

COMMENT

MODERN DAY CHÂTEAU D'IF IN FLORIDA? COLLECTING DUST ON THE SHELVES OF JUSTICE: POTENTIALLY EXCULPATORY DNA EVIDENCE WAITS FOR A TURN IN THE FLORIDA SUNSHINE

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I. INTRODUCTION

*"[T]he robot maybe is the judiciary"*¹

*"A year after the restoration of Louis XVIII, a visit was made by the inspector-general of prisons."*² In 1998 a Florida appellate court

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I would like to thank the faculty and staff of Stetson University College of Law, especially the Queen of Reference, Sally Waters, and Professor Jerome Latimer, a scholar dedicated to improving our system of justice. I would also like to thank the *Stetson Law Review*, especially my editors William C. Robinson, Jr. and Alison D. Clark.

This piece is dedicated to my parents, Florence R. and Donald F. Buchholz, who taught me, by their lives, how to recognize that which is just, that which is right, and that which needs to change, and to my children, Claudia Joy and Evan Daniel, who inspire me to try to teach, by my life, what is just, what is right, and what needs to change.

To God, who spoke through the minor prophet Micah and said: "He hath shewed thee, O man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?" *Micah* 6:8 (King James).

1. Natl. Inst. of J., *National Commission on the Future of DNA Evidence* <<http://www.ojp.usdoj.gov/nij/dnamtgtrans6/trans-c.html>> (last updated July 25, 2000) (emphasis added). Ronald Reinstein, the associate presiding judge of the Superior Court of Arizona, while chairing the Post-conviction Issues Working Group for the National Commission on the Future of DNA Evidence on July 25, 1999, stated, "I mean in our state, if I want to get it done as an individual judge, I'll get it done, and that is because the Supreme Court rulemaking power over, you know, trumps the legislation; but in some jurisdictions, that is just not going to happen evidently. It may not even happen, because as you say, the robot maybe is the judiciary." *Id.*

2. Alexandre Dumas, *The Count of Monte Cristo* 101 (David Coward ed., Oxford U. Press 1990) (originally published 1846) (emphasis added). Throughout this Comment, the Author refers to Alexandre Dumas's epic tale of unjust imprisonment to suggest that in many ways,

considered the post-conviction relief request of a prisoner named Wilton Dedge in *Dedge v. State*.³ “I do not know what reason government can assign for these useless visits; when you see one prisoner you see all—always the same thing—ill-fed and innocent.”⁴ Two of three appellate judges on the *Dedge* court affirmed the trial court’s denial of Dedge’s request.⁵ The court did not issue a majority opinion. Dedge contends he is innocent of the crimes for which he was convicted in 1984.⁶ “I must conscientiously perform my duty.’ . . . ‘Let us visit this one first.’”⁷ The lone dissenter in *Dedge*, Judge Winifred J. Sharp, wrote a three-page opinion that revisited the trial,⁸ explored a new scientific test, Polymerase Chain Reaction Deoxyribonucleic Acid (PCR DNA) analysis,⁹ considered the applicability of the new test to Dedge’s case,¹⁰ and criticized the majority’s application of a ticking two-year-time-bomb lurking within Florida’s post-conviction relief statute.¹¹ “[T]urning to the prisoner, ‘What do you demand?’ . . . ‘[I]f innocent, I may be set at liberty.’”¹² Since no DNA tests were available at the time of his 1984 trial, Dedge asks for DNA tests, now available, which could exonerate him.¹³

Unfortunately, forces, both evident and hidden, block his attempts. Florida needs a rule to supplement Rule 3.850,¹⁴ Florida’s

our so-called modern solutions to age-old social dilemmas, such as ensuring the innocent are not imprisoned, may not be so modern after all. Contrasting the events of this fictional account with a modern Florida case emphasizes the point.

3. *Dedge v. State*, 723 S.2d 322, 322 (Fla. Dist. App. 5th 1998) (Sharp, J., dissenting).

4. Dumas, *supra* n. 2, at 101 (emphasis added).

5. *Dedge*, 723 S.2d at 322 (Sharp, J., dissenting).

6. *Id.* “Dedge was arrested for offenses committed against [a woman], after she was sexually assaulted in her home.” *Id.*

7. Dumas, *supra* n. 2, at 102 (emphasis added).

8. 723 S.2d at 322–323 (Sharp, J., dissenting). Judge Sharp lists the evidence at trial as follows: a hair that may or may not have belonged to Dedge, a so-called jailhouse confession to another inmate, the “testimony” of a scent hound who was 60% accurate, and the testimony of the victim who had previously identified Dedge’s brother. *Id.*

9. *Id.* at 323. Judge Sharp recognized a unique value of PCR DNA analysis — its ability to access the DNA in degraded samples. *Id.*

10. *Id.* at 324. Since this was a stranger-on-stranger crime, if DNA test results show an “absence” of Dedge’s DNA, it could be reasoned that Dedge was not at the crime scene. This could absolve Dedge of guilt. *Id.*

11. Fla. R. Crim. P. 3.850 (1999 & Supp. 2000); *Dedge*, 723 S.2d at 324 (Sharp, J., dissenting). Judge Sharp calls the majority’s reading of the two-year time limit in Rule 3.850 “harsh . . . under the circumstances of this case.” *Dedge*, 723 S.2d at 324 (Sharp, J., dissenting).

12. Dumas, *supra* n. 2, at 103 (emphasis added).

13. *Dedge*, 723 S.2d at 324 (Sharp, J., dissenting). Judge Sharp points out that the test results could lead to a pardon or other remedy. *Id.*

14. Fla. R. Crim. P. 3.850.

Post-conviction Relief Rule; an archaic Rule that is “virtually useless to defendants whose evidence of actual innocence surfaces years after trial.”¹⁵ For some, evidence of actual innocence may lay on the shelf of an evidence locker, in the custody of the State of Florida. Years earlier, the prosecution may have used this evidence to convict the defendant. Now, a new mode of “communication” with DNA, PCR DNA analysis, can reveal new information about that same evidence.¹⁶ This new information could be probative of a defendant’s innocence.¹⁷ Yet, even if a court were persuaded, the judiciary can cite no rule that would allow a Florida court to retrieve the evidence years after trial and perform a DNA analysis. The judiciary cannot legislate the substantive right to attain the evidence for testing.¹⁸ Since the legislature is silent, there is no method in Florida to get the evidence out of the storage locker and into a laboratory for testing. It is evident that Florida’s method for providing relief for movants like Mr. Dedge, the Rule 3.850 motion, is inadequate.¹⁹

It is also evident that Florida’s elected group capable of eliminating that inadequacy, the legislature, is resistant.²⁰ The reason why that resistance is so tenacious is hidden; hidden in judicial dicta and legislative history is an opportunistic concept, finality, which has crippled justice.²¹ There is considerable resistance to the idea that a final adjudication of guilt may not be final.

A modern-day prisoner faces the same dilemma as Dantès in *The Count of Monte Cristo* who said, “*I have committed no crime. Are there any magistrates or judges at the Château d’If?*”²² The reply came from his jailer, who said, “*There are only . . . a governor, a*

15. Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims after Herrera v. Collins*, 71 Temp. L. Rev. 489, 517 (1998).

16. *Infra* pt. II.

17. *Infra* pt. VII.

18. See Fla. Const. art. II, § 3 (“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”); *In re Fla. R. of Crim. P.*, 272 S.2d 65, 66 (Fla. 1972) (“The Revised Criminal Rules of Procedure describe the machinery by which substantive rights are protected and enforced. They are within the purview of the term ‘practice and procedure’ as used in Fla. Const., art. V, § 3, F.S.A.”). “[S]ubstantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property.” *Id.* at 66.

19. *Infra* pt. VI.

20. *Infra* pt. VII.

21. *Infra* pt. VIII.

22. Dumas, *supra* n. 2, at 65 (emphasis added).

garrison, turnkeys, and good thick walls.”²³ It is this mentality that forces exasperated defense attorneys to file Section 1983 claims in federal court in order to gain access to DNA evidence.²⁴ It is that mentality that prompted prominent attorney, Barry C. Scheck, when referring to one of “*those states*”²⁵ like Florida, to explain the process of obtaining evidence in the following way:

[Y]ou send them a letter saying, Please don’t throw away the evidence, the evidence manager writes us back and says, I’m not listening to you. I don’t care what you say. We’ll do whatever we want. We will destroy it whenever we want, and we don’t recognize any need to preserve this, or do anything about it.²⁶

It is that mentality that prompted Senator Patrick Leahy (D-Vt.) to introduce a bill in the United States Senate which would require states to “preserve all biological material secured in connection with a State criminal case” for a time comparable to the Federal law.²⁷

23. *Id.* (emphasis added).

24. Professor Barry C. Scheck of Cardozo Law School, who is a member of the Post-conviction Issues Working Group for the National Commission on the Future of DNA Evidence, stated at the July 25, 1999, meeting that “[y]ou have to go into federal court and sue them. That is what we are doing now, we are going to federal court and filing 1983 actions.” Natl. Inst. of J., *supra* n. 1, at 10. Professor Scheck is referring to 42 U.S.C. § 1983 (1994 & Supp. 1999), which states, in part,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Brisson v. Tester, 1994 WL 709401 at *5 (E.D. Pa. Dec. 21, 1994), discusses Section 1983 claims. “[A Section] 1983 cause of action has two elements: (1) a federally protected right is implicated and (2) the defendant’s actions caused the plaintiff to be deprived of that right.” One of Brisson’s Section 1983 claims was a deprivation of due process claim against the Board of County Commissioners, which denied funding for DNA testing. *Id.* at *22. The *Brisson* court found that Brisson had alleged a viable claim and refused to dismiss the claim. *Id.* at *25. The request for the DNA testing in *Brisson* was not in the form of a post-conviction motion. *See id.* at *3 (Brisson requested the tests pre-trial, and his request was denied).

25. Natl. Inst. of J., *supra* n. 1, at 10 (emphasis added).

26. *Id.*

27. Sen. 2073, 106th Cong. § 103 (2000). This bill was introduced on February 10, 2000, as *The Innocence Protection Act of 2000*. *Id.* at § 103(1)(a).

To be fair, this is not a mentality unique to Florida.²⁸ But it is a Florida case that has become the Congressional poster child for those wrongly imprisoned.²⁹ We should be wary, because behind every poster child lies a campaign. The campaign here is a simple one. It goes as follows: You, the several states, will keep any biological crime scene material, or we will cut funding for your laboratories.³⁰ You, the several states, will overlook any time limits your rules may contain when a prisoner requests DNA tests.³¹ If you, the several states, do not drop the time limits in your rules, not only will we permit defendants to name the state as a party in a civil suit, we will remove all the cloaks of executive and judicial immunity that your state officers enjoy. In other words, we will let defendants sue your state for putting time limits in the rules and sue your governor and your judges for allowing the time limits to bar the defendants' claims.³² Finally, you, the several states, will provide a forum where state prisoners can make claims of actual innocence, or we will do it for you. We will declare that you have not provided any procedures for these defendants unless your state's highest court will review these cases. Then we will take these

28. Natl. Inst. of J., *supra* n. 1, at 10 (specifically mentioning Missouri and Louisiana). Professor Scheck said,

The State of Missouri, the [S]tate of Louisiana, the State of Florida; and, you know, there [are] other states where we just haven't even heard from . . . those states [that] are aggressively resisting any effort to even find the evidence in cases would be plainly exculpatory. And we are taking them to court.

Id.

29. Sen. 2073, 106th Cong. at § 101(8).

For example, in *Dedge v. Florida*, the court without opinion affirmed the denial of a motion to release trial evidence for the purpose of DNA testing. The trial court denied the motion as procedurally barred under the 2-year limitation on claims of newly discovered evidence established by the State of Florida.

Id. (citation omitted) (emphasis added).

30. Sen. 2073, 106th Cong. at § 103(b)(D)(i), (c)(D)(i). For both federal and state trials, the State will need to "preserve all biological material secured." *Id.* at § 103(c)(D)(i). This would be a new requirement under the DNA Identification Grant Program. *Id.* at § 103(a).

31. *Id.* at § 104(b). "No State shall rely upon a time limit or procedural default rule to deny a person an opportunity to present noncumulative, exculpatory DNA results in court, or in an executive or administrative forum in which a decision is made in accordance with procedural due process." *Id.*

32. *Id.* at § 104(c). "REMEDY – A person may enforce subsections (a) and (b) in a civil action for declaratory or injunctive relief, filed either in a State court of general jurisdiction or in a district court of the United States, naming either the State or an executive or judicial officer of the State as a defendant. No State or State executive or judicial officer shall have immunity from actions under this subsection." *Id.*

claims, provide the relief you refuse to provide, and leave you to defend your lawsuits.³³ That is quite a campaign.

What could provoke such a campaign? Consider the words of one Justice of the United States Supreme Court who recognizes that in some cases, at the time of trial, there is “the possibility that a distorted record will cause a jury to convict a defendant of a crime he did not commit.”³⁴ Consider the words of a Florida judge who wonders, “What price can be put on one’s freedom for one day, much less years?”³⁵ Yet, why is the campaign so intrusive and why feature a Florida case? The intrusion is necessary, because the doctrine of finality prohibits the innocent from revealing proof of their innocence.³⁶ Florida’s highest court recently reaffirmed the edict that “[t]he doctrine of finality is a necessary and strong thread that runs through the fabric of our judicial system.”³⁷ The doctrine of finality is also a thread in a web that keeps the innocent trapped for years. Maybe a Florida case became the poster child for this campaign because in Florida, from the judiciary to the legislature, there lingers the belief that “the doctrine of finality should be given great deference and should be an important consideration in determining whether a proceeding will be reopened.”³⁸ Should not “the quest for

33. *Id.* at § 405(2). “For purposes of paragraph (1), if the highest court of a State has discretion to decline appellate review of a case or a claim, a petition asking that court to entertain a case or a claim is not an available State court procedure.” *Id.* This bill is proposing an amendment to 28 U.S.C. § 2254(c) (1994 & Supp. 1999). According to Section 2254, the federal habeas statute, a prisoner’s habeas petition will have standing in federal court if there is no other available state court procedure. 28 U.S.C. § 2254(b)–(c).

34. *Taylor v. Ill.*, 484 U.S. 400, 431 (1988) (Brennan, J., dissenting).

35. *Steele v. Kehoe*, 724 S.2d 1192, 1195 (Fla. Dist. App. 5th 1998) (Sharp, J., specially concurring). The Fifth District struggled with the Rule 3.850 time limitation. Steele was convicted of murder. He said his attorney “failed to timely file” a Rule 3.850 motion. *Id.* at 1193. The court certified the issue to the Florida Supreme Court as follows:

UNDER THE FACTS OF THIS CASE, IS IT APPROPRIATE TO ORDER A BELATED HEARING IN ORDER TO DETERMINE WHETHER THE ATTORNEY WAS IN FACT RETAINED TO FILE A POST-CONVICTION MOTION AND, IF SO, TO DETERMINE THE VALIDITY OF THE ISSUES THAT DEFENDANT ASSERTS SHOULD HAVE BEEN RAISED IN SUCH MOTION?

Id. at 1195.

36. A final judgment is “[a] court’s last action that settles the rights of the parties and disposes of all issues in controversy.” *Black’s Law Dictionary* 847 (Bryan A. Garner ed., 7th ed., West 1999).

37. *Swafford v. State*, 679 S.2d 736, 740 (Fla. 1996) (Harding, J., specially concurring).

38. *Id.*

truth and the fair adjudication of guilt or innocence” trump this doctrine?³⁹

“*I know it is not in your power to release me, but you can plead for me . . . that is all I ask.*”⁴⁰ Judge Sharp’s dissenting opinion in *Dedge* is a plea for help.⁴¹ Some ask to unlock the shelves of justice to test potentially exculpatory evidence. Some are content to risk federal intrusion into our state process, hoping the intruders will fail. Some ask for new state laws providing post-conviction relief not only to maintain state control in this area, but because it is the right thing to do. Others are content with the status quo. “*The door closed, and Dantès advanced with outstretched hands until he touched the wall; he then sat down in the corner until his eyes became accustomed to the darkness.*”⁴²

II. “THE SINGLE MOST IMPORTANT ADVANCE IN
FORENSIC SCIENCE SINCE THE DISCOVERY OF
FINGERPRINTS 100 YEARS AGO”⁴³

Advocates introduce evidence from DNA tests to connect genetic material to a suspect⁴⁴ or to demonstrate that certain genetic material could not come from a suspect.⁴⁵ This is done by comparing biological crime scene evidence with a suspect’s biological samples.⁴⁶ The underlying premise in this process is that each person can be

39. *Taylor*, 484 U.S. at 419 (Brennan, J., dissenting). “Criminal discovery is not a game. It is integral to the quest for truth and the fair adjudication of guilt or innocence.” *Id.* “I would not permit the doctrine of finality to trump the opportunity of a death-sentenced defendant to have a claim of newly discovered evidence reviewed by a court to determine its merits where the claim is properly brought.” *Swafford*, 679 S.2d at 740 (Harding, J., specially concurring) (citation omitted).

40. *Dumas*, *supra* n. 2, at 104 (emphasis added).

41. *Dedge*, 723 S.2d at 322–324 (Sharp, J., dissenting).

42. *Dumas*, *supra* n. 2, at 69 (emphasis added).

43. Anne Krueger, *DNA Offers Biological Body of Evidence; Genetic Testing a Powerful Tool to Convict or Exonerate*, S.D. Union-Trib. B1 (Jan. 31, 1999) (available in 1999 WL 4049918) (quoting Dwight Adams, FBI Scientific Analysis Chief) (emphasis added).

44. *See U.S. v. Hicks*, 103 F.3d 837, 844 n. 7 (9th Cir. 1996) (“RFLP . . . DNA testing . . . seek[s] to establish a statistical ‘match’ between a sample and a particular individual”).

45. *Id.* at 845. “PCR testing is generally not used as a method to establish a statistical ‘match’ between a sample and an individual, but, rather, is used as a technique to exclude certain individuals as possible contributors to a particular sample.” *Id.*

46. Albert M.T. Finch, III, “*Oops! We Forgot to Put It in the Refrigerator*”: *DNA Identification and the State’s Duty to Preserve Evidence*, 25 John Marshall L. Rev. 809, 812 (1992). “[L]aboratory technicians compare biological samples taken from a suspect with biological samples taken from the crime scene and determine whether there is a match.” *Id.* at 813.

identified by their DNA “fingerprints.”⁴⁷ A person cannot change his or her DNA,⁴⁸ and the DNA of every cell in a given person is the same.⁴⁹ Except for identical twins, the DNA sequence of each human being is unique.⁵⁰ Therefore, if a person leaves some of his or her biological material at a crime scene, the uniqueness of his or her DNA will tie that biological material to that person.⁵¹

A. The Science of DNA

Deoxyribonucleic acid, or DNA, is a molecule made up of two polynucleotide chains.⁵² A nucleotide is a sugar molecule + a phosphate molecule + a base.⁵³ The following are the only four possible bases: adenine (A), guanine (G), cytosine (C) and thymine (T).⁵⁴ The bases of the two nucleotide chains link together in a ladder-like structure.⁵⁵ Base C always pairs with base G, and base T always pairs with base A.

The chain contains the information that transmits traits or characteristics. The chain in humans is very long, consisting of three billion base pairs. Portions of the chain are said to be the gene for a characteristic, such as eye color.⁵⁶ Other portions of the chain

47. See Howard Coleman & Eric Swenson, *DNA in the Courtroom: A Trial Watcher's Guide 2* (Dwight Holloway & Teresa Aulinkas eds., GeneLex Press 1994) (“Alec Jeffreys, a geneticist at the University of Leicester . . . called the process he invented ‘DNA fingerprinting’”).

48. David F. Betsch, *DNA Fingerprinting in Human Health and Society* <http://www.accessexcellence.org/AB/IWT/DNA_Fingerprinting_Basics.html> (accessed July 25, 2000). “[DNA] cannot be altered by any known treatment. Consequently, DNA fingerprinting is rapidly becoming the primary method for identifying and distinguishing among individual human beings.” *Id.*

49. Eric S. Grace, *Biotechnology Unzipped: Promises and Realities* 17 (Joseph Henry Press 1997).

50. Dr. Eric S. Lander, *Use of DNA in Identification* <http://www.accessexcellence.org/AB/BA/Use_of_DNA_Identification.html> (accessed July 25, 2000).

51. *Id.* “Should you choose to leave your DNA sequence behind here in some form in some biological tissue, in principle, I ought to be able to look at it and by its uniqueness know whose it is.” *Id.*

52. Gordon J. Coleman & David Dewar, *The Addison-Wesley Science Handbook* 109–110 (Helix 1997).

53. *Webster's New World Dictionary of Science* 202 (David Lindley & T. Harvey Moore eds., 2d ed., MacMillan Co. 1998) [hereinafter *Webster's*].

54. Coleman & Dewar, *supra* n. 52, at 110.

55. *Webster's*, *supra* n. 53, at 202.

56. Natl. Research Council, *The Evaluation of Forensic DNA Evidence* 13 (Natl. Acad. Press 1996). “A *gene* is a stretch of DNA, ranging from a few thousand to tens of thousands of base pairs, that produces a specific product, usually a protein. . . . The gene product may be detected by laboratory methods, as with blood groups, or by some visible manifestation,

transmit no information.⁵⁷ The term “locus” refers to the physical location of the portion on the DNA molecule.⁵⁸ “Polymorphism” occurs in both the portions of the chain that transmit information and the portions that transmit no information.⁵⁹ “Polymorphism” refers to the fact that in any given population, the sequence of base pairs at any particular loci along the chain will differ.⁶⁰

The frequency with which the most common sequence in the human population will appear at the same loci is less than 0.6.⁶¹ Forensic scientists refer to a group of analyzed loci submitted to identity testing as a DNA profile.⁶² It is also called DNA fingerprinting.⁶³

B. From RFLP to PCR

DNA identity testing examines the polymorphic sites on the DNA molecule.⁶⁴ DNA is extracted from biological crime scene evidence such as semen, blood, hair, and saliva.⁶⁵ Then, scientists usually perform one of two tests.⁶⁶ The first test is Restriction Fragment Length Polymorphism (RFLP).⁶⁷ The RFLP result is

such as eye color.” *Id.* (emphasis in original).

57. *Id.* at 13. “Genes are interspersed among the rest of the DNA and actually compose only a small fraction of the total. Most of the rest has no known function.” *Id.*

58. *Id.* at 216.

59. Coleman & Swenson, *supra* n. 47, at 34.

60. Natl. Research Council, *supra* n. 56, at 217.

61. *Id.*

62. *Id.* at 14.

63. Sean Henahan, *An Interview with DNA Forensics Authority Dr. Bruce Weir*, William Neal Reynolds Professor of Statistics and Genetics, North Carolina State University <http://www.accessexcellence.org/WN/NM/interview_dr_bruce_weir.html> (accessed July 25, 2000).

64. William Bains, *Biotechnology from A to Z* 128 (2d ed., Oxford U. Press 1998).

65. Grace, *supra* n. 49, at 51.

66. Coleman & Swenson, *supra* n. 47, at 36. “If intact (high molecular weight) human DNA is present in sufficient amounts, RFLP testing can proceed. If the DNA is degraded, or present in minute amounts, PCR testing is used.” *Id.*; Telephone Interview with Debbie Glidewell, Senior Forensic Scientist, Palm Beach Sheriff’s Crime Lab., West Palm Beach, Fla. (Sept. 21, 1999).

67. Bains, *supra* n. 64, at 340. RFLP is a method to find variations in the length of a particular locus. *Id.*

The term refers only to the way of detecting the variant, which is by the use of the very specific DNA-cutting enzymes called restriction enzymes. The essence of an RFLP is that one variant DNA is cut by a particular enzyme at one site, the other is not. This means that the fragments produced by that enzyme of those DNAs have different lengths.

Id. RFLP is also referred to as VNTR (Variable Numbers of Tandem Repeats). See Natl. Research Council, *supra* n. 56, at 252 (Under RFLP, it refers to VNTR).

analogous to a unique “bar code” for each individual.⁶⁸ This bar code can then be compared with the bar code of a suspect. If the pattern of the two bands are similar, it is termed a match, or an inclusion.⁶⁹ If the two bands differ, it is termed a nonmatch or an exclusion.⁷⁰ The main drawbacks of RFLP testing are twofold.⁷¹ First, RFLP requires a fresh sample.⁷² Second, the sample must be at least the size of a dime.⁷³ This may not always be feasible.⁷⁴

The second test is PCR, which stands for Polymerase Chain Reaction.⁷⁵ For PCR, a probe isolates a particular loci.⁷⁶ Then PCR amplifies that loci of the DNA like a “genetic photocopy machine.”⁷⁷ This “multiplied” sample can then be compared with the sample from a suspect.⁷⁸ The main drawback of PCR is the possibility of sample contamination.⁷⁹ Contamination by anyone from the crime

68. Grace, *supra* n. 49, at 51.

69. Natl. Commn. on the Future of DNA Evid., *Postconviction DNA Testing: Recommendations for Handling Requests* 28 (Sept. 1999).

70. *Id.* at 29.

71. Charles M. Strom, *Genetic Justice: A Lawyer's Guide to the Science of DNA Testing*, 87 Ill. B.J. 18, 20 (Jan. 1999).

72. Ann E. Donlan, *State Geared for DNA Tests; Certified Boston Lab Already in High Demand*, Boston Herald 3 (Feb. 3, 1999) (available in 1999 WL 3389224). Joseph Valaro of the Boston Police Crime Lab said, when referring to DNA samples, that they “must be ‘extremely pristine for RFLP to work.’” *Id.*

73. *Id.*; John Schwartz, *How Lab Sleuths Use DNA*, Austin Am.-Statesman C1 (Aug. 22, 1998) (available in 1998 WL 3622503); Strom, *supra* n. 71, at 20.

74. Finch, *supra* n. 46, at 819 (“Another factor limiting the reliability of DNA testing results is the apparent difficulty in collecting a sufficient amount of biological evidence to perform a valid test. DNA analysis requires law enforcement personnel to take a certain minimum amount of usable biological material from the crime scene in order to obtain a valid result” (footnote omitted)); see *infra* n. 94 (explaining why this is not always feasible).

75. Seung Yon Rhee, *Kary B. Mullis (born December 28, 1944), Access Excellence about Biotech* <http://www.accessexcellence.org/AB/BC/Kary_B_Mullis.html> (accessed July 25, 2000). Kary Mullis conceived PCR “while cruising in a Honda Civic on Highway 128 from San Francisco to Mendocino.” *Id.* In 1993 he won the Nobel Prize in chemistry for its invention. Access Excellence, *Biotechnology: 1977–Present: The Dawn of Biotech* <<http://www.accessexcellence.org/AB/BC/1977-Present.html>> (accessed July 25, 2000).

76. Bains, *supra* n. 64, at 127.

77. Ryan McDonald, *Juries and Crime Labs: Correcting the Weak Links in the DNA Chain*, 24 Am. J.L. & Med. 345, 351 (1998); see Grace, *supra* n. 49, at 51 (referring to the PCR analysis as “the DNA copier”).

78. Bains, *supra* n. 64, at 128.

79. Telephone Interview with Dr. Bruce J. Cochrane, Prof. of Biology, Dir., Interdisciplinary Stud. Program, U. of S. Fla. (Sept. 9, 1999).

scene to the laboratory can result in *false matches*⁸⁰ or *false exclusions*.⁸¹

Contamination resulting in false matches and false inclusions may occur by inadvertently mixing even a minute amount of extraneous DNA with the forensic sample.⁸² Therefore, when the probe isolates a particular loci, it may isolate someone else's DNA loci.⁸³ If by coincidence the loci on the inculpatory biological evidence matches a suspect, a false match occurs, even if the suspect was not at the crime scene.⁸⁴ On the other hand, if a few stray molecules mix with the forensic sample from, for instance, a detective sneezing on the sample, the probe might pick up the detective's DNA.⁸⁵ Then when this DNA is replicated and tested, it would be the "profile" of the perpetrator.⁸⁶ Therefore, even if a suspect was the perpetrator, he or she would be falsely excluded.⁸⁷

Testing at multiple loci decreases these risks.⁸⁸ Handling evidence carefully at the crime scene also decreases these risks.⁸⁹ Despite these risks, confidence in DNA profiling in the scientific community is high.⁹⁰ According to Dr. Bruce Weir, a noted population genetics specialist, "There are very few people who have thought about and examined the issues carefully who remain critical

80. See Natl. Research Council, *supra* n. 56, at 83. ("A false match could occur if the genetic type of the contaminating materials by chance matched the genetic type of a principal (such as a suspect) in the case").

81. *Id.* at 51.

82. *Id.* at 23. "If the contaminating DNA is present at a level comparable to the target DNA, its amplification can confound the interpretation of typing results, possibly leading to an erroneous conclusion." *Id.*; Telephone Interview, *supra* n. 66.

83. Natl. Research Council, *supra* n. 56, at 23; Telephone Interview, *supra* n. 66.

84. Natl. Research Council, *supra* n. 56, at 83–84.

85. Telephone Interview, *supra* n. 66. The Author, along with a forensic scientist, considered various hypothetical scenarios. Natl. Commn. on the Future of DNA Evid., *What Every Law Enforcement Officer Should Know about DNA Evidence* <<http://www.ncjrs.org/pdffiles1/nij/178240.pdf>> (accessed July 11, 2000).

86. Telephone Interview, *supra* n. 66.

87. *Id.*

88. Natl. Research Council, *supra* n. 56, at 83.

89. See Natl. Commn. on the Future of DNA Evid., *supra* n. 85 (listing the precautions one should take to avoid contamination of DNA evidence).

[1.] Wear gloves. Change them often. [2.] Use disposable instruments or clean them thoroughly before and after handling each sample. [3.] Avoid touching the area where you believe DNA may exist. [4.] Avoid talking, sneezing, and coughing over evidence. [5.] Avoid touching your face, nose, and mouth when collecting and packaging evidence. [6.] Air-dry evidence thoroughly before packaging. [7.] Put evidence into new paper bags or envelopes, not into plastic bags. Do not use staples.

Id.

90. Henahan, *supra* n. 63.

of DNA profiling.⁹¹ The value of PCR DNA analysis is already recognized by many forensic experts in Florida.⁹² The Florida DNA database laboratories are currently in a transition stage from RFLP to PCR testing.⁹³

PCR eliminates the following drawbacks inherent in RFLP testing: sample size and sample age. With PCR, scientists can access genetic information that RFLP cannot access because of the size or age of the sample.⁹⁴ In particular, PCR can take a very small sample, even one cell of genetic material, and replicate the cell until the requisite amount of DNA is produced.⁹⁵ In addition, sample age is not a problem for PCR.⁹⁶ Scientists can take genetic material from a ten-year-old murder case, or a three million year-old leaf, and replicate more than enough DNA material that is “highly informative.”⁹⁷

III. A VISIT FROM A FAIRY GODMOTHER⁹⁸

In some cases, although investigators collected genetic material at the crime scene, it was not possible to utilize the material due to the lack of DNA technology.⁹⁹ Performing PCR analysis on the genetic material in these cases would be like a fairy godmother waving her wand. A formerly useless piece of genetic evidence would suddenly have the potential to be evidence of a “newly acquired exculpatory character.”¹⁰⁰ This is, because the first, and still widely used, forensic DNA test, RFLP, was limited to cases with fresh samples of the requisite size.¹⁰¹ The newer PCR test eliminates

91. *Id.*

92. Telephone Interview with David Coffman, Fla. DNA Crime Lab Sec. Supervisor, Fla. Dept. of L. Enforcement (Oct. 11, 1999).

93. *Id.*

94. John Gibeaut, *Ruling Every Which Way, Courts Cautiously Explore the Strange, New Tests for DNA*, 84 ABA J. 40 (Apr. 1998). “PCR is an important tool for law enforcement officers who aren’t always lucky enough to have an obliging criminal leave behind a warm pool of blood.” *Id.*

95. McDonald, *supra* n. 77, at 351.

96. Mary V. Ashley, *Molecular Conservation Genetics*, 87 Am. Sci. 28 (Jan. 1, 1999) (available in 1999 WL 3555336). PCR technology can even be used on dried museum skins. *Id.*

97. Telephone Interview, *supra* n. 79.

98. This is a reference to *Cinderella* and her transformation when her fairy godmother waved her magic wand. *Cinderella* (Golden Bks. Staff ed., Golden Bks. Publ. Co. 1999).

99. *Dedge*, 723 S.2d at 324 (Sharp, J., dissenting).

100. Finch, *supra* n. 46, at 826.

101. Gibeaut, *supra* n. 94, at 40.

these obstacles; consequently, these cases may now be ripe for PCR DNA analysis.¹⁰²

This significant advance is vital in the following two scenarios: Where genetic evidence was collected at the crime scene, but no DNA test of any type had been developed¹⁰³ and where genetic evidence was collected at the crime scene, but the quantity was too small for the existing DNA technology.¹⁰⁴ PCR is not just another DNA test. It is also a unique way to *access* previously unavailable DNA information.¹⁰⁵

The evidence that emerges is possibly of a “newly acquired exculpatory character”¹⁰⁶ and conflicts with the “interest in finality.”¹⁰⁷ The United States Supreme Court’s decision in *Herrera v. Collins*¹⁰⁸ evaluated the need for finality against claims of actual innocence.¹⁰⁹ Among the concerns were the disruptive effect of these new claims on the need for finality and the burden of retrying cases with stale evidence.¹¹⁰ The Court was concerned that “erosion of memory and dispersion of witnesses that occur with the passage of time” . . . diminish[es] the chances of a reliable criminal adjudication.”¹¹¹ These concerns in the context of DNA are rendered moot.¹¹²

102. Edward Connors et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial*, U.S. Dept. of Justice Off. of J. Programs (June 1996).

103. *Id.* The authors point out that most convictions were during a time when DNA testing was not “readily accessible.” *Id.*

104. *Dedge*, 723 S.2d at 323 (Sharp, J., dissenting). “The PCR method is more sophisticated than the RFLP method, and it is the only kind of DNA test that can be used on DNA samples which are old, small, or deteriorated — the condition of the samples in this case.” *Id.* (footnote omitted).

105. *Hicks*, 103 F.3d at 845. “The PCR method itself is not a genetic test; it is a mere amplification technique. *Id.* PCR is “[a] technique used in the process of DNA profiling.” Connors et al., *supra* n. 102, at 80 (emphasis added); see *Dedge*, 723 S.2d at 323 (Sharp, J., dissenting) (“[T]he PCR method is often the only available method for testing small forensic samples due to the limited quantity of DNA available in the samples”). “The PCR method harnesses cellular enzymes to replicate portions of the DNA so that a sufficient number of copies of the DNA may be *obtained in order to perform testing.*” *Dedge*, 723 S.2d at 323 n.5 (Sharp, J., dissenting) (emphasis added).

106. Finch, *supra* n. 46, at 826.

107. Anderson, *supra* n. 15, at 499.

108. 506 U.S. 390 (1993).

109. *Id.* at 417.

110. *Id.*

111. *Id.* at 404–405 (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986)).

112. See Natl. Commn. on the Future of DNA Evid., *supra* n. 69, at vii (“DNA samples last indefinitely”).

The Commission has examined the use of DNA evidence in previously adjudicated cases in order to develop recommendations about the postconviction process and is

This is because DNA “memories” do not erode; DNA remains the same over time.¹¹³ Scientists acknowledge that even a dried museum skin contains probative DNA.¹¹⁴ In addition, the new PCR test changes *stale* evidence into *ripe* evidence.¹¹⁵ Forensic laboratories assisting so-called *cold case* squads acknowledge the potential for the PCR test to *breathe life* into old, *stale* cases.¹¹⁶ Will anyone else?

IV. DNA IN THE FLORIDA COURTROOM

In 1995 the Florida Supreme Court in *Hayes v. State*¹¹⁷ took judicial notice that DNA test results that pass the *Frye v. United States*¹¹⁸ test “are generally accepted as reliable in the scientific

exploring the effect that DNA technology may have on the statutes of limitation for filing appeals and charges. The latter issue arises because DNA samples last indefinitely, beyond the periods of time permitted for such filings.

Id. at vi–vii.

The results of DNA testing do not become weaker over time in the manner of testimonial proof. To the contrary, the probative value of DNA testing has been steadily increasing as technological advances and growing databases amplify the ability to identify perpetrators and eliminate suspects.

Id. at 9–10.

113. Telephone Interview, *supra* n. 66. DNA will not change into some other DNA over time. *Id.*

114. Ashley, *supra* n. 96, at 5.

115. See Finch, *supra* n. 46, at 826 (It attains a “newly acquired exculpatory character”). “[T]he probative value of DNA testing has been steadily increasing as technological advances and growing databases amplify the ability to identify perpetrators and eliminate suspects.” Natl. Commn. on the Future of DNA Evid., *supra* n. 69, at 9–10.

116. The Palm Beach Sheriff’s Crime Laboratory is working on cases from around 1991 or 1992 to the present in their cold case squad. Telephone Interview, *supra* n. 66.

117. 660 S.2d 257 (Fla. 1995).

118. *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923).

First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. Second, the trial judge must decide whether the expert’s testimony is based on a scientific principle or discovery that is “sufficiently established to have gained general acceptance in the particular field in which it belongs.”

Ramirez v. State, 651 S.2d 1164, 1167 (1995) (citing *Frye*, 293 F. at 1014) (citations omitted).

The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. . . . Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert’s opinion, which it may either accept or reject.

Id.; see William R. Eleazer & Glen Weissenberger, *Florida Evidence: 1998 Courtroom Manual* 407 (Anderson Publg. Co. 1997) (emphasis in original) (“The Florida Supreme Court has now made it clear that the ‘*Frye Test*’ . . . is the standard that governs admissibility under the Florida Evidence Code for new scientific principles and techniques”).

community.”¹¹⁹ DNA admissibility in *Hayes* was “an issue of first impression.”¹²⁰ The court recognized that “[t]he study of DNA polymorphisms can, in principle, provide a reliable method for comparing samples.”¹²¹

Hayes challenged the admissibility of two DNA tests introduced by the prosecution.¹²² The *Frye* test was not properly applied, so the court found the tests inadmissible.¹²³ The court did not exclude the tests as a matter of law.¹²⁴ The court endorsed a case by case evaluation when it explained that “DNA test results as evidence in criminal trials are not only new, but, as important, such results are based on technology that is still evolving and must be evaluated on a case by case basis.”¹²⁵ Unfortunately, the *Hayes* court went on to say that DNA testing “has not yet reached the level of stability of other forms of identification such as fingerprint comparisons.”¹²⁶ Regardless of the reliability attributed to any case specific DNA evidence or its admissibility in a *Frye* proceeding, the *Hayes* court clearly labeled DNA methodology as “an extremely important new identification technique.”¹²⁷ Furthermore, it has been almost five years since the court reached its decision in *Hayes*.¹²⁸ Since then, the science of DNA technology has “come into its own.”¹²⁹ Some commentators even advocate removing “DNA evidence from the jury’s fact-finding process.”¹³⁰ “In other words, in any given DNA evidence case, the judge hears all of the necessary expert scientific testimony. The judge then either admits or excludes evidence of a positive DNA match to the jury.”¹³¹

DNA in the Florida courtroom has made some remarkable inroads. The Florida First District Court of Appeal found that exceptional circumstances existed to extend the time for speedy trial where the prosecutor was waiting for DNA test results to come in

119. *Hayes*, 660 S.2d at 264.

120. *Id.* at 262.

121. *Id.* at 262 n. 3.

122. *Id.* at 262.

123. *Id.* at 264.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 257. The court reached its decision in June 1995. *Id.*

129. Eric A. Fischer, *DNA Evidence Comes into Its Own* <<http://www4.nationalacademies.org/onpi/oped.nsf/aaca>> (accessed July 14, 2000).

130. McDonald, *supra* n. 77, at 345.

131. *Id.* at 345–346.

from the lab. The trial judge's comments revealed the court's respect for DNA evidence. "We have been talking about DNA for three or four months. Isn't it possible to have it done through another source?"¹³² This comment is remarkable considering what will not qualify as an exceptional circumstance in Florida to justify the extension of speedy trial. For instance, congestion of the court docket,¹³³ absence of available jurors,¹³⁴ unavailability of co-defendants,¹³⁵ the defendant providing a false name at arrest,¹³⁶ and a judge's severe illness¹³⁷ are not considered exceptional circumstances. In Florida, a defendant's right to a speedy trial is serious. In *Landry v. State*,¹³⁸ the Florida Supreme Court discharged a defendant who had been adjudicated guilty of murder, because his demand for speedy trial was erroneously denied.¹³⁹ Yet, judges can and will postpone trials to wait for DNA test results to come back from the lab.¹⁴⁰ Why? Because the "highly informative" nature of DNA — its potential for identification — is important and valuable to the legal community.¹⁴¹ This is evident in the legal system's response to DNA technology.

*V. DNA IN THE COURTROOMS OF AMERICA: "THE
PROBATIVE POWER OF DNA TYPING CAN BE SO
GREAT THAT IT CAN OUTWEIGH ALL OTHER
EVIDENCE IN A TRIAL"*¹⁴²

The law and science have not always been compatible.¹⁴³ One commentator attributes the trouble to "fundamental differences between the legal and scientific processes" and refers to the two as

132. *Westberry v. State*, 700 S.2d 1236, 1237 (Fla. Dist. App. 1st 1997).

133. *Swalheim v. State*, 717 S.2d 578, 580 (Fla. Dist. App. 5th 1998).

134. *Jones v. State*, 707 S.2d 905, 905–906 (Fla. Dist. App. 2d 1998).

135. *Miller v. State*, 694 S.2d 884, 885 (Fla. Dist. App. 2d 1997).

136. *Loftis v. State*, 682 S.2d 632, 633–634 (Fla. Dist. App. 5th 1996).

137. *Underwood v. Johnson*, 651 S.2d 760, 762–763 (Fla. Dist. App. 1st 1995).

138. 666 S.2d 121 (Fla. 1996).

139. *Id.* at 123, 125.

140. *See Westberry*, 700 S.2d at 1236–1237 (waiting months for DNA results needed for the trial).

141. *See generally* Connors et al., *supra* n. 102 (exploring twenty-eight cases where convicted felons were exonerated by DNA evidence).

142. *Hayes*, 660 S.2d at 262 (emphasis added).

143. *See Development in the Law: Confronting the New Challenges of Scientific Evidence, Introduction*, 108 Harv. L. Rev. 1481, 1490 (1995) (mentioning the "fear of science and misunderstanding of the legal standards").

different “cultures.”¹⁴⁴ For the science of DNA technology, it is no longer appropriate to question whether the cultures will relate or overlap.¹⁴⁵ The legal system has embraced the identification potential of DNA technology despite whatever trouble there has been in the past.

A 1996 National Institute of Justice report reveals the extent of the embrace.¹⁴⁶ Attorney General Janet Reno endorsed the technology when she wrote, “DNA aids the search for truth by exonerating the innocent. The criminal justice system is not infallible, and this report documents cases in which the search for truth took a tortuous path.”¹⁴⁷

The report contains similar endorsements from forensic scientists (“DNA technology has given police and the courts a means of identifying the perpetrators of rapes and murders with a very high degree of confidence.”);¹⁴⁸ law enforcement officials (“DNA analysis is a powerful and often necessary tool for establishing the presence or absence of someone at a crime scene.”);¹⁴⁹ and legal scholars (“The sobering fact is that in all 28 cases, the error was unmasked — and justice finally served — only because of the novel scientific technique of DNA typing.”).¹⁵⁰ The report features twenty-eight cases that showcase the power of DNA technology to exonerate those wrongly imprisoned.¹⁵¹ Many of the cases involve eyewitness identification testimony that DNA evidence directly contradicted.¹⁵² The report is evidence that DNA technology is regarded as an “invaluable resource.”¹⁵³

The report prompted Attorney General Janet Reno to ask the National Institute of Justice to investigate the future of DNA

144. *Id.* at 1484. “Although these difficulties have troubled the legal system for six centuries, the problems posed by scientific evidence have become especially salient in recent decades.” *Id.*

145. *See generally id.* (The subject of this law review introduction explores the challenges when the two “cultures” overlap).

146. Connors et al., *supra* n. 102, at 1.

147. *Id.* at 2.

148. *Id.* at 7 (quoting Walter F. Rowe, Prof., Dept. of Forensic Sci., George Wash. U.).

149. *Id.* at 15–16 (quoting Matt L. Rodriguez, Superintendent of Police, Chi. Police Dept.).

150. *Id.* at 6 (quoting Edward J. Imwinkelried, Prof. of L., U. of Cal. at Davis).

151. *Id.* at 4. “The outcomes in the 28 cases documented in this report dramatize the real nature of the question of standards for determining the admissibility of scientific evidence in the United States.” *Id.*

152. *Id.* at 29.

153. *Id.* at 11 (quoting Ronald S. Reinstein, Presiding J., Crim. Dept., Super. C. of Ariz., Maricopa County).

evidence.¹⁵⁴ In 1998 an investigative group called the National Commission on the Future of DNA Evidence was formed.¹⁵⁵ The group's mission was "[t]o maximize the value of forensic DNA Evidence in the criminal justice system."¹⁵⁶ Commission members throughout the nation included a Federal Bureau of Investigation scientist, district attorneys, academics, forensic experts, a police superintendent, a mayor, a public defender, and others with an interest in the mission.¹⁵⁷ Chaired by the Wisconsin Supreme Court's Chief Justice Shirley S. Abrahamson, the group released a report in September 1999, titled, *Postconviction DNA Testing: Recommendations for Handling Requests*.¹⁵⁸ The report is an informative guide "created because forensic DNA technology can strengthen our confidence in the judicial process. . . . [Attorney General Reno] encourage[s] prosecutors, defense attorneys . . . the judiciary, victim advocates, and laboratory personnel to apply these recommendations to their individual cases."¹⁵⁹

The *nature* of DNA impresses the legal system. Both the prosecution and the defense regard it as a valuable tool.¹⁶⁰ This is due to its "double-edged" potential to convict or exonerate a suspect.¹⁶¹ It has been used in 23,000 United States cases annually, and has received over 350 favorable appellate court rulings¹⁶² since its first judicial appearance in a Florida court in 1987.¹⁶³

Legislatures also embrace DNA technology. The United States Code provides for a so-called Federal Bureau of Investigation DNA database.¹⁶⁴ The 1994 DNA Identification Act authorized the

154. Natl. Commn. on the Future of DNA Evid., *supra* n. 69, at iii.

155. *Id.* at v.

156. Natl. Inst. of J., *National Commission on the Future of DNA Evidence* <<http://www.ojp.usdoj.gov/nij/dna/welcome.html>> (last updated July 25, 2000).

157. Natl. Commn. on the Future of DNA Evid., *supra* n. 69, at vi.

158. *Id.*

159. *Id.* at iii.

160. *See* Krueger, *supra* n. 43, at B1 (convicting and exonerating defendants).

161. *Id.* "First introduced in criminal cases in the 1980s, DNA evidence has become a widely accepted and double-edged forensic tool. DNA has been used to convict murderers and rapists as well as to exonerate innocent defendants." *Id.*

162. *See id.* (The general manager of Cellmark Diagnostics, Mark Stolorow, said, "No appellate court has ruled that the science of DNA testing is inherently unreliable").

163. Coleman & Swenson, *supra* n. 47, at 4. "The trial of accused rapist Tommy Lee Andrews began in Orlando, Florida, on November 3, 1987. A scientist from Lifecodes and a M.I.T. biologist testified that semen from the victim matched Andrews' DNA." *Id.*

164. 42 U.S.C. § 14132 (1994).

creation of a “Combined DNA Index System,” or CODIS.¹⁶⁵ CODIS is a giant database linking state and local law enforcement crime laboratories together.¹⁶⁶ The purpose of the database is “to facilitate law enforcement exchange of DNA *identification* information.”¹⁶⁷ The following three types of DNA evidence may be indexed in this database: convict identification records,¹⁶⁸ analyses of crime scene samples,¹⁶⁹ and unidentified human remain samples.¹⁷⁰ CODIS is currently operating in eighty laboratories throughout thirty-six states,¹⁷¹ including Florida.¹⁷² Congress appropriated twenty-five million dollars over five years for the identification database.¹⁷³ Evidently, Congress places a high value on DNA technology.

VI. DNA AFTER THE TRIAL: “IT IS NO ANSWER TO SAY
THAT WE ARE DOING THE BEST WE CAN”¹⁷⁴

Forensic Science commentators call it “hot,”¹⁷⁵ “a gift,”¹⁷⁶ and refer to its revolutionary value.¹⁷⁷ In the last ten years, state and federal governments have recognized and capitalized on this value.¹⁷⁸ Despite endorsements, which included the Massachusetts State Police Laboratory Director, Carl M. Selavka said, “This is just the greatest time for DNA.”¹⁷⁹ There is one place where DNA

165. Off. of Info. Resources Mgt., *DOJ IRM Program, V. Major Endeavors* <http://www.usdoj.gov/jmd/orginfo/irm/irm__majend.html> (accessed July 14, 2000).

166. *Id.*

167. 42 U.S.C. § 14132 (emphasis added).

168. *Id.* § 14132(a)(1).

169. *Id.* § 14132(a)(2).

170. *Id.* § 14132(a)(3).

171. Off. of Info. Resources Mgt., *supra* n. 165.

172. Fla. Dept. of L. Enforcement, *DNA Investigative Support Database* <<http://www.fdle.state.fl.us/index.asp>> (accessed July 14, 2000).

173. *See* 42 U.S.C. § 14134 (1994) (differing amounts of funds from 1996 through 2000 totaling twenty-five million dollars).

174. *People v. Bull*, 705 N.E.2d 824, 848 (Ill. 1998) (Harrison, J., concurring in part and dissenting in part) (emphasis added). Justice Moses W. Harrison, II explores a sentencing scheme and some post-conviction relief injustices. *Id.* at 847–848.

175. *See* Ashley, *supra* n. 96 (referring to DNA analysis and the constant emergence of new methods to study DNA).

176. Kate Marquess, *Defense and Prosecution Put Different Spins on DNA*, 22 Chi. Law. 6 (July 1999) (quoting Prof. Lawrence C. Marshall, N.W.U. Sch. of L.).

177. *See* Denise A. Filocoma, Student Author, *Unravelling the DNA Controversy: People v. Wesley, A Step in the Right Direction*, 3 J.L. & Policy 537, 540 (1995) (“DNA testing has been heralded as the ‘breakthrough’ that could transform and revolutionize the world of criminal law”).

178. *Infra* pt. VII.

179. Donlan, *supra* n. 72 (quoting Carl M. Selavka, Dir., Mass. St. Police Laboratory).

evidence is treated like a “hot” potato, a “gift” to be returned, and a redcoat. The place is Florida’s post-conviction relief process.

The post-conviction relief process is the process a convict must follow to “collateral[ly] attack . . . [a] judgment and sentence.”¹⁸⁰ One Indiana court said the following: “It is a special quasi-civil remedy designed for the presentation of errors unknown or unavailable at the time of trial or direct appeal.”¹⁸¹ Post-conviction relief is unlike the appeals process, which requires preservation in the trial record.¹⁸² Post-conviction relief covers those problems that do not show up on the trial transcript. In order to obtain post-conviction relief in Florida, a movant must file a post-conviction relief motion via Rule 3.850. “Florida Rule of Criminal Procedure 3.850 was adopted in 1963 as Criminal Procedure Rule No. 1 to ‘provide a complete and efficacious post-conviction remedy to correct convictions on any grounds which subject them to collateral attack.’”¹⁸³

The Rule also contains a form, like a tax return.¹⁸⁴ More predicates are cited in the form for post-conviction relief.¹⁸⁵ A predicate is an assertion based on certain grounds, that if proven, would entitle the movant to relief. The movant has the opportunity to list grounds for relief.¹⁸⁶ Among the grounds listed are “[n]ewly discovered evidence”¹⁸⁷ and “[c]hanges in the law that would be

180. Raymond T. Elligett, Jr. & John M. Scheb, *Florida Appellate Practice and Advocacy* 224 (Bookworld Publications 1998). “As stated in *Roy*, decided shortly after the adoption of the rule, “[t]he rule is intended to provide a complete and efficacious post-conviction remedy to correct convictions on any grounds which subject them to collateral attack.” *Id.* (emphasis added) (alterations in original).

181. *Sewell v. State*, 592 N.E.2d 705, 707 (Ind. App. Dist. 3d 1992).

182. Elligett & Scheb, *supra* n. 180, at 200. “Section 924.051(3) conditions the right to appeal upon the preservation of a prejudicial error or the assertion of a fundamental error.” *Id.*

183. *Richardson v. State*, 546 S.2d 1037, 1037–1038 (Fla. 1989) (quoting *Roy v. Wainwright*, 151 S.2d 825, 828 (Fla. 1963)).

184. Fla. R. Crim. P. 3.987 (West 1999) (including a motion form).

185. *Id.* R. 3.987(14)(a)–(i) on the motion form.

(a) Conviction obtained by plea of guilty or nolo contendere that was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea. (b) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant. (c) Conviction obtained by a violation of the protection against double jeopardy. (d) Denial of effective assistance of counsel. (e) Denial of right of appeal. (f) Lack of jurisdiction of the court to enter the judgment or impose sentence (such as an unconstitutional statute). (g) Sentence in excess of the maximum authorized by law. (h) Newly discovered evidence. (i) Changes in the law that would be retroactive.

Id.

186. *Id.* R. 3.987(14)(a)–(d).

187. *Id.* R. 3.987(14)(h).

retroactive.”¹⁸⁸ If the movant selects one of those or other possible grounds, then there is a place to allege facts.¹⁸⁹ The instructions clearly specify that the movant “must allege facts.”¹⁹⁰ The motion will be rejected if no facts are alleged.¹⁹¹ Although this is only a form, it reveals a great deal about the post-conviction relief process in Florida and why some motions do not succeed in garnering an evidentiary hearing. Imagine you have been in prison for ten years for a crime you did not commit.¹⁹² Your only avenue of relief is a Rule 3.850 motion. Investigators collected and stored biological evidence from the crime scene. The evidence is in the dark recesses of some evidence locker. You are reading an old copy of *Scientific American*. There is an article about PCR DNA analysis that sparks your interest. As you read, you realize this new revolutionary test may help you. What can you do? Perhaps you try to file a Rule 3.850 motion. What do you write? Do you write that biological evidence exists that could clear you, but you need to get the PCR test done first? No, because you must allege facts.¹⁹³ Is that a fact? The fact is you really want the court to give you an intermediary step, a DNA analysis, that could result in tangible evidence of a DNA match or nonmatch.¹⁹⁴ Then that fact could be written on the face of the motion, and a judge would have a valid ground to grant an evidentiary hearing. As it stands, you cannot allege any facts. You can allege that you may be able to “acquire[] exculpatory character” evidence.¹⁹⁵ What grounds do you allege? Newly discovered evidence? The evidence has been around for ten years. You knew about it then. Do you say the evidence could have a “newly acquired exculpatory character” if an analysis is performed?¹⁹⁶ Most likely you make some argument and get the paper back stamped “procedurally barred.”¹⁹⁷

188. *Id.* R. 3.987(14)(i).

189. *Id.* R. 3.987(14)(a)–(d).

190. *Id.* R. 3.987(14).

191. *Id.* “If you select one or more of these grounds for relief, you must allege facts. The motion will not be accepted by the court if you merely check (a) through (i).” *Id.*

192. The following hypothetical is an amalgamation of cases such as *Dedge*, 723 S.2d at 322 (Sharp, J., dissenting) and *Zeigler v. State*, 654 S.2d 1162 (Fla. 1995).

193. Fla. R. Crim. P. 3.987(14).

194. See *Dedge*, 723 S.2d at 324 (Sharp, J., dissenting) (“The relief sought in this case was not to vacate or set aside the conviction. Rather, it was to obtain the evidence for the purpose of testing it”).

195. Finch, *supra* n. 46, at 826.

196. *Id.*

197. For more examples of “procedurally barred,” see *Pope v. State*, 702 S.2d 221, 224 (Fla. 1998) and *Short v. State*, 738 S.2d 1005, 1007 (Fla. Dist. App. 3d 1999).

You are procedurally barred, because you did not follow the Rule. It does not matter that you could not follow the Rule; the fact is you did not allege facts, so you are barred. Rule 3.850 states, in part, that

[o]n filing of a rule 3.850 motion, the clerk shall forward the motion and file to the court. If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion shall be denied without a hearing.¹⁹⁸

Therefore, one possible outcome after filing a Rule 3.850 motion is no hearing.¹⁹⁹ In addition, the court must attach to the form the part of the motion or file that shows that the movant is not entitled to relief unless the motion on its face was legally insufficient.²⁰⁰

You may get a sympathetic judge who realizes that if the motion, files, and records do not “conclusively show that the movant is entitled to no relief,”²⁰¹ the court will still order the state attorney to file an answer or other action. A judge could exercise discretion with how “conclusively” the records show whether the movant is entitled to relief. After the answer is filed, the judge then decides whether to grant an evidentiary hearing. At this point, the outcome for the movant is the granting of an evidentiary hearing or the denying of an evidentiary hearing.

Therefore, an evidentiary hearing can be denied at two points in the process, both initially and after an answer is filed.²⁰² A judge still has discretion at this point, even with no clearly alleged facts, to grant an evidentiary hearing.²⁰³ Unfortunately, another part of the Rule further impedes the judge from granting the hearing.²⁰⁴

198. Fla. R. Crim. P. 3.850(d).

199. *Id.* “We have encouraged trial courts to hold evidentiary hearings on postconviction motions. However, where the motion lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied.” *Ragsdale v. State*, 720 S.2d 203, 207 (Fla. 1998).

200. Fla. R. Crim. P. 3.850(d).

201. *Id.*

202. Judge John M. Scheb, Lecture, *Appellate Practice* (Stetson U. College of L., Oct. 15, 1999).

203. See *Jones v. State*, 591 S.2d 911, 916 (Fla. 1992) (The Florida Supreme Court reversed an order denying post-conviction relief; the court ordered an evidentiary hearing, because on the face of the pleadings, the court could not determine whether some evidence could be considered newly discovered).

204. *Supra* pt. V.

A. “Time Is on My Side”²⁰⁵

Time is not on the side of the incarcerated in Florida — for them, Rule 3.850 contains a ticking time bomb. The bomb is set to detonate two years after the occurrence of some event. For instance, an event could be when a defendant is adjudicated a habitual offender. After the event, the defendant would have two years to challenge that adjudication.²⁰⁶ While, in the interest of finality,²⁰⁷ courts may find it necessary to bar most post-conviction relief beyond the current time limits, the courts either incorrectly apply Rule 3.850 for PCR DNA analysis in order to assure finality, or the Rule itself is inadequate to accommodate PCR analysis. Florida’s Rule 3.850 post-conviction relief statute provides, in part, that

[n]o other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that

(1) the facts on which the claim is predicated were unknown to the movant or the movant’s attorney and could not have been ascertained by the exercise of due diligence²⁰⁸

A recent Florida case illustrates an unfortunate application of Rule 3.850’s two-year time bar in the context of PCR DNA analysis.²⁰⁹ *Dedge v. State* is a case where a small amount of genetic material was collected before DNA testing was available.²¹⁰ Dedge was convicted of sexual battery in 1984. In 1997 he filed a motion to release trial evidence for PCR DNA testing. The trial court denied the motion, finding it “procedurally barred,” under Rule 3.850.²¹¹ The Fifth District Court of Appeal issued a per curiam affirmance, with a dissenting opinion by Judge Sharp. Judge Sharp explained as follows:

205. Rolling Stones, *Time Is on My Side*, in *Hot Rocks 1964–1971* (London Recs. 1971) (CD recording).

206. *Bover v. State*, 732 S.2d 1187, 1188 (Fla. Dist. App. 3d 1999).

207. See Natl. Commn. on the Future of DNA Evid., *supra* n. 69, at 3 (“Finality is a fundamental value that can properly be ignored only in the extraordinary case”).

208. Fla. R. Crim. P. 3.850(b)–(b)(1).

209. *Dedge*, 723 S.2d at 322 (Sharp, J., dissenting).

210. *Id.*

211. *Id.* at 322.

The rationale for applying the two-year bar in this case was that the type of DNA testing Dedge sought to conduct (the PCR method) became available in 1993, and his motion was not filed until 1997. Thus any results of the test would be considered as “newly discovered,” and barred by the two-year limitation in rule 3.850.²¹²

There are three faulty premises with this rationale. First, the court equates the “results of the test”²¹³ with availability of the test.²¹⁴ The mere availability of a way to acquire new facts should not be equated with the actual results for two reasons. The rule says “*facts . . . unknown to the movant or the movant’s attorney.*”²¹⁵ The rule does not say a *method* to find the facts. Since the PCR test is a method scientists use to access DNA, it is a *method* to find the facts. In Dedge’s case, a formerly useless piece of genetic evidence can be PCR replicated.²¹⁶ Once that piece of genetic evidence is compared to Dedge’s DNA pattern, there will be a known fact. A scientist could testify either that the genetic evidence at the crime scene is connected to Dedge or it could not have come from Dedge.²¹⁷ Yet, there is no way to get to the fact previously unknown as required by the Rule.²¹⁸ Dedge cannot get to an expert opinion until he gets the test, but he cannot get the test, because a procedural bar exists.²¹⁹ Even if we assume the PCR test is a fact under the Rule, equating the two presupposes that the convict or his lawyer understands the significance of every scientific breakthrough and its application to the case.²²⁰ As Judge Sharp pointed out, “I think it unfair and unrealistic to expect an indigent, serving two life sentences in

212. *Id.*

213. *Id.* “Thus any results of the test would be considered as ‘newly discovered,’ and barred by the two-year limitation in rule 3.850.” *Id.* (Sharp, J., dissenting).

214. *See id.* (“[T]he PCR method[] became available in 1993, and his motion was not filed until 1997”).

215. Fla. R. Crim. P. 3.850(b)(1) (emphasis added).

216. *See Dedge*, 723 S.2d at 323 (Sharp, J., dissenting) (“The PCR method . . . can be used on DNA samples which are old, small, or deteriorated”).

217. *See Bains*, *supra* n. 64, at 127–128 (charting the DNA of different individuals and comparing them).

218. Fla. R. Crim. P. 3.850(b)(1).

219. *See Dedge*, 723 S.2d at 322 (Sharp, J., dissenting) (“The trial court denied the motion because it found that Dedge’s DNA claim was procedurally barred under Florida Rule of Criminal Procedure 3.850”).

220. *See id.* at 324 (The convict or his lawyer must know of the benefits of DNA testing prior to requesting it).

prison, to have had notice of the existence of PCR-based testing and its possible application to his case prior to 1995 when it was first discussed by a Florida court.”²²¹

The second premise in the *Dedge* court’s rationale is that the courts would have accepted the PCR method between 1993 and 1995, which they did not.²²² The dissent in *Dedge* points out that “even today it is not admissible, across the board.”²²³ It was not until 1995 that the Florida Supreme Court took judicial notice in *Hayes v. State* “that DNA test results are generally accept[able] as reliable in the scientific community. . . .”²²⁴ Furthermore, the *Hayes* court reviewed only the older RFLP analysis,²²⁵ not the PCR method that *Dedge* is seeking.²²⁶ The *Hayes* court made the important point that “DNA test results as evidence in criminal trials are not only new, but, as important, such results are based on technology that is still evolving and must be evaluated on a case by case basis.”²²⁷ The court in *Hayes* recognized the “evolving” nature of DNA technology.²²⁸ It is important that Florida recognize the evolutionary nature of PCR analysis. PCR can retrieve information that RFLP cannot,²²⁹ information of a possible “newly acquired exculpatory character.”²³⁰

The final premise in *Dedge* is that “2 years after the judgment and sentence become final”²³¹ is equal to 2 years after a DNA test is developed that could uncover new evidence.²³² There is no majority opinion in *Dedge*, and the dissent does not mention *Adams v. State*,²³³ but the court may have applied the test developed in *Adams*. The *Adams* court held “that a defendant must raise any

221. *Id.*

222. *See id.* (The Author infers this from the dissent’s statement that “admissibility of PCR tests in Florida courts is still being debated”).

223. *Id.*

224. *Hayes*, 660 S.2d at 264.

225. *Id.* at 263.

226. *Dedge*, 723 S.2d at 322 (Sharp, J., dissenting).

227. *Hayes*, 660 S.2d at 264.

228. *Id.*

229. *See* Gibeaut, *supra* n. 94, at 40 (Scientists can access genetic information with PCR that RFLP could not reach, because the specimen was too old, degraded, or minimal).

230. Finch, *supra* n. 46, at 826.

231. Fla. R. Crim. P. 3.850(b).

232. *Dedge*, 723 S.2d at 322 (Sharp, J., dissenting).

The rationale for applying the two-year bar in this case was that the type of DNA testing *Dedge* sought to conduct (the PCR method) became available in 1993, and his motion was not filed until 1997. Thus any results of the test would be considered as “newly discovered,” and barred by the two-year limitation in rule 3.850.

Id.

233. 543 S.2d 1244 (Fla. 1989).

contentions based upon new facts or a significant change in the law within two years of the time such facts become known or such change was announced.”²³⁴ In effect, the *Adams* ruling added “significant change[s] in the law” to the standard list of successful Rule 3.850 predicates.²³⁵

The *Adams* two-year rule was applied in *Zeigler v. State*,²³⁶ which involved a Rule 3.850 motion concerning PCR DNA analysis.²³⁷ Zeigler was convicted of murder in 1976.²³⁸ Over ten years later, he filed a Rule 3.850 motion on a non-DNA issue.²³⁹ At the time he filed the motion, Zeigler knew that PCR existed and that PCR may have some application to his case, but Zeigler wanted to wait until PCR was more acceptable in the courts.²⁴⁰ Consequently, he waited until 1994 to file a Rule 3.850 motion for PCR testing of some blood stain evidence.²⁴¹ The Florida Supreme Court upheld a lower court’s decision that Zeigler’s motion was time-barred.²⁴² In coming to its decision, the Court relied on *Adams*.²⁴³ Is this a significant change in the law or a significant change in the science of DNA? How can it be a significant change in the law if PCR DNA analysis is not always accepted in every Florida courtroom because of *Frye*?²⁴⁴

Exceptions to the two-year *Adams* rule do exist.²⁴⁵ Notably, a 1999 Florida Supreme Court decision, *Dixon v. State*,²⁴⁶ created an exception to *Adams* and validated Zeigler’s *Frye* concerns. *Dixon* concerned a 1988 amendment to Florida’s habitual offender statute.²⁴⁷ After the 1988 amendment, courts imposed consecutive

234. *Id.* at 1247.

235. *Id.*

236. 654 S.2d 1162 (Fla. 1995).

237. *Id.* at 1164.

238. *Id.* at 1163.

239. *Id.* at 1164.

240. *Id.* Mr. Zeigler had *Frye* concerns. *Id.* “Zeigler contends that it was reasonable for him to wait . . . until DNA evidence was given scientific sanction and standards were established regarding the admissibility of the specific DNA typing technique that he requested [to] be used in his case.” *Id.*; see *supra* n. 118 (discussing the *Frye* test).

241. *Zeigler*, 654 S.2d at 1163–1164.

242. *Id.* at 1164.

243. *Id.*

244. Throughout this paper, the Author poses various rhetorical questions. The purpose of these questions is to prompt both the interested reader and the interested legislator to consider whether Florida law is deficient when it comes to post-conviction relief.

245. *Dixon v. State*, 730 S.2d 265 (Fla. 1999).

246. 730 S.2d 265 (Fla. 1999).

247. *Id.* at 269 n. 6.

sentences when crimes occurred in the same incident — for instance, attempted manslaughter with a firearm and aggravated battery with a firearm.²⁴⁸ Dixon received consecutive sentences for crimes occurring in the same incident.²⁴⁹ In 1993 the Florida Supreme Court in *Hale v. State*²⁵⁰ held that the statute does not authorize imposing consecutive sentences when crimes occur in the same “episode.”²⁵¹ Almost two years later, in 1995, the Florida Supreme Court, in *State v. Callaway*,²⁵² held that the *Hale* decision applies retroactively.²⁵³ Referring to a liberty interest, Justice Stephen H. Grimes explains in *Callaway* that

[t]he administration of justice would be more detrimentally affected if criminal defendants who had the misfortune to be sentenced during the six year window between the amendment of section 775.084 and the decision in *Hale* are required to serve sentences two or more times as long as similarly situated defendants who happened to be sentenced after *Hale*.²⁵⁴

The lower court in *Dixon* certified a question to the Florida Supreme Court asking it to reconcile the two-year rule in *Adams* with the decision in *Callaway* to apply *Hale* retroactively.²⁵⁵ If the lower court in *Dixon* was allowed to strictly apply the two-year bar of *Adams*, Dixon’s Rule 3.850 motion would be time-barred.²⁵⁶ This was because *Hale* was decided in 1993 and Dixon filed in 1994.²⁵⁷ Yet, it was not until 1995 that the retroactivity of *Hale* was

248. *Id.* at 266; *Jackson v. State*, 659 S.2d 1060, 1061 (Fla. 1995); *Brooks v. State*, 630 S.2d 527, 527 (Fla. 1993).

249. *Dixon*, 730 S.2d at 266.

250. 630 S.2d 521 (Fla. 1993).

251. *Id.* at 524.

252. 658 S.2d 983 (Fla. 1995).

253. *Id.* at 987.

254. *Id.* (emphasis added).

255. *Dixon*, 730 S.2d at 265–266.

[W]e rephrase the certified question as follows: WHETHER A DEFENDANT’S RULE 3.850 MOTION SEEKING THE RETROACTIVE APPLICATION OF *HALE* WAS TIMELY WHEN FILED WITHIN TWO YEARS FROM THE DATE THE MANDATE ISSUED IN THIS COURT’S OPINION IN *CALLAWAY*, WHICH ANNOUNCED THE RETROACTIVITY OF *HALE*.

Id. (emphasis added).

256. *See id.* at 269 (rendering “Dixon’s renewed 3.850 motion timely because it was filed within two years of” the *Callaway* decision effectively quashing the decisions below). “The trial court summarily denied [Dixon’s] motion. The Third District affirmed that denial without [a] written opinion.” *Id.* at 266.

257. *Id.*

announced in *Callaway*.²⁵⁸ The Florida Supreme Court answered the certified question saying it was being “consistent with the *intent of Adams*,” when it held that the two years should start to toll from the later *Callaway* decision and not the *Hale* decision.²⁵⁹ This was so, even though *the significant change in the law* that *Adams* established as a benchmark test²⁶⁰ occurred in *Hale*.²⁶¹ The *Dixon* court reasoned, “Only when we decide the issue of retroactivity do we announce whether the change of law has ‘fundamental significance’ and accordingly constitutes a ‘fundamental change of law.’”²⁶²

This same reasoning should be applied to PCR DNA testing in Florida. Only when a court recognizes the validity of a scientific procedure, should the two years of *Adams* begin to run. To start the two years running from the discovery of a scientific technique is like making the two years run from the *Hale* decision, rather than the later *Callaway* decision, before the issue of retroactivity was decided. The decision to validate in a *Frye* hearing is the exclusive prerogative of the trial judge.²⁶³ How exactly will a trial judge hold a *Frye* hearing if post-conviction motions of this type are procedurally barred from reaching him or her? When an individual court decides the issue of PCR validity, then the two year *Adams* “clock” should begin to run.

The rule in *Adams* says “a significant change in the law”²⁶⁴ It does not say a significant change in the *science*. PCR DNA analysis is a significant change in the science of DNA technology.²⁶⁵ If courts continue to equate the change in the science with the change in the law, not only will *Adams* be misapplied, defendants like Dedge will have the “nightmare” of being caught in an evidentiary quagmire.²⁶⁶

258. *Id.*

259. *Id.* at 267 (emphasis added).

260. *Adams*, 543 S.2d at 1246.

261. *Hale*, 630 S.2d at 524. The significant change in *Hale* was the finding “that Hale’s enhanced maximum sentences must run concurrently.” *Id.*

262. *Dixon*, 730 S.2d at 267–268.

263. *Brim v. State*, 695 S.2d 268, 272 (Fla. 1997). “[W]e have expressly held that the trial judge must treat new or novel scientific evidence as a matter of admissibility [for the judge] rather than a matter of weight [for the jury].” *Id.* (alterations in original).

264. *Adams*, 543 S.2d at 1247.

265. Gibeaut, *supra* n. 94, at 40. “Like the Starship Enterprise, DNA analysis continues to boldly go where no science has gone before.” *Id.*

266. See *Dedge*, 723 S.2d at 324 (Sharp, J., dissenting) (“One of my worst nightmares as a judge, is and has been, that persons convicted and imprisoned in a ‘legal’ proceeding, are in fact innocent”).

Additionally, a court's determination of when something occurred is vital in the post-conviction relief context. To the *Zeigler* court, PCR was available in 1991.²⁶⁷ To the *Dedge* court, it became available in 1993.²⁶⁸ Since courts may declare Rule 3.850 motions time barred based on these disparate findings, inmates do not and will not receive uniform treatment in Florida until Florida develops a rule tailor-made for PCR DNA analysis.

There is no procedural rule in Florida that adequately addresses PCR DNA analysis in the post-conviction relief arena. Rule 3.850 does not work well with these cases. Florida needs a new intermediary procedural rule. The type of relief inmates seek in these cases is unique. Inmates seek to obtain formerly useless evidence for the purpose of conducting PCR DNA analysis that *could* prove "informative." After the analysis is conducted, a Rule 3.850 motion and the two-year rule would then be appropriate. But it is necessary to first provide an intermediary step to obtain the information. Otherwise, Rule 3.850 motions are essentially preempted for inmates like *Dedge* who seek the information.²⁶⁹

Assuming that the rule is applied correctly, the result is incongruent with much of Florida post-conviction relief case law. The key question for the trial court when evaluating a Rule 3.850 motion is as follows: Is the claim legally sufficient for the post-conviction relief motion, therefore requiring a hearing or attachment of record showing why the defendant is not entitled to relief?²⁷⁰ The Florida Supreme Court, in *Stone v. State*,²⁷¹ made it clear that it is not permissible for the trial court to summarily deny the motion.²⁷² In order to get an evidentiary hearing under Rule 3.850, the proponent must propose a successful *predicate*.²⁷³

Case law reveals that there are successful predicates in Florida, predicates that resulted in evidentiary hearings, both within the two-year time limit of Rule 3.850 and beyond the two-year time limit. A close examination of these cases shows that a case seeking PCR DNA testing would logically fit as an element in either set.

267. *Zeigler*, 654 S.2d at 1164.

268. *Dedge*, 723 S.2d at 322 (Sharp, J., dissenting).

269. *See id.* at 324 ("The relief sought in this case was not to vacate or set aside the conviction. Rather, it was to obtain the evidence for the purpose of testing it").

270. *Stone v. State*, 667 S.2d 974, 975 (Fla. Dist. App. 4th 1996).

271. 667 S.2d 974 (Fla. Dist. App. 4th 1996).

272. *Id.*

273. Fla. R. Crim. P. 3.850(b)(1)-(b)(3).

B. Successful Predicates within Two Years

One commentator analyzed the process in Florida and reflected that “[w]hat qualifies for post-conviction relief remains a source of uncertainty.”²⁷⁴ Case law reveals the existence of at least one certainty when a claim for “cognizable” relief in post-conviction relief proceedings is made.²⁷⁵ A movant must either be granted an evidentiary hearing or told why an evidentiary hearing is denied.²⁷⁶

The inquiries in the following cases are fact specific. Examples of cases that succeed in receiving a hearing include the following: a claim that trial counsel was ineffective for failing to call a spouse as an alibi witness;²⁷⁷ a claim that the trial transcript is ambiguous as to if any promises were given to the defendant concerning his sentence;²⁷⁸ and a claim that the defendant was not advised he could be deported.²⁷⁹ In each case a hearing was granted, because it was not clear from the record what had actually occurred at trial.²⁸⁰ Furthermore, the *purpose* of the hearing is to clear up a possible error in the trial court.²⁸¹ What could be more erroneous than mistaken identity? In 1990 the Florida Supreme Court held that the trial court had erred by not granting “an evidentiary hearing to evaluate new evidence;” the key witness was repudiating her identification testimony.²⁸² The court found this was newly discovered evidence, and the movant was entitled to an evidentiary hearing.²⁸³ Since DNA tests are identification tests, should not a

274. Benedict P. Kuehne, *Criminal Law and Procedure: 1993 Survey of Florida Law*, 18 Nova L. Rev. 235, 276 (1993).

275. *Steinhorst v. State*, 498 S.2d 414, 415 (Fla. 1986) (“But where the motion contains allegations of substantial material facts stating a claim cognizable in post-conviction proceedings, the motion must be evaluated in light of the trial record”).

276. *Stone*, 667 S.2d at 975. The Florida Supreme Court has made it clear that it is error to deny a Rule 3.850 motion without first examining the trial record. *Steinhorst*, 498 S.2d at 415.

277. *Reid v. State*, 682 S.2d 194, 195 (Fla. Dist. App. 4th 1996).

278. *Eady v. State*, 622 S.2d 61, 62 (Fla. Dist. App. 1st 1993).

279. *Lu v. State*, 683 S.2d 1110, 1112 (Fla. Dist. App. 4th 1996).

280. *Id.*; *Reid*, 682 S.2d at 195; *Eady*, 622 S.2d at 61–62.

281. *See Witt v. State*, 387 S.2d 922, 927 (Fla. 1980) (The main purpose for the rule relating to post-conviction relief is “to provide a method of reviewing a conviction based on a major change of law, where unfairness [is] so fundamental in either process or substance that the doctrine of finality [has] to be set aside”).

282. *Smith v. Dugger*, 565 S.2d 1293, 1295–1296 (Fla. 1990).

283. *Id.* at 1297.

movant be afforded a hearing to see if the “PCR witness” should be heard?

One defendant was granted a Rule 3.850 motion to interview a jury foreman based on a trial counsel’s affidavit that he remembers a rumor that the jury was evenly deadlocked at the sentencing phase.²⁸⁴ What about hearing of the existence of a DNA test that could help your case?

C. Successful Predicates beyond Two Years

Rule 3.850 states the criteria for considering post-conviction relief motions beyond two years.²⁸⁵ One exception to the two years is where the motion “alleges that the facts on which the claim is predicated were unknown to the movant or the movant’s attorney and could not have been ascertained by the exercise of due diligence.”²⁸⁶ In *Hallman v. State*,²⁸⁷ the court defined newly discovered evidence as asserted facts “unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence.”²⁸⁸

Not all newly discovered evidence is created equal. In *Jones v. State*,²⁸⁹ the court found that only certain newly discovered evidence qualifies as a motion for relief.²⁹⁰ The evidence should “be of such nature that it would probably produce an acquittal on retrial.”²⁹¹ The *Jones* court decided that another inmate’s confession in prison and then after release for a crime for which Jones was adjudged guilty qualified as newly discovered evidence.²⁹² The evidence was introduced eight years after Jones was convicted.²⁹³ The court decided that the trial judge should hold an evidentiary hearing to “consider all newly discovered evidence . . . and determine whether such evidence . . . would have probably resulted in an acquittal.”²⁹⁴

284. *Johnson v. State*, 593 S.2d 206, 210 (Fla. 1992).

285. Fla. R. Crim. P. 3.850(b)(1)–(b)(3).

286. *Id.* R. 3.850(b)–(b)(1).

287. 371 S.2d 482 (Fla. 1979).

288. *Id.* at 485.

289. 591 S.2d 911 (Fla. 1991).

290. *See id.* at 916 (On remand, “[T]he trial judge should consider all newly discovered evidence which would be admissible and determine whether such evidence, had it been introduced at the trial, would have probably resulted in an acquittal”).

291. *Id.* at 915.

292. *Id.* at 916.

293. *Id.* at 911. The Florida Supreme Court affirmed Jones’s conviction in 1983 in *Jones v. State*, 440 S.2d 570, 579 (Fla. 1983), and the current case was decided in 1992.

294. *Id.* at 916.

Newly discovered evidence is not the only standard for relief beyond the two-year limit in Rule 3.850. In *Ventura v. State*,²⁹⁵ an inmate tried unsuccessfully to access public records to make a Rule 3.850 motion.²⁹⁶ The court held that because certain government “entities” failed to provide him with the requested records, he was allowed to amend his original Rule 3.850 motion beyond the two year time limit in the rule.²⁹⁷ Certain scientific “entities” have failed to provide some defendants with the information they need. Now technology has stepped in to provide the information with the PCR test. Will their time be extended?

Another successful predicate that falls outside of the two-year limit of the rule is where the court makes a mistake. In *Hickox v. State*,²⁹⁸ the court “improvidently granted Hickox the right to file a 3.850 motion out of time.”²⁹⁹ As a result, the court held that the language of their prior opinion made an exception for Hickox and is the “law of the case.”³⁰⁰ The court stated, “[I]t would not serve the interests of justice to disallow as untimely a motion filed in reliance thereon.”³⁰¹ Does it serve the interests of justice to “disallow as untimely” these motions seeking DNA analysis?

Another case involved “procedural default” in the post-conviction relief context. The public defender’s office represented the movant at his trial and at his first Rule 3.850 proceeding. Consequently, the movant could not assert an ineffective assistance of trial counsel claim. The court cited the “peculiar facts” of the case as its reason to “overlook the procedural default.”³⁰² The Florida Supreme Court remanded the case for an evidentiary hearing.³⁰³ Cases where DNA analysis was unavailable or the technology could not access the information, which now are “ripe” for PCR DNA analysis, are “peculiar” enough to “overlook the procedural default.”

What a mess. Exceptions to exceptions. Judges cite “peculiar facts” to justify overlooking procedure. The judiciary is forced to choose between legal gymnastics, contorting justice to appear as if it follows legislative intent, or to stand idly by while injustice

295. 673 S.2d 479 (Fla. 1996).

296. *Id.* at 479–480.

297. *Id.* at 479.

298. 569 S.2d 776 (Fla. Dist. App. 1st 1990).

299. *Hickox v. State*, 604 S.2d 528, 529 (Fla. Dist. App. 1st 1992).

300. *Id.*

301. *Id.*

302. *Breedlove v. Singletary*, 595 S.2d 8, 11 (Fla. 1992).

303. *Id.* at 12.

prevails. Is this the best we can do? There is evidence that some in the Florida legislature think we can do better.

**VII. “THE INCRIMINATORY POTENTIAL OF DNA
COMPARISONS HAS BEEN ROUTINELY RECOGNIZED;
THE COROLLARY EXCULPATORY POTENTIAL
SHOULD BE PRESUMED”³⁰⁴**

In the December 1999, January 2000, and February 2000 sessions, the Florida legislature addressed post-conviction relief. Although the bills addressed post-conviction relief for capital defendants only, post-conviction DNA testing was at least included in the initial bills.³⁰⁵ Senate Bill Six would have provided for a motion “based on newly discovered evidence of actual innocence as demonstrated by evidence subject to DNA testing.”³⁰⁶ Another bill had a provision specifically for PCR DNA testing.³⁰⁷ Senate Bill Six died in committee.³⁰⁸ The other bill went through some “revisions” before its enactment. What is the result of these revisions? There is no longer any provision for post-conviction DNA testing in the so-called “*Death Penalty Reform Act of 2000*,”³⁰⁹ nor in any other Florida post-conviction legislation this session.

Yet, DNA testing survived in other Florida legislation this session, legislation that was unrelated to post-conviction relief.³¹⁰ The legislation where DNA testing survived is eerily familiar. It is legislation that requires those convicted of burglary or attempted burglary to give their blood for DNA analysis.³¹¹ This enacted bill

304. *Sewell*, 592 N.E.2d at 707 (emphasis added).

305. Fla. Sen. 6, Spec. Sess. A § 14(9)(a) (Jan. 5, 2000). “The motion must be based on newly discovered evidence of actual innocence as demonstrated by evidence subject to DNA testing.” *Id.*

“A defendant may make a motion in the trial court that entered the judgment and sentence for the performance of forensic DNA testing using the Polymerase Chain Reaction (PCR) method.” Fla. H. 1, Spec. Sess. A § 14(10)(a) (Jan. 14, 2000). None of this language survived.

306. Fla. Sen. 6, Spec. Sess. A § 14 (9)(a).

307. Fla. H. 1, Spec. Sess. A § 14(10)(a).

308. Fla. Sen. 6, Spec. Sess. A (Jan. 7, 2000), Florida Bill Tracking.

309. *See generally* Fla. Stat. Ann. §§ 27.51 (West 1998 & Supp. 2000), 27.702 (West 1998 & Supp. 2000), 27.703 (West 1998 & Supp. 2000), 27.709 (West 1998 & Supp. 2000), 27.710 (West Supp. 2000), 27.711 (West Supp. 2000), 119.19 (West Supp. 2000), 922.095 (West Supp. 2000), 924.051 (West Supp. 2000), 924.055 (West Supp. 2000); 2000 Fla. Sess. L. Serv. Ch. 00-3 §§ 6, 9, 12, 16 (West); Fla. R. Crim. P. 3.850, 3.851 (1999 & Supp. 2000), 3.852 (1999 & Supp. 2000) (all of the above cited statutes comprise the *Death Penalty Reform Act of 2000*).

310. *See generally* Fla. Stat. § 943.325 (1999) (not relating to post-conviction relief).

311. *Id.* § 943.325(1)(a).

demands the tests not only for those currently incarcerated, but it also requires those on any court-ordered supervision to submit to testing.³¹² This includes both adults and juveniles.³¹³ Several Florida statutes already capitalize on the informative nature of DNA. The Conditional Release Program Act³¹⁴ contains a requirement that certain releasees submit blood specimens “to the Florida Department of Law Enforcement [FDLE] to be registered with the DNA database.”³¹⁵ Some probationers and community controllees must submit to the same requirement.³¹⁶ Another statute charges the FDLE and state crime labs with the duty to “establish, implement, and maintain a statewide automated personal *identification* system”³¹⁷ The system provides for widespread “classifying, matching, and storing analyses of DNA” for certain Florida convicts and parolees.³¹⁸ Their blood is drawn, sent to one of the labs, and the DNA test is performed. The statute says that specimens are sent to the “testing facility for analysis to determine genetic markers and characteristics for the purpose of individual identification of the person submitting the sample.”³¹⁹ The ten combined FDLE and local labs³²⁰ use DNA analysis routinely, and incidentally, in about one-third of the cases in some labs, suspects are excluded.³²¹ While these statutes serve as Florida’s acknowledgment of the probative value of DNA technology, look carefully at the legislation. What type of legislation succeeds in garnering DNA testing? The type of legislation that could inculcate a defendant initially at trial and the type that could keep genetic tabs on a freed prisoner succeed.³²² What type of legislation fails in garnering DNA testing?³²³ The type of legislation that could exculpate a defendant after trial fails. Is this

312. *Id.* § 943.325(1)(a)-(1)(b).

313. *Id.* § 943.325(1)(b).

314. Fla. Stat. § 947.1405 (1999).

315. *Id.* § 947.1405(7)(a)(8).

316. Fla. Stat. § 948.03(5)(a)(8) (1999).

317. Fla. Stat. § 943.325(8) (emphasis added).

318. *Id.*

319. *Id.* § 943.325(5).

320. Telephone Interview, *supra* n. 92. The labs are located in Tallahassee, Jacksonville, Orlando, Tampa, Pensacola, Ft. Myers, Key West, Indian River, Palm Beach, and Metro-Dade Counties. *Id.*

321. Telephone Interview, *supra* n. 66.

322. *Convicted Burglar / DNA Testing*, Sen. 838, 106th Cong. (2000).

323. See Fla. H. 1, Spec. Sess. A. The current version of the “*Death Penalty Reform Act of 2000*” contains no DNA tests. *Supra* n. 309 and accompanying text.

not more than a little disingenuous?³²⁴ Maybe the problem is not insincerity. Maybe, the problem is that candidly and sincerely, we do not care about those already convicted. Maybe we say to ourselves, “[W]hen you see one prisoner you see all—always the same thing—ill-fed and innocent.”³²⁵

VIII. “POST-CONVICTION PROCEEDINGS ARE GOVERNED BY THE MORE FLEXIBLE STANDARDS OF THE DUE PROCESS GUARANTEE OF THE CONSTITUTION”³²⁶

Someone tell that to Dedge. Dedge asked for evidence to perform a DNA test. If he had asked for the tests before his 1984 trial, his request would have been regarded as a discovery request.³²⁷ Discovery and due process are intertwined. For instance, in *Cunningham v. State*,³²⁸ the court held that the appellant’s due process rights were violated when the State failed to produce a pair of sunglasses found at the scene of a rape.³²⁹ The appellant had filed a discovery motion for the glasses,³³⁰ but in Florida, “Rule 3.850 is not a discovery rule.”³³¹ The same court that decided that “Rule 3.850 is not a discovery rule,” also stated that “[t]he primary purpose of granting a hearing under Criminal Procedure Rule 1.850 [now 3.850] is to give the movant an opportunity to present evidence in support of his allegations.”³³² In some cases, these pronouncements are at odds with each other. Since Rule 3.850 is the only way to collaterally attack a judgment or sentence and is not a discovery rule, sometimes the judiciary will be forced to pick one or the other. Some courts compromise “[T]he court may allow limited discovery into matters which are relevant and material.”³³³ How limited is the

324. Disingenuous means “not ingenuous; not candid; not straightforward; insincere.” *Webster’s New Twentieth Century Dictionary of the English Language* 525 (Jean L. McKechnie ed., 2d ed., World Publ. Co. 1977).

325. Dumas, *supra* n. 2, at 101 (emphasis added).

326. *Steele*, 724 S.2d at 1195 (Sharp, J., specially concurring) (emphasis added).

327. See Fla. R. Crim. P. 3.220(a), (d)(1) (1999 & Supp. 2000) (“[A] defendant may elect to participate in the discovery process provided by [Rule 3.220]”); *State v. Trummert*, 647 S.2d 966, 967 (Fla. Dist. App. 4th 1994) (The defendant made several discovery motions prior to trial for DNA evidence).

328. 254 S.2d 391 (Fla. Dist. App. 1st 1971).

329. *Id.* at 393.

330. *Id.*

331. *Boisvert v. State*, 693 S.2d 652, 654 (Fla. Dist. App. 5th 1997).

332. *Id.*

333. *State v. Lewis*, 656 S.2d 1248, 1249–1250 (Fla. 1994) (quoting and adopting language from *Davis v. State*, 624 S.2d 282, 284 (Fla. Dist. App. 3d 1993)).

discovery? The *Dedge* court seemed very limited. Florida needs a statute for certain cases that declares a successful predicate automatically exists for PCR DNA analysis — a statute eliminating time constraints for newly discovered evidence. After all, “Criminal discovery is not a game. It is integral to the quest for truth and the fair adjudication of guilt or innocence.”³³⁴ If the quest for truth, the hunt for truth,³³⁵ can be resumed effectively years after trial, should we not allow additional discovery?

Certainly in the case of PCR DNA analysis, conducting additional discovery in the form of testing the DNA is necessary before any evidence can be presented. Do not “the more flexible standards of the due process guarantee of the constitution”³³⁶ suggest we may benefit by allowing discovery in post-conviction relief settings? If this is so, why was the *Dedge* court so limited? Why does one side always seem to win out? Why does post-conviction discovery lose? What is tipping the scales?

IX. “SOCIETY’S RESOURCES HAVE BEEN
CONCENTRATED AT THAT TIME AND PLACE’”³³⁷

The time? A time of reckoning. The place? A courtroom. To what endeavor has society concentrated its resources? “[I]n order to *decide*, within the limits of human fallibility, the question of guilt or innocence of one of its citizens.”³³⁸ There is a sense that once the decision “guilty” is made, then due process and those “flexible standards” disappear. This can be attributed to a pervasive belief that once adjudicated “guilty,” a person crosses into another dimension, a dimension characterized by its lack of due process. In 1993 the United States Supreme Court crystallized this notion in *Herrera v. Collins*. Once a defendant is convicted, the State has accomplished its goal of converting that individual from one “presumed innocent to one found guilty beyond a reasonable doubt.”³³⁹ It is this notion of “conversion” that places the wrongly convicted beyond “the more flexible standards of the due process

334. *Taylor*, 484 U.S. at 419 (Brennan, J., dissenting).

335. See *The Right to Use Technology in the Hunt for Truth Act*, Sen. 1700, 106th Cong. § 1 (1999) (Implicit in the title of this act is DNA testing for some cases is essentially a discovery device; the hunt is for truth, the quest is for truth).

336. *Steele*, 724 S.2d at 1195 (Sharp, J., concurring specially).

337. *Herrera*, 506 U.S. at 401 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)) (emphasis added).

338. *Id.* (quoting *Wainwright*, 433 U.S. at 90) (emphasis added).

339. *Id.* at 399 (quoting *Ross v. Moffitt*, 417 U.S. 600, 610 (1974)).

guarantee of the constitution.”³⁴⁰ As the *Herrera* court stated, “[He was not] before this Court as an innocent man, but rather as one . . . convicted by due process of law.”³⁴¹ How did such an insidious concept develop within the law? Perhaps our own language contains some clues.

One linguist characterized English grammar as “simplistic,” when compared to other languages.³⁴² For example, both Ancient Greek and English have a present perfect tense, a tense that expresses a state or an action. But, Koine differs from English in that Koine present perfect does not express a past completed action, it expresses the resultant state of some past action.³⁴³ For instance, in English *He is guilty*, could have been translated from the Greek in either of the following instances: *He committed a crime and as a result is guilty* or *He is guilty as a result of an adjudication*. The English present tense is the most accurate way to translate either sentence from the Greek perfect tense.³⁴⁴ What is the point? It is that the adjudication of guilt puts one in prison, it does not make one guilty. A person can be guilty or innocent and still be guilty as a result of an adjudication. Even English grammar merges the state of being guilty with the process of ascertaining guilt. The inherent grammatical prejudice is that an adjudication of guilt and actual guilt are synonymous. They are not.³⁴⁵ There is also an inherent judicial prejudice that equates an adjudication of guilt with actual guilt. Is that not the implication when the Supreme Court said he “does not come before the Court as one who is ‘innocent,’ but, on the contrary, as one who has been convicted by due process of law”?³⁴⁶

Some jurisdictions have squarely addressed and remedied this prejudice. The New Jersey Superior Court granted a hearing and stated, “[W]hen the State’s proofs are weak, when the record supports at least a reasonable doubt of guilt, and when there exists a way to establish guilt or innocence once and for all, we will not elevate form so highly over substance that fundamental justice is

340. *Steele*, 724 S.2d at 1195 (Sharp, J., concurring specially).

341. *Herrera*, 506 U.S. at 407 n. 6.

342. Donald J. Mastronarde, *Introduction to Attic Greek* 22 n. 1 (U. Cal. Press 1993).

343. Carl A.P. Ruck, *Ancient Greek a New Approach* 156 (2d ed., M.I.T. Press 1997).

344. Mastronarde, *supra* n. 342, at 280.

345. See generally Connors et al., *supra* n. 102 (This report explores twenty-eight cases where convicted felons were exonerated by DNA evidence).

346. *Herrera*, 506 U.S. at 399–400.

sacrificed.”³⁴⁷ Is that what is happening in Florida when we deny an evidentiary hearing in these cases? Are we elevating form so highly over substance that we sacrifice fundamental justice? In what cases would it be appropriate to “forego form” in order that fundamental justice is not sacrificed?

When identity is at issue, DNA material should be seized and maintained indefinitely.³⁴⁸ “[T]he time may be close at hand when genetic blueprint evidence will be as routine and decisive as fingerprint evidence.”³⁴⁹ Given the potential of DNA evidence to positively match or exclude a suspect, the effort and cost is worthwhile. The New Jersey court predicated their order of post-conviction DNA testing in a rape case on their suspicion that “the jury convicted the wrong man.”³⁵⁰ Noting it would rather “tear [] at the very roots of the defense bar’s trial responsibility.’ . . . than sit by while an innocent man . . . languishes in prison,”³⁵¹ the court ordered DNA testing requested by the post-conviction relief motion, *even though the testing was available at trial.*³⁵² This is extraordinary. In essence, the court gave this defendant a redo. The court ignored the fact that “[s]ociety’s resources have been concentrated at that time and place.”³⁵³ Dedge did not even ask for a redo. The PCR test was unavailable at Dedge’s 1984 trial.³⁵⁴

The Pennsylvania Superior Court recognized the exculpatory nature of DNA test results when it awarded a new trial in a thirteen-year-old rape case.³⁵⁵ The assault occurred in a dark location and identity was at issue at the trial.³⁵⁶ The defendant had succeeded in his post-conviction relief motion for DNA testing.³⁵⁷ The resultant evidence was exculpatory.³⁵⁸ According to the court,

347. *State v. Thomas*, 586 A.2d 250, 254 (N.J. Super. App. Div. 1991).

348. *Connors et al.*, *supra* n. 102, at 13.

349. *Thomas*, 586 A.2d at 253.

350. *Id.* at 254 (quoting and agreeing with the dissent’s opinion that the wrong man theory is the basis of the majority’s opinion).

351. *Id.* (partially quoting the dissent).

352. *Id.*

353. *Herrera*, 506 U.S. at 401.

354. *Dedge*, 723 S.2d at 322 (Sharp, J., dissenting). This type of DNA test did not become available until 1993. *Id.*

355. *Commonwealth v. Reese*, 663 A.2d 206, 207 (Pa. Super. 1995). The original jury trial was in 1982. *Id.*

356. *Id.*

357. *Id.*

358. *Id.* at 210.

since the evidence was not cumulative and would have likely been outcome determinative, a new trial was warranted.³⁵⁹

Other jurisdictions have tackled the problem with DNA and post-conviction relief. A 1996 Illinois Supreme Court ruling in *People v. Washington*³⁶⁰ prompted the Illinois General Assembly to enact legislation in the form of a post-trial motion for forensic DNA testing³⁶¹ (the case did not even involve DNA).³⁶² The *Washington* case involved a “freestanding claim of innocence.”³⁶³ Washington filed a petition under the Illinois equivalent of Florida’s Rule 3.850, the Illinois Post-conviction Hearing Act.³⁶⁴ The only proper grounds for relief under the act at the time were constitutional in nature.³⁶⁵ The issue was “should additional process be afforded in Illinois when newly discovered evidence indicates that a convicted person is actually innocent?”³⁶⁶ The legislature answered that it was “cognizable as a matter of due process.”³⁶⁷ The court took a shot at the Illinois General Assembly when it rendered its opinion “[g]iven the limited avenues that our legislature has so far seen fit to provide for raising freestanding claims of innocence”³⁶⁸

The legislature promptly drafted legislation, including a statute providing for a “[m]otion for fingerprint or forensic testing not available at trial regarding actual innocence.”³⁶⁹ Forensic DNA testing is specifically noted in the statute.³⁷⁰ Yet, DNA was never mentioned in *Washington*.³⁷¹ His claim of innocence had nothing to do with DNA testing.³⁷² His claim was a “freestanding claim of

359. *Id.*

360. 665 N.E.2d 1330 (Ill. 1996).

361. Anderson, *supra* n. 15, at 504–505.

362. *Washington*, 665 N.E.2d at 1331. The evidence was witness testimony. *Id.*

363. *Id.* at 1333.

364. *Id.* at 1331.

365. *Id.* at 1333 (citing 725 Ill. Comp. Stat. Ann. § 5/122-1 (West 1992 & Supp. 2000)).

366. *Id.* at 1336.

367. *Id.* at 1337.

368. *Id.*

369. 725 Ill. Comp. Stat. Ann. § 5/116-3 (West Supp. 2000).

370. *Id.*

371. *Washington*, 665 N.E.2d at 1331. The evidence was witness testimony. *Id.* Washington was sent to prison in 1982 for a murder conviction. *Id.* In 1990 a witness came forward who implicated another person in the murder. *Id.* The witness was forced to flee to Mississippi for years, after the real killer kidnapped her soon after the crime and held her captive for several weeks. *Id.* at 1332.

372. *Id.* at 1331.

innocence.³⁷³ Yet, the legislature's response was to draft a statute providing for, among other things, DNA testing.³⁷⁴

The court in *Washington* framed the issue as follows: "Essentially, then, the issue is the time relativeness of due process as a matter of this State's constitutional jurisprudence; that is, should additional process be afforded in Illinois when newly discovered evidence indicates that a convicted person is actually innocent?"³⁷⁵ It seems that the legislature heard those words, and the logical conclusion is that the Illinois legislature values the probative power of DNA evidence in the context of "freestanding claim[s] of innocence" in the post-conviction setting.

X. HOPE

On October 6, 1999, Senator Richard Durbin (D-Ill.) introduced a bill with the title "The Right to Use Technology in the Hunt for Truth Act" or "TRUTH Act," to amend the Federal Rules of Criminal Procedure.³⁷⁶ Recognizing recent advances in DNA technology, in particular the PCR test, Senator Durbin lauded the technology's potential when he said, "[T]he hallmark of our criminal justice system has always been the search for the truth. With this goal in mind, I am introducing legislation to ensure the quality of justice in our criminal courts through the use of DNA testing."³⁷⁷

The proposed federal rule is almost identical to a recently enacted rule of criminal procedure in the Senator's home state of Illinois.³⁷⁸ The proposed rule is as follows:

Rule 33.1. Motion for forensic testing not available at trial regarding actual innocence

(a) MOTION BY DEFENDANT. – A court on a motion of a defendant may order the performance of forensic DNA testing on evidence that was secured in relation to the trial of that defendant which resulted in the defendant's conviction, but which was not subject to the testing which is now requested because the technology for the testing was not available at the

373. *Id.* at 1333.

374. Anderson, *supra* n. 15, at 504–505.

375. *Washington*, 665 N.E.2d at 1336.

376. Sen. 1700, 106th Cong. at § 1.

377. 145 Cong. Rec. S12101–S12103, S12108 (1999).

378. 725 Ill. Comp. Stat. Ann. § 5/116-3.

time of trial. Reasonable notice of the motion shall be served upon the Government.

(b) PRIMA FACIE CASE. – The defendant shall present a prima facie case that—

(1) identity was an issue in the trial which resulted in the conviction of the defendant; and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, replaced, or altered in any material aspect.

(c) DETERMINATION OF THE COURT. – The court shall allow the testing under reasonable conditions designed to protect the interests of the Government in the evidence and the testing process upon a determination that—

(1) the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant’s assertion of actual innocence; and

(2) the testing requested employs a scientific method generally accepted within the relevant scientific community.³⁷⁹

The proposed rule addresses fears of opening a Pandora’s box of finality issues by requiring the defendant to make a prima facie case.³⁸⁰ There may, however, be a problem with defining *available* in the phrase “not available at the time of trial.”³⁸¹ Does available mean that the technology was created at the time of trial? Or does it mean that a few labs in the country employed the technology? Does available mean a majority of labs performed the test? What would available mean for a state like Florida with *Frye* considerations? Would it make more sense for the governor, in an executive order, to order PCR tests for any case that meets the threshold prima facie showing, without regard for *availability* of PCR at the time of any past trial? At the very least, a similar rule in Florida could provide courts with an alternative to the current choice — procedurally barred.

379. Sen. 1700, 106th Cong. at § 1 (emphasis added).

380. *Id.* at R. 33.1(b).

381. *Id.* at R. 33.1(a).

The National Commission on the Future of DNA Evidence is currently drafting a post-conviction DNA model statute.³⁸² Hopefully, the commission will release a final uniform statute soon. The intent of the Commission and the Department of Justice is to provide the states with a model statute for use when drafting their own post-conviction DNA testing statute.³⁸³ Both Illinois and New York already have such a statute.³⁸⁴ Any legislative body considering such a statute would need to answer a number of questions such as the following: Who can request the testing? Under what circumstances has a movant presented a prima facie case? Who will pay for the test? What labs will do the testing? Once testing is performed, what procedure will be followed if test results prove to be exculpatory?

The following is a framework for a post-conviction relief statute for DNA testing:

Statute Framework

A. MOTION—A movant may, at any time, make a motion before the trial court, requesting forensic DNA testing on evidence which was collected in his or her case.

B. ORDER—The trial court may order testing if it finds that:

1. Identity was an issue at the trial;
2. The State properly preserved the evidence to be tested;
3. The scientific technique to be used meets the standard for admissibility; and
4. Neither the movant, nor the movant's attorney, were aware of the technique's availability for evidence in their case at the time of trial.

C. RESULTS—The results of the forensic DNA testing shall be made available to the court, the movant, and the State.

382. Christopher Asplen, assistant United States attorney and executive director of the National Commission on the Future of DNA Evidence, was kind enough to send the Author a draft from the commission's July 1999 meeting. The draft, however, is not available for dissemination.

383. Telephone Interview with Christopher Asplen, Asst. U.S. Atty., Exec. Dir., Natl. Commn. on the Future of DNA Evid. (Oct. 18, 1999).

384. 725 Ill. Comp. Stat. Ann. § 5/116-3; N.Y. Crim. Pro. Laws § 440.30 (McKinney 1999).

D. PAYMENT— The trial court may require the State or the movant to pay for the forensic DNA testing.

The Author invites any interested persons to add to or alter this framework in an attempt to make forensic DNA testing available in furtherance of justice in the post-conviction arena. The Author invites any interested persons to help usher DNA technology into Florida's post-conviction relief process. Finally, for all claims of actual innocence, the Author hopes we consider whether everything possible is being done.

Finality is important, but justice is paramount. Current application of Rule 3.850 in some cases asking for PCR DNA analysis results in injustice. This was the story of why a scientific renaissance is waiting for justice to catch up. The Florida legislature recognizes that facts unknown at the time of trial may become known in the future. The current Florida post-conviction relief statute reveals the legislative intent to ensure that a judge will consider any exculpatory information that may come to light in the future.³⁸⁵ In keeping with that intent, it is appropriate to create a rule of criminal procedure and a statute that will bring DNA evidence into the light.

It would also be appropriate to consider if we are satisfied to be a modern day Chateau d'If, with "*only . . . a governor, a garrison, turnkeys, and good thick walls.*"³⁸⁶ We could adopt some more progressive statutes. Even if post-conviction DNA testing is eventually a given in Florida, what of the future? Are we content to wait for evidentiary quagmires to ensnare the innocent and then, years later, consider a rescue? Would it be more just to loosen judicial restraints? Therefore, if some new scientific advance trusted for its inculpatory value emerged, the judiciary could promptly ensure its exculpatory value is recognized.

As it stands, the doctrine of finality impermissibly prohibits the innocent from revealing proof of their innocence. But the PCR DNA evidentiary quagmire is just one illustration where the "doctrine of finality" infected an antiquated statute and proved pathological to our system of justice. Even if Congress requires states to keep all biological material, and even if the legislature passes a bill provid-

385. Fla. R. Crim. P. 3.850(b)–(b)(1). "Time Limitations. . . . No other motion shall be filed . . . *unless* it alleges that . . . the facts on which the claim is predicated were unknown." *Id.* (emphasis added).

386. Dumas, *supra* n. 2, at 65 (emphasis added).

ing PCR DNA analysis for certain post-conviction situations, this doctrine will continue to bind future forensic and scientific advances. It is time for Florida to free the judiciary from some of its Gepetto-like strings.³⁸⁷ A new statute for PCR DNA analysis would free certain evidence. Better still, a thoughtful revision of the post-conviction relief statute would give courts some flexibility when faced with new evidence and would ensure that in the future the judiciary could promptly respond to any brave new world³⁸⁸ the mind has yet to imagine.

*“Dantès fell on his knees, and prayed earnestly. The door closed, but this time a fresh inmate was left with Dantès. Hope.”*³⁸⁹

387. This is a reference to Pinnochio and his puppeteer “father” Gepetto. Carlo Collodi, *Pinnochio* (Eeno-Clad Bks. 1999).

388. In Aldous Huxley’s, *Brave New World* (Harper/Collins Publishers, Inc. 1998), a fictional society embraces a totalitarian government like mindless robots. The World Controllers have decided that a pain free world equals a happy world. As a result, all freedoms have been sacrificed. Some characters in the book believe there is another way to happiness. *Id.*

389. Dumas, *supra* n. 2, at 104 (emphasis added).