

ENROLLED ACT NO. 62, SENATE

FIFTY-NINTH LEGISLATURE OF THE STATE OF WYOMING
2008 BUDGET SESSION

AN ACT relating to criminal procedure; creating a Post-Conviction DNA Testing Act; establishing procedures for post-conviction motions for DNA testing; authorizing new trials as specified; prohibiting waiver of rights as specified; limiting appeals of court decisions as specified; providing a right to counsel for motions; authorizing legal representation for needy persons as specified; providing for costs; authorizing consensual DNA testing; requiring victim notification; providing definitions; amending requirements for retention of evidence as specified; and providing for an effective date.

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

Section 1. W.S. 7-12-302 through 7-12-315 are created to read:

7-12-302. Short title.

This act shall be known and may be cited as the "Post-Conviction DNA Testing Act."

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

(a) As used in this act:

(i) "DNA" means deoxyribonucleic acid;

(ii) "Movant" means the person filing a motion under subsection (c) of this section;

(iii) "This act" means W.S. 7-12-302 through 7-12-315.

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

(c) A person convicted of a felony offense may, preliminary to the filing of a motion for a new trial, file a motion for post-conviction DNA testing in the district court that entered the judgment of conviction against him if the movant asserts under oath and the motion includes a good faith, particularized factual basis containing the following information:

(i) Why DNA evidence is material to:

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

(B) A sentence enhancement; or

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

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

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

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

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

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

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

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

(A) The result of the testing was inconclusive;

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

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

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

(d) The court may not order DNA testing in cases in which the trial or a plea of guilty or nolo contendere occurred after January 1, 2000 and the person did not request DNA testing or present DNA evidence for strategic or tactical reasons or as a result of a lack of due

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diligence, unless the failure to exercise due diligence is found to be a result of ineffective assistance of counsel. A person convicted before January 1, 2000 shall not be required to make a showing of due diligence under this subsection.

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

(a) Notice of the motion filed under W.S. 7-12-303(c) shall be served upon the district attorney in the county in which the conviction occurred and, if applicable, the governmental agency or laboratory holding the evidence sought to be tested.

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

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

(d) If a motion is filed pursuant to W.S. 7-12-303(c), and the motion asserts the evidence is in the custody of the state or its agents, the court shall order

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the state to preserve during the pendency of the proceeding all material and relevant evidence in the state's possession or control that could be subjected to DNA testing and analysis. The state shall prepare an inventory of the evidence and shall submit a copy of the inventory to the movant and to the court. If the state determines that the evidence is no longer available, the state shall notify the court and the movant of the loss or destruction of the evidence and explain its loss or destruction. The state shall provide copies of chain of custody documentation or other documents explaining the loss or destruction of the evidence. After a motion is filed under W.S. 7-12-303(c), prosecutors in the case, law enforcement officers and crime laboratory personnel shall cooperate in preserving material and relevant evidence and in determining the sufficiency of the chain of custody of the evidence which may be subject to DNA testing.

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

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

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

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

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

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

(ii) In a capital case:

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

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

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

7-12-306. Designation of testing laboratory.

(a) If the court orders DNA testing pursuant to W.S. 7-12-305(e), the DNA test shall be performed by the Wyoming state crime laboratory unless the movant establishes that the state crime laboratory has a conflict of interest or

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does not have the capability to perform the necessary testing.

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

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

(ii) By a laboratory that:

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

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

7-12-307. Discovery.

(a) If the DNA evidence being tested under this act has been previously subjected to DNA analysis by either the state or defense prior to the hearing conducted under W.S. 7-12-305, the court may order the state or defense to provide each party and the court with access to the laboratory reports prepared in connection with the DNA analysis, as well as the underlying data and laboratory notes. If DNA or other analysis was previously conducted by either the state or defense without the knowledge of the other party, all information relating to the testing shall be disclosed by the motion filed under W.S. 7-12-303(c) or any response thereto.

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

7-12-308. Right to counsel.

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

7-12-309. Costs of testing.

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

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

(ii) The person is needy; and

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

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

7-12-310. Order following testing.

(a) If the results of the DNA analysis are inconclusive or show that the movant is the source of the

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evidence, the court shall deny any motion for a new trial based upon the DNA evidence and shall provide the results to the board of parole.

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

(c) Upon the stipulation of both parties or a motion for dismissal of the original charges against the movant by the state in lieu of a retrial, the court shall:

(i) Vacate the movant's conviction consistent with the evidence demonstrating the movant's actual innocence;

(ii) Issue an order of actual innocence and exoneration; and

(iii) Issue an order of expungement.

(d) In the event a retrial is pursued and conducted and the movant is acquitted at the retrial, the court shall:

(i) Issue an order of actual innocence and exoneration; and

(ii) Issue an order of expungement.

7-12-311. Victim notification.

Following any motion filed under this act, the district attorney shall provide notice to the victim that the motion has been filed, the time and place for any hearing that may

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be held as a result of the motion, and the disposition of the motion. For purposes of this section, "victim" means as defined in W.S. 1-40-202(a)(ii).

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

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

(b) If a movant is granted a new trial under this act, any offense that was dismissed or not charged pursuant to a plea agreement that resulted in the conviction that has been set aside as a result of this act may be refiled by the state.

7-12-313. Appeal.

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

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

7-12-314. Subsequent motions.

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The court shall not be required to entertain a second or subsequent motion under W.S. 7-12-303(c) on behalf of the same movant, except where there is clear and compelling evidence that the evidence sought to be tested was wrongfully withheld from the movant by the state or its agents.

7-12-315. Consensual testing.

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

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

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

(r) Law enforcement agencies shall preserve biological material that was seized or recovered as evidence in the investigation or prosecution that resulted in a conviction or adjudication as a delinquent for a crime of violence and not consumed in previous DNA testing. The biological material shall be preserved for five (5) years or, except as provided in this section, for as long as any person incarcerated in connection with the case or investigation remains in custody, whichever is longer.

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Notwithstanding any provisions to the contrary ~~herein in this section,~~ effective July 1, 2008 a law enforcement agency may dispose of the biological ~~evidence relevant to a felony criminal prosecution shall not be destroyed unless and until the person who was convicted in the case has died~~ material after five (5) years if the law enforcement agency notifies any person who remains incarcerated in connection with the investigation or prosecution and any counsel of record for such person, or if there is no counsel of record, the state public defender, of the intention to dispose of the evidence and the law enforcement agency affords the person not less than one hundred eighty (180) days after the notification to file a motion for DNA testing or preservation of the biological material. The law enforcement agency shall not be required to preserve evidence that is required to be, and has been, returned to its rightful owner, or is of such a size, bulk or physical character as to render retention impracticable. If practicable, the law enforcement agency shall remove and preserve representative portions of the biological material sufficient to permit future DNA testing before returning or disposing of the material.

(s) Whoever willfully or maliciously destroys, alters, conceals or tampers with evidence that is required to be preserved under subsection (r) of this section with the intent to impair the integrity of that evidence, to prevent that evidence from being subjected to DNA testing or to prevent the production or use of that evidence in an official proceeding shall upon conviction be subject to a fine of not more than ten thousand dollars (\$10,000.00), imprisonment for not more than five (5) years, or both.

7-6-104. Representation of needy persons.

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

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

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

(END)

Speaker of the House

President of the Senate

Governor

TIME APPROVED: _____

DATE APPROVED: _____

I hereby certify that this act originated in the Senate.

Chief Clerk