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.)

Prepared By: Criminal Justice Committee

BILL:	Senate Bill 186
INTRODUCER:	Senator Villalobos
SUBJECT:	Postconviction DNA Testing
DATE:	January 20, 2006
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Favorable**
2.			JU	
3.			JA	
4.				
5.				
6.				

I. Summary:

Senate Bill 186 amends the existing postconviction DNA testing statute in three significant ways: 1) it eliminates the deadline for filing postconviction DNA petitions; 2) it eliminates the current requirement that a felon be convicted at trial in order to file a petition; 3) the bill also requires that evidence which is collected at the time of the crime for which testing may be requested be maintained until the term of the sentence in the case has expired.

The Act would become effective upon becoming a law, retroactive to the current deadline for filing Petitions for Postconviction DNA Testing, October 1, 2005.

This bill substantially amends Section 925.11, Florida Statutes.

II. Present Situation:

When the Florida Legislature first addressed postconviction DNA testing 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. 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. 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

The Legislature amended s. 925.11, F.S., in 2004 to extend the original 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. This extended the previous deadline of October 1, 2003, to October 1, 2005, for any petition that would otherwise be time-barred. The Florida Supreme Court adopted this new deadline in Rule 3.853, Florida Rules of Criminal Procedure, the rule that governs postconviction DNA court procedure.

The time limitation is measured from *the later of the following dates* based on the law's effective date of October 1, 2003:

- Four years from the date the judgment and sentence became final;
- Four years from the date the conviction was affirmed on direct appeal;
- Four years from the date collateral counsel was appointed (applicable solely in death penalty cases); or
- October 1, 2005.

The law also provides a catch-all exception to the four-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.

On September 29, 2005, the Florida Supreme Court amended Florida Rule of Criminal Procedure 3.853(d)(1). The amendment extended the time for filing petitions from October 1, 2005, to July 1, 2006 (SC 05-1702).

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. By virtue of extending the petition filing deadline in 2003, the requirements related to preservation of evidence set forth in s. 925.11(4), F.S., were necessarily likewise extended.

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. s. 925.11(4)(c), F.S.

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, or if the convicted petitioner is exonerated, the person who actually committed the crime may be arrested and stand trial.

The Governor, by Executive Order, extended the period of time law enforcement agencies must preserve evidence that may contain DNA, essentially eliminating any possibility that such evidence would be destroyed before postconviction testing could be performed, if requested and ordered by a court. (Executive Order 05-160)

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).

III. Effect of Proposed Changes:

Senate Bill 186 amends s. 925.11, F.S., as follows:

- eliminates the necessity of a trial for a felon to be eligible to file a Petition seeking postconviction DNA testing. The bill would allow defendants who have pled and been sentenced to file a Petition.

- eliminates the deadline for filing a Petition for Postconviction DNA testing, providing for a petition to be filed at any time after the judgment and sentence becomes final.

- provides that physical evidence for which postconviction DNA testing may be requested be retained by the governmental entity in possession of it:
    1. for 60 days after the execution of the sentence in Death cases (current law), or
    2. in all other cases, until the expiration of sentence if no other provision of law or rule requires the preservation or retention of the evidence.

  Preservation of physical evidence in cases where a defendant has entered a plea and been sentenced, rather than going to trial, will have to be preserved by the law enforcement agency in possession of it. This is a new requirement, beyond the evidence usually in the possession of the Clerk of the Court, in trial cases.

- The Act takes effect upon becoming a law, retroactive to October 1, 2005, the current statutory deadline for filing petitions.

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.*

The provisions of this bill may be distinguishable from other legislation that has raised Separation of Powers concerns, due to the fact that this bill expands a legislatively created substantive right to DNA testing.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

As previously noted, law enforcement agencies will be required to maintain physical evidence, collected at the time of the crime, for which postconviction DNA testing may be requested, until the expiration of the sentence in criminal cases that have been pled. To date, primarily the Clerks of the Court have had this responsibility, due to the fact that testing has been limited to cases that have gone to trial.

The Florida Department of Law Enforcement has estimated a significant potential fiscal impact related to including plea cases under the postconviction DNA testing umbrella. The elimination of the deadline for filing petitions in cases that have been tried would have minimum fiscal impact.

Based upon an estimate over a three and one-half year period of time, FDLE believes approximately 4 percent of inmates in the custody of the Department of Corrections, sentenced for crimes that are more likely to produce a DNA sample are currently "eligible" for DNA testing. This figure, 2,419, is based upon an analysis of the types of crime, and only trial cases that resulted in a prison sentence. FDLE has received 100-150 cases for analysis, or about 6 percent of the eligible cases.

Assuming the same rate of requests from inmates whose cases may have evidence that contains DNA, and whose petitions are granted by the reviewing court, FDLE estimates approximately 3,483 new analysis requests from DOC inmates if the current law is amended to include plea cases. Breaking the total number estimated (3,483) over a five-year period to 696 cases per year, the following alternatives are presented by FDLE. One is for in-house analysis, and the other is for outsourcing the work:

In-house Analysis

- FTE: 696 cases are approximately 4.8 FTE worth of cases. These analysts could be housed in a single unit to work only post-conviction testing. They would require one FTE for support. Cost for analysts would be $51,952.56 each (salary plus benefits) Total: $259,762.80. Cost for Forensic Technologist $37,975.08 (salary plus benefits). Total Cost for FTE: $297,738 (recurring).

- Cost for Kits and Expendables: Assuming each of these cases had 5 samples for DNA analysis the number of samples would be 3480 requiring 35 DNA kits @ $2,981 per Kit. Total Kit Cost: $104,335. There is approximately $50,000 for other expendables used in DNA analysis. Total $154,335 (recurring).

- The unit would require OCO equipment listed below:

2 Thermal Cyclers ($8000 each)	Total: $16,000
1 Genetic Analyzer ($157,000)	Total: $157,000
1 Real Time PCR Instrument ($50,000)	Total: $50,000
5 Microscopes ($3,000 each)	Total: $15,000
5 Centrifuges ($2,000 each)	Total: $10,000
2 Biological Hoods ($15,000 each)	Total: $30,000
2 Incubators ($5,000 each)	Total: $10,000
	Total: $273,000 (Non-recurring)

FDLE Outsources Cases to Private Vendors

- The Costs for working outsourcing cases to a private vendor would be between $1,500 and $3,000 per case depending on the type of analysis and the size of the case. Therefore total costs for outsourcing 696 cases would be between $1,044,000 and $2,088,000 each year for five years and perhaps beyond.

One issue with a potential fiscal impact related to the use of private vendor testing is the following:

- In order to search any unidentified profiles on the DNA Database, FDLE would have to review the data provided by the private vendor and do the upload.

Additional Considerations

Two factors should be taken into account in the estimated fiscal and workload impact submitted by FDLE:

1. It appears that FDLE's estimates have only accounted for defendants who are in the custody of the Department of Corrections. Defendants who have pled and not received a prison sentence may also petition for testing under the provisions of the bill. Although the motivation for one to seek testing under those circumstances may be less strong than one who is in prison, the opportunity would exist nonetheless.

2. The Florida Innocence Initiative spearheads and conducts the vast majority of investigation and litigation of postconviction DNA petitions in Florida. A spokesperson for the Initiative has explained to Criminal Justice Committee staff that in most cases, the courts are granting their request to have the DNA tested at private laboratories, and that the Initiative is paying for the testing. This is so because, due to the commonly-degraded state of the evidence, testing that FDLE is unable to perform is required.

VI. Technical Deficiencies:

None.

VII. Related Issues:

DNA Database and Efficiency Issues

The Florida Department of Law Enforcement has raised several issues with regard to Senate Bill 186 that are not directly related to fiscal issues. These are:

- There are no databases for searching unknown profiles against convicted offenders with DNA analysis other than those used by FDLE. Therefore, cases that are analyzed by private vendors with YSTR's or Mitchondrial DNA cannot be searched if the profile does not match the defendant.
- It would be much more efficient if the prosecuting authority responding to the postconviction DNA petition would consult with FDLE immediately upon receiving the petition. FDLE has found that oftentimes the court has ordered the testing, but specificity is lacking or certain evidence that could or should be tested, to provide a dispositive result, is not included in the Order.

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. 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.

It is a labor-and time-intensive review process to investigate inmates' claims of innocence made to the Innocence Projects. 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.

VIII. Summary of Amendments:

None.