

CHAPTER 154**(HB 4)**

AN ACT relating to deoxyribonucleic acid evidence in criminal cases.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A NEW SECTION OF KRS CHAPTER 422 IS CREATED TO READ AS FOLLOWS:

- (1) At any time, a person who was convicted of and sentenced to death for a capital offense and who meets the requirements of this section may request the forensic deoxyribonucleic acid (DNA) testing and analysis of any evidence that is in the possession or control of the court or Commonwealth, that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.*
- (2) After notice to the prosecutor and an opportunity to respond, the court shall order DNA testing and analysis if the court finds that all of the following apply:*
 - (a) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis;*
 - (b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted; and*
 - (c) The evidence was not previously subjected to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and may resolve an issue not previously resolved by the previous testing and analysis.*
- (3) After notice to the prosecutor and an opportunity to respond, the court may order DNA testing and analysis if the court finds that all of the following apply:*
 - (a) A reasonable probability exists that either:*
 - 1. The petitioner's verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or*
 - 2. DNA testing and analysis will produce exculpatory evidence.*
 - (b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted.*
 - (c) The evidence was not previously subject to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and that may resolve an issue not previously resolved by the previous testing and analysis.*
- (4) If the court orders testing and analysis pursuant to subsection (2) of this section, the court shall order the responsibility for payment, if necessary. If the court orders testing and analysis of this section pursuant to subsection (3) of this section the court shall require the petitioner to pay the costs of testing and analysis, if required by Section 3 of this Act. If the court orders testing and analysis under subsection (2) or (3) of this section the court shall appoint counsel to those petitioners who qualify for appointment under KRS Chapter 31.*

- (5) *If the prosecutor or defense counsel has previously subjected evidence to DNA testing and analysis, the court shall order the prosecutor or defense counsel to provide all the parties and the court with access to the laboratory reports that were prepared in connection with the testing and analysis, including underlying data and laboratory notes. If the court orders DNA testing and analysis pursuant to this section, the court shall order the production of any laboratory reports that are prepared in connection with the testing and analysis may order the production of any underlying data and laboratory notes.*
- (6) *If a petition is filed pursuant to this section, the court shall order the state to preserve during the pendency of the proceeding all 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 defense and the court. If the evidence is intentionally destroyed after the court orders its preservation, the court may impose appropriate sanctions, including criminal contempt.*
- (7) *The court may make any other orders that the court deems appropriate, including designating any of the following:*
 - (a) *The preservation of some of the sample for replicating the testing and analysis;*
 - (b) *Elimination samples from third parties.*
- (8) *If the results of the DNA testing and analysis are not favorable to the petitioner, the court shall dismiss the petition. The court may make further orders as it deems appropriate, including any of the following:*
 - (a) *Notifying the Department of Corrections and the Parole Board;*
 - (b) *Requesting that the petitioner's sample be added to the Kentucky State Police database;*
 - (c) *Providing notification to the victim or family of the victim.*
- (9) *In a capital case in which the death penalty has been imposed, notwithstanding any other provision of law that would bar a hearing as untimely, if the results of the DNA testing and analysis are favorable to the petitioner, the court shall order a hearing and make any further orders that are required pursuant to this section or the Kentucky Rules of Criminal Procedure.*

SECTION 2. A NEW SECTION OF KRS CHAPTER 422 IS CREATED TO READ AS FOLLOWS:

- (1) *When a person is being tried for a capital offense and there is evidence in the case which may be subjected to deoxyribonucleic acid (DNA) testing and analysis the Commonwealth or the defendant may move to have any item of evidence not previously subjected to DNA testing and analysis tested and analyzed.*
- (2) *If the court is satisfied that the item of evidence has not been tested and analyzed, that DNA testing and analysis would yield evidence of probative value, and that the item of evidence has not previously been the subject of DNA testing and analysis or that new DNA testing and analysis would yield a more accurate result, the court shall order DNA testing and analysis of the evidence.*
- (3) *The testing and analysis of the evidence shall be done by the State Police laboratory or at another laboratory selected by the Kentucky State Police laboratory.*

- (4) *DNA testing and analysis results shall be made available to both the Commonwealth and the defendant and either the Commonwealth or the defendant may move that they be admitted at trial.*
- (5) *If the defendant is convicted of any offense for which DNA test and analysis results are required to be maintained by law, the DNA test and analysis results obtained pursuant to this section shall be utilized for that purpose, whether or not the test and analysis results were introduced in the case.*

SECTION 3. A NEW SECTION OF KRS CHAPTER 17 IS CREATED TO READ AS FOLLOWS:

- (1) *In addition to the requirements specified in Section 1 of this Act, any evidence submitted for testing and analysis pursuant to Section 1 or 2 of this Act shall be of probative value. When the motion is filed with the court requesting testing and analysis of evidence pursuant to this section the applicant shall include sufficient information about the evidence, the necessity for its testing and analysis, and its applicability to the proceeding for a court to make a determination of the probative value of the evidence proposed to be tested and analyzed.*
- (2) *The prosecution, with a court order issued pursuant to this section, may submit not more than five (5) items of evidence for testing and analysis by the Kentucky State Police laboratory or another laboratory selected by the Kentucky State Police laboratory without charge. The cost of testing and analysis any items of evidence in excess of the five (5) initial items to be tested and analyzed shall be borne by the agency or person requesting the testing and analysis. Any additional item of evidence submitted for testing and analysis shall be accompanied by the court order specified in subsection (1) of this section.*
- (3) *The defense, with a court order issued pursuant to this section, may submit not more than five (5) items of evidence for testing and analysis by the Kentucky State Police laboratory or another laboratory selected by the Kentucky State Police laboratory without charge. The cost of testing and analysis any item of evidence in excess of the five (5) initial items to be tested and analyzed shall be borne by the agency or person requesting the testing and analysis. Any additional item of evidence submitted for testing and analysis shall be accompanied by the court order specified in subsection (1) of this section.*
- (4) *Any other party in a criminal case, with permission of the court after a specific showing of necessity for testing and analysis, together with the items specified in subsection (1) of this section, may submit an item of evidence for testing and analysis by the Kentucky State Police laboratory or another laboratory selected by the Kentucky State Police laboratory for testing and analysis. The cost of testing and analysis of any item of evidence permitted to be submitted by the court shall be borne by the person or organization requesting the testing and analysis.*
- (5) *The Kentucky State Police shall promulgate by administrative regulation a uniform schedule of fees to be charged for testing and analysis conducted pursuant to Section 1 or 2 of this Act.*

Section 4. KRS 17.170 is amended to read as follows:

- (1) Any person convicted on or after July 14, 1992, of a felony offense under KRS Chapter 510 or KRS 530.020, shall, or who is in the custody of the Department of Corrections on July 14, 1992, under KRS Chapter 510 or KRS 530.020 may, have a sample of blood, *an oral*

swab, or sample obtained through a noninvasive procedure taken by the Department of Corrections for DNA (deoxyribonucleic acid) law enforcement identification purposes and inclusion in law enforcement identification databases.

- (2) The samples shall be obtained in a medically approved manner by a physician, registered nurse, phlebotomist, medical technician, or medical technologist, and packaged and submitted in containers provided by the Department of State Police forensic laboratory in accordance with administrative regulations promulgated by the Department of State Police forensic laboratory. No civil liability shall attach to any person authorized to *obtain the DNA sample*~~[draw blood]~~ as provided by this section as a result of the act of *obtaining the DNA sample*~~[drawing blood]~~ from any person, provided the *procedure*~~[blood]~~ was *done*~~[drawn]~~ according to generally accepted medical procedures.
- (3) The cost of testing shall be paid by the agency or individual making the request for testing.
- (4) Any person who tampers or attempts to tamper with any *DNA sample collected under this section*~~[of blood]~~ or *its*~~[the]~~ container~~[collected pursuant to subsection (1) or (2)]~~ without lawful authority shall be guilty of a Class D felony.

SECTION 5. A NEW SECTION OF KRS CHAPTER 17 IS CREATED TO READ AS FOLLOWS:

Any person convicted on or after the effective date of this Act or who is in the custody of the Department of Corrections on or after the effective date of this Act for a violation of KRS 530.064, 531.310, or 531.320 or a felony attempt to commit one (1) of these offenses shall be subject to the provisions of KRS 17.170 relating to the collection and retention of deoxyribonucleic acid (DNA) evidence.

SECTION 6. A NEW SECTION OF KRS CHAPTER 17 IS CREATED TO READ AS FOLLOWS:

Any person convicted on or after the effective date of this Act or who is in the custody of the Department of Corrections on or after the effective date of this Act for a violation of KRS 511.020 or 511.030 or a felony attempt to commit one of these offenses shall be subject to the provisions of KRS 17.170 relating to the collection and retention of deoxyribonucleic acid (DNA) evidence.

SECTION 7. A NEW SECTION OF KRS CHAPTER 17 IS CREATED TO READ AS FOLLOWS:

Any person convicted on or after the effective date of this Act or who is in the custody of the Department of Corrections on or after the effective date of this act for a capital offense, Class A felony, or Class B felony involving the death of the victim or serious physical injury to the victim as specified in KRS 439.3401 shall be subject to the provisions of KRS 17.170 relating to the collection and retention of deoxyribonucleic acid (DNA) evidence.

SECTION 8. A NEW SECTION OF KRS CHAPTER 17 IS CREATED TO READ AS FOLLOWS:

Sections 5 and 6 of this Act shall apply to a public offender adjudicated a public offender or in the custody of the Department of Juvenile Justice on or after the effective date of this Act for any offense defined in Section 4 or 5 of this Act or an attempt to commit one (1) of the named offenses.

Section 9. KRS 17.175 is amended to read as follows:

- (1) A centralized database of DNA (deoxyribonucleic acid) identification records for convicted criminals, crime scene specimens, missing persons, and close biological relatives of missing persons shall be established in the Department of State Police under the direction, control, and supervision of the State Police forensic laboratory. The established system shall be compatible with the procedures set forth in a national DNA identification index to ensure data exchange on a national level.
- (2) The purpose of the centralized DNA database is to assist federal, state, and local criminal justice and law enforcement agencies within and outside the Commonwealth in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of sex-related crimes, violent crimes, or other crimes and the identification and location of missing and unidentified persons.
- (3) The Department of State Police forensic laboratory shall receive, analyze, and classify samples of blood received from the Department of Corrections in compliance with KRS 17.170 and this section, and samples from other sources, and shall file the DNA results in the centralized databases for identification and statistical purposes.
- (4) Records produced from the samples shall be used only for law enforcement purposes and shall be exempt from the provisions of KRS Chapter 61.
- (5) A person whose DNA profile has been included in the data bank pursuant to this chapter may request expungement on the grounds that the felony conviction on which the authority for including the DNA profile was based, has been reversed and the case dismissed. The Department of State Police shall expunge all identifiable information in the data bank pertaining to the person and destroy all samples from the person upon receipt of:
 - (a) A written request for expungement pursuant to this section; and
 - (b) A certified copy of the court order reversing and dismissing the conviction.
- (6) The Department of State Police forensic laboratory shall promulgate administrative regulations necessary to carry out the provisions of the DNA database identification system to include procedures for collection of *DNA* samples~~[of blood]~~ and the database system usage and integrity.
- (7) Any person who disseminates, receives, or otherwise uses or attempts to use information in the database, knowing that such dissemination, receipt, or use is for a purpose other than authorized by law, shall be guilty of a Class A misdemeanor.

SECTION 10. A NEW SECTION OF KRS CHAPTER 524 IS CREATED TO READ AS FOLLOWS:

(1) As used in this section:

(a) "Defendant" means a person charged with a:

- 1. Capital offense, Class A felony, Class B felony, or Class C felony; or**
- 2. Class D felony under KRS Chapter 510; and**

(b) "Following trial" means after:

- 1. The first appeal authorized by the Constitution of Kentucky in a criminal case has been decided; or**

2. *The time for the first appeal authorized by the Constitution of Kentucky in a criminal case has lapsed without an appeal having been filed.*
- (2) *No item of evidence gathered by law enforcement, prosecutorial, or defense authorities that may be subject to deoxyribonucleic acid (DNA) evidence testing and analysis in order to confirm the guilt or innocence of a criminal defendant shall be disposed of prior to trial of a criminal defendant unless:*
 - (a) *The prosecution has determined that the defendant will not be tried for the criminal offense;*
 - (b) *The prosecution has made a motion before the court in which the case would have been tried to destroy the evidence; and*
 - (c) *The court has, following an adversarial proceeding in which the prosecution and the defendant were heard, authorized the destruction of the evidence by court order.*
- (3) *No item of evidence gathered by law enforcement, prosecutorial, or defense authorities that may be subject to deoxyribonucleic acid (DNA) evidence testing and analysis in order to confirm the guilt or innocence of a criminal defendant shall be disposed of following the trial unless:*
 - (a) *The evidence, together with DNA evidence testing and analysis results, has been presented at the trial, and the defendant has been found guilty, pled guilty, or entered an Alford plea at the trial;*
 - (b) *The evidence was not introduced at the trial, or if introduced at the trial was not the subject of DNA testing and analysis, and the defendant has been found guilty, pled guilty, or entered an Alford plea at the trial, and the trial court has ordered the destruction of the evidence after an adversarial hearing conducted upon motion of either the prosecution or the defendant;*
 - (c) *The trial resulted in the defendant being found not guilty or the charges were dismissed after jeopardy attached, whether or not the evidence was introduced at the trial or was subject to DNA testing and analysis or not, and the trial court ordered the destruction of the evidence after an adversarial hearing conducted upon motion of either the prosecution or the defendant; or*
 - (d) *The trial resulted in the dismissal of charges against the defendant, and the defendant may be subject to retrial, in which event the evidence shall be retained until after the retrial, which shall be considered a new trial for the purposes of this section.*
- (4) *The burden of proof for a motion to destroy evidence that may be subject to DNA testing and analysis shall be upon the party making the motion, and the court may permit the destruction of the evidence under this section upon good cause shown favoring its destruction.*
- (5) *It is recognized by the General Assembly that the DNA evidence laboratory testing and analysis procedure consumes and destroys a portion of the evidence or may destroy all of the evidence if the sample is small. The consuming and destruction of evidence during the laboratory analysis process shall not result in liability for its consumption or destruction if the following conditions are met:*

- (a) *The Kentucky State Police laboratory uses a method of testing and analysis which preserves as much of the biological material or other evidence tested and analyzed as is reasonably possible; or*
 - (b) *If the Kentucky State Police laboratory knows or reasonably believes that the entire sample of evidence to be tested and analyzed that the laboratory, prior to the testing or analysis of the evidence, notifies in writing the court which ordered the testing and analysis and counsel for all parties:*
 - 1. *That the entire sample of evidence may be destroyed by the testing and analysis;*
 - 2. *The possibility that another laboratory may be able to perform the testing and analysis in a less destructive manner with at least equal results;*
 - 3. *The name of the laboratory capable of performing the testing and analysis, the costs of testing and analysis, the advantages of sending the material to that other laboratory, and the amount of biological material or other evidence which might be saved by alternative testing and analysis; and*
 - 4. *The Kentucky State Police laboratory follows the directive of the court with regard to the testing and analysis; or*
 - (c) *If the Kentucky State Police laboratory knows or reasonably believes that so much of the biological material or evidence may be consumed or destroyed in the testing and analysis that an insufficient sample will remain for independent testing and analysis that the laboratory follows the procedure specified in paragraph (b) of this subsection.*
- (6) *Destruction of evidence in violation of this section shall be a violation of KRS 524.100.*
- (7) *Subject to subsection (6) of Section 1 of this Act, the appropriate governmental entity shall retain any biological material secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for DNA testing and analysis.*

SECTION 11. A NEW SECTION OF KRS CHAPTER 17 IS CREATED TO READ AS FOLLOWS:

- (1) *Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 of this Act shall become effective on the normal effective date for legislation passed at the 2002 Regular Session of the General Assembly.*
- (2) *Implementation of Sections 1, 2, 3, 4, and 10 of this Act shall occur on the normal effective date, however, actual compliance with the provisions of Sections 5, 6, 7, 8, and 9 of this Act may be delayed until funding is available for their full implementation.*
- (3) *As funding becomes available, Sections 5, 6, 7, 8, and 9 of this Act shall be implemented in their numerical order. As a section is implemented, the Reviser of Statutes shall be notified by the Secretary of Justice, in writing, as to the date of implementation. DNA sample collection and testing shall apply to any person meeting the criteria of Section 5, 6, 7, 8, or 9 of this Act as of the effective date of this Act and not the date of implementation of the testing.*

- (4) *Once implementation of a provision of Section 5, 6, 7, 8, or 9 of this Act is begun it shall not be discontinued.*

Approved April 2, 2002