

West's Montana Code Annotated  
Title 46. Criminal Procedure  
Chapter 21. Postconviction Hearing (Refs & Annos)  
Part 1. Initiating Proceedings

MCA 46-21-110

46-21-110. Petition for DNA testing

Currentness

(1) A person convicted of a felony may file a written petition for performance of DNA testing, as defined in 44-6-101, in the court that entered the judgment of conviction. The petition must include the petitioner's statement that the petitioner was not the perpetrator of the felony that resulted in the conviction and that DNA testing is relevant to the assertion of innocence. The petition must be verified by the petitioner under penalty of perjury and must:

(a) explain why the identity of the perpetrator of the felony was or should have been a significant issue in the case;

(b) present a prima facie case that the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect;

(c) explain, in light of all the evidence, how the requested testing would establish the petitioner's innocence of the felony;

(d) make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought;

(e) reveal the results of any DNA or other known biological testing that was previously conducted by the prosecution or defense; and

(f) state whether a petition was previously filed under this section and the results of the proceeding.

(2) If the petition does not contain the information required in subsection (1), the court shall return the petition to the petitioner and advise the petitioner that the matter cannot be considered without the missing information.

(3) If subsection (1) is complied with, the court shall order a copy of the petition to be served on the attorney general, the county attorney of the county of conviction, and, if known, the laboratory or government agency holding the evidence sought to be tested. The court shall order that any responses to the petition must be filed within a reasonable time after the date of service under this subsection.

(4) The court may order a hearing on the petition. The hearing must be before the judge who conducted the trial, unless the court determines that that judge is unavailable. Upon request of any party, the court may in the interest of justice order the petitioner to be present at the hearing. The court may consider evidence whether or not it was introduced at the trial.

(5) The court shall grant the petition if it determines that the petition is not made for the purpose of delay and that:

(a) the evidence sought to be tested is available and has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect;

(b) the identity of the perpetrator of the felony was or should have been a significant issue in the case;

(c) the petitioner has made a showing that the evidence sought to be tested has a reasonable probability, assuming favorable results, of being material to the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction;

(d) in light of all the evidence, there is a reasonable probability that the petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution; and

(e) the evidence sought to be tested was not previously tested or was tested previously but another test would provide results that are reasonably more discriminating and probative on the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction or would have a reasonable probability of contradicting the prior test results.

(6) If the court grants the petition, the court shall identify the evidence to be tested. The testing must be conducted by a laboratory mutually agreed upon by the petitioner, the attorney general, and the county attorney of the county of conviction. If the parties cannot agree on a laboratory, the court shall direct a laboratory of the court's choice to conduct the testing. At the request of the attorney general or the county attorney of the county of conviction, the court shall order the evidence submitted to an additional laboratory designated by the requester for additional testing. The court shall impose reasonable conditions on the testing designed to protect the parties' interests in the integrity of the evidence and the

testing process.

(7) After a petition has been filed under this section, the court may order:

(a) the state to locate and provide the petitioner with any documents, notes, logs, or reports relating to physical evidence collected in connection with the case or otherwise assist the petitioner in locating biological evidence that the state contends has been lost or destroyed;

(b) the state to take reasonable measures to locate biological evidence that may be in its custody;

(c) the state to assist the petitioner in locating evidence that may be in the custody of a public or private hospital or laboratory or other facility; and

(d) the production of original documents from the laboratory showing the results of any analysis conducted on any items or biological material collected as evidence from the time the evidence was received to the time of disposition. 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 analysis for trace evidence. All items from the requested case file must be made available to the petitioner, including digital files and photographs.

(8) The provisions of subsection (7) do not limit a court from ordering the production of any other relevant evidence.

(9) Testing ordered by the court must be conducted as soon as practicable, and if the court finds that a gross miscarriage of justice would otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, the court shall order a laboratory, if located in this state, to give the testing priority over any other pending casework of the laboratory.

(10) The test results must be fully disclosed to the parties.

(11) If the test results are inconclusive, the court may order further appropriate testing or terminate the proceeding. If the test results inculcate the petitioner, the court shall:

(a) notify the board of pardons and parole;

(b) order the petitioner's test sample to be included in the DNA identification index established under [44-6-102](#) and the federal combined DNA index system (CODIS) offender database;

(c) notify any victim and the family of the victim that the test results were not favorable to the petitioner; and

(d) terminate the proceeding.

(12) If the test results are favorable to the petitioner, the court shall order a hearing to determine whether there is a reasonable probability that a different outcome at trial could have been reached and after the hearing shall make appropriate orders to serve the interests of justice, including an order that:

(a) vacates and sets aside the judgment;

(b) discharges the defendant if the defendant is in custody; or

(c) resentences the defendant.

(13) The court may order a DNA profile to be submitted to the DNA identification index established under [44-6-102](#) and the federal combined DNA index system (CODIS) offender database to determine whether it matches a DNA profile of a known individual or a DNA profile from an unsolved crime. The DNA profile may be obtained from probative biological material from crime scene evidence.

(14) The court shall order a petitioner who is able to do so to pay the costs of testing. If the petitioner is unable to pay, the court shall order the state to pay the costs of testing. The court shall order additional testing requested by the attorney general or the county attorney of the county of conviction to be paid for by the state.

(15) The remedy provided by this section is in addition to any remedy available under part 1 of this chapter.

(16) When a motion is filed to vacate a conviction based on DNA results that are favorable to the petitioner, the state may provide victim services to the victim of the crime that is being reinvestigated during the reinvestigation, during the court proceedings, and, upon consultation with the victim or a victim advocate, after final adjudication of the case.

**Credits**

Enacted by [Laws 2003, ch. 79, § 1](#). Amended by [Laws 2015, ch. 313, § 1](#), eff. April 27, 2015.

[Notes of Decisions \(11\)](#)

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