HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1935 (PCB JU 04-19) DNA Evidence
SPONSOR(S): Committee on Judiciary
TIED BILLS: None **IDEN./SIM. BILLS:** SB 44

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	19 Y, 0 N	Jaroslav	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

Current law provides a two-year window for the filing of postconviction motions seeking the testing of DNA evidence. This bill extends the current two-year time limitation during which time a person convicted and sentenced must file a petition for post-conviction DNA testing of evidence to a four-year time limitation. The bill extends the previous deadline of October 1, 2003, to October 1, 2005, for any petition that would otherwise be time-barred.

The application of this bill's provisions is made retroactive to October 1, 2003.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[x]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[x]	No[]	N/A[]
4. Increase personal responsibility?	Yes[]	No[]	N/A[x]
5. Empower families?	Yes[]	No[]	N/A[x]

For any principle that received a "no" above, please explain:

Because this bill requires governmental entities to maintain evidence longer, it could arguably be described as increasing government.

B. EFFECT OF PROPOSED CHANGES:

Present Situation: General Background

With the advent of advanced forensic technology and highly publicized capital cases involving exonerations of convicted defendants, the use of DNA testing is at the forefront of major criminal justice legislative reform in many states. To date, over 36 states, including Florida, have enacted laws to allow post-conviction DNA testing to exonerate or otherwise reduce the sentence of convicted persons under specified circumstances.[1] The criteria vary from state to state as to who may petition, what the petition must allege, whether representation is provided, how payment for DNA testing is made, and when evidence must be preserved.

When the Legislature first addressed this issue in 2001, it gave a person convicted at trial and sentenced a statutory right to petition for post-conviction DNA testing of physical evidence collected at the time of the crime based on the assertion that the DNA test results could exonerate that person or alternatively reduce the sentence.[2] In order to petition, the person must: 1) be a person convicted at trial and sentenced, 2) show that his or her identity was a genuinely disputed issue in the case and why, 3) claim to be innocent, and 4) meet the reasonable probability standard that the person would have been acquitted or received a lesser sentence if the DNA testing had been done at the time of trial or done at the time of the petition under the evolving forensic DNA testing technologies.

If the trial court determines that the facts are sufficiently alleged, the state attorney is required to respond within 30 days pursuant to court order. If the court decides to hold a hearing, the court may appoint counsel for an indigent petitioner, if necessary. The trial court must make a determination based on a finding of 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
- a reasonable probability exists that the defendant would have been acquitted of the crime charged or received a lesser sentence if DNA test results had been admitted at trial.

[1] Legislation is also pending in Congress relating in part to post-conviction DNA testing. H.R. 3214 ("Advancing Justice Through DNA Technology Act of 2003") by Rep. Sensenbrenner passed the House on November 5, 2003 and has since been referred to the Senate Committee on the Judiciary, where it joined its Senate companion, S. 1700 by Sen. Hatch.
[2] *See* ch. 2001-97, L.O.F.; ss. 925.11 and 943.3251, F.S.

If the court denies the petition for DNA testing, a motion for rehearing must be filed within 15 days of the order and the 30-day period for filing an appeal is tolled until the court rules on the motion. Otherwise, either party has 30 days to file an appeal of the ruling. The order denying relief must include notice of these time limitations. If the court grants the petition for DNA testing, the defendant is assessed the cost of the DNA testing unless the court finds that the defendant is otherwise indigent. The Florida Department of Law Enforcement ("FDLE") performs the DNA test pursuant to court order.[3] The results of the DNA testing are provided to the court, the defendant and the prosecuting authority.

Current Time Limitations

Section 925.11(1)(b), F.S., currently imposes a two-year period for filing such petitions. Florida is one of nine states, out of the 36 states which provide for post-conviction DNA testing, to impose a time limitation on petitioning for testing.

The time limitation is measured from the later of the following dates based on the law's effective date of October 1, 2001:

- Two years from the date the judgment and sentence became final;
- Two years from the date the conviction was affirmed on direct appeal;
- Two years from the date collateral counsel was appointed (applicable solely in death penalty cases); or
- October 1, 2003.

The first three events captured the persons convicted at trial and sentenced whose cases were still pending in the system for which the applicable event would be triggered on or after October 1, 2001 (the effective date of the act). The October 1, 2003, date provided a window of opportunity to capture two other groups of convicted persons:

1. Those convicted persons whose claims would have been entirely time-barred because two or more years before October 1, 2001 (the effective date), had already elapsed since the applicable triggering event had occurred (that is, anytime before October 1, 1999), and

2. Those convicted persons whose claims would have less than a full two year period to have notice of their right and time to perfect a petition for post-conviction DNA testing because the applicable event was triggered between October 1, 1999 and September 30, 2001 (the day before the effective date of the act).

The law also provides a catch-all exception to the two-year time limitation whereby if the facts upon which the petition is founded were unknown or could not have been known with the exercise of due diligence, then a person convicted at trial and sentenced could petition at any time for post-conviction DNA testing. This language mirrors the language of Rule 3.850 (b)(1) of the Florida Rules of Criminal Procedure, commonly known as the "due diligence/newly discovered evidence" exception.

Preservation of Physical Evidence

Section 925.11(4), F.S., provides for preservation of physical evidence collected at the time of the crime for which post-conviction DNA testing may be requested. With the exception of death penalty cases, physical evidence in the possession of governmental entities must be maintained for at least the time limitations set forth in s. 925.11(1)(b), F.S.[4] Under the statute, evidence in death penalty cases must be maintained for 60 days after the execution of the sentence.

[3] *See* s. 943.3251, F.S.
[4] *See* s. 925.11(4), F.S.

Section 925.11(4)(c), F.S., provides the conditions under which the physical evidence may be disposed of prior to the time limitations set forth in paragraph (1)(b) of s. 925.11, F.S. All of the conditions set forth therein must be met. Prior to the disposition of the evidence, notice must be provided to the defendant and any counsel of record, the prosecuting authority, and the Attorney General. If the notifying governmental entity does not receive, within 90 days after notification, either a copy of a petition for post-conviction DNA testing or a request not to dispose of the evidence because a petition will be filed, the evidence may be disposed of, unless some other provision of law or rule requires its preservation or retention. (Note that until July 1, 2003, s. 43.195, F.S., provided that the clerks of court could dispose of items of physical evidence which have been held as exhibits in excess of three years in cases on which no appeal is pending or can be made. As of July 1, 2003, that section, renumbered as s. 28.213, F.S., includes cases in which no appeal or collateral attack is pending or can be made.)

It should be pointed out that physical evidence in many older cases may have long since been destroyed as a matter of routine purging. If, however, the evidence existed and was under the control of a governmental entity at the time of the enactment of s. 925.11, F.S., it is highly unlikely that it has been destroyed. Given the advent of new testing DNA methods, governmental agencies are keenly aware of the potential usefulness of this evidence. Especially in the most serious cases, law enforcement actually has an interest in preserving the evidence until the inmate has served his or her sentence to completion. This is so because there is always the possibility a case could come back for a re-trial on some issue. It would reflect poorly on the agency in the eyes of the electorate to have that evidence unavailable for a re-trial of a serious case.

Innocence Projects

Post-conviction DNA testing was primarily publicized through the efforts of attorney Barry C. Scheck and Peter Neufeld who began studying and litigating the forensic evidence testing in 1988. Their efforts resulted in the establishment of the Innocence Project in 1992 at the Benjamin N. Cardozo School of Law. Since then a number of Innocence Projects have been established nationwide including at Florida State and Nova Southeastern Universities. Many of these projects are run by pro-bono organizations. These projects form the backbone of The Innocence Network which incorporates law schools, journalism schools, and public defender offices to assist inmates trying to prove their innocence whether or not the cases involve biological evidence which can be subjected to DNA testing.

The labor-and time-intensive review process[5] to investigate inmates' claims of innocence made to the Innocence Projects and the approaching two-year time limitation prompted the filing of two emergency petitions[6] before the Florida Supreme Court in September 2003. The petition filed by the Criminal Procedural Rules Committee of the Florida Bar sought to change the October 1, 2003, deadline in Rule 3.853, FLA. R. CRIM. P., to October 1, 2004, to "extend the rapidly approaching deadline of October 1, 2003."[7] The Florida Innocence Project and the Florida Innocence Initiative filed an Emergency Petition (Case No. SC03-1654) asking the Court to suspend the destruction of physical evidence, at least so long as the Court considered the matters raised by the Emergency Petitions.

On September 30, 2003, the Florida Supreme Court issued an order temporarily suspending the October 1, 2003, deadline in FLA. R. CRIM. P. 3.853 (governing motions for post-conviction DNA

[5] Time estimates by the Innocence Project range from three to five years for investigating the claims and determining whether such convicted persons have a viable claim to assert for post-conviction DNA testing of evidence that could exonerate them or otherwise reduce their sentence.

[6] The petition filed by the Florida Bar Rules of Criminal Procedure Committee sought a one-year extension to the time limitations in FLA. R. CRIM. P. 3.853. The petition filed by a consortium of Florida Innocence Project participants and affected inmates sought a writ of mandamus to prevent the destruction of biological evidence in possession of governmental entities.

[7] Emergency Petition by the Florida Criminal Procedure Rules Committee for an Amendment to the Florida Rules of Criminal Procedure, No. SC03-1630.

testing).[8] Oral arguments were heard on November 7, 2003, but no opinion on the merits has been issued to date.

In its September 30 Order, the Florida Supreme Court stated:

> To allow this Court an opportunity to fully consider the petitions, the deadline of October 1, 2003, set forth in rule 3.853(d)(1)(A), is hereby suspended until further order of this Court. Further, as petitioners point out, operation of the same deadline in section 925.11(1)(b)1., Florida Statutes (2002), may result in the non-preservation of physical evidence for DNA testing under section 925.11(4)(b). Because such a result would render these proceedings moot and in effect preclude this Court, should it determine it has jurisdiction, from the "complete exercise" thereof, the deadline in section 925.11(1)(b)1. is hereby held in abeyance while this Court considers its jurisdiction and other matters before it. … No other provision of the rule or statute is affected by this order.[9]

Rights to Appeal, Generally

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.[10]

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 has 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[11] and provides:

> 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*,[12] 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.[13]

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[8] *See Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A) (Postconviction DNA Testing)*, 857 So.2d 190 (Fla. 2003).
[9] *Id.* at 190.
[10] *See Amendments to the Florida Rules of Appellate Procedure*, 696 So.2d 1103 (Fla. 1996).
[11] Chapter 96-248, L.O.F.
[12] 758 So.2d 661 (Fla. 2000).
[13] *Id.* at 664 (citing *Amendments to the Florida Rules of Appellate Procedure*, *supra*, 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 FLA. R. CRIM. P. 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.[14] 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.[15] 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.[16]

Motions for postconviction relief based on newly discovered evidence must be raised within two years of the discovery of such evidence.[17] 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*,[18] 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."[19]

Appeal or Review After a Plea of Guilty or *Nolo Contendere*

When a defendant pleads guilty or *nolo contendere* (no contest), having chosen to waive the right to take his or her case to trial, appeal rights are limited. Specifically, s. 924.06(3), F.S., provides: "[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*,[20] the Florida Supreme 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: "[t]here 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, provides that "[i]f 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

[14] *See* FLA. R. CRIM. P. 3.850(d).
[15] *See* FLA. R. CRIM. P. 3.850(b).
[16] *See Jones v. State*, 709 So.2d 512 (Fla. 1998); *Torres-Arboleda v. Dugger*, 636 So.2d 1321 (Fla. 1994).
[17] *See Adams v. State*, 543 So.2d 1244 (Fla.1989).
[18] 773 So.2d 34 (Fla. 2000).
[19] *Id.* at 43. *See also Ziegler v. State*, 654 So.2d 1162 (Fla. 1995).
[20] 373 So.2d 898 (Fla. 1979).

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*,[21] 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)."[22]

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.[23] 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.[24] 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.[25]

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 direct appeal is to the Supreme Court of the United States by petition for writ of *certiorari*.

Second, if the U.S. Supreme Court rejects the appeal (either by denying the cert. petition or hearing the appeal and affirming), the defendant's sentence becomes final and state collateral postconviction proceedings or collateral review begin. The Capital Collateral Regional Counsel ("CCRC") or attorneys appointed from the Registry represent 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 three categories of claims: ineffective assistance of trial counsel; violations of *Brady v. Maryland*,[26] i.e., denial of due process by 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.

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[21] 760 So.2d 114 (Fla. 2000).
[22] *Maddox v. State* held 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.
[23] *See Brown v. State*, 376 So.2d 382 (Fla. 1979); *State v. Ashby*, 245 So.2d 225 (Fla. 1971).
[24] *See Phuagnong v. State*, 714 So.2d 527 (Fla. 1st DCA 1998).
[25] *Griffin v. State*, 753 So.2d 676 (Fla. 2000).
[26] 373 U.S. 83 (1963).

The third, and what is intended to be the final, stage is to seek a federal writ of *habeas corpus*, a proceeding controlled by Title 28 U.S.C. § 2254(a). Federal *habeas* allows a defendant to petition a United States 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 on direct appeal or in state postconviction proceedings. Appeals of federal *habeas* petitions from Florida are to the U.S. Court of Appeals for the Eleventh Circuit and then to the U.S. 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."[27] 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."[28]

Time Limitations, Amending Motions in Capital Cases

Rule 3.851, Fla. R. Crim. P., 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."

Proposed Changes

This bill amends s. 925.11, F.S., to extend the current two-year time limitation during which time a person convicted and sentenced must file a petition for post-conviction DNA testing of evidence to a four-year time limitation. The bill extends the previous deadline of October 1, 2003, to October 1, 2005, for any petition that would otherwise be time-barred.

The bill is effective upon becoming law and the application of its provisions is made retroactive to October 1, 2003.

C. SECTION DIRECTORY:

Section 1. amends s. 925.11, F.S., relating to postconviction DNA testing.

Section 2. provides an effective date of upon becoming law, applied retroactively to October 1, 2003.

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[27] *McCrae v. State*, 437 So.2d 1388, 1390 (Fla.1983). *See also Ranaldson v. State*, 672 So.2d 564 (Fla. 1st DCA. 1996).
[28] *See e.g.*, *Pope v. State*, 702 So.2d 221, 223 (Fla. 1997).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Petitions generated by this bill will have an indeterminate impact on trial courts, state attorneys, public defenders, the Department of Corrections, and FDLE. It is unknown at this time what type of DNA analysis is currently performed by FDLE and the extent of backlog, if any, on DNA testing and particularly, post-conviction DNA testing orders. It is unknown how much expense is incurred on behalf of indigent defendants for post-conviction DNA testing.

It is also unknown at this time how much expense is incurred on behalf of indigent defendants to investigate and determine viable claims for filing post-conviction petitions for DNA testing.

This bill may also impose an indeterminate increase in costs incurred in storage and preservation of evidence in the custody of state governmental entities including but not limited to FDLE, the courts, state attorneys' offices, public and private labs, hospital facilities, public defenders' offices and capital collateral offices.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill may impose an indeterminate increase in costs incurred in storage and preservation of evidence in the custody of local governmental entities, including but not limited to police and sheriff's departments, clerks of the court and hospital facilities.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may impose an indeterminate increase in costs incurred in storage and preservation of evidence in the custody of nongovernmental entities including but not limited to private labs, hospital facilities, and private counsels' offices.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

Separation of Powers: Substance versus Procedure

Article II, section 3 of the Florida Constitution provides: “No person belonging to one branch [of state government] shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” The Legislature has the exclusive power to enact substantive laws while Article V, section 2 of the Florida Constitution grants to 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.

Florida courts protect their rulemaking power by striking down laws that conflict with their rules. For example, in 1976, the Florida Supreme Court ruled unconstitutional a statute regarding the state mental hospital because it was in conflict with a previously passed criminal rule of procedure regarding persons found not guilty by reason of insanity.[29] In 1991, the court ruled that a statute requiring mandatory severance of a mortgage foreclosure trial from a trial on any other counterclaims was unconstitutional because it conflicted with an existing rule of civil procedure.[30]

Essentially, the rule is that substance is legislative and procedure is judicial. In practice, determining the difference is not simple or clear. In 1973, Justice Adkins described the difference between substance and procedure in this way:

> The entire area of substance and procedure may be described as a "twilight zone” and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." 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.[31]

This “twilight zone” remains to this day, and causes in the analysis of many enactments a difficult determination of whether a matter is procedural or substantive.

In January of 2000, the Legislature passed the Death Penalty Reform Act (“DPRA”) of 2000.[32] 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. Finally, the bill repealed the rules of criminal procedure governing capital postconviction motions.

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[29] *See In re Connors*, 332 So.2d 336 (Fla. 1976).
[30] *See Haven Federal Savings & Loan Assn. v. Kirian*, 579 So.2d 730 (Fla. 1991).
[31] *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1973).
[32] Chapter 2000-3, L.O.F.

In *Allen v. Butterworth*,[33] the Florida Supreme Court held that the DPRA was an "unconstitutional encroachment" on the court's "exclusive power to 'adopt rules for the practice and procedure in all courts.'"[34] 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.[35] Finally, 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.[36] 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."[37]

The provisions of this bill may be distinguishable from those of the DPRA due to the fact that this bill creates (or redefines) 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.[38]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On April 13, 2004, the House Committee on Judiciary adopted one amendment to this bill. The original bill would have left current law in place, allowing DNA testing only for those convicted at trial. The amendment removed this requirement, thus opening the process to those who may have plead guilty or *nolo contendere*. The Committee then reported this bill favorably as amended.

This analysis is drafted to the bill as amended.

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[33] 756 So.2d 52 (Fla. 2000).
[34] *Id.* at 54.
[35] *Id.* at 61.
[36] *Id.* at 61 (citing Art. I, s. 13, Fla. Const.).
[37] *Id.* at 62.
[38] *See, e.g.*, *Department of Transportation v. Fortune Federal Savings and Loan Assn.*, 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."); *City of Lake Mary v. Seminole County*, 419 So.2d 737, 739 (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."); *Fernandez v. Florida Ins. Guaranty Assn., 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.")