

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENT TO FLORIDA
RULES OF CRIMINAL PROCEDURE
CREATING RULE 3.853 (DNA TESTING)

Case No. SC01-363

**AMENDED
EMERGENCY PETITION TO CREATE RULE 3.853
FLORIDA RULES OF CRIMINAL PROCEDURE
(DNA TESTING)**

John F. Harkness, Jr., Executive Director of The Florida Bar, and the Honorable O. H. Eaton, Jr., Circuit Judge, Chair of The Florida Bar Criminal Procedure Rules Committee (“Rules Committee”), respectfully request the Court to expedite the review of a proposed new rule of criminal procedure authorizing DNA testing for certain individuals who may have been convicted of crimes and who are either actually innocent or whose sentence may be mitigated, and as grounds therefore state:

1. On June 6, 2001, this matter was scheduled for oral argument, during which the Court requested the Criminal Procedure Rules Committee to reconsider the proposed rule and blend it with recently enacted legislation on the same subject, Ch. 2001-97, Laws of Florida.

2. The Fast Track Subcommittee of the Rules Committee was convened for

that purpose in Tampa, on June 16, 2001. The Fast Track Subcommittee is composed of former chairs of the Rules Committee and other experienced Rules Committee members.

3. The Fast Track Subcommittee considered the proposed legislation and combined the best procedural aspects of the legislation and the proposed rule. The Fast Track Subcommittee opted to vote for the broadest inclusion of certain aspects of the two proposals and unanimously approved a rule that is hereafter referred to as the “newly proposed rule.” A copy of the newly proposed rule is attached to this petition.

4. A comparison of the newly proposed rule and the legislation follows:

a. The newly proposed rule provides for DNA testing for all defendants, whether they were tried or pled guilty or nolo contendere. The Rules Committee has been informed that the legislation limited the application for DNA testing to defendants “tried and found guilty” because of concern by some legislators that the Florida Department of Law Enforcement (“FDLE”) would be unable to absorb the number of applications that agency expects to receive and not for the purpose of attempting to limit this Court’s authority to issue writs of habeas corpus through postconviction proceedings. The Fast Track Subcommittee believed that the legislature did not have the authority to limit the applications for DNA testing. See

Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000). Additionally, the newly proposed rule contains a provision for alternative testing discussed below.

b. The time limitations in the legislation were adopted by the Fast Track Subcommittee.

c. The legislation provides for appointment of counsel to indigent applicants, and the newly proposed rule contains that provision.

d. Subdivision (b) of the newly proposed rule, which details the contents of the motion, follows the provisions of the legislation with minor editorial changes.

e. The newly proposed rule differs from the legislation in that subdivision (c)(7) provides for FDLE (or its designee) to conduct the testing, but also authorizes the trial court, on a showing of good cause, to order testing by another laboratory or agency. The Fast Track Subcommittee was of the opinion that the trial court has that inherent authority and there may be cases in which testing by FDLE would be suspect. Additionally, in nonindigent cases, private counsel may prefer testing to be done by an independent laboratory. This provision also satisfies legislative concern that FDLE may not be able to absorb the number of cases expected by that agency.

f. The legislation contains a provision for newly discovered evidence, and the newly proposed rule contains that provision.

g. The newly proposed rule, in subdivision (d)(B)(2), provides that a motion

for postconviction relief based solely on the results of court-ordered DNA testing may not be subject to the time limitations in *Fla. R. Crim. P.* 3.850–3.851 and may not be considered a “successive motion.” The legislation does not contain a similar provision.

h. The newly proposed rule contains a provision that tolls the time for filing a notice of appeal if a motion for rehearing is filed. The legislation does not contain a similar provision.

i. Other minor differences between the legislation and the newly proposed rule are editorial in nature or are necessary to put the newly proposed rule in the format required by the Court.

5. The full committee voted unanimously to adopt the newly proposed rule.

6. The Board of Governors of The Florida Bar, through its Executive Committee, has unanimously authorized the filing of this amended petition.

WHEREFORE, the undersigned respectfully request the Court to review this proposed rule as an emergency amendment to the Florida Rules of Criminal Procedure and to adopt the proposed rule as soon as possible.

We certify that a copy of this Amended Petition has been sent this day to all counsel of record.

Respectfully submitted on _____.

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(c) Procedure.

(1) On receipt of the motion, the clerk of the court shall file it and deliver the court file to the assigned judge.

(2) The court shall review the motion and deny it if it is insufficient. If the motion is sufficient, the prosecuting authority shall be ordered to respond to the motion within 30 days or such other time as may be ordered by the court.

(3) On receipt of the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the motion or set the motion for hearing.

(4) In the event that the motion shall proceed to a hearing, the court may appoint counsel to assist the movant if the court determines that assistance of counsel is necessary and on making the appropriate finding of indigence.

(5) The court shall make the following findings when ruling on the motion:

(A) Whether it has been shown that physical evidence that may contain DNA still exists.

(B) Whether the results of DNA testing of that 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.

(6) If the court orders DNA testing of the physical evidence, the cost of the testing may be assessed against the movant, unless the movant is indigent. If the movant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(7) The court-ordered DNA testing shall be ordered to be conducted by the

Department of Law Enforcement or its designee, as provided by statute, unless the court, on a showing of good cause, orders testing by another laboratory or agency.

(8) The results of the DNA testing ordered by the court shall be provided to the court, the movant, and the prosecuting authority.

(d) **Time Limitations.**

(1) The motion for postconviction DNA testing must be filed:.

(A) 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; or

(B) At any time, if the facts on which the petition is predicated were unknown to the petitioner or the movant's attorney and could not have been ascertained by the exercise of due diligence.

(2) A motion to vacate filed under rule 3.850 or a motion for postconviction or collateral relief filed under 3.851, which is based solely on the results of the court-ordered DNA testing obtained under this rule, is not subject to the time limitations otherwise provided in those rules. A motion to vacate filed under rule 3.850 or a motion for postconviction or collateral relief filed under 3.851, which is based solely on the results of the court ordered DNA testing obtained under this rule, shall not be considered a successive motion under those rules.

(e) **Rehearing.** The movant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered.

(f) **Appeal.** An appeal may be taken by any adversely affected party within 30 days from the entry of the order on the motion. All orders denying relief must include a statement that the movant has the right to appeal within 30 days

after the order denying relief is entered.