

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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HOUSE BILL 1190
Committee Substitute Favorable 4/23/09
PROPOSED COMMITTEE SUBSTITUTE H1190-PCS30343-RQ-24

Short Title: Preservation of DNA & Biological Evidence.

(Public)

Sponsors:

Referred to:

April 8, 2009

1 A BILL TO BE ENTITLED
2 AN ACT TO CLARIFY AND STRENGTHEN THE LAW REGARDING THE
3 PRESERVATION OF DNA AND BIOLOGICAL EVIDENCE THAT IS RELATED TO A
4 CRIMINAL OFFENSE AND A DEFENDANT'S ACCESS TO THAT EVIDENCE.

5 The General Assembly of North Carolina enacts:

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

7 "§ 15A-266.1. Policy.

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

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

15 "§ 15A-266.2. Definitions.

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

18 (1) "CODIS" means the FBI's national DNA identification index system that
19 allows the storage and exchange of DNA records submitted by State and
20 local forensic DNA laboratories. The term "CODIS" is derived from
21 Combined DNA Index System.

22 (1a) "Custodial Agency" means the governmental entity in possession of
23 evidence collected as part of a criminal investigation or prosecution.

24 (2) "DNA" means deoxyribonucleic acid. DNA is located in the nucleus of cells
25 and provides an individual's personal genetic blueprint. DNA encodes
26 genetic information that is the basis of human heredity and forensic
27 identification.

28 (3) "DNA Record" means DNA identification information stored in the State
29 DNA Database or CODIS for the purpose of generating investigative leads
30 or supporting statistical interpretation of DNA test results. The DNA record
31 is the result obtained from the DNA typing tests. The DNA record is
32 comprised of the characteristics of a DNA sample which are of value in
33 establishing the identity of individuals. The results of all DNA identification



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1 tests on an individual's DNA sample are also collectively referred to as the
2 DNA profile of an individual.

3 (4) "DNA Sample" in this Article means a ~~blood~~-blood, buccal, or any other
4 sample provided by any person convicted of offenses covered by this Article
5 or submitted to the SBI Laboratory for analysis pursuant to a criminal
6 investigation.

7 (5) "FBI" means the Federal Bureau of Investigation.

8 (5a) "NDIS" means the National DNA Index System that is the system of DNA
9 profile records which meet federal standards.

10 (6) "SBI" means the State Bureau of Investigation. The SBI is responsible for
11 the policy management and administration of the State DNA identification
12 record system to support law enforcement, and for liaison with the FBI
13 regarding the State's participation in CODIS.

14 (7) "State DNA Database" means the SBI's DNA identification record system to
15 support law enforcement. It is administered by the SBI and provides DNA
16 records to the FBI for storage and maintenance in CODIS. The SBI's DNA
17 Database system is the collective capability provided by computer software
18 and procedures administered by the SBI to store and maintain DNA records
19 related to forensic casework, to convicted offenders required to provide a
20 DNA sample under this Article, and to anonymous DNA records used for
21 research or quality control.

22 (8) "State DNA Databank" means the repository of DNA samples collected
23 under the provisions of this Article."

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

25 **"§ 15A-267. Access to DNA samples from crime scene.**

26 (a) A criminal defendant shall have access before trial to the following:

27 (1) Any DNA analyses performed in connection with the case in which the
28 defendant is charged.

29 (2) Any biological material, that has not been DNA tested, that was collected
30 from the crime scene, the defendant's residence, or the defendant's property.

31 (3) A complete inventory of all physical evidence collected in connection with
32 the investigation.

33 (b) Access as provided for in subsection (a) of this section shall be governed by
34 G.S. 15A-902 and G.S. 15A-952.

35 (c) Upon a defendant's motion made before trial in accordance with G.S. 15A-952, the
36 court ~~may~~ shall order the SBI or any approved vendor that meets SBI contracting standards
37 to perform DNA testing and DNA Database comparisons of any biological material collected in
38 connection with the case in which the defendant is charged and, if the data meets NDIS criteria,
39 order the SBI to search and/or upload to CODIS any profiles obtained from the testing upon a
40 showing of all of the following:

41 (1) That the biological material is relevant to the investigation.

42 (2) That the biological material was not previously DNA tested or that more
43 accurate testing procedures are now available that were not available at the
44 time of previous testing and there is a reasonable possibility that the result
45 would have been different.

46 (3) That the testing is material to the defendant's defense.

47 (d) The defendant shall be responsible for bearing the cost of any further testing and
48 comparison of the biological materials, including any costs associated with the testing and
49 comparison by the SBI in accordance with this section, unless the court has determined the
50 defendant is indigent, in which event the State shall bear the costs."

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

1 **"§ 15A-268. Preservation of biological evidence.**

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

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

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

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

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

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

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

42 (1) For conviction resulting in a sentence of death, until execution.

43 (1a) For conviction resulting in a sentence of life without parole, until the death
44 of the convicted person.

45 (1b) For conviction of any homicide, sex offense, assault, kidnapping, burglary,
46 robbery, arson or burning, for which a Class B1-E felony punishment is
47 imposed, the evidence shall be preserved during the period of incarceration
48 and mandatory supervised release, including sex offender registration
49 pursuant to Article 27A of Chapter 14 of the General Statutes, except in
50 cases where the person convicted entered and was convicted on a plea of

1 guilty, in which case the evidence shall be preserved for the earlier of three
2 years from the date of conviction or until released.

3 ~~(2) For conviction of a violent felony, as defined in G.S. 14-7.7(b), the evidence~~
4 ~~shall be preserved during the period of incarceration except in cases where~~
5 ~~the person convicted entered and was convicted on a plea of guilty, in which~~
6 ~~case the evidence shall be preserved for three years from the date of~~
7 ~~conviction.~~

8 ~~(3) For conviction of an offense requiring sex offender registration pursuant to~~
9 ~~Article 27A of Chapter 14 of the General Statutes, during the period of~~
10 ~~incarceration and any period of mandatory supervised release or probation.~~

11 ~~(4) For conviction of any felony not governed by subdivisions (1), (2), or (3) of~~
12 ~~this subsection for which the defendant's genetic profile may be taken by a~~
13 ~~law enforcement agency and included in the State DNA database, the~~
14 ~~evidence shall be preserved for a period of seven years from the date of~~
15 ~~conviction except in cases where the person convicted entered and was~~
16 ~~convicted on a plea of guilty, in which case the evidence shall be preserved~~
17 ~~for three years from the date of conviction.~~

18 (5) Biological evidence collected as part of a criminal investigation of any
19 homicide or rape, in which no charges are filed, shall be preserved for the
20 period of time that the crime remains unsolved.

21 (6) A custodial agency in custody of biological evidence unrelated to a criminal
22 investigation or prosecution referenced by subdivision (1), (1a), (1b), or (5)
23 of this subsection may dispose of the evidence in accordance with the rules
24 of the agency.

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

28 (b) ~~The governmental entity custodial agency~~ required to preserve evidence pursuant to
29 subsection (a1) of this section may ~~petition the court for an order allowing for disposition~~
30 dispose of the evidence prior to the expiration of the period of time described in subsection
31 ~~(a2)(a6)~~ of this section if all of the following conditions are met:

32 (1) ~~The governmental entity custodial agency~~ sent notice of its intent to dispose
33 of the evidence to the district attorney in the county in which the conviction
34 was obtained.

35 (2) The district attorney gave to each of the following persons written
36 notification of the intent of the ~~governmental entity custodial agency~~
37 to dispose of the evidence: any defendant convicted of a felony who is
38 currently incarcerated in connection with the case, the defendant's ~~current~~
39 counsel of ~~record, record~~ for that case, and the Office of Indigent Defense
40 ~~Services, and the Attorney General Services.~~ The notice shall be consistent
41 with the provisions of this section, and the district attorney shall send a copy
42 of the notice to the ~~governmental entity custodial agency~~. Delivery of written
43 notification from the district attorney to the defendant was effectuated by the
44 district attorney transmitting the written notification to the superintendent of
45 the correctional facility where the defendant was assigned at the time and the
46 superintendent's personal delivery of the written notification to the
47 defendant. Certification of delivery by the superintendent to the defendant in
48 accordance with this subdivision was in accordance with subsection (c) of
49 this section.

50 (3) The written notification from the district attorney specified the following:

- 1 a. That the ~~governmental entity~~custodial agency would destroy the
2 evidence collected in connection with the case unless the
3 ~~governmental entity~~custodial agency received a written request that
4 the evidence not be destroyed.
- 5 b. The address of the ~~governmental entity~~custodial agency where the
6 written request was to be sent.
- 7 c. That the written request from the defendant, or his or her
8 representative, must be received by the ~~governmental entity~~custodial
9 agency within 90 days of the date of receipt by the defendant of the
10 district attorney's written notification.
- 11 d. That the written request must ask that the ~~material evidence~~ not be
12 destroyed or disposed of for one of the following reasons:
- 13 1. The case is currently on appeal.
 - 14 2. The case is currently in postconviction proceedings.
 - 15 3. The defendant will file ~~within 180 days of the date of receipt~~
16 ~~by the defendant of the district attorney's written notification~~
17 a motion for DNA testing pursuant to G.S. 15A-269, that is
18 followed ~~G.S. 15A-269~~ within 180 days of ~~sending the~~
19 ~~request that the evidence not be destroyed or disposed of, by a~~
20 ~~motion for DNA testing pursuant to G.S. 15A-269, the~~
21 ~~postmark of the defendant's response to the district attorney's~~
22 ~~written notification of the governmental entity's intent to~~
23 ~~dispose of the evidence,~~ unless a request for extension is
24 requested by the defendant and agreed to by the ~~governmental~~
25 ~~entity in possession of the evidence.~~custodial agency.
- 26 (4) The ~~governmental entity~~custodial agency did not receive a written request
27 in compliance with the conditions set forth in sub-subdivision (3)d. of this
28 subsection within 90 days of the date of receipt by the defendant of the
29 district attorney's written notification.
- 30 (c) Upon receiving a written notification from a district attorney in accordance with
31 subdivision (b)(3) of this section, the superintendent shall personally deliver the written
32 notification to the defendant. Upon effectuating personal delivery on the defendant, the
33 superintendent shall sign a sworn written certification that the written notification had been
34 delivered to the defendant in compliance with this subsection indicating the date the delivery
35 was made. The superintendent's certification shall be sent by the superintendent to the
36 ~~governmental entity~~custodial agency that intends to dispose of the sample of evidence. The
37 ~~governmental entity~~custodial agency may rely on the superintendent's certification as evidence
38 of the date of receipt by the defendant of the district attorney's written notification.
- 39 (d) After a ~~hearing,~~hearing held in response to a defendant's written request that the
40 evidence not be destroyed in response to notice pursuant to subsection (b) of this section, the
41 court may enter an order authorizing the ~~governmental entity~~custodial agency to dispose of the
42 evidence if the court determines by the preponderance of the evidence that the evidence:
- 43 (1) Has no significant value for biological analysis and should be returned to its
44 rightful owner, destroyed, used for training purposes, or otherwise disposed
45 of as provided by law; or
 - 46 (2) ~~Has no significant value for biological analysis and is of a size, bulk, or~~
47 ~~physical characteristic not usually retained by the governmental entity and~~
48 ~~cannot practically be retained by the governmental entity; or~~
 - 49 (3) May have value for biological analysis but is of a size, bulk, or physical
50 ~~characteristic not usually retained by the governmental entity and cannot~~

1 ~~practically be retained by the governmental entity character as to render~~
2 ~~retention impracticable or should be returned to its rightful owner.~~

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

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

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

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

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

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

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

37 **"§ 15A-269. Request for postconviction DNA testing.**

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

- 43 (1) Is material to the defendant's defense.
44 (2) Is related to the investigation or prosecution that resulted in the judgment.
45 (3) Meets either of the following conditions:
46 a. It was not DNA tested previously.
47 b. It was tested previously, but the requested DNA test would provide
48 results that are significantly more accurate and probative of the
49 identity of the perpetrator or accomplice or have a reasonable
50 probability of contradicting prior test results.

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

4 (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of
5 this section have been met;

6 (2) If the DNA testing being requested had been conducted on the evidence,
7 there exists a reasonable probability that the verdict would have been more
8 favorable to the defendant; and

9 (3) The defendant has signed a sworn affidavit of innocence.

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

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

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

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

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

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

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

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

36 **"§ 15A-270.1. Right to appeal denial of defendant's motion for DNA testing.**

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

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

42 (1) Three members of the Senate appointed by the President Pro Tempore of the
43 Senate.

44 (2) Three members of the House of Representatives appointed by the Speaker of
45 the House of Representatives.

46 (3) The Attorney General or the Attorney General's designee.

47 (4) The Director of the SBI or the Director's designee.

48 (5) The Director of the Administrative Office of the Courts or the Director's
49 designee.

50 (6) The President of the North Carolina Association of Clerks of Superior Court
51 or the President's designee.

- 1 (7) The President of the North Carolina Association of Chiefs of Police or the
2 President's designee.
3 (8) The President of the North Carolina Sheriffs' Association or the President's
4 designee.
5 (9) The President of North Carolina Advocates for Justice or the President's
6 designee.
7 (10) One North Carolina district attorney appointed by the Speaker of the House
8 of Representatives.
9 (11) One North Carolina district attorney appointed by the President Pro Tempore
10 of the Senate.

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

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

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

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

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

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