IN THE

Supreme Court of Florida

IN RE: AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.853(d)(1)(A) (POSTCONVICTION DNA TESTING).	Case Nos. SC03-1630; SC03-1654

COMMENTS OF
THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Florida Association of Criminal Defense Lawyers ("FACDL") submits the following comments in support of the emergency petition filed by the Florida Criminal Procedure Rules Committee ("Committee") for an amendment to Florida Rule of Criminal Procedure 3.853(d)(1)(A). FACDL further respectfully suggests that the Court determine whether the procedural deadlines set forth in section 925.11, Florida Statutes (2003),[1] violate the separation of powers doctrine. *See* Art. II, § 3, Fla.

[1] Section 925.11 involves two separate and distinct rights: (1) the right of a criminal defendant to file a postconviction motion requesting that the biological or DNA evidence collected in his or her case be tested to determine whether the evidence may exonerate the defendant; and (2) the right of the State and its agencies to destroy biological evidence. Regarding the right of defendants to file postconviction DNA motions, section 925.11(1)(b) states that all criminal defendants, both capital and noncapital, must file his or her request:

Const. (prohibiting the members of one branch of government from exercising "any

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> 1. Within 2 years following the date that the judgment and sentence in the case becomes final if no direct appeal is taken, within 2 years following the date that the conviction is affirmed on direct appeal if an appeal is taken, within 2 years following the date that collateral counsel is appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital case, or by October 1, 2003, whichever occurs later; or
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> 2. At any time if the facts on which the petition is predicated were unknown to the petitioner or the petitioner's attorney and could not have been ascertained by the exercise of due diligence.

Regarding the right of the State and it agencies to destroy biological evidence, for noncapital cases, section 925.11(4)(b) states that biological evidence "shall be maintained for at least the period of time set forth in subparagraph (1)(b)1." For capital cases, section 925.11(4) (b) states that biological evidence "shall be maintained for 60 days after execution of the sentence." The State or its agencies can destroy evidence prior to the times set forth in section 925.11(4)(b) if:

> 1. The governmental entity notifies all of the following individuals of its intent to dispose of the evidence: the sentenced defendant, any counsel of record, the prosecuting authority, and the Attorney General.
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> 2. The notifying entity does not receive, within 90 days after sending the notification, either a copy of a petition for postsentencing DNA testing filed pursuant to this section or a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the time for filing it has expired.
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> 3. No other provision of law or rule requires that the physical evidence be preserved or retained.

§ 925.11(4)(c), Fla. Stat. (2003).

In contrast to section 925.11, rule 3.853 is silent regarding the ability of the State and its agencies to destroy biological evidence. The rule merely sets forth the procedure and time limitations for defendants to file postconviction DNA motions.

powers appertaining to either of the other branches unless expressly provided herein."). Article V, section 2(a), of the Florida Constitution states that the Supreme Court of Florida has the exclusive authority to "adopt rules for practice and procedure in all courts . . . ."

A. Introduction

FACDL consists largely of members of the private criminal defense bar in Florida. Several members of FACDL have relied on the procedures set forth in rule 3.853 in an attempt to exonerate defendants convicted of criminal offenses in the State of Florida. FACDL agrees with the Committee's proposed amendment to add, at a minimum, one additional year for allowing criminal defendants to file motions pursuant to rule 3.853.[2] FACDL submits that the setting of time limitations for postconviction motions is strictly a matter of practice and procedure, and therefore, section 925.11 notwithstanding, the Court has the exclusive constitutional authority to extend the

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[2] Rule 3.853(d)(1)(A) provides:

> The motion for postconviction DNA testing must be filed: Within 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 was 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.

deadline set by rule 3.853. FACDL further submits that in so far as section 925.11 purports to set time limitations for postconviction remedies, the statute violates the separation of powers clause. *See* Art. II, § 3, Fla. Const. Finally, FACDL directs the attention of the Court to similar federal legislation being considered by Congress in an effort to eliminate the problem of the destruction of potentially exculpatory evidence.

B. The establishment of time limitations for postconviction motions is a matter of practice and procedure and therefore the judiciary is the only branch of government authorized by the Florida Constitution to set such deadlines.

Without question, the Court has the authority to stay a deadline set by a rule or procedure or amend a rule of criminal procedure. *See* art. V, § 2(a), Fla. Const. Nevertheless, a question arose in the Court's 30 September 2003 opinion regarding whether the Court has the "jurisdiction to suspend a provision of a lawfully enacted statute." *Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A)*, 28 Fla. L. Weekly S737, S738 (Fla. Sept. 30, 2003). It has been suggested that the proper procedure would be to challenge the constitutionality of section 925.11 in circuit court.

While "ordinarily the initial challenge to the constitutionality of a statute should be made before a trial court . . . mandamus is the appropriate vehicle for addressing

claims of unconstitutionality where the functions of government will be adversely affected without an immediate determination." *Allen v. Butterworth*, 756 So. 2d 52, 54-55 (Fla. 2000) (citations omitted). To answer the question raised in the instant case, the Court need look no further than its decision in *Allen*.

In *Allen*, several inmates under sentence of death filed petitions in the Court requesting the Court to stay the application of the Death Penalty Reform Act of 2000 (DPRA), chapter 2000-3, Laws of Florida (Committee Substitute for House Bill 1A (2000)). Among other things, the DPRA set new deadlines for capital defendants to file postconviction motions (postconviction motions were to be filed within 180 days of the filing of the initial brief on direct appeal – the so-called "dual-track" system). The inmates in *Allen* moved the Court to stay the new deadlines of the DPRA and to declare the DPRA violative of the separation of powers clause of the Florida Constitution.

The Court began its analysis in *Allen* by considering its jurisdictional basis for addressing the claims raised by the petitioners. The Court held:

> This Court has previously addressed the constitutionality of legislative acts through its mandamus authority. Accordingly, we treat all of the petitions filed here as petitions for writs of mandamus. While this Court has entertained mandamus petitions involving constitutional challenges, ordinarily the initial challenge to the constitutionality of a statute should be made before a trial court. However, mandamus is the appropriate vehicle for addressing claims of unconstitutionality where the

> functions of government will be adversely affected without an immediate determination.
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> In the instant case, the DPRA drastically changes Florida's postconviction death penalty proceedings, thereby affecting a large number of cases pending in this Court and at various stages in the trial courts throughout the state. The responsibilities of a large number of state-employed attorneys will also be affected by the DPRA. Until the constitutionality challenge is resolved, the status of these proceedings is in limbo. Thus, we conclude that the functions of government will be adversely affected without an immediate determination of the constitutionality of the DPRA and accept jurisdiction pursuant to our mandamus authority under article V, section 3(b)(8) of the Florida Constitution.

Allen, 756 So. 2d at 54-55 (citations omitted).[3]

Turning to the merits, the Court in *Allen* addressed whether the Florida Legislature's attempt to set time limitations for postconviction motions violated the separation of powers clause of the Florida Constitution. The Court unanimously held that it did:

> We find the resolution of the separation of powers claim to be dispositive in this case. Article II, section 3 of the Florida Constitution prohibits the members of one branch of government from exercising "any powers appertaining to either of the other branches unless expressly provided herein." Article V, section 2(a) states that the Florida Supreme Court has the exclusive authority to "adopt rules for the practice and procedure in all courts, including the time for seeking appellate review." The Legislature has the authority to repeal judicial rules by a two-thirds

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[3] There was also some discussion in the *Allen* opinion concerning the Court's "exclusive appellate jurisdiction in death cases and its original jurisdiction to hear ancillary petitions in cases where the death sentence has been imposed." *Allen*, 756 So. 2d at 54. *See also* art. V, § 3(b)(1), Fla. Const.

vote, but the authority to initiate rules rests with the Court.

Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law. . . . . To resolve the separation of powers claim in this case, we must determine whether the provisions of the DPRA are substantive or procedural.

The State argues that the deadlines for filing postconviction motions in the DPRA are statutes of limitations and are therefore substantive. . . . Although habeas corpus petitions are technically civil actions, they are unlike other traditional civil actions [they are actually quasi-criminal]. . . . In addition to being quasi-criminal, the writ of habeas corpus is explicitly derived from text of the Florida Constitution, which provides that the writ "shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety." Art. I, § 13, Fla. Const. As this Court explained in *Haag v. State*, 591 So. 2d 614, 616 (Fla. 1992), "[a] basic guarantee of Florida law is that the right to relief through the writ of habeas corpus must be 'grantable of right, freely and without cost." While the right to habeas relief "is subject to certain reasonable limitations consistent with [its] full and fair exercise," 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.*

Further, this Court has explained that "[r]ule 3.850 is a procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus." *State v. Bolyea*, 520 So. 2d 562, 563 (Fla. 1988); "[A]s a general rule . . . whatever power is conferred upon the courts by the Constitution cannot be enlarged or abridged by the Legislature." *State ex rel. Buckwalter v. City of Lakeland*, 112 Fla. 200, 208, 150 So. 508, 512 (1933) (finding that legislative act improperly attempted to interfere with judicial power to issue writs of mandamus and to limit scope of writ of mandamus).

Based on the foregoing, we conclude that the writ of habeas corpus and other postconviction remedies are not the type of "original civil action" described in *Williams* [*v. Law*, 368 So. 2d 1285 (Fla. 1979),] for which the Legislature can establish deadlines pursuant to a statute of limitations. Due to the constitutional and quasi-criminal nature of habeas proceedings and the fact that such proceedings are the primary avenue through which convicted defendants are able to challenge the

> validity of a conviction and sentence, we hold that article V, section 2(a) of the Florida Constitution grants this Court the exclusive authority to set deadlines for postconviction motions.
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> . . .
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> For all of these reasons, we conclude that the establishment of time limitations for the writ of habeas corpus is a matter of practice and procedure and, therefore, the judiciary is the only branch of government authorized by the Florida Constitution to set such deadlines. Accordingly, we hold the DPRA in large part invalid as an encroachment on this Court's exclusive power to "adopt rules for the practice and procedure in all courts." Art. V, § 2(a), Fla. Const.

Allen, 756 So. 2d at 59-64 (citations omitted) (footnotes omitted).

The analysis in *Allen* applies with equal force to section 925.11. In regards to the Court's jurisdiction to consider the constitutionality of section 925.11 in an original proceeding, as the Court recognized in *Allen*, "mandamus is the appropriate vehicle for addressing claims of unconstitutionality where the functions of government will be adversely affected without an immediate determination." 756 So. 2d at 55. The passing of the deadline imposed by section 925.11 satisfied the test set forth in *Allen*. Had the Court not acted prior to 01 October 2003, the State and all of its agencies would have been free to dispose of all of the potentially exculpatory evidence in noncapital cases. The damage could be irreversible and prejudicial. Moreover, all defendants, both capital and noncapital, would have been procedurally barred from requesting future DNA tests, thus denying these defendants access to the court system. Without question, the "functions of government would have been adversely

affected." *Allen*, 756 So. 2d at 55. Accordingly, in the present case, the Court has jurisdiction pursuant to its mandamus authority under article V, section 3(b)(8), of the Florida Constitution to determine the constitutionality of the deadlines set forth in section 925.11(1)(b).[4]

Turning to the merits, pursuant to the reasoning set forth in *Allen*, the deadlines contained in section 925.11(1)(b) violate the separation of powers doctrine. DNA testing is a postconviction remedy akin to the remedies set forth in rule 3.851 and the DPRA. Hence, the remedy is not the type of civil action for which the Legislature can establish deadlines pursuant to a statute of limitations. Section 925.11(1) provides in relevant part:

> (b) Except as provided in subparagraph 2., a petition for postsentencing DNA testing may be filed or considered:
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> 1. Within 2 years following the date that the judgment and sentence in the case becomes final if no direct appeal is taken, within 2 years following the date that the conviction is affirmed on direct appeal if an appeal is taken, within 2 years following the date that collateral counsel is appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital case, or by October 1, 2003, whichever occurs later.

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[4] As in *Allen*, rule 3.853 and section 925.11 affect the Court's "exclusive appellate jurisdiction in death cases and its original jurisdiction to hear ancillary petitions in cases where the death sentence has been imposed." *Allen*, 756 So. 2d at 54. The time limitations set forth in rule 3.853 and section 925.11 apply to capital defendants. Further, the procedures for destroying biological evidence set forth in section 925.11(4) also apply to capital defendants.

Section 925.11(1)(b)1 is an unconstitutional effort by the Legislature to set a deadline for a postconviction remedy, which the Court in *Allen* held was impermissible. The judiciary is the only branch authorized by the Florida Constitution to set such deadlines. Therefore, section 925.11(1)(b)1 is unconstitutional as a violation of the separation of powers doctrine.

C. It is a violation of due process to permit the State or its agencies to destroy potentially exculpatory evidence without giving actual notice to the sentenced defendant.

Much of the concern regarding the procedures set forth in rule 3.853 and section 925.11 involves the possibility that the State or its agencies would destroy potentially exculpatory evidence without giving notice to a particular sentenced defendant. Section 925.11(4) provides the following procedures for disposing of biological evidence:

> (c) A governmental entity may dispose of the physical evidence before the expiration of the period of time set forth in paragraph (1)(b) if all of the conditions set forth below are met.
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> 1. The governmental entity notifies all of the following individuals of its intent to dispose of the evidence: the sentenced defendant, any counsel of record, the prosecuting authority, and the Attorney General.
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> 2. The notifying entity does not receive, within 90 days after sending the notification, either a copy of a petition for postsentencing DNA testing filed pursuant to this section or a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the time for filing it has expired.

3. No other provision of law or rule requires that the physical evidence be preserved or retained.

Yet, prior to the Court's recent stay, section 925.11(4)(c) authorized the State and all of its agencies to dispose of all biological evidence in all noncapital cases, without any notice, on 01 October 2003. Such a procedure violates due process. Even if the Court sets a new deadline to file motions pursuant to rule 3.853, the potential exists that evidence will be destroyed in the future without providing actual notice to the affected defendant.

Congress is presently considering a bill that allows for postconviction DNA testing in federal criminal cases. The bill, entitled the Innocence Protection Act of 2003,[5] provides that the Government may not destroy biological evidence unless and until "the defendant is notified after conviction that the biological evidence may be destroyed and the defendant does not file a motion [to have the evidence tested] within 180 days of receipt of the notice." § 3600A(c)(3), H.R. 3214, 108th Cong. (2003).[6]

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[5] The Innocence Protection Act of 2003 is subsumed in a larger bill, H.R. 3214, entitled the "Advancing Justice Through DNA Technology Act of 2003."

[6] Among other things, H.R. 3214 establishes rules and procedures governing applications for DNA testing by defendants in the federal system. A court shall order DNA testing if the applicant asserts under penalty of perjury that he or she is actually innocent of a qualifying offense, and the proposed DNA testing would produce new material evidence that supports such assertion and raises a reasonable probability that the applicant did not commit the offense. The court is permitted to appoint counsel for indigent applicants. Limitations on access to testing are imposed where the applicant

A copy of H.R. 3214 is included in the appendix to this pleading.[7] On 08 October 2003, the House Judiciary Committee approved H.R. 3214 by a 28-1 vote. *See* Appendix at A-67.

Due process requires that sentenced defendants be given explicit notice and opportunity to respond before biological evidence is destroyed by the State or its agencies. To the extent that section 925.11(4) permits the disposal of biological evidence without such notice, the subsection is unconstitutional. In *State v. James*, 614 P.2d 207, 208 (Wash. Ct. App. 1980), a Washington appellate court recognized that

> [d]ue process imposes certain duties on law enforcement and investigatory agencies to insure that every criminal trial is a "'search for truth, not an adversary game.'" *State v. Wright*, 557 P.2d 1, 4 (Wash. 1976) (quoting *United States v. Perry*, 471 F.2d 1057, 1063 (D.C. Cir. 1972)). One of the duties is to preserve material evidence not only for the benefit of the State but for the defendant, also. *If the State destroys evidence without notice to the defendant, and there is a "reasonable*

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seeks to interfere with the administration of justice rather than to support a valid claim. Penalties are established in the event that testing inculpates the applicant. Where test results are exculpatory, the court shall grant the applicant's motion for a new trial or resentencing if the test results and other evidence establish by a preponderance of the evidence that a new trial would result in an acquittal of the offense at issue.

In contrast to rule 3.853 and section 925.11, H.R. 3214 does not establish deadlines for defendants to file DNA motions.

[7] The Innocence Protection Act of 2003 is located in Title III of H.R. 3214 (page 32). Section 3600A, entitled "Prohibition on destruction of biological evidence," appears on page 43 of the bill.

> *possibility" that the destroyed evidence is material to guilt or innocence and favorable to the defendant, the defendant's due process rights are violated . . . .*

(Emphasis added). Accordingly, the appropriate procedure in the present context would be to require that the notice requirements set forth in section 925.11(4)(c)1 apply to *all* situations where the State intends to dispose of biological evidence, not just evidence destroyed prior to 01 October 2003 (or any other date set by the Court or Legislature).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Honorable Olin Wilson Shinholser
Chair, The Florida Bar Criminal
Procedure Rules Committee
P. O. Box 9000, Drawer J118
Bartow, Florida 33831-9000

by hand/mail delivery this ________ day of October, 2003.

Ivy R. Ginsberg
1 N.E. 2nd Avenue, Suite 200
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by hand/mail delivery this ________ day of October, 2003.

Respectfully submitted,

____

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