreover, further advances in forensic science are foreseeable and may permit more precise reconstruction of facts to establish the identities of criminals. Surely no one could honestly say that they could have predicted fifteen years ago the role that DNA would presently play in the criminal justice system.

[9] James Dao, *In Same Case, DNA Clears Convict and Finds Suspect*, N.Y. Times (Sept. 5, 2003), *available at*

would be continuing his duties as the prison librarian and the real perpetrator would be at large. This is only one instance of the dual value of this testing.

Making postconviction DNA testing impossible through a hard deadline and subsequent destruction of evidence detracts from the perceived legitimacy of our criminal justice system in Florida, especially as cases of post-conviction exoneration attract national attention.

Moreover, while three influential and well-respected state attorneys are to be commended for their the promises to continue testing after the deadline expires, it is in the best interests of justice, the people of the State of Florida, and the criminal justice system for this Court to address the need to continue testing through the adoption of an amendment to Rule 3.853. This will allow for a consistent and effective mechanism for the testing of DNA evidence.

Assuming *arguendo* that this is an appropriate issue for legislative action, rather than rule implementation of a basic constitutional right as we assert, any legislative action could not take place before the next legislative session. Accordingly, it is nonetheless essential and necessary for this Court to safeguard the post-conviction avenues for DNA testing and the integrity of existing evidence.

THEREFORE, the Florida Innocence Project supports the proposed amendment to Rule of Criminal Procedure 3.853 that would extend the October 1, 2003 deadline and further requests the Court to provide a procedure for the

preservation of all DNA evidence and to encourage government and non-government organizations and individuals to provide funding and donated support for the Florida Innocence Project so that it may expedite the process of screening and assignment of the cases.

Respectfully submitted,


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