

APPENDIX B

Comments from interested parties:

- 02/07/01 Florida Public Defender Association
- 02/08/01 Judi Kinney, Assistant Public Defender
- 02/08/01 Florida Innocence Project
- 02/21/01 Jon H. Gutmacher, P.A.

February 7, 2001

Mr. John Harkness
Executive Director of the Florida Bar
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

RE: Proposed Rule of Criminal Procedure 3.853

Dear Mr. Harkness:

The Florida Public Defender Association (FPDA) appointed an ad hoc committee to address proposed emergency Rule 3.853, Florida Rules of Criminal Procedure, promulgated by the Criminal Procedure Rules Committee. The Board of Directors of the FPDA met today in Melbourne, Florida, and considered the preliminary work of the ad hoc committee. With the direction of the Board, we offer the following comments regarding the proposed rule:

Under the present law, after a conviction has become final, claims of “newly discovered evidence” must be brought in a Motion for Post-Conviction Relief pursuant to Rule 3.850, Fla.R.Cr.P., see Thompson v. State, 759 So.2d 650, 668 (Fla.2000), n13 and Richardson v. State, 546 So.2d 1037 (Fla.1989), and, as a result of new (and ongoing) scientific discoveries and testing methods, many recent such claims have been based on genuinely newly discovered DNA evidence. Despite the reality of the recent advances in DNA testing, the method and timeliness of raising and presenting such claims under the present Rules of Procedure has remained an issue.

The timeliness of such claims, based on new testing methods, has been explained by the Florida Supreme Court in two recent cases. In Zeigler v. State, 654 So.2d 1162 (Fla.1995), the Court said:

We agree with the trial court that Zeigler’s
DNA claim is procedurally barred.
Assuming for the sake of argument that the

more sophisticated PCR (a DNA testing method) was not in use when Andrews was decided,¹ Zeigler concedes that the method was available in 1991. Therefore, he should have raised the claim in his pending motion for post-conviction relief in order to avoid the procedural bar of successive motions. Instead, he waited in excess of two years before first raising the claim in 1994. See Adams v. State, 543 So.2d 1244 (Fla.1989) (motions for post-conviction relief based on newly discovered evidence must be raised within two years *of such discovery*.) (Footnote added.) (Emphasis added.)

Zeigler at 1164.

In Sireci v. State, 25 Fla. L. Weekly S673 (Fla. September 7, 2000), the Florida Supreme Court further explained its holding in Zeigler, stating that:

DNA typing was recognized in this State as a valid test as early as 1988. See Zeigler v. State, 654 So.2d 1162, 1164 (Fla.1995) (citing Andrews v. State, 533 So.2d 841 (Fla.5th DCA 1988.)) In Zeigler, we held that the two-year period for filing a 3.850 motion based on newly discovered evidence *begins to run* on a defendant's post-conviction request for DNA testing *when the testing method became available*. See 654 So.2d at 1164; see also Adams v. State, 543 So.2d 1244 (Fla.1989) (holding that a motion for

¹Andrews v. State, 553 So.2d 841 (Fla.5th DCA 1988), review denied, 542 So.2d 1332 (Fla.1989), recognized "DNA typing" as a valid test in 1988.

post-conviction relief based on newly discovered evidence must be raised *within two years of such discovery.*)² The final amended version of Sireci's 3.850 motion was filed in 1997 - approximately nine years after DNA testing was recognized in Florida. Thus, this portion of the claim is time-barred. (Emphasis added.) (Footnote added.)

Based upon the holdings of Adams, Zeigler, and Sireci, we assumed that the purpose of any new rule concerning DNA as “newly discovered evidence” would be for the purpose of not only establishing a procedure for raising the issue if it “exonerated” the Defendant, but with respect to any claim³ in which “newly

²At the time of the 1989 Adams decision cited in both Zeigler and Sireci, paragraph (b) of Rule 3.850 provided that all motions for post-conviction relief had to be filed within two years of the judgment and sentence becoming final. However, with the adoption of Rule 3.851, Collateral Relief After Death Sentence Has Been Imposed (adopted October 21, 1993 and effective January 1, 1994, 626 So.2d 198), which stated that any Rule 3.850 motion to vacate a conviction and sentence of death was required to be filed within *one* year of the judgment and sentence becoming final, Rule 3.850 was amended, to be consistent with new Rule 3.851, and now also states that a motion for post-conviction relief “in a capital case in which a death sentence has been imposed,” must be filed within one year of the judgment and sentence becoming final. Rule 3.850, amended October 21, 1993, effective January 1, 1994, (626 So.2d 198).

³ Clearly, “newly discovered” DNA evidence which in any fashion would “exonerate” an accused, whether “identification ... is a genuine disputed issue” (see paragraph (b) (4) of the proposed Rule) or the issue is the accuracy of a “confession,” should be able to be presented. It is, however, also entirely possible that “newly discovered” DNA evidence could create reasonable doubt about, or even eliminate, the sole

discovered DNA evidence” would meet the standard necessary for relief under Rule 3.850, that is: “would probably produce an acquittal on retrial.”⁴

In addition, we assumed that any new rule would take in to consideration not only those *present* valid claims which might otherwise be time barred, but also establish clear time limitations with respect to raising such claims based on *future* scientific advances, i.e., “when the testing method became available.” Sireci.

In other words, we presumed that the commendable purpose of the rule would be to further justice in *all* cases by clarifying and codifying the case law, and by creating a procedure in which a claim of “newly discovered DNA evidence” - newly discovered because of new scientific advances and testing methods, and *not* due to a lack of diligence on the part of the defendant or counsel - could be raised within two years of “the testing method becoming available.” We also assumed

aggravating circumstance that made a defendant eligible for a death sentence, or a fact or element necessary to the defendant’s guilt for the crime for which he was convicted. That being the case, there would be see to be no reason in either law or logic to foreclose the right of any defendant to present “newly discovered” DNA evidence when such evidence is based on new scientific discoveries, advances or testing methods.

⁴ Jones v. State, 709 So.2d 512, 521 (Fla. 1998), cited in Sireci, *supra*, as authority for the criteria for when a motion for post-conviction relief should be granted and a new trial ordered based on “newly discovered evidence.”

that the rule would permit a defendant to test for and present such evidence whether it completely exonerated him, or, when considered together with all of the evidence in the case, “would probably produce an acquittal on retrial.” Jones v. State, supra at 521. For obvious reasons of fundamental fairness, due process, and the truth seeking process, and in recognition of the pace and number of modern scientific advances, not only would such a rule be a laudable goal, but any more “restrictive” or less inclusive rule seems impossible to justify either legally or morally:

If a defendant can use “newly discovered evidence” - based on scientific advances and testing which “became available” more than two years after his conviction - when such evidence “exonerates” him (what section (a) of the proposed rule now requires), how could the State not allow the use of the *same evidence* if it would (as a matter of law) reduce the degree of the crime for which the defendant could be convicted, eliminate his eligibility for the death penalty, or “would probably produce an acquittal on retrial”?

If a defendant is allowed to present such a motion within two years of the adoption of the rule or of his conviction becoming final, whichever is later (as permitted in section (d) (1) of the proposed rule), how could the state deny a defendant the right to present such evidence when the “testing method becomes available” two years *and a day* after the adoption of the rule or his conviction

becomes final?⁵

Unfortunately, as currently drafted the proposed rule would not only permit these clearly unfair examples but, in limiting the filing of motions seeking DNA testing to two years from the adoption of the motion or the conviction becoming final, fails to take into consideration motions based on *future* scientific advances and testing methods, and in so doing, is actually at odds with the holdings of Adams, Zeigler and Sireci.

In order to address the problems discussed above, we have made certain additions to and deletions from the current proposed rule, and have attached them for your consideration and review.⁶

In accordance with the above discussion, our amendments to sections (a), (b)(3) and (4) and (c)(4)(C), are for the purpose of properly expanding the scope of the rule to all of those cases in which a defendant should have the right to seek

⁵ For that matter, can, or *should*, the State put *any* time limit on the presentation and consideration of new discovered scientific evidence that would “exonerate” a defendant? Does the State want to adopt a rule of procedure that allows a person who is demonstrably innocent to remain in prison because a deadline was somehow missed?

⁶ In accordance with convention, our suggested additions to the proposed rule are those words underlined, and the words ~~stricken~~ through are those portions which we believe should be deleted.

and then present DNA evidence based on new scientific discoveries or testing methods.

Our addition of the last two sentences in section (b)(2) is in recognition of the fact that scientific discoveries are dynamic and ongoing, and that advances may be made even after motions under this rule and Rules 3.850 and 3.851 are filed. In addition, proposed Rule 3.853 provides *only for the testing* of items for DNA evidence, the results of which would then need to be incorporated into a motion for post-conviction relief filed pursuant to Rules 3.850 or 3.851.

Our addition of the language to section (d)(1), as discussed above, is for the purpose of allowing the new rule to encompass not only present DNA claims which might otherwise be time barred, but to make the rule meaningful, and in accordance with the Court's holdings in Adams, Zeigler and Sireci, with respect to scientific discoveries and testing methods that are developed and become available in the future.

Though we have not proposed to strike section (d)(2),⁷ we nevertheless are unclear with respect to either its purpose or meaning, and believe that it is, at best,

⁷ “(2) The time limitations provided in Fla. R. Crim. P. 3.850–3.851 do not apply to a motion made under this rule if the motion for postconviction relief is based on the results of DNA testing.”

confusing. In the first place, since the proposed rule has its own “time limitations,” it is unclear why the “time limitations provided in Fla.R.Cr.P 3.850-3.851,” should ever apply to the new rule. In the second, since the new rule is for the purpose of *obtaining* DNA testing and results, it is not clear how a (previously filed?) motion for post-conviction relief could be based on the results of DNA testing, or if one has been previously filed “based on the results of DNA testing” previously obtained, why that should effect the “time limitations” of either rule.

If the purpose of this sub-paragraph is to say that a motion filed under the new rule (for DNA testing) may be filed beyond the time limitations of Rules 3.850-3.851, in order to amend a previously timely filed motion for post conviction relief, then it should be said more clearly. At any rate, as presently written we believe that the meaning and intent of this sub-paragraph is unclear and should probably be omitted.

Finally, while the Florida Public Defender Association supports a rule to allow inmates easier access to DNA testing, we believe it would be a mistake to conclude that DNA testing is a panacea for the problem of wrongful convictions. In the vast majority of criminal cases, there is no DNA evidence to be tested. There is no reason to believe, however, that those cases are immune from the same errors that occurred in the tragic case of Frank Lee Smith. Indeed, Frank Lee Smith is the 20th death-sentenced person in Florida to be proven innocent in the

post-*Furman* era. See <http://www.deathpenaltyinfo.org/Innocentlist.html> .

We ask The Florida Bar to recommend the creation of a special commission to study the Smith case and other wrongful conviction cases to identify the underlying problems and propose safeguards to prevent similar miscarriages of justice in the future. The creation of such commissions is a central recommendation of the founders of the Innocence Project, which has correctly focused not only on expanding access to DNA testing but trying to learn from the mistakes that caused the wrongful convictions in the first place. See Barry Scheck, Peter Neufeld, Jim Dwyer *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

News accounts of the Frank Lee Smith case suggest that we could learn a great deal from that case See http://www.sptimes.com/News/010701/news_pf/State/He_didn_t_do_it_.shtml. Specifically, we need to further examine problems with eyewitness identification and a prosecutorial and police culture that believes so strongly in its own infallibility that it will bend the rules to uphold a conviction rather than acknowledge a mistake. See Sidney O. Freedberg, *He Didn't Do It*, *The St. Petersburg Times* (Jan. 7, 2001). Other leading causes of wrongful convictions include informant and snitch testimony, false confessions, inadequate resources and training for defense counsel, and “junk” forensic science. *ACTUAL INNOCENCE*, *supra*, at 246.

We urge the Florida Bar to take the lead in creating a commission to study wrongful convictions and to recommend reforms to prevent another tragedy like Smith's.

Respectfully Submitted,

Florida Public Defender Association

By: John Skye, Chief Assistant Public
Defender

Thirteenth Judicial Circuit of Florida

Paula Saunders, Assistant Public Defender
Second Judicial Circuit of Florida

Christina Spaulding, Assistant Public

Defender

Eleventh Judicial Circuit of Florida

William P. White, Chief Assistant Public

Defender

Fourth Judicial Circuit of Florida

Enclosures (by e-mail as attachments)

FLORIDA PUBLIC DEFENDER ASSOCIATION
PROPOSED AMENDMENTS TO PROPOSED RULE 3.853

RULE 3.853 MOTIONS FOR DNA EVIDENCE EXAMINATION

(a) **Grounds for Motion.** A person who has been tried and found guilty or has entered a plea of guilty or nolo contendere before a court established by the laws of Florida may petition that court to order the examination of physical evidence collected at the time of the investigation of the crime that may contain DNA (deoxyribonucleic acid) and that would ~~exonerate the defendant~~ lead to a result other than the guilt of the defendant for the highest offense for which the defendant was convicted, or which would exonerate the defendant from eligibility for the death penalty as a matter of law.

(b) **Contents of Motion.** The motion must be under oath by the defendant and must include the following:

(1) a statement of the facts relied on in support of the motion, including a description of the physical evidence to be tested containing DNA, and, if known, the present 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 any previous DNA testing were inconclusive and that subsequent scientific developments in the DNA testing technique likely would produce a definitive result; This statement should contain a description of the DNA technology to be relied upon by the defendant. The motion may be amended after filing to include this description.

(3) a statement that the defendant is innocent, that the defendant is not guilty of the highest offense for which the defendant was convicted and or that DNA evidence will exonerate the defendant of the crime for which the defendant was convicted; lead to a result other than the guilt of the defendant for the highest offense for which the defendant was convicted, or which would exonerate the defendant from eligibility for the death penalty as a matter of law.

(4) a statement that identification of the defendant is a genuine disputed issue in the case; Identification shall not be limited to the issue of the defendant's participation in the crime charged, but shall include the presentation of DNA evidence that leads to a result other than the guilt of the defendant for the

highest offense for which the defendant was convicted, or which would exonerate the defendant from eligibility for the death penalty as a matter of law.

(5) any other material facts relevant to the motion; and

(6) a certificate that a copy of the motion has been served on the prosecuting authority.

(c) **Procedure.**

(1) The clerk of the court shall file the motion when it is received and deliver the court file to the assigned judge.

(2) The assigned judge shall review the motion and deny the motion if it is insufficient. If the motion is sufficient, the prosecuting authority shall be ordered to respond to the motion within a specified time.

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

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

(A) whether the physical evidence that may contain DNA still exists;

(B) whether the results of DNA testing of that physical evidence would have been admissible at the trial and whether there exists reliable proof to establish that the evidence has not been materially altered and would be admissible at a future hearing; and

(C) whether there is a reasonable probability that the defendant would have been acquitted, or that there is a reasonable probability that there would have been a result at trial other than the guilt of the defendant for the highest offense for which the defendant was convicted, or which would exonerate the defendant from eligibility for the death penalty as a matter of law if the DNA evidence had been admitted at trial.

(5) The court may tax the cost of DNA testing against the defendant

if the defendant is not indigent.

(d) **Time Limitations.**

(1) No motion shall be filed or considered more than 2 years after the date that this rule is adopted by the Supreme Court of Florida, nor more than 2 years after the judgment and sentence in the case become final, whichever is later, except that, a motion may be filed and considered no more than 2 years after the date that the Supreme Court of Florida approves any new DNA technology for use in the courts of the State of Florida.

(2) The time limitations provided in Fla. R. Crim. P. 3.850–3.851 do not apply to a motion made under this rule if the motion for postconviction relief is based on the results of DNA testing.

(e) **Appeal; Rehearing.** An appeal may be taken by any adversely affected party from the order entered on the motion. All orders denying relief must include a statement that the defendant has the right to appeal within 30 days after the rendition of the order denying relief. The defendant 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. The court or the clerk shall serve on all parties a copy of any order rendered with a certificate of service including the date of service.

Judi Kinney <jkinney@pubdef-18.brevard.fl.us>

02/08/01 08:43 AM

Please respond to "jkinney@pubdef-18.brevard.fl.us"

To:"jharkness@flabar.org" <jharkness@flabar.org>
cc:

Subject:

This response will serve as an objection to the Proposed emergency rule amendment, Florida Rules of Criminal Procedure 3.853:

The Rule in Section (d) places a two year limitation on motions to be filed or considered, either two years after the adoption of this rule or two years after the Judgment and sentence becomes final, whichever is later.

I fail to see the "emergency" other than someone desiring to keep potentially innocents in prison.

No time limit should be placed on innocence. The wrongful conviction of a person is exactly that, a wrongful conviction. To place a time limit would not only be unjust to the convicted person, but would also be unjust to the victim, the victim's family, the State, the Judicial System (which is sworn to seek truth and justice and fairness) but also the true offender or others who might be victims of the true offender.

To allow an innocent person to stay behind bars or be put to death because of a "rule" with a two year limitation is incomprehensible and reprehensible.

The styling of the rule would especially hamper those persons who are indigent, mentally incompetent, mentally retarded or challenged,

incapacitated, non-English speakers, juveniles and those who are not "saavy" or ignorant of the law. Such a denial of access would create unequal and discriminatory injustices.

In addition, technology continues at a rapid and sophisticated rate and the rule makes no allowance for that, but forecloses technology on the effective date.

With regard to the standards, I am also opposed the standards set forth in the rule.

I would suggest that the Arizona Statutes relating to post-conviction DNA testing and the National Commission on DNA Evidence more appropriately preserves the integrity of the system which provides for testing upon motion with one of several considerations being cases in which a reasonable probability exists that petitioner's verdict of sentence would have been more favorable if the results of the DNA were available at trial OR DNA testing would produce EXCULPATORY evidence.

Having had many years experience in law enforcement at the State and Federal level and many years in defense work, I believe the system can only work if we follow our constitutional and moral conscience and provide equal justice for all.

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Judith L

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"jharkne

02/08/01 03:00 PM

Comments Regarding Proposed Rule 3.853
Submitted on Behalf of the Florida Innocence Project:

The purpose of proposed Rule 3.853 is to provide the means by which a wrongfully accused person can petition the court for the post-conviction testing of DNA evidence. Proposed Rule 3.853 stands apart from Rule 3.850 in that it does not provide relief for newly discovered evidence but rather, it provides relief by allowing evidence to be tested by methods which were not available at the time of trial. The inclusion of a two year time limitation in Proposed Rule 3.853 (d)(1) compromises the very purpose of the rule.

No one can predict what changes in DNA testing will occur in the future. The only thing that can be predicted is that new methods and new technologies will be developed. History reinforces science's unequivocal record of endless discovery and refinement of knowledge. During the past ten years, DNA testing has changed dramatically. In 1991 RFLP (Restriction Fragment Length Polymorphism) testing was being used. In 1992, a more sophisticated method called PCR/DQ Alpha testing was implemented. This test was further refined in 1993 by the use of PCR DQ

alpha/amplitype PM. In 1997 PCR/STR testing began to be implemented in labs across the country. PCR/STR allowed minute DNA samples, as tiny as a pinhead, to be tested. History tells us that genetic testing can evolve quickly in a relatively short amount of time. It is absurd to think that advances in genetic science or technology will not occur in the future.

In addition a two-year time limitation would require that an incarcerated, indigent defendant keep abreast of scientific advances of which lawyers practicing in the courts of Florida are not even aware. See *Dedge v. Florida*, 723 So. 2d 322 (5th DCA 1998)(dissent, J. Sharp). This result is simply unjust.

A claim of actual innocence should not be defeated because of a time limitation. Defendants should have the fate of their liberty determined by substance and merits, not procedural bars. Currently, five states have statutes governing the post-conviction testing of DNA evidence. None impose this type of time limitation. We urge you to remove the two year time limitation from Proposed Rule 3.853.

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February 22, 2001

The Florida Bar
Office of the Executive Director
Tallahassee, Fl.

JHARKNESS@FLABAR.ORG

RE: Proposed Emergency DNA testing rule

To whom it may concern:

Please accept these late comments to the proposed emergency rules on DNA testing and forward them to either the Board of Governors, or Criminal Procedures Rules Committee. I feel that these should be submitted regardless of whether the Board has already reviewed the matter at the February 9th meeting due to the importance of issue, and what I respectfully perceive as shortcomings in the proposal. I also would comment, respectfully, that this was a proposed “emergency” rule — but I would suggest that one week to respond to a published notice is generally unreasonable for most practitioners who are busy in trial or otherwise — and in the future, the Bar should give not less than 14 days to respond, and better — that any such proposals for comments be required to be published in two consecutive issues of The Florida Bar News, as a matter of procedure.

I would make the following changes or additions to the proposal:

1. DNA testing is a scientific process that will continuously undergo change as the science improves.
2. Contamination that renders the testing process as “scientifically unreliable” should be the guideline for the court — not whether the evidence has been “materially altered”.
3. The court should be required to order evidence preserved when there is a reasonable basis to believe that it may become testable at some point in the future if and when the science of DNA testing has improved, and where a favorable DNA result would present a reasonable probability that the Defendant would have been acquitted.
4. A motion for DNA testing may be brought at any time within two years of the time the movant knew, or reasonably should have known that there existed evidence from which scientifically reliable DNA testing was available, and a favorable result of such DNA testing would present a reasonable possibility that the Defendant would have been acquitted.
5. If a motion is denied because there is not a currently available reliable scientific DNA test of the available evidence, the motion may be renewed within two years of the time the movant knew, or reasonably should have known that scientifically reliable DNA testing had become available, and the results of favorable DNA testing would present a reasonable possibility that the Defendant would have been acquitted.
6. If any motion is denied for insufficiency, the court shall state the basis of the insufficiency in a written order, and the movant may, within a period of sixty days of notice of such, attempt to correct the insufficiency, unless granted additional time upon a showing of good cause.