

**IN THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT IN AND  
FOR MONROE COUNTY, FLORIDA**

STATE OF FLORIDA,	)	
Plaintiff-Respondent,	)	
	)	
v.	)	Case No. 82-CF-1059-K
	)	
ORLANDO BOSQUETE,	)	
Defendant-Petitioner.	)	

**UNOPPOSED MOTION TO VACATE CONVICTIONS**

Defendant-Petitioner Orlando Bosquete, by and through undersigned counsel, respectfully submits this Unopposed Motion to Vacate Convictions pursuant to Fla. R. Crim. P. 3.850.

The motion is based upon new DNA test results – conducted pursuant to this Court’s 2004 order under Fl. R. Crim. P. 3.853, and with the State’s consent – which reveal that Mr. Bosquete is actually innocent of the sexual assault and burglary offenses for which he was convicted over twenty-three years ago. Specifically, the DNA tests show to a scientific certainty that Mr. Bosquete is not the source of semen on the victim’s underwear deposited by the true perpetrator of this crime. These DNA tests results were obtained using technology that was unavailable at the time of Mr. Bosquete’s trial.

The State of Florida, by and through the Office of State Attorney Mark E. Kohl, has informed undersigned counsel that it agrees that the DNA test results are exculpatory, and warrant the vacatur of Mr. Bosquete’s convictions and his immediate release from custody.

In light of the foregoing, and as set forth below, Defendant-Petitioner easily satisfies the requirements of Rule 3.850.

**(1) The judgment or sentence under attack and the court which rendered it.**

In December 1982 and January 1983, Petitioner was tried before a jury in the 16<sup>th</sup> Judicial Circuit in and for Monroe County (the Hon. Bill G. Chappell, Circuit Judge, presiding). On January 3, 1983, defendant was found guilty of one count of burglary of a dwelling during which an assault was committed, and one count of attempted sexual battery with slight force. On January 20, 1983, defendant was sentenced to 50 years for burglary of a dwelling during which an assault was committed and sentenced 15 years for attempted sexual battery with slight force.

**(2) Whether there was an appeal from the judgment or sentence and the disposition of the appeal.**

Petitioner appealed his convictions and sentence. In an unpublished decision, the District Court of Appeal affirmed the convictions, but reduced the sentence on the attempted sexual battery count from 15 to 5 years, the maximum sentence permitted by statute.

**(3) Whether a previous postconviction motion has been filed and if so how many.**

In September 2003, Petitioner filed a timely *pro se* motion for post-conviction DNA testing pursuant to Fl. R. Crim. Pro. 3.853, which was granted by this Court by Order dated June 2, 2004. In August 2005, represented by undersigned co-counsel, he filed a Supplemental Motion under Rule 3.853 for DNA Testing at a Private Laboratory, Additional Testing, and Preservation of Physical Evidence. That motion was also granted, by Order of this Court dated on September 25, 2005. Upon information and belief, this is Petitioner's first motion for post-conviction relief pursuant to Rule 3.850.

**(4) If a previous motion or motions have been filed, the reason or reasons why**

**the claim or claims in the present motion were not raised previously.**

The grounds for the motion were previously unavailable to Petitioner. The new DNA test results upon which the motion is premised were not obtained until this month, when the laboratory ordered to perform the testing (Orchid Cellmark, Inc.) issued its final report dated May 12, 2006 and received on May 16, 2006. This motion is clearly timely pursuant to Rule 3.853(d)(2), which provides that a new motion for post-conviction relief based on newly discovered evidence may be filed at any time upon receipt of post-conviction DNA test results that were “obtained under” Rule 3.853. *See* Fl. R. Crim. Pro. 3.853(d) (2); Fl. R. Crim. Pro. 3.850(b).

**(5) The nature of the relief sought.**

Petitioner seeks a hearing on his Motion at which this Court shall order the *vacatur* of both of his criminal convictions, the dismissal of the indictments, and his immediate release from custody.

**(6) A brief statement of the facts and other conditions relied upon in support of the motion.**

*Crime and Investigation*

During the early morning hours of June 25, 1982, two Spanish-speaking white males broke into 104 Stock Island Apartments in Stock Island, Florida (Trial transcript (“T”) at 3, 9, 31). The victim in this case, Margaret K\_\_\_\_<sup>1</sup>, was at the time an unmarried woman who lived with an elderly female friend, each occupying separate bedrooms. (T.78)

On the night in question, Ms. K\_\_\_\_ was asleep in her bed, and awoke to find one of

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<sup>1</sup> Although part of the original trial record, to protect the victim’s privacy, her full name has been omitted from this Motion.

the male intruders in her bedroom, on top of her, with his hand over her mouth. (T.33). the perpetrator had close-cropped or shaved hair (later described by the victim as a “burr” haircut). He was wearing pants (which he had pulled down to his knees) but no shirt. (T.8-9; deposition of Margaret K \_\_\_\_ dated August 23, 1982 (“depo.”), at 6).

The perpetrator pulled the victim’s underwear down and pulled up her pajama top. (T.33). He fondled the victim’s breasts, put his penis in his hand, and masturbated over her. (Monroe County Sheriff’s Department Arrest Report (“Arrest Report”) dated June 25, 1982). The perpetrator then proceeded to ejaculate on the victim’s underwear, legs, and pajama top. (T.61-63; Arrest Report at 2).

The second perpetrator, who had noticeably longer hair, did not enter the victim’s bedroom for the duration of the assault. The victim only caught a fleeting glimpse of this second perpetrator when he stood in the bedroom doorway and told the man who was sexually assaulting the victim, in Spanish, “Hurry up, let’s go.” (T.35; depo. at 8-9). The two intruders then fled the apartment. (T.35)

According to the defendant’s arrest form, the Sheriff’s Department received the victim’s complaint at around 2:11 A.M., reporting a burglary by “two Latin subjects.” (Arrest Report at 1). When the police arrived, the victim spoke to Deputy Carlton Lopez (T. 36) and described the incident and the sexual assault committed by the intruder who was on top of her (T. 8). Deputy Lopez put out an all points bulletin, describing the suspect in the sexual assault as a white, Spanish-speaking male with no shirt and no hair (T. 36, 108). No further descriptive criteria were provided.

Shortly thereafter, while Deputy Lopez was still interviewing the victim, Deputy Stephen Kelly radioed that he stopped a group of Cuban-American males in the parking

lot of a convenience store on Stock Island, the Tom Thumb Store, and that one of the males “matched the description” of the man who had committed the sexual assault, *i.e.* he had no hair and wore no shirt (T. 9). Ms. K\_\_\_ agreed to come to the store to see if she could identify the man. (T.92)

A few minutes later, Deputy Lopez and the victim drove into the parking lot of the convenience store, where the group of Cuban-American males was being detained. The Petitioner, Orlando Bosquete, was among that group. (T.10) Petitioner later testified at trial that he had gone to the convenience store with his cousins after spending the entire evening at home with his family, watching sports on T.V. (T.185-86)

From the squad car, at a distance about twenty feet away from the assembled men, the victim pointed at Petitioner and said, “That’s him, that’s him.” (T. 10). Specifically, she identified Petitioner as the man she believed was the intruder who had masturbated over her and ejaculated on her clothing. (T.12) Petitioner was immediately arrested and placed in the back of a patrol car. (T.18)

At the time the victim made this identification, Petitioner was the only man in the group she was asked to view who matched the general description of the intruder, *i.e.*, he was the only man she was asked to view who had little or no hair (having shaved his head earlier that same day because of the summer heat) and without a shirt. (T.14, T.146-47)

At no time in the six months prior to trial was the victim asked to identify Petitioner in the daylight or in a police line-up. Nor was she asked to compare his features (whether via photographs or in a live-lineup) with those of other men with little or no hair who, like Petitioner, also fit the general description of the perpetrator. (T.14).

In addition, photographs taken of Petitioner on the night of his arrest indicate that he

had a large, black moustache at the time. (T. 25, T.49) By contrast, immediately after the assault, the victim reported that the perpetrator had no facial hair (Depo at 6; T. 108) The night before she testified at trial, the victim was shown mug shot photographs of the defendant at the time of his arrest, in which his black moustache was visible; the next day, in her testimony, she stated for the first time that the perpetrator had a moustache. (T.40, 46, 49)

At the convenience store, the victim also made a tentative identification of another man, Pablo Cazola, as the 2<sup>nd</sup> perpetrator (*i.e.*, the man who had not entered the bedroom during the assault, but had helped burglarize the home). Upon arrest, a search of Mr. Cazola's pockets revealed a gold charm necklace, which was later identified as one that had been stolen from the victim's roommate during the burglary. (T.18; depo. at 17). On December 16, 1982, Mr. Cazola pled guilty to burglary of a dwelling.

*Physical evidence collected*

In the course of its pre-trial investigation, the Sheriff's Department collected a pair of semen-stained underwear and a semen-stained pajama top from the victim. (T.116) She reported that she had been wearing both items on the night of the incident, and that the perpetrator had ejaculated upon them. (T.61-62, 116) Indeed, when asked whether she was positive that any semen on these items came from the perpetrator, she stated, "It certainly didn't come from anyone else that I know of." (T.62)

Subsequent analysis by the Florida Department of Law Enforcement (FDLE) confirmed that both items appeared to be stained with semen. (T. 129-30) No forensic DNA testing was performed at the time of Petitioner's arrest and trial, because the technology had not yet been developed.

The victim's stained underwear was entered into evidence at trial as State's Exhibit 5. (T.115, 117). The victim's pajama top was also entered into evidence. (T.115)

At trial, Petitioner testified in his own defense, maintaining that he was innocent and that the victim was mistaken in identifying him as her assailant. (T.185-190) He also presented an alibi defense, partially supported by the testimony of two family members (his cousin, Ricardo Bosquete, and his uncle, Francisco Bosquete) that he had spent the entire evening at home with them, watching television.

*Post-conviction DNA testing and review*

The victim's underwear and pajama top were sent to Orchid Cellmark laboratory ("Cellmark") in November 2005. A new DNA sample (buccal swab) from Petitioner was collected by state officials at the Hardee Correctional Institution and sent to Cellmark for analysis on or about March 4, 2006.

On or about April 13, 2006, undersigned counsel at the Innocence Project was informed by Cellmark by telephone that the lab had completed the preliminary DNA analysis of the items to be tested pursuant to court order. In this telephone call, Cellmark analyst and Unit Supervisor Jody Hrabal informed counsel that while no semen or spermatozoa could be detected on the victim's pajama top, both semen and spermatozoa were detected on the underwear. Ms. Hrabal further informed counsel that a single male DNA profile had been obtained from the stains on the underwear, and Petitioner was conclusively excluded as the source of that DNA. Cellmark anticipated that a final written report documenting the results would be available in a matter of week.

Undersigned counsel immediately contacted Catherine Vogel, the Assistant State Attorney assigned to the case (who represented the State in the 3.853 proceedings before

this Court, but who had not participated in the original prosecution of Petitioner in 1982-83), to inform her of the results as reported by Cellmark. Upon information and belief, while awaiting the laboratory report, the Office of the State Attorney then conducted a thorough review of the case file and additional investigation in order to determine with certainty the potential exculpatory significance of the DNA test results.

On or about May 10, Ms. Vogel informed defense counsel that the State had located the victim, Ms. K\_\_\_\_, and that the victim had confirmed that she had no other sexual partners in the time immediately prior to the assault who could have been the source of the semen stain on her underwear, and that the State was therefore prepared to consent to the immediate *vacatur* of Petitioner's criminal convictions upon review of the Cellmark laboratory report. On or about May 11, undersigned counsel spoke with Ms. Vogel, who confirmed that, if the written DNA test results as previously conveyed by telephone in fact excluded Petitioner as the source of the semen on the underwear, the State would agree that the results are wholly exculpatory and that Petitioner is actually innocent of these offenses.

On May 16, 2006, undersigned counsel received, by facsimile, the laboratory report from Orchid Cellmark regarding the above-referenced DNA test results. (*See* Report annexed hereto as Exhibit A). This report was immediately transmitted to the Office of the State Attorney, so that the FDLE could review the report on the State's behalf and ensure the accuracy of the results stated.

As previously indicated by telephone, the Cellmark DNA laboratory report reveals that a DNA profile of a single male was detected on the victim's semen-stained underwear, and that Petitioner Orlando Bosquete is conclusively excluded as the source.

Moreover, because the DNA detected came only from a single male, with no female DNA in the mixture, the test results are wholly consistent with the actions of the perpetrator of the June 25, 1982 assault (*i.e.*, with an act of male ejaculation, rather than vaginal drainage from a prior act of consensual sexual intercourse). As such, these newly-available DNA test results wholly exonerate Petitioner and establish that he is actually innocent of the offenses of June 25, 1982, for which he was convicted in 1983 and remains incarcerated.

WHEREAS, in light of the foregoing, Defendant-Petitioner respectfully requests that this Court schedule a hearing on his Unopposed Motion to Vacate Convictions on the earliest possible date that is convenient for the parties and the Court and at which the Defendant-Petitioner may be present, and that at the hearing, GRANT the Defendant-Petitioner's Motion in its entirety and immediately release him from custody.

Respectfully Submitted,

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