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MODEL LEGISLATION, 2011 STATE LEGISLATIVE SESSIONS

AN ACT CONCERNING ACCESS TO POST-CONVICTION DNA TESTING

SECTION 1. LEGISLATIVE INTENT

The legislature finds that:

- A. Existing [State] law regarding consideration of new evidence post-conviction fails to adequately account for the enduring probative value of DNA evidence;
- B. U.S. Attorney General Eric Holder expressed his hope, in the interest of justice and identifying the true perpetrators of crimes, that "all levels of government will follow the federal government's lead by working to expand access to DNA evidence";
- C. Emerging DNA testing technologies can enhance the quality of justice;
- D. The scientifically reliable results of DNA testing provide the certainty and finality that bolster the public's trust in [State's] criminal justice system;
- E. In addition to the wrongfully convicted and their families, crime victims, law enforcement, prosecutors, courts and the public are harmed whenever individuals guilty of crimes elude justice while innocent individuals are imprisoned for crimes they did not commit; and
- F. [State] must enhance its procedures for considering post-conviction DNA testing so that all credible claims of innocence based on newly discovered evidence can be properly evaluated.



SECTION 2. DEFINITIONS

A. “Biological evidence” means the contents of a sexual assault examination kit; and any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other identifiable biological material that was collected as part of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies whether that material is catalogued separately (e.g., on a slide, swab or in a test tube) or is present on other evidence (including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups, cigarettes, etc.)

B. “Document” or “documents” includes any tangible thing upon which any expression, communication, or representation has been recorded by any means, and includes any writing (including electronic), recording, drawing, map, graph or chart, photograph, and other data compilation in the actual or constructive possession, custody, care, or control of the government, which pertains directly or indirectly, in whole or in part, either to any of the subjects listed below or to any other matter relevant to the issues in this action.

SECTION 3. PETITION FOR POST-CONVICTION DEOXYRIBONUCLEIC ACID (DNA)

TESTING

Notwithstanding any other provision of law governing post-conviction relief, a person convicted of a crime and who asserts he did not commit that crime may at any time file a petition requesting forensic DNA testing of any biological evidence secured in relation to the investigation or prosecution attendant to the conviction. Persons eligible for testing shall include any and all of the following:



- A. Persons currently incarcerated; civilly committed; on parole or probation; or subject to sex offender registration.
- B. Persons convicted on a plea of not guilty, guilty or *nolo contendere*;
- C. Persons deemed to have provided a confession or admission related to the crime, either before or after conviction; and
- D. Persons who have finished serving their sentences.

SECTION 4. PROCEEDINGS

The petitioner shall be granted full, fair and prompt proceedings upon the filing of a motion under this Act. The petitioner shall serve a copy of such motion upon the attorney for the state. The state shall file its response to the motion within 30 days of the receipt of service. The court shall hear the motion no sooner than 30 and no later than 90 days after its filing.

SECTION 5. ORDER FOR POST-CONVICTION TESTING

The court shall order testing upon the filing of a motion for post-conviction DNA testing, but only after the court provides the state with notice and an opportunity to respond and it holds a hearing on the motion in which it finds:

- A. A reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through DNA testing at the time of the original prosecution;
- B. One or more of the item(s) of evidence that the petitioner seeks to have tested still exists;
- C. The evidence to be tested was secured in relation to the offense underlying the challenged conviction and:



1. Was not previously subjected to DNA testing; or
2. Although previously subjected to DNA testing, can be subjected to additional DNA testing that provides a reasonable likelihood of more probative results;

D. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself has the potential to establish the integrity of the evidence. For purposes of this Act, evidence that has been in the custody of law enforcement, other government officials or a public or private hospital shall be presumed to satisfy the chain-of-custody requirement of this subsection, absent specific evidence of material tampering, replacement or alteration; and

E. The application for testing is made to demonstrate innocence or the appropriateness of a lesser sentence and not solely to unreasonably delay the execution of sentence or the administration of justice.

SECTION 6. COURT-ORDERED ACCESS TO COMBINED DNA INDEX SYSTEM

For purposes of making an application pursuant to [relevant sections of [state] post-conviction DNA testing law], for purposes of making a credible application for executive clemency, or before trial, for purposes of obtaining exculpatory evidence, a court may order that a law enforcement entity that has access to the Combined DNA Index System submit the DNA profile obtained from probative biological material from crime scene evidence to determine whether it matches a profile of a known individual or a profile from an unsolved crime. The petitioner must show that the DNA profile derived from probative biological material from crime scene evidence complies with the Federal Bureau of Investigation's requirements for the uploading of crime



scene profiles to the National DNA Index System.

SECTION 7. COUNSEL

The court may appoint counsel for an indigent petitioner at any time during proceedings under this Act.

A. If the petitioner has filed *pro se*, the court shall appoint counsel for the petitioner upon a showing that DNA testing may be material to the petitioner's claim of wrongful conviction.

B. The court, in its discretion, may refer *pro se* requests for DNA testing to qualified parties for further review, without appointing the parties as counsel at that time. Such qualified parties may include, but shall not be limited to, indigent defense organizations or clinical legal education programs.

C. If the petitioner has retained private *pro bono* counsel that may include, but shall not be limited to, counsel from a nonprofit organization that represents indigent persons, the court may, in its discretion, award reasonable attorney's fees and costs at the conclusion of the litigation.

SECTION 8. DISCOVERY

A. At any time after a petition has been filed under this Act, the court may order:

1. The state to locate and provide the petitioner with any documents, notes, logs or reports relating to items of physical evidence collected in connection with the case or otherwise assist the petitioner in locating items of biological evidence that the state contends have been lost or destroyed;

2. The state to take reasonable measures to locate biological evidence that may be in its custody;



3. The state to assist the petitioner in locating evidence that may be in the custody of a public or private hospital, public or private laboratory or other facility; and
 4. The production of laboratory documents of analyses performed from the time of evidence intake to disposition, in the original form provided by the laboratory as prepared in connection with the examination and/or analysis of any items collected as evidence which may contain biological material. This includes but is not limited to the underlying data and laboratory notes prepared in connection with DNA tests, presumptive tests for the presence of biological material, serological tests, and analyses of trace evidence, if the evidence had been subjected to such testing. Any and all items from the requested case file shall be made available, including digital files and non-photocopied, photograph quality prints of photographs taken.
- B. If the prosecution or the petitioner previously conducted any DNA or other biological-evidence testing without knowledge of the other party, such testing shall be revealed in the motion for testing or response.
- C. If the court orders new post-conviction DNA testing in connection with a proceeding brought under this Act, the court shall order the production of any laboratory reports prepared in connection with the DNA testing. The court may, in its discretion, also order production of the underlying data or other laboratory documents.
- D. The results of any post-conviction DNA testing conducted under this Act shall be disclosed to the prosecution, the petitioner and the court.
- E. Upon receipt of a motion for post-conviction DNA testing, the state shall prepare an inventory of the evidence related to the case and issue a copy of the inventory to the prosecution, the petitioner, and the court.

SECTION 9. PRESERVATION OF EVIDENCE

- A. Notwithstanding any other provision of law, every appropriate governmental entity shall retain and catalogue each item of physical evidence that contains biological material secured in connection with a criminal case in the amount and manner sufficient to develop a DNA profile from the biological material contained in or included on the evidence for the period of time that any person is incarcerated; civilly committed; on parole or probation; or subject to sex offender registration.
- B. This requirement shall apply with or without the filing of a petition for post-conviction DNA testing.
- C. In cases where a petition for post-conviction DNA testing has been filed under this Act, the state shall prepare an inventory of the evidence related to the case and submit a copy of the inventory to the petitioner and the court.
1. If biological evidence is destroyed after the filing of a petition under this Act, the court may impose appropriate sanctions on the responsible party or parties.
 2. If the court finds that biological evidence was destroyed in violation of the provisions of this statute, it shall consider appropriate remedies.
- D. This requirement shall apply to biological evidence that is in the custody of a law enforcement agency in the State on the effective date of this Act.

SECTION 10. CHOICE OF LABORATORY

- A. If the court orders DNA testing, such testing shall be conducted by a facility mutually agreed upon by the petitioner and the state and approved by the court.



B. If the parties cannot agree, the court shall designate the testing facility and provide parties with a reasonable opportunity to be heard on the choice-of-laboratory issue.

C. The court shall impose reasonable conditions on the testing to protect the parties' interests in the integrity of the evidence and the testing process.

SECTION 11. PAYMENT.

A. If a state or county crime laboratory performs post-conviction DNA testing under this Act, the state shall bear the costs of such testing.

B. If testing is performed at a private laboratory, the court may require either the petitioner or the state to pay for the testing, as the interests of justice require.

C. If the state or county crime laboratory does not have the ability or resources to conduct the type of DNA testing to be performed, the state shall bear the costs of testing at a private laboratory that has such capabilities.

SECTION 12. APPEAL

The petitioner shall have the right to appeal a decision denying post-conviction DNA testing.

SECTION 13. SUCCESSIVE PETITIONS

A. If the petitioner has filed a prior petition for DNA testing under this Act or any other provision of law, the petitioner may file and the court shall adjudicate a successive petition or petitions under this Act, provided the petitioner asserts new or different grounds for relief, including, but not limited to, factual, scientific or legal arguments not previously presented or the availability of more advanced DNA technology.

B. The court may also, in its discretion, adjudicate any successive petition if the interests of justice so require.

SECTION 14. ADDITIONAL ORDERS

A. The court may in its discretion make such other orders as may be appropriate. This includes, but is not limited to, designating:

1. The type of DNA analysis to be used;
2. The testing procedures to be followed;
3. The preservation of some portion of the sample for testing replication;
4. Additional DNA testing, if the results of the initial testing are inconclusive or otherwise merit additional scientific analysis; and/or
5. The collection and DNA testing of elimination samples from third parties.

B. DNA profile information from biological samples taken from any person pursuant to a motion for post-conviction DNA testing shall be exempt from any law requiring disclosure of information to the public.

SECTION 15. PROCEDURE FOLLOWING TEST RESULTS

A. If the results of forensic DNA testing ordered under this Act are favorable to the petitioner, the court shall schedule a hearing to determine the appropriate relief to be granted.

Based on the results of the testing and any evidence or other matter presented at the hearing, the court shall thereafter enter any order that serves the interests of justice, including any of the following:

1. An order setting aside or vacating the petitioner's judgment of conviction, judgment of not guilty by reason of mental disease or defect or adjudication of delinquency;
 2. An order granting the petitioner a new trial or fact-finding hearing;
 3. An order granting the petitioner a new sentencing hearing, commitment hearing or dispositional hearing;
 4. An order discharging the petitioner from custody;
 5. An order specifying the disposition of any evidence that remains after the completion of the testing;
 6. An order granting the petitioner additional discovery on matters related to DNA test results or the conviction or sentence under attack, including, but not limited to, documents pertaining to the original criminal investigation or the identities of other suspects; and
 7. An order directing the state to place any unidentified DNA profile(s) obtained from post-conviction DNA testing into state and/or federal databases.
- B. If the results of the tests are not favorable to the petitioner, the court:
1. Shall dismiss the petition; and
 2. May make any further orders that are appropriate, including those that:
 - a. Provide that the parole board or a probation department be notified of the test results; and
 - b. Request that the petitioner's DNA profile be added to the state's convicted offender database.



SECTION 16. REACTIVATION OF VICTIMS SERVICES

When post-conviction DNA testing is being considered by the court, the State shall, upon request, reactivate victim services for the victim of the crime being reinvestigated during the reinvestigation of the case, the pendency of the proceedings, and, as determined by the court after consultation with the victim and/or victim advocate, following final adjudication of the case.

SECTION 17. CONSENT

A. Nothing in this Act shall prohibit a convicted person and the state from consenting to and conducting post-conviction DNA testing by agreement of the parties, without filing a motion for post-conviction DNA testing under this Act.

B. Notwithstanding any other provision of law governing post-conviction relief, if DNA test results are obtained under testing conducted upon consent of the parties which are favorable to the petitioner, the petitioner may file and the court shall adjudicate, a motion for post-conviction relief based on the DNA test results under section 15 of this Act.

SECTION 18. EFFECTIVE DATE.

This Act shall take effect one hundred and twenty days after the date of its enactment and shall apply to all jurisdictions in this state.