

West's Annotated Indiana Code [Currentness](#)

Title 35. Criminal Law and Procedure

▢ [Article 38](#). Proceedings Following Dismissal, Verdict, or Finding

▢ [Chapter 7](#). Postconviction DNA Testing and Analysis

→ **35-38-7-1 Applicability of chapter**

Sec. 1. This chapter applies only to an offense that is any of the following:

- (1) Murder.
- (2) A Class A felony.
- (3) A Class B felony.
- (4) A Class C felony.

#### **35-38-7-2 “DNA” defined**

Sec. 2. As used in this chapter, “DNA” refers to deoxyribonucleic acid.

#### **35-38-7-3 “Offense” defined**

Sec. 3. As used in this chapter, “offense” means a felony to which a petition under this chapter relates.

#### **35-38-7-4 “Victim” defined**

Sec. 4. As used in this chapter, “victim” means an individual who would be entitled under [IC 35-40-5-8](#) to receive information about a release of the petitioner.

#### **35-38-7-5 Petition to require testing**

Sec. 5. A person who was convicted of and sentenced for an offense may file a written petition with the court that sentenced the petitioner for the offense to require the forensic DNA testing and analysis of any evidence that:

- (1) is:
  - (A) in the possession or control of a court or the state; or
  - (B) otherwise contained in the Indiana DNA data base established under [IC 10-13-6](#);

(2) is related to the investigation or prosecution that resulted in the person's conviction; and

(3) may contain biological evidence.

### **35-38-7-6 Notice of petition to prosecuting attorney**

Sec. 6. A petitioner must give notice of the petition to the prosecuting attorney for the county where the offense was allegedly committed.

### **35-38-7-7 Opportunity to respond to petition**

Sec. 7. The court shall give the prosecuting attorney an opportunity to respond to the petition. The court may, in its discretion, order a hearing on the petition.

### **35-38-7-8 Prima facie proof required**

Sec. 8. After complying with [section 7](#) of this chapter, the court shall determine whether the petitioner has presented prima facie proof of the following:

(1) That the evidence sought to be tested is material to identifying the petitioner as:

(A) the perpetrator of; or

(B) an accomplice to;

the offense that resulted in the petitioner's conviction.

(2) That a sample of the evidence that the petitioner seeks to subject to DNA testing and analysis is in the possession or control of either:

(A) the state or a court; or

(B) another person, and, if this clause applies, that a sufficient chain of custody for the evidence exists to suggest that the evidence has not been substituted, tampered with, replaced, contaminated, or degraded in any material aspect.

(3) The evidence sought to be tested:

(A) was not previously tested; or

(B) was tested, but the requested DNA testing and analysis will:

(i) provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice; or

(ii) have a reasonable probability of contradicting prior test results.

(4) A reasonable probability exists that the petitioner would not have:

(A) been:

(i) prosecuted for; or

(ii) convicted of;

the offense; or

(B) received as severe a sentence for the offense;

if exculpatory results had been obtained through the requested DNA testing and analysis.

### **35-38-7-9 Order for testing**

Sec. 9. If the court makes the findings described in [section 8\(1\)](#), 8(2), 8(3), and 8(4) of this chapter, the court shall order DNA testing and analysis of the evidence.

### **35-38-7-10 Method and payment for testing**

Sec. 10. If the court orders DNA testing and analysis under [section 9](#) of this chapter, the court shall order the method and responsibility for the payment of any costs associated with the DNA testing and analysis.

### **35-38-7-11 Appointment of defense counsel**

Sec. 11. The court may appoint defense counsel for the person who was convicted of the offense at any time during any proceedings under this chapter if the person is indigent.

### **35-38-7-12 Selection of laboratory**

Sec. 12. If the court orders DNA testing and analysis under this chapter, the court shall select a laboratory that meets the quality assurance and proficiency testing standards applicable to laboratories conducting forensic DNA analysis under IC 10-13-6.

### **35-38-7-13 Access to laboratory reports**

Sec. 13. (a) If a prosecuting attorney or defense counsel has previously subjected relevant evidence to DNA testing and analysis, the court may order the prosecuting attorney 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.

(b) If the court orders DNA testing and analysis under this chapter, the court:

- (1) shall order the production of any laboratory reports that are prepared in connection with the testing and analysis; and
- (2) may order the production of any underlying data and laboratory notes.

#### **35-38-7-14 Preservation and inventory of testing results**

Sec. 14. If a petition for DNA testing and analysis is filed under this chapter:

- (1) 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;
- (2) the state shall:
  - (A) prepare an inventory of the evidence in the possession or control of the state that could be subjected to DNA testing and analysis; and
  - (B) submit a copy of the inventory to defense counsel and the court; and
- (3) if evidence is intentionally destroyed after the court orders its preservation, the court may impose appropriate sanctions.

#### **35-38-7-15 Discretionary orders by court; elimination samples**

Sec. 15. (a) The court may make any other orders under this chapter that the court considers appropriate, including designating any of the following:

- (1) The type of DNA testing and analysis to be used.
  - (2) That the DNA testing and analysis satisfies the pertinent evidentiary rules concerning the admission of scientific evidence or testimony in the Indiana Rules of Evidence.
  - (3) The procedures to be followed during the DNA testing and analysis.
  - (4) The preservation of some of the sample for replicating the DNA testing and analysis.
  - (5) Elimination samples from third parties.
- (b) Elimination samples from a third party shall be required only if:
- (1) the petitioner has been excluded as the perpetrator or accomplice by DNA testing and analysis; or
  - (2) extraordinary circumstances are shown to require the DNA test and analysis.

If the court orders elimination samples from a third party, the court shall offer the third party the choice to provide a sample that can be obtained through the least intrusive method possible.

**35-38-7-16 Notice to victims and third parties**

Sec. 16. (a) The prosecuting attorney may provide notification under the procedures of IC 35-40-12 when:

- (1) the petitioner first files a petition for DNA testing and analysis under this chapter; and
- (2) the prosecuting attorney knows the name and address of the victim.

If the court grants a petition for DNA testing and analysis, the prosecuting attorney shall provide notification if the name and address of the victim are known. A victim shall be notified of the results of the DNA testing and analysis.

(b) The name and address of a victim are confidential for purposes of this chapter.

(c) Notification of third parties regarding a court order to provide elimination samples shall be through the prosecuting attorney.

(d) If a petitioner is exonerated by DNA testing and analysis, the victim shall be notified before the petitioner's release.

**35-38-7-17 Notification of convicted person**

Sec. 17. Regardless of whether a petition has been filed under this chapter, if:

(1) a prosecuting attorney decides to order forensic DNA testing or analysis that was not previously performed on biological evidence that is related to the investigation or prosecution that resulted in a person's conviction; and

(2) the testing will consume the remaining biological evidence;

the prosecuting attorney must notify the person of the proposed DNA testing and analysis.

**35-38-7-18 Unfavorable results of postconviction testing**

Sec. 18. If the results of the postconviction DNA testing and analysis are not favorable to the person who was convicted of the offense, the court:

(1) shall dismiss the person's petition; and

(2) may make any further orders that the court determines to be appropriate, including any of the following:

(A) An order providing for notification of the parole board or a probation department.

(B) An order requesting that the petitioner's sample be added to the Indiana data base established under IC 10-13-6.

**35-38-7-19 Favorable results of postconviction testing**

Sec. 19. Notwithstanding any law that would bar a trial as untimely, if the results of postconviction DNA testing and analysis are favorable to the person who was convicted of the offense, the court shall order any of the following:

- (1) Upon motion of the prosecuting attorney and good cause shown, order retesting of the identified biological material and stay the petitioner's motion for a new trial pending the results of the DNA retesting.
- (2) Upon joint petition of the prosecuting attorney and the petitioner, order the release of the person.
- (3) Order a new trial or any other relief as may be appropriate under Indiana law or court rule.

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