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 44

SPONSOR: Judiciary Committee and Senator Villalobos

SUBJECT: DNA Evidence

DATE: December 11, 2003 REVISED: _____ _____ _____ _____

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

I. Summary:

This bill provides a statute of limitations period for four years in lieu of two years during which time only persons who were convicted at trial and sentenced may petition, under specified circumstances, for a post-conviction DNA (deoxyribonucleic acid) testing of evidence that could exonerate them or otherwise reduce their sentence. The bill also 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 implicit 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.

II. Present Situation:

With the advent of advanced forensic technology and highly publicized capital cases involving wrongfully convicted persons, the use of DNA testing is at the forefront of major criminal justice legislative reform in many states. To date, over 36 states have enacted laws to allow post-conviction DNA testing to exonerate or otherwise reduce the sentence of wrongfully 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 Florida Legislature revised its post-conviction laws in 2001, it gave *a person convicted at trial and sentenced* a limited 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.;

[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.

ss. 925.11 and 943.3251. 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 or done 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.

A two-year statute of limitations period for filing such petitions exists in statute. Florida is only one of nine states in the nation whose laws impose a statute of limitations period for petitioning for post-conviction DNA testing. The statute of limitations period 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 a collateral counsel was appointed (applicable solely in death penalty cases); or
- October 1, 2003.

The first three events captured the class of 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 limited window of opportunity to capture two other classes of specified convicted persons:
1) Those convicted persons whose claims would have been entirely time-barred because two or more years before the effective date of the law had already elapsed since one of the applicable events had been triggered (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 if any fact upon which the petition is founded was unknown or could not have been known with due diligence at the time of trial, then a person convicted at trial and sentenced could petition at any time for post-conviction DNA testing.

With the exception of death penalty cases, physical evidence in the possession of governmental entities may be destroyed after two years from the dates mentioned above.[2] No notice is required to anyone, including the defendant, prior to the destruction unless the governmental entity wants to destroy the evidence before the two years are up. If the governmental entity wants to destroy that evidence beforehand, then notice must be provided to specified persons including the defendant. If the defendant does not respond within 90 days that he or she intends to file or does not file a petition for post-conviction DNA testing, the evidence may be destroyed. If the physical evidence relates to a death penalty or capital offense case, then the evidence must be retained for a minimum of 60 days after the execution. No other requirements exist for preservation or retention of the evidence.

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 statute of limitations period prompted two emergency petitions[4] before the Florida Supreme Court and a recent legislative workshop review of the existing statutory provisions. The legislative review explored a number of issues including, but not limited to: whether the statute placed an undue burden on the class of convicted persons unrepresented by counsel prior to or after conviction to receive notice of their right and assert their claim of innocence, particularly if their cases predated DNA testing or more reliable forms of DNA testing analyses, whether the statute of limitations should be eliminated or the statute of limitations extended to allow time for investigating and evaluating these claims, whether it is appropriate or constitutional to impose a statute of limitations, whether the

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

[3] Time estimates 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 statute of limitations period 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.

provision governing the two-year destruction of evidence rendered the "unknown fact" catch-all exception to the statute of limitations moot and thus unconstitutional as a denial of access to the courts, how one's assertion of innocence could be balanced against the need for prosecutorial finality and relief to the victim and victim's family, whether defendants who plead guilty or nolo contendere (no contest) should have the same limited right to petition for post-conviction DNA testing as persons convicted at trial, what difficulties exist in obtaining physical evidence that may be in the possession of any number of custodial entities, and whether the development of new improved or advanced DNA testing technologies unavailable at the time of trial would qualify under the 'unknown fact' catch-all exception in the statute allowing for a petition to be filed at any time.

On September 30, 2003, the Florida Supreme Court issued an order temporarily suspending an 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 based on a legislative enactment in 2001. *See* ch. 2001-97, L.O.F; s. 925.11, F.S.[6] The Court order also temporarily suspended the operation of s. 925.11(4), F.S., relating to the destruction of physical evidence for DNA testing. Oral arguments were heard on November 7, 2003, but no opinion on the merits has been issued to date.

III. Effect of Proposed Changes:

This bill amends s. 925.11, F.S., and replaces the two-year statute of limitations period with a four-year statute of limitations period during which time a person convicted at trial and sentenced must file a petition for post-conviction DNA testing of evidence that could exonerate them or otherwise reduce their sentence. The bill also provides a deadline of October 1, 2005, for any petition that would otherwise be time-barred.

This bill provides that the act becomes effective upon becoming law. The new four-year statute of limitations period clearly applies to the class of persons convicted at trial and sentenced whose right to petition are triggered when the judgment and sentence become final or when the conviction is affirmed on direct appeal, or when capital collateral counsel is appointed on or after the yet unknown effective date of this law.

It is not entirely clear if the bill creates an extension or replaces the pre-existing statute of limitations period with a four-year statute of limitations period and the October 1, 2005, deadline for the class of convicted persons whose right to petition were or are governed by current law. Since the Florida Supreme Court's court order suspended the statute of limitations in Rule 3.853 of the Florida Rules of Criminal Procedure which indirectly suspended the same statute of limitations period in s. 925.11, F.S., technically no right to petition under s. 925.11, F.S., has

[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 relief by allowing evidence to be tested by DNA testing methodologies that might not have been available at the time of trial.

been extinguished under the pre-existing statute of limitations. The time period is not being enforced. A claim extinguished by a statute of limitations can not be revived by a subsequent court decision (*see In re Estate of Smith*, 685 So.2d 1206, 1210 (Fla.), cert. denied, 520 U.S. 1265, 117 S.Ct. 2434, 138 L.Ed.2d 195 (1997) or by legislative action (*see Wiley v. Roof*, 641 So.2d 66, 68-69 (Fla.1994).

The amendment to s. 925.11, F.S., would need to apply retroactively in order to effectuate an extension to the statute of limitations period for the class of convicted persons whose rights were or are governed by the pre-existing law but for the Florida Supreme Court's order. The two-prong query for determining whether a statute should be retroactively applied is whether clear legislative intent exists to apply the statute retroactively, and whether it's constitutionally permissible. *See Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494 (Fla. 1999). The bill does not contain legislative intent language regarding retroactive application. This issue affects both classes of convicted persons who would have had to file by October 1, 2003, or who, by the later operation of the two-year statute of limitations period triggered by their judgment and sentence becoming final or their conviction being affirmed on direct appeal or their capital collateral counsel being appointed, would have had to file between October 1, 2003, and the yet unspecified effective date provided in this bill.

If the Court does not pre-empt legislative action and construes this legislative change to the statute of limitations period as an extension to, rather than as a total replacement of the two-year statute of limitations period in s. 925.11, F.S., and subsequently adopts this change into Rule 3.853 of the Florida Rules of Criminal Procedure, then the Court may have to note expressly that this is an extension that applies retroactively. Court rules of procedure are prospective only unless specifically provided otherwise. *See Pearlstein v. King*, 610 So.2d 445 , 446 (Fla.,1992), citing to *Tucker v. State,* 357 So.2d 719, 721 (fnt 9)(Fla.1978).

If the amendment is construed as an extension, then the October 1, 2005, deadline, gives two more years to the class of convicted persons who would have had to file by the pre-existing deadline of October 1, 2003. As to the class of convicted persons whose right to petition are governed by the later operation of the pre-existing two-year statute of limitations such that they would have had to file on October 1, 2003, or between October 1, 2003 and the yet unspecified effective date of this act, the new October 1, 2005 deadline affords this class less than two *additional* years of notice and time to perfect their petition contrary to their counterparts under the new statute of limitations period in s. 925.11, F.S.

(This bill does not affect the current law as applied to the "unknown fact" exception. The bill also does not extend any right to the class of convicted persons who pled guilty or nolo contendere who currently do not have the right to petition for post-conviction DNA testing.)

Since the bill amends the statute of limitations period in subsection (1) of s. 925.11, F.S., for filing the petition for post-conviction DNA testing, the bill also has the implicit effect of creating a four year time period in subsection (4) of s. 925.11, F.S., whose time period for the preservation of DNA evidence prior to destruction is linked to the statute of limitations period.

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:

- Post-conviction DNA testing statutes implicate the constitutionally protected but circumscribed right to appeal.[7] That right includes a right to a direct appeal and an appeal on a matter collateral to the conviction. A direct appeal typically involves claims based on legal errors apparent from the trial transcript or record on appeal including evidentiary rulings, or other matters objected to at trial such as the jury instructions, prosecutorial misconduct, and procedural rulings made by the trial court.[8] A collateral review appeal or post-conviction relief involves claims that are "collateral" to what happened in the trial court such as ineffective counsel, newly discovered evidence (e.g., post-trial recantation by a principal witness) and failure to disclose or suppression of material exculpatory evidence (encompassed due process denial as a *Brady* violation).

  Right to Appeal of Persons Tried and Sentenced: Such persons have a right to a direct appeal after trial and an appeal on a matter collateral to the conviction. Florida Rule of Criminal Procedure 3.850 governs collateral review or post-conviction proceedings. A Rule 3.850 motion must be filed in the trial court where the defendant was tried and sentenced. The court may hold an evidentiary hearing. The state attorney must respond upon court order to a motion unless the record conclusively shows that the defendant is not entitled to relief. If the trial court denies the motion for post-conviction relief whether an evidentiary hearing is held or not, the defendant

[7] *See Amendments to the Florida Rules of Appellate Procedure,* 696 So.2d 1103 (Fla. 1996)(Article V, section 4(b) of the Florida Constitution is construed to convey a constitutional protection of the right to an appeal.)

[8] As part of the Criminal Appeal Reform Act of 1996, the Legislature codified the contemporaneous objection rule which acted as a procedural bar to prevent defendants from raising an issue on appeal not otherwise objected to at trial. Section 924.051(3), F.S., specifically reads ". . .(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,* 696 So.2d 1103, 1104-1105 (Fla. 1996).

is then entitled to an appeal to the respective District Court of Appeal except as to death penalty cases which are appealed to the Florida Supreme Court. Under the rule, the defendant has two years from the date the judgment and sentence is final to file the motion unless the facts alleged in the motion were unknown to the defendant and could not have otherwise been ascertained through the exercise of due diligence. If the collateral post-conviction motion is based on newly discovered evidence, the court must determine whether 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. Such motions must be raised within two years of the discovery of such evidence.[9]

Appeals in Cases Involving Pleas of Guilt or Nolo Contendere Cases--A defendant who pleads guilty or nolo contendere (no contest) has a limited right to appeal since he or she has elected to forego a trial. A person who pleads guilty[10] or nolo contendere[11] has no right to a direct appeal unless he or she expressly reserves the right to appeal a legally dispositive issue.

Appeals in Cases Involving the Death Penalty or Capital Cases--A defendant who is sentenced to death is entitled to an appeal at three levels:

1. A direct appeal, with the assistance of a public defender or private counsel, may be filed with the Florida Supreme Court. The decision of the Florida Supreme Court is then appealed via a petition for writ of certiorari to the United States Supreme Court.
2. If the U.S. Supreme Court rejects the petition for writ, a state collateral post-conviction proceedings or collateral review may begin. The Capital Collateral Regional Counsel (CCRC) represents most defendants in capital collateral post-conviction proceedings. *See* ss.27.701, 27.703, 27.710, and 27.711 (A registry counsel may be appointed in conflict cases). Rules 3.850, 3.851 and 3.852, Fla. R.Crim.P. govern post-conviction proceedings. Rule 3.851 applies to all motions and petitions for any type of post-conviction 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

[9] *See Adams v. State,* 543 So.2d 1244 (Fla.1989). See *Torres-Arboleda v. Dugger,* 636 So.2d 1321 (Fla. 1994); *Jones v. State,* 709 So.2d 512 (Fla. 1998). The two-year time period begins to run on a defendant's post-conviction request for testing when the testing method became available. In *Sireci v. State,* 773 So.2d 34 (Fla. 2000), the Florida Supreme Court held that the defendant's post-conviction 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).

[10] *See* s. 924.07(3), F.S., which was upheld as constitutional in *Robinson v. State,* 373 So.2d 898 (Fla. 1979). The court held that there are an exclusive and limited class of issues without reservation of dispositive issue which include: 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.

[11] *See* s. 924.051(4), F.S., which was upheld as constitutional in *Leonard v. State*, 760 So.2d 114 (Fla. 2000). No right of direct appeal is available to a plea of nolo contendere unless (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 law.)

sentence in a death case becomes final. The one year limitation assumes that the defendant will have counsel assigned and working on the post-conviction 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."

3. A petition for habeas corpus may be initiated in federal district court to review whether the conviction or sentence is in violation of federal law. The proceeding is almost exclusively limited to the consideration of claims previously asserted in direct appeal or in state post-conviction proceedings. This proceeding is controlled by federal law (28 U.S.C. s. 2254(a). 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 post-conviction motion and a second federal habeas petition along with motions to stay the execution. Successive collateral post-conviction motions are restricted by court rule if the court 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 court 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." *See* Rule 3.850(f), Fla.R.Crim.P.[12]

- Post-conviction DNA testing statutes implicate the separation of powers provision in art. II, s. 3 of the *Florida Constitution*. While the Legislature has the exclusive power to enact substantive laws, the Florida Supreme Court is empowered to adopt court rules, procedure and practices. See art. V, s. 2 of the *Florida Constitution*. Based on current case law, the courts tend to find certain provisions unconstitutional such as those regarding timing and sequence of court procedures, creating expedited proceedings, issuing mandates to the courts to perform certain functions, and attempting to supersede or modify existing rules of court or others intruding into areas of practice and procedure within the province of the court. *See Allen v. State*, 756 So.2d 52, 54 (Fla. 2000)(Deadlines for filing post-conviction motions in the Death Penalty Reform Act of 2000 constituted an unconstitutional encroachment on the Court's exclusive power to adopt rules of practice and procedure in the court.) The Court held in *Allen* 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

[12] 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 Ronaldson 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).

and sentence, we hold that article V, section 2(a) of the Florida Constitution grants this Court the exclusive authority to set deadlines for post-conviction motions." *Id.* at 62.

However, over the years, the courts have also shown some willingness to adopt a procedural statute as a court rule, particularly when the court finds the legislative intent or underlying legislative policy to be beneficial to the judicial system. The Court's acquiescence and adoption of the substantive and procedural aspects of s. 925.11, F.S., including the statute of limitations into Rule 3.853 of the Florida Rules of Criminal Procedure is an example.[13] The issue of whether this specific issue is controlled by the judiciary or the legislative branch as a procedural or substantive matter respectively, will have to be resolved by the courts if the Court issues an opinion relating to the suspended statute of limitations period in Rule 3.853 of the Florida Rules of Criminal Procedure that adopts a statute of limitations period contrary to existing law or to the time period proposed in this bill and subsequently enacted by the Legislature.

- Post-conviction DNA testing statutes 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 suspended the application of the two-year statute of limitations period for destruction of physical evidence in s. 925.11(4), F.S. Arguably, the unilateral destruction of potentially exculpatory physical evidence without notice to the defendant after the statute of limitations period places an undue burden on and potentially renders illusory a convicted person's statutory right to petition under the 'unknown fact" 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.

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. It is unknown at this time how many convicted persons could be potentially affected by the extension of the statute of limitations period 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 substantive errors rather than legal technicalities. It is unknown at this time how many

[13] *See Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), Amendment to Florida Rules of Appellate Procedure 9.140 and 9.141*, 803 So.2d 633 (Fla. 2001). Note the nomenclature difference between Rule 3.853 and s. 925.11, F.S., wherein the former refers to the relief in the form of a motion and the latter refers to the relief in the form of a petition.

cases are being held in abeyance at this time pending the resolution of the statute of limitations issues by the Court or the Legislature.

According to OPPAGA, no agreed upon methodology exists for estimating the number of innocent people wrongfully convicted of crimes. Estimates have ranged from 0.3%-5% statewide to 10% 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 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 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 section 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.

VIII. Amendments:

None.