HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 61 Postsentencing DNA Testing
SPONSOR(S): Quinones and others
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Governmental Operations Committee		Williamson	Everhart
2) Criminal Justice Committee			
3) Justice Appropriations Committee			
4) State Administration Council			
5)			

SUMMARY ANALYSIS

Current law provided a four-year window for a convicted person claiming innocence to file a postconviction motion seeking the testing of DNA evidence. The four-year window expired October 1, 2005.

The bill removes the four-year time limitation. In addition, the bill requires the maintenance of physical evidence until the defendant's sentence is completed.

The application of the bill's provisions is made retroactive to September 30, 2005.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill requires governmental entities to maintain physical evidence for a longer period of time.

Safeguard individual liberty – The bill allows a person who has maintained his or her innocence to file a petition for postconviction DNA testing without worrying about meeting a deadline for filing the motion.

B. EFFECT OF PROPOSED CHANGES:

EFFECT OF BILL

The bill deletes the time period for filing petitions for postconviction DNA (deoxyribonucleic acid) testing. Current law provides a four-year window for a person who has maintained his or her innocence to file a postconviction motion seeking the testing of DNA evidence. The four-year window expired October 1, 2005.

In addition, the bill requires physical evidence to be maintained until the defendant's sentence has been completed, unless certain requirements are met for early disposal. The bill makes conforming changes.

The application of the bill's provisions is made retroactive to September 30, 2005.

BACKGROUND

GENERAL BACKGROUND

The legislature first addressed the issue of postconviction DNA testing in 2001. It gave a person, convicted at trial and sentenced, a statutory right to petition for postconviction DNA testing of physical evidence collected at the time of the crime. This right is based on the assertion that the DNA test results could exonerate that person or alternatively reduce the sentence.[1] In order to petition the court, the person must:

- Be convicted at trial and sentenced;
- Show that his or her identity was a genuinely disputed issue in the case and why;
- Claim to be innocent; and
- 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. 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;
- There is reliable proof that the evidence has not been materially altered and would be admissible at a future hearing; and

[1] *See* ch. 2001-97, L.O.F.; ss. 925.11 and 943.3251, F.S.

- A reasonable probability exists that the defendant would have been acquitted of the crime or received a lesser sentence 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 for filing an appeal is tolled until the court rules on the motion. Otherwise, either party has 30 days to file an appeal of the ruling. The order denying relief must include notice of these time limitations. If the court grants the petition for DNA testing, the defendant is assessed the cost of the DNA testing, unless the court finds that the defendant is otherwise indigent. The Florida Department of Law Enforcement (FDLE) performs the DNA test pursuant to court order.[2] The DNA test results are provided to the court, the defendant, and the prosecuting authority.

CURRENT TIME LIMITATIONS

Current law imposes a four-year period for filing such petitions. 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.[3]

The law also provides a catch-all exception to the four-year time limitation. A person convicted at trial and sentenced could petition at any time for postconviction DNA testing if the facts upon which the petition is founded were unknown or could not have been known with the exercise of due diligence.

PRESERVATION OF PHYSICAL EVIDENCE

Current law provides for preservation of physical evidence collected at the time of the crime for which postconviction DNA testing may be requested.[4] With the exception of death penalty cases, physical evidence in the possession of governmental entities must be maintained for at least four years or until October 1, 2005.[5] Evidence in death penalty cases must be maintained for 60 days after the execution of the sentence. Physical evidence may be disposed of prior to the time limitations if certain conditions are met.[6]

Physical evidence in 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 DNA testing methods, governmental agencies are keenly aware of the potential usefulness of this evidence.

Most recently, the governor issued Executive Order 05-160.[7] The order requires governmental entities in the possession of any physical evidence to preserve the evidence for which DNA testing may be requested.

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[2] *See* s. 943.3251, F.S.
[3] Section 925.11(1)(b), F.S.
[4] Section 925.11(4), F.S.
[5] *See* s. 925.11(4), F.S.
[6] Section 925.11(4)(c), F.S., provides the conditions under which physical evidence may be disposed of prior to the time limitations set forth in s. 925.11(1)(b), F.S. Prior to the disposition of evidence, notice must be provided to the defendant and any counsel of record, the prosecuting authority, and the Attorney General. Within 90 days after notification, if the notifying governmental entity does not receive either a copy of a petition for postconviction 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.
[7] The order was issued August 5, 2005.

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.[8]

DIRECT APPEALS AFTER TRIAL

Matters that are raised on direct appeal include evidentiary rulings made by the trial court during the course of the defendant's trial, and other matters objected to during the course of the trial such as the jury instructions, prosecutorial misconduct, and procedural rulings made by the trial court. The Legislature has codified the "contemporaneous objection" rule, a procedural bar that prevented defendants from raising issues on appeal that 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.

In *State v. Jefferson*,[9] the Florida Supreme Court found that the provision did not represent 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.[10]

COLLATERAL REVIEW

Postconviction proceedings, also known as collateral review,[11] usually involve claims:

- That the defendant's trial counsel was ineffective;
- Of newly discovered evidence; and
- That the prosecution failed to disclose exculpatory evidence.

A motion must be filed in the trial court where the defendant was tried and sentenced.[12] 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.[13] 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.[14]

Motions for postconviction relief based on newly discovered evidence must be raised within two years of the discovery of such evidence.[15] The Florida Supreme Court has held that the two year time limit for filing a 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*,[16] the Florida Supreme Court held that the defendant's postconviction claim filed on his 1976 conviction,

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[8] Article V, section 4(b) of the Florida Constitution has been construed to convey a constitutional protection of this right. *See Amendments to the Florida Rules of Appellate Procedure*, 696 So.2d 1103 (Fla. 1996).
[9] 758 So.2d 661 (Fla. 2000).
[10] *Id.* at 664 (citing *Amendments to the Florida Rules of Appellate Procedure, supra*, at 1104-1105).
[11] Procedurally, collateral review is generally governed by FLA. R. CRIM. P. 3.850.
[12] The 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. *See* FLA. R. CRIM. P. 3.850(b).
[13] *See* FLA. R. CRIM. P. 3.850(d).
[14] 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. *See Jones v. State*, 709 So.2d 512 (Fla. 1998); *Torres-Arboleda v. Dugger*, 636 So.2d 1321 (Fla. 1994).
[15] *See Adams v. State*, 543 So.2d 1244 (Fla.1989).
[16] 773 So.2d 34 (Fla. 2000).

which was filed in 1993, was time barred because "DNA typing was recognized in this state as a valid test as early as 1988."[17]

If a defendant has been sentenced to death, the defendant is entitled to challenge the conviction and sentence in three stages. First, the public defender or private counsel is required to file a direct appeal to the Florida Supreme Court. An appeal of that decision is to the U.S. Supreme Court by petition for writ of *certiorari*. Second, if the U.S. Supreme Court rejects the appeal, the defendant's sentence becomes final and the state collateral postconviction proceeding or collateral review begins.[18] The third stage is to seek a federal writ of *habeas corpus*.[19] Appeals of federal *habeas* petitions from Florida are to the U.S. Court of Appeals for the Eleventh Circuit and then to the U.S. Supreme Court. Finally, once the Governor signs a death warrant, a defendant will typically file a second or successive collateral postconviction motion and a second federal *habeas* petition along with motions to stay the execution.

C. SECTION DIRECTORY:

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

Section 2 provides an effective date of "upon becoming a law," applied retroactively to September 30, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have a fiscal impact on state revenues.

2. Expenditures:

   Petitions generated by the bill will have an indeterminate impact on trial courts, state attorneys, public defenders, the Department of Corrections, and FDLE. It is unknown the extent of FDLE's backlog, if any, on DNA testing and particularly, postconviction DNA testing orders. It is unknown how much expense is incurred on behalf of indigent defendants for postconviction DNA testing.[20]

   Also, it is unknown how much expense is incurred on behalf of indigent defendants to investigate and determine viable claims for filing postconviction petitions for DNA testing.

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

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[17] *Id.* at 43. *See also Ziegler v. State*, 654 So.2d 1162 (Fla. 1995).

[18] State collateral postconviction proceedings are controlled by Rules 3.850, 3.851 and 3.852, FLA. R. CRIM. P. Unlike a direct appeal, which challenges the legal errors apparent from the trial transcripts or record on appeal, a collateral postconviction proceeding is designed to raise claims which are "collateral" to what transpired in the trial court. Consequently, such postconviction proceedings usually involve three categories of claims: ineffective assistance of trial counsel; violations of *Brady v. Maryland* (373 U.S. 83 (1963)), i.e., denial of due process by the prosecution's suppression of material, exculpatory evidence; and newly discovered evidence, for example, post-trial recantation by a principal witness. Since the consideration of these claims often require new fact finding, collateral postconviction motions are filed in the trial court that sentenced the defendant to death. Appeals from the grant or denial of postconviction relief are to the Florida Supreme Court.

[19] This is a proceeding controlled by Title 28 U.S.C. § 2254(a). Federal *habeas* allows a defendant to petition a U.S. district court to review whether the conviction or sentence violates or was obtained in violation of federal law. Federal *habeas* is almost exclusively limited to consideration of claims previously asserted on direct appeal or in state postconviction proceedings.

[20] Fiscal information from FDLE was not available at the time this analysis was published.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have a fiscal impact on local revenues.

2. Expenditures:

The bill may impose an indeterminate increase in costs incurred in storage and preservation of evidence in the custody of local governmental entities, including but not limited to police and sheriff's departments, clerks of the court,[21] and hospital facilities.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Separation of Powers: Substance versus Procedure

The bill could raise concerns regarding separation of powers.

Constitutional Authority

Under Article V, Section 2 of the Florida Constitution, the Supreme Court "shall adopt rules of practice and procedure in all courts . . ." The same section also authorizes the Legislature to repeal court rules of procedure with a two-thirds vote of the membership of both houses.

Separation of Powers

Article II, Section 3 of the Florida Constitution provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The Legislature has the exclusive power to enact substantive laws[22] while Article V, section 2 of the Florida Constitution, grants the Florida Supreme Court the power to "adopt rules for the practice and procedure in all courts, including the time for seeking appellate review."

[21] Per the Florida Association of Court Clerks and Comptrollers (FACC), the clerk is required to preserve evidence in a criminal case "virtually forever—law requires clerks to hold evidence in a criminal case in the event there could potentially be an appeal….there are appeals even on death row." The clerks are fine with the suggested extended timeframes in the bill. Email from the FACC, October 11, 2005.

[22] *See* Art. III, s. 1, Fla. Const.; *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000); *Johnson v. State*, 336 So.2d 93 (Fla. 1976).

Changes to substantive law by court rules of procedure appear to violate the separation of powers provision of the Florida Constitution.[23]

Distinguishing Substance from Procedure

Generally speaking, "substantive law" involves matters of public policy affecting the authority of government and rights of citizens relating to life, liberty and property. Court "rules of practice and procedure" govern the administration of courts, and the behavior of litigants within a court proceeding.[24] In practice, determining the difference is not simple or clear. In 1973, Justice Adkins described the difference between substance and procedure:

> The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[25]

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

DNA Testing

In 2001, the legislature created a limited statutory right to give defendants in closed criminal cases an additional opportunity to prove their innocence using DNA evidence.[26] It provided a two-year time period for pending and future cases that expired on October 1, 2003. Shortly after enactment, the court passed a rule to implement the statute reflecting the statutory deadlines.[27] Prior to the October 1 expiration, the court issued an order temporarily suspending the deadline. In addition, the court ordered government entities to store evidence in all closed criminal cases indefinitely.[28] The opinion of the court suspending the statutory deadline was a four to three decision. Justice Wells said in

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[23] *Id.*

[24] In *Allen v. Butterworth*, the Florida Supreme Court referred to a discussion explaining the distinction between substance and procedure from Justice Adkins' concurring opinion in *In Re Rules of Criminal Procedure*, 272 So.2d 65,66 (Fla. 1972):

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.

[25] *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1973).

[26] *See* s. 925.11, F.S.; ch. 2001-197, L.O.F.

[27] *See Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853*, 807 So.2d 633 (Fla. 2001).

[28] *See Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A) (Postconviction DNA Testing)*, 857 So.2d 190 (Fla. 2003).

dissent ". . . this Court does not have jurisdiction to 'suspend' a provision of a lawfully enacted statute or to mandate that evidence . . . be maintained beyond the period the statute specifically states that the evidence is to be maintained."[29]

In 2004, the legislature further amended the law to extend the time period from two to four years and provided for expiration October 1, 2005.[30] In September 2004, the court amended its rule to reflect the statutory changes.[31] The court has amended the rule, once again, to extend the deadline from October 1, 2005, to July 1, 2006.[32]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Florida Bar has "adopted a legislative position calling for a permanent method for state inmates to seek DNA testing that could exonerate them."[33] The Bar has not taken a position on whether postconviction DNA testing should be made available to those who plead guilty or no contest.[34]

The Florida Innocence Initiative has stated that maintenance of evidence is the most critical aspect of preserving a defendant's right to DNA testing.[35]

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Not applicable.

[29] Justice Wells was joined by Justices Cantero and Bell. Comments of the Criminal Court Steering Committee, October 13, 2003, at 8 and 9 n.33, (citing Wells, J., dissenting in *Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A)*).
[30] *See* ch. 2004-67, L.O.F.
[31] *See* 884 So.2d 934.
[32] *See Amendments to Florida Rule of Criminal Procedure 3.853(D)*, SC05-1702 (September 29, 2005).
[33] Blankenship, G. "Bar supports permanent DNA reforms," *The Florida Bar News*, September 15, 2005.
[34] *Id.*
[35] Pudlow, J. "Momentum builds for extending DNA testing," *The Florida Bar News*, September 1, 2005.