IN THE SUPREME COURT OF FLORIDA

Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A) (Postconviction DNA Testing)
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Case Number SC03-1630

The Florida Public Defender Association, Inc., ("FPDA") offers the following comments in support of The Florida Bar's emergency petition to amend Florida Rule of Criminal Procedure 3.853(d)(1)(A). The FPDA consists of the twenty elected public defenders, hundreds of assistant public defenders and support staff. As appointed counsel for indigent criminal defendants, FPDA members are deeply interested in the rules of criminal procedure, and especially in procedural mechanisms allowing relief for erroneously convicted defendants.

I.
ANY ARBITRARY DEADLINE FOR FILING 3.853 MOTIONS INEVITABLY WILL RESULT IN INJUSTICES.

Because of the Innocence Project's tremendous backlog in screening Florida cases, and the utter lack of funding to hire lawyers to process this backlog, a one-year extension of the time in rule 3.853(d)(1)(A) is a bare minimum. Accordingly, the FPDA supports The Florida Bar's emergency petition to amend rule 3.853.

The FPDA, however, is concerned that any deadline for filing a 3.853 motion will inevitably result in a miscarriage of justice. Imprisonment for a crime someone else committed is the height of injustice. The discovery of reliable DNA testing methods has revealed many cases of wrongful convictions. Sadly, Florida has not been immune from such wrongful convictions, as illustrated by the cases of Frank Lee Smith and Jerry Townsend. The specter of innocent citizens sitting in prison for crimes they did not commit is intolerable in a free society, as demonstrated by the intense media publicity generated by such cases.[1]

The response of the criminal justice system to these injustices is crucial. No reasonable person expects infallibility from a criminal justice system. Instead, the mark of a fair and just legal system is that the system acknowledges the possibility of error and provides mechanisms to remedy error when it is discovered. Conversely, we condemn legal systems that value legal niceties and finality more than fairness and exoneration of the innocent.

A deadline for filing motions for postconviction DNA testing is the type of procedural obstacle that will inherently result in injustice. Although extending the deadline another year will help alleviate the number of injustices, on October 1, 2004, that deadline will pass. Inevitably, after that time a prisoner will come forward with a

[1]A Westlaw search of Florida newspapers for "DNA" within 20 words of "innocen!" or "exonerat!" returned 687 articles.

strong claim that DNA tests will exonerate him or her.

Ultimately, a legalistic system with an arbitrary deadline condemns itself. Such a deadline will leave innocent citizens in prison, not for committing a crime, but for filing a motion for DNA testing too late. A just system will provide a mechanism to address the issue of innocence without arbitrary deadlines. Even in the situation where someone delayed filing through sheer ignorance or laziness, if DNA evidence can exonerate that person, the justice system must not close the door. No arbitrary deadline should condemn an innocent person to prison.

The only exception to this deadline is if the basis for the petition was "unknown to the petitioner or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.853(d)(1)(B). The simple fact, however, is that "due diligence" has nothing to do with innocence. This exception does not take into account common problems among prisoners such as illiteracy, mental retardation (as in the case of Mr. Townsend), mental illness, and simple ignorance. The persons most likely to suffer a wrongful conviction are those who had the weakest skills navigating the legal system during their trials. These same persons are also the ones most likely to miss a deadline and not be able to prove "due diligence."

Two major obstacles to filing a timely 3.853 motion are the ignorance of DNA testing methods and detailed pleading requirements. Rule 3.853 does not require mere

"notice pleading." Instead, this rule requires that:

> The motion for postconviction DNA testing must be under oath and must include the following:
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> (1) a statement of the facts relied on in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;
>
> (2) a statement that the evidence was not tested previously for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result;
>
> (3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;
>
> (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;
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> (5) a statement of any other facts relevant to the motion; and
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> (6) a certificate that a copy of the motion has been served on the prosecuting authority.

The appellate case law under this rule reveals cases where the court affirmed a

denial of a 3.853 petition because the *pro se* prisoner failed to meet the detailed pleading requirements. *See Saffold v. State*, 850 So. 2d 574 (Fla. 2d DCA 2003); *Coombs v. State*, 824 So. 2d 958 (Fla. 3d DCA 2002); *Galloway v. State*, 802 So. 2d 1173 (Fla. 1st DCA 2001). Sometimes the appellate courts realize the problem may be inartful pleading and grant leave for the petitioner to refile another petition. *See Saffold*, 850 So. 2d at 577-78; *Harrison v. State*, 821 So. 2d 318 (Fla. 2d DCA 2002); *Cain v. State*, 807 So. 2d 181 (Fla. 5th DCA 2002); *see also Dedge v. State*, 832 So. 2d 835 (5th DCA 2002) (attorney given leave to refile). The *pro se* nature of much of this litigation, however, leaves little reason to believe the petitioners will be any better legal drafters the second time.

A string of reversals by the Second District Court of Appeal also suggests that the circuit courts may be applying the pleading requirements even more strictly than the appellate courts. *See Zollman v. State*, 28 Fla. L. Weekly D2083 (Fla 2d DCA Sept. 3, 2003); *Warren v. State*, 851 So. 2d 817 (Fla. 2d DCA 2003); *Riley v. State*, 851 So. 2d 811 (Fla. 2d DCA 2003); *Manual v. State*, 28 Fla. L. Weekly D1399 (Fla. 2d DCA June 13, 2003); *Huffman v. State*, 837 So. 2d 1147 (Fla. 2d DCA 2003); *Knighten v. State*, 829 So. 2d 249 (Fla. 2d DCA 2002); *Zollman v. State* 820 So. 2d 1059 (Fla. 2d DCA 2002). These cases are only the published opinions from litigants who managed to navigate the appellate process in one district court of appeal. A

survey of the unpublished circuit and district court orders from across the state would probably reveal an even greater problem. Thus, illiteracy, ignorance, and inability to comply with the detailed pleading requirements may result in a delay in filing a 3.853 motion, yet would not constitute "due diligence" sufficient to excuse a failure to comply with a deadline.

Additionally, prisoners fail to keep up with rapidly changing DNA testing techniques and technologies. A truly revolutionary DNA technique might meet the exception in rule 3.8853(d)(1)(B) because no one could have discovered it even with due diligence. The problem with the "due diligence" standard, however, lies in the slow transfer of scientific knowledge into the broader culture. Someone with adequate reading ability and intelligence theoretically could investigate whether science has made any helpful advances, but the problem with ignorance is this it precludes any such investigation. Ignorance is not knowing that you do not know and need to investigate.

The problem is, unfortunately, not confined to prisoners. Even defense attorneys are often ignorant of existing techniques. In the press of an underfunded and overcrowded legal system, defense attorneys often cannot keep up with the latest advances in DNA testing. For instance, this Court recently noted that a trial court had found that mitochondrial DNA testing, a technique particularly useful for decayed material or samples too small for prior techniques, had been available "in judicial

proceedings since 1996, and that mitochondrial DNA testing had been used in the Thirteenth Judicial Circuit in 1999." *Tompkins v. State*, SC01-1619 (Fla. Oct. 9, 2003). Although this Court's decision decided the 3.853 motion was inadequate on other grounds, the trial court's finding would suggest that the possibility of mitochondrial DNA testing would not meet the "could not have been ascertained by the exercise of due diligence" standard. Fla. R. Crim. P. 3.853(d)(1)(B). Thus, the trial court would have enforced the deadline, although many criminal defense attorneys probably have never heard of the technique. Even those who have heard of it may not know that it allows DNA testing for previously untestable items such as hair follicles, which contain no living cells. The first Florida appellate decision upholding such testing under a *Frye* challenge was decided only a few months ago. *See Magaletti v. State*, 847 So. 2d 523 (Fla. 2d DCA 2003).

In another case, this Court affirmed a trial court's holding that: "The only method of testing fingernail scrapings is that which was used by the Florida Department of Law Enforcement (FDLE) to test the scrapings in this case. The type of testing done by the FDLE is called Short Tandem Repeat Typing DNA testing (STR DNA)." *King v. State*, 808 So. 2d 1237, 1248 (Fla. 2002). In a motion filed in January 2002, Mr. King's counsel did not contest this factual statement. *Id*. at 1246. The problem in that case was that fingernail scrapings resulted in far more cells from

the victim than from the perpetrator. *See id.*

Unbeknownst to Mr. King's lawyer, however, a solution was already available. Over a year earlier in November 2000, the National Institute of Justice ("NIJ") described a technique of testing on the Y chromosome. *See* National Commission on the Future of DNA Evidence, National Institute of Justice, *The Future of Forensic DNA Testing* 19 (2000).[2] As with Mr. King's case, when the victim was female and the perpetrator male, this technique allows DNA testing to be conducted by focusing only on the DNA with a Y (male) chromosome. *See id.* Only three laboratories, all outside Florida, conduct such testing. *See* Sherri M. Owens, *Judge Will Allow New DNA Test in Rape-Murder Case*, Orlando Sentinel, October 4, 2003, at B1. Nevertheless, the lawyer would have a hard time claiming that with due diligence he or she could not have discovered Y chromosome testing. After all, this testing gained widespread attention when it was used to identify all of Thomas Jefferson's descendants, both black and white. *See* Leef Smith, *Monticello to Include Jefferson's Paternity*, Sun-Sentinel, Jan. 27, 2000, at 11A. Accordingly, the technique could have

[2]The report predicted that by 2002, DNA databases would contain Y chromosome markers. *See* National Commission on the Future of DNA Evidence, *supra* at 28. Of course, DNA databases are used to find perpetrators, but are irrelevant for purposes of exoneration. Therefore, reasonable diligence would have uncovered this testing method by November 2000.

been discovered with due diligence and a court would apply the deadline.[3]

These two cases are anomalous because they are death penalty cases with appointed counsel to file postconviction motions. Nevertheless, these two cases illustrate the difficulties that even lawyers have in keeping up with technological change in DNA testing. The vast majority of prisoners do not have appointed counsel to file such motions, and are likely to be even more ignorant of changes in DNA testing technology that could benefit them.

Additionally, many prisoners (and lawyers) will not think of all the types of evidence that can be subjected to DNA testing. While prisoners might know that blood or semen is subject to DNA testing, many would not know that other items are also susceptible to testing. The NIJ recommends testing of eyeglasses, the handles of baseball bats (or, presumably, other blunt instruments), and the inside surfaces of hats, bandanas, and masks. *See* Crime Scene Investigation Working Group, National Institute of Justice, *Using DNA to Solve Cold Cases*, 21 (2002). The NIJ also recommends DNA testing of dirty laundry, facial tissues or cotton swabs, and tape or ligatures. *See id.* Many sources of DNA on this evidence are not blood or semen, but

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[3]Ultimately, Barry Scheck of the Innocence Project began representing Mr. King and Governor Bush delayed Mr. King's execution to allow for Y chromosome testing. *See* Kelly Benham, *Condemned Man Pins Hopes on New DNA Test*, St. Petersburg Times, Dec. 4, 2002, at 6B, 1B.

sweat, skin cells, dandruff and even ear wax. *See id.*

To make matters worse, the ignorance of lawyers can infect their clients. Trial counsel may have already told some prisoners that DNA tests were inconclusive, that not enough genetic material was available for testing, or that DNA testing was only available on bodily fluids. Such advice may be ineffective assistance of counsel, but such claims are also subject to a deadline. *See* Fla. R. Crim. P. 3.850(b). If the prisoner does not learn the nuances of DNA testing in time to file a 3.853 motion, the prisoner will not be able to file a timely ineffective assistance of counsel claim either.

Finally, the "due diligence" standard creates for the courts a very difficult decision: when has scientific knowledge sufficiently permeated the broader culture such that a prisoner or lawyer would know of a new DNA technique or technology? For instance, forensic medical examiners attempting to identify the victims of the attack on the World Trade Center have developed a method of examining damaged DNA. *See* Lynne Duke, *Doctor Who; Biologist Bob Schaler Hunts for Names Amid the Remains of 9/11*, The Washington Post, September 7, 2003, at D1. The standard STR requires DNA segments of 200 to 400 base pairs long. The new technique looks at the smallest molecular structure of DNA, the single nucleotide polymorphisms or SNPs. *Id*. This technique allows the examiners to look at DNA strands only 50 to 85 base pairs long. *Id*. Now that this story has been published in *The Washington Post*,

is every lawyer presumed to be aware of this new technique? How about every prisoner?

In another example, police in the United Kingdom have begun using another technique called "low copy number" DNA testing. *See* Jim Cusack, *Technology Prompts Now Look at Murder Case*, Irish Times. Mar. 19, 2002, at P5. This technique allows only few cells to be "grown" into a large enough sample for testing. *Id*. British newspapers refer to the technique as far back as 2000. *See* Nicholas Rufford, *Police to Arrest Suzy Lamplugh Murder Suspect*, Sunday Times, Dec. 3. 2000, at 1. Although the technique was apparently developed by an American scientist, *see* Cusack, *supra*, it appears to be in use only in the United Kingdom. Again, when are American lawyers and prisoners presumed to know such information?

All of these problems stem from the arbitrary deadline combined with a "due diligence" exception. Neither a deadline nor "due diligence" have anything to do with innocence. Both of these mechanisms value finality over innocence. Given scientific advancement in this field, finality will be elusive at best.

More importantly, both the deadline and due diligence exception assume that finality justifies leaving an innocent person in prison. It is never too late to free an innocent person. The desire to avoid such a manifest injustice underlies the rule allowing motions to correct illegal sentences to be filed "at any time." Fla. R. Crim.

P. 3.800(a). Case law has substantiated that "any time" means exactly what it says. *See, e.g., State v. Callaway*, 658 So. 2d 983, 988 (Fla. 1995) ("A rule 3.800 motion can be filed at any time, even decades after a sentence has been imposed . . . .").

Two pragmatic reasons make this lack of a deadline work. First, prisoners have every incentive to correct illegal sentences as soon as possible—no one stays in prison a day longer than necessary. Second, illegal sentences can be determined without courts making difficult credibility determinations.

By comparison, motions to vacate pleas require evidentiary hearings and must be filed within two years. *See* Fla. R. Crim. P. 3.850. This time limitation is reasonable because a delayed evidentiary hearing often results in dimmer memories and unavailable witnesses. These hearings often are credibility or "swearing" contests. Without a time limitation, prisoners would have every incentive to wait until no one could refute their allegations before filing a 3.850 motion. Given this potential for abuse, a time limit is fair and reasonable.

DNA testing, however, is not susceptible to the same manipulation. No matter how long a prisoner waits, his or her DNA is not going to change. Similarly, time will not change the DNA found at the crime scene, except to degrade it in a way that may make exoneration impossible. Rule 3.853 motions do not require a credibility determination that is subject to manipulation by delay. In these motions, the trial judge

must make three findings:

> (A) Whether it has been shown that physical evidence that may contain DNA still exists.
>
> (B) Whether the results of DNA testing of the physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.
>
> (C) 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.

Fla. R. Crim. P. 3.853(4). Factor "C" is a legal conclusion based on the records of the case. Similar to 3.800 motions to correct illegal sentences, this factor turns entirely on court records. Factor "B" is also a legal conclusion based on the admissibility of the DNA testing procedure and the authenticity of the physical evidence. Factor "A" is a factual finding about the existence of the physical evidence where delay does not work in favor of the prisoner. The longer the time, the greater chance the physical evidence may deteriorate or be lost.[4] Thus, the concerns with manipulation underlying

[4]As in other situations, laches would apply to bar claims when the delay makes an accurate judicial determination impossible. *See McCray v. State*, 699 So. 2d 1366 (Fla. 1997) (applying laches to ineffectiveness of appellate counsel claims); *Wright v. State*, 711 So. 2d 66 (Fla. 3d DCA 1998) (applying laches to illegal sentence).

the two-year time limitation on 3.850 motions do not apply in the context of motions for DNA testing. Instead, the rationale for allowing motions to correct illegal sentence "any time" apply to these motions for DNA testing.

II.

THIS COURT HAS THE CONSTITUTIONAL AUTHORITY TO AMEND THE DEADLINE IN RULE 3.853.

Under the Florida Constitution, this Court, and only this Court, has the authority to set or abolish time limitations on filing postconviction motions under rule 3.853. Section 925.11(1)(b)1 of the Florida Statutes stated that motions for DNA testing must be filed by October 1, 2003, or within two years of the conviction becoming final or the appointment of postconviction counsel. When this Court first promulgated rule 3.853, this Court avoided reaching the obvious separation of powers violation, saying that "we adopt the appended procedures to effectuate the new legislation without reaching the constitutional issues raised in this proceeding." *Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*, 807 So. 2d 633, 634 (Fla. 2001).

This Court must now address the separation of powers issue, even if it need not explicitly pass on the constitutionality of the statute. Article II, section 3, of the

Florida Constitution prohibits one branch of government from exercising the powers of another branch. Article V, section 2(a) of the Florida Constitution gives the Supreme Court of Florida exclusive authority to "adopt rules for the practice and procedure in all courts." Consequently, the legislature has no authority to enact procedural rules, only substantive law. *See Allen v. Butterworth*, 756 So. 2d 52, 59-64 (Fla. 2000).

The classic definition of this distinction is Justice Adkins' concurring opinion in *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (Fla. 1972):

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.
>
> Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.

Id. at 66 (*quoted in, e.g., Allen*, 756 So. 2d at 60).

The timing for filing a motion is part of the "order, process [and] steps" in the criminal case. Florida courts have routinely found that the timing of steps in litigation is a procedural matter within their control. *See, e.g., Jackson v. Florida Dept. of Corrections*, 790 So. 2d 381 (Fla. 2001) (holding that although the right for indigents to litigate without paying costs is substantive, the requirement that the person file copies of their prior actions before the court can make an indigency determination is procedural and therefore unconstitutional); *Allen v. Butterworth*, 756 So. 2d at 59-64 (holding unconstitutional a statute attempting to establish deadlines for postconviction motions); *Haven Federal Savings & Loan Assoc. v. Kirian*, 579 So. 2d 730 (Fla. 1991) (holding unconstitutional a statute attempting to regulate when counterclaims in a foreclosure action could be tried); *Markert v. Johnston*, 367 So. 2d 1003, 1006 (Fla. 1978) ("The timing of joinder during the course of a trial is, without question, a matter of practice or procedure assigned by the Constitution exclusively to this Court."); *Huntley v. State*, 339 So. 2d 194 (Fla. 1976) (holding that mandatory language in a statute requiring a presentence investigation report before sentencing was procedural and, therefore, unconstitutional); *Hanzelik v. Grottoli and Hudon Investment of America, Inc.*, 687 So. 2d 1363 (Fla. 4th DCA 1997) (holding that timing of the acceptance of offers of attorneys' fees is procedural); *In re Adoption of a Minor Child*, 570 So. 2d 340, 342 (Fla. 4th DCA 1990) (holding that time for taking an

appeal is procedural); *Military Park Fire Control Tax District No. 4 v. DeMarois*, 407 So. 2d 1020 (Fla. 4th DCA 1981) (holding that a statute requiring an expedited appeal was procedural and, therefore, unconstitutional).

This Court has already decided in *Allen v. Butterworth* that "article V, section 2(a) of the Florida Constitution grants this Court the exclusive authority to set deadlines for postconviction motions." 756 So. 2d at 62. In doing so, this Court rejected the state's attempt to characterize such deadlines as a statute of limitations. *See* 756 So. 2d at 60-62. This Court noted that postconviction motions are merely procedural vehicles for remedies otherwise available through habeas corpus. *Id*. at 61. Petitions for writs of habeas corpus are not subject to filing deadlines. Under the Florida Constitution, they are "grantable of right, freely" and "shall never be suspended, unless in case of rebellion or invasion, suspension is essential to the public safety." Art. I, § 13, Fla. Const.

Thus, irrespective of section 925.11(1)(b)1 of the Florida Statutes, this Court has exclusive jurisdiction to set or abolish any deadlines for filing motions under rule 3.853.

CONCLUSION

This Court should abolish the deadline for filing 3.853 motions. No time should be too late for a DNA test that could exonerate an innocent citizen and perhaps lead to the discovery of the real perpetrator. The Florida Bar's proposed amendment is a step in the right direction and, therefore, this Court should adopt it.

Respectfully submitted,

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CERTIFICATES

I hereby certify that a copy of the foregoing comments were delivered by mail to the Honorable Olin Wilson Shinholser, Circuit Judge, Post Office Box 9000, Drawer J118, Bartow, Florida 33831-9000; and Ivy R. Ginsburg, 1 N.E. 2nd Avenue, Suite 200, Miami, Florida 33132-2507 on this 17th day of October 2003.

I hereby certify that these comments were printed in 14-point Times New Roman.

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NANCY DANIELS

IN THE SUPREME COURT OF FLORIDA

Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A) (Postconviction DNA Testing)
_____/

Case Number SC03-1630

REQUEST TO PARTICIPATE IN ORAL ARGUMENT

The Florida Public Defender Association, Inc., hereby notifies this Honorable Court that it wishes to participate in the oral argument in this matter previously scheduled for Friday, November 7, 2003, at 8:30 a.m. John Eddy Morrison, Assistant Public Defender, will be appearing on behalf of the Florida Public Defender Association, Inc.

I hereby certify that a copy of the foregoing notice was delivered by mail to the Honorable Olin Wilson Shinholser, Circuit Judge, Post Office Box 9000, Drawer J118, Bartow, Florida 33831-9000, and Ivy R. Ginsburg, 1 N.E. 2nd Avenue, Suite 200, Miami, Florida 33132-2507 on this 17th day of October 2003.

Respectfully submitted,

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