

**DRAFT ONLY  
NOT APPROVED FOR  
INTRODUCTION**

SENATE FILE NO. \_\_\_\_\_

Post-conviction relief petitions-DNA evidence.

Sponsored by: Joint Judiciary Interim Committee

A BILL

for

1 AN ACT relating to criminal procedure; creating a Post-  
2 conviction DNA Testing Act; establishing procedures for  
3 post-conviction motions for DNA testing; authorizing new  
4 trials as specified; prohibiting waiver of rights as  
5 specified; limiting appeals of court decisions as  
6 specified; providing a right to counsel for motions;  
7 authorizing legal representation for needy persons as  
8 specified; providing for costs; authorizing consensual DNA  
9 testing; requiring victim notification; providing  
10 definitions; requiring a report to the legislature;  
11 amending requirements for retention of evidence as  
12 specified; and providing for an effective date.

13

14 *Be It Enacted by the Legislature of the State of Wyoming:*

1

2       **Section 1.** W.S. 7-12-302 through 7-12-316 are created

3 to read:

4

5       **7-12-302. Short title.**

6

7 This act shall be known and may be cited as "The Post-

8 conviction DNA Testing Act".

9

10       **7-12-303. New trial; motion for post-conviction**11 **testing of DNA; motion contents; sufficiency of**12 **allegations, consent to DNA sample; definitions.**

13

14       (a) As used in this act:

15

16               (i) "DNA" means deoxyribonucleic acid;

17

18               (ii) "Movant" means the person filing a motion

19 under W.S. 7-12-303(c);

20

21               (iii) "This act" means W.S. 7-12-302 through 7-

22 12-316.

23

1           (b) Notwithstanding any law or rule of procedure that  
2 bars a motion for a new trial as untimely, a convicted  
3 person may use the results of a DNA test ordered pursuant  
4 to this act as the grounds for filing a motion for a new  
5 trial.

6  
7           (c) A person convicted of a felony offense may,  
8 preliminary to the filing of a motion for a new trial, file  
9 a motion for post-conviction DNA testing in the district  
10 court that entered the judgment of conviction against him  
11 if the movant asserts under oath and the motion includes  
12 all of the following information:

13  
14                   (i) Why DNA evidence is material to:

15  
16                           (A) The identity of the perpetrator of, or  
17 accomplice to, the crime;

18  
19                           (B) A sentence enhancement; or

20  
21                           (C) An aggravating factor alleged in a  
22 capital case.

1           (ii) That evidence is still in existence and is  
2 in a condition that allows DNA testing to be conducted;

3                           **\*\*\*Staff Comment\*\*\***

4           **Requiring the movant to swear that evidence is**  
5           **still in existence and usable for testing appears**  
6           **to be a difficult, if not impossible, hurdle to**  
7           **overcome. This preceding paragraph (ii) may**  
8           **warrant further discussion.**  
9

10           (iii) That the chain of custody is sufficient to  
11 establish that the evidence has not been substituted,  
12 contaminated or altered in any material aspect that would  
13 prevent reliable DNA testing;

14

15           (iv) That the specific evidence to be tested can  
16 be identified;

17

18           (v) That the type of DNA testing to be conducted  
19 is specified;

20

21           (vi) That the DNA testing employs a scientific  
22 method sufficiently reliable and relevant to be admissible  
23 under the Wyoming Rules of Evidence;

24

1           (vii) That a theory of defense can be presented,  
2 not inconsistent with theories previously asserted at  
3 trial, that the requested DNA testing would support;

4  
5           (viii) That the evidence was not previously  
6 subjected to DNA testing, or if the evidence was previously  
7 tested one (1) of the following would apply:

8  
9                   (A) The result of the testing was  
10 inconclusive;

11  
12                   (B) The evidence was not subjected to the  
13 testing that is now requested, and the new testing may  
14 resolve an issue not resolved by the prior testing; or

15  
16                   (C) The requested DNA test would provide  
17 results that are significantly more accurate and probative  
18 of the identity of the perpetrator or accomplice.

19  
20           (ix) That the evidence that is the subject of  
21 the request for testing has the potential to produce new,  
22 noncumulative evidence that will establish the movant's  
23 actual innocence.

1

2 (d) The court may not order DNA testing in cases in  
3 which the trial or a plea of guilty or nolo contendere  
4 occurred after December 31, 1995 and the person did not  
5 request DNA testing or present DNA evidence for strategic  
6 or tactical reasons or as a result of a lack of due  
7 diligence, unless the failure to exercise due diligence is  
8 found to be a result of ineffective assistance of counsel.

9 A person convicted before December 31, 1995 shall not be  
10 required to make a showing of due diligence under this  
11 subsection.

12 **\*\*\*Staff Comment\*\*\***

13 Staff is uncertain what the significance of, or  
14 reason for, the last sentence in the preceding  
15 subsection is. The provision may raise an equal  
16 protection issue so there has to be a rational  
17 nexus between the provision and what it is  
18 attempting to accomplish. Another issue the  
19 sentence raises is the uniform operation of laws  
20 issue under Article 1, section 34 of the Wyoming  
21 Consitution. This provision may warrant more  
22 detailed discussion.

23

24 **7-12-304. Service of process; response by the state;**  
25 **preservation of evidence.**

26

27 (a) Notice of the motion filed under W.S. 7-12-303(c)  
28 shall be served upon the district attorney in the county in

1 which the conviction occurred, the attorney general and, if  
2 applicable, the governmental agency or laboratory holding  
3 the evidence sought to be tested.

4  
5 (b) The district attorney who is served, or the  
6 attorney general, shall within sixty (60) days after  
7 receipt of service of a copy of the motion, or within any  
8 additional period of time the court allows, answer or  
9 otherwise respond to the motion requesting DNA testing.

10  
11 (c) The district attorney who is served or the  
12 attorney general may support the motion requesting DNA  
13 testing or oppose the motion with a statement of reasons  
14 and may recommend to the court, if any DNA testing is  
15 ordered, that a particular type of testing should be  
16 conducted, or object to the proposed testing laboratory, or  
17 make such other objections, recommendations or requests as  
18 will preserve the integrity of the evidence, including, but  
19 not limited to, requests for independent testing by the  
20 state or procedures in the event that the proposed testing  
21 will deplete the DNA sample.

1           (d) If a motion is filed pursuant to W.S. 7-12-  
2 303(c), and the motion asserts the evidence is in the  
3 custody of the state or its agents, the court shall order  
4 the state to preserve during the pendency of the proceeding  
5 all material and relevant evidence in the state's  
6 possession or control that could be subjected to DNA  
7 testing and analysis. The state shall prepare an inventory  
8 of the evidence and shall submit a copy of the inventory to  
9 the movant and to the court. If the state determines that  
10 the evidence is no longer available, the state shall notify  
11 the court and the movant of the loss or destruction of the  
12 evidence and explain its loss or destruction. The state  
13 shall provide copies of chain of custody documentation or  
14 other documents explaining the loss or destruction of the  
15 evidence. After a motion is filed under W.S. 7-12-303(c),  
16 prosecutors in the case, law enforcement officers and crime  
17 laboratory personnel shall cooperate in preserving material  
18 and relevant evidence and in determining the sufficiency of  
19 the chain of custody of the evidence which may be subject  
20 to DNA testing.

21

22           **7-12-305. Review by the court; hearing on motion,**  
23 **findings; order.**



1

2 (a) If the court determines that a motion is filed in  
3 compliance with the requirements of W.S. 7-12-303(c) and  
4 the state has had opportunity to respond to the motion, the  
5 court shall set a hearing for not more than ninety (90)  
6 days after the date the motion was filed. If the court  
7 finds that that the motion does not comply with the  
8 requirements of W.S. 7-12-303(c), the court may deny the  
9 motion without hearing.

10

11 (b) The hearing under subsection (a) of this section  
12 shall be heard by the judge who conducted the trial that  
13 resulted in the movant's conviction unless the judge is  
14 unavailable.

15

16 **\*\*\*Staff Comment\*\*\***

17 **The Committee may want to consider what**  
18 **"unavailability" means, e.g., no longer on the**  
19 **bench, retired, death, illness, etc.**

20

21 (c) The movant and the state may present evidence by  
22 sworn and notarized affidavits or by testimony; provided,  
23 however, any affidavit shall be served on the opposing  
24 party at least fifteen (15) days prior to the hearing.

25

1           (d) The movant shall be required to present a prima  
2 facie case showing that the evidence supports findings  
3 consistent with the facts asserted under W.S. 7-12-303(c)  
4 and DNA testing of the specified evidence would, assuming  
5 exculpatory results, establish:

6  
7           (i) The actual innocence of the movant of the  
8 offense for which the movant was convicted; or

9  
10          (ii) In a capital case:

11  
12           (A) The movant's actual innocence of the  
13 charged or uncharged conduct constituting an aggravating  
14 circumstance; or

15  
16           (B) A mitigating circumstance as a result  
17 of the DNA testing.

18                   **\*\*\*Staff Comment\*\*\***

19           **The language in subsection (d)(intro) and**  
20           **paragraphs (i) and (ii) were changed for purposes**  
21           **of grammar and syntax from that provided to LSO.**  
22           **The language provided did not indicate if**  
23           **subparagraphs (ii)(A) and (B) would be in the**  
24           **conjunctive or disjunctive, so an "or" was used,**  
25           **but the Committee may decide, after discussion of**  
26           **this subsection, that an "and" would be more**  
27           **appropriate.**  
28

1           (e) If the court finds that the movant has presented  
2 a prima facie case showing that the evidence supports  
3 findings consistent with W.S. 7-12-303(c) and the evidence  
4 would establish actual innocence, the court may order  
5 testing, subject to W.S. 7-12-306.

6  
7           **7-12-306. Designation of testing laboratory.**

8  
9           (a) If the court orders DNA testing pursuant to W.S.  
10 7-12-305(e), the DNA test shall be performed by the Wyoming  
11 state crime laboratory unless the movant establishes that  
12 the state crime laboratory has a conflict of interest or  
13 does not have the capability to perform the necessary  
14 testing.

15  
16           (b) If the court orders that the DNA testing under  
17 W.S. 7-12-305(e) shall be conducted by a laboratory other  
18 than the state crime laboratory, the court shall require  
19 that the testing be performed:

20  
21           (i) Under reasonable conditions designed to  
22 protect the state's interests in the integrity of the  
23 evidence;

1

2 (ii) By a laboratory that:

3

4 (A) Meets standards that at minimum comply  
5 with the standards of the DNA advisory board established  
6 pursuant to 42 U.S.C. 14131; and

7

8 (B) Is accredited by the American society  
9 of crime laboratory directors accreditation board.

10

11 **7-12-307. Discovery.**

12

13 (a) If the DNA evidence being tested under this act  
14 has been previously subjected to DNA analysis by either the  
15 state or defense prior to the hearing conducted under W.S.  
16 7-12-305, the court may order the state or defense to  
17 provide each party and the court with access to the  
18 laboratory reports prepared in connection with the DNA  
19 analysis, as well as the underlying data and laboratory  
20 notes. If DNA or other analysis was previously conducted  
21 by either the state or defense without the knowledge of the  
22 other party, all information relating to the testing shall

1 be disclosed by the motion filed under W.S. 7-12-303(c) or  
2 any response thereto.

3  
4 (b) The results of any DNA testing ordered under W.S.  
5 7-12-305(e) shall be fully disclosed to the movant, the  
6 district attorney, the attorney general and the court. If  
7 requested by any party, the court shall order production of  
8 the underlying laboratory data and notes or chain of  
9 custody documents.

10  
11 **7-12-308. Right to counsel.**

12  
13 A convicted person is entitled to counsel during a  
14 proceeding under this act. Upon request of the person, the  
15 court shall appoint counsel for the convicted person if the  
16 court determines that the person is needy and the person  
17 wishes to submit a motion under W.S. 7-12-303(c). Counsel  
18 shall be appointed as provided in W.S. 7-6-104(c)(viii).

19  
20 **7-12-309. Costs of testing.**

21  
22 (a) The person filing a motion under W.S. 7-12-303(c)  
23 shall bear the cost of the DNA testing unless:

1

2 (i) The person is serving a sentence of  
3 imprisonment;

4

5 (ii) The person is needy; and

6

7 (iii) The DNA test supports the person's motion.

8

9 (b) In the case of person meeting the criteria  
10 specified in paragraphs (a)(i) through (iii) of this  
11 section, the costs of testing shall be paid by the state.

12

13 **7-12-310. Order following testing.**

14

15 (a) If the results of the DNA analysis are  
16 inconclusive or show that the movant is the source of the  
17 evidence, the court shall deny any motion for a new trial  
18 based upon the DNA evidence and shall provide the results  
19 to the board of parole.

20

21 (b) If the results of the DNA analysis are consistent  
22 with assertions contained in the movant's motion, the court  
23 shall set the matter for hearing on motion for a new trial.

1

2

**7-12-311. Victim notification.**

3

4 Following any motion filed under this act, the district  
5 attorney shall provide notice to the victim that the motion  
6 has been filed, the time and place for any hearing that may  
7 be held as a result of the motion, and the disposition of  
8 the motion. For purposes of this section, "victim" means  
9 as defined in W.S. 1-40-202(a)(ii).

10

11

**7-12-312. Rights not waived; refiling of uncharged  
12 offenses.**

13

14 (a) Notwithstanding any other provision of law, the  
15 right to file a motion under W.S. 7-12-303(c) shall not be  
16 waived. The prohibition against waiver of the right  
17 provided under this section applies to, but is not limited  
18 to, a waiver that is given as part of an agreement  
19 resulting in a plea of guilty or nolo contendere.

20

21

22 (b) If a movant is granted a new trial under this  
23 act, any offense that was dismissed or not charged pursuant  
to a plea agreement that resulted in the conviction that

1 has been set aside as a result of this act may be refiled  
2 by the state.

3

4 **7-12-313. Appeal.**

5

6 (a) An order granting or denying a motion for DNA  
7 testing filed under W.S. 7-12-303(c) shall not be  
8 appealable, but may be subject to review only under a writ  
9 of review filed by the movant, the district attorney or the  
10 attorney general. The petition for a writ of review may  
11 be filed no later than twenty (20) days after the court's  
12 order granting or denying the motion for DNA testing.

13

14 (b) Any party to the action may appeal to the Wyoming  
15 supreme court any order granting or denying a motion for a  
16 new trial under W.S. 7-12-310(b).

17

18 **7-12-314. Subsequent motions.**

19

20 The court shall not be required to entertain a second or  
21 subsequent motion under W.S. 7-12-303(c) on behalf of the  
22 same movant, except where there is clear and compelling  
23 evidence that the evidence sought to be tested was



1 wrongfully withheld from the movant by the state or its  
2 agents.

3  
4 **7-12-315. Consensual testing.**

5  
6 Nothing in this act shall be interpreted to prohibit a  
7 convicted person and the state from consenting to and  
8 conducting post-conviction DNA testing without filing a  
9 motion under W.S. 7-12-303(c). Notwithstanding any other  
10 provision of law governing post-conviction relief, if DNA  
11 test results are obtained under testing conducted upon  
12 consent of the parties and the results are favorable to the  
13 convicted person, the convicted person may file, and the  
14 court shall adjudicate, a motion for a new trial based on  
15 the DNA test results.

16  
17 **7-12-316. Report to the legislature.**

18  
19 Beginning January 1, 2010 and annually thereafter, the  
20 attorney general shall report to the joint judiciary  
21 interim committee on any post-conviction DNA testing  
22 motions filed and the results thereof.

1       **Section 2.**   W.S. 7-2-105(r) and by creating a new  
2 subsection (s) and 7-6-104(c) by creating a new paragraph  
3 (viii) are amended to read:

4  
5       **7-2-105. Disposition and appraisal of property seized**  
6 **or held; notice and order to show cause; judgment.**

7  
8       (r) Law enforcement agencies shall preserve  
9 biological material that was seized or recovered as  
10 evidence in the investigation or prosecution that resulted  
11 in a conviction or adjudication as a delinquent for a crime  
12 of violence and not consumed in previous DNA testing. The  
13 biological material shall be preserved for five (5) years  
14 or, except as provided herein, for as long as any person  
15 incarcerated in connection with the case or investigation  
16 remains in custody, whichever is longer. Notwithstanding  
17 ~~any provisions to the contrary herein~~ subsection (a) of  
18 this section, a law enforcement agency may dispose of the  
19 biological ~~evidence relevant to a felony criminal~~  
20 ~~prosecution shall not be destroyed unless and until the~~  
21 ~~person who was convicted in the case has died~~ material  
22 after five (5) years if the law enforcement agency notifies  
23 any person who remains incarcerated in connection with the

1 investigation or prosecution and any counsel of record for  
2 such person, or if there is no counsel of record, the state  
3 public defender, of the intention to dispose of the  
4 evidence and the law enforcement agency affords the person  
5 not less than one hundred eighty (180) days after the  
6 notification to file a motion for DNA testing of the  
7 biological material. The law enforcement agency shall not  
8 be required to preserve evidence that is required to be,  
9 and has been, returned to its rightful owner, or is of such  
10 a size, bulk or physical character as to render retention  
11 impracticable. If practicable, the law enforcement agency  
12 shall remove and preserve representative portions of the  
13 biological material sufficient to permit future DNA testing  
14 before returning or disposing of the material.

15  
16 (s) Whoever willfully or maliciously destroys,  
17 alters, conceals or tampers with evidence that is required  
18 to be preserved under subsection (r) of this section with  
19 the intent to impair the integrity of that evidence, to  
20 prevent that evidence from being subjected to DNA testing  
21 or to prevent the production or use of that evidence in an  
22 official proceeding shall upon conviction be subject to a

1 fine of not more than ten thousand dollars (\$10,000.00),  
2 imprisonment for not more than five (5) years, or both.

3

4 **7-6-104. Representation of needy persons.**

5

6 (c) A needy person who is entitled to be represented  
7 by an attorney under subsection (a) of this section is  
8 entitled:

9

10 (viii) To be represented by the public defender  
11 in a motion brought in accordance with the provisions of  
12 the Post-conviction DNA Testing Act.

13

14 **Section 3.** This act is effective July 1, 2008.

15

16 (END)