

South Dakota Codified Laws [Currentness](#)

Title 23. Law Enforcement ([Refs & Annos](#))

→ [Chapter 23-5B. DNA Testing of Persons Convicted of Felonies \(Refs & Annos\)](#)

[23-5B-1. Order upon motion for DNA testing of person convicted of felony--Requirements](#)

Upon a written motion by any person who has been convicted of a felony offense, the court that entered the judgment of conviction for the felony offense shall order DNA testing of specific evidence if the court finds that all of the following apply:

- (1) The petitioner asserts, under penalty of perjury, that the petitioner is actually innocent of the felony offense for which the petitioner is under a sentence of imprisonment or death;
- (2) The petitioner's conviction is final under chapter 23A-32;
- (3) The petitioner has exhausted any claim for relief under chapter 21-27 or [28 U.S.C. § 2254](#);
- (4) The specific evidence to be tested was secured in relation to the investigation or prosecution of the felony offense for which the petitioner was convicted;
- (5) The specific evidence was either:
 - (a) Not previously subjected to DNA testing and the petitioner did not:
 - (i) Knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding after the date of enactment of this chapter; or
 - (ii) Knowingly fail to request DNA testing of that evidence in a prior petition for relief under chapter 21-27 or [28 U.S.C. § 2254](#); or
 - (b) Previously subjected to DNA testing and the petitioner is requesting DNA testing using a new method or technology that is substantially more probative than the prior DNA testing;
- (6) The petitioner shows good cause for the failure to request DNA testing of the specific evidence at the time of trial;
- (7) The specific evidence to be tested exists, is in the possession of the state, and has been subject to a chain

of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing;

(8) The proposed DNA testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices;

(9) The petitioner identifies a theory of defense that:

(a) Is consistent with an affirmative defense presented at trial; or

(b) Would establish the actual innocence of the petitioner of the felony offense referenced in the petitioner's assertion under subdivision (1); and

(10) If the petitioner was convicted following a trial, the identity of the perpetrator was at issue in the trial.

23-5B-2. Notice to attorney general and state's attorney of motion for testing--Response

Upon the receipt of the petitioner's written motion filed under § 23-5B-1, the court shall:

(1) Notify the attorney general and the state's attorney who prosecuted the case resulting in the petitioner's conviction; and

(2) Allow the state twenty days from the receipt of notice to respond to the motion.

23-5B-3. Referral of indigent petitioner's request for testing to Innocence Project or volunteer attorney

The court may not appoint counsel for an indigent petitioner under this chapter. However, the court may refer requests for DNA testing to the Innocence Project in South Dakota or such volunteer attorney as the State Bar of South Dakota may designate.

23-5B-4. Petitioner may retain counsel

Nothing in this chapter precludes a petitioner from proceeding with privately retained counsel.

23-5B-5. Preservation of evidence in state custody

Upon receiving notice from the court that a written motion has been made, the attorney general or the state's

attorney who prosecuted the case, shall take all reasonable actions necessary to ensure that all evidence which was collected in connection with the investigation or prosecution of the case, and which remains in the actual or constructive custody of the state or any of its political subdivisions, is preserved pending completion of the proceedings under this chapter.

23-5B-6. Testing laboratory

The court shall direct that any DNA testing ordered pursuant to § 23-5B-1 be carried out by the South Dakota Division of Criminal Investigation. However, the court may order DNA testing by another qualified laboratory if the court makes all necessary orders to ensure the integrity of the specific evidence and the reliability of the testing process and test results.

23-5B-7. Testing by agreement

Nothing in this chapter prohibits 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 pursuant to this chapter.

23-5B-8. Disclosure of test results

The results of any DNA testing ordered pursuant to § 23-5B-1 shall be disclosed to the court, the petitioner, and the state.

23-5B-9. Submission of test results to State DNA Database

The state shall submit any test results relating to the DNA of the petitioner to the State DNA Database.

23-5B-10. Inconclusive test results or match between DNA sample and DNA evidence

If the DNA test results obtained pursuant to this chapter are inconclusive or show that the petitioner was the source of the DNA evidence, the DNA sample of the petitioner shall be retained in the State DNA Database.

23-5B-11. Match between DNA sample and other offense

If the DNA test results obtained pursuant to this chapter exclude the petitioner as the source of the DNA evidence, and a comparison of the DNA sample of the petitioner results in a match between the DNA sample of the petitioner and another offense, the attorney general shall notify the appropriate agency and preserve the DNA sample of the petitioner.

23-5B-12. Denial of relief upon inconclusive test results

If DNA test results obtained pursuant to this chapter are inconclusive, the circuit court shall deny the petitioner relief.

23-5B-13. Effect of match between DNA sample and DNA evidence

If DNA test results obtained pursuant to this chapter show that the petitioner was the source of the DNA evidence, the court shall:

- (1) Deny the petitioner relief; and
- (2) On motion of the state:
 - (a) Assess the petitioner the cost of any DNA testing carried out pursuant to this chapter; and
 - (b) Order that the finding be forwarded to the South Dakota Board of Pardons and Paroles so that the board may consider the finding in reviewing any subsequent parole application submitted by the petitioner.

23-5B-14. Sentencing in prosecution for false assertions

In any prosecution of the petitioner pursuant to this chapter for false assertions or other conduct in proceedings pursuant to this chapter, the court, upon conviction of the petitioner, shall sentence the petitioner to a sentence that runs consecutively to any other term of imprisonment the petitioner is serving.

23-5B-15. Motion for new trial where testing excludes petitioner as source of DNA evidence

If DNA test results obtained pursuant to this chapter exclude the petitioner as the source of the DNA evidence, the petitioner may file a motion for a new trial. The court shall establish a reasonable schedule for the petitioner to file such motion for a new trial and for the state to respond to the motion for a new trial.

23-5B-16. Grounds for new trial

The court shall grant the motion of the petitioner for a new trial if the DNA test results, when considered with all other evidence in the case, establish by compelling evidence that a new trial would result in the acquittal of the felony offense, as referenced in § 23-5B-1, for which the petitioner is under a sentence of imprisonment.

23-5B-17. Habeas corpus

Nothing in this chapter provides a basis for relief in any state or federal habeas corpus proceeding.

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