

SENATE FILE NO. SF0065

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; authorizing orders
10 for third party DNA testing; providing definitions;
11 requiring a report to the legislature; amending
12 requirements for retention of evidence as specified; and
13 providing for an effective date.

14

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

16

1 **Section 1.** W.S. 7-7-106 and 7-12-302 through 7-12-316
2 are created to read:

3

4 **7-7-106. Third party DNA sampling.**

5

6 (a) The state, prior to the filing of a criminal
7 charge, or the state or any party after the filing of a
8 criminal charge or in the course of proceedings pursuant to
9 W.S. 7-12-301 through 7-12-316, may petition for an order
10 from a district or circuit court having jurisdiction for
11 the collection of a DNA sample from a person not suspected
12 of committing a crime, subject to the following:

13

14 (i) An order may issue only upon a written
15 petition with attached sworn affidavit establishing:

16

17 (A) That the person from whom the DNA
18 sample is to be collected is not suspected of committing a
19 crime;

20

21 (B) That probable cause exists that a
22 serious crime has been committed;

23

1 (C) That a DNA sample is necessary to
2 establish or eliminate that person as a contributor to or
3 source of the DNA evidence or otherwise establishes the
4 profile of a person who may have committed the crime,
5 either because there is reason to believe that the person
6 has contributed to or been the source of the DNA evidence;
7 or

8
9 (D) For other good cause shown that the DNA
10 sample of that particular person is necessary for the
11 purposes of this section.

12

13 (b) Prior to issuing an order under this section, the
14 person from whom the DNA sample is sought shall be afforded
15 the following rights:

16

17 (i) The right to notice of the petition and
18 affidavit;

19

20 (ii) An opportunity for a hearing before an
21 order is entered;

22

23 (iii) The right to be represented at such
24 hearing; and

1

2 (iv) The right to be represented by an attorney
3 at such hearing, and if the person is needy, the right to
4 appointed counsel for that purpose, in accordance with W.S.
5 7-6-104(c)(ix).

6

7 **7-12-302. Short title.**

8

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

11

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

15

16 (a) As used in this act:

17

18 (i) "DNA" means deoxyribonucleic acid;

19

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

22

23 (iii) "This act" means W.S. 7-12-302 through
24 7-12-316.

1

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

7

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

15

16 (i) Why DNA evidence is material to:

17

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

20

21 (B) A sentence enhancement; or

22

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

1

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

4

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

9

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

12

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

15

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

19

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

23

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

4
5 (A) The result of the testing was
6 inconclusive;

7
8 (B) The evidence was not subjected to the
9 testing that is now requested, and the new testing may
10 resolve an issue not resolved by the prior testing; or

11
12 (C) The requested DNA test would provide
13 results that are significantly more accurate and probative
14 of the identity of the perpetrator or accomplice.

15
16 (ix) That the evidence that is the subject of
17 the request for testing has the potential to produce new,
18 noncumulative evidence that will establish the movant's
19 actual innocence.

20
21 (d) The court may not order DNA testing in cases in
22 which the trial or a plea of guilty or nolo contendere
23 occurred after January 1, 2000 and the person did not
24 request DNA testing or present DNA evidence for strategic

1 or tactical reasons or as a result of a lack of due
2 diligence, unless the failure to exercise due diligence is
3 found to be a result of ineffective assistance of counsel.
4 A person convicted before January 1, 2000 shall not be
5 required to make a showing of due diligence under this
6 subsection.

7

8 **7-12-304. Service of process; response by the state;**
9 **preservation of evidence.**

10

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

16

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

22

23 (c) The district attorney who is served or the
24 attorney general may support the motion requesting DNA

1 testing or oppose the motion with a statement of reasons
2 and may recommend to the court, if any DNA testing is
3 ordered, that a particular type of testing should be
4 conducted, or object to the proposed testing laboratory, or
5 make such other objections, recommendations or requests as
6 will preserve the integrity of the evidence, including, but
7 not limited to, requests for independent testing by the
8 state or procedures in the event that the proposed testing
9 will deplete the DNA sample.

10

11 (d) If a motion is filed pursuant to W.S.
12 7-12-303(c), and the motion asserts the evidence is in the
13 custody of the state or its agents, the court shall order
14 the state to preserve during the pendency of the proceeding
15 all material and relevant evidence in the state's
16 possession or control that could be subjected to DNA
17 testing and analysis. The state shall prepare an inventory
18 of the evidence and shall submit a copy of the inventory to
19 the movant and to the court. If the state determines that
20 the evidence is no longer available, the state shall notify
21 the court and the movant of the loss or destruction of the
22 evidence and explain its loss or destruction. The state
23 shall provide copies of chain of custody documentation or
24 other documents explaining the loss or destruction of the

1 evidence. After a motion is filed under W.S. 7-12-303(c),
2 prosecutors in the case, law enforcement officers and crime
3 laboratory personnel shall cooperate in preserving material
4 and relevant evidence and in determining the sufficiency of
5 the chain of custody of the evidence which may be subject
6 to DNA testing.

7
8 **7-12-305. Review by the court; hearing on motion,**
9 **findings; order.**

10
11 (a) If the court determines that a motion is filed in
12 compliance with the requirements of W.S. 7-12-303(c) and
13 the state has had opportunity to respond to the motion, the
14 court shall set a hearing for not more than ninety (90)
15 days after the date the motion was filed. If the court
16 finds that the motion does not comply with the requirements
17 of W.S. 7-12-303(c), the court may deny the motion without
18 hearing.

19
20 (b) The hearing under subsection (a) of this section
21 shall be heard by the judge who conducted the trial that
22 resulted in the movant's conviction unless the judge is
23 unavailable.

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

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

11
12 (i) The actual innocence of the movant of the
13 offense for which the movant was convicted; or

14
15 (ii) In a capital case:

16
17 (A) The movant's actual innocence of the
18 charged or uncharged conduct constituting an aggravating
19 circumstance; or

20
21 (B) A mitigating circumstance as a result
22 of the DNA testing.

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 (ii) By a laboratory that:

2

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

6

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

9

10 **7-12-307. Discovery.**

11

12 (a) If the DNA evidence being tested under this act
13 has been previously subjected to DNA analysis by either the
14 state or defense prior to the hearing conducted under W.S.
15 7-12-305, the court may order the state or defense to
16 provide each party and the court with access to the
17 laboratory reports prepared in connection with the DNA
18 analysis, as well as the underlying data and laboratory
19 notes. If DNA or other analysis was previously conducted
20 by either the state or defense without the knowledge of the
21 other party, all information relating to the testing shall
22 be disclosed by the motion filed under W.S. 7-12-303(c) or
23 any response thereto.

24

1 (b) The results of any DNA testing ordered under W.S.
2 7-12-305(e) shall be fully disclosed to the movant, the
3 district attorney, the attorney general and the court. If
4 requested by any party, the court shall order production of
5 the underlying laboratory data and notes or chain of
6 custody documents.

7

8 **7-12-308. Right to counsel.**

9

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

16

17 **7-12-309. Costs of testing.**

18

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

21

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

24

1 (ii) The person is needy; and

2

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

4

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

8

9 **7-12-310. Order following testing.**

10

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

16

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

21

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

1

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

5

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

8

9 (iii) Issue an order of expungement.

10

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

14

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

17

18 (ii) Issue an order of expungement.

19

20 **7-12-311. Victim notification.**

21

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

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

4

5 **7-12-312. Rights not waived; refiling of uncharged**
6 **offenses.**

7

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

14

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

20

21 **7-12-313. Appeal.**

22

23 (a) An order granting or denying a motion for DNA
24 testing filed under W.S. 7-12-303(c) shall not be

1 appealable, but may be subject to review only under a writ
2 of review filed by the movant, the district attorney or the
3 attorney general. The petition for a writ of review may be
4 filed no later than twenty (20) days after the court's
5 order granting or denying the motion for DNA testing.

6
7 (b) Any party to the action may appeal to the Wyoming
8 supreme court any order granting or denying a motion for a
9 new trial under W.S. 7-12-310(b).

10
11 **7-12-314. Subsequent motions.**

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

19
20 **7-12-315. Consensual testing.**

21
22 Nothing in this act shall be interpreted to prohibit a
23 convicted person and the state from consenting to and
24 conducting post-conviction DNA testing without filing a

1 motion under W.S. 7-12-303(c). Notwithstanding any other
2 provision of law governing post-conviction relief, if DNA
3 test results are obtained under testing conducted upon
4 consent of the parties and the results are favorable to the
5 convicted person, the convicted person may file, and the
6 court shall adjudicate, a motion for a new trial based on
7 the DNA test results.

8
9 **7-12-316. Report to the legislature.**

10
11 Beginning January 1, 2010 and annually thereafter, the
12 attorney general shall report to the joint judiciary
13 interim committee on any post-conviction DNA testing
14 motions filed and the results thereof.

15
16 **Section 2.** W.S. 7-2-105(r) and by creating a new
17 subsection (s) and 7-6-104(c) by creating new paragraphs
18 (viii) and (ix) are amended to read:

19
20 **7-2-105. Disposition and appraisal of property seized**
21 **or held; notice and order to show cause; judgment.**

22
23 (r) Law enforcement agencies shall preserve
24 biological material that was seized or recovered as

1 evidence in the investigation or prosecution that resulted
2 in a conviction or adjudication as a delinquent for a crime
3 of violence and not consumed in previous DNA testing. The
4 biological material shall be preserved for five (5) years
5 or, except as provided in this section, for as long as any
6 person incarcerated in connection with the case or
7 investigation remains in custody, whichever is longer.
8 Notwithstanding any provisions to the contrary ~~herein in~~
9 this section, effective July 1, 2008 a law enforcement
10 agency may dispose of the biological ~~evidence relevant to a~~
11 ~~felony criminal prosecution shall not be destroyed unless~~
12 ~~and until the person who was convicted in the case has died~~
13 material after five (5) years if the law enforcement agency
14 notifies any person who remains incarcerated in connection
15 with the investigation or prosecution and any counsel of
16 record for such person, or if there is no counsel of
17 record, the state public defender, of the intention to
18 dispose of the evidence and the law enforcement agency
19 affords the person not less than one hundred eighty (180)
20 days after the notification to file a motion for DNA
21 testing or preservation of the biological material. The
22 law enforcement agency shall not be required to preserve
23 evidence that is required to be, and has been, returned to
24 its rightful owner, or is of such a size, bulk or physical

1 character as to render retention impracticable. If
2 practicable, the law enforcement agency shall remove and
3 preserve representative portions of the biological material
4 sufficient to permit future DNA testing before returning or
5 disposing of the material.

6
7 (s) Whoever willfully or maliciously destroys,
8 alters, conceals or tampers with evidence that is required
9 to be preserved under subsection (r) of this section with
10 the intent to impair the integrity of that evidence, to
11 prevent that evidence from being subjected to DNA testing
12 or to prevent the production or use of that evidence in an
13 official proceeding shall upon conviction be subject to a
14 fine of not more than ten thousand dollars (\$10,000.00),
15 imprisonment for not more than five (5) years, or both.

16
17 **7-6-104. Representation of needy persons.**

18
19 (c) A needy person who is entitled to be represented
20 by an attorney under subsection (a) of this section is
21 entitled:
22

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

5 (ix) To be represented by the public defender in
6 any petition for an order under W.S. 7-7-106.

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

10 (END)