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/CS/SB 44

SPONSOR: Criminal Justice Committee, Judiciary Committee, and Senator Villalobos

SUBJECT: DNA Evidence

DATE: January 22, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matthews	Lang	JU	Fav/CS
2.	Cellon	Cannon	CJ	Fav/CS
3.			GO	
4.			ACJ	
5.			AP	
6.			RC	

I. Summary:

This bill extends, by two years, the time period within which persons who were convicted at trial and sentenced may petition, under specified circumstances, for post-conviction DNA (deoxyribonucleic acid) testing of evidence that could exonerate them or otherwise reduce their sentence.

The bill provides a deadline of October 1, 2005, for such petitions that would otherwise be time-barred by the operation of the law. This bill also has the effect of requiring governmental entities to preserve physical evidence in their possession for four years before it can be destroyed without having to provide notice.

The bill is effective upon becoming a law with application of its provisions retroactive to October 1, 2003.

II. Present Situation:

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.

[1] Two congressional bills are pending relating in part to post-conviction DNA testing. HR 3214 EH (Advancing Justice Through DNA Technology Act of 2003) has passed the House and is in the Senate as of 11/2003.

When the Florida 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. *See* ch. 2001-97, L.O.F.; ss. 925.11 and 943.3251, F.S. 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, 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 if DNA test results had been admitted at trial.

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 of 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. *See* s. 943.3251, F.S. The results of the DNA testing are provided to the court, the defendant and the prosecuting authority.

Current Time Limitations

A two-year period for filing such petitions was created in s. 925.11(1)(b), F.S. 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 post-conviction DNA 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 was 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), Fl.R.Crim.P., 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.[2] Under the statute, evidence in death penalty cases must be maintained for 60 days after the execution of the sentence.

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

[2] See s. 925.11(4), F.S.

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 Shepard Broad Law Center in Nova Southeastern University in Florida and at Florida State University. 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[3] process 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[4] 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 to October 1, 2004, to "extend the rapidly approaching deadline of October 1, 2003." *Emergency Petition by the Florida Criminal Procedure Rules Committee for an Amendment to the Florida Rules of Criminal Procedure, Case No. SC03-1630.* 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 the Florida Rule of Criminal Procedure Rule 3.853 governing motions for post-conviction DNA testing.[5] Rule 3.853 was adopted by the Florida Supreme Court in 2001. *See* ch. 2001-97, L.O.F; s. 925.11, F.S.[6] Oral arguments were heard on November 7, 2003, but no opinion on the merits has been issued to date.

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[3]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.

[4] The petition filed by the Florida Bar Rules of Criminal Procedure Committee sought a one-year extension to the time limitations in Rule 3.853. The petition filed by a consortia 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.

[5] *See Amendments to Florida Rule of Criminal Procedure* 3.853(d)(a)(A), Case No. SC03-1630 (September 30, 2003).

[6] Section 925.11, F.S., was enacted in 2001 while an emergency rule petition was pending in the Florida Supreme Court in February 2001. The Florida Bar Criminal Procedures Rules Committee had filed the petition to request an amendment to the rules of criminal procedure that would provide a procedure for post-conviction DNA testing. Subsequent to the adoption of the legislation, the Florida Supreme Court adopted Rule 3.853. *See Amendment to Florida Rules of Criminal Procedure Creating Rule 3*.853, 807 So.2d 633 (Fla. 2001). Rule 3.853 provides procedures for obtaining DNA testing under section 925.11, F.S..

In its September 30 Order, the 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. *Order Setting Oral Argument, SC03-1630,* September 30, 2003.

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. *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) 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 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."

III. Effect of Proposed Changes:

This bill amends s. 925.11, F.S., and has the effect of extending the current two-year time limitation during which time a person convicted at trial 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. This bill provides that the act becomes effective upon becoming law.

Extending the filing deadlines should result in the time necessary for the thorough investigation of claims of innocence and the filing of well-pled petitions for post-sentencing DNA testing resulting therefrom.

By virtue of extending the filing deadline, the requirements related to preservation of evidence set forth in s. 925.11(4), F.S., are necessarily likewise extended.

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

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, 2005, or within 4 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:

Two population pools of persons convicted at trial and sentenced are affected by this bill: those currently in the custody of the Department of Corrections (DOC) and those who have previously been released or were never actually in DOC custody. It is unknown at this time how many convicted persons could be potentially affected by the extension of the time limitation in the post-conviction DNA testing statute. According to the Florida Department of Corrections, of the 363 offenders released during 2002-2003, 76 of those offenders were released due to having their sentences or judgments vacated by the courts.

DOC was unable to provide the *reasons* for the court action. It is unknown at this time how many cases, if any, are being held in abeyance pending the resolution of the s. 925.11, F.S., time limitation issues by the Court or the Legislature.

According to OPPAGA, no agreed upon methodology exists for estimating the number of potentially innocent people wrongfully convicted of crimes. Estimates have ranged from 0.3 percent – 5 percent statewide to 10 percent nationwide. Furthermore according to OPPAGA, even for those who may be wrongfully convicted, DNA evidence may not necessarily be a component for proving innocence and even if it is, DNA evidence may not actually exist or be available for testing which would significantly narrow the pool of convicted persons who may petition for relief.

C. Government Sector Impact:

Petitions generated by this bill will have an indeterminate impact on trial courts, state attorneys, the Department of Corrections, and the Florida Department of Law Enforcement. It is unknown at this time what type of DNA analysis is currently performed by the Florida Department of Law Enforcement 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.

There may also be an indeterminate increase in costs incurred by the extension as affecting storage and preservation of evidence in the custody of local and state governmental entities and nongovernmental entities including but not limited to Florida Department of Law Enforcement, police departments, clerks of the court, courts, state attorneys' offices, public and private labs, hospital facilities, private counsels' offices, capital collateral offices, and public defenders' offices.

VI. Technical Deficiencies:

None.

VII. Related Issues:

DNA Testing
It is not known whether the development of a new, scientifically more reliable method of DNA testing that is approved or used would alone qualify under the 'unknown fact' exception to the statute of limitations period for post-conviction DNA testing in s. 925.11. Rule 3.853 of the Florida Rules of Criminal Procedures appears to provide relief by allowing evidence to be tested by methods not available at the time of trial. This exception is most relevant for persons whose cases predate the existence or availability of DNA testing technologies at the time of trial. The term "DNA testing" is not defined in s. 925.11, F.S., or in any other statutory section. Florida statutes do define "DNA analysis" in s. 760.40, F.S., to mean the "medical and biological

examination and analysis of a person to identify the presence and composition of genes in that person's body. The definition also includes "DNA typing and genetic testing." Florida law prohibits DNA analysis without the informed consent of a person. The results are the exclusive and confidential property of the person tested. Exceptions to the prohibition exist. DNA analysis may be performed for criminal prosecution, for a determination of paternity, and for acquisition of DNA material from persons convicted of certain offenses (s. 943.325, F.S.).

Although methodologies and technologies are evolving, four main types of forensic DNA testing exist:

- *RFLP (restriction fragment length polymorphism) analysis* requires larger amounts of DNA and the DNA must not be degraded. This analysis is not suitable for old crime-scene evidence or for a small amount of DNA evidence.

- *PCR (polymerase chain reaction) analysis* often requires less DNA than RFLP testing and the DNA may be partially degraded. However, PCR still requires a sample size and degradation limitations. PCR tests are extremely sensitive to contaminating DNA at the crime scene and within the test laboratory which can influence results, particularly in the absence of proper handling techniques or controls. During PCR, contaminants may be amplified up to a billion times their original concentration. Even within PCR analysis a number of tests exist that differ in reliability and effectiveness.

- *STR (short tandem repeat) analysis* is used to evaluate specific regions (loci) within nuclear DNA. Variability in STR regions can be used to distinguish one DNA profile from another. The Federal Bureau of Investigation (FBI) uses a standard set of 13 specific STR regions for its software program, CODIS, that supports local, state, and national databases of DNA profiles from convicted offenders, unsolved crime scene evidence, and missing persons. The odds that two individuals will have the same 13-loci DNA profile is about one in one billion.

- *Mitochondrial DNA analysis* (mtDNA) can be used to examine the DNA from samples that cannot be analyzed by RFLP or STR. Nuclear DNA must be extracted from samples for use in RFLP, PCR, and STR; however, mtDNA analysis uses DNA extracted from another cellular organelle called a mitochondrion. While older biological samples that lack nucleated cellular material, such as hair, bones, and teeth, cannot be analyzed with STR and RFLP, they can be analyzed with mtDNA. In the investigation of cases that have gone unsolved for many years, mtDNA is deemed valuable.

See http://www.ornl.gov/sci/techresources/Human_Genome/elsi/forensics.shtml#6.

Post-conviction DNA testing statutes potentially implicate the right of access to the courts under s. 21 of article. I of the Florida Constitution. The Florida Supreme Court order issued on September 30, 2003, specifically held in abeyance the application of the two-year period for retention of physical evidence in s. 925.11(4), F.S., until the matters before the Court are decided.

Arguably, the unilateral destruction of potentially exculpatory physical evidence without notice to the defendant after the running of the four-year filing deadline created by the bill could place

an undue burden on and potentially render illusory a convicted person's statutory right to petition under the "due diligence/newly discovered evidence" exception of the law which allows a person to petition at any time for post-conviction DNA testing. *See* s. 925.11(1)(b)2., F.S. This bill does not address or resolve this matter.

It should be noted, however, that it is equally likely that no one will actually be adversely effected by this apparent omission. Governmental agencies that are in possession of physical evidence from which DNA could be extracted and tested have been on notice since the original bill went into effect in October 2001, that the evidence should be safeguarded against destruction. This requirement has not changed. Evidence that was destroyed, whether inadvertently, mistakenly, or even purposely through the normal course of agency business, before the effective date of s. 925.11, F.S., cannot be resurrected or reconstructed.

Section 925.11(1)(b)2., F.S., provides an avenue by which a petitioner, if he or she can persuade the Court that the "newly discovered" evidence raised could not have been discovered before the normal filing deadline if "due diligence" was utilized, can raise the issue of actual innocence *after the statutory deadlines have passed.* The Legislature must balance the rights of the accused, the rights of the victims or their families, the constraints upon governmental agencies responsible for evidence in criminal cases, while trusting that the courts will judiciously and wisely apply this statutorily provided opportunity of last resort.

VIII. Amendments:

None.