

CHAPTER 77

(HB 41)

AN ACT relating to DNA.

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

➔Section 1. KRS 422.285 is amended to read as follows:

- (1) (a) *Except as provided in paragraph (b) of this subsection*~~[At any time]~~, a person who was convicted of a capital offense, a Class A felony, a Class B felony, or any offense designated a violent offense under *KRS 439.3401*~~[and sentenced to death for a capital offense]~~ and who meets the requirements of this section may *at any time* 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.
- (b) *This subsection shall not apply to offenses under KRS Chapter 218A, unless the offense was accompanied by another offense outside of that chapter for which testing is authorized by paragraph (a) of this subsection.*
- (2) *Upon receipt of a request under this section accompanied by a supporting affidavit containing sufficient factual averments to support the request from a person who meets the requirements of subsection (5)(f) of this section at the time the request is made for an offense to which the DNA relates, the court shall:*
 - (a) *If the petitioner is not represented by counsel, appoint the Department for Public Advocacy to represent the petitioner for purposes of the request, pursuant to KRS 31.110(2)(c); or*
 - (b) *If the petitioner is represented by counsel or waives appointment of counsel in writing or if the Department for Public Advocacy has previously withdrawn from representation of the petitioner for purposes of the request, require the petitioner to deposit an amount certain with the court sufficient to cover the reasonable costs of the testing being requested.*
- (3) *Counsel representing the petitioner shall be provided a reasonable opportunity to investigate the petitioner's request and shall be permitted to supplement the request. Pursuant to KRS 31.110(2)(c), the petitioner shall have no further right to counsel provided by the Department for Public Advocacy on the matter if counsel determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense. If the Department for Public Advocacy moves to withdraw as counsel for petitioner and the court grants the motion, the court shall proceed as directed under subsection (2)(b) of this section.*
- (4) *Upon receipt of the deposit required under subsection (2)(b) of this section or a motion from counsel provided by the Department for Public Advocacy to proceed, the court shall provide notice to the prosecutor and an opportunity to respond to the petitioner's request.*
- (5)~~(2)~~ *After due consideration of the request and any supplements and responses thereto*~~[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;
 - (d) *Except for a petitioner sentenced to death, the petitioner was convicted of the offense after a trial or after entering an Alford plea;*
 - (e) *Except for a petitioner sentenced to death, the testing is not sought for touch DNA, meaning casual or limited contact DNA; and*

- (f) *The petitioner is still incarcerated or on probation, parole, or other form of correctional supervision, monitoring, or registration for the offense to which the DNA relates.*
- ~~(6)(3)~~ After *due consideration of the request and any supplements and responses thereto*~~[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;~~[and]~~
 - (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;
 - ~~(d)~~ *Except for a petitioner sentenced to death, the petitioner was convicted of the offense after a trial or after entering an Alford plea;*
 - ~~(e)~~ *Except for a petitioner sentenced to death, the testing is not sought for touch DNA, meaning casual or limited contact DNA; and*
 - (f) *The petitioner is still incarcerated or on probation, parole, or other form of correctional supervision, monitoring, or registration for the offense to which the DNA relates.*
- ~~(7)(4)~~ *The provisions of KRS 17.176 to the contrary notwithstanding, the petitioner shall pay the costs of all testing and analysis ordered under this section. If the court determines that the petitioner is a needy person using the standards set out in KRS 31.120 and the Department for Public Advocacy so moves, the court shall treat the costs of testing and analysis as a direct expense of the defense for the purposes of authorizing payment under KRS 31.185*~~[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 KRS 17.176. 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].~~
- ~~(8)(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 and may order the production of any underlying data and laboratory notes.
- ~~(9)(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.
- ~~(10)(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; and
 - (b) Elimination samples from third parties.
- ~~(11)(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 Department of Kentucky State Police database; and

(c) Providing notification to the victim or family of the victim.

~~(12)(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. KRS 17.176 is amended to read as follows:

- (1) In addition to the requirements specified in KRS 422.285, any evidence submitted for testing and analysis pursuant to KRS 422.285 or 422.287 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 Department of Kentucky State Police forensic laboratory or another laboratory selected by the Department of Kentucky State Police forensic laboratory ~~without charge~~. ***In capital cases, the tests shall be performed without charge to the prosecution.*** The cost of testing and analysis of 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 Department of Kentucky State Police forensic laboratory or another laboratory selected by the Department of Kentucky State Police forensic laboratory ~~without charge~~. ***In capital cases, the tests shall be performed without charge to the defense.*** The cost of testing and analysis of 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 Department of Kentucky State Police forensic laboratory or another laboratory selected by the Department of Kentucky State Police forensic 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 Department of Kentucky State Police shall promulgate by administrative regulation a uniform schedule of fees to be charged for testing and analysis conducted pursuant to KRS 422.285 or 422.287.

➔Section 3. KRS 524.140 is amended 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 Department of 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 Department of 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 Department of Kentucky State Police laboratory follows the directive of the court with regard to the testing and analysis; or
 - (c) If the Department of 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 KRS 422.285(9)~~(6)~~, 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.

Signed by Governor March 22, 2013.