

West's F.S.A. § 925.11

West's Florida Statutes Annotated [Currentness](#)

Title XLVII. Criminal Procedure and Corrections (Chapters 900-999) ([Refs & Annos](#))

[Chapter 925](#). Miscellaneous Provisions of Criminal Procedure ([Refs & Annos](#))

➔925.11. Postsentencing DNA testing

(4) Preservation of evidence.--

(a) Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement shall maintain any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested.

(b) In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence. In all other cases, a governmental entity may dispose of the physical evidence if the term of the sentence imposed in the case has expired and no other provision of law or rule requires that the physical evidence be preserved or retained.

CREDIT(S)

Added by [Laws 2001, c. 2001-97, § 1, eff. Oct. 1, 2001](#). Amended by [Laws 2004, c. 2004-67, § 1, eff. May 20, 2004](#); [Laws 2006, c. 2006-292, § 1, eff. June 23, 2006](#).

RETROACTIVITY

<Section 2 of Laws 2004, c. 2004-67, provides: >

<"This act shall take effect upon becoming a law [May 20, 2004] and shall operate retroactively to October 1, 2003.">

<Laws 2006, c. 2006-292, § 4, provides that the act shall take effect upon becoming a law [June 23, 2006] and shall apply retroactively to October 1, 2005.>

HISTORICAL AND STATUTORY NOTES

Amendment Notes:

Laws 2004, c. 2004-67, § 1, in subsec. (1)(b)1., substituted references to 4 years for references to 2 years, and substituted a reference to October 1, 2005 for a reference to October 1, 2003.

Laws 2006, c. 2006-292, § 1, rewrote subsecs. (1) and (4); and in subsec. (2)(a)1., added "establishing that the petitioner is not the person who committed the crime" at the end. Subsecs. (1) and (4) formerly read:

"(1) Petition for examination.--

"(a) A person who has been tried and found guilty of committing a crime and has been sentenced by a court established by the laws of this state may petition that court to order the examination of physical evidence collected at the time of the investigation of the crime for which he or she has been sentenced which may contain DNA (deoxyribonucleic acid) and which would exonerate that person or mitigate the sentence that person received.

"(b) Except as provided in subparagraph 2., a petition for postsentencing DNA testing may be filed or considered:

"1. Within 4 years following the date that the judgment and sentence in the case becomes final if no direct appeal is taken, within 4 years following the date that the conviction is affirmed on direct appeal if an appeal is taken, within 4 years following the date that collateral counsel is appointed or retained subsequent to the conviction being affirmed on direct appeal in a capital case, or by October 1, 2005, whichever occurs later; or

"2. At any time if the facts on which the petition is predicated were unknown to the petitioner or the petitioner's attorney and could not have been ascertained by the exercise of due diligence."

"(4) Preservation of evidence.--

"(a) Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement shall maintain any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested.

"(b) Except for a case in which the death penalty is imposed, the evidence shall be maintained for at least the period of time set forth in subparagraph (1)(b)1. In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence.

"(c) A governmental entity may dispose of the physical evidence before the expiration of the period of time set forth in paragraph (1)(b) if all of the conditions set forth below are met.

"1. The governmental entity notifies all of the following individuals of its intent to dispose of the evidence: the sentenced defendant, any counsel of record, the prosecuting authority, and the Attorney General.

"2. The notifying entity does not receive, within 90 days after sending the notification, either a copy of a petition for postsentencing DNA testing filed pursuant to this section or a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the time for filing it has expired.

"3. No other provision of law or rule requires that the physical evidence be preserved or retained."

LAW REVIEW AND JOURNAL COMMENTARIES

[Freeing the innocent: Obtaining post-conviction DNA testing in Florida. Cathrine Arcabascio, 28 Nova L.Rev. 61 \(Fall 2003\).](#)

RESEARCH REFERENCES

ALR Library

[125 ALR 5th 497](#), DNA Evidence as Newly Discovered Evidence Which Will Warrant Grant of New Trial or Other Postconviction Relief in Criminal Case.

Encyclopedias

[8 Am. Jur. Proof of Facts 3d 749](#), Foundation for DNA Fingerprint Evidence.

[Am. Jur. 2d Habeas Corpus § 60](#), Newly Discovered Evidence.

[FL Jur. 2d Criminal Law § 2460.5](#), Postsentencing DNA Testing.

[FL Jur. 2d Habeas Corp. & Post Conviction Remedies § 146](#), Use of Motion for Issues Cognizable on Appeal.

[FL Jur. 2d Habeas Corp. & Post Conviction Remedies § 169](#), Newly Discovered Evidence.

[FL Jur. 2d Habeas Corp. & Post Conviction Remedies § 198](#), Discovery.

Forms

[Florida Pleading and Practice Forms § 98:4.10](#), Motion for Postconviction Relief -- to Obtain DNA Testing.

[Florida Pleading and Practice Forms § 98:13.10](#), Motion for Postconviction Relief -- to Obtain DNA Testing.

NOTES OF DECISIONS

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[1/4](#). Construction and application

Question of propriety of postconviction DNA testing was in exclusive control of judiciary under grant of constitutional authority to issue writs of habeas corpus, and thus, rule of criminal procedure permitting DNA testing even if defendant did not deny commission of crime did not violate separation of powers provision of state constitution, despite statute providing that postconviction DNA testing was available only to resolve a claim of mistaken identity, where rule afforded same kind of remedy that would have been available by habeas corpus. [Crow v. State, App. 1 Dist., 866 So.2d 1257 \(2004\)](#). [Constitutional Law §70.1\(10\)](#); [Criminal Law §1590](#)

1/2. Purpose

The purpose of statute and rule allowing for motion for postconviction DNA testing is to provide defendants with a means by which to challenge convictions when there is a credible concern that an injustice may have occurred and DNA testing may resolve the issue. [Zollman v. State, App. 2 Dist., 820 So.2d 1059 \(2002\)](#). [Criminal Law ¶1590](#)

1. Probability of acquittal

Defendant, who had been convicted of kidnapping and sexual battery, was not entitled to postsentencing DNA testing of condom found in vicinity of area of alleged assault, where sexual assault occurred in outdoor area near public park and there was no suggestion in record that victim's assailant had used condom, and thus, testing of condom would not, regardless of results, exonerate defendant. [Starr v. State, App. 5 Dist., 944 So.2d 1121 \(2006\)](#). [Criminal Law ¶1590](#)

Capital murder defendant seeking post-conviction DNA testing failed to establish that DNA evidence proving that he was not the triggerman would create reasonable probability that he would have received lesser sentence, where state's theory that death penalty was appropriate was not based primarily on defendant's status as triggerman, and neither sentencing court nor state Supreme Court relied upon defendant's triggerman status in imposing and affirming death penalty; state argued in closing that jurors could recommend death penalty if they concluded that defendant played major role in felony murder and that he acted with reckless indifference to human life. [Van Poyck v. State, 908 So.2d 326 \(2005\)](#), rehearing denied, certiorari denied [126 S.Ct. 1570, 164 L.Ed.2d 326](#). [Criminal Law ¶1590](#)

Trial court appropriately denied defendant's motion for postconviction forensic DNA testing, given absence of reasonable probability that results of tests would have led to defendant's acquittal, with both victims having identified defendant as the man who kidnapped and assaulted them at gunpoint, and then fled in car, and police later apprehending defendant standing near the car with the victim's earrings in his pocket. [Harris v. State, App. 3 Dist., 868 So.2d 589 \(2004\)](#), rehearing denied, review denied [880 So.2d 1211](#). [Criminal Law ¶1590](#)

There was no reasonable probability that defendant would have been acquitted of capital murder based on DNA evidence of hair, bone fragments, victim's robe or pajamas found in shallow grave, as required for defendant to be entitled to postconviction DNA testing; victim's identity had been conclusively established and remains were contaminated due to location. [Tompkins v. State, 872 So.2d 230 \(2003\)](#), revised on rehearing, rehearing denied. [Criminal Law ¶1590](#)

Reasonable probability existed that sexual battery defendant would have been acquitted had DNA evidence demonstrated that the semen found on washcloth which victim used to wash herself after attack was inconsistent with defendant's DNA, and thus State was required to provide response prior to trial court's addressing merits of defendant's motion for postconviction DNA testing, even though victim identified defendant as her assailant, where the only other evidence of defendant's guilt was a serology test on the washcloth, which identified that the sample on the washcloth could have come from defendant or 37% of the general population. [Manual v. State, App. 2 Dist., 855 So.2d 97 \(2003\)](#). [Criminal Law ¶1590](#)

African-American defendant sufficiently alleged that DNA testing could exonerate him, for the purpose of defendant's request for post-conviction DNA testing 20 years after he was convicted of burglary and two counts of sexual battery; both caucasian victims

originally identified another man as their attacker and admitted that their description of the attacker and defendant's actual appearance had some inconsistencies, and at trial the prosecutor heavily relied on evidence that two pubic hairs found at the crime scene came from an African-American. [Knighten v. State, App. 2 Dist., 829 So.2d 249 \(2002\)](#). [Criminal Law](#) 🔑1590

On the issue of whether requested DNA testing will exonerate the defendant, the determination of whether the defendant's allegations are facially sufficient to warrant such testing requires consideration of the facts of the crime itself and the other available evidence. [Zollman v. State, App. 2 Dist., 820 So.2d 1059 \(2002\)](#). [Criminal Law](#) 🔑1590

Movant for postconviction DNA testing was not entitled to additional DNA testing, under mitochondrial DNA (mtDNA) testing method, of hair fragment found on capital murder victim's nightgown, where there was no reasonable probability that movant would be acquitted, or would receive a life sentence, if re-testing was allowed; hair fragment was too small to determine if it was Negroid or Caucasian in origin and too small to be microscopically matched to any known samples, and hair fragment could have come from fire and police personnel at murder scene. [King v. State, 808 So.2d 1237 \(2002\)](#), stay granted [122 S.Ct. 932, 534 U.S. 1118, 151 L.Ed.2d 894](#), certiorari denied [122 S.Ct. 2670, 536 U.S. 962, 153 L.Ed.2d 843](#). [Criminal Law](#) 🔑1590

Movant for postconviction DNA testing was not entitled to additional DNA testing, under mitochondrial DNA (mtDNA) testing method, of three pubic hairs obtained from pubic hair combings of capital murder victim, where there was no reasonable probability that movant would be acquitted, or would receive a life sentence, if re-testing was allowed; all three pubic hairs from the combings microscopically matched the known pubic hairs of victim. [King v. State, 808 So.2d 1237 \(2002\)](#), stay granted [122 S.Ct. 932, 534 U.S. 1118, 151 L.Ed.2d 894](#), certiorari denied [122 S.Ct. 2670, 536 U.S. 962, 153 L.Ed.2d 843](#). [Criminal Law](#) 🔑1590

Postconviction relief petitioner was not entitled to have DNA evidence re-analyzed, where there was no reasonable probability that he would be acquitted; petitioner admitted to engaging in sexual activity with child victim, and both victim and eyewitness testified to acts preformed by petitioner. [Hartline v. State, App. 5 Dist., 806 So.2d 595 \(2002\)](#). [Criminal Law](#) 🔑1590

2. Inconclusive results

DNA tests performed for use in trial for sexual battery were not "inconclusive" within meaning of rule and statute providing for post-sentencing DNA testing when results of previous DNA testing were inconclusive and subsequent scientific developments in DNA testing techniques likely would produce definitive result, even though defendant offered evidence challenging reliability of prior testing methods; DNA tests were not inconclusive but merely contested, given that experts testified as to reliability of tests and that defendant's DNA matched DNA found on victim. [Newberry v. State, App. 4 Dist., 870 So.2d 926 \(2004\)](#), rehearing granted, review denied [884 So.2d 23](#). [Criminal Law](#) 🔑1590

Movant for postconviction DNA testing was not entitled to additional DNA testing, under short tandem repeat typing DNA (STR DNA) testing method, of fingernail scrapings taken from capital murder victim, where the scrapings had already been tested for STR DNA by Florida Department of Law Enforcement (FDLE), and FDLE's test results had been inconclusive because there had been insufficient quality or quantity to perform STR DNA analysis. [King v. State, 808 So.2d 1237 \(2002\)](#), stay granted [122 S.Ct. 932, 534 U.S. 1118, 151 L.Ed.2d 894](#), certiorari denied [122 S.Ct. 2670, 536 U.S. 962, 153 L.Ed.2d 843](#). [Criminal Law](#) 🔑1590

3. Relevancy of evidence

Defendant was not entitled to postconviction DNA testing after he pled guilty to attempted burglary of dwelling, armed burglary with assault, involuntary sexual battery, and lewd assault, where defendant alleged no facts in support of his motion for such testing, did not suggest that there were any items that might have contained DNA other than vial of his own semen apparently taken by law enforcement after his arrest, did not state how DNA testing of his own semen sample would have been useful, did not claim that identification was genuinely disputed issue, and voluntarily entered guilty pleas and admitted under oath that he committed each offense. [Fuentes v. State, App. 3 Dist., 907 So.2d 609 \(2005\)](#). [Criminal Law ¶1590](#)

Identification of defendant as victims' assailant was a genuinely disputed issue at trial, for the purpose of defendant's request for post-conviction DNA testing, where both victims originally identified another man as their attacker, the victims selected the other man from a photo array that included defendant's photograph, and both victims acknowledged that there were inconsistencies between their description of their attacker and defendant's actual appearance. [Knighten v. State, App. 2 Dist., 829 So.2d 249 \(2002\)](#). [Criminal Law ¶1590](#)

Identification of defendant as victim's assailant was a genuinely disputed issue at trial for purposes of defendant's request for postconviction DNA testing, despite fact that victim identified defendant at trial as assailant, where defendant consistently maintained his innocence, victim initially described assailant as having physical characteristics which defendant did not have, and the only significant evidence tying defendant to crime was victim's identification of defendant as assailant. [Zollman v. State, App. 2 Dist., 820 So.2d 1059 \(2002\)](#). [Criminal Law ¶1590](#)

Results of DNA testing, requested by defendant 23 years after his conviction for kidnapping, sexual battery, and robbery, would bear on the question of his guilt or innocence, as would support defendant's request for such testing, since there were no individuals present at crime scene other than victim and her assailant, victim testified that her assailant ejaculated into her, so DNA testing of the contents of the victim's rape kit would show whether defendant was perpetrator of sexual battery, and because there was only one assailant, if defendant did not commit sexual battery, he did not commit kidnapping or robbery. [Zollman v. State, App. 2 Dist., 820 So.2d 1059 \(2002\)](#). [Criminal Law ¶1590](#)

Postconviction relief movant was not entitled to the release of rape kit that was presented at trial for sexual battery, which he sought in order to perform DNA tests; any DNA test results would be superfluous because movant's unsuccessful defense at trial had been one of consensual sex, not identity. [Marsh v. State, App. 3 Dist., 812 So.2d 579 \(2002\)](#). [Criminal Law ¶1590](#)

4. Nolo contendere pleas

Defendant who entered nolo contendere plea to attempted sexual battery was not precluded from seeking postconviction DNA testing. [Lindsey v. State, App. 5 Dist., 936 So.2d 1213 \(2006\)](#). [Criminal Law ¶1590](#)

Defendant who pled nolo contendere to sexual battery did not have statutory right to obtain postconviction DNA testing. [Stewart v. State, App. 5 Dist., 840 So.2d 438 \(2003\)](#), review denied [848 So.2d 1155](#). [Criminal Law ¶1590](#)

Defendant who pled nolo contendere prior to trial was precluded from seeking

postconviction DNA testing under statute limiting such motions to those who were tried and found guilty of committing crime. [Reighn v. State, App. 1 Dist., 834 So.2d 252 \(2002\)](#), rehearing denied, cause dismissed [871 So.2d 874](#). [Criminal Law ¶1590](#)

[4.5](#). Guilty pleas

Defendant who pled guilty to sexual battery while armed and robbery with a deadly weapon was not entitled to evidentiary hearing on his motion for postconviction DNA testing; defendant did not go to trial and, thus, was not entitled to postconviction DNA testing pursuant to the terms of the statute governing such testing. [Delidle v. State, App. 5 Dist., 866 So.2d 748 \(2004\)](#). [Criminal Law ¶1590](#)

[5](#). Motions

Other issues raised in defendant's motion for postconviction forensic DNA testing, which were unrelated to request for DNA testing, were procedurally barred from consideration, as they should have been raised on direct appeal; defendant included in motion complaints of suggestive lineup procedures, failure to compare latent fingerprints, and failure to interview an unnamed alibi witness, among others. [Harris v. State, App. 3 Dist., 868 So.2d 589 \(2004\)](#), rehearing denied, review denied [880 So.2d 1211](#). [Criminal Law ¶1429\(2\)](#)

Defendant complied with procedural requirement of rule governing motions for postconviction DNA testing that he include in motion present location or last known location of the evidence containing DNA to be tested by listing several agencies that might have had or might have possession of the evidence; defendant was obligated to provide information regarding the location of the evidence only if he had knowledge of said location. [Warren v. State, App. 2 Dist., 851 So.2d 817 \(2003\)](#). [Criminal Law ¶1590](#)

It would be preferable that if a movant seeking postconviction DNA testing has no knowledge regarding the location of the evidence to be tested, he so state in the motion. [Warren v. State, App. 2 Dist., 851 So.2d 817 \(2003\)](#). [Criminal Law ¶1590](#)

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