

CHAPTER 4: USING POST-CONVICTION DNA TESTING TO ATTACK YOUR CONVICTION OR SENTENCE*

A. INTRODUCTION

The purpose of this chapter is to explain how to ask a court to do DNA testing after you are convicted in order to prove your innocence. To begin this process, you will have to file a motion for post-conviction relief. This Chapter will walk you through how to write this motion and explain how the court may respond.

Over 300 individuals in the United States have been exonerated (found innocent) by post-conviction DNA testing to date.¹ For example, on September 28, 2012, a man named Damon Thibodeaux was exonerated by DNA testing after having been sentenced to death and spending 15 years in prison for a New Orleans-area murder.² DNA is uniquely capable of proving innocence in crimes where biological material (anything that comes from the human body) was left by the perpetrator (the person who committed the crime).³ However, many people in prison were convicted before DNA testing was possible, or before it was considered reliable, and they were not able to present evidence at their trial that might have helped prove their innocence. There are organizations in Louisiana that help prisoners recover DNA evidence and secure DNA testing. Because applying for DNA testing is very complicated, the *JLM* strongly recommends that you contact one of these organizations rather than proceeding on your own (“*pro se*”) if possible.

In the past, methods of testing evidence found at crime scenes were crude (basic), and convictions based on crime scene evidence were often inaccurate. Modern DNA testing is much more accurate than older methods. If you believe there might have been biological evidence collected from the scene of the crime you were convicted of, and if you think DNA tests of the evidence would prove your innocence, you may be able to have the evidence tested or re-tested for DNA. Biological evidence means anything that comes from or has been in contact with a human body, such as blood, semen, hair, saliva, sweat, skin cells, fingernail scrapings, and clothing or weapons. Filing a motion for DNA testing is governed by Article 926.1 of the Louisiana Code of Criminal Procedure. When making your motion, you will have to follow the requirements of Article 926.1 closely.

Part B of this Chapter tells you how to file your motion for DNA testing. Part C describes what will happen after you file your motion. Part D discusses the option to appeal if the court denies your motion. Part E tells you what will happen if the court grants your motion. Part F discusses how you can go about contacting legal organizations that might be able to help you with filing a motion for DNA testing. Lastly, Appendix A includes the contact information for these legal organizations.

B. HOW TO FILE A MOTION

1. What to Include in Your Motion

Before filing a motion for a new trial based on newly discovered evidence (evidence that was not available at the time of your conviction), you need to file a motion to ask for DNA testing. Filing a motion for DNA testing can be complicated, so you should try to get a lawyer to help you with it if you can.⁴ If you write a motion for DNA testing on your own, be very careful to include everything required. A court can deny your motion if it is missing any of the parts described below.

¹ Exonerate the Innocent, *available at* <https://www.innocenceproject.org/exonerate/> (last visited Sept. 7, 2017).

² Damon Thibodeaux, *available at* <https://www.innocenceproject.org/cases/damon-thibodeaux/> (last visited Sept. 7, 2017).

³ DNA (which stands for “deoxyribonucleic acid”) is a substance contained in every human cell. Each strand of DNA is encoded with information about the specific physical characteristics of the individual from whom it comes. What Is the Science Behind Forensic DNA Testing?, *available at* <http://www.innocenceproject.org/faqs/what-is-the-science-behind-forensic-dna-testing> (last visited Mar. 17, 2016). For more background information on DNA, *see* Genetics Home Reference, What is DNA?, *available at* <https://ghr.nlm.nih.gov/handbook/basics/dna> (last visited Mar. 14, 2016).

⁴ Refer to Appendix A for a list of organizations that can help you.

You can obtain an application form from your correctional institution or from the district court clerk's offices.⁵ The application form follows a "fill in the blank" format.⁶ You should file your application with the *district* court where your conviction occurred, even if your actual conviction occurred in city court.⁷ You should also include a copy of the judgment of your conviction and sentence with your application.⁸ Finally, you should mail a copy of your application to the Office of Adult Services within the Department of Public Safety & Corrections,⁹ at the following mailing address:¹⁰

Attn: Office of Adult Services
P.O. Box 94304
Baton Rouge, LA 70804-9304
Phone: (225) 342-9711
Fax: (225) 342-3349

All motions for post-conviction relief (including DNA testing) under Article 926 must include the following background information:¹¹

- 1) The name of the person in custody (you) and the place of custody if known, or if not known, a statement to that effect;
- 2) The name of the custodian (Warden, Superintendent, Jailer, or authorized person having custody of you), if known, or if not known, a designation or description of him as far as possible;
- 3) A statement of the grounds upon which relief is sought, specifying with reasonable particularity the factual basis for such relief;¹²
- 4) A statement of all prior applications for writs of habeas corpus or for post-conviction relief filed by or on behalf of the person in custody in connection with his present custody; and
- 5) All errors known or discoverable by the exercise of due diligence (reasonable care).

Article 926.1 includes four additional requirements that must be included in a motion for DNA testing. When writing your motion, you should go through each requirement separately and show how the facts of your case meet each one. By being as clear as possible about a) the pieces of evidence you want tested, b) why you are seeking post-conviction DNA testing, and c) how you meet all the requirements of your state's statute, your motion will have a better chance of succeeding.

A motion for DNA testing under Article 926.1 must include the following four requirements:¹³

- 1) A factual explanation of why there is an articulable doubt (uncertainty that is able to be expressed clearly), based on competent evidence (evidence which tends to prove the matter in dispute) whether or not introduced at trial, as to the guilt of the petitioner in that DNA testing will resolve the doubt and establish the innocence of the petitioner;
- 2) The factual circumstances establishing the timeliness of the application;
- 3) The identification of the particular evidence for which DNA testing is sought;

⁵ For the address of your district court, refer to the following addresses: For Western District of Louisiana court offices, refer to <http://www.lawd.uscourts.gov/clerks-office/> (last visited Sept. 8, 2017); for Middle District of Louisiana court offices, refer to <http://www.lamd.uscourts.gov/> (last visited Sept. 8, 2017); for Eastern District of Louisiana court offices, refer to <http://www.laed.uscourts.gov/content/accessing-court> (last visited Sept. 8, 2017). The law governing this procedure is LA. CODE CRIM. PROC. ANN. arts. 925–926 (2017).

⁶ LA. CODE CRIM. PROC. ANN. art. 926 (2017).

⁷ LA. CODE CRIM. PROC. ANN. art. 926(A) (2017); La. Supreme Court Rules, Appendix A, Uniform Application for Post-Conviction Relief, *available at* <http://www.lasc.org/rules/supreme/appA.pdf> (last visited Mar. 17, 2016).

⁸ LA. CODE CRIM. PROC. ANN. art. 926(A) (2017). If you ask for a copy of your judgment and do not receive it, you should make a note in your application that a copy of the judgment has been demanded and refused.

⁹ LA. CODE CRIM. PROC. ANN. art. 926.1(J) (2017).

¹⁰ Department of Corrections, *available at* <http://doc.la.gov/pages/contact-us/headquarters/> (last visited Mar. 17, 2016).

¹¹ LA. CODE CRIM. PROC. ANN. art. 926(B) (2017). Article 926.1 is applicable until August 31, 2019. "On or after August 31, 2019, a petitioner may request DNA testing under the rules for filing an application for post-conviction relief as provided in Article 930.4 or 930.8." LA. CODE CRIM. PROC. ANN. art. 926.1 (2017).

¹² You will want to state that you are seeking relief based in accordance with the ground found in Article 930.3(7). That is, the results of DNA testing performed pursuant to an application granted under Article 926.1 will prove by clear and convincing evidence that I am factually innocent of the crime for which I was convicted.

¹³ LA. CODE CRIM. PROC. ANN. art. 926.1(B) (2017).

- 4) That the applicant is factually innocent of the crime for which he was convicted, in the form of an affidavit signed by the petitioner under penalty of perjury (law prohibiting lying under oath).

The following subsections will explain each of these four requirements of the motion in greater detail.

a. Explaining how DNA testing will establish your innocence

The first thing you must do when writing your motion is to tell the court why there is some doubt that you committed the crime and how DNA testing will help to establish your innocence. You cannot just say that “there is evidence currently available for DNA testing but the testing was not available or was not done at the time of the conviction;” you must explain *what* that evidence is and *why* it would prove your innocence.¹⁴

Relief will only be granted if the DNA testing proves by *clear and convincing evidence* that you are factually innocent of the crime for which you were convicted.¹⁵ This does not mean that the court must be certain that the evidence will prove you are innocent, but it does impose a significant burden on you. A court can legally deny your request for testing if it believes that your conviction would be justifiable regardless of what a DNA test might show.¹⁶

In your motion, you should ask the court to take *judicial notice* of the trial record. Judicial notice of the trial record means that the court will consider all the facts introduced at trial as part of your motion.¹⁷ For example, if someone was convicted of rape, and at trial no evidence showed that the victim had intercourse with anyone besides her attacker for 24 hours before the crime, the court can find that there is a substantial likelihood that the convicted person would not have been convicted if DNA testing showed the semen found in the rape victim was not his.

Even though asking the court to take judicial notice may be enough to have your motion granted, you still should explain why the evidence is relevant to your case and why, if the results had been known at trial, you would not have been convicted. If you just ask the court to take judicial notice, without adding any explanation, the court may decide that the facts do not show how the DNA evidence would have made a difference in the outcome of your trial. First, you should point out weaknesses in the case against you at trial. Then, you should include any other facts from the trial that indicate your innocence. Finally, you should explain to the court how a favorable DNA test will make a difference in your case. The following paragraph is an example of such an explanation:

At trial, the state claimed that there was only one robber. The victim cut the robber's leg with a kitchen knife. If the blood on the kitchen knife excludes me as a source, it shows that the robber was someone else. If the trial court had known that information, there is substantial likelihood that I would not have been convicted.

You should also explain why the evidence was not tested. If it was DNA tested before, you will have to explain to the court that DNA testing methods have gotten better since your trial and it is reasonably likely that new results will be more helpful than the old results. Even if methods of DNA testing have gotten better and the result would now be more accurate, the court will still deny the motion if the newer DNA test is not reasonably likely to provide more information about the case. To avoid this scenario, you should explain in detail how the results

¹⁴ LA. CODE CRIM. PROC. ANN. art. 926.1(E) (2017).

¹⁵ LA. CODE CRIM. PROC. ANN. art. 930.3(7) (2017); *see also* State v. Robertson, No. 42-247, pp. 1–3 (La. App. 2 Cir. 6/25/07); 958 So. 2d 787, 787–789, *writ denied* 2007-1634 (La. 5/9/08); 980 So. 2d 682 (finding DNA testing would not provide clear and convincing evidence of innocence because there was sufficient evidence to support the applicant's conviction for rape: the victim identified the applicant, fingerprints alleged to match the applicant were recovered from the crime scene, and seminal fluid of the same blood type as the applicant's was found); LA. CODE CRIM. PROC. ANN. art. 930.2 (2017) (“The petitioner in an application for post conviction relief shall have the burden of proving that relief should be granted.”). “Clear and convincing evidence” means that it is “highly probable or reasonably certain” that you are factually innocent. It is a greater burden than “preponderance of the evidence” (the standard for civil trials), but less than “evidence beyond a reasonable doubt” (the standard for criminal trials). Black's Law Dictionary 636 (9th ed., 2009).

¹⁶ *But see* State v. Johnson, 2007-0475, p. 15 (La. App. 1 Cir. 10/10/07); 971 So. 2d 1124, 1131, *writ granted* 2007-2034 (La. 6/6/08); 983 So. 2d 907 (finding DNA testing excluded defendant as source of DNA found under victim's fingernails but did not prove by clear and convincing evidence that defendant was factually innocent of second-degree murder since the victim's fingernail scrapings were not necessarily from the assailant during the attack, another male's DNA could have been transferred to victim's fingernails by other methods, and defendant had placed himself at the scene of the crime and told police the unusual circumstances of the murder); State v. Edwards, 43-802, p. 2 (La. App. 2 Cir. 8/7/08); 988 So. 2d 850, 851, *writ denied* 2008-2476 (La. 8/20/09); 15 So. 3d 1009 (defendant was denied DNA testing of a cap and blood traces found at crime scene since neither would prove defendant's factual innocence).

¹⁷ *See* LA. CODE EVID. ANN. art. 201 (2017).

of the new DNA test will shed new light on your claim of innocence. The following paragraph is an example of such an explanation:

The original DNA test of blood on the doorknob showed the blood did not come from me but could have come from the victim. The new and more accurate test might be able to show the blood did not come from the victim either. If the new test shows the blood is not from the victim, the test would prove that someone else was at the crime scene, which would be *probative*¹⁸ because two witnesses said there was only one attacker.

If the evidence was not DNA tested before, the court is more likely to grant the motion if you can show that there was no testing available at the time of your trial that would have provided useful results. If this is the case, you should write in your motion that the evidence was not DNA tested and that no testing available at the time could have provided those meaningful results. If you can, try to get an affidavit from an expert in DNA testing that explains that there was no useful testing available at the time of your trial. If testing was available, it is helpful to your case if you can show either that it was not your fault that the evidence was not tested or that it would be *in the interests of justice* (fairness) to allow it now.

b. Establishing the timeliness of the application

Your motion for DNA testing will be dismissed if you have not first appealed your conviction.¹⁹ You must also show that your motion has been timely filed in order to avoid having it dismissed.²⁰ A motion for DNA testing will be accepted as timely at any time before August 31, 2019.

On or after August 31, 2019, this “timeliness” requirement means that you must file your application within two years after your judgment of conviction and sentence has become final²¹. If more than two years have gone by, you may still submit a motion if you qualify under one of these exceptions:²²

- 1) The application alleges, and the petitioner proves or the state admits, that the facts upon which the claim is predicated were not previously known to the petitioner or his attorney;²³
- 2) The petitioner’s claim is based on a newly established interpretation of constitutional law that retroactively applies to the petitioner’s case, and the petition is filed within one year of the final ruling;
- 3) The person asserting the claim has been sentenced to death.

If more than two years have passed since your sentence became final, you should look closely at these exceptions to see if one applies to your case. Otherwise, you will not be able to go forward with your motion. For instance, if you have been sentenced to death, the timeliness requirement does not apply to you, and you may submit an application at any time.

Otherwise, the most likely exception to apply is the first (“unknown fact”) exception. In order to claim this exception, you will want to show that you did not seek a DNA test within two years of your conviction becoming final due to a fact that was unknown to you at the time and that you have only recently learned. A late realization that an error may have occurred at trial does not count as the discovery of a new fact.²⁴ In addition, you cannot use the fact that you were incarcerated or did not have a lawyer as an excuse for not having discovered the fact earlier.²⁵ Rather, you will need to show that discovering the new fact was out of your control. The following paragraph is an example of such an explanation:

¹⁸ “Probative” means tending to show proof (of your innocence).

¹⁹ LA. CODE CRIM. PROC. ANN. art. 924.1 (2017).

²⁰ LA. CODE CRIM. PROC. ANN. art. 926.1(C)(2) (2017).

²¹ LA. CODE CRIM. PROC. ANN. art. 926.1(A)(1) (2017); LA. CODE OF CRIM. PROC. art. 930.8(A) (2017).

²² LA. CODE OF CRIM. PROC. art. 930.8(A) (2017).

²³ See *State v. Parker*, 1998-0256, p. 1 (La. 5/8/98); 711 So. 2d 694, 695 (defendant’s late realization that an error may have occurred at trial did not qualify as discovery of new fact); see also *Carlin v. Cain*, 97-2390, pp. 1–2 (La. 3/13/98); 706 So. 2d 968, 968 (holding that this exception requires no “diligence” of an inmate).

²⁴ *State v. Parker*, 1998-0256, p. 1 (La. 5/8/98); 711 So. 2d 694, 695.

²⁵ *State v. Obney*, 99-592, p. 5 (La. App. 3 Cir. 8/11/99); 746 So. 2d 24, 27, *writ denied*, 1999-2667 (La. 5/5/00); 760 So. 2d 1190 (rejecting lack of counsel as excuse for late discovery of civil trial testimony).

Although the final sentencing occurred over two years ago, the State withheld exculpatory evidence (evidence that helps prove you didn't commit a crime) that did not come to light until recently. Thus, this application for post-conviction relief is not time-barred and should not be dismissed.

c. Identifying the Evidence You Want Tested

You must identify exactly what items of evidence you want tested or re-tested.²⁶ This evidence may have been collected as part of the investigation of the original crime or it may be newly discovered evidence.²⁷ Finding evidence can be difficult. A big part of finding evidence is understanding the difference between biological evidence that was introduced at your trial (for instance, a bloody shirt) and evidence that was collected during the investigation, but not introduced at your trial (for instance, a rape kit—the evidence collected from a rape victim when she was examined by a doctor). You do not need to actually locate the evidence you want tested. You only need to prove that it was either collected during the course of the investigation or introduced into evidence at your trial (or both). The evidence to be tested has to be available and in a condition that would permit DNA testing.²⁸ Because biological material can deteriorate and make it difficult to test, not all evidence is in a condition that would allow for testing.

DNA evidence must conform to the Louisiana Code of Evidence to be admissible.²⁹ Mostly, this requires that the evidence be reliable.³⁰ If the reliability of the evidence, combined with the “chain of custody” as a whole, render the sample unreliable, it must be excluded from evidence.³¹ Chain of custody means that the evidence was never out of police control. Therefore, it may be helpful to establish that there was a chain of custody, which can be demonstrated through police records showing that the evidence was never out of police control. Since you probably will not know the condition of the DNA or whether there was a chain of custody, you should ask the court in your motion to find out.

Your motion should be very specific about what you want tested. You must refer to biological material, such as blood, semen, saliva, hair, skin, or sweat, that you already know exists. You cannot have a piece of evidence tested just to see if it might have biological material on it. Tell the court exactly what evidence you want tested. The court is more likely to grant your motion if it knows specifically what evidence you want tested. Examples of specific requests include “the bloodstain on the lower left side of the victim's t-shirt” and “the saliva on the cigarette found outside the door of the victim's house.”

d. Signing an affidavit

Finally, your motion must include a signed affidavit stating that you are factually innocent of the crime for which you were convicted. Factually innocent means that you did not commit the crime, not just that you should not have been convicted because of legal problems with your conviction. An affidavit is simply a written statement made under oath and notarized. Since these statements are under oath, everything you write in them must be truthful. If they are found to be untruthful, you could be charged with perjury or contempt of court.

It is a good idea to attach affidavits (sworn statements) wherever possible to make your claim stronger. When identifying the evidence you want tested, you can attach an affidavit saying someone told you the evidence exists. For example, if you remember that a police officer told you that a bloody sock was collected during the investigation, you should attach an affidavit saying so.

²⁶ LA. CODE CRIM. PROC. ANN. art. 926.1(B)(3) (2017).

²⁷ See LA. CODE CRIM. PROC. ANN. art. 851(B) (2017); *State v. Jason*, 2001-1428, pp. 7–8 (La. App. 3 Cir. 7/10/02); 820 So. 2d 1286, 1290–1291 (denying motion because “the trial record contain[ed] no mention of semen analysis or of DNA analysis,” nor did the defendant “suggest that this might be newly discovered evidence”).

²⁸ “Relief under this Article shall not be granted when the court finds that there is a substantial question as to the integrity of the evidence to be tested.” LA. CODE CRIM. PROC. ANN. art. 926.1(D) (2017).

²⁹ LA. REV. STAT. § 15:441.1 (2017).

³⁰ Louisiana law requires you to show that the item you offer as evidence is the original and has not changed. See LA. CODE EVID. ANN. art. 901(A) (2017). This does not necessarily mean that you need to demonstrate a so-called “chain of custody” (unbroken record of police control of the evidence from the time it is collected to the time it is presented in court) as proof of authenticity. See LA. CODE EVID. ANN. art. 901(A) cmt. D (2017).

³¹ *Cole v. State ex rel. Dept. of Transp. & Dev.*, 1999-912, p. 10 (La. App. 3 Cir. 12/22/99); 755 So. 2d 315, 324, *writ denied* 2000-0199 (La. 4/7/00); 759 So. 2d 766 (requiring party seeking to introduce a blood alcohol test result “to lay a proper foundation, which . . . relates not only to the chain of custody, but also to the integrity and reliability of the chemical test.”).

It is very helpful to get affidavits from experts in DNA testing in order to explain to the court how previous DNA testing methods were not adequate or how the methods have improved. This information is very technical and complicated, and the court is much more likely to accept your claim if it is backed up by an expert. See the list in Appendix A at the end of this Chapter for names of legal organizations that may be able to help you find a DNA expert who could provide an affidavit.

Affidavits are also useful for supporting other claims. For example, you can use an affidavit to show that there is a good chance you would not have been convicted if the evidence had been tested at trial and that the identity of the perpetrator was an issue in the case. You do not need an affidavit simply to talk about what is in the trial record. However, any time you are telling the court new information that comes from your personal knowledge, an affidavit will make your claim stronger because it is a sworn statement.³² If you are innocent, an affidavit stating that you are innocent might help your claim that there is a good chance that you would not have been convicted if DNA testing had been done. You should also attach an affidavit stating that you are not seeking this motion simply to delay the execution of your sentence.

2. Getting Counsel to Help You

Under Article 930.7, if you are indigent (poor) and cannot afford a lawyer, you may be able to have a lawyer appointed to you by the court.³³ You are not entitled to a lawyer to file your motion for you, though, unless it was ordered by the trial court.³⁴ However, if you are indigent, you will be appointed a lawyer later on when the court orders an evidentiary hearing, authorizes a deposition (the under-oath questioning of someone connected to the case), or requests admissions of fact.³⁵

You may also obtain a free copy of the transcript from your trial, including sentencing, if you can show that you have a particular need for it.³⁶ That is, you must show that your claim is not frivolous—that your claim has a serious purpose—and the transcript is needed to decide the issue presented.³⁷ For additional information about obtaining a lawyer, see Section F.

C. THE STATE'S RESPONSE TO YOUR MOTION, POSSIBLE HEARING, AND THE COURT'S DECISION

1. The State's Response to Your Motion for DNA Testing

Once the court receives your motion for DNA testing, it will try to find the DNA evidence that is to be tested.³⁸ It will then serve a copy of the application to the district attorney and the law enforcement agency which has possession of the evidence to be tested, including but not limited to sheriffs, the office of state police, local police agencies, court clerks, and crime laboratories.³⁹ The custodian of the DNA evidence, through the district attorney in the parish where you were convicted, must provide an answer on the merits of your motion within 30 days unless the district attorney files a procedural objection or the court dismisses your motion for a reason described below.⁴⁰

Once you submit your motion, there are several potential outcomes to your case:

a. Procedural Objection

The district attorney may file a procedural objection to your motion.⁴¹ For example, the district attorney may object that the court lacks personal jurisdiction to hear your motion,⁴² or your claim may be barred because you

³² Remember that you cannot make untrue statements in a sworn affidavit. If you do so, you could be punished with perjury charges or contempt.

³³ LA. CODE CRIM. PROC. ANN. art. 930.7(A) (2017).

³⁴ *State v. Obney*, 99-592, p. 5 (La. App. 3 Cir. 8/24/99); 746 So. 2d 24, 27, *writ denied*, 1999-2667 (La. 5/5/00); 760 So. 2d 1190.

³⁵ LA. CODE CRIM. PROC. ANN. art. 930.7(C) (2017).

³⁶ *State ex rel. Simmons v. State*, 94-2879, pp. 1–2 (La. 12/16/94); 647 So. 2d 1094, 1095.

³⁷ *United States v. MacCollom*, 426 U.S. 317, 326, 96 S. Ct. 2086, 2092, 48 L.Ed.2d 666 (1976); *State ex rel. Nash v. State*, 92-1307, p. 1 (La. App. 1 Cir. 1992); 604 So. 2d 1054, 1054.

³⁸ LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

³⁹ LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

⁴⁰ LA. CODE CRIM. PROC. ANN. art. 927(A) (2017).

⁴¹ LA. CODE CRIM. PROC. ANN. art. 927 (2017).

⁴² That is, the motion should have been filed in a different court.

have an appeal pending.⁴³ If this happens, the court will not order an answer until it considers the objections and rules on them.⁴⁴ You may have to amend your motion in order to comply with the court's ruling.

b. Dismissal upon the Pleadings

If your motion fails to allege a claim which, if established, would entitle you to relief (didn't put enough information into your motion), then it will be dismissed by the court without an answer.⁴⁵ This is why it is important to include as much information as possible to show that a favorable DNA test will make a difference in your case and to be specific about the evidence that you want tested.

c. Summary Disposition

The court may decide that the factual and legal issues can be resolved without further proceedings and grant or deny relief right away.⁴⁶ For instance, if the record clearly shows that your conviction would be allowed no matter what a DNA test might show, then relief may be denied without a further hearing. In other cases, the court may decide that some expansion of the record (that the court needs more information to decide your case) is necessary but that the case can be decided without a full evidentiary hearing.⁴⁷

d. Evidentiary Hearing

If the court decides there are questions of fact that cannot be resolved by summary disposition, it will order an evidentiary hearing.⁴⁸

2. Hearing on your Motion

The court is allowed to hold a hearing to help it decide whether or not to grant the motion. However, the court does not have to hold a hearing and can decide based only on the written submissions, which include your motion and the state's response. You may or may not be allowed to participate at the evidentiary hearing depending on the types of evidence to be received by the court.⁴⁹ If you are incarcerated and allowed to participate, this may mean using teleconference, video link, or other visual remote technology rather than appearing in person.⁵⁰ In the hearing, as throughout the application process, you will have the burden of proving that DNA testing should go forward.⁵¹

3. Decision on Your Motion

Once the court receives all the information it needs, it will decide whether your motion meets the requirements of Article 926.1 and either order DNA testing or deny your motion. If you meet your burden under the statute, the court will likely order the testing.

D. APPEALING THE COURT'S DECISION IF YOUR MOTION IS DENIED

There is no right to appeal from a judgment dismissing your motion or otherwise denying relief.⁵² The Courts of Appeal do have supervisory jurisdiction, meaning it can use its discretion to review any trial case.⁵³ However, this is an extraordinary measure that is not often taken. Thus, the judgment of the trial court is generally final.

⁴³ See LA. CODE CRIM. PROC. ANN. art. 924.1 (2017) (requiring the petitioner to exhaust his right of appeal before applying for post-conviction relief).

⁴⁴ LA. CODE CRIM. PROC. ANN. art. 927(A) (2017).

⁴⁵ LA. CODE CRIM. PROC. ANN. art. 928 (2017).

⁴⁶ LA. CODE CRIM. PROC. ANN. art. 929(A) (2017).

⁴⁷ LA. CODE CRIM. PROC. ANN. art. 929 (2017).

⁴⁸ LA. CODE CRIM. PROC. ANN. art. 930 (2017).

⁴⁹ LA. CODE CRIM. PROC. ANN. art. 930 (2017). Note that you may not be entitled to be present at the hearing if the only evidence to be received includes duly authenticated records, transcripts, depositions, documents, or portions thereof, or admissions of facts, and you have been or will be provided with copies of such evidence and an opportunity to respond to the evidence in writing.

⁵⁰ LA. CODE CRIM. PROC. ANN. art. 930.9 (2017)

⁵¹ LA. CODE CRIM. PROC. ANN. art. 930.2 (2017).

⁵² LA. CODE CRIM. PROC. ANN. art. 930.6(A) (2017); *State v. Walker*, 94-340, p. 3 (La. App. 5 Cir. 10/25/94); 645 So. 2d 766, 768.

⁵³ LA. CODE CRIM. PROC. ANN. art. 930.6 (2017).

E. AFTER YOUR MOTION FOR DNA TESTING HAS BEEN GRANTED

1. Getting the DNA Tested

If the court grants your motion for DNA testing, it will issue orders to obtain the samples and to protect their integrity.⁵⁴ At this point, no evidence may be destroyed until the case has been resolved.⁵⁵ The testing will be performed by a laboratory that you and the district attorney agree upon.⁵⁶ If a laboratory cannot be agreed upon, the court will choose a laboratory for you instead.⁵⁷ If the court chooses a private laboratory, the district attorney has the right to withhold a sufficient portion of the evidence to have it tested independently.⁵⁸

During this process, your DNA profile will be sent by the district attorney to the state police and put in the state DNA database.⁵⁹ In the event your conviction is reversed, you may request to have your DNA record removed from this database.⁶⁰

2. Getting a New Trial Based on the Results of the DNA Tests

When the results are known, they will be filed by the laboratory with the court and served to you and to the district attorney.⁶¹ A new trial will be granted if the results of the DNA tests prove by clear and convincing evidence that you are factually innocent of the crime for which you were convicted.⁶²

F. LEGAL ASSISTANCE FOR THOSE SEEKING POST-CONVICTION DNA TESTING

Appendix A contains a list of not-for-profit organizations that may be able to provide you with legal assistance if you do not have a lawyer and would like help in filing a motion for DNA testing. Because these organizations get many requests for help, they are unable to help everyone who contacts them and often have to choose among many worthy cases. As a result, you may want to contact multiple organizations to see if any of them can help you.

To request the help of an organization, you should mail them a letter. The letter should include a summary of the facts of your case and the evidence used against you. If you can, you should specify what biological evidence from your case, such as semen, blood, saliva, hair, skin, or sweat, you would like tested for DNA and why you believe that evidence will show you are innocent. If possible, you should include the last known location of this evidence. Your letter should also include your name, your prison identification number, and your mail address.

These organizations receive many letters, so they may not be able to respond to your letter for some time. Because of this, you should not mail them any of your legal documents unless or until they ask you to, since you may need these documents in the meantime.

G. CONCLUSION

If you believe there is biological evidence that may prove your innocence of the crime for which you were convicted, you may be able to obtain DNA testing under Article 926.1 of the Louisiana Code of Criminal Procedure. If you want to file a motion to obtain DNA testing, you should follow the procedures outlined above. You will find a list of organizations that may be able to provide you with legal assistance in Appendix A.

⁵⁴ LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

⁵⁵ LA. CODE CRIM. PROC. ANN. art. 926.1(H)(2) (2017).

⁵⁶ LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

⁵⁷ The court will choose a laboratory that is accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) in forensic DNA analysis. LA. CODE CRIM. PROC. ANN. art. 926.1(F) (2017).

⁵⁸ “Under such circumstances, the petitioner shall submit DNA samples to the district attorney for purposes of comparison with the unknown sample retained by the district attorney. A laboratory selected to perform the analysis shall, if possible, retain and maintain the integrity of a sufficient portion of the unknown sample for replicate testing. If after initial examination of the evidence, but before actual testing, the laboratory decides that there is insufficient evidentially significant material for replicate tests, then it shall notify the district attorney in writing of its finding.” LA. CODE CRIM. PROC. ANN. art. 926.1(G) (2017).

⁵⁹ LA. CODE CRIM. PROC. ANN. art. 926.1(I) (2017); *see also* LA. REV. STAT. ANN. § 15:614 (2017).

⁶⁰ LA. CODE CRIM. PROC. ANN. art. 926.1(I) (2017); *see also* LA. REV. STAT. ANN. § 15:614 (2017).

⁶¹ LA. CODE CRIM. PROC. ANN. art. 926.1(H) (2017).

⁶² *See* LA. CODE CRIM. PROC. ANN. art. 930.3 (2017); *State v. Johnson*, 2007-0475, p. 15 (La. App. 1 Cir. 10/10/07); 971 So. 2d 1124, 1125; *writ granted*, 2007-2034 (La. 6/6/08), 983 So. 2d 907 (new trial denied because results of DNA testing did not prove by clear and convincing evidence the factual evidence of the defendant).

APPENDIX A

ORGANIZATIONS THAT MAY BE ABLE TO ASSIST YOU IN OBTAINING DNA TESTING

Innocence Project, Inc.

40 Worth Street, Suite 701

New York, NY 10013

Phone: (212) 364-5340

Email: info@innocenceproject.org

Website: www.innocenceproject.org

Innocence Project New Orleans

4051 Ulloa Street

New Orleans, LA 70119

Phone: (504) 943-1902

Fax: (504) 943-1905

Website: www.ip-no.org