SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 366

SPONSOR: Criminal Justice Committee and Senator Villalobos

SUBJECT: Postconviction DNA Testing

DATE: March 13, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Favorable/CS
2.			APJ	
3.			AP	
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 366 provides a method by which a person who has been tried and found guilty of a criminal offense may petition the court to order DNA (deoxyribonucleic acid) testing of physical evidence, that would exonerate that person, collected at the time of the investigation of the crime.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 925.11 and 943.3251.

II. Present Situation:

Under current law, a defendant who has been convicted has certain rights to appeal on direct appeal or on matters that are collateral to the conviction. Article V, Section 4(b) of the Florida Constitution has been construed to convey a constitutional protection of this right. *Amendments to the Florida Rules of Appellate Procedure,* 696 So.2d 1103 (Fla. 1996).

Direct Appeals after Trial

Matters which are raised on direct appeal include evidentiary rulings made by the trial court during the course of the defendant's trial, and other matters objected to during the course of the trial such as the jury instructions, prosecutorial misconduct, and procedural rulings made by the trial court. The Legislature codified the "contemporaneous objection" rule, a procedural bar that prevented defendants from raising issues on appeal which had not been objected to at the trial level. The rule allowed trial court judges to consider rulings carefully, perhaps correcting potential mistakes at the trial level.

Section 924.051(3), F.S., was enacted as part of the Criminal Appeal Reform Act of 1996 and reads as follows: "(3) An appeal may not be taken from a judgment or order of a trial court unless prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error."

The Florida Supreme Court found in *State v. Jefferson*, 758 So.2d 661 (Fla. 2000), that the foregoing provision did not constitute a jurisdictional bar to appellate review in criminal cases, but rather that the Legislature acted within its power to "place reasonable conditions" upon this right to appeal (quoting from *Amendments to the Florida Rules of Appellate Procedure,* id., at 1104-1105.).

Collateral Review

Postconviction proceedings, also known as collateral review, usually involve claims that the defendant's trial counsel was ineffective, claims of newly discovered evidence and claims that the prosecution failed to disclose exculpatory evidence. Procedurally, collateral review is generally governed by Florida Rule of Criminal Procedure 3.850. A rule 3.850 motion must be filed in the trial court where the defendant was tried and sentenced. According to rule 3.850, unless the record in the case conclusively shows that the defendant is entitled to no relief, the trial court must order the state attorney to respond to the motion and may then hold an evidentiary hearing. *Fla. R. Crim P. 3.850(d).* If the trial court denies the motion for postconviction relief with or without holding an evidentiary hearing, the defendant is then entitled to an appeal of this denial to the District Court of Appeal that has jurisdiction over the circuit court where the motion was filed.

A rule 3.850 motion must be filed within two years of the defendant's judgment and sentence becoming final unless the motion alleges that the facts on which the claim is based were unknown to the defendant and could not have been ascertained by the exercise of due diligence. *Fla. R. Crim. P. 3.850(b)*. In order to grant a new trial based on newly discovered evidence, the trial court must first find that the evidence was unknown and could not have been known at the time of trial through due diligence. Also, the trial court must find that the evidence is of such a nature that it would probably produce an acquittal on retrial. *Torres-Arboleda v. Dugger*, 636 So.2d 1321 (Fla. 1994); *Jones v. State*, 709 So.2d 512 (Fla. 1998).

Motions for postconviction relief based on newly discovered evidence must be raised within two years of the discovery of such evidence. *Adams v. State*, 543 So.2d 1244 (Fla.1989) . The Florida Supreme Court has held that the two year time limit for filing a 3.850 motion based on newly discovered evidence begins to run on a defendant's postconviction request for DNA testing when the testing method became available. For example, in *Sireci v. State*, 773 So.2d 34 (Fla. 2000), the Florida Supreme Court held that the defendant's postconviction claim filed on his 1976 conviction, which was filed in 1993, was time barred because "DNA typing was recognized in this state as a valid test as early as 1988." See also, *Ziegler v. State*, 654 So.2d 1162 (Fla. 1995).

Appeal or Review After a Plea of Guilty or Nolo Contendere

When a defendant pleads guilty or nolo contendere (no contest), having elected not to take his or her case to trial, appeal rights are limited. Section 924.07(3), F.S., states: "A defendant who pleads guilty with no express reservation of the right to appeal a legally dispositive issue, or a defendant who pleads nolo contendere with no express reservation of the right to appeal a legally dispositive issue, shall have no right to direct appeal."

In *Robinson v. State*, 373 So.2d 898 (Fla. 1979), the Court was asked to review the constitutionality of the foregoing statutory language. The Court upheld the statute as applied in the Robinson case, making it clear that once a defendant pleads guilty the only issues that may be appealed are actions that took place contemporaneous with the plea. The Court stated: "There is an exclusive and limited class of issues which occur contemporaneously with the entry of the plea that may be the proper subject of an appeal. To our knowledge, they would include only the following: (1) subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea." These principles continue to control.

Section 924.051(4), F.S., enacted as part of the Criminal Appeal Reform Act of 1996, states: "(4) If a defendant pleads nolo contendere without expressly reserving the right to appeal a legally dispositive issue, or if a defendant pleads guilty without expressly reserving the right to appeal a legally dispositive issue, the defendant may not appeal the judgment or sentence." The Florida Supreme Court was asked to review this statute in *Leonard v. State*, 760 So.2d 114 (Fla. 2000), and noting its similarity to the statute reviewed in *Robinson*, found that the enactment of that statute basically codified the rule in *Robinson*.

In the *Leonard* case the Court states the rule to be followed by the lower courts: "[t]he district courts should affirm summarily … when the court determines that an appeal does not present: (1) a legally dispositive issue that was expressly reserved for appellate review pursuant to section 924.051(4); (2) an issue concerning whether the trial court lacked subject matter jurisdiction as set forth in *Robinson*; or (3) a preserved sentencing error or a sentencing error that constitutes fundamental error as set forth in our opinion in *Maddox*, 760 So.2d 89 (Fla. 2000)." (*Maddox v. State* explains that a claim that the sentence imposed exceeds the maximum sentence allowed by statute constitutes a fundamental error that can be raised on appeal, even when the defendant had pled guilty. *Id.* at 101.)

The general policy of the Florida Supreme Court, and the Court's interpretation of the policy of the Legislature, is that where a defendant enters a plea of nolo contendere and reserves the right to appeal the trial court's crucial ruling on legal issues that are dispositive of the case, it avoids an unnecessary trial and helps narrow the issues much like stipulations to the facts or law can do in a trial situation. See *State v. Ashby*, 245 So.2d 225 (Fla. 1971); *Brown v. State*, 376 So.2d 382 (Fla. 1979). When the parties stipulate that an issue is dispositive, in that the state cannot or will not proceed with the prosecution of the case if the case is remanded because the crucial trial court ruling is reversed, the state may not argue otherwise on appeal. *Phuagnong v. State*, 714 So.2d 527 (Fla. 1st DCA 1998). The First District Court of Appeal further held that no stipulation is necessary under certain circumstances, such as where the trial court ruled upon the constitutionality of the statute under which the defendant is charged. In a case where that lower

court ruling is not upheld on appeal, it is not merely tactically infeasible for the state to go forward, it is legally impossible. *Griffin v. State,* 753 So.2d 676 (Fla. 2000).

Postconviction Proceedings in Capital Cases

After a defendant has been sentenced to death, the defendant is entitled to challenge the conviction and sentence in three distinct stages. First, the public defender or private counsel is required to file a direct appeal to the Florida Supreme Court. An appeal of the Florida Supreme Court's decision on the direct appeal is to the United States Supreme Court by petition for writ of certiorari.

Second, if the U.S. Supreme Court rejects the appeal, state collateral postconviction proceedings or collateral review begin. The Capital Collateral Regional Counsel (CCRC) represents most defendants in capital collateral postconviction proceedings.

State collateral postconviction proceedings are controlled by Rules 3.850, 3.851 and 3.852, Fla. R.Crim.P. Unlike a direct appeal, which challenges the legal errors apparent from the trial transcripts or record on appeal, a collateral postconviction proceeding is designed to raise claims which are "collateral" to what transpired in the trial court. Consequently, such postconviction proceedings usually involve the three categories of claims mentioned previously: ineffective assistance of trial counsel; Brady violations, i.e., a due process denial from the prosecution's suppression of material, exculpatory evidence; and newly discovered evidence, for example, post-trial recantation by a principal witness.

Since the consideration of these claims often require new fact finding, collateral postconviction motions are filed in the trial court which sentenced the defendant to death. Appeals from the grant or denial of postconviction relief are to the Florida Supreme Court.

The third, and what is intended to be the final stage is federal habeas corpus, a proceeding controlled by 28 U.S.C. s. 2254(a). Federal habeas allows a defendant to petition the federal district court to review whether the conviction or sentence violates or was obtained in violation of federal law. Federal habeas is almost exclusively limited to consideration of claims previously asserted in direct appeal or in state postconviction proceedings. Appeals of federal habeas are to the Federal Eleventh Circuit Court of Appeal and then to the United States Supreme Court.

Finally, once the Governor signs a death warrant, a defendant will typically file a second or successive collateral postconviction motion and a second federal habeas petition along with motions to stay the execution.

Rule 3.850(f), Fla.R.Crim.P, restricts successive collateral postconviction motions as follows: "A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules."

The Florida Supreme Court has held that the restriction against such successive motions on grounds previously raised is applied "only when the grounds raised were previously adjudicated

on their merits, and not where the previous motion was summarily denied or dismissed for legal insufficiency." *McCrae v. State,* 437 So. 2d 1388, 1390 (Fla.1983); See also *Ranaldson v. State,* 672 So. 2d 564, 565 (Fla. 1st DCA. 1996). However, when the Court finds that the defendant could have and should have raised his or her claims in the original motion, Rule 3.850(f) works as a "procedural default." See e.g., *Pope v. State,* 702 So. 2d 221, 223 (Fla. 1997).

Time limitations, amending motions in capital cases. Rule 3.851 applies to all motions and petitions for any type of postconviction or collateral relief by prisoners who have been sentenced to death. Rule 3.851(b)(1) provides that a Rule 3.850 motion must be filed within one year after the judgment and sentence in a death case become final. Rule 3.851(3), states that the one year time limitation in Rule 3.851(b)(1) assumes that the defendant will have counsel assigned and working on the postconviction motion within 30 days after the judgment and sentence become final. "Further, this time limitation shall not preclude the right to amend or to supplement pending pleadings pursuant to these rules."

Postconviction DNA Statutes in Other States and in Congress

Around the country many states have enacted postconviction DNA statutes, or are in the process of considering them. These states include Arizona, California, Delaware, Illinois, Michigan, Oklahoma, Tennessee and Washington.

In Ohio, the Attorney General has initiated a program called the Capital Justice Initiative, under which the state will provide a process by which inmates on Death Row may request a DNA test. Simply stated, the state will make the test available to inmates who meet the following criteria:

- the inmate has consistently asserted innocence;
- credible and adequate biological evidence actually exists; and
- it can be determined that the testing will definitely result in either exoneration or incrimination of the inmate.

If the test results are favorable to the inmate, he or she may petition the court for a hearing to determine how persuasive the DNA evidence is toward establishing actual innocence.

Additionally, the Innocence Protection Act of 2000 (Senate Bill 2073) is currently under consideration in Congress.

Proposed Rule of Procedure Before the Florida Supreme Court

The Florida Bar's Criminal Procedure Rules Committee has approved a proposed amendment to the Rules of Criminal Procedure to address the issue of postconviction DNA testing. The bar has filed an emergency petition with the Florida Supreme Court asking the Court to adopt the proposed rule. The proposed rule is similar to the bill, with the notable exception that the proposed rule applies not only to defendants who have taken their cases to trial, but also to those who have pled guilty or nolo contendere. The proposed rule makes no provision for preservation of evidence which may be subjected to DNA testing in the future, nor does it provide for disclosure of the test results. The bill provides for both evidence preservation and disclosure of results.

III. Effect of Proposed Changes:

The bill provides that a person who has been found guilty at trial of committing a criminal offense has the right to seek testing of physical evidence collected at the time of the crime which may contain DNA evidence that would exonerate him or her.

In order to seek such testing, a sworn motion must be filed in the trial court either before October 1, 2003, (two years after the bill becomes law) or within two years of the date on which the judgment and sentence in the case becomes final, whichever is later. This provision opens a new window of opportunity to people who have previously been sentenced and whose time frames for filing postconviction motions have lapsed.

The sworn motion must contain the following:

- a statement of the facts relied upon, including a description of the physical evidence which contains DNA and, if known, how the evidence was originally obtained and where it is located at the present time;
- a statement that the evidence was either not previously tested for DNA, or, if tested, that the results of the previous test(s) was inconclusive, and that subsequent scientific developments in DNA testing would likely produce a definitive result;
- a statement that the defendant (movant) is innocent and that DNA evidence will exonerate the defendant of the crime for which he or she was convicted, and how the evidence would exonerate him or her;
- a statement that identification was a genuinely disputed issue in the case; and
- any other material facts that are relevant to the motion.

The motion must also contain a certification that the appropriate state attorney has been served with a copy of the motion.

Under the provisions of the bill, the trial court will review the motion and determine if the facts are sufficient to support its filing. The court has the option of denying the motion at that point if the facts are insufficient. If the court finds the facts alleged are sufficient to support the filing of the motion, the court shall then order the state attorney to respond to the motion within 30 days. After reviewing the state's response, the court may then rule on the motion or order a hearing on the matter. If the defendant is indigent, counsel may be appointed to assist the defendant if the motion proceeds to a hearing and the court deems the assistance of counsel is necessary.

In ruling on the motion, the court must find whether:

- the physical evidence that may contain DNA still exists;
- the results of DNA testing of that evidence would have been admissible at trial and whether there is reliable proof that the evidence has not been materially altered and would be admissible at a future hearing; and
- there is a reasonable probability that the defendant would have been acquitted of the crime charged if DNA test results had been admitted at trial.

The court's ruling on the motion may be appealed by any adversely affected party under the provisions of the bill.

The defendant may appeal an adverse ruling within 30 days. The time for filing the appeal is tolled if a motion for rehearing is filed, until an order on that motion is filed. A motion for rehearing must be filed within 15 days of service of the court's order denying the original motion for DNA testing. The order denying relief must include notice of these time limitations.

If the motion for testing is granted, the court is required to make a determination of whether the defendant is indigent. An indigent defendant may not be required to pay for the DNA testing. If the defendant is not indigent, the cost of testing the physical evidence may be assessed against him or her.

The Florida Department of Law Enforcement or its designee shall carry out any testing ordered by the court. Governmental entities that may be in possession of any physical evidence in the case shall maintain the evidence for the period of time during which a defendant may file a motion under the provisions of the bill.

The bill provides that results of testing ordered by the court shall be provided to the court, the defendant, and the prosecuting authority.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Legislature has the exclusive power to enact substantive laws while Article V, Section 2 of the Florida Constitution gives the Florida Supreme Court the power to "adopt rules for the practice and procedure in all courts, including the time for seeking appellate review." This bill may be challenged on a claim that it violates the separation of powers doctrine. *Art. II, Sect. 3, Fla. Const.* In January of 2000, the Legislature passed the Death Penalty Reform Act (DPRA) of 2000. The bill advanced the start of the postconviction process in capital cases to have it begin while the case was on direct appeal. The bill also imposed other time limitations at key points of the postconviction process. The bill made conforming changes to the laws governing public records in capital cases. The bill also eliminated successive postconviction motions and prohibited amending a postconviction motion after the

expiration of the time limitation. The bill repealed the rules of criminal procedure applying to capital postconviction motions.

In Allen v. State, 756 So.2d 52 (Fla. 2000), the Florida Supreme Court held that the Death Penalty Reform Act of 2000 was an "unconstitutional encroachment" on the Court's "exclusive power to 'adopt rules for the practice and procedure in all courts.'" *Id.* at 54. The court rejected the State's argument that the deadlines for filing postconviction motions in the DPRA were comparable to statutes of limitations in civil cases which the court had previously considered substantive. *Id.* at 61. The court held that rule 3.850 of the Florida Rules of Criminal Procedure is a "procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus" under the Florida Constitution. *Id.* at 61, *Art. I, Sect. 13, Fla. Const.* According to the court, "[d]ue to the constitutional and quasi-criminal nature of habeas corpus 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." *Id.* at 62.

The provisions of this bill may be distinguishable from those of the DPRA due to the fact that this bill creates a new substantive right to DNA testing in limited circumstances while the DPRA restricted postconviction rights which were otherwise available through existing provisions of the state constitution. The Legislature may limit substantive rights that it has created. *City of Lake Mary v. Seminole County,* 419 So.2d 737 (Fla. 5th DCA 1982)(upholding limited right of appeal in annexation proceedings and stating, "[i]f the Legislature has the power to create a right of appeal in the circuit court where none previously existed, it is incongruous to assert that it cannot limit the scope of that review."); *Department of Transp. v. Fortune Federal Sav. and Loan Ass'n,* 532 So.2d 1267, 1270 (Fla. 1988)("It is only by the will of the legislature that business damages may be awarded in certain situations which are properly limited by the legislature. In other words, the legislature has created a right to business damages, so it may also limit that right."); *Fernandez v. Florida Ins. Guaranty Ass'n, Inc.*, 383 So.2d 974, 976 (Fla. 3rd DCA 1980)(holding that because absent the legislative creation of the Florida Insurance Guaranty Association, "there would be no effective remedy to recovery on any claims whatever against insolvent insurers, there can be no constitutional infirmity in the legislature's decision to limit those newly-created rights and, in effect, not to establish an additional one.")

As previously stated, the bill *expands* certain time limitations for seeking postconviction review, in that motions for testing of physical evidence for DNA may be filed either by October 1, 2003, or within 2 years of a judgment and sentence becoming final. For those whose review has been time-barred, this bill opens a new window of opportunity.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There will certainly be some impact on the trial court level statewide, if the bill is enacted. At a minimum, trial court judges will likely be reviewing motions filed in their courts resulting from this new claim. The court may require written responses from the state. If the court orders a hearing, the state attorney will be in court presumably opposing the defendant's motion. These are workload issues that are difficult to estimate because it is unknown how many motions for testing of physical evidence for DNA will be filed.

Based on some figures provided by the Capital Collateral Regional Counsel, there are potentially 43 inmates on Death Row who may benefit from the passage of this legislation. The Commission on Administration of Justice in Capital Cases put together some preliminary calculations, based on data provided by the Department of Corrections with reference to total inmate population, which were presented at the January 23, 2001, meeting of the Criminal Justice Committee of the Florida Senate.

The calculations assumed that of those inmates who are currently incarcerated, those who are incarcerated due to convictions of crimes like murder or sexual battery, *where there is a greater chance of having physical evidence in the case*, are the most likely to benefit from the enactment of the bill. One must remember; however, that in all of those cases, identity may not have been an issue. For instance, many sex offenses go to trial because the defendant denies a crime was committed, based on the argument that the victim consented, *not* that the defendant wasn't there.

The rough calculations are as follows:

- On June 30, 2000, the total inmate population was 71,200.
- Of those 71,200 inmates, 18,300 were incarcerated on either a homicide (10,400) or a sex offense (7,900).
- The average sentence of those 18,300 inmates is 28 years - DNA testing has been available for roughly 10 years, so approximately 6,000 inmates have likely already taken advantage of any DNA testing that might benefit them (or the test was offered as proof of their guilt) – this leaves approximately 13,000 inmates.
- Of those 13,000 inmates, approximately 20 percent of their cases actually had DNA evidence – this number was based on an estimate only by the State Attorney in a metropolitan area of the state – this leaves *2,600* inmates in the pool of those who may benefit from the testing.
- Of those 2,600 inmates, it is unknown *how many of those inmates' cases actually went to trial*, but it has been estimated that approximately 3 percent is a fair assessment – if that estimate is increased to 15 percent, the pool of potential candidates who are currently incarcerated and may seek postconviction DNA testing could be as small as *390*.

These calculations do not take into account the people who are not currently incarcerated who may nonetheless seek testing. Nor do these calculations attempt to estimate the number of inmates who are incarcerated who may choose *not* to seek DNA testing for whatever reason.

Assuming that the Florida Department of Law Enforcement conducts any testing of physical evidence resulting from motions granted, the potential costs are as follows (based on extensive data provided by FDLE):

- Assuming that no new equipment or personnel would be needed and that each case would contain only a minimal number of samples, the total cost per case would be $1,200, under what FDLE calls a "best case scenario." (FDLE "best case scenario" cost to do testing in 400 cases = +/- $480,000.) The cost escalates when the possibility of overtime, multiple samples per case, and new equipment are factored in.
- Comparing the time frame within which FDLE could perform the tests with a private laboratory, the differences in the time to complete the tests appears to be negligible.
- A cost comparison between FDLE and the private lab indicates that the private lab is considerably more expensive (ex: FDLE real costs to do 18,000 cases = +/- $30 million; private lab costs = +/- $90 million)

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.