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Freeing the Innocent: Obtaining Post-Conviction DNA Testing in Florida

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FREEING THE INNOCENT: OBTAINING POST-CONVICTION DNA TESTING IN FLORIDA

CATHERINE ARCABASCIO*

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Some were sentenced to death. Without warning or just cause, all were one day swept off the streets, forcibly separated from their families and friends, and ultimately bound over into a maddening nightmare.

Post-conviction DNA tests performed on critical pieces of biological evidence proved they were innocent simply, elegantly, and definitively. But resurrecting their lives, and those of their loved ones, all shattered by unthinkable injustice, is a complex and messy process. Yet it must be undertaken at once, as a matter of common decency,

* Catherine Arcabascio is an associate professor of law at Nova Southeastern University, Shepard Broad Law Center. She also is Co-Founder and Co-Director of the Florida Innocence Project. I would like to thank my co-director, Craig Trocino, for the countless hours he has devoted to the Project. In addition, I also would like to thank the Innocence Project in New York, particularly Barry Scheck and Peter Neufeld for inspiring us to start the Project, and David Menschel for always being available for a brainstorming session. And finally, I would like to extend a heartfelt thanks to all the students of the Florida Innocence Project, especially Andrea Edwards, Linda Naish, Adrienne Sampson, Kathleen Bonczyk, Ellyn Bogdanoff, and Carrie Lane. They are the heart and soul of the Project, and without them we would not exist.

as a signal we can face the truth, as a measure to redeem our aspiration that America should be, can be, fair and just.¹

I. INTRODUCTION

To date, 138 people have been exonerated in the United States through the use of DNA testing.² On October 1, 2001, section 925.11 of the *Florida Statutes*, entitled "Postsentencing DNA Testing," went into effect; its procedural counterpart, rule 3.853 of the *Florida Rules of Criminal Procedure*, entitled "Motion for Postconviction DNA Testing," went into effect on October 18, 2001.³ The purpose of both section 925.11 and rule 3.853 is to provide movants a means by which they can challenge a conviction when there is "a credible concern that an injustice may have occurred and DNA testing may resolve the issue."⁴ Both section 925.11 and rule 3.853 set forth the requirements that must be met before a convicted movant will be allowed access to physical evidence from his case that could be subjected to DNA testing.⁵

Since section 925.11 and rule 3.853 went into effect, the Florida Innocence Project⁶ and other organizations like it have been working together to represent many indigent movants in the State of Florida.⁷ The litigation strategies that are contained in this article are a direct result of the combined experience and efforts of all the members of these organizations.

The organization of this article primarily will track the structure of rule 3.853, because the rule procedurally dictates the format of the motion. If it is necessary to the flow and understanding of the concepts presented in this article, a section of rule 3.853 may be discussed out of chronological order. There are some differences between the rule and the statute that will be discussed throughout this article; cites to both the rule and statute will be in-

1. TARYN SIMON, *THE INNOCENTS* 8 (Lesley Martin ed., 2003).

2. See The Innocence Project, at <http://www.innocenceproject.org/> (last visited Aug. 22, 2003).

3. FLA. STAT. § 925.11 (2002); FLA. R. CRIM. P. 3.853.

4. *Zollman v. State*, 820 So. 2d 1059, 1062 (Fla. 2d Dist. Ct. App. 2002) (quoting *In re Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing)*, 807 So. 2d 633, 636 (Fla. 2001) [hereinafter *Amendment*]).

5. § 925.11(2)(a)(1)-(6); FLA. R. CRIM. P. 3.853(b)(1)-(6).

6. The Florida Innocence Project was founded in 1999 at Nova Southeastern University, Shepard Broad Law Center. It provides *pro bono* legal assistance to convicted defendants who maintain that they are innocent and that DNA can exonerate them.

7. There is no automatic right to counsel in these post-conviction proceedings. See *infra* Section V.

cluded in the footnotes. As is customary in practice, the motion for DNA testing will be referred to as a "3.853 motion."

II. WHO MAY SEEK RELIEF

Not all movants are entitled to relief under section 925.11. "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"⁸ Rule 3.853 is silent with respect to this distinction, although the rule proposed by the Florida Bar Criminal Procedure Rules Committee did include language that authorized testing for those who entered guilty or nolo contendere pleas.⁹ The Supreme Court of Florida chose to remove it.¹⁰ Accordingly, a movant who enters an outright guilty plea will be barred from seeking DNA testing under the statute.¹¹ In *Reighn v. State*,¹² the First District Court of Appeal held that the movant's motion requesting DNA testing was barred under section 925.11 because section 925.11(1)(a) of the statute only allows one who "has been tried and found guilty of committing a crime" to file a 3.853 motion.¹³ Because the movant had pleaded nolo contendere prior to her trial, the First District Court of Appeal found that she, too, was barred.¹⁴

While a full discussion of this issue is beyond the scope of this article, there is a valid argument that excluding those who plead guilty from obtaining DNA testing is unjust and may be unconstitutional. In his concurring opinion in the Fourth Circuit Court of Appeals decision, *Harvey v. Horan*,¹⁵ denying a rehearing *en banc* for a movant seeking DNA testing through a § 1983 action, Judge Luttig included some strongly worded dicta regarding a movant's right to access evidence.¹⁶ He stated, "that there is a residual, core liberty interest protected by the Due Process Clause of the Fourteenth Amendment which, in certain, very limited circumstances, gives rise to a procedural due process right to access previously-produced forensic evidence

8. § 925.11(1)(a).

9. See generally FLA. R. CRIM. P. 3.853. See also *Amendment*, *supra* note 4, at 634.

10. See *Amendment*, *supra* note 4.

11. *Id.*

12. 834 So. 2d 252 (Fla. 1st Dist. Ct. App. 2002).

13. *Id.* at 253 (quoting § 925.11(1)(a)).

14. *Id.*

15. 285 F.3d 298 (4th Cir. 2002) (reviewing petitioner's section 1983 action that sought access to the evidence in his case sometime after his conviction in a Virginia court). The sole issue before the court was whether a section 1983 action was the appropriate vehicle for him to access that evidence. See *id.*

16. *Id.* at 308.

for purposes of STR DNA testing.”¹⁷ Judge Luttig further explained, “[a]t least as classically understood, it is not a right of procedural due process. And neither is it a typical substantive due process right. But it is a right that legitimately draws upon the principles that underlay all of these—a conceptual and constitutional fact” that eluded the majority.¹⁸ While Judge Luttig did not discuss this principle within the context of guilty pleas, his reasoning should nonetheless apply to those who pleaded guilty. Indeed, the process of negotiating pleas is so deeply rooted in our criminal justice system that it should not be treated differently than a conviction when determining who should be entitled to access evidence. Innocent people do sometimes take pleas, just as they sometimes confess to crimes they did not commit.¹⁹

Similarly, in the Supreme Court of Florida’s opinion adopting rule 3.853, Justice Anstead concurring in part and dissenting in part, also objected to the denial of 3.853 relief for those who plead guilty:

Of course, we know as a fact the overwhelming majority of criminal cases are resolved through plea negotiations and, hence, any DNA testing under the legislation excluding those cases will be limited to a small percentage of convicted defendants. To be sure, however, we also know that plea bargaining often results in many cases of pleas of convenience or best interests where the defendant simply acknowledges that the uncertain risk of trial on additional and more serious charges compels him to accept conviction and punishment even while maintaining innocence. We have consistently recognized that courts should grant relief when a fundamental injustice has been demonstrated regardless of whether the defendant was convicted by trial or by plea.²⁰

Justice Anstead also pointed out that access to DNA testing is in essence a claim of illegal detention under the “constitutional writ of habeas corpus,” which is provided for in Florida’s Constitution.²¹ Moreover, the Supreme Court of Florida possesses exclusive jurisdiction over proper pro-

17. *Id.*

18. *Id.* at 311.

19. *See, e.g., Prosecutors Seek Reversal in Central Park Jogger Case*, REUTERS NEWS SERV. (N.Y.), Dec. 6, 2002, available at <http://www.bet.com/articles/1,,clgb4807-5525,00.html> (reporting that after another man confessed to the crime and DNA testing confirmed he was guilty, prosecutors asked the court to reverse the convictions of five defendants for the rape of a jogger in New York’s Central Park on April 19, 1989 on the grounds that the video-taped confessions of the then teenage defendants were coerced by police).

20. *Amendment, supra* note 4.

21. *Id.*

cedures for invoking the writ.²² The ability to file a writ of habeas corpus is available to a movant, regardless of whether or not he pleads guilty.²³ The only issue, according to Justice Anstead, is whether a “fundamental injustice has occurred.”²⁴

III. STATUTE OF LIMITATIONS FOR FILING 3.853 MOTIONS

Despite the recommendations of numerous attorneys across the State of Florida, the Supreme Court of Florida adopted a rule that included a statute of limitations.²⁵ The Florida Innocence Project suggested in its comments to the Rules Committee that:

The inclusion of a two year time limitation in Proposed Rule 3.853 (d)(1) compromises the very purpose of the rule. No one can predict what changes in DNA testing will occur in the future. The only thing that can be predicted is that new methods and new technologies will be developed. History reinforces science’s unequivocal record of endless discovery and refinement of knowledge.²⁶

In addition, because this particular group of cases is so old, a proper and thorough investigation takes more than two years.²⁷ These and other comments opposing the time limitation failed to persuade the supreme court.²⁸ It adopted a rule that includes time limitations for three categories of cases, so that it would mirror section 925.11.²⁹

The first states that a movant must file a 3.853 motion “[w]ithin 2 years following the date that the judgment and sentence in the case became final if no direct appeal was taken . . . or by October 1, 2003, whichever occurs later.”³⁰ The second applies to cases where there has been a direct appeal. In

22. *Id.*

23. *Id.*

24. *Id.* at 637.

25. See Emergency Petition to Create Rule 3.853 Florida Rules of Criminal Procedure (DNA Testing) at App. B, *In re* Amendment to Fla. Rules of Criminal Procedure Creating Rule 3.853 (DNA Testing), 807 So. 2d 633 (Fla. 2001) (No. SC01-363), available at http://www.flcourts.org/sct/clerk/briefs/2001/201-400/01-363_appendixB.pdf (last visited Oct. 16, 2003) [hereinafter Emergency Petition].

26. *Id.*

27. Unpublished data compiled from the over 700 requests for assistance received by the Florida Innocence Project; see also Emergency Petition, *supra* note 25.

28. *Amendment, supra* note 4, at 635.

29. *Id.* See generally FLA. R. CRIM. P. 3.853; § 925.11.

30. FLA. R. CRIM. P. 3.853(d)(1)(a); § 925.11(1)(b)(1).

those cases, the motion must be filed “within 2 years following the date that the conviction was affirmed on direct appeal . . . or by October 1, 2003, whichever occurs later.”³¹ Finally, in a death penalty case, the motion must be filed “within 2 years following the date that collateral counsel was appointed or retained subsequent to the conviction being affirmed on direct appeal” or by October 1, 2003, whichever occurs later.³² Thus, all motions involving cases in which the convictions were final prior to October 1, 2001 must be filed by October 1, 2003.³³ That many of the cases that fall under the purview of rule 3.853 will be barred by the statute of limitations is obvious because DNA technology did not exist as it does now.

This is particularly troubling because this group of cases is most burdened by the statute of limitations. Many of the affected cases are fifteen or twenty years old. It is not uncommon to find cases from the 1970’s, which have records that have been archived for many years, if they still exist at all.³⁴ The Florida Innocence Project has received requests for assistance in cases dating back as early as 1959.

The same problem exists in locating the physical evidence in these cases.³⁵ These are the cases that were tried during a time when DNA testing did not exist, was too new to be available in all cases, or was in its infancy and less reliable tests were being conducted on the evidence.

Although a majority³⁶ of the states that have enacted DNA statutes do not include a testing deadline in their statute, the Florida Legislature chose to include such a provision.³⁷ The inclusion of this time limitation makes it entirely possible that innocent movants will have lost their opportunity to be exonerated.

If the deadline passes, a movant still may be able to file a 3.853 motion. Rule 3.853(d)(1)(a) allows a motion to be filed at any time “if the facts on which the petition is predicated were unknown to petitioner or the peti-

31. *Id.*

32. *Id.*

33. *Id.*

34. *See, e.g.,* Zollman v. State, 820 So. 2d 1059, 1060 (Fla. 2d Dist. Ct. App. 2002) (deciding the filing of a 3.853 motion twenty-three years after rape conviction); Galloway v. State, 802 So. 2d 1173 (Fla. 1st Dist. Ct. App. 2001) (deciding the filing of a 3.853 motion based upon a 1979 conviction of two counts of robbery and one count of sexual battery).

35. *See, e.g.,* King v. State, 808 So. 2d 1237, 1241 (Fla. 2002) (dismissing defendant’s motion for DNA testing due to determination that vaginal washings and rectal swab no longer existed).

36. This includes states that allow testing during the entire period of a defendant’s incarceration.

37. *Compare* FLA. STAT. § 925.11(1)(b)(1), *with* ARIZ. REV. STAT. § 13-4240(A) (2001), N.J. STAT. ANN. § 2A:84A-32a (West 2003), *and* N.Y. CRIM. P. LAW § 440.30 (McKinney Supp. 2003).

tioner's attorney and could not have been ascertained by the exercise of due diligence.³⁸ Rule 3.853's due diligence requirement is similar to the due diligence requirement in rule 3.850, which governs motions to vacate, set aside, or correct sentences.³⁹ If a fact could have been discovered with due diligence but was not, most courts will deny a 3.850 motion as being untimely.⁴⁰ The question of due diligence under 3.853 is not yet ripe and thus no caselaw exists that interprets it. It would seem, however, that the courts would interpret rule 3.853's due diligence requirement the same way that it interprets rule 3.850. This section however, is crippled by the fact that government agencies have the right to destroy the evidence once the two-year statute of limitations has expired.⁴¹

A less elegant option would be to file a 3.853 motion that is facially sufficient, but not thoroughly investigated. The court will review the motion and based upon the facts provided in the motion, may deny it for facial insufficiency. If it is denied for facial insufficiency after the October 1, 2003 deadline has passed, the decision will have to be appealed. In that case, the district court of appeal may simply give the movant leave to file a facially sufficient motion. If it is denied substantively, the movant may still have an opportunity to file a second 3.853 motion. Currently there is no caselaw barring successive 3.853 motions. However, 3.853's statutory cousin, 3.850 has a healthy body of caselaw that bars successive motions on the theory of finality.⁴²

There are several strong constitutional arguments that exist which may prevent the statute of limitations from acting as a bar to accessing evidence. Should Florida legislators during the coming legislative session choose to ignore the call to extend the statute of limitations, the battle to conduct DNA testing after the October 1, 2003 deadline in this class of cases no doubt will be fought in court on constitutional grounds.⁴³

38. FLA. STAT. § 925.11(1)(b)(2) (2002).

39. Compare FLA. R. CRIM. P. 3.853(d)(1)(B), with FLA. R. CRIM. P. 3.850(b)(1).

40. Correll v. State, 698 So. 2d 522, 523-24 (Fla. 1997).

41. § 925.11 (4)(a), (b); see also *infra* Section IV.A.3.

42. See, e.g., Foster v. State, 614 So. 2d 455, 458 (Fla. 1992) (holding that interpretation of FLA. R. CRIM. P. 3.850(f) means that a successive motion may be dismissed if it fails to allege new or different grounds for relief).

43. For a more detailed discussion of the constitutional arguments, see Emergency Petition, *supra* note 25; see also NAT'L INST. OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS (Sept. 1999), at <http://www.ncjrs.org/pdffiles1/nij/177626.pdf> [hereinafter RECOMMENDATIONS FOR TESTING].

IV. FACIAL SUFFICIENCY FOR A 3.853 MOTION

Rule 3.853 requires that a motion for DNA testing contain five statements that must be made “under oath” by the sentenced movant.⁴⁴

A. *The Statement of the Facts*

In order to be considered facially sufficient, a 3.853 motion must contain “a statement of the facts relied on in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained.”⁴⁵

Normally, one can use the trial transcripts to provide the court with a recitation of the underlying facts in a case. If the conviction is old, however, it is likely that some documents, including the transcript, will be difficult to locate because there is no one set rule that governs how long public offices must keep transcripts. In some circumstances, the movant or his family may have a copy of the trial transcript. If neither has it, then it is possible that one of the movant’s prior lawyers may have a copy, so make sure to inquire with both the trial lawyers and the appellate lawyers. If that also leads to a dead-end, most of the trial transcripts in criminal cases are warehoused by the Attorney General’s Office in Tallahassee.

If all else fails, neither the rule nor the statute technically requires that the trial transcript be the only source regarding the facts.⁴⁶ In *Zollman v. State*,⁴⁷ the Second District Court of Appeal held that the determination of whether the 3.853 motion is facially sufficient “requires consideration of the facts of the crime itself *and the other available evidence*.”⁴⁸ Nothing prohibits the use of facts from other transcribed proceedings such as hearings and depositions as long as the facts of the crime itself are established. Like 3.850 motions, which allow the defense to argue that newly discovered evidence should permit the movant to obtain a new trial, it appears that facts outside the record may also satisfy the requirements of rule 3.853.

A movant or his attorney wishing to file a 3.853 motion also should collect all of the police records and other documents from the case. These documents should have been turned over during discovery and should be obtainable through the movant or his prior counsel. However, because these

44. FLA. R. CRIM. P. 3.853(b); § 925.11(2)(a).

45. FLA. R. CRIM. P. 3.853(b)(1); § 925.11(2)(a)(1).

46. See FLA. R. CRIM. P. 3.853; § 925.11.

47. 820 So. 2d 1059 (Fla. 2d Dist. Ct. App. 2002).

48. *Id.* at 1063 (emphasis added).

cases are normally very old, it may be difficult to retrieve them. Thus, an attorney should make a public records request, commonly known in Florida as a Chapter 119 request, to each and every law enforcement agency involved in the movant's case and to the State Attorney's Office.⁴⁹ Pursuant to Chapter 119, a movant is entitled to obtain copies of public records that are maintained in a state public agency.⁵⁰ Some of these documents also may help in establishing the underlying facts of the crime should the transcript not be located.

1. Determining Which Underlying Facts to Include

Developing a persuasive factual recitation that provides the basis for an exoneration claim is one of the most difficult and important parts of drafting a 3.853 motion. The facts should be presented as completely as possible.⁵¹

Similar to a direct appeal or a 3.850 motion, a 3.853 motion should contain basic factual information regarding the charges presented to the jury, the crime or crimes of which the movant was convicted, the sentence he received, and the trial judge who presided over the case.⁵² The facts section also should contain specific details about the actual underlying crime, i.e. where and when the crime occurred, whether there were any witnesses, how the movant was identified, whether or not there were other suspects, and most importantly, what physical evidence was collected.⁵³

Other facts that relate to the prosecution and defense theories at trial also should be presented. For example, if a prosecutor proceeded on the theory that only one person raped the victim, that fact should be included in the statement of facts. At the post-conviction stage, a prosecutor may attempt to argue that even if the results of a DNA test indicate that the semen does not belong to a movant, that result does not necessarily exonerate him. Some of these arguments are founded upon new theories that were never presented at trial. Even though there was never another person alleged to have been involved in a crime, the prosecution may attempt during post-conviction pro-

49. FLA. STAT. § 119.011 (2002).

50. § 119.011(2) (meaning of agency is, "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law").

51. *See, e.g.*, *Galloway v. State*, 802 So. 2d at 1174 (denying *pro se* defendant's 3.853 motion on the grounds that his allegations failed to properly assert how DNA testing could exonerate him. Court held that the fact that only co-defendant's DNA was on the defendant and at the scene of the crime did not mean that the defendant was not present when the sexual battery was committed).

52. *See* FLA. R. CRIM. P. 3.853(b)(1)-(5).

53. *Id.*

ceedings to argue in a single perpetrator rape case that there could have been another person present who participated in the crime and who deposited the semen. Thus, it is important to present the facts as completely as possible.

In *Knighen v. State*, the prosecutor argued during trial that a pubic hair, found in the bedroom where the rape of two women had taken place, could have been Knighen's.⁵⁴ At trial, the defense relied upon a misidentification theory.⁵⁵ To rebut that theory, the prosecution "relied heavily" on the pubic hair:

She also told you that those two pubic hairs could have originated from Toney Knighen. No emotionalism, no room for mistake. Ask yourself what is the probability that someone with pubic hairs exactly like Toney Knighen's was in that trailer in that bedroom and on that carpet. Its [sic] not very likely.⁵⁶

The prosecutor then argued that the chances of a mistaken identity were slim given the hair evidence.⁵⁷ The Second District Court of Appeal clearly took the prosecutor's closing arguments into account when it held not only that Knighen's motion was facially sufficient but also that DNA testing of the pubic hair should be granted.⁵⁸

Keep in mind that each case is factually distinct and, apart from the traditional facts like conviction, date of conviction, judge and sentence, a separate determination will have to be made regarding what facts may prove pivotal and crucial. The cases cited above suggest that a somewhat holistic and broader view of 3.853 litigation is more effective. While a bare bones recitation of the facts might meet minimal facial sufficiency, other facts may prove necessary in establishing that DNA can exonerate the movant. Having a narrow focus will only allow the prosecution more leeway to argue against exoneration. Moreover, if the motion is denied summarily without a hearing at the trial level, the record on appeal will be limited to the allegations in the motion.⁵⁹ Thus, providing the court with a full record is crucial.

2. Describing the Physical Evidence

The second component of rule 3.853(b)(1) requires the movant to include "a description of the physical evidence containing DNA to be tested

54. 829 So. 2d 249, 250 (Fla. 2d Dist. Ct. App. 2002).

55. *Id.*

56. *Id.*

57. *Id.* at 251.

58. *Id.* at 252.

59. *Zollman v. State*, 820 So. 2d 1059, 1060 (Fla. 2d Dist. Ct. App. 2002).

and, if known, the present location or last known location of the evidence and how it was originally obtained.”⁶⁰ Note that this section does not place the burden specifically upon the movant to establish with absolute certainty the whereabouts of potential evidence. It merely states that if it is known, the movant should provide the court with that information. Indeed, in this post-conviction process, the movant or his attorney are in the most disadvantaged position to locate the evidence. Fairness demands that the burden should squarely be on the prosecution to find out whether or not evidence in a case still exists and where it is located.

To date, there has been no Florida district court of appeal case that explicitly states how this burden is to be allocated or satisfied. In *Huffman v. State*,⁶¹ the movant stated in his 3.853 motion “that the last known location of the evidence was at the Florida Department of Law Enforcement in Tampa or at the Sarasota County Police Department.”⁶² In response to the motion, the State did not “indicate whether the rape kit was still available for testing.”⁶³ “The trial court acknowledged that the State failed to allege whether the evidence sought to be tested was still available for testing,” but it never fully addressed the issue in its opinion, having decided to deny the 3.853 motion on other grounds.⁶⁴ However, it appears that the Second District Court of Appeal did not assume that the burden rested completely with the movant.⁶⁵ In *Borland v. State*,⁶⁶ the Second District Court of Appeal held that “a finding by the trial court that DNA evidence does or does not exist is a factual determination” and thus, the trial court must conduct an evidentiary hearing.⁶⁷ If the State provides an unsworn statement that evidence does not exist, that assertion alone will be insufficient and the court must hold an evidentiary hearing.⁶⁸ Moreover, an affidavit from the State will not suffice.⁶⁹ “An affidavit serves as the functional equivalent of testimony which is contradictory to the allegations sworn as true by the movant.”⁷⁰

Despite an urge to take the inflexible position that the defendant should not conduct a diligent search for the evidence, a defendant or attorney filing a 3.853 motion nevertheless should make an attempt to locate the evidence.

60. FLA. R. CRIM. P. 3.853(b)(1); FLA. STAT. § 925.11(2)(a)(1) (2002).

61. 837 So. 2d 1147 (Fla. 2d Dist. Ct. App. 2003).

62. *Id.* at 1148.

63. *Id.*

64. *Id.* at 1149.

65. *Id.*

66. 848 So. 2d 1288 (Fla. 2d Dist. Ct. App. 2003).

67. *Id.* at 1289; *see also* Marsh v. State, 852 So. 2d 945 (Fla. 2d Dist. Ct. App. 2003).

68. *Borland*, 848 So. 2d. at 1290.

69. *Id.*

70. *Id.* (quoting Clark v. State, 662 So. 2d 729, 730 (Fla. 2d Dist. Ct. App. 1995)).

First, knowing exactly what evidence exists will assist in formulating stronger exoneration arguments. Second, even though an evidentiary hearing should be granted, it remains unclear if there is some due diligence requirement attached to locating the evidence.

3. Locating and Preserving the Evidence

If the transcript is available, it will be easy to determine whether any physical evidence was admitted at trial. That information also is easily obtained from the court's records. However, the record will not reveal what other evidence was collected but never tested. Police reports can provide information about what evidence the police collected regardless of whether any testing was done on it.⁷¹

When DNA testing was first used, a large sample of blood, saliva, semen, or other bodily fluid was necessary in order to conduct the testing. With today's methodologies, a sample of physical evidence the size of a pinhead can be tested.⁷² Thus, DNA can be found on a small cigarette butt, toothpick, a sweaty article of clothing, the handle of a weapon, eyeglasses, facial tissues, stamps, tape, mouthpiece of a bottle or can, urine, feces, a bullet, bite mark, or fingernails.⁷³ A pin-sized stain on a garment that was collected at the scene of the crime could easily have been overlooked and never tested. Or, a hair that may only have been subjected to microscopic comparison could today be subjected to mitochondrial DNA testing even if there is no root.⁷⁴ It can even be tested using the newer PCR/STR method to determine whether there is semen on the hair.⁷⁵

If a garment or other item has been subjected to either earlier rudimentary DNA testing or to ABO blood typing, the "stain," in all likelihood, was cut from the item of clothing. The cutting may have been used entirely in the earlier testing and therefore it will not be available for new testing. However, there may be tiny fluid spatters around the area where the garment was cut that now can be subjected to new testing. In short, DNA can be found on

71. See FLA. STAT. § 119.011 (2002); see also discussion *infra* Section IV.A.

72. ANDRES A. MOENSSENS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 910-911 (4th ed. 1995).

73. NAT'L INST. JUSTICE, WHAT EVERY LAW ENFORCEMENT OFFICER SHOULD KNOW ABOUT DNA EVIDENCE: WHAT IS DNA?, <http://www.ncjrs.org/nij/DNAbro/id.html> (last modified September 1999).

74. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 24. Mitochondrial testing can be done on samples that are not suited for other types of testing. *Id.* at 28. It can be done on dried bones, teeth, or hair shafts or on samples that contain little or degraded nuclear DNA. *Id.*; see also *infra* Section IV.B.

75. See also *infra* Section IV.B.

virtually anything. “[W]herever anyone goes, whatever anyone does, he leaves something behind”⁷⁶ Thus, the net in the search for evidence should be cast as widely as possible.

In very old cases, there is a strong possibility that the evidence has been destroyed. With the exception of section 925.11(4)(b), there are no set rules governing the period of time for which an agency must keep evidence before it is allowed to be destroyed.⁷⁷ In fact, some jurisdictions had no rules in place ten or twenty years ago. More recently however, many jurisdictions have implemented rules that require the evidence to be maintained for extended periods of time, such as the length of the sentence or until an execution in a death penalty cases has been imposed.

Whether or not the evidence is destroyed will depend largely on where the evidence has been maintained. In addition, some offices will not find the evidence during a first attempt and will hastily report that the evidence does not exist. Do not automatically assume that this is true or accurate. With some luck and persistence, you still may be able to find the evidence.

In Florida, if the evidence was introduced at the movant’s trial, it will remain under the jurisdiction of the clerk’s office in the courthouse. If evidence was not used at trial, usually because it was not or could not be subjected to any forensic testing or the testing was deemed inconclusive, then the police department that arrested the movant usually will store the evidence.⁷⁸ In order to locate this evidence, provide the police or sheriff’s department that arrested the movant with the original case number and if possible, the evidence identification numbers. If the police department is unwilling to provide this information over the phone, file a Chapter 119 request.⁷⁹ In recent years, several law enforcement organizations, such as the Broward Sheriff’s Office and other local police departments, have merged so it may be quite time consuming to track down where evidence wound up after the merger.

There are other places where evidence may be located. In rape cases, slides are made as part of a “rape kit” at the hospital where the victim was treated.⁸⁰ Some of those hospitals may have kept a slide or set of slides. It is worthwhile to find out which hospital treated the victim. If that information cannot be discovered however, the movant or his attorney should make sure to include the name of the hospital in the 3.853 motion as a possible source of evidence. If it can be determined that the hospital’s common practice

76. MOENSSENS ET AL., *supra* note 72, at 963.

77. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 24.

78. *Id.*

79. *See* § 119.011-.19.

80. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 46.

requires that slides be kept a particular amount of time, that information also should be included in the motion. That way, the movant can request that the court order the hospital to look for any slides related to the case. In addition, there may be evidence located at pathology departments, clinics, or doctor's offices.⁸¹ If the case involves a murder, also check at the medical examiner's office.⁸²

Sometimes the lab that did the original testing will keep some of the slides or photographs of the results of earlier DNA tests.⁸³ In Florida, the common places to search are the Florida Department of Law Enforcement Laboratories, which are located in Jacksonville, Tallahassee, Daytona Beach, Pensacola, Fort Myers, Orlando, and Tampa Bay.⁸⁴ In addition, there are local county labs such as the Broward Sheriff's Office or the Miami-Dade County Laboratories that may have evidence. In some cases, samples also may have been sent to other private independent labs either by the prosecution or by the defense.⁸⁵ Samples also may have been sent to the Federal Bureau of Investigation Laboratory for testing.⁸⁶

Regardless of whether the movant actually locates the evidence or not, he should send a letter to each and every agency where the evidence could be located requesting that the evidence be preserved and that notice be given to the defense should the agency wish to destroy any evidence in the case.⁸⁷ In the letter, the movant should cite to section 925.11(4)(a), which states:

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.⁸⁸

Section 925.11(4)(b) requires that the evidence shall be maintained for at least the time periods of section 925.11(1)(b), which outlines the statute of

81. *Id.*

82. *Id.*

83. *Id.*

84. See FLA. DEP'T OF LAW ENFORCEMENT, CRIME LABORATORY SERVICES, at <http://www.fdle.state.fl.us/crimelab/> (last visited Aug. 27, 2003).

85. See, e.g., *Murray v. State*, 838 So. 2d 1073 (Fla. 2002).

86. *Id.* at 1076. For more information on the FBI laboratory visit <http://www.fbi.gov/hq/lab/labhome.htm>.

87. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 46.

88. FLA. R. CRIM. P. 3.853 (containing no language regarding the destruction of evidence).

limitations for filing 3.853 motions. Thus, if a defendant does not take a direct appeal, the evidence in his case must be maintained for two years following the date that the judgment and sentence became final, or October 1, 2003, whichever is later.⁸⁹ If the defendant files a direct appeal, the evidence in his case must be preserved for two years following the date that the conviction is affirmed on direct appeal or October 1, 2003, whichever is later.⁹⁰ In a death penalty case, the evidence must be preserved for sixty days after the execution of sentence.⁹¹ Rule 3.853 contains no provisions regarding the destruction of evidence.⁹²

However, a government agency may dispose of the evidence before the expiration of these time periods if the following conditions are met. First, the agency must notify the defendant, any counsel of record, the prosecuting authority, and the Attorney General.⁹³ Second, the agency must 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.”⁹⁴

This portion of the statute is internally inconsistent with section 925.11(1)(b)(2), which allows a movant to file a motion for DNA testing after the statute of limitations has expired if the facts upon which the motion is predicated could not have been ascertained with due diligence.⁹⁵ Thus, even though the statute allows for testing beyond the two-year period, the evidence can be destroyed immediately after the statutes of limitations have run.

Even if the search for evidence is unsuccessful, the motion should nonetheless be filed. It should list all of the places the evidence was last known to have been located and include a request that the court order the prosecution to search for the evidence in all of the listed locations. If the prosecution alleges that it cannot locate the evidence, the movant should request that the court require the prosecution to provide proof that the evidence has been destroyed. That proof should be submitted in the form of a sworn affidavit from the person responsible for the evidence in the particular location where it was allegedly destroyed. The affidavit should either detail the futile attempt to locate the evidence or should have the affiant swear that the evi-

89. FLA. STAT. § 925.11(1)(b), (4)(b) (2002).

90. *Id.*

91. *Id.*

92. *See* FLA. R. CRIM. P. 3.853.

93. § 925.11(4)(c)(1).

94. § 925.11(4)(c)(2).

95. *Compare* § 925.11(c)(1)-(2), *with* § 925.11(1)(b)(2).

dence was destroyed. If the evidence was destroyed, the court should require the agency that destroyed it to provide documentation of its destruction procedures and also to provide proof of destruction.

B. Statement that the Evidence Was not Tested Previously or That Previous Testing Was Inconclusive

Rule 3.853(b)(2) requires a statement “that the evidence was not tested previously for DNA.”⁹⁶ In the alternative, if testing was done previously, the movant must include a statement that the results of previous DNA testing were “inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result.”⁹⁷ If the case falls within the first category of cases, then satisfying this part of the rule is relatively simple. If DNA testing was not done, then that statement alone will satisfy rule 3.853(b)(2).

Prior to 1988, one can almost assume that no DNA testing was conducted in a case. While trace evidence items including hair, blood, semen, or other bodily fluids routinely were collected, at best they were subjected to rudimentary tests such as ABO blood typing, tests to determine whether there was spermatozoa present, and microscopic hair comparison. In 1988, however, Tommie Lee Andrews became the first person in the United States to be tried and subsequently convicted using DNA evidence.⁹⁸

Yet, one cannot assume that all cases that were prosecuted after 1988 utilized DNA testing. Cases exist dating from 1988 to 2001 in which the prosecution did no DNA testing even though DNA testing could have produced exonerating results. There are various reasons why there may not have been testing. In some cases, the labs may not have been able to complete testing either because they were too busy, machine malfunctions occurred, or the prosecutor simply did not request testing. In addition, DNA testing routinely was done, for example, in rape and murder cases but other cases such as burglaries were not considered “DNA” cases even though there now are ways to test the collected trace evidence.

Today, many labs conduct a type of DNA testing called PCR/STR.⁹⁹ With a more modern testing method, such as PCR/STR, a pin-size amount of

96. FLA. R. CRIM. P. 3.853(b)(2); § 925.11(2)(a)(2).

97. *Id.*

98. *Andrews v. State*, 533 So. 2d 851 (Fla. 5th Dist. Ct. App. 1988).

99. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 27.

sample can be replicated and then tested.¹⁰⁰ PCR is the acronym for Polymerase Chain Reaction and STR is the acronym for Short Tandem Repeat.¹⁰¹

The term PCR applies to different types of testing that can vary in “reliability and effectiveness.”¹⁰² PCR is not actually a testing method but rather it is a way to amplify or duplicate a DNA sample and thus “may be likened to a molecular xeroxing machine.”¹⁰³

In some cases, even though results were reported as being conclusive, by today’s standards they should be deemed inconclusive. For example, rudimentary PCR-DQ Alpha testing provides results that are not sufficiently discriminating.¹⁰⁴ According to the National Commission on the Future of DNA Evidence, “[a] falsely accused individual may be included as a possible donor of a DNA sample with this test system.”¹⁰⁵ However, an inclusion with DQ-Alpha testing, would have, in the past, been interpreted as a “conclusive” result.¹⁰⁶ If an older version of DNA testing was done, and “results” were obtained, ask an expert to review the data and determine whether those results should be deemed inconclusive.¹⁰⁷

Another type of testing that is used is called Restriction Fragment Length Polymorphisms, or RFLP.¹⁰⁸ This type of DNA testing however, requires a greater amount of sample to test.¹⁰⁹ The sample should be dime-sized or larger.¹¹⁰ The use of RFLP testing could have produced inconclusive results either because the DNA sample was too small or too degraded.¹¹¹ If testing was done previously, a lab report will indicate whether the results were inconclusive.

In addition to the PCR/STR and PCR Mitochondrial DNA testing methods, there are other new testing methods available today.¹¹² For example, Y-chromosome testing is useful when only the male portion of a mixed DNA sample is relevant to the case.¹¹³ It also may be useful to test fingernail scrapings from a female victim when the assailant was a male or in multiple

100. *Id.*

101. *Id.* at 68.

102. Donald E. Riley, *DNA Testing: An Introduction for Non-Scientists*, SCI. TESTIMONY ¶ 19 (1998), at <http://www.scientific.org/tutorials/articles/riley/riley.html>.

103. MOENSSENS ET AL., *supra* note 72, at 877.

104. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 24.

105. *Id.* at 27.

106. *Id.* at 34.

107. *Id.*

108. *Id.* at 26.

109. MOENSSENS ET AL., *supra* note 72, at 891.

110. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 26.

111. *Id.*

112. *Id.* at 29–30; *see also* Riley, *supra* note 102.

113. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 29–30.

male assailant cases.¹¹⁴ While ultimately the laboratory conducting the DNA test may be in the best position to determine which type of testing is best for a case, the movant should be aware of the options available to him and should request in his 3.853 motion that these new testing methods be used.

Both rule 3.853 and section 925.11 require that the Florida Department of Law Enforcement's Laboratory conduct post-conviction testing.¹¹⁵ While section 925.11 does not offer an alternative to this mandate, rule 3.853 does provide one.¹¹⁶ Rule 3.853 allows that the court "on a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors or the National Forensic Science Training Center when requested by a movant who can bear the cost of such testing."¹¹⁷ If the Florida Department of Law Enforcement ("FDLE") is not equipped to conduct the more specialized types of DNA testing needed in a particular case, then that should be sufficient "good cause" for the court to order testing at an independent certified laboratory.¹¹⁸

A movant also should consider requesting that tests be conducted at a laboratory other than the FDLE for another reason. The FDLE laboratories have 2100 backlogged cases.¹¹⁹ According to a recent newspaper article in the Miami Herald, the average turnaround time for DNA testing at the five FDLE laboratories is currently 164 days, or more than five months.¹²⁰ Such serious delays in obtaining testing should establish good cause to send the specimens to another lab. That is assuming that the movant can absorb the cost of doing so.¹²¹

Whichever lab ultimately does the testing, the movant should always request that the lab split the sample.¹²² This will ensure that there is sufficient sample remaining should additional testing be required.¹²³

If DNA testing was done previously in a case, then there are two other issues to consider before submitting a 3.853 motion. First, assess whether re-

114. *Id.*

115. FLA. R. CRIM. P. 3.853 (c)(7); § 925.11(2)(h).

116. *Id.*

117. FLA. R. CRIM. P. 3.853 (c)(7).

118. Some prosecutors have stipulated to testing the evidence at a different laboratory.

119. Wanda J. DeMarzo & Daniel de Vise, *DNA Testing a Challenge For Busy Crime Labs*, MIAMI HERALD, June 29, 2003, at 1A. In January of 2003, the St. Petersburg Times reported that the FDLE had almost 2700 backlogged open cases and 8300 additional samples from prison inmates awaiting testing. *FDLE Labs Have Thousands of DNA Requests Pending, Paper Says*, MIAMI HERALD, Jan. 28, 2003, at 3B [hereinafter *FDLE*].

120. *FDLE*, *supra* note 119.

121. See FLA. R. CRIM. P. 3.853(c)(7).

122. RECOMMENDATIONS FOR TESTING, *supra* note 43, at 24.

123. *Id.*

analyzing the DNA will exonerate the movant. In *Hartline v. State*,¹²⁴ the pro se movant argued that he was entitled to new DNA testing on the grounds that the state's expert witness testified the DNA evidence was inconclusive.¹²⁵ However, in denying the motion, the court held that even if the DNA were re-examined, he had admitted to engaging in sexual activity with the minor/victim.¹²⁶

Second, strongly consider having an expert review the testimony of the expert witnesses and the lab reports to ensure that the conclusions drawn by the expert are in fact correct and that the protocols used by a lab were proper and were followed. In *Murray v. State*,¹²⁷ the Supreme Court of Florida reversed the murder, burglary, and sexual battery convictions of Gerald Murray because of errors made during DNA testing by the state's expert.¹²⁸ At the 1994 trial, the state admitted hair evidence that the prosecution maintained matched Murray's.¹²⁹ The defense presented its own witnesses, one of whom had worked with the state's expert and who actually performed the DNA test.¹³⁰ Dr. Warren testified that he had committed "several serious errors" during the testing and that they had not maintained the proper testing controls.¹³¹ The defense witness testified that the results were inconclusive and unreliable. In addition, Dr. Howard Baum, an assistant medical examiner in New York City also testified for the defense that these results were inconclusive and unreliable.¹³²

In order for a DNA test to be considered reliable, "there must be an independent review by a second qualified analyst."¹³³ After the testing, Dr. Warren concluded that the tests were inconclusive.¹³⁴ His supervisor, the prosecution witness, disagreed and submitted a lab report, which concluded that the results were conclusive, and that they were consistent with Murray's.¹³⁵ As the Court noted, "one of the elements of a second independent review is to ensure that the results of the initial review were reliable, and

124. 806 So. 2d 595 (Fla. 5th Dist. Ct. App. 2002).

125. *Id.* at 595-96.

126. *Id.*

127. 838 So. 2d 1073 (Fla. 2002).

128. *Id.* at 1081.

129. *Id.* at 1076.

130. *Id.* at 1077.

131. *Id.*

132. *Murray*, 838 So. 2d at 1077.

133. *Id.* at 1080.

134. *Id.*

135. *Id.*

should the two analysts disagree, the tests should be deemed inconclusive in the absence of further analysis.”¹³⁶

The defense also questioned Dr. Warren about the failure to document some of the tests:

Q: Do you have an explanation for why there were those clerical errors that you'd like to share with the jury?

A: Well, we were quite busy at the time. We were very busy, as a matter of fact. If you look at the evidence on some of these work sheets you will see gels from different—evidence from different cases ganged together on the same gel and it was, at the time, an expedient issue there.

Q: And, sir, I know that this is not easy for you. Would you admit that the paperwork and the documentation that came out of Micro Diagnostics at that time was below what would be normally accepted?

A: It was, to be blunt, sloppy.

Q: Thank you, sir.

A: And below standards.¹³⁷

Needless to say, this exchange raises serious concerns and highlights the problems that may occur at the testing phase. Unlike the circumstance in *Murray*, however, some of those failings at the testing level may not necessarily come to light at trial. Thus, it always is a good idea to work with an expert so that she can give an independent opinion about the results that were provided by the state.

C. *Statement of Innocence and Exoneration*

Rule 3.853 requires a movant to explicitly state that he is innocent of the crime.¹³⁸ This rule was adhered to strictly in *Coombs v. State*,¹³⁹ where the trial court denied the petitioner's pro se motion in part because he failed to state that he was innocent. The movant also must explain how DNA testing will exonerate him.¹⁴⁰ Neither the rule nor the statute provides a definition of exoneration. In *Galloway v. State*,¹⁴¹ the First District Court of Appeal provided a dictionary definition of exoneration and incorrectly at-

136. *Id.* at 1081.

137. *Murray*, 838 So. 2d at 1081 n.7.

138. FLA. R. CRIM. P. 3.853(b)(3); § 925.11(2)(a)(3).

139. 824 So. 2d 958 (Fla. 3d Dist. Ct. App. 2002).

140. *Id.* (citing FLA. R. CRIM. P. 3.853(b)(3)).

141. 802 So. 2d 1173 (Fla. 1st Dist. Ct. App. 2001).

tempted to use that as the standard by which to measure whether a motion for DNA testing should be granted.¹⁴²

However, the rule and the statute do provide the correct legal standard to apply in determining whether to deny or grant the motion. A court is required to make a finding, *inter alia*, of “[w]hether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.”¹⁴³ The Supreme Court of Florida has applied this standard.¹⁴⁴

Drafting this part of the motion also can be quite difficult. If it is drafted inartfully, it will be fatal to the success of the motion. Part of the problem lies in failing to provide the court with the different types of testing that can be done and the numerous possibilities regarding exoneration. The trouble does not arise with the “one perpetrator/one victim” type of cases but with those that are factually more complicated. For example, if there are two or more perpetrators in a rape, one could first make an argument that if none of the samples match the movant, then he should be exonerated. In some multiple perpetrator cases, however, that argument will not be enough to satisfy a court. The court could find that if the sample does not match the movant, he has nonetheless been convicted as a principal in the case under an acting in concert theory and as such, will not be exonerated. However, the defense should make a much more thorough argument to the court. The better argument would include an additional statement that if none of the samples match the movant or his co-movants, then the movant should be exonerated with DNA testing. This argument also should be included if there is trial testimony that the perpetrator of the crime did not ejaculate during the rape, but other co-perpetrators did ejaculate. If the sample does not match the co-defendants and there is testimony that both raped her, there could be a reasonable probability that the jury would have acquitted the movant at trial.

In *Galloway*, the court affirmed the trial court’s denial of the appellant’s 3.853 motion.¹⁴⁵ Appellant had been convicted with two co-defendants of robbery and sexual battery.¹⁴⁶ In his 3.853 motion, he merely alleged that his DNA would not match the DNA recovered at the scene of the crime and from the victim’s body. The court noted that the evidence could not demon-

142. *Id.* at 1175.

143. FLA. R. CRIM. P. 3.853(c)(5)(C); § 925.11(2)(f)(3).

144. *See, e.g.*, *King v. State*, 808 So. 2d 1237, 1247 (Fla. 2002); *see also Huffman v. State*, 837 So. 2d 1147 (Fla. 2d Dist. Ct. App. 2003); *Dedge v. State*, 832 So. 2d 835 (Fla. 5th Dist. Ct. App. 2002); *Hartline v. State*, 806 So. 2d 595 (Fla. 5th Dist. Ct. App. 2002).

145. 802 So. 2d at 1175.

146. *Id.* at 1174.

strate that defendant did not participate in the crime.¹⁴⁷ That may be true. However, if DNA testing had been done and one or more semen samples were found from the sample taken from the victim and none matched any of the defendants, then those results could indeed exonerate the defendant.¹⁴⁸

In the alternative, a movant can provide a statement of how DNA testing will mitigate his sentence.¹⁴⁹ To date, there has been no case in which a movant in a non-capital case has argued that testing could mitigate a sentence. However, in a case where the movant has been convicted in one trial of various different crimes, it is conceivable that he could be exonerated of one of those charges and not the others. Accordingly, there could be a mitigation of the overall sentence meted out to the movant.

D. *Identification of Movant*

Rule 3.853 also requires a statement that identity was a genuinely disputed issue at trial.¹⁵⁰ The movant also must explain why identification was an issue at trial.¹⁵¹ The fact that a victim identifies a defendant does not mean that identity is a genuinely disputed issue at trial.¹⁵² Perhaps the most comprehensive discussion regarding this point can be found in *Zollman*.¹⁵³ In *Zollman*, the victim was forced into her car, driven to a remote area, and raped.¹⁵⁴ After the attack, she identified Zollman in a line-up as her attacker. She then identified him again at trial.¹⁵⁵ Zollman's "defense at trial was misidentification."¹⁵⁶ Nonetheless, "the trial court found that identity was not 'genuinely disputed' at trial" because the victim identified the movant at trial.¹⁵⁷ The Second District Court of Appeal disagreed, finding that "[t]he supreme court has recognized that there is a substantial body of academic work challenging the reliability of eyewitness identifications in criminal

147. *Id.* at 1175.

148. Without reading the full transcript of the case, it is impossible to establish with certainty that the argument could have established the exoneration element of Galloway's 3.853 motion. However, the case does provide a fairly common factual scenario in which this strategy can be implemented.

149. FLA. R. CRIM. P. 3.853(b)(3); § 925.11(2)(a)(3).

150. FLA. R. CRIM. P. 3.853(b)(4); § 925.11(2)(a)(4).

151. *Id.*

152. *Knighten v. State*, 829 So. 2d 249, 251 (Fla. 2d Dist. Ct. App. 2002) (citing *Zollman v. State*, 820 So. 2d 1059 (Fla. 2d Dist. Ct. App. 2002)).

153. 820 So. 2d at 1062.

154. *Id.* at 1060.

155. *Id.* at 1061.

156. *Id.* at 1062.

157. *Id.*

cases.”¹⁵⁸ “Thus, the fact that the victim identified Zollman as her assailant . . . does not mean that identi[fication] was not genuinely disputed.”¹⁵⁹

Even if there is significant evidence of guilt presented at trial, including some sort of identification, a movant will nonetheless be entitled to DNA testing if the testing will shed light on the movant’s guilt or innocence.¹⁶⁰

In contrast, in *Marsh v. State*,¹⁶¹ the court held that a defense of consensual sex at trial would preclude a movant from claiming in a 3.853 motion that identity was at issue.¹⁶² Similarly, a self-defense defense claim presented at trial may also be a bar to obtaining DNA testing.

In sum, an attorney should argue that identity is an issue in any case where the movant claims he did not commit the crime, regardless of whether the movant was known to the victim or other witnesses or was merely identified by the victim or other witnesses.

E. *A Statement of any Other Facts Relevant to the Motion*

Because there is no requirement that the verified 3.853 motion contain only facts from the trial transcript, the decision to include other facts must be made on a case-by-case basis. If there are facts outside of the record that are helpful to the case, then they ought to be included in the motion. For example, there are situations where, during the course of the police investigation or of the defense’s investigation, facts are discovered but are not elicited at trial. Some of those facts, in retrospect, may support the theory that someone else committed the crime. If that is true, then those facts should be included in the motion.

V. PROCEDURE

A copy of the motion must be served on the prosecutor and a certificate of service must be attached to the motion.¹⁶³ Similar to a 3.850 motion, once the 3.853 motion is filed it will be sent to the assigned judge.¹⁶⁴ This is normally the judge who originally tried the case. If that judge is no longer on the bench or has been transferred to a different court, the case will be as-

158. *Zollman*, 820 So. 2d at 1062.

159. *Id.*

160. *Huffman v. State*, 837 So. 2d 1147, 1149 (Fla. 2d Dist. Ct. App. 2003) (including evidence at trial of a fingerprint match, phone calls traced to defendant’s house that were made to the victim’s house after the attack, and a voice identification of defendant at trial).

161. 812 So. 2d 579 (Fla. 3d Dist. Ct. App. 2002).

162. *Id.* at 580.

163. FLA. R. CRIM. P. 3.850(b)(6); § 925.11(2)(a)(6).

164. FLA. R. CRIM. P. 3.853(c)(1); § 925.11(2)(b).

signed to another judge. The court must then determine if the motion is facially sufficient.¹⁶⁵ If the court finds that the motion is facially insufficient, it will deny the motion without requiring the prosecution to respond.¹⁶⁶ However, a trial court may not summarily deny a 3.853 motion “if the record conclusively shows that the defendant is not entitled to relief.”¹⁶⁷ If the motion is facially sufficient, it must order the prosecution to respond.¹⁶⁸

If the court deems the motion facially sufficient, it will issue an order to show cause and the prosecutor will have thirty days to respond.¹⁶⁹ Rule 3.853 also allows the court to provide the prosecution with more time to respond.¹⁷⁰ Subsequently, the court will review the prosecution’s response and must enter an order on the merits or set it for hearing.¹⁷¹ If the case proceeds to a hearing, the court may appoint counsel if there is a finding of indigence and if the court determines that counsel is necessary.¹⁷² The movant may file for rehearing from an order denying relief within fifteen days after the service of the order.¹⁷³ This will toll the time for filing an appeal.¹⁷⁴ Either party may take an appeal from an adverse ruling within thirty days from the day the order was rendered.¹⁷⁵

The court must make three findings in its ruling.¹⁷⁶ First, the court must determine “[w]hether it has been shown that physical evidence that may contain DNA still exists.”¹⁷⁷ Second, the court must determine “[w]hether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.”¹⁷⁸ Finally, it must determine “[w]hether there is a reasonable prob-

165. FLA. R. CRIM. P. 3.853(c)(2); § 925.11(2)(c).

166. *See id.*

167. *Zollman v. State*, 820 So. 2d 1059, 1063 n.2 (Fla. 2d Dist. Ct. App. 2002).

168. *Id.*

169. FLA. R. CRIM. P. 3.853(c)(2); § 925.11(2)(c).

170. *See* FLA. R. CRIM. P. 3.853(c)(2). Section 925.11(2)(c) of the *Florida Statutes* contains no such language.

171. FLA. R. CRIM. P. 3.853(c)(3); § 925.11(2)(d).

172. FLA. R. CRIM. P. 3.853(c)(4); § 925.11(2)(e).

173. FLA. R. CRIM. P. 3.853(e); § 925.11(3)(c).

174. *Id.*

175. FLA. R. CRIM. P. 3.853(f); § 925.11(3)(a)-(b).

176. FLA. R. CRIM. P. 3.853(c)(5); § 925.11(f).

177. FLA. R. CRIM. P. 3.853(c)(5)(A); § 925.11(2)(f)(1).

178. FLA. R. CRIM. P. 3.853(c)(5)(B); § 925.11(2)(f)(2). The language of section 925.11 differs slightly from rule 3.853 in that it does not use the word “authentic” but rather, requires that the evidence cannot have been “materially altered.”

ability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial."¹⁷⁹

If the court orders DNA testing, the movant may have to pay for the testing unless he is indigent.¹⁸⁰ If the movant is indigent, the state bears the cost of the testing.¹⁸¹

If the DNA testing provides exonerative results, the movant must file a motion to vacate the sentence or move for a new trial by filing a 3.850 motion based upon newly discovered evidence.¹⁸² Realistically, it is quite difficult for the prosecution to retry these old cases, especially when the DNA results will be admissible at trial. However, they still may attempt to do so.

VI. CONCLUSION

Advances in science finally have provided us with a means to challenge a criminal justice system that is by no means perfect and to correct the injustices that it has created. New DNA testing methodologies now allow us to determine someone's innocence with virtual certainty.

While section 925.11 is a step in the right direction, it does not go far enough to remedy the failings of the criminal justice system. As long as we continue to rely upon rote pleas for the disposition of the vast majority of criminal cases and ignore such serious issues as misidentification and false confessions, there always will exist the possibility that an innocent person will be convicted of a crime. If what we strive for is a criminal justice system that provides us with fair and precise results, then DNA testing should be available as a remedy to anyone at anytime who can establish that he has met the requirements of section 925.11.

No one knows exactly how many wrongfully convicted individuals who long ago gave up any hope of being exonerated remain incarcerated. These are the very same people who may not even know that there are new technologies that can exonerate them or that there are organizations, like the Florida Innocence Project, who will assist them. If we do not allow these individuals to request DNA testing, our system will always be plagued by the unacceptable reality that an innocent person has been convicted and remains incarcerated for a crime he did not commit.

179. FLA. R. CRIM. P. 3.853(c)(5)(C); § 925.11(2)(f)(3).

180. FLA. R. CRIM. P. 3.853(c)(6); § 925.11(2)(g).

181. *Id.*

182. FLA. R. CRIM. P. 3.853(d)(2).

VII. ADDENDUM

On September 5, 2003, the Florida Criminal Procedure Rules Committee voted by a two-thirds majority to propose to the Supreme Court of Florida an emergency amendment to rule 3.853 of the *Florida Rules of Criminal Procedure*, which would extend the October 1, 2003 deadline for one year. That motion was filed on September 17, 2003. On September 19, 2003 the Florida Innocence Project filed an Emergency Petition to Invoke All Writs Jurisdiction asking the Supreme Court of Florida for a constitutional writ that would prevent the destruction of biological evidence without notice.

On September 30, 2003, the Supreme Court of Florida consolidated the emergency petition filed by the Criminal Procedure Rules Committee and the emergency writ filed by the Florida Innocence Project. The court noted the urgency of this matter and expedited oral argument. That argument is set for November 7, 2003.

In order to allow the court more time to consider the petitions, it suspended the October 1, 2003 deadline in *Florida Rule of Criminal Procedure* 3.853 (d)(1)(A) until further order from the Court. Moreover, the Court held in abeyance the October 1, 2003 deadline in *Florida Statutes* section 925.11 (1)(b)(1).

Justice Lewis, in a special concurrence, stated that there was no question that the court had jurisdiction to consider issuance of the writ. Moreover, Justice Lewis wrote that the Supreme Court of Florida has the constitutional authority to amend Rule 3.853. Chief Justice Anstead and Justices Pariente and Quince concurred with Justice Lewis. Justices Wells, Cantero and Bell dissented, finding that the majority did not have jurisdiction to suspend a provision of the statute nor the constitutional authority to mandate that evidence be maintained.

On October 21, 2003, the Senate Committee on Criminal Justice and the Senate Judiciary Committee held a joint meeting to discuss the possibility of amending section 925.11 of the *Florida Statutes* to extend the testing deadline.