IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE, RULE 3.853

CASE NUMBER: SC05-1702

COMMENTS OF THE FLORIDA INNOCENCE INITIATIVE, INC.

On September 9, 2005, the Florida Criminal Procedure Rules Committee voted essentially unanimously (with one member abstaining) to file an emergency petition to the Supreme Court of Florida proposing the elimination of any deadline to Florida Rule of Criminal Procedure 3.853. This action was a marked evolution in the Committee's efforts to ensure continuing access to postconviction DNA testing to exonerate the innocent, as its 2003 consideration of the issue resulted in a divided vote in favor of a one-year extension. In its recent action, the Committee joined with a unanimous Board of Governors of the Florida Bar, resolving that DNA testing be made a permanent part of the justice system[1]; with Governor Jeb Bush, whose issuance of an Executive Order preserves critical biological evidence despite any lapse in the statutory right to seek DNA testing[2]; and with Legislators J. Alex Villalobos, John Quinones and Ellyn Bogdanoff, who are sponsoring bills

[1] The Board of Governors of the Florida Bar expressed support for permanent access to DNA testing in September, 2005 by unanimously adopting the position that DNA testing should be "a permanent and meaningful component of Florida's criminal justice system - to help ensure that the real perpetrators of crimes are punished, that the freedom of innocent people is protected, and that the public's trust and confidence in the judicial process are not diminished." (Florida Bar News, September 15, 2005)

[2] In an Executive Order issued August 5, 2005, Governor Bush outlined the importance of access to DNA testing when he expressed concern about the potential for destruction of this crucial evidence after the October 1, 2005 deadline in Rule 3.853. Such destruction, he stated, would preclude "some sentenced prisoners from the opportunity to seek DNA testing and confirm or dispel their guilt" and "could potentially enable the innocent to be wrongly convicted and the guilty to go free." Governor Bush also highlighted the public's interest in allowing access to evidence for DNA testing as "the pursuit of solving crime is enabled when law enforcement agencies, prosecutors, crime victims, defendants, or defense counsel retain access to DNA evidence for the purposes of identifying suspects in unsolved crimes." (Executive Order 05-160)

which both delete any deadline and remove other artificial obstacles to justice[3]. A clear consensus about the importance of allowing unfettered access to DNA testing in meritorious cases has developed, and there are no longer organized—or, apparently, any—voices in opposition. Each branch of government appears to be contributing meaningfully to the creation of a justice system with treats postconviction DNA testing with rationality and fundamental fairness, devoid of deadlines and arbitrary barriers to simple justice. The Florida Innocence Initiative, Inc., supports and encourages all such efforts, and is profoundly grateful for them.

The Florida Innocence Initiative, Inc. (FII) is a non-profit organization supported entirely by private donations and by the *pro bono* efforts of law students, attorneys, and interested citizens throughout the State of Florida. FII has a staff of two, and is currently the only entity working to find and free wrongfully incarcerated Floridians through the use of DNA technology.

With the third largest prison population in the nation and grossly inadequate resources, FII screens and investigates criminal cases in which its help is sought, identifying meritorious innocence cases and placing them with *pro bono* counsel. After placement, FII provides consultation and logistical assistance on all facets of

[3] Senator J. Alex Villalobos (R-Miami), announced on August 11, 2005 in an editorial published in the Miami Herald that he would be sponsoring a bill (SB 186) during the 2006 legislative session to completely remove the DNA testing deadline from F.S. 925.11. His reasoning, he wrote, is "simple: If the state of Florida knowingly keeps an innocent person from using DNA to clear his or her name, then justice is not being served." (Miami Herald, August 11, 2005) Representative John Quinones (R-Kissimmee), co-sponsoring an identical measure in the House (HB 61), has stated "There's no expiration on innocence." (Florida Today, October 20, 2005) Representative Ellyn Bogdanoff has joined Representative Quinones as a prime co-sponsor of his bill in the House.

the postconviction process and on the complex scientific issues frequently involved in achieving genetic profiles on degraded biological evidence. Since its inception in 2003, FII has screened and investigated 499 felony cases, with 51 referred to counsel. A persistent backlog exists, however, currently due in part to the closing of the Florida Innocence Project at Nova Southeastern University's Shepard Broad Law Center, with quantification difficult as the transfer of case files to FII is on-going; a reasonable estimate of unprocessed requests statewide is 1,200.

Any deadline on the ability to prove innocence will necessarily and absolutely fail to do justice, regardless of the identified number of inmates awaiting FII's assistance pursuant to a specific request. There is much at stake beyond these numbers, including the certainty that many of Florida's wrongfully incarcerated citizens lack the ability to understand the relevance or power of DNA testing to identify true perpetrators of crime; with 75% of the prison population suffering from functional illiteracy[4], the event triggering an investigation—simply sending a letter to FII—is beyond the ability of many who may have heard about exonerations and modern DNA technology. Additional and tragic barriers exist in the form of mental illness, with depression, despair and Post Traumatic Stress Disorder commonly experienced by those living the nightmare of wrongful

[4] A functionally illiterate, indigent prisoner is not able to determine which evidence in a case can be subjected to DNA testing and is 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. (See Governor's Mentoring Initiative, The Price of Illiteracy, June 14, 2000, last accessed on August 21, 2003 at http://www.myflorida.com/myflorida/governorsoffice/mentoring/articles/illiteracy_price.html)

accusation, prosecution and incarceration. With no right to counsel for any class of post-appellate inmate other than those awaiting execution, no fiscal resources, and compromised or nonexistent advocacy ability, access to DNA testing on the most critical criminal justice issue can never be limited in any way based on a perceived need to clear up the backlog and impose statutory limitations thereafter. Whenever an innocent inmate finds help or the ability to vindicate his or her fundamental human rights otherwise, a path to justice must exist. No constitutional or public policy imperative counsels otherwise, and none can.

The sea change of opinion and support since 2003 is likely due to the tragic miscarriages of justice suffered by two Floridians, their families and communities. The exonerations of Wilton Dedge (August 12, 2004) and Luis Diaz (August 3, 2005) serve to highlight the importance of access to postconviction DNA testing. Mr. Dedge was twice convicted on flawed and unreliable evidence possessing essentially every hallmark of wrongful conviction (FII began working on Mr. Dedge's case approximately six months prior to his release, providing primarily investigative and strategic support to long-term *pro bono* counsel). Despite this reality, his quest for DNA testing lasted for sixteen of his twenty-two years as a Florida prisoner, with the State refusing to simply test those physical items it had assured two juries belonged to Mr. Dedge and no one else. Even when exclusionary test results were obtained, the State sought to keep him in prison, at

one point telling an incredulous panel of the Fifth District Court of Appeals that innocence was irrelevant and that procedural barriers should keep him incarcerated. By contrast, the exoneration of Luis Diaz—convicted in 1979 as the "Bird Road Rapist" after a highly publicized law enforcement investigation involving unreliable identification procedures—was the result of collaborative work between the defense and prosecution. Responding to a letter sent by Mr. Diaz's son Jose in 1998, FII began investigating the case in 2003, placing it with *pro bono* counsel at Holland & Knight just before the former statutory deadline of October 1st of that year. After twenty-six years of wrongful incarceration, Luis Diaz, age sixty-seven, is free to live the remainder of his life at home with his family. Mr. Diaz and Mr. Dedge join death row inmate Frank Lee Smith (exonerated posthumously, in 2001) and Jerry Townsend (mentally retarded inmate who falsely confessed, exonerated in 2001) in further demonstrating the power of DNA technology to effectuate some measure of justice to victims of wrongful incarceration. FII expects additional DNA exonerations imminently, but believes that the number will likely always remain fairly small, not because Florida lacks a significant problem with wrongful accusation, prosecution and incarceration (see *infra*), but because only 10% of felony cases involve biological evidence—and much of it was destroyed by the State before an independent obligation to preserve it was enacted into the postconviction DNA law.

In addition to the efforts underway in other branches of government to correct the injustice inherent in maintaining a deadline on innocence, this Court has clear authority to do so. *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000). In *Allen*, this Court unanimously found that the Florida Legislature's attempt to set time limitations for postconviction motions violated the separation of powers clause of the Florida Constitution. There can be no meaningful suggestion from any quarter that *Allen* isn't controlling here, and, indeed, none has issued. If "hard cases make bad law," it would seem that only rarely has an easier one been presented to this Court.

DNA exonerations nationwide now number 163, and recent scholarship on the incidence and causes of wrongful conviction leaves no doubt that Florida's justice system is in dire need of remedial action. The dubious distinction of leading the nation in death row reversals based on innocence is ours[5], with twenty-four such prisoners achieving acquittal on retrial or having charges dismissed after postconviction proceedings necessitated vacating their convictions and sentences. A recent study by Professor James Liebman[6] found Florida's overall error rate in death cases to be unusually high (with 50% reversed on direct appeal and 39%

[5] Florida leads all death penalty states with 21 exonerations (plus 3 recent), with Illinois in close second with 18, due, in part, to the complete moratorium on the death penalty issued by Governor Ryan. The next closest state is Louisiana, with only 8 exonerations from death row. See http://www.deathpenaltyinfo.org/article.php?did=412&scid=6#inn-st (last accessed November 15, 2005)

[6] *A Broken System*, Part II: Why There Is So Much Error In Capital Cases, and What Can Be Done About It, James S. Liebman, Jeffrey Fagan, Andrew Gelman, Valerie West, Garth Davies and Alexander Kiss, February 11, 2002, available at http://www2.law.columbia.edu/brokensystem2/ (last accessed November 15, 2005)

reversed in state and federal postconviction proceedings). It is logical to assume that prisoners in general population, lacking the right to postconviction counsel, experience miscarriages of justice in similar percentages, although precise determination or quantification of the error rate in non-capital cases remains a nascent field of academic study. In a seminal study of 523 exonerations (in both DNA and non-DNA cases), Samuel Gross ranked Florida in the top ten States with the highest exoneration statistics[7].

There is much work to be done in Florida, and eliminating any deadline on innocence is the critical and necessary first step. DNA exonerations are vital, and not just for the affected exonerees and their families. They provide the required certainty with which productive dialogue and remedial action can begin, for the ultimate goal of innocence work is a fairer, more reliable criminal justice system which has learned the abundant lessons presented in exoneration cases and markedly improved policies, procedures and advocacy for all our citizens. The opportunity and responsibility to do so rests with all criminal justice actors, and, in elevating the search for truth above arbitrary time bars in the DNA context, Florida will join the majority of States and begin moving in the right direction.

[7] The top ten states with the most DNA and non-DNA exonerations are Illinois, New York, Texas, California, Florida, Massachusetts, Louisiana, Pennsylvania, Oklahoma and Missouri, and account for 2/3 of all exonerations. See Exonerations in the United States 1989 through 2003, 95 J. Crim. L. & Criminology 523, 541 (Winter 2005).

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