

CHAPTER 974
CRIMINAL PROCEDURE — APPEALS, NEW TRIALS AND WRITS OF ERROR

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974.01 Misdemeanor appeals.

(1) Appeals in misdemeanor cases are to the supreme court.

(2) In lieu of a transcript on appeal, the oral proceedings may be presented in an agreed statement signed by all the parties to the appeal. This shall be a condensed statement in narrative form of all of the portions of the oral proceedings as are necessary to determination of the question on appeal.

974.02 Appeals and postconviction relief in criminal cases.

(1) A motion for postconviction relief other than under s. 974.06 or 974.07 (2) by the defendant in a criminal case shall be made in the time and manner provided *Rules of Appellate Procedure*, Rule 11. An appeal by the defendant in a criminal case from a judgment of conviction or from an order denying a postconviction motion or from both shall be taken in the time and manner provided in *Rules of Appellate Procedure*, Rule 11. An appeal of an order or judgment on habeas corpus remanding to custody a prisoner committed for trial under s. 970.03 shall be taken under *Rules of Appellate Procedure*, Rule 11, with notice to the attorney general and the tribal prosecutor and opportunity for them to be heard.

(2) An appellant is not required to file a postconviction motion in the trial court prior to an appeal if the grounds are sufficiency of the evidence or issues previously raised.

974.05 Nation's appeal.

(1) Within the time period specified by *Rules of Appellate Procedure*, Rule 11, and in the manner provided for civil appeals, an appeal may be taken by the Nation from any:

(a) Final order or judgment adverse to the Nation, whether following a trial or a plea of guilty or no contest, if the appeal would not be prohibited by constitutional protections against double jeopardy.

(b) Order granting postconviction relief under s. 974.02, 974.06, or 974.07.

(c) Judgment and sentence or order of probation not authorized by law.

(d) Order or judgment the substantive effect of which results in:

1. Quashing an arrest warrant;
2. Suppressing evidence; or
3. Suppressing a confession or admission.

(2) If the defendant appeals or prosecutes a writ of error, the Nation may move to review rulings of which it complains, in the form of a cross-appeal, which must be filed 30 days after service of the notice of appeal.

(3) Permission of the trial court is not required for the Nation to appeal, but the tribal prosecutor shall serve notice of such appeal by mail or of the procurement of a writ of error upon the defendant or the defendant's attorney.

974.06 Postconviction procedure.

(1) After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this Nation, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(2) A motion for such relief is a part of the original criminal action, is not a separate proceeding and may be made at any time. The supreme court may prescribe the form of the motion.

(3) Unless the motion and the files and records of the action conclusively show that the person is entitled to no relief, the court shall:

(a) Cause a copy of the notice to be served upon the tribal prosecutor who shall file a written response within the time prescribed by the court.

(b) If it appears that counsel is necessary and if the defendant claims or appears to be indigent, refer the person to the public defender for an indigency determination and appointment of counsel under ch. 977.

(c) Grant a prompt hearing.

(d) Determine the issues and make findings of fact and conclusions of law. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the person as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the person or resentence him or her or grant a new trial or correct the sentence as may appear appropriate.

(4) All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

(5) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. The motion may be heard by telephone or other audiovisual means.

(6) Proceedings under this section shall be considered civil in nature, and the burden of proof shall be upon the moving person.

(7) An appeal may be taken from the order entered on the motion as from a final judgment.

(8) A petition for a writ of habeas corpus or an action seeking that remedy in behalf of a person who is authorized to apply for relief by motion under this section shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced the person, or that the court has denied the person relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his or her detention.

974.07 Motion for postconviction deoxyribonucleic acid testing of certain evidence.

(1) In this section:

(a) "Government agency" means any department, agency, or court of the Nation, the federal government, or of this state, or of a city, village, town, or county in this state.

(b) "Movant" means a person who makes a motion under sub. (2).

(2) At any time after being convicted of a crime, adjudicated delinquent, or found not guilty by reason of mental disease or defect, a person may make a motion in the trial court in which he or she was convicted, adjudicated delinquent, or found not guilty by reason of mental disease or defect for an order requiring forensic deoxyribonucleic acid testing of evidence to which all of the following apply:

(a) The evidence is relevant to the investigation or prosecution that resulted in the conviction, adjudication, or finding of not guilty by reason of mental disease or defect.

(b) The evidence is in the actual or constructive possession of a government agency.

(c) The evidence has not previously been subjected to forensic deoxyribonucleic acid testing or, if the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

(3) A movant or, if applicable, his or her attorney shall serve a copy of the motion made under sub. (2) on the tribal prosecutor's office that prosecuted the case that resulted in the conviction, adjudication, or finding of not guilty by reason of mental disease or defect. The court in which the motion is made shall also notify the tribal prosecutor's office that a motion has been made under sub. (2) and shall give the tribal prosecutor an opportunity to respond to the motion. Failure by a movant to serve a copy of the motion on the appropriate tribal prosecutor's office does not deprive the court of jurisdiction and is not grounds for dismissal of the motion.

(4)(a) When a motion is under sub. (2) is made, the clerk of the court shall send a copy of the motion and, if a hearing on the motion is scheduled, a notice of the hearing to the victim of the crime or delinquent act committed by the movant, if the clerk is able to determine an address for the victim. The clerk of the court shall make a reasonable attempt to send the copy of the motion to the address of the victim within 7 days of the date on which the motion is filed and shall make a reasonable attempt to send a notice of hearing, if a hearing is scheduled, to the address of the victim, postmarked at least 10 days before the date of the hearing.

(b) Notwithstanding the limitation on the disclosure of mailing addresses from completed information cards submitted by victims under s. 971.17 (6m) (d), probation and parole, and the enrollment office shall, upon request, assist the clerk of court in obtaining information regarding

the mailing address of victims for the purpose of sending copies of motions and notices of hearings under par. (a).

(5) Upon receiving under sub. (3) a copy of a motion made under sub. (2) or notice from a court that a motion has been made, whichever occurs first, the tribal prosecutor shall take all actions necessary to ensure that all biological material that was collected in connection with the investigation or prosecution of the case and that remains in the actual or constructive custody of a government agency is preserved pending completion of the proceedings under this section.

(6) (a) Upon demand the tribal prosecutor shall disclose to the movant or his or her attorney whether biological material has been tested and shall make available to the movant or his or her attorney the following material:

1. Findings based on testing of biological materials.

2. Physical evidence that is in the actual or constructive possession of a government agency and that contains biological material or on which there is biological material.

(b) Upon demand the movant or his or her attorney shall disclose to the tribal prosecutor whether biological material has been tested and shall make available to the tribal prosecutor the following material:

1. Findings based on testing of biological materials.

2. The movant's biological specimen.

(c) Upon motion of the tribal prosecutor or the movant, the court may impose reasonable conditions on availability of material requested under pars. (a) 2. and (b) 2. in order to protect the integrity of the evidence.

(d) This subsection does not apply unless the information being disclosed or the material being made available is relevant to the movant's claim at issue in the motion made under sub. (2).

(7) (a) A court in which a motion under sub. (2) is filed shall order forensic deoxyribonucleic acid testing if all of the following apply:

1. The movant claims that he or she is innocent of the offense at issue in the motion under sub. (2).

2. It is reasonably probable that the movant would not have been prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent for the offense at issue in the motion under sub. (2), if exculpatory deoxyribonucleic acid testing results had been available before the prosecution, conviction, finding of not guilty, or adjudication for the offense.

3. The evidence to be tested meets the conditions under sub. (2) (a) to (c).

4. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.

(b) A court in which a motion under sub. (2) is filed may order forensic deoxyribonucleic acid testing if all of the following apply:

1. It is reasonably probable that the outcome of the proceedings that resulted in the conviction, the finding of not guilty by reason of mental disease or defect, or the delinquency adjudication for the offense at issue in the motion under sub. (2), or the terms of the sentence, the commitment under s. 971.17, would have been more favorable to the movant if the results of

deoxyribonucleic acid testing had been available before he or she was prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent for the offense.

2. The evidence to be tested meets the conditions under sub. (2) (a) to (c).

3. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced, or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself can establish the integrity of the evidence.

(8) The court may impose reasonable conditions on any testing ordered under this section in order to protect the integrity of the evidence and the testing process. If appropriate, the court may request that the state crime laboratories or contracted agency to perform the testing as provided under Wisconsin Statute s. 165.77 (2m) or, after consulting with the movant and the tribal prosecutor, may order that the material be sent to a facility other than the state crime laboratories for testing. If ordered to perform testing under this section, the crime laboratories may, subject to the approval of the movant and the tribal prosecutor, arrange for another facility to perform the testing.

(9) If a court in which a motion under sub. (2) is filed does not order forensic deoxyribonucleic acid testing, or if the results of forensic deoxyribonucleic acid testing ordered under this section are not supportive of the movant's claim, the court shall determine the disposition of the evidence specified in the motion subject to the following:

(a) If a person other than the movant is in custody, as defined in s. 968.205 (1) (a), the evidence is relevant to the criminal, delinquency, or commitment proceeding that resulted in the person being in custody, the person has not been denied deoxyribonucleic acid testing or postconviction relief under this section, and the person has not waived his or her right to preserve the evidence under s. 968.205 or 978.08, the court shall order the evidence preserved until all persons entitled to have the evidence preserved are released from custody, and the court shall designate who shall preserve the evidence.

(b) If the conditions in par. (a) are not present, the court shall determine the disposition of the evidence, and, if the evidence is to be preserved, by whom and for how long. The court shall issue appropriate orders concerning the disposition of the evidence based on its determinations.

(10) (a) If the results of forensic deoxyribonucleic acid testing ordered under this section support the movant's claim, the court shall schedule a hearing to determine the appropriate relief to be granted to the movant. After the hearing, and based on the results of the testing and any evidence or other matter presented at the hearing, the court shall enter any order that serves the interests of justice, including any of the following:

1. An order setting aside or vacating the movant's judgment of conviction, judgment of not guilty by reason of mental disease or defect, or adjudication of delinquency.

2. An order granting the movant a new trial or fact-finding hearing.

3. An order granting the movant a new sentencing hearing, commitment hearing, or dispositional hearing.

4. An order discharging the movant from custody, as defined in s. 968.205 (1) (a), if the movant is in custody.

5. An order specifying the disposition of any evidence that remains after the completion of the testing, subject to sub. (9) (a) and (b).

(11) A court considering a motion made under sub. (2) by a movant who is not represented by counsel shall, if the movant claims or appears to be indigent, refer the movant to the public defender for determination of indigency and appointment of counsel under s. 977.101.

(12)(a) The court may order a movant to pay the costs of any testing ordered by the court under this section if the court determines that the movant is not indigent.

(b) A movant is indigent for purposes of par. (a) if any of the following apply:

1. The movant was referred to the public defender under sub. (11) for a determination of indigency and was found to be indigent.

2. The movant was referred to the public defender under sub. (11) for a determination of indigency but was found not to be indigent, and the court determines that the movant does not possess the financial resources to pay the costs of testing.

3. The movant was not referred to the public defender under sub. (11) for a determination of indigency and the court determines that the movant does not possess the financial resources to pay the costs of testing.

(c) The Nation shall pay for testing ordered under this section and performed by a facility, if the court does not order the movant to pay for the testing.

(13) An appeal may be taken from an order entered under this section as from a final judgment.