SC21-1467

In the Supreme Court of Florida

STATE OF FLORIDA,
Appellant,

v.

HENRY P. SIRECI,
Appellee.

On Appeal from the Circuit Court for the Ninth Judicial Circuit, in and for Orange County
L.T. No. 1976-CF-532

INITIAL BRIEF ON THE MERITS

ASHLEY MOODY
Attorney General

SCOTT BROWNE (FBN802743)
Chief Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 Frontage Road, Suite 200
Tampa, Florida 33607
(813) 287-7900
scott.browne@myfloridalegal.com

HENRY C. WHITAKER (FBN1031175)
Solicitor General
JEFFREY PAUL DESOUSA (FBN110951)
Chief Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
jeffrey.desousa@myfloridalegal.com
jenna.hodges@myfloridalegal.com

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Counsel for State of Florida

STATEMENT OF THE ISSUES

In the more than forty years since his conviction for capital murder, this Court has repeatedly rejected Appellee Henry Sireci's requests for postconviction DNA testing, reasoning that given the overwhelming evidence of guilt—including Appellee's seven confessions—the results of that testing would not exonerate him or lessen his sentence. In 2021, without notifying or serving the Attorney General, Appellee and the State Attorney entered a purported "joint stipulation" asking the circuit court to authorize DNA testing, which it did. The issue on appeal is:

Whether the circuit court's order for DNA testing violates Florida Rule of Criminal Procedure 3.853.

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INTRODUCTION AND SUMMARY OF ARGUMENT

After robbing and murdering Howard Poteet in 1976, Appellee Henry Sireci confessed to at least seven people, including his girlfriend, brother, and brother-in-law. At his ensuing trial for capital first-degree murder, Appellee's attorney appeared to acknowledge that he killed Mr. Poteet but implored the jury to find Appellee guilty of a lesser degree of murder. The jury convicted Appellee as charged, and he was sentenced to death. He later pleaded guilty to the robbery and murder of another victim in a separate case.

Appellee has since repeatedly sought postconviction DNA testing to challenge the factual basis for his conviction. In 2005, for example, this Court affirmed an order denying him relief under Florida Rule of Criminal Procedure 3.853, the rule governing postconviction DNA testing, because DNA testing would not cast doubt on Appellee's conviction or sentence "in light of the other evidence of guilt." *Sireci v. State*, 908 So. 2d 321, 325 (Fla. 2005). And even after the State agreed in 2010 to waive the requirements of Rule 3.853, DNA testing revealed nothing that might exonerate him.

The State now appeals an order compelling the release of

additional evidence from the clerk's office and the Orange County Sheriff's Office for DNA testing by a private laboratory. The circuit court ordered the material tested pursuant to a purported "joint stipulation" between attorneys representing Appellee and the State Attorney's Office for the Ninth Judicial Circuit. Its order did not claim to find that the terms of Rule 3.853 had been met—terms that safeguard the State's important interests in the finality of its convictions and integrity of scientific evidence. And the State Attorney's Office did not consult with the Attorney General before agreeing to that stipulation. Neither that order nor the joint stipulation was served on the Attorney General, who by statute is co-counsel for the State in this capital case.

Upon learning of the order approving additional DNA testing from a newspaper article, the Attorney General immediately moved to stay the release of evidence and unsuccessfully asked the circuit court to reconsider its order and compel compliance with the rules governing DNA testing. The release of evidence has been stayed pending this appeal.

This Court should reverse for two reasons.

First, the State Attorney had no authority to unilaterally waive the requirements for testing under Rule 3.853 and Section 925.11 over the Attorney General's express objections. The Legislature has made the Attorney General "co-counsel of record" alongside the State Attorney in capital collateral proceedings. § 16.01(6), Fla. Stat. The State Attorney thus may not unilaterally bind the State in capital postconviction matters over the objection of the state official co-designated to work on those matters. That conclusion comports with basic principles of agency law, under which co-agents like the Attorney General and State Attorney may act jointly—not unilaterally—in cases where one has not delegated its authority to the other. The 2021 joint stipulation therefore did not authorize the circuit court's order.

Second, absent a valid stipulation, the order conflicts with Rule 3.853 and the underlying statute. Rule 3.853 permits DNA testing only where the defendant establishes 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." Fla. R. Crim. P. 3.853(c)(5)(C); *see also* § 925.11(2)(f)3., Fla. Stat. That

requirement protects the finality of valid criminal convictions. But Appellee did not—and as this Court has repeatedly held, could not—make that showing because DNA testing would neither exonerate him nor absolve him of the death penalty. The evidence of his guilt was overwhelming and, indeed, was largely uncontested by Appellee himself at trial.[1] Testing would thus do little more than delay justice yet again to the victim's family and to the public in this long-final case. On top of that, the testing ordered by the circuit court would risk the corruption of evidence, because the order allows testing by a private lab instead of the Florida Department of Law Enforcement (FDLE) as Rule 3.853 requires. *See* Fla. R. Crim. P. 3.853(c)(7); *see also* § 925.11(2)(h), Fla. Stat.

The order should be reversed.

STATEMENT OF THE CASE AND FACTS

1. In 1976, Appellee Henry Perry Sireci was convicted of, and sentenced to death for, the first-degree murder of Howard Poteet. The

[1] In closing argument, defense counsel seemed to acknowledge that Appellee killed Mr. Poteet but urged the jury to find him guilty of only the lesser offense of third-degree murder because premeditation had not been shown. 10/21/76 Tr. 702–12.

evidence at trial reflected that Appellee went to a used-car lot and discussed buying a car with Mr. Poteet. *Sireci v. State*, 399 So. 2d 964, 966 (Fla. 1981). A struggle broke out and Appellee killed Mr. Poteet by stabbing him 55 times and slitting his throat. *Id.* at 967.

After the killing, Appellee told his girlfriend, Barbara Perkins, that he was talking to Mr. Poteet about a car when he hit Mr. Poteet in the head with a wrench. *Id.* When Mr. Poteet refused to tell Appellee where he kept the money, Appellee began stabbing him. *Id.* Appellee admitted to Ms. Perkins that he killed Mr. Poteet and stole his wallet. *Id.*

Ms. Perkins was not the only person to whom Appellee confessed. In all, he separately confessed to seven people. For example, Harvey Woodall, Appellee's cellmate when he was arrested in Illinois, testified that Appellee admitted killing Mr. Poteet. *Id.* According to Woodall, Appellee recounted hitting Mr. Poteet with a wrench and stabbing him repeatedly. *Id.* Appellee told Woodall that he was not going to leave any witnesses and that he knew Mr. Poteet was dead when he left. *Id.* Appellee told Woodall that he stole around $150 from Mr. Poteet, plus credit cards. *Id.*

Appellee confessed in similarly graphic fashion to his friend Bonnie Arnold, who relayed to jurors that Appellee admitted to striking Mr. Poteet with a tire tool, then stabbing him. *Id.* Appellee went to the dealership intending to steal some car keys and come back later to steal a car. *Id.*

Appellee also confessed to his brother, Peter Sireci; his brother-in-law, David Wilson; another cellmate;[2] and Detective Gary Arbisi. *Sireci v. State*, 773 So. 2d 34, 43 n.16 (Fla. 2000). This Court has described those confessions as "consistent, detailed accounts of the murder." *Id.* at 43.[3]

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[2] Donald Holtzinger was in jail serving a brief sentence for a probation violation when he shared a cell with Appellee. Appellee not only admitted murdering a business owner in Orlando, he also solicited Holtzinger to murder his brother-in-law, David Wilson, who Appellee explained was one of the primary witnesses against him. 10/21/76 Tr. 284. Appellee gave Holtzinger Appellee's wife's phone number and asked him to go to Rockford, Illinois, where he could get in touch with Appellee's brother and kill Wilson in exchange for $1,500. *Id.* at 285, 304–05.

[3] Appellee now insists that "he has always maintained" his innocence, Mot. to Dismiss 1, and that each of the witnesses either fabricated the alleged confessions or that the confessions themselves were not credible. *Id.* at 4 n.2. Yet he offers no plausible reason to think that *every* witness to his confessions had an independent, concurrent reason to frame him for murder. Nor has he explained why the likely murder weapon was found in his parent's home, other than to speculate that his own brother-in-law planted the weapon

2. Partly on the strength of those many confessions, in 2000 this Court rejected Appellee's postconviction claim that DNA testing of hairs found in a motel room linked to the murder would provide newly discovered evidence of his innocence. *Id.* at 43–44. Even assuming Appellee's claim could surpass several procedural hurdles, the Court found that Appellee failed to prove that "this evidence would 'probably produce an acquittal on retrial'"—the standard for a claim of newly discovered evidence. *Id.* at 44. Appellee's theory was that the hairs might have shown that Ms. Perkins had visited the motel room and therefore had some involvement in the murder—a reason to fabricate Appellee's confession. *Id.* But, this Court explained, "[a]t trial, Perkins admitted to having picked up Sireci at the abandoned motel," so it was "not difficult to imagine that she might have actually gone inside the room." *Id.* And in rejecting another of Appellee's postconviction claims, the Court stressed that "[a]n independent review of the record indicates that, in total, seven different people testified that appellant confessed to them that he had

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there as part of a land grab. R. 240–41. In any event, this Court has repeatedly credited those confessions, as discussed below.

murdered Howard Poteet." *Id.* at 42–43.

This Court again rejected Appellee's requests for DNA testing in 2005. Appellee had asserted that he was entitled to DNA testing of various items that, he hypothesized, would absolve him of the death penalty "by showing that even if he was involved in the death of the victim, [he] was a minor participant." *Sireci v. State*, 908 So. 2d 321, 324 (Fla. 2005). Namely, he sought to test a hair found on Mr. Poteet's sock that potentially matched Appellee's hair and was introduced at trial to show that Appellee was at the crime scene; blood stains on a jacket found in the motel room where Appellee was believed to have gone after the murder; and hairs on a towel found in the motel room. *Id.* at 325. To justify testing, Appellee alleged that it would show that the hair on Mr. Poteet's sock was not Appellee's, that the blood on the jacket was not Mr. Poteet's, and that the hair in the motel room was Appellee's girlfriend's, linking her to the crime. *Id.*

As to the blood stain, the Court held that Appellee had failed to properly request testing and therefore was procedurally barred. *Id.* Regarding the hair on Mr. Poteet's sock, the Court rejected the claim

for two reasons: first, DNA testing would not exonerate Appellee because even if DNA results "had shown that the hair . . . was not Sireci's," prosecutors simply "would not have introduced that hair into evidence at his trial," with no resulting impact on the verdict; and second, "in light of the other evidence of guilt, there is no reasonable probability that Sireci would have been acquitted or received a lesser sentence if the State had not introduced into evidence the hair on Poteet's sock." *Id.* Indeed, "seven witnesses testified that Sireci admitted to them that he killed Poteet." *Id.*[4] As for the hair in the motel room, the Court adhered to its 2000 ruling that even favorable DNA results would not have produced an acquittal—Perkins' hair in the motel room would merely confirm what was already known: that she picked Appellee up there. *Id.* & n.6 (citing *Sireci*, 773 So. 2d at 44).

3. Appellee nonetheless subsequently secured DNA testing of other evidence in 2010. By way of background, postconviction DNA testing is governed by statute and rule, *see* §§ 925.11, Fla. Stat. &

[4] Appellee also unsuccessfully raised a DNA claim in his federal habeas petition. *See Sireci v. Sec'y, Fla. Dept. of Corr.*, No. 6:02–cv–1160, 2009 WL 651140, at *29–31 (M.D. Fla. Mar. 12, 2009).

925.12, Fla. Stat.; Fla. R. Crim. P. 3.853, which set out various safeguards and requirements before testing is authorized.[5] Among other things, the trial court must find "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." Fla. R. Crim. P. 3853(c)(5)(C); *see also* § 925.11(2)(f)3., Fla. Stat. And unless "good cause" is shown, testing must be conducted by FDLE. Fla. R. Crim. P. 3.853(c)(7); *cf.* § 925.11(2)(h), Fla. Stat.

But in 2010, the State Attorney for the Ninth Judicial Circuit agreed to waive those requirements—without notice to or express objection from the Attorney General—and to test various items. Those items included: Mr. Poteet's fingernails, pants, rings, watch, and blood sample; reference samples from Bonnie Arnold; and reference samples from Barbara Perkins. R. 276.

"In exchange for the State's agreement to allow the above listed items to be tested," the written agreement between the State Attorney and Appellee stated that "Mr. Sireci hereby waives his right to seek a

[5] For ease of reference, these and other relevant authorities appear in the Statutory and Rules Appendix at the end of this brief.

court order for DNA testing in state or federal court of any items of biological evidence collected in connection with the investigation into Mr. Poteet's homicide." R. 277. Future testing would be allowed only if "the State agree[d]." *Id.*

As Appellee acknowledges, the results of the 2010 DNA tests were inconclusive and did not exonerate him. R. 133, 168, 299–300.

4. More than a decade later, in May 2021, the newly elected State Attorney for the Ninth Judicial Circuit purported to enter a "Joint Stipulation" to DNA test additional evidence in Appellee's case. R. 103–06. Among the items to be tested were several that this Court had concluded in 2000 and 2005 that Appellee had no right to: the hair on Mr. Poteet's sock, the bloody jacket, and hairs from the motel room. R. 103–04. Also to be tested were hairs and other material found on Mr. Poteet's body. R. 104.

The Attorney General was never notified about the proposed stipulation or served with it. R. 113.

Per this joint request, the circuit court authorized the testing of evidence on May 10, 2021. R. 103–06. Upon learning of that order from a local newspaper, R. 113, 494, the Attorney General

immediately moved for reconsideration and insisted on compliance with Rule 3.853 and Section 925.11. R. 111–18. Among other reasons, the Attorney General observed that despite serving as statutory "co-counsel in all capital postconviction matters," she was not served with notice of the proceedings. R. 113 (citing § 16.01(6), Fla. Stat.). And the Attorney General pointed out several ways that the circuit court's order violated Rule 3.853. R. 114–17. She also moved to stay the release of evidence pending a ruling on the motion for reconsideration. R. 108–09. A stay was granted. R. 119–20.

Appellee responded that he was not seeking DNA testing under Rule 3.853—in fact, he said, the "Joint Stipulation" was "*wholly outside* the procedures of Rule 3.853." R. 154. Because the State Attorney had agreed to testing, Appellee believed Rule 3.853's requirements did not apply. R. 149–55.

At a hearing in September 2021, the Attorney General agreed that *the State* could waive Rule 3.853's procedural requirements in appropriate circumstances. R. 491. But there had been no valid waiver here because the Legislature has designated the Attorney General as "co-counsel" in capital postconviction cases, and the

Attorney General expressly objected to the waiver. R. 491–96. Absent a waiver, the circuit court had to "follow . . . the comprehensive set of criminal rules that apply to DNA testing." R. 496. Appellee had made no effort to show that he could satisfy those requirements, the Attorney General explained, including by showing "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." Fla. R. Crim. P. 3.853(c)(5)(C).

The circuit court denied reconsideration but left its stay in place pending any appeal. R. 463–65. This proceeding followed.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction. As the State has explained, Resp. to Mot. to Dismiss 10–18, this is an appeal from an order "granting relief under Florida Rule[] of Criminal Procedure . . . 3.853" and therefore is authorized by Florida Rule of Appellate Procedure 9.140(c)(1)(J). *See also* Fla. R. Crim. P. 3.853(f); § 925.11(3)(a), Fla. Stat. Since the circuit court made no factual findings about the release of evidence for DNA testing, this case presents a pure question of law reviewed *de novo*. *See Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013).

Alternatively, this Court may exercise its all-writs jurisdiction under Article V, Section 3(b)(7) of the Florida Constitution, Resp. to Mot. to Dismiss 19–20 (citing this Court's holding that it has "exclusive jurisdiction to review all types of collateral proceedings in death penalty cases"), or its power under Florida Rule of Appellate Procedure 9.142(c)(1) to review "nonfinal orders issued in postconviction proceedings following the imposition of the death penalty." *Id.* at 20–23.

As to Rule 9.142(c)(1), this Court's review mirrors common-law certiorari in that relief is available where an order "departs from the essential requirements of law" and "cause[s] material injury for which there is no adequate remedy on appeal." Fla. R. App. P. 9.142(c)(4)(F); *see also Justice Admin. Comm'n v. Rudenstine*, Nos. SC15-842, SC15-1250, 2016 WL 2908408, at *1 (Fla. May 19, 2016). The "clearly established law" necessary to demonstrate a departure from the essential requirements of law "can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law." *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003). "Thus, in addition to case law

dealing with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision may be the basis for granting certiorari review." *Id.*

The merits arguments presented below are predicated on the clear text of Rule 3.853 and Section 925.11, and thus establish a departure from the essential requirements of law. Whether viewed through the lens of *de novo* or certiorari review, the State has made the requisite showing of error.

As for irreparable injury, the circuit court's order harms the State in at least two ways. For one, the State, the public, and the victims of Appellee's crimes are entitled to finality, *cf. Sireci v. Florida*, No. 6:02–cv–1160, 2009 WL 651140, at *30–31 (M.D. Fla. Mar. 12, 2009) (contrasting the "minimal" "risk of an erroneous deprivation of [Appellee's] purported liberty interest" (given the substantial evidence of guilt) with the State's need to "ensur[e] closure for victims and survivors"), and the circuit court's order frustrates that important principle. For another, by deviating from Rule 3.853's safeguard that "DNA testing shall be ordered to be conducted by [FDLE] or its designee" unless the movant shows "good cause," Fla. R. Crim. P.

3.853(c)(7); *see also* § 925.11(2)(h), Fla. Stat. (similar), the order below jeopardizes the integrity of forensic evidence.

ARGUMENT

This Court should reverse the circuit court's order authorizing DNA testing.

The circuit court's order in this long-final case violates Florida's comprehensive statutory and rule-based scheme governing postconviction DNA testing, a scheme that balances the State and public's interest in the finality of lawful convictions with the desire to safeguard the reliability of verdicts. The State Attorney could not unilaterally waive the requirements of that scheme: by statute, the Attorney General serves as co-counsel in all capital collateral proceedings, and her express objection vitiated any purported agreement with Appellee. And absent a valid waiver, Appellee was not entitled to relief because he did not even attempt to meet the requirements of Rule 3.853 and Section 925.11.

A. The purported joint stipulation was invalid in light of the Attorney General's express objection.

The State Attorney in a capital case has no power to waive the requirements for postconviction DNA testing over the express objection of the Attorney General. The circuit court's order therefore

cannot be sustained by any purported stipulation by Appellee and the State Attorney.

1. By statute, the Attorney General is "co-counsel of record" in capital postconviction DNA testing proceedings.

In keeping with the Attorney General's role as Florida's "chief state legal officer," Art. IV, § 4(b), Fla. Const., the Legislature has designated the Attorney General "co-counsel of record in capital collateral proceedings." § 16.01(6), Fla. Stat. That statute describes the Attorney General's co-counsel status as a "dut[y]," *id.* § 16.01 (Title), and the chapter law that amended Section 16.01 to include the co-counsel provision noted that it was "*requiring*" the Attorney General to serve that role in capital postconviction matters. Ch. 97-313, Preamble, Laws of Fla. (emphasis added).

Consequently, the Attorney General routinely represents the State in capital postconviction litigation in both state and federal court. That includes responding to petitions for postconviction relief or habeas corpus in state circuit courts and federal district courts, filing motions, and appearing at evidentiary hearings as necessary. The Attorney General and applicable State Attorney's Office ordinarily work side-by-side to uphold the State's lawfully obtained

convictions.

That has always been true in Appellee's case. Even aside from representing the State in Appellee's various appeals from adverse postconviction rulings, the Attorney General has often appeared in trial court to respond to Appellee's collateral attacks to his conviction and sentence. *See, e.g.*, Answer to Deft's Successive Mot. for Post-Conviction Relief, *State v. Sireci*, No. 1976-CF-000532-A-O (9th Jud. Cir. Mar. 1, 2017) (signed by Assistant Attorney General Scott Browne and Assistant State Attorney Kenneth Nunnelly); Resp. to Successive Rule 3.851 Mot. to Vacate Judgment of Conviction and Sentence, *State v. Sireci*, No. 1976-CF-000532-A-O (9th Jud. Cir. May 12, 2014) (same).

Appellee's efforts to obtain DNA testing in the circuit court implicated the Attorney General's duties under Section 16.01. His request came in a "capital . . . proceeding[]," § 16.01(6), Fla. Stat., as he had been convicted of a capital crime and sentenced to death. And the proceeding was "collateral" in nature: Rule 3.853—which governs DNA testing after a conviction and sentence—is housed in Part XVII of the Florida Rules of Criminal Procedure, a section of the rules

devoted to "*Postconviction* Relief," (emphasis added), and authorizes a "[m]otion for [*p*]*ostconviction* DNA [t]esting," Fla. R. Crim. P. 3.853 (emphasis added).

The Attorney General was therefore "co-counsel of record" below. § 16.01(6), Fla. Stat. The dual authority of the State Attorney and the Attorney General, particularly given the Attorney General's constitutionally assigned role as "the chief state legal officer," Art. IV, § 4(b), Fla. Const., gives the Attorney General a prevailing interest in defending the validity and finality of criminal convictions even if the State Attorney declines to do so. *See Cameron v. EMB Women's Surgical Ctr.*, No. 20-601, 595 U.S. __ (Mar. 3, 2022) (slip op. at 8–9).

2. The State Attorney could not unilaterally waive Rule 3.853's requirements.

The Attorney General's essential role in litigating capital postconviction DNA proceedings includes the authority to decide whether to waive any of the requirements and safeguards of Rule 3.853. Among those requirements, a trial court must make the following findings before allowing DNA testing:

> (A) Whether it has been shown that physical evidence that may contain DNA still exists.
>
> (B) Whether 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.
>
> (C) Whether 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.

Fla. R. Crim. P. 3.853(c)(5)(A)-(C). And when testing has been authorized, the rule protects the reliability of testing and the integrity of DNA materials by requiring that "DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee," unless the movant shows "good cause" for why the testing should be done by another accredited laboratory. Fla. R. Crim. P. 3.853(c)(7).

As the Attorney General explained below, R. 491, Rule 3.853's requirements may in some circumstances be waived. That explains the occasional practice of the prosecuting authority signing so-called "consent agreements" or stipulations for DNA testing. R. 153–54. As with all waivers, however, a waiver under Rule 3.853 is valid only if made in "clear and unequivocal terms," *cf. State, Dept. of Elder Affairs v. Caldwell*, 199 So. 3d 1107, 1110 (Fla. 1st DCA 2016); *Pijuan v. Bank of Am., N.A.*, 253 So. 3d 112, 115 n.5 (Fla. 3d DCA 2018); *Martin*

v. State, 107 So. 3d 281, 296 (Fla. 2012) (waiver of *Miranda* rights), and by an agent with the power to effectuate the waiver.

Gauged by that familiar standard, the purported stipulation in this case cannot stand. The Legislature has made the Attorney General "co-counsel of record" in capital postconviction proceedings, § 16.01(6), Fla. Stat., and thus the State Attorney had no power to unilaterally waive the law's procedural protections over the express objection of the Attorney General. To hold otherwise would make the Attorney General subsidiary counsel, not "co-counsel."[6]

In the circuit court, Appellee suggested that Section 16.01(6) contemplated just such a reduced role for the Attorney General, arguing that reading Sections 16.01 and 27.01 *in pari materia* compelled the conclusion that the State Attorney serves as "lead counsel" in capital collateral proceedings, while the Attorney General merely assists. R. 157. But co-counsel is "one who shares with one

[6] The circuit court suggested that by virtue of being "elected," the State Attorney was lead counsel in circuit court in this capital postconviction case and would have to "answer" to voters for any "unwise decision." R. 529. But the Attorney General was elected statewide by millions more people than was the State Attorney to serve as "the chief state legal officer." Art. IV, § 4(b), Fla. Const.

or more others the duties of providing counsel and especially legal counsel to someone." *Cocounsel*, Merriam-Webster (last visited Mar. 4, 2022), https://tinyurl.com/64z8ehd3. And unlike in statutes where the Legislature empowers a state official solely to "assist" another in court, *e.g.*, § 27.05, Fla. Stat.; *see Barnes v. State*, 743 So. 2d 1105, 1111–12 (Fla. 4th DCA 1999) (opinion on motion for rehearing/rehearing en banc) (observing that the Legislature has authorized the State Attorney merely to "assist" the Attorney General in appellate litigation), Section 16.01(6) puts the Attorney General at least on equal footing with the State Attorneys in capital collateral litigation. Indeed, even with respect to the ordinary duties of State Attorneys, it is the Attorney General who may "exercise a general superintendence and direction over the several state attorneys of the several circuits as to the manner of discharging their respective duties." § 16.08, Fla. Stat. And again, it is the Attorney General, not the State Attorney, who is Florida's "chief state legal officer." Art. IV, § 4(b), Fla. Const.

Basic principles of agency law confirm that the State Attorney cannot unilaterally waive protections enjoyed by the State over the

objection of the Attorney General—protections that safeguard the bedrock criminal-law interest in finality. *See Sireci v. Sec'y, Fla. Dept. of Corr.*, No. 6:02–cv–1160, 2009 WL 651140, at *31 (M.D. Fla. Mar. 12, 2009) (explaining that postconviction DNA testing implicates the "strong interest in the finality of duly adjudicated criminal judgments").

Lawyers serve as "agents of their clients." *Brooks Tropicals, Inc. v. Acosta*, 959 So. 2d 288, 295 (Fla. 3d DCA 2007); *see also* Fla. R. Gen. Prac. & Jud. Admin. 2.505(h) ("Attorney as Agent of Client. An attorney appearing in an action or proceeding pursuant to subdivisions (e)(1)–(e)(6) is the agent authorized to bind the client for purposes of the action, hearing, or proceeding."). Collectively, Section 16.01(6) and Section 27.02(1) make the Attorney General and State Attorneys co-agents of the State in capital postconviction matters. Co-agents have the power to act *jointly*, not *unilaterally*. According to the Second Restatement of Agency, "[u]nless otherwise agreed, authority given in one authorization to two or more persons to act as agents includes only authority to act jointly, except in the execution of a properly delegable authority." Restatement (Second) of Agency

§ 41 (1958); *First Nat. Bank of Beaver v. Hough*, 643 F.2d 705, 707 (10th Cir. 1981) (action by one lawyer did not bind the client because "when an agency is given to more than one person, it is presumed that the principal intended the agency to be joint and to be exercisable only by the unanimous action of the agents"); *see also* Restatement (Third) of Agency § 3.14 cmt. e (2006) ("A principal may also structure a relationship among coagents to provide that the agents must act jointly to take action."). This Court has long applied that rule. *Chapman v. St. Stephens Protestant Episcopal Church*, 136 So. 238, 242 (Fla. 1931) ("Where authority is conferred upon two or more agents to represent their principal in a business transaction, it is the general rule that such an agency will be presumed to be joint, and it can be performed by the agents only jointly, unless an intent appears that it may be otherwise executed . . . .").

Thus, when an agent either does not delegate to the co-agent the power to act unilaterally for both, or—as here—expressly objects to the conduct of the co-agent, the co-agent has "only authority to act jointly" with the agent. In this circumstance, then, the State Attorney has no power to unilaterally bind the principal.

In sum, there was no "clear and unequivocal" waiver of Rule 3.853's requirements, and no power on the part of the State Attorney to bind the State.

3. Even assuming Rule 3.853 did not control, the State Attorney could not unilaterally enter a joint stipulation here.

Even if Appellee were correct in arguing below that the so-called joint stipulation procedure operated "wholly outside" of Rule 3.853, the State Attorney still lacked the power to unilaterally bind the State to an agreement for DNA testing.

No new agreement could be entered over the Attorney General's express objection. That is because, again, Section 16.01(6) makes the Attorney General "co-counsel of record" in capital collateral proceedings. Whatever the label a capital defendant might attach to a request for postconviction DNA testing, that request entails a "capital collateral proceeding" within the meaning of Section 16.01(6). DNA testing in that circumstance is sought *after* the defendant's conviction and sentence have become final on direct appeal, and therefore arises in the postconviction posture. For all the reasons listed above, the Attorney General plays a central role in ratifying an agreement for testing. Her express objection meant that

the State Attorney could not claim to speak for the State.

Perhaps appreciating that Section 16.01(6) barred the State Attorney from unilaterally making a new agreement in the abstract, Appellee argued below that the 2010 agreement guaranteed Appellee the right to testing so long as the "State Attorney" consented. R. 131–32, 146–48. But that mischaracterizes the language of the agreement, which contemplated future testing despite Appellee's waiver only so long as "*the State* agree[d]." R. 277. Here, given the Attorney General's objection—and status as co-counsel—"the State" has not agreed.

* * *

In short, the circuit court's order authorizing DNA testing cannot be sustained based on any stipulation between Appellee and the State Attorney.

B. The circuit court's order violates Rule 3.853 and Section 925.11.

Without a valid stipulation, the circuit court's order cannot stand because Appellee did not satisfy the requirements of Rule 3.853 and Section 925.11. That order violates Florida's postconviction DNA testing regime in two respects. First, Appellee

failed to show a "reasonable probability" that testing would exonerate him. Second, he failed to show "good cause" why a private laboratory, not FDLE, should conduct the testing.

1. Appellee did not show a "reasonable probability" that the results of DNA testing would change the outcome at trial or sentencing.

To subject his long-final conviction to renewed scrutiny, Appellee had to show a "reasonable probability that [he] would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial." Fla. R. Crim. P. 3.853(c)(5)(C); § 925.11(2)(f)3., Fla. Stat. That he failed to do so here is no surprise: this Court on two occasions has determined that DNA testing of several of the same items Appellee now seeks to test was unjustified because even the best-case result would leave Appellee's conviction and sentence unaltered. *Sireci v. State*, 773 So. 2d 34, 44 (Fla. 2000); *Sireci v. State*, 908 So. 2d 321, 324–25 (Fla. 2005).[7] Indeed, Appellee's

[7] Appellee's 2005 appeal of the denial of his third amended motion for DNA testing addressed the hair on Mr. Poteet's sock, hairs found in the motel room, and the bloody jacket. While this Court found any argument regarding the jacket to be procedurally barred, it affirmed on the merits the denial of testing for the remaining items under Rule 3.853. *Sireci v. State*, 908 So. 2d at 325. Appellee now seeks to test those same items. R. 103–04.

identity as the killer is not reasonably in doubt and DNA testing would neither exonerate Appellee nor mitigate his sentence.

As this Court noted in affirming the denial of Appellee's Rule 3.851 motion for postconviction relief in 2000, "[a]n independent review of the record indicates that, in total, seven different people testified that appellant confessed to them that he had murdered Howard Poteet." *Sireci*, 773 So. 2d at 42–43. Those people included: "(1) Barbara Perkins—girlfriend; (2) Donald Holtzinger—cell mate; (3) Peter Sireci—brother; (4) Harvey Woodall—cell mate; (5) Bonnie Lee Arnold—friend; (6) David Wilson—brother in law; (7) Gary Arbisi—detective." *Id.* at 43 n.16. And those confessions "were all consistent, detailed accounts of the murder." *Id.* at 43.

This Court reached a similar conclusion in affirming the prior denial of postconviction DNA testing in 2005. *Sireci*, 908 So. 2d at 325. There, it "conclude[d] that, in light of the other evidence of guilt, there is no reasonable probability that Sireci would have been acquitted or received a lesser sentence if the State had not introduced into evidence the hair on Poteet's sock." *Id.* After all, the Court reasoned, "seven witnesses testified that Sireci admitted to them that

he killed Poteet." *Id.*

Given these facts, Appellee cannot show that anything would change with DNA testing of the hair on Mr. Poteet's sock, the blood stain on the denim jacket, or the hairs in the motel room. *See Willacy v. State*, 967 So. 2d 131, 145 (Fla. 2007) ("[B]ecause DNA testing would not eliminate significant and substantial evidence directly linking Willacy to Sather's murder, it would not give rise to a reasonable probability of acquittal or a lesser sentence."). Rather than *attempt* to make this showing, either as to those items or the other items listed in the 2021 joint stipulation, Appellee asserted merely that the testing was authorized by the stipulation itself. He therefore has no right to DNA testing under Rule 3.853. *See* Fla. R. Crim. P. 3.853(c)(5)(C).

The order was also invalid because the circuit court did not purport to make the findings required by Rule 3.853(c)(5) before DNA testing may be authorized. It did not find, for instance, that the results of any DNA testing "likely would be admissible at trial." Fla. R. Crim. P. 3.853(c)(5)(B). Nor did it find "a reasonable probability that [Appellee] would have been acquitted or would have received a

lesser sentence if the DNA evidence had been admitted at trial." Fla. R. Crim. P. 3.853(c)(5)(C). That alone is cause for reversal.

There are good reasons for Rule 3.853's requirements. As this Court long ago explained, "[t]he importance of finality in any justice system, including the criminal justice system, cannot be understated." *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980). That is true both to preserve "the availability of judicial resources," *id.*, and out of respect for the public and victims. Rule 3.853 balances the State's interest in ensuring the veracity of its convictions with this need for finality. But Appellee has done nothing to call into question the veracity of his conviction. This "litigation must, at some point, come to an end." *Id.*

2. Appellee did not show "good cause" for allowing testing by a non-FDLE laboratory.

The circuit court's order also violates Rule 3.853 and Section 925.11 by cutting FDLE out of the testing process without good cause.

Rule 3.853(c)(7) requires that DNA testing "be conducted by [FDLE] or its designee, as provided by statute." Fla. R. Crim. P. 3.853(c)(7); *see also* § 925.11(2)(h), Fla. Stat. ("Any DNA testing

ordered by the court shall be carried out by [FDLE] or its designee, as provided in s. 943.3251."). The rule permits a court to depart from the usual course only "upon a showing of good cause," and even then the testing must be done "by another laboratory or agency certified by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) or Forensic Quality Services, Inc. (FQS)." Fla. R. Crim. P. 3.853(c)(7).

As with Rule 3.853's other provisions, that requirement serves an important purpose. When this Court was considering adopting Rule 3.853 in 2001, FDLE pointed out that its involvement in the testing process would prevent a defendant from engaging in "laboratory shopping" for a lab whose profit-motive may cloud its objectivity. *See* FDLE Resp., *In Re: Amended Emergency Petition to Create Rule 3.853*, No. SC01-363, at *8–9 (Aug. 14, 2001); *see also* R. 528–29 (trial court acknowledging that requiring FDLE to conduct DNA testing ensures "that there will be confidence in the outcome"). And the requirement reflects a concern that less capable and experienced lab technicians may mishandle DNA materials in any number of ways, corrupting the integrity of that evidence.

Appellee made no effort to show good cause for dispensing with the requirement that FDLE conduct the testing. The circuit court thus erred in ordering that testing be done by an outside laboratory. R. 104 (Forensic Analytical Crime Laboratory).

CONCLUSION

Appellee's latest efforts to relitigate his conviction deny the State, the victim's family, and the public finality in this brutal 1975 homicide. Yet he has not shown—and cannot show—any valid basis for postconviction DNA testing. This Court should reverse the circuit court's order.

Dated: March 4, 2022

Respectfully submitted,

ASHLEY MOODY
Attorney General

/s/ Scott Browne
HENRY C. WHITAKER (FBN1031175)
Solicitor General
JEFFREY PAUL DESOUSA (FBN110951)
Chief Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
jeffrey.desousa@myfloridalegal.com
jenna.hodges@myfloridalegal.com

SCOTT BROWNE (FBN802743)
Chief Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 Frontage Road, Suite 200
Tampa, Florida 33607
(813) 287-7900
scott.browne@myfloridalegal.com

Counsel for State of Florida

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal to the following on this **fourth** day of March 2022:

Julissa R. Fontán
Capital Collateral Regional
Counsel—Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637
(813) 558-1600
fontan@ccmr.state.fl.us
support@ccmr.state.fl.us

Nina Morrison
Innocence Project
40 Worth St., Suite 701
New York, NY 10013
212-364-5340
nmorrison@innocenceproject.org

Counsel for Appellee

/s/ Scott Browne
Chief Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 6,318 words.

/s/ Scott Browne
Chief Assistant Attorney General

STATUTORY AND RULES APPENDIX

Index

§ 16.01, Fla. Stat. Residence, office, and duties of Attorney General

The Attorney General:

(1) Shall reside at the seat of government and shall keep his or her office in the capitol.

(2) Shall perform the duties prescribed by the Constitution of this state and also perform such other duties appropriate to his or her office as may from time to time be required of the Attorney General by law or by resolution of the Legislature.

(3) Notwithstanding any other provision of law, shall, on the written requisition of the Governor, a member of the Cabinet, the head of a department in the executive branch of state government, the Speaker of the House of Representatives, the President of the Senate, the Minority Leader of the House of Representatives, or the Minority Leader of the Senate, and may, upon the written requisition of a member of the Legislature, other state officer, or officer of a county, municipality, other unit of local government, or political subdivision, give an official opinion and legal advice in writing on any question of law relating to the official duties of the requesting officer.

(4) Shall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state.

(5) Shall appear in and attend to such suits or prosecutions in any other of the courts of this state or in any courts of any other state or of the United States. This subsection is not intended to authorize the joinder of the Attorney General as a party in such suits or prosecutions.

(6) Shall act as co-counsel of record in capital collateral proceedings.

(7) Shall have and perform all powers and duties incident or usual to such office.

(8) Shall make and keep in his or her office a record of all his or her official acts and proceedings, containing copies of all official opinions, reports, and correspondence, and also keep and preserve in the office all official letters and communications to him or her and cause a registry and index thereof to be made and kept, all of which official papers and records shall be subject to the inspection of the Governor of the state and to the disposition of the Legislature by act or resolution thereof.

(9) May periodically publish a report of his or her official opinions and may prepare and publish an index or consolidated index or indexes of opinions.

Credits

Laws 1845, c. 2, § 2; Laws 1871, c. 1845; Rev.St.1892, § 85; Gen.St.1906, § 87; Rev.Gen.St.1920, § 101; Comp.Gen.Laws 1927, § 125; Laws 1945, c. 22858, § 7; Laws 1959, c. 59-1, § 7; Laws 1978, c. 78-399, § 1; Laws 1979, c. 79-159, § 1; Laws 1981, c. 81-259, § 7; Laws 1985, c. 85-123, § 1; Laws 1995, c. 95-147, § 45; Laws 1997, c. 97-313, § 10. Amended by Laws 2001, c. 2001-266, § 6, eff. July 1, 2001.

§ 925.11, Fla. Stat. Postsentencing DNA testing

(1) Petition for examination.--

(a)

1. A person who has been tried and found guilty of committing a felony 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 that may contain DNA (deoxyribonucleic acid) and that would exonerate that person or mitigate the sentence that person received.

2. A person who has entered a plea of guilty or nolo contendere to a felony prior to July 1, 2006, 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 that may contain DNA (deoxyribonucleic acid) and that would exonerate that person.

(b) A petition for postsentencing DNA testing under paragraph (a) may be filed or considered at any time following the date that the judgment and sentence in the case becomes final.

(2) Method for seeking postsentencing DNA testing.--

(a) The petition for postsentencing DNA testing must be made under oath by the sentenced defendant and must include the following:

1. A statement of the facts relied on in support of the petition, including a description of the physical evidence containing DNA to be tested and, if known, the present location or the last known location of the evidence and how

it was originally obtained;

2. A statement that the evidence was not previously tested for DNA or a statement that the results of any previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques would likely produce a definitive result establishing that the petitioner is not the person who committed the crime;

3. A statement that the sentenced defendant is innocent and how the DNA testing requested by the petition will exonerate the defendant of the crime for which the defendant was sentenced or will mitigate the sentence received by the defendant for that crime;

4. A statement that identification of the defendant is a genuinely disputed issue in the case, and why it is an issue;

5. Any other facts relevant to the petition; and

6. A certificate that a copy of the petition has been served on the prosecuting authority.

(b) Upon receiving the petition, the clerk of the court shall file it and deliver the court file to the assigned judge.

(c) The court shall review the petition and deny it if it is insufficient. If the petition is sufficient, the prosecuting authority shall be ordered to respond to the petition within 30 days.

(d) Upon receiving the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the petition or set the petition for hearing.

(e) Counsel may be appointed to assist the sentenced defendant if the petition proceeds to a hearing and if the court determines

that the assistance of counsel is necessary and makes the requisite finding of indigency.

(f) The court shall make the following findings when ruling on the petition:

1. Whether the sentenced defendant has shown that the physical evidence that may contain DNA still exists;

2. Whether the results of DNA testing of that physical evidence would be admissible at trial and whether there exists reliable proof to establish that the evidence has not been materially altered and would be admissible at a future hearing; and

3. Whether there is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

(g) If the court orders DNA testing of the physical evidence, the cost of such testing may be assessed against the sentenced defendant unless he or she is indigent. If the sentenced defendant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(h) Any DNA testing ordered by the court shall be carried out by the Department of Law Enforcement or its designee, as provided in s. 943.3251.

(i) The results of the DNA testing ordered by the court shall be provided to the court, the sentenced defendant, and the prosecuting authority.

(3) Right to appeal; rehearing.--

(a) An appeal from the court's order on the petition for postsentencing DNA testing may be taken by any adversely

affected party.

(b) An order denying relief shall include a statement that the sentenced defendant has the right to appeal within 30 days after the order denying relief is entered.

(c) The sentenced defendant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered.

(d) The clerk of the court shall serve on all parties a copy of any order rendered with a certificate of service, including the date of service.

(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.

Credits

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.

§ 925.12, Fla. Stat. DNA testing; defendants entering pleas

(1) For defendants who have entered a plea of guilty or nolo contendere to a felony on or after July 1, 2006, a defendant may petition for postsentencing DNA testing under s. 925.11 under the following circumstances:

> (a) The facts on which the petition is predicated were unknown to the petitioner or the petitioner's attorney at the time the plea was entered and could not have been ascertained by the exercise of due diligence; or
>
> (b) The physical evidence for which DNA testing is sought was not disclosed to the defense by the state prior to the entry of the plea by the petitioner.

(2) For defendants seeking to enter a plea of guilty or nolo contendere to a felony on or after July 1, 2006, the court shall inquire of the defendant and of counsel for the defendant and the state as to physical evidence containing DNA known to exist that could exonerate the defendant prior to accepting a plea of guilty or nolo contendere. If no physical evidence containing DNA that could exonerate the defendant is known to exist, the court may proceed with consideration of accepting the plea. If physical evidence containing DNA that could exonerate the defendant is known to exist, the court may postpone the proceeding on the defendant's behalf and order DNA testing upon motion of counsel specifying the physical evidence to be tested.

(3) It is the intent of the Legislature that the Supreme Court adopt rules of procedure consistent with this section for a court, prior to the acceptance of a plea, to make an inquiry into the following matters:

> (a) Whether counsel for the defense has reviewed the discovery disclosed by the state and whether such discovery included a listing or description of physical items of evidence.

(b) Whether the nature of the evidence against the defendant disclosed through discovery has been reviewed with the defendant.

(c) Whether the defendant or counsel for the defendant is aware of any physical evidence disclosed by the state for which DNA testing may exonerate the defendant.

(d) Whether the state is aware of any physical evidence for which DNA testing may exonerate the defendant.

(4) It is the intent of the Legislature that the postponement of the proceedings by the court on the defendant's behalf under subsection (2) constitute an extension attributable to the defendant for purposes of the defendant's right to a speedy trial.

Credits

Added by Laws 2006, c. 2006-292, § 2, eff. June 23, 2006.

Fla. R. Crim. P. 3.853. Motion for Postconviction DNA Testing

(a) Purpose. This rule provides procedures for obtaining DNA (deoxyribonucleic acid) testing under sections 925.11 and 925.12, Florida Statutes.

(b) Contents of Motion. The motion for postconviction DNA testing must be under oath and must include the following:

(1) a statement of the facts relied upon 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;

(2) a statement that the evidence was not previously tested for DNA, or 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 establishing that the movant is not the person who committed the crime;

(3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;

(4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;

(5) a statement of any other facts relevant to the motion; and

(6) a certificate that a copy of the motion has been served on the prosecuting authority.

(c) Procedure.

(1) Upon receipt of the motion, the clerk of the court shall file it and deliver the court file to the assigned judge.

(2) The court shall review the motion and deny it if it is facially insufficient. If the motion is facially sufficient, the prosecuting authority shall be ordered to respond to the motion within 30 days or such other time as may be ordered by the court.

(3) Upon receipt of the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the motion or set the motion for hearing.

(4) In the event that the motion shall proceed to a hearing, the court may appoint counsel to assist the movant if the court determines that assistance of counsel is necessary and upon a determination of indigency pursuant to section 27.52, Florida Statutes.

(5) The court shall make the following findings when ruling on the motion:

> (A) Whether it has been shown that physical evidence that may contain DNA still exists.
>
> (B) Whether 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.
>
> (C) Whether 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.

(6) If the court orders DNA testing of the physical evidence, the cost of the testing may be assessed against the movant, unless

the movant is indigent. If the movant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(7) The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, upon a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) or Forensic Quality Services, Inc. (FQS) if requested by a movant who can bear the cost of such testing.

(8) The results of the DNA testing ordered by the court shall be provided in writing to the court, the movant, and the prosecuting authority.

(d) Time Limitations. The motion for postconviction DNA testing may be filed or considered at any time following the date that the judgment and sentence in the case becomes final.

(e) Rehearing. The movant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered.

(f) Appeal. An appeal may be taken by any adversely affected party within 30 days from the date the order on the motion is rendered. All orders denying relief must include a statement that the movant has the right to appeal within 30 days after the order denying relief is rendered.

Credits

Added October 18, 2001 (807 So.2d 633). Amended September 15, 2004 (884 So.2d 934); September 29, 2005 (935 So.2d 1218); September 21, 2006 (938 So.2d 977); March 29, 2007 (953 So.2d 513); Nov. 19, 2009, effective Jan. 1, 2010 (26 So.3d 534); September 2, 2010 (43 So.3d 688)