

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2308 Session of
2018

INTRODUCED BY NESBIT, McCLINTON, BERNSTINE, BRIGGS, DALEY, HILL-
EVANS, PASHINSKI, READSHAW, SCHLOSSBERG, SOLOMON AND MURT,
MAY 2, 2018

REFERRED TO COMMITTEE ON JUDICIARY, MAY 2, 2018

AN ACT

1 Amending Title 42 (Judiciary and Judicial Procedure) of the
2 Pennsylvania Consolidated Statutes, in post-trial matters,
3 further providing for postconviction DNA testing.

4 The General Assembly finds and declares as follows:

5 (1) Postconviction DNA testing has exonerated wrongfully
6 convicted individuals and identified real perpetrators of
7 crimes.

8 (2) To the extent possible, DNA testing of evidence
9 before trial is encouraged to help prevent wrongful
10 convictions and to lead to earlier detection and conviction
11 of actual perpetrators.

12 The General Assembly of the Commonwealth of Pennsylvania
13 hereby enacts as follows:

14 Section 1. Section 9543.1 of Title 42 of the Pennsylvania
15 Consolidated Statutes is amended to read:

16 § 9543.1. Postconviction DNA testing.

17 (a) Motion.--

18 (1) An individual convicted of a criminal offense in a

1 court of this Commonwealth [and serving a term of
2 imprisonment or awaiting execution because of a sentence of
3 death] may apply by making a written motion to the sentencing
4 court at any time for the performance of forensic DNA testing
5 on specific evidence that is related to the investigation or
6 prosecution that resulted in the judgment of conviction.

7 (2) The evidence may have been discovered either prior
8 to or after the applicant's conviction. The evidence shall be
9 available for testing as of the date of the motion. If the
10 evidence was discovered prior to the applicant's conviction,
11 the evidence shall not have been subject to the DNA testing
12 requested because the technology for testing was not in
13 existence at the time of the trial or the applicant's counsel
14 did not seek testing at the time of the trial in a case where
15 a verdict was rendered on or before January 1, 1995, or the
16 evidence was subject to the testing, but newer technology
17 could provide substantially more accurate and substantially
18 probative results or the applicant's counsel sought funds
19 from the court to pay for the testing because his client was
20 indigent and the court refused the request despite the
21 client's indigency.

22 (3) A request for DNA testing under this section shall
23 be by written petition and shall be filed with the clerk of
24 courts of the judicial district where the sentence is
25 imposed.

26 (4) DNA testing may be sought at any time if the motion
27 is made in a timely manner and for the purpose of
28 demonstrating the applicant's actual innocence and not to
29 delay the execution of sentence or administration of justice.

30 (5) Notwithstanding any other provision of law, a plea

1 of guilty to a crime of violence, as defined in section
2 9714(g) (relating to sentences for second and subsequent
3 offenses), or a confession given by an applicant concerning
4 the offense for which the applicant was convicted shall not
5 prohibit the applicant from asserting actual innocence under
6 subsection (c)(2) or the court from making a determination
7 and ordering DNA testing under subsection (d)(2).

8 (6) The motion shall explain how, after review of the
9 record of the applicant's trial, there is a reasonable
10 possibility if the applicant is under State supervision, or
11 there is a reasonable probability if the applicant is not
12 under State supervision, or after review of the record of the
13 applicant's guilty plea there is a reasonable probability,
14 that the testing would produce exculpatory evidence that
15 would establish:

16 (i) the applicant's actual innocence of the offense
17 for which the applicant was convicted;

18 (ii) in a capital case, the applicant's actual
19 innocence of the charged or uncharged conduct
20 constituting an aggravating circumstance under section
21 9711(d) (relating to sentencing procedure for murder of
22 the first degree) if the applicant's exoneration of the
23 conduct would result in vacating a sentence of death; or

24 (iii) in a capital case, a mitigating circumstance
25 under section 9711(e)(7) under the circumstances set
26 forth in section 9711(c)(1)(iv).

27 (b) Notice to the Commonwealth.--

28 (1) Upon receipt of a motion under subsection (a), the
29 court shall notify the Commonwealth and shall afford the
30 Commonwealth an opportunity to respond to the motion.

1 (2) Upon receipt of a motion under subsection (a) or
2 notice of the motion, as applicable, the Commonwealth and the
3 court shall take the steps reasonably necessary to ensure
4 that any remaining biological material in the possession of
5 the Commonwealth or the court is preserved pending the
6 completion of the proceedings under this section.

7 (c) Requirements.--In any motion under subsection (a), under
8 penalty of perjury, the applicant shall:

9 (1) (i) specify the evidence to be tested;

10 (ii) state that the applicant consents to provide
11 samples of bodily fluid for use in the DNA testing; and

12 (iii) acknowledge that the applicant understands
13 that, if the motion is granted, any data obtained from
14 any DNA samples or test results may be entered into law
15 enforcement databases, may be used in the investigation
16 of other crimes and may be used as evidence against the
17 applicant in other cases.

18 (2) (i) in a sworn statement subject to the penalties
19 under 18 Pa.C.S. §§ 4902 (relating to perjury) and 4903
20 (relating to false swearing), assert the applicant's
21 actual innocence of the offense for which the applicant
22 was convicted and that the applicant seeks DNA testing
23 for the purpose of demonstrating the applicant's actual
24 innocence; and

25 (ii) in a capital case:

26 (A) assert the applicant's actual innocence of
27 the charged or uncharged conduct constituting an
28 aggravating circumstance under section 9711(d)
29 [(relating to sentencing procedure for murder of the
30 first degree)] if the applicant's exoneration of the

1 conduct would result in vacating a sentence of death;
2 or

3 (B) assert that the outcome of the DNA testing
4 would establish a mitigating circumstance under
5 section 9711(e)(7) if that mitigating circumstance
6 was presented to the sentencing judge or jury and
7 facts as to that issue were in dispute at the
8 sentencing hearing.

9 (3) present a prima facie case demonstrating that the:

10 (i) identity of or the participation in the crime by
11 the perpetrator was at issue in the proceedings that
12 resulted in the applicant's conviction and sentencing;
13 and

14 (ii) DNA testing of the specific evidence, assuming
15 exculpatory results, would establish:

16 (A) the applicant's actual innocence of the
17 offense for which the applicant was convicted;

18 (B) in a capital case, the applicant's actual
19 innocence of the charged or uncharged conduct
20 constituting an aggravating circumstance under
21 section 9711(d) if the applicant's exoneration of the
22 conduct would result in vacating a sentence of death;
23 or

24 (C) in a capital case, a mitigating circumstance
25 under section 9711(e)(7) under the circumstances set
26 forth in [subsection (c)(1)(iv)] section 9711(c)(1)
27 (iv).

28 (d) Order.--

29 (1) Except as provided in paragraph (2), the court shall
30 order the testing requested in a motion under subsection (a)

1 under reasonable conditions designed to preserve the
2 integrity of the evidence and the testing process upon a
3 determination, after review of the record of the applicant's
4 trial, that the:

5 (i) requirements of subsection (c) have been met;

6 (ii) evidence to be tested has been subject to a
7 chain of custody sufficient to establish that it has not
8 been altered in any material respect; and

9 (iii) motion is made in a timely manner and for the
10 purpose of demonstrating the applicant's actual innocence
11 and not to delay the execution of sentence or
12 administration of justice.

13 (2) The court shall not order the testing requested in a
14 motion under subsection (a) if, after review of the record of
15 the applicant's trial, the court determines that there is no
16 reasonable possibility for an applicant under State
17 supervision, or there is no reasonable probability for an
18 applicant not under State supervision, or after review of the
19 record of the applicant's guilty plea, the court determines
20 that there is no reasonable probability, that the testing
21 would produce exculpatory evidence that:

22 (i) would establish the applicant's actual innocence
23 of the offense for which the applicant was convicted;

24 (ii) in a capital case, would establish the
25 applicant's actual innocence of the charged or uncharged
26 conduct constituting an aggravating circumstance under
27 section 9711(d) if the applicant's exoneration of the
28 conduct would result in vacating a sentence of death; or

29 (iii) in a capital case, would establish a
30 mitigating circumstance under section 9711(e) (7) under

the circumstances set forth in [subsection (c) (1) (iv).]
section 9711(c) (1) (iv).

(3) Any DNA testing order under this section shall constitute a final order. An applicant or the Commonwealth may appeal a decision denying or granting a DNA testing order in accordance with the Pennsylvania Rules of Appellate Procedure.

(4) Any decision granting or denying a DNA testing order shall include an explanation by the court of how the testing requested in a motion under subsection (a) has met or fails to have met the requirements under paragraphs (1), (2) and (3).

(5) Upon determining the petitioner has met the applicable burden established in paragraph (1) or (2), the court may require the Commonwealth to prepare an inventory of evidence related to the case and serve a copy of the inventory to the prosecution, the applicant, the applicant's attorney, if applicable, and the court. The inventory may include, but not be limited to, a list of evidence collected and forensic testing previously done relating to the evidence and the names of agencies that conducted the forensic testing.

(e) Testing procedures.--

(1) Any DNA testing ordered under this section shall be conducted by:

(i) a laboratory mutually selected by the Commonwealth and the applicant;

(ii) a laboratory selected by the court that ordered the testing if the Commonwealth and the applicant are unable to agree on a laboratory[, a laboratory selected

1 by the court that ordered the testing]; or

2 (iii) if the applicant is indigent, the testing
3 shall be conducted by the Pennsylvania State Police or,
4 at the Pennsylvania State Police's sole discretion, by a
5 laboratory designated by the Pennsylvania State Police.

6 (2) The costs of any testing ordered under this section
7 shall be paid:

8 (i) by the applicant; or

9 (ii) in the case of an applicant who is indigent, by
10 the Commonwealth of Pennsylvania.

11 (3) [Testing conducted by the Pennsylvania State Police
12 shall be carried out in accordance with the protocols and
13 procedures established by the Pennsylvania State Police.] To
14 the extent possible and not inconsistent with best laboratory
15 practices, the testing shall be conducted in a manner that
16 ensures that some portion of the sample is preserved for
17 replication of testing. If the laboratory determines it may
18 be necessary to consume the entirety of any sample during
19 testing, the laboratory shall inform the prosecution, the
20 applicant and the applicant's attorney, if applicable, of its
21 recommendation and obtain the prosecution and the applicant's
22 consent before proceeding. If the prosecution and the
23 applicant do not consent, the court may issue any appropriate
24 order before testing proceeds.

25 (4) If testing is performed by a private laboratory and
26 a DNA database search is anticipated, the applicant shall
27 ensure that the chosen laboratory is accredited by an
28 accreditation body that is a signatory to the International
29 Laboratory Accreditation Cooperation Mutual Recognition
30 Agreement that is designated by the Federal Bureau of

1 Investigation in accordance with section 210303 of the
2 Violent Crime Control and Law Enforcement Act of 1994 (Public
3 Law 103-322, 34 U.S.C. § 12591), that requires conformance to
4 forensic science requirements and that the accreditation
5 include DNA testing, and is compliant with Federal Bureau of
6 Investigation quality assurance standards.

7 (5) When testing is performed by a private laboratory,
8 the public laboratory shall take all reasonable measures
9 before the testing is conducted to ensure that the results of
10 the testing may be entered into CODIS so that a comparison to
11 known offender or crime scene profiles may be made if the
12 laboratory and test results otherwise satisfy the criteria
13 for database entry.

14 (6) Testing conducted by the Pennsylvania State Police
15 shall be carried out in accordance with the protocols and
16 procedures established by the Pennsylvania State Police.

17 (7) To the extent possible, if communication with the
18 parties regarding the testing process and test results is
19 necessary, the testing laboratory shall communicate with
20 counsel for the applicant and the Commonwealth
21 simultaneously.

22 (8) No direct communication involving the testing
23 laboratory without the inclusion of a representative of each
24 party shall occur.

25 (f) Posttesting procedures.--

26 (1) After the DNA testing conducted under this section
27 has been completed, the applicant may, pursuant to section
28 9545(b)(2) (relating to jurisdiction and proceedings), during
29 the [60-day] one-year period beginning on the date on which
30 the applicant is notified of the test results, petition to

1 the court for postconviction relief pursuant to section
2 9543(a)(2)(vi) (relating to eligibility for relief).

3 (2) Upon receipt of a petition filed under paragraph
4 (1), the court shall consider the petition along with any
5 answer filed by the Commonwealth and shall conduct a hearing
6 thereon.

7 (3) In any hearing on a petition for postconviction
8 relief filed under paragraph (1), the court shall determine
9 whether the exculpatory evidence resulting from the DNA
10 testing conducted under this section would have changed the
11 outcome of the trial as required by section 9543(a)(2)(vi).

12 (4) If testing complies with Federal Bureau of
13 Investigation requirements and the data meets NDIS criteria,
14 profiles obtained from the testing shall be searched or
15 uploaded to CODIS.

16 (5) When testing is conducted by a private laboratory, a
17 court may order a public laboratory with access to CODIS to
18 take the necessary measures to ensure the DNA profile
19 obtained from probative biological material from crime scene
20 evidence can be uploaded to CODIS by the public laboratory.
21 Necessary measures may include requiring the public
22 laboratory to conduct a review of the private laboratory's
23 facilities or records to ensure that the private laboratory
24 complies with Federal Bureau of Investigation requirements
25 regarding CODIS. If the private laboratory meets Federal
26 Bureau of Investigation and CODIS requirements, the court may
27 order the public laboratory to upload the DNA profile to
28 determine whether the profile matches a profile of a known
29 individual or a profile from an unsolved crime. The DNA
30 profile submitted to the databases must comply with the

Federal Bureau of Investigation requirements for the uploading of DNA profiles to CODIS, and the Commonwealth shall take all reasonable measures to ensure that the testing complies with the requirements.

(6) If DNA testing conclusively identifies the DNA profile of the applicant on probative and inculpatory evidence, the court shall dismiss the petition and may make any further orders that are appropriate. An order under this paragraph may:

(i) direct that the Pennsylvania Board of Probation and Parole be notified of the test results; or

(ii) mandate that the applicant's DNA profile be added to the Commonwealth's convicted offender database.

(g) Effect of motion.--The filing of a motion for forensic DNA testing pursuant to subsection (a) shall have the following effect:

(1) The filing of the motion shall constitute the applicant's consent to provide samples of bodily fluid for use in the DNA testing.

(2) The data from any DNA samples or test results obtained as a result of the motion may be entered into law enforcement databases, may be used in the investigation of other crimes and may be used as evidence against the applicant in other cases.

(h) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Applicant." The individual who files a motion under subsection (a).

"CODIS." The Combined DNA Index System administered by the

1 Federal Bureau of Investigation that allows for the storage and
2 exchange of DNA records submitted by Federal, State and local
3 forensic DNA laboratories.

4 "DNA." Deoxyribonucleic acid.

5 "NDIS." The National DNA Index System which is the national
6 DNA database system of DNA records and meets Federal quality
7 assurance and privacy standards.

8 "Public laboratory." The Pennsylvania State Police Forensic
9 DNA Division, the Philadelphia Police Department Forensic
10 Science Bureau, the Allegheny County Medical Examiner's Office
11 or any other laboratory maintained by the Commonwealth with
12 access to CODIS.

13 Section 2. This act shall take effect in 60 days.