

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009**

**SESSION LAW 2009-203
HOUSE BILL 1190**

AN ACT TO CLARIFY AND STRENGTHEN THE LAW REGARDING THE PRESERVATION OF DNA AND BIOLOGICAL EVIDENCE THAT IS RELATED TO A CRIMINAL OFFENSE AND A DEFENDANT'S ACCESS TO THAT EVIDENCE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-266.1 reads as rewritten:

"§ 15A-266.1. Policy.

It is the policy of the State to assist federal, State, and local criminal justice and law enforcement agencies in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of felonies or violent crimes against the person. Identification, detection, and exclusion ~~is~~are facilitated by the analysis of biological evidence that is often left by the perpetrator or is recovered from the crime scene. The analysis of biological evidence can also be used to identify missing persons and victims of mass disasters."

SECTION 2. G.S. 15A-266.2 reads as rewritten:

"§ 15A-266.2. Definitions.

As used in this Article, unless another meaning is specified or the context clearly requires otherwise, the following terms have the meanings specified:

- (1) "CODIS" means the FBI's national DNA identification index system that allows the storage and exchange of DNA records submitted by State and local forensic DNA laboratories. The term "CODIS" is derived from Combined DNA Index System.
- (1a) "Custodial Agency" means the governmental entity in possession of evidence collected as part of a criminal investigation or prosecution. This term includes a central evidence storage facility operated by a State agency.
- (2) "DNA" means deoxyribonucleic acid. DNA is located in the nucleus of cells and provides an individual's personal genetic blueprint. DNA encodes genetic information that is the basis of human heredity and forensic identification.
- (3) "DNA Record" means DNA identification information stored in the State DNA Database or CODIS for the purpose of generating investigative leads or supporting statistical interpretation of DNA test results. The DNA record is the result obtained from the DNA typing tests. The DNA record is comprised of the characteristics of a DNA sample which are of value in establishing the identity of individuals. The results of all DNA identification tests on an individual's DNA sample are also collectively referred to as the DNA profile of an individual.
- (4) "DNA Sample" in this Article means a ~~blood~~blood, buccal, or any other sample provided by any person convicted of offenses covered by this Article or submitted to the SBI Laboratory for analysis pursuant to a criminal investigation.
- (5) "FBI" means the Federal Bureau of Investigation.
- (5a) "NDIS" means the National DNA Index System that is the system of DNA profile records which meet federal standards.
- (6) "SBI" means the State Bureau of Investigation. The SBI is responsible for the policy management and administration of the State DNA identification record system to support law enforcement, and for liaison with the FBI regarding the State's participation in CODIS.



- (7) "State DNA Database" means the SBI's DNA identification record system to support law enforcement. It is administered by the SBI and provides DNA records to the FBI for storage and maintenance in CODIS. The SBI's DNA Database system is the collective capability provided by computer software and procedures administered by the SBI to store and maintain DNA records related to forensic casework, to convicted offenders required to provide a DNA sample under this Article, and to anonymous DNA records used for research or quality control.
- (8) "State DNA Databank" means the repository of DNA samples collected under the provisions of this Article."

SECTION 3. G.S. 15A-267 reads as rewritten:

"§ 15A-267. Access to DNA samples from crime scene.

- (a) A criminal defendant shall have access before trial to the following:
 - (1) Any DNA analyses performed in connection with the case in which the defendant is charged.
 - (2) Any biological material, that has not been DNA tested, that was collected from the crime scene, the defendant's residence, or the defendant's property.
 - (3) A complete inventory of all physical evidence collected in connection with the investigation.
- (b) Access as provided for in subsection (a) of this section shall be governed by G.S. 15A-902 and G.S. 15A-952.
- (c) Upon a defendant's motion made before trial in accordance with G.S. 15A-952, the court ~~may~~ shall order the SBI or any approved vendor that meets SBI contracting standards to perform DNA testing and DNA Database comparisons of any biological material collected in connection with the case in which the defendant is charged and, if the data meets NDIS criteria, order the SBI to search and/or upload to CODIS any profiles obtained from the testing upon a showing of all of the following:
 - (1) That the biological material is relevant to the investigation.
 - (2) That the biological material was not previously DNA tested or that more accurate testing procedures are now available that were not available at the time of previous testing and there is a reasonable possibility that the result would have been different.
 - (3) That the testing is material to the defendant's defense.
- (d) The defendant shall be responsible for bearing the cost of any further testing and comparison of the biological materials, including any costs associated with the testing and comparison by the SBI in accordance with this section, unless the court has determined the defendant is indigent, in which event the State shall bear the costs."

SECTION 4. G.S. 15A-268 reads as rewritten:

"§ 15A-268. Preservation of biological evidence.

(a) As used in this section, the term "biological evidence" includes the contents of a sexual assault examination kit or any item that contains blood, semen, hair, saliva, skin tissue, fingerprints, or other identifiable human biological material, ~~material that may reasonably be used to incriminate or exculpate any person in the criminal investigation~~, whether that material is catalogued separately on a slide or swab, in a test tube, or some other similar method, or is present on clothing, ligatures, bedding, other household materials, drinking cups, cigarettes, or any other item of evidence.

(a1) Notwithstanding any other provision of law and subject to subsection (b) of this section, a ~~governmental entity in custody of evidence~~ custodial agency shall preserve any physical evidence that is reasonably likely to contain any biological evidence collected in the course of a criminal investigation or prosecution. Evidence shall be preserved in a manner reasonably calculated to prevent contamination or degradation of any biological evidence that might be present, subject to a continuous chain of custody, and securely retained with sufficient official documentation to locate the evidence.

(a2) The SBI shall promulgate and publish minimum guidelines that meet the requirements for retention and preservation of biological evidence under subsection (a1) of this section. Guidelines shall be published no later than January 1, 2010, and shall be reviewed and updated biennially thereafter. Law enforcement agencies and the Conference of Clerks of Superior Court shall ensure the guidelines are distributed to all employees with responsibility for maintaining custody of evidence.

(a3) When physical evidence is offered or admitted into evidence in a criminal proceeding of the General Court of Justice, the presiding judge shall inquire of the State and defendant as to the identity of the collecting agency of the evidence and whether the evidence in question is reasonably likely to contain biological evidence and if that biological evidence is relevant to establishing the identity of the perpetrator in the case. If either party asserts that the evidence in question may have biological evidentiary value, and the court so finds, the court shall instruct that the evidence be so designated in the court's records and that the evidence be preserved pursuant to the requirements of this section.

(a4) If evidence has been designated by the court as biological evidence pursuant to subsection (a3) of this section, the clerk of superior court that takes custody of evidence pursuant to the rules of practice and procedure for the superior and district courts as adopted by the Supreme Court pursuant to G.S. 7A-34 shall preserve such evidence consistent with subsection (a1) of this section. Upon conclusion of the clerk's role as custodian, as provided in the applicable rules of practice, the clerk shall return such evidence to the collecting agency, as determined in subsection (a3) of this section, in a manner that ensures the chain of custody is maintained and documented.

(a5) The duty to preserve may not be waived knowingly and voluntarily by a defendant, without a court proceeding.

~~(a2)~~(a6) The evidence described by subsection (a1) of this section shall be preserved for the following period:

- (1) For conviction resulting in a sentence of death, until execution.
- (1a) For conviction resulting in a sentence of life without parole, until the death of the convicted person.
- (1b) For conviction of any homicide, sex offense, assault, kidnapping, burglary, robbery, arson or burning, for which a Class B1-E felony punishment is imposed, the evidence shall be preserved during the period of incarceration and mandatory supervised release, including sex offender registration pursuant to Article 27A of Chapter 14 of the General Statutes, except in cases where the person convicted entered and was convicted on a plea of guilty, in which case the evidence shall be preserved for the earlier of three years from the date of conviction or until released.
- ~~(2) For conviction of a violent felony, as defined in G.S. 14-7.7(b), the evidence shall be preserved during the period of incarceration except in cases where the person convicted entered and was convicted on a plea of guilty, in which case the evidence shall be preserved for three years from the date of conviction.~~
- ~~(3) For conviction of an offense requiring sex offender registration pursuant to Article 27A of Chapter 14 of the General Statutes, during the period of incarceration and any period of mandatory supervised release or probation.~~
- ~~(4) For conviction of any felony not governed by subdivisions (1), (2), or (3) of this subsection for which the defendant's genetic profile may be taken by a law enforcement agency and included in the State DNA database, the evidence shall be preserved for a period of seven years from the date of conviction except in cases where the person convicted entered and was convicted on a plea of guilty, in which case the evidence shall be preserved for three years from the date of conviction.~~
- (5) Biological evidence collected as part of a criminal investigation of any homicide or rape, in which no charges are filed, shall be preserved for the period of time that the crime remains unsolved.
- (6) A custodial agency in custody of biological evidence unrelated to a criminal investigation or prosecution referenced by subdivision (1), (1a), (1b), or (5) of this subsection may dispose of the evidence in accordance with the rules of the agency.

(a7) Upon written request by the defendant, the custodial agency shall prepare an inventory of biological evidence relevant to the defendant's case that has been preserved pursuant to this section.

~~(b) The governmental entity custodial agency required to preserve evidence pursuant to subsection (a1) of this section may petition the court for an order allowing for disposition~~

dispose of the evidence prior to the expiration of the period of time described in subsection ~~(a2)~~(a6) of this section if all of the following conditions are met:

- (1) The ~~governmental entity custodial agency~~ sent notice of its intent to dispose of the evidence to the district attorney in the county in which the conviction was obtained.
- (2) The district attorney gave to each of the following persons written notification of the intent of the ~~governmental entity custodial agency~~ to dispose of the evidence: any defendant convicted of a felony who is currently incarcerated in connection with the case, the defendant's ~~current~~ counsel of ~~record, record~~ for that case, and the Office of Indigent Defense Services, and the Attorney General Services. The notice shall be consistent with the provisions of this section, and the district attorney shall send a copy of the notice to the ~~governmental entity custodial agency~~. Delivery of written notification from the district attorney to the defendant was effectuated by the district attorney transmitting the written notification to the superintendent of the correctional facility where the defendant was assigned at the time and the superintendent's personal delivery of the written notification to the defendant. Certification of delivery by the superintendent to the defendant in accordance with this subdivision was in accordance with subsection (c) of this section.
- (3) The written notification from the district attorney specified the following:
 - a. That the ~~governmental entity custodial agency~~ would destroy the evidence collected in connection with the case unless the ~~governmental entity custodial agency~~ received a written request that the evidence not be destroyed.
 - b. The address of the ~~governmental entity custodial agency~~ where the written request was to be sent.
 - c. That the written request from the defendant, or his or her representative, must be received by the ~~governmental entity custodial agency~~ within 90 days of the date of receipt by the defendant of the district attorney's written notification.
 - d. That the written request must ask that the ~~material evidence~~ not be destroyed or disposed of for one of the following reasons:
 1. The case is currently on appeal.
 2. The case is currently in postconviction proceedings.
 3. The defendant will file ~~within 180 days of the date of receipt by the defendant of the district attorney's written notification~~ a motion for DNA testing pursuant to G.S. 15A-269, that is followed ~~G.S. 15A-269~~ within 180 days of sending the request that the evidence not be destroyed or disposed of, by a motion for DNA testing pursuant to G.S. 15A-269, the postmark of the defendant's response to the district attorney's written notification of the ~~governmental entity's intent to dispose of the evidence, unless a request for extension is requested by the defendant and agreed to by the ~~governmental entity in possession of the evidence, custodial agency.~~~~
- (4) The ~~governmental entity custodial agency~~ did not receive a written request in compliance with the conditions set forth in sub-subdivision (3)d. of this subsection within 90 days of the date of receipt by the defendant of the district attorney's written notification.

(c) Upon receiving a written notification from a district attorney in accordance with subdivision (b)(3) of this section, the superintendent shall personally deliver the written notification to the defendant. Upon effectuating personal delivery on the defendant, the superintendent shall sign a sworn written certification that the written notification had been delivered to the defendant in compliance with this subsection indicating the date the delivery was made. The superintendent's certification shall be sent by the superintendent to the ~~governmental entity custodial agency~~ that intends to dispose of the sample of evidence. The ~~governmental entity custodial agency~~ may rely on the superintendent's certification as evidence of the date of receipt by the defendant of the district attorney's written notification.

(d) ~~After a hearing, hearing held in response to a defendant's written request that the evidence not be destroyed in response to notice pursuant to subsection (b) of this section, the court may enter an order authorizing the governmental entity custodial agency to dispose of the evidence if the court determines by the preponderance of the evidence that the evidence:~~

- ~~(1) Has no significant value for biological analysis and should be returned to its rightful owner, destroyed, used for training purposes, or otherwise disposed of as provided by law; or~~
- ~~(2) Has no significant value for biological analysis and is of a size, bulk, or physical characteristic not usually retained by the governmental entity and cannot practically be retained by the governmental entity; or~~
- ~~(3) May have value for biological analysis but is of a size, bulk, or physical characteristic not usually retained by the governmental entity and cannot practically be retained by the governmental entity, character as to render retention impracticable or should be returned to its rightful owner.~~

~~(e) The court order allowing the disposition of the evidence pursuant to this section may subdivision (d)(3) of this section shall require the governmental entity to custodial agency to return such evidence to the collecting agency. The collecting agency shall take reasonable measures to remove or preserve portions of evidence suitable for future biological testing or likely to contain biological evidence related to the offense through cuttings, swabs, or other means consistent with SBI minimum guidelines in a quantity sufficient to permit DNA testing before returning or disposing of the evidence. The court may provide the defendant an opportunity to take reasonable measures to preserve the evidence.~~

(f) An order regarding the disposition of evidence pursuant to this section shall be a final and appealable order. The defendant shall have 30 days from the entry of the order to file notice of appeal. The governmental entity shall not dispose of the evidence while the appeal is pending.

(g) If an entity is asked to produce evidence that is required to be preserved under the provisions of this section and cannot produce the evidence, the chief evidence custodian of the custodial agency shall provide an affidavit in which he or she describes, under penalty of perjury, the efforts taken to locate the evidence and affirms that the evidence could not be located. If the evidence that is required to be preserved pursuant to this section has been destroyed, the court may conduct a hearing to determine whether obstruction of justice and contempt proceedings are in order. If the court finds the destruction violated the defendant's due process rights, the court shall order an appropriate remedy, which may include dismissal of charges.

(h) All records documenting the possession, control, storage, and destruction of evidence related to a criminal investigation or prosecution of an offense referenced in subdivision (1), (1a), (1b), or (5) of subsection (a6) of this section shall be retained.

(i) Whoever knowingly and intentionally destroys, alters, conceals, or tampers with evidence that is required to be preserved under this section, with the intent to impair the integrity of that evidence, prevent that evidence from being subjected to DNA testing, or prevent production or use of that evidence in an official proceeding, shall be punished as follows:

- (1) If the evidence is for a noncapital crime, then a violation of this subsection is a Class I felony.
- (2) If the evidence is for a crime of first degree murder, then a violation of this subsection is a Class H felony."

SECTION 5. G.S. 15A-269 reads as rewritten:

"§ 15A-269. Request for postconviction DNA testing.

(a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing ~~of any and, if testing complies with FBI requirements and the data meets NDIS criteria, profiles obtained from the testing shall be searched and/or uploaded to CODIS if the biological evidence that meets all of the following conditions:~~

- (1) Is material to the defendant's defense.
- (2) Is related to the investigation or prosecution that resulted in the judgment.
- (3) Meets either of the following conditions:
 - a. It was not DNA tested previously.

b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

(b) The court shall grant the motion for DNA testing and, if testing complies with FBI requirements, the run of any profiles obtained from the testing, of the evidence upon its determination that:

- (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
- (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and
- (3) The defendant has signed a sworn affidavit of innocence.

(b1) If the court orders DNA testing, such testing shall be conducted by an SBI-approved testing facility, mutually agreed upon by the petitioner and the State and approved by the court. If the parties cannot agree, the court shall designate the testing facility and provide the parties with reasonable opportunity to be heard on the issue.

(c) The court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.

(d) The defendant shall be responsible for bearing the cost of any DNA testing ordered under this section unless the court determines the defendant is indigent, in which event the State shall bear the costs.

(e) DNA testing ordered by the court pursuant to this section shall be done as soon as practicable. However, if the court finds that a miscarriage of justice will otherwise occur and that DNA testing is necessary in the interests of justice, the court shall order a delay of the proceedings or execution of the sentence pending the DNA testing.

(f) Upon receipt of a motion for postconviction DNA testing, the custodial agency shall inventory the evidence pertaining to that case and provide the inventory list, as well as any documents, notes, logs, or reports relating to the items of physical evidence, to the prosecution, the petitioner, and the court.

(g) Upon receipt of a motion for postconviction DNA testing, the State shall, upon request, reactivate any victim services for the victim of the crime being investigated during the reinvestigation of the case and pendency of the proceedings.

(h) Nothing in this Article shall prohibit a convicted person and the State from consenting to and conducting postconviction DNA testing by agreement of the parties, without filing a motion for postconviction testing under this Article."

SECTION 6. G.S. 15A-270.1 reads as rewritten:

"§ 15A-270.1. Right to appeal denial of defendant's motion for DNA testing.

The defendant may appeal an order denying the defendant's motion for DNA testing under this Article, including by an interlocutory appeal. The court shall appoint counsel upon a finding of indigency."

SECTION 7.(a) The Joint Select Study Committee on the Preservation of Biological Evidence is established. The membership shall be as follows:

- (1) Three members of the Senate appointed by the President Pro Tempore of the Senate.
- (2) Three members of the House of Representatives appointed by the Speaker of the House of Representatives.
- (3) The Attorney General or the Attorney General's designee.
- (4) The Director of the SBI or the Director's designee.
- (5) The Director of the Administrative Office of the Courts or the Director's designee.
- (6) The President of the North Carolina Association of Clerks of Superior Court or the President's designee.
- (7) The President of the North Carolina Association of Chiefs of Police or the President's designee.
- (8) The President of the North Carolina Sheriffs' Association or the President's designee.

- (9) The President of North Carolina Advocates for Justice or the President's designee.
- (10) One North Carolina district attorney appointed by the Speaker of the House of Representatives.
- (11) One North Carolina district attorney appointed by the President Pro Tempore of the Senate.
- (12) One public member appointed by the Speaker of the House of Representatives.
- (13) One public member appointed by the President Pro Tempore of the Senate.

The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each appoint one legislative member of the Committee to serve as cochair. The Committee shall meet upon the call of the cochairs. A quorum of the Committee shall be a majority of its members.

SECTION 7.(b) The Committee shall review matters related to the preservation of DNA and biological evidence, including:

- (1) The costs associated with the promulgation of minimum guidelines for the retention and preservation of biological evidence.
- (2) Emerging technologies with regard to the retention and preservation of biological evidence.
- (3) Procedures for the interagency transfer of biological evidence.
- (4) Any other topic the Committee believes is related to its purpose.

SECTION 7.(c) Members of the Committee shall receive per diem, subsistence, and travel allowance as provided in G.S. 120-3.1, 138-5, or 138-6, as appropriate. The expenses of the Committee shall be considered expenses incurred for the joint operation of the General Assembly. All expenses of the Committee shall be paid from the Legislative Services Commission's Reserve for Studies. The Legislative Services Officer shall assign professional and clerical staff to assist the Committee in its work.

SECTION 7.(d) The Committee shall submit a final report on the results of its study, including any proposed legislation, to the General Assembly on or before April 1, 2010. The Committee shall file a copy of its report with the President Pro Tempore's office, the Speaker's office, and the Legislative Library. The Committee shall terminate on April 1, 2010, or upon the filing of its final report, whichever occurs first.

SECTION 8. Section 7 of this act is effective when it becomes law. The remainder of this act becomes effective December 1, 2009.

In the General Assembly read three times and ratified this the 17th day of June, 2009.

s/ Walter H. Dalton
President of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Beverly E. Perdue
Governor

Approved 12:00 p.m. this 26th day of June, 2009