HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 61 CS Postsentencing Testing of DNA Evidence
SPONSOR(S): Quinones and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 186

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Governmental Operations Committee	6 Y, 0 N, w/CS	Williamson	Everhart
2) Criminal Justice Committee	7 Y, 0 N	Cunningham	Kramer
3) Criminal Justice Appropriations Committee	4 Y, 0 N	DeBeaugrine	DeBeaugrine
4) State Administration Council		Williamson	Bussey
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 and expands those eligible to request DNA testing. Any person convicted of a felony and sentenced, not just those who claimed innocence, may petition the court for postconviction DNA testing. They may petition for the testing at any time following the date that the judgment and sentence is final. In addition, the bill requires the maintenance of physical evidence until the defendant's sentence is completed.

Application of the bill's provisions is retroactive to October 1, 2005.

The fiscal impact of the bill is indeterminate. Please see fiscal notes for further explanation.

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.

Safeguard individual liberty – The bill allows any person 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 timeframe for filing petitions for postconviction DNA (deoxyribonucleic acid) testing. Current law provides a four-year window for a person maintaining his or her innocence to file a postconviction motion seeking the testing of DNA evidence. The four-year window expired October 1, 2005.

Any person convicted of a felony and sentenced may petition the court for postconviction DNA testing at any time following the date that the judgment and sentence is final. As such, a person who pleads guilty or who maintains his or her innocence is eligible to petition the court for DNA testing. Current law only allows a person maintaining his or her innocence to petition the court for postconviction DNA testing.

The bill requires the maintenance of physical evidence until the defendant's sentence is completed. Governmental entities cannot dispose of the evidence prior to the defendant's completion of his or her sentence.

Application of the bill's provisions is retroactive to October 1, 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.[2]

If the trial court determines that the facts are sufficiently alleged, the state attorney must respond within 30 days pursuant to court order. The trial court must make a determination based on a finding of whether:

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

[2] The reasonable probability standard provides that the person would have been acquitted or received a lesser sentence if DNA testing was performed at the time of trial or at the time of the petition under the evolving forensic DNA testing technologies.

- 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;
- There is reliable proof that the evidence would be admissible at a future hearing; and
- 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, there is a 15-day period to file a motion for rehearing. 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 indigent. The Florida Department of Law Enforcement (FDLE) performs the DNA test pursuant to court order.[3] FDLE provides the test results 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;[4] or
- October 1, 2005.[5]

The law provides a catchall exception to the four-year time limitation. A person convicted at trial and sentenced can 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 requires preservation of physical evidence collected at the time of the crime if postconviction DNA testing is possible.[6] With the exception of death penalty cases, governmental entities maintain physical evidence for at least four years or until October 1, 2005.[7] Evidence in death penalty cases is preserved for 60 days after the execution of the sentence. Governmental entities can dispose of physical evidence earlier under certain conditions.[8]

Most recently, the governor issued Executive Order 05-160.[9] The order requires governmental entities in the possession of any physical evidence to preserve the evidence if DNA testing may be requested.

RIGHTS TO APPEAL, GENERALLY

Under current law, a convicted person has certain rights to appeal on direct appeal or on matters that are collateral to the conviction.[10]

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[3] *See* s. 943.3251, F.S.
[4] This is applicable solely in death penalty cases.
[5] Section 925.11(1)(b), F.S.
[6] Section 925.11(4), F.S.
[7] *See* s. 925.11(4), F.S.
[8] Section 925.11(4)(c), F.S., provides the conditions for early disposal of physical evidence. Any counsel of record, the prosecuting authority, and the Attorney General must receive notice prior to the disposition of evidence. 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 of the filing of a petition, the evidence may be disposed of, unless some other provision of law or rule requires its preservation or retention.
[9] The order was issued August 5, 2005.
[10] Article V, section 4(b) of the Florida Constitution conveys a constitutional protection of this right. *See Amendments to the Florida Rules of Appellate Procedure*, 696 So.2d 1103 (Fla. 1996).

DIRECT APPEALS AFTER TRIAL

Matters 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. It is a procedural bar that prevents defendants from raising issues on appeal not objected to at the trial level. The rule allows trial court judges to consider rulings carefully, perhaps correcting potential mistakes at the trial level.

In *State v. Jefferson*,[11] 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.[12]

APPEAL OR REVIEW AFTER A PLEA OF GUILTY OR NOLO CONTENDERE

Appeal rights are limited when a defendant pleads guilty or *nolo contendere* (no contest). Such a plea means a defendant chooses to waive the right to take his or her case to trial.[13]

In *Robinson v. State*,[14] the Florida Supreme Court reviewed the constitutionality of the statutory provision. The court upheld the statute making it clear that once a defendant pleads guilty the only issues for appeal are actions that took place contemporaneous with the plea. The court stated: "[t]here is an exclusive and limited class of issues which occur contemporaneously with the entry of the plea that may be the proper subject of an appeal. To our knowledge, they would include only the following: (1) subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea." These principles continue to control.

COLLATERAL REVIEW

Postconviction proceedings, also known as collateral review,[15] usually involve claims that:

- The defendant's trial counsel was ineffective;
- There is newly discovered evidence; and
- The prosecution failed to disclose exculpatory evidence.

The defendant must file a motion in the trial court where he or she was tried and sentenced.[16] 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.[17] If the trial court denies the motion for postconviction relief, with or without holding an evidentiary hearing, the defendant is entitled to appeal this denial to the District Court of Appeal with jurisdiction over the circuit court where the motion was filed.[18]

Motions for postconviction relief based on newly discovered evidence must be raised within two years of the discovery of such evidence.[19] The Florida Supreme Court has held that the two-year time limit

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[11] 758 So.2d 661 (Fla. 2000).
[12] *Id.* at 664 (citing *Amendments to the Florida Rules of Appellate Procedure, supra*, at 1104-1105).
[13] Section 924.06(3), F.S.
[14] 373 So.2d 898 (Fla. 1979).
[15] Procedurally, collateral review is generally governed by FLA. R. CRIM. P. 3.850.
[16] The motion must be filed within two years of the finalization of the defendant's judgment and sentence 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).
[17] *See* FLA. R. CRIM. P. 3.850(d).
[18] 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. In addition, 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).
[19] *See Adams v. State*, 543 So.2d 1244 (Fla.1989).

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*,[20] 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."[21]

A defendant is entitled to challenge a conviction and death sentence in three stages. First, the public defender or private counsel must 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.[22] Third, the defendant seeks a federal writ of *habeas corpus*.[23] 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 typically files a second or successive collateral postconviction motions 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 October 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

   Indeterminate. See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

[20] 773 So.2d 34 (Fla. 2000).
[21] *Id.* at 43. *See also Ziegler v. State*, 654 So.2d 1162 (Fla. 1995).
[22] Rules 3.850, 3.851 and 3.852, FLA. R. CRIM. P., control state collateral postconviction proceedings. Unlike a direct appeal, a collateral postconviction proceeding raises claims that are "collateral" to what transpired in the trial court. Consequently, such postconviction proceedings usually involve three categories of claims: ineffective assistance of trial counsel; 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.
[23] 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.

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,[24] 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:[25]

The FDLE has indicated that the costs of additional DNA tests could be as high as $725,073 if any additional analyses required by the bill are conducted in-house or as high as $2.1 million if the additional work is outsourced. The FDLE arrives at this calculation by assuming that 6% of inmates who pled guilty would petition the court for DNA testing of evidence. This would result in 3,483 additional DNA analyses[26]. The 6% assumption is based on the approximate percentage of inmates who are eligible under current law and have requested DNA testing. Current law only allows inmates who did not plead guilty to request DNA testing.

The FDLE then calculates need for additional resources of 4.8 FTE and $725,073 for salaries, expenses and additional lab equipment needed to process the estimated 3,483 additional cases. The $2.1 million upper estimate for outsourcing assumes $3,000 per analysis by a private lab.

FDLE staff indicates, however, that these two figures represent the upper extreme. There are a number of factors that could impact the assumption that 6% of the newly eligible inmates would actually request and be granted testing of DNA evidence:

- There is no evidence to suggest that inmates who admitted guilt would be as likely to request DNA testing as those who maintained their innocence throughout court proceedings.
- There is no way to know how many newly eligible inmates would have DNA evidence available to be tested. In addition to cases where there was never DNA evidence collected, local jurisdictions often destroy evidence once a sentence is imposed.
- According to FDLE staff, it has become common practice to test evidence containing DNA during the criminal investigation. It is not known whether courts would allow subsequent DNA testing of evidence that has already been tested if the initial test was conclusive.

Based on the necessity to make assumptions with very little supporting data, the fiscal impact on the FDLE is indeterminate.

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.

[24] 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.

[25] FDLE Fiscal Analysis of HB 61 by Representative Quinones, October 26, 2005.

[26] Estimated 58,060 inmates who pled guilty multiplied by 0.06.

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 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 that "[t]he 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[27] 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."

Changes to substantive law by court rules of procedure appear to violate the separation of powers provision of the Florida Constitution.[28]

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. 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.[29]

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.

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[27] *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).
[28] *Id.*
[29] *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1973).

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.[30] It provided a two-year 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.[31] 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.[32] The opinion of the court suspending the statutory deadline was a four to three decision. Justice Wells said in 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."[33]

In 2004, the legislature further amended the law to extend the period from two to four years and provided for expiration October 1, 2005.[34] In September 2004, the court amended its rule to reflect the statutory changes.[35] The court amended the rule, once again, to extend the deadline from October 1, 2005, to July 1, 2006.[36]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Florida Bar "adopted a legislative position calling for a permanent method for state inmates to seek DNA testing that could exonerate them."[37] The Bar took no position regarding the availability of postconviction DNA testing for those who plead guilty or no contest.[38]

The Florida Innocence Initiative contends that maintenance of evidence is the most critical aspect of preserving a defendant's right to DNA testing.[39]

FDLE recommends that the department receive notice at the time a motion for postconviction DNA testing is filed rather than when it is signed. FDLE staff could then assist the parties and expedite the testing process.[40]

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On October 19, 2005, the Governmental Operations Committee adopted a strike-all amendment and reported the bill favorably with Committee Substitute. The strike-all amendment authorizes postconviction DNA testing of any person convicted of a felony and sentenced, at any time, rather than limiting testing to those persons maintaining their innocence. The strike-all amendment removes the authorization for early disposal of physical evidence by governmental entities.

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[30] *See* s. 925.11, F.S.; ch. 2001-197, L.O.F.
[31] *See Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853*, 807 So.2d 633 (Fla. 2001).
[32] *See Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A) (Postconviction DNA Testing)*, 857 So.2d 190 (Fla. 2003).
[33] 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)*).
[34] *See* ch. 2004-67, L.O.F.
[35] *See* 884 So.2d 934.
[36] *See Amendments to Florida Rule of Criminal Procedure 3.853(D)*, SC05-1702 (September 29, 2005).
[37] Blankenship, G. "Bar supports permanent DNA reforms," *The Florida Bar News*, September 15, 2005.
[38] *Id.*
[39] Pudlow, J. "Momentum builds for extending DNA testing," *The Florida Bar News*, September 1, 2005.
[40] FDLE Analysis of HB 61, "Issues Related to FDLE," October 26, 2005.