The Florida Senate

Interim Report 2011-112 *October 2010*

Committee on Criminal Justice

EVIDENCE PRESERVATION FOR POSTSENTENCING DNA TESTING - REASSESSING CURRENT STATUTORY *REQUIREMENTS IN SECTION 925.11, F.S.*

Issue Description

The normal course of affairs in a law enforcement agency's evidence section can be described as a natural flow. Physical evidence, having been gathered during criminal investigations, comes in for preservation and retention while evidence that is no longer needed because the criminal case has "ended" is disposed of by the agency. This natural progression of the retention and disposition of evidence is inextricably linked to the flow of criminal cases through the justice system.

Some governmental entities responsible for retaining and preserving physical evidence gathered from crime scenes are experiencing an overflow of evidence in their safekeeping. They have physical evidence accumulating at unprecedented levels because they are keeping more of it, and they are keeping it for longer periods of time. The reason for keeping more physical evidence for longer periods of time, according to agency representatives, is because of the possibility that the evidence contains DNA. As a result of the overflow, the entities (primarily law enforcement agencies) have been forced to acquire costly additional secure storage space and refrigeration units, and expend more employee hours maintaining the evidence.

The agencies' physical evidence accumulation problem was brought to Senate staff's attention during the 2010 legislative session when Senate Bill 2522 was filed. In part, the bill was an attempt to ease the physical evidence accumulation problem in cases involving DNA evidence. Because the bill brought the problem to light, Senate staff initiated discussions about the issue with the stakeholders. Staff and the stakeholders decided to work together to find options for elected officials before the 2011 Legislative Session begins.

Background

It is safe to say that ten years ago, when Florida was debating its 2001 postsentencing DNA testing law, people had a certain amount of skepticism about, and perhaps resistance to the idea of DNA testing in cases where it was being used as evidence in postsentencing claims of innocence. Although the Innocence Project, the organization that relies upon DNA testing to assist people who claim their innocence after being convicted of a crime, had been founded in New York in 1992, and was having success in cases around the country, the Florida Innocence Initiative was just beginning to make its presence known in Florida.

During that time period, The Innocence Protection Act of 2000 was being debated in Congress. A few other state legislatures had passed or were considering postsentencing DNA testing bills. Convictions were being challenged in Florida courts based upon DNA testing, under the appellate legal theory of "newly discovered evidence." The Florida Supreme Court had received an Emergency Petition requesting that the Court adopt a Rule of Criminal Procedure that would clarify a statewide procedure by which challenges based upon DNA could be brought.

The Florida Legislature took up the matter of postsentencing DNA testing in 2001 and passed a law creating a statutory right to raise legal challenges claiming innocence.[1] The law has been amended twice since its passage, in 2003 and 2006. In order to fully understand the current physical evidence overflow problem some law

[1] Ch. 2001-97, Laws of Florida.

enforcement agencies are contending with, it is helpful to consider postconviction proceedings in cases where a plea is entered and the evolution of the postsentencing DNA testing law.[2]

Appellate Review of Criminal Cases Resolved by a Plea

A defendant who has been convicted of a crime 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.[3]

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 924.06(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 *directly* 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."

Postconviction proceedings, also known as collateral review, usually involve claims that the defendant's trial counsel was ineffective, claims of newly discovered evidence or evidence that could not have been discovered through the exercise of due diligence, 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 and considered in the trial court where the defendant was sentenced.

A defendant who enters a plea may file a motion for postconviction relief, based on collateral matters, within two years of the judgment and sentence becoming final in the case. Generally, the judgment and sentence in a plea case do not become final until the thirty days within which a direct appeal could be filed have passed and no direct appeal is filed. However, if there is a direct appeal, the judgment and sentence do not become final until the last appellate court to hear the direct appeal has upheld the judgment and sentence and issued its mandate.

As previously stated, 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.[4] This basis for collateral review is known as the "newly discovered evidence" theory. In order to grant a new trial, in addition to making the finding that the evidence was unknown and could not have been known at the time of trial through due diligence, the trial court must also find that the evidence is of such a nature that it would probably produce an acquittal on retrial.[5]

Motions for postconviction relief based on newly discovered evidence must be raised *within two years of the discovery* of such evidence.[6] 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

[2] This Report omits discussion of the application of the law or evidence retention in capital cases because evidence in cases in which the defendant is sentenced to death is retained for sixty days after the execution has been carried out. See s. 925.11(4)(b), F.S.
[3] *Amendments to the Florida Rules of Appellate Procedure*, 696 So.2d 1103 (Fla. 1996).
[4] *Fla. R. Crim. P. 3.850(b)*.
[5] *Torres-Arboleda v. Dugger*, 636 So.2d 1321 (Fla. 1994); *Jones v. State*, 709 So.2d 512 (Fla. 1998).
[6] *Adams v. State*, 543 So.2d 1244 (Fla.1989).

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."[7]

Regardless, a claim based upon newly discovered evidence can be brought at a time that is not precisely "calendar-driven," but rather, within two years of having made the discovery whenever that may be.[8]

An Overview of the 2001 Postsentencing DNA Testing Law

The postsentencing DNA testing law in Florida, as it existed from October 1, 2001 to October 1, 2003, applied in *all* criminal cases in which the defendant had been convicted and sentenced subsequent to a *trial*.[9] It provided for testing, if granted by the court, of physical evidence collected at the time of the crime investigation which would exonerate the person or mitigate the sentence.

The statute set forth a time limit within which a petition seeking testing had to be filed with the trial court. The time limitation was *either* two years from the date the judgment and sentence became final where no direct appeal was filed, within two years of the conviction being affirmed on direct appeal, within two years of collateral counsel being appointed in a capital case, *or* by October 1, 2003, whichever applicable date occurred later.[10] The petition could be filed *at any time* under the newly discovered evidence theory.[11]

Among other facts, the sworn petition was required to contain a statement that "*identification* of the defendant is a *genuinely disputed issue* in the case."[12]

Subsection (4) of s. 925.11, F.S., provided requirements for the *preservation of evidence* as follows:

> (4) Preservation of evidence.—
>
> (a) Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement shall maintain any physical evidence collected at the time of the crime *for which a postsentencing testing of DNA may be requested*.
>
> (b) Except for a case in which the death penalty is imposed, the evidence shall be maintained *for at least the period of time set forth in subparagraph (1)(b)1* [time limits for filing petition]. In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence.
>
> (c) A governmental entity may dispose of the physical evidence *before* the expiration of the period of time set forth in paragraph (1)(b) *if* all of the conditions set forth below are met.
>
> 1. The governmental entity *notifies* all of the following individuals of its intent to dispose of the evidence: the sentenced defendant, any counsel of record, the prosecuting authority, and the Attorney General.
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> 2. The *notifying entity does not receive*, within 90 days after sending the notification, either a copy of a petition for postsentencing DNA testing filed pursuant to this section or a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the time for filing it has expired.

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[7] See also, *Ziegler v. State*, 654 So.2d 1162 (Fla. 1995).
[8] *Sireci v. State*, 773 So.2d 34 (Fla. 2000); *Ziegler v. State*, 654 So.2d 1162 (Fla. 1995).
[9] Section 925.11(1)(a), F.S. (2001).
[10] Section 925.11(1)(b)1., F.S. (2001.
[11] Section 925.11(1)(b)2., F.S. (2001).
[12] Section 925.11(2)(a), F.S. (2001).

> 3. No other provision of law or rule requires that the physical evidence be preserved or retained. [emphasis added and clarification noted]

Briefly stated, an agency could dispose of physical evidence for which postsentencing DNA testing may be requested *prior to* the time limitations for a petition for testing to have been filed with the court *if* the notification provision set forth above was followed.

2003 Amendment

During the 2004 Legislative Session, the Legislature amended s. 925.11, F.S., 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.[13] The effect of the law was made retroactive to October 1, 2003. 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.[14]

By virtue of the Legislature extending the petition filing deadline to allow petitioners four years to request testing, the requirements related to preservation of evidence were similarly extended.[15] The possibility of disposing of physical evidence by use of the notice provision of the original statute remained intact.

2006 Amendment

Again in 2006, the Legislature addressed issues related to postsentencing DNA testing.[16] This amendment *eliminated the time limitations* within which a person had to file a petition seeking postsentencing DNA testing, allowing the filing or consideration of a petition "at any time following the date that the judgment and sentence in the case becomes final."[17]

It also *did away with the Notice provisions* whereby a governmental entity could dispose of physical evidence in a case after giving proper notice to interested parties. Subsection (4)(a) now simply states that a governmental entity "shall maintain any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested" (see testing may be requested "at any time following the date that the judgment and sentence in the case becomes final" in the paragraph above).[18]

Reading subsection (4)(a) together with subsection (4)(b) of s. 925.11, F.S., which states: "…a governmental entity may dispose of the physical evidence if the term of the sentence imposed in the case has expired…", it now appears as if the loss of the notice provision means that a governmental entity is required to maintain physical evidence until the end of a person's sentence. This view is certainly the conservative view. For an agency to construe the statute otherwise, it would have to somehow determine whether DNA testing "may be requested…at any time" on a particular piece of evidence.

The 2006 amendment also *expanded the pool* of people who could take advantage of postsentencing DNA testing to include those who enter a plea of guilty or nolo contendere to felony charges. However, in plea cases, the petition for DNA testing can only be filed if the facts upon which the petition is based were unknown at the time of the entry of the plea and could not have been ascertained by due diligence, or the physical evidence was not disclosed by the prosecutor.[19]

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[13] Chapter 2004-67, L.O.F.
[14] *Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A)(Postconviction DNA Testing)*, 884 So. 2d 934 (Fla. 2004).
[15] Chapter 2004-67, L.O.F.; *see also*, *Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A)(Postconviction DNA Testing)*, 884 So. 2d 934 (Fla. 2004) (approving similar extension language to rules of procedure for the court system).
[16] Chapter 2006-292, L.O.F.
[17] Section 925.11(1)(b).
[18] Section 925.11(4)(a), F.S.
[19] Section 925.12(1), F.S.

The 2006 amendment seems to *foreclose the likelihood of* not only *postsentencing DNA testing petitions* being filed but also many collateral challenges, in plea cases. This is because the 2006 amendment requires that an *inquiry* be made of the prosecutor, defense counsel and the defendant as to the disclosure and review of physical evidence in the case that contains DNA that may exonerate the defendant, before the court accepts the plea.[20] If such evidence exists but has not been tested, the statute provides for a postponement of the plea proceedings so that testing may occur.

The Florida Supreme Court also adopted a Rule that requires the judge to make the *inquiry before accepting a plea*.[21] The Rule, which mirrors the 2006 statute, states:

> (d) DNA Evidence Inquiry. Before accepting a defendant's plea of guilty or nolo contendere to a felony, the judge must inquire whether counsel for the defense has reviewed the discovery disclosed by the state, whether such discovery included a listing or description of physical items of evidence, and whether counsel has reviewed the nature of the evidence with the defendant. The judge must then inquire of the defendant and counsel for the defendant and the state whether physical evidence containing DNA is known to exist that could exonerate the defendant. If no such physical evidence is known to exist, the court may accept the defendant's plea and impose sentence. If such physical evidence is known to exist, upon defendant's motion specifying the physical evidence to be tested, the court may postpone the proceeding and order DNA testing.

Plainly stated, the court's inquiry should weed out cases where the issue of mistaken identity could later be raised. In practice, the court's inquiry leaves only "newly discovered evidence" or "undisclosed evidence" as a basis for filing a petition for DNA testing after a plea, as provided in s. 925.12, F.S.[22] By definition "newly discovered" or "undisclosed" evidence is not evidence that has been gathered during the investigation of the crime to which the defendant is entering a plea, and which is being retained by a governmental entity.

In theory, therefore, it could be said that the pre-plea inquiry by the court should have provided governmental entities approval for the disposition of physical evidence in plea cases, but it has not done so. Subsequent to the passage of the 2006 amendment, many law enforcement agencies are unsure about their authority to dispose of such evidence, or whether the agency is under a statutory obligation to maintain it, and if so, for how long. They are apparently also uncomfortable with any view of the meaning of the statute other than the conservative view, which avoids confronting questions about whether DNA testing "may be requested…at any time."[23] As a result, problems of both a fiscal and a physical (space) nature have begun to arise.

Findings and/or Conclusions

Physical Evidence Accumulation: Is There a Problem that Requires Legislative Action?

During the 2010 Legislative Session, Senate Bill 2522 was filed. It was a collaboration between the Florida Association of Police Chiefs and the Innocence Project of Florida. The bill was, in part, an attempt to amend s. 925.11, F.S., the postsentencing DNA testing statute to address physical evidence overflow issues being experienced by law enforcement agencies. Had the bill passed it would have drastically redefined current statutory requirements for governmental entities' preservation of physical evidence that may contain DNA.[24]

As a result of the physical evidence overflow issue coming to light, Senate staff met with stakeholders to discuss the problem in March 2010. It was decided that, together, the stakeholders would more thoroughly examine the issue during the 2010 Interim, to determine if an identifiable problem exists and, if so, to try to reach a consensus recommendation on how to fix the problem.

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[20] Section 925.12(2), F.S.
[21] Fla. R. Crim. P. 3.172(d).
[22] Section 925.12(2), F.S.
[23] Ss. 425.11(1)(b) and (4), F.S.
[24] In brief, the bill would have required retention of portions of bulky items likely to contain DNA in "serious crimes" cases. See Senate Bill 2522, 2010 Legislative Session.

A simple questionnaire was sent to the Clerks of Court and law enforcement agencies asking whether the preservation of evidence requirements as they appear in s. 925.11(4), F.S. (2006) – that the evidence be retained for as long as a sentenced defendant could file a petition seeking postsentencing DNA testing – has created demonstrable storage space or fiscal issues.[25] A summary of the results is as follows:

- 300 local police departments were surveyed by the Florida Police Chiefs Association and 280 responses were summarized by the Association in memo form. According to the memo, local police departments have seen at least a 30% increase in the volume of evidence being retained which the Association's memo directly attributes to the postsentencing DNA testing statute. This has created not only storage space and method problems but fiscal issues due to the amount of staff time spent researching the legal status of defendant's cases in order to determine if evidence disposal is statutorily permitted.
- Of the 26 Clerks of Courts that responded, 8 are currently experiencing evidence storage space or related fiscal issues (although some Clerks could predict that a problem may be on the horizon).
- Of the 11 County Sheriffs that responded, 7 reported storage or fiscal issues because of evidence accumulation much the same as police departments.
- Although the Florida Department of Law Enforcement does not normally retain evidence due to the nature of the agency's role in criminal investigations and therefore has not experienced the same problems as local agencies, when s. 925.11, F.S., was amended in 2006, FDLE's analysis of the bill mentioned a concern about the bill's likely problematic effect on local agencies' with regard to evidence retention.[26]

The accumulation of evidence appears to be attributable to two systemic factors: One, a 2006 statutory amendment to the postsentencing DNA testing statutes that eliminated the procedure by which agencies had been able to lawfully dispose of evidence prior to the end of a person's sentence, with confidence that it would not be needed for DNA testing at a later time; and two, the 2006 amendment provided for postsentencing DNA testing in felony cases where the defendant enters a plea, significantly increasing the pool of cases in which evidence has to be secured and preserved where, before, the evidence could be disposed of. Although the Legislature created a "safety-valve" judicial inquiry that should have provided authority for the disposition of evidence in the plea cases, it is not working.

Having determined that local governmental entities are experiencing a demonstrable problem due to DNA evidence retention, Senate staff began discussions with stakeholders in the criminal justice system to determine if some agreement could be reached about how to solve the problem.

How Can We Fix the Problem?

There are five major variables (and many combinations thereof) to consider in deciding how to approach the issue. These variables are shown below with the Florida approach indicated in parentheses. They are:

1) *Trial case or plea entered.* (Florida keeps evidence in trial and plea cases)
2) *Duration of preservation, event or calendar-driven.* (Florida keeps evidence for the length of sentence in all felony cases)
3) *Automatic retention or affirmative action required.* (Florida provides for automatic retention)
4) *Bulk evidence or sample.* (Florida provides for retention of "any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested")
5) *Enumerated types of cases treated differently than other types of cases.* (Florida keeps evidence in all felony cases)

[25] Responses on file with the Florida Senate Criminal Justice Committee.
[26] FDLE Fiscal Impact Statement dated October 26, 2005.

Conclusions from Meetings with Stakeholders

During the 2010 Interim, Senate staff conducted two meetings with stakeholders to discuss the variables listed above with a focus on how the state legislature might address the overflow of evidence currently being retained by local law enforcement agencies and Clerks of the Court. Included in the meetings and post-meeting discussions were representatives of The Florida Police Chiefs Association, the Innocence Project of Florida, the Florida Sheriff's Association, the State Attorneys, the Public Defenders, Capital Collateral Regional Counsel, the Florida Association of County Clerks, the Attorney General's Criminal Appeals Division, the Florida Department of Law Enforcement, the Regional Conflict Counsels, and the Florida Association of Criminal Defense Attorneys.

Focus on Science, Inter-Agency Communication and Training. The work began with some guidance from FDLE on scientifically-acceptable alternatives to preserving bulky items such as furniture. It was determined that there are methods of preserving potential DNA evidence from bulky items while being mindful of the expanding testing methods like extracting DNA from transferred skin cells. For example, it is perfectly acceptable for an agency to remove and retain the upholstered parts of a sofa ("skin") and discard the frame ("skeleton").

This topic reinforced the value of communication between agencies, particularly between the law enforcement agencies and the case prosecutors, in deciding what items are of evidentiary value and which are not. Some cases are simply not "DNA cases." Identity is not a contested issue in every criminal case. Communication between agencies on that question could help eliminate at least a portion of the overflow. It does not seem advisable to set forth in statute when and how a particular type of evidence should or could be preserved in a particular way. This is an arena where latitude should be given for professionals to exercise their judgment. However, along with the survey responses, the group discussion on this particular topic indicated there may be a need for on-going statewide training on handling evidence as it relates to current and future DNA science.

County Clerk Evidence Overflow Directly Related to Judge, Prosecutor Preference. The county clerks' representatives mentioned that it would be helpful to them if, after hearings and trials, the party that enters items into evidence would reclaim those items for preservation purposes. This would not only ease the burden of the clerks' evidence overflow but make it easier for the evidence to be located and reviewed in cases where litigation continues after a hearing or trial. The practice of reclaiming evidence or leaving evidence for the clerk to preserve seems to be a matter that varies from courtroom to courtroom, depending upon the judge or prosecutor's preference. Some practitioners believe that the physical evidence should remain with the official record of the hearing or trial, and so as a matter of course, the evidence in the courtroom for the clerk to retain.

The Notice Provision as a Mechanism for Evidence Disposition. The workgroup seemed to agree that local law enforcement agencies and the county Clerks do in fact have a problem with evidence accumulation. It was also assumed that the cause of the overflow of physical evidence must be related to the 2006 amendment of the postsentencing DNA testing law because that was the only recent change in the criminal law that addressed evidence disposition.

Since the 2006 amendment deleted the notice provision (see the discussion on pages 3-4 of this Report), staff presented draft notice provision language as a jumping-off point for discussion. Objections from the law enforcement perspective were related to the amount of employee time it requires to ascertain the identities and current addresses of the parties who need to be noticed of the pending disposition of evidence. Other concerns centered around whether extra effort should be made to see to it that incarcerated persons actually receive the Notice. There was discussion about enlisting the aid of the Department of Corrections in either perfecting personal service of the Notice or at least verifying the inmate's whereabouts.

Date-Certain Mechanism for Evidence Disposition Legally Problematic and Somewhat Confusing. Discussion then turned to the possibility of evidence retention until some date-certain directly related to the case becoming "final."

At the second meeting of the workgroup, it quickly became apparent that although there was a desire among the group members for the certainty element, determining the date upon which a case becomes "final" is not a simple matter, even among practitioners. Based upon the number of direct appeals and then collateral matters that might

be raised in a given case, "finality" can be a moving target. Law enforcement asserted that this approach might require more dedicated employee time than the notice provision and create even less certainty. However, they supported the idea of date-certain evidence disposition if appropriate language could be created.

State attorneys mentioned that this particular date-certain method of evidence disposal could lead to litigation that they advised should be avoided if possible. They also expressed the opinion that a person who truly contests criminal charges by arguing that improper identification has occurred is more likely to go to trial in the case, and therefore the evidence will automatically be preserved.

Although staff and other group members continued to try to perfect the date-certain language for several days after the second meeting, the potential legal pitfalls could not be overcome to such a degree that we were entirely certain of the viability of that approach.

Affirmative Action by Defendant for Retention of Evidence. The state attorneys suggested that the few defendants who enter a plea in order to avoid the risk of a trial, but who contend that they have been mis-identified, could make an official request that the evidence in the case be retained by the agency.

Discussion followed about the option of requiring that a defendant who contests the identity issue filing a request that the evidence be retained by a date certain. Objections to this idea centered around the difficulty incarcerated persons have in getting such documents filed, particularly without legal representation.

Linking Retention Schedule with Type of Crime, A Policy Shift. An option that did not seem agreeable to enough of the group members included tying the length of time evidence is retained to the type of crime the person pleads to having committed. Although this seems like a convenient way for agencies to determine a date upon which evidence can be disposed of, it raises the issue of the "value" of a person's incarcerative time. In other words, if Person A has a second-degree felony 10-year sentence, should that evidence be kept for a shorter period of time than Person B's evidence if he is serving a first-degree felony 15-year sentence? This approach was a big policy-shift and went beyond what was required to solve the evidence overflow problem.

Tackling policy issues upon which the Legislature seems settled, for example allowing postsentencing DNA testing in plea cases, and providing that all felony crimes be included in the postsentencing DNA testing law, seemed ill-advised and unnecessary in view of the particular problem the workgroup met to consider.

Ancillary Issue: Compliance by Judiciary in Making DNA Evidence Inquiry at Plea Hearing. The practitioners in the workgroup shared that judges on the criminal bench are not reliably making the inquiry suggested in statute and required by court rule, about the existence of DNA evidence in plea cases before the court accepts a plea.[27] This inquiry is designed to make postsentencing DNA testing in cases in which identity is truly an issue unnecessary by requiring full disclosure prior to the plea being entered. The inquiry reinforces the apparent intent of the Legislature by the very enactment of s. 925.12, F.S. Including plea cases in the postsentencing DNA testing statute (previously limited to trial cases only) was not intended to open the floodgates to postsentencing litigation, and the inquiry itself is a method by which the opening of the floodgates can be prevented.

The workgroup decided to pursue at least one of two approaches for improving this critical part of the postsentencing DNA testing system. First, the group members are seeking the aid of the Criminal Court Steering Committee and asking that the DNA evidence inquiry be included in all felony plea forms. The second approach discussed was the possibility of seeking a mandate from the Supreme Court of Florida that requires the trial courts to make the inquiry in all felony pleas. These particular judiciary-related endeavors may be further pursued by the workgroup members.

[27] Section 925.12(2)-(3), F.S. and Fla. R. Crim. P. 3.172(d).

Options and/or Recommendations

Senate staff recommends a two-pronged legislative approach toward alleviating the overflow of physical evidence in the safekeeping of law enforcement agencies and Clerk's offices throughout the state. Neither approach involves a policy shift but, rather a nuts-and-bolts solution to a nuts-and-bolts problem.

1) *Recommend Amending Statute to Provide Notice Prior to Disposal of Evidence for 2006-2010 Plea Cases.* In order to provide for the disposition of physical evidence in felony cases in which a defendant entered a plea of guilty or nolo contendere on or after July 1, 2006 but before October 1, 2011 (presumptive effective date), the governmental entity may dispose of the evidence if the governmental entity notifies all of the following individuals of its intent to dispose of the evidence: the sentenced defendant, any defense counsel of record and the prosecuting authority in the case. The sentenced person shall be given notice by personal service. The notice shall include the statutory language that sets forth the sentenced person's options.

   Within 90 days after serving the notification, if the governmental entity has not received either a copy of a petition for postsentencing DNA testing filed pursuant to s. 925.11, F.S., a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the time for filing it has expired, or an objection from the prosecuting authority, and no other provision of law or rule requires that the physical evidence be preserved or retained, it may then be disposed of.

   This first part of the two-pronged approach will enable agencies to dispose of physical evidence that has accumulated in plea cases since the 2006 amendment to the postsentencing DNA testing law. Although it creates a modified version of the notice provision that was deleted in that amendment, this is not viewed as a policy shift. This first prong simply solves a problem that is the result of unforeseen consequences that were outside the control of lawmakers.

   It is believed that the plea inquiry regarding DNA evidence, enacted in that 2006 amendment, was expected to be done by the courts and therefore, that agencies would be comfortable disposing of the physical evidence in plea cases. The court's inquiry was to be the "safety-valve" that allowed disposition of physical evidence without the agency giving notice. However, reliance on the inquiry provision is not proving to be a sure bet. The planned safety-valve is not effective because: 1) the inquiry is not always being made and, even if it is being made, agencies are not privy to it; and 2) agencies are simply not comfortable disposing of evidence that may contain DNA in forms that are more readily available than they were even 5 years ago, without a greater degree of certainty that the evidence will not be needed in the future.

   It will be within the local agency's prerogative to determine whether utilizing this first prong is a cost-effective measure for the agency. It will also ensure that proper and reliable notice is given to the sentenced person, thereby providing due process and bolstering the agency's confidence in the decision to dispose of the evidence.

2) *Recommend Defendant File Written Request for Evidence Retention in Plea Cases Going Forward.* In felony cases in which a defendant enters a plea on or after October 1, 2011, in order to have evidence retained by an agency he or she must file a written request that physical evidence collected at the time of the crime be retained by the governmental entity in possession of the evidence, because it contains DNA that could exonerate him or her, with the Clerk of the Court who shall forthwith provide a copy to the governmental entity in possession of the evidence and the prosecuting authority.

   The request must be filed no later than 30 days after the plea has been entered. Absent such a written request being filed, the governmental entity may dispose of the physical evidence in the case upon or after the 90th day after the plea was entered and the sentence imposed provided the governmental entity has received the written approval of the prosecuting authority in the case. The prosecuting authority may

challenge the request if it does not allege that the evidence sought to be retained contains DNA that could exonerate the sentenced person.

Prong two puts the responsibility on the party in whose interest it may be to have the evidence retained. It should not raise any issue about hardship on the sentenced person because the defense attorney is under an obligation to be available to him or her for thirty days after sentencing in order to file a Notice of Appeal if one will be filed in the case. The clerk is responsible for distributing copies of a request that evidence be held. It also protects the interest of the prosecutor by requiring his or her approval prior to evidence destruction.

The defense attorney may elect to have the client complete a written waiver with regard to any evidence retention issues, for the court file and for the agency in possession of the physical evidence, at the time of the plea. The waiver would be a natural part of the plea hearing, particularly if the DNA evidence inquiry is being made by the court, or if the inquiry has been incorporated into the county's plea form. Likewise, if the defendant is entering a plea in order to avoid a trial, and identity is truly an issue, the request for evidence retention could be filed during the plea hearing. These suggestions are obviously local issues that can be decided and implemented by the local authorities as they deem appropriate.

Although the interim workgroup did not reach a consensus on a solution for the local agency's issues with evidence overflow, the solution recommended in this report is a workable compromise and a reflection of the workgroup members' practical expertise.