

By: Senator(s) Albritton

To: Judiciary, Division B

SENATE BILL NO. 2844

1 AN ACT TO AUTHORIZE POST-CONVICTION DNA TESTING UPON
2 APPLICATION OF A DEFENDANT; TO CREATE NEW CODE SECTION 99-39-5.1,
3 MISSISSIPPI CODE OF 1972, TO CLARIFY POST-CONVICTION DNA TESTING;
4 AND FOR RELATED PURPOSES.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

6 **SECTION 1.** (1) Upon a written motion by an individual under
7 a sentence of imprisonment or death, the court that entered the
8 judgment of conviction shall order DNA testing of specific
9 evidence if the court finds that all of the following apply:

10 (a) The applicant asserts, under penalty of perjury,
11 that the applicant is actually innocent of:

12 (i) The offense for which the applicant is under a
13 sentence of imprisonment or death; or

14 (ii) Another offense, if:

15 1. Evidence of offense was admitted in a
16 court proceeding and exoneration of such offense would entitle the
17 applicant to a reduced sentence or new sentencing hearing; and

18 2. To the extent available, the applicant has
19 exhausted all remedies available under state law for requesting
20 DNA testing of specified evidence relating to the offense.

21 (b) The specific evidence to be tested was secured in
22 relation to the investigation or prosecution of the offense
23 referenced in the applicant's assertion under paragraph (a).

24 (c) The specific evidence to be tested:

25 (i) Was not previously subjected to DNA testing
26 and the applicant did not:

27 1. Knowingly and voluntarily waive the right
28 to request DNA testing of that evidence in a court proceeding
29 after the effective date of this act; or

30 2. Knowingly fail to request DNA testing of
31 that evidence in a prior motion for postconviction DNA testing; or

32 (ii) Was previously subjected to DNA testing and
33 the applicant is requesting DNA testing using a new method or
34 technology that is substantially more probative than the prior DNA
35 testing.

36 (d) The specific evidence to be tested is in the
37 possession of the state and has been subject to a chain of custody
38 and retained under conditions sufficient to ensure that such
39 evidence has not been substituted, contaminated, tampered with,
40 replaced or altered in any respect material to the proposed DNA
41 testing.

42 (e) The proposed DNA testing is reasonable in scope,
43 uses scientifically sound methods, and is consistent with accepted
44 forensic practices.

45 (f) The applicant identifies a theory of defense that:

46 (i) Is not inconsistent with an affirmative
47 defense presented at trial; and

48 (ii) Would establish the actual innocence of the
49 applicant of the offense referenced in the applicant's assertion
50 under paragraph (a).

51 (g) If the applicant was convicted following a trial,
52 the identity of the perpetrator was at issue in the trial.

53 (h) The proposed DNA testing of the specific evidence
54 may produce new material evidence that would:

55 (i) Support the theory of defense referenced in
56 paragraph (f); and

57 (ii) Raise a reasonable probability that the
58 applicant did not commit the offense.

59 (i) The applicant certifies that the applicant will
60 provide a DNA sample for purposes of comparison.

61 (j) The motion is made in a timely fashion, subject to
62 the following conditions;

63 (i) There shall be a rebuttable presumption of
64 timeliness if the motion is made within sixty (60) months of the
65 effective date of this act or within thirty-six (36) months of
66 conviction, whichever comes later. Such presumption may be
67 rebutted upon a showing:

68 1. That the applicant's motion for a DNA test
69 is based solely upon information used in a previously denied
70 motion; or

71 2. Clear and convincing evidence that the
72 applicant's filing is done solely to cause delay or harassment.

73 (ii) There shall be a rebuttable presumption
74 against timeliness for any motion not satisfying subparagraph (i)
75 above. Such presumption may be rebutted upon the court's finding:

76 1. That the applicant was or is incompetent
77 and such incompetence substantially contributed to the delay in
78 the applicant's motion for a DNA test;

79 2. The evidence to be tested is newly
80 discovered DNA evidence;

81 3. That the applicant's motion is not based
82 solely upon the applicant's own assertion of innocence and, after
83 considering all relevant facts and circumstances surrounding the
84 motion, a denial would result in a manifest injustice; or

85 4. Upon good cause shown.

86 (2) (a) Upon the receipt of a motion filed under subsection
87 (1), the court shall:

88 (i) Notify the prosecution; and

89 (ii) Allow the prosecution a reasonable time
90 period to respond to the motion.

91 (b) To the extent necessary to carry out proceedings
92 under this section, the court shall direct the state to preserve
93 the specific evidence relating to a motion under subsection (1).

94 (c) The court may appoint counsel for an indigent
95 applicant under this section.

96 (3) (a) The court shall direct that any DNA testing ordered
97 under this section be carried out by any qualified laboratory if
98 the court makes all necessary orders to ensure the integrity of
99 the specific evidence and the reliability of the testing process
100 and test results.

101 (b) The costs of any DNA testing ordered under this
102 section shall be paid:

103 (i) By the applicant; or

104 (ii) In the case of an applicant who is indigent,
105 by the state.

106 (4) In any case in which the applicant is sentenced to
107 death:

108 (a) Any DNA testing ordered under this section shall be
109 completed not later than sixty (60) days after the date on which
110 the prosecution responds to the motion filed under subsection (1);
111 and

112 (b) Not later than one hundred twenty (120) days after
113 the date on which the DNA testing ordered under this section is
114 completed, the court shall order any post-testing procedures under
115 subsection (6) or (7), as appropriate.

116 (5) (a) The results of any DNA testing ordered under this
117 section shall be simultaneously disclosed to the court, the
118 applicant, and the prosecutor.

119 (b) If the DNA test results obtained under this section
120 exclude the applicant as the source of the DNA evidence, and a
121 comparison of the DNA sample of the applicant does not result in a
122 match between the DNA sample of the applicant and another offense,
123 the Attorney General shall destroy the DNA sample of the applicant

124 and ensure that such information is not retained if there is no
125 other legal authority to retain the DNA sample of the applicant.

126 (6) (a) If DNA test results obtained under this section are
127 inconclusive, the court may order further testing, if appropriate,
128 or may deny the applicant relief.

129 (b) If DNA test results obtained under this section
130 show that the applicant was the source of the DNA evidence, the
131 court shall:

132 (i) Deny the applicant relief; and

133 (ii) On motion of the state:

134 1. Make a determination whether the
135 applicant's assertion of actual innocence was false, and, if the
136 court makes such a finding, the court may hold the applicant in
137 contempt; and

138 2. Assess against the applicant the cost of
139 any DNA testing carried out under this section.

140 (7) (a) Notwithstanding any law that would bar a motion
141 under this paragraph as untimely, if DNA test results obtained
142 under this section exclude the applicant as the source of the DNA
143 evidence, the applicant may file a motion for a new trial or
144 resentencing, as appropriate. The court shall establish a
145 reasonable schedule for the applicant to file such a motion and
146 for the prosecution to respond to the motion.

147 (b) The court shall grant the motion of the applicant
148 for a new trial or resentencing, as appropriate, if the DNA test
149 results, when considered with all other evidence in the case
150 (regardless of whether such evidence was introduced at trial),
151 establish by compelling evidence that a new trial would result in
152 an acquittal of:

153 (i) In the case of a motion for a new trial the
154 offense for which the applicant is under a sentence of
155 imprisonment or death; and

156 (ii) In the case of a motion for resentencing,
157 another offense, if evidence of such offense was admitted during a
158 sentencing hearing and exoneration of such offense would entitle
159 the applicant to a reduced sentence or a new sentencing
160 proceeding.

161 (8) (a) Nothing in this section shall affect the
162 circumstances under which a person may obtain DNA testing or
163 post-conviction relief under any other law.

164 (b) Nothing in this section shall provide a basis for
165 relief in any habeas corpus proceeding.

166 **SECTION 2.** The following shall be codified as Section
167 99-39-5.1, Mississippi Code of 1972:

168 99-39-5.1. (1) Notwithstanding the time limitations laid
169 out in subsection (2), a prisoner convicted of a felony may file
170 an application under the provisions of this section requesting DNA
171 testing of evidence containing biological material. The
172 application must be signed by the applicant and must allege the
173 following:

174 (a) That the applicant is factually innocent of the
175 crime for which he was convicted, regardless of whether the
176 applicant pled guilty or nolo contendere; and

177 (b) That evidence potentially suitable for DNA testing
178 was secured in relation to the offense that is the basis of the
179 challenged conviction, whether or not it was used at trial; and

180 (c) (i) DNA testing was not performed on the evidence
181 secured in relation to the offense either because DNA testing was
182 not available, or was available but not technologically capable of
183 providing probative results, or for any other reason that was not
184 the fault of the convicted person; or

185 (ii) Although the evidence was previously
186 subjected to DNA testing, it can now be subjected to newer testing
187 techniques that provide a reasonable likelihood of results that

188 are more accurate and probative than the results of the previous
189 test.

190 (2) The application shall be filed in the trial court where
191 the applicant was convicted, and shall be served on the Attorney
192 General, the appropriate district attorney, and the law
193 enforcement agency in possession of the evidence. After service
194 of the application, no evidence shall be destroyed that is
195 relevant to a case in which an application for DNA testing has
196 been filed until the case has been finally resolved by the courts.

197 (3) After service of the motion, the court shall hold a
198 hearing to determine whether:

199 (a) The evidence still exists and is in a condition
200 making DNA testing possible;

201 (b) The evidence has been subjected to a chain of
202 custody sufficient to establish that it has not been substituted,
203 tampered with, replaced or altered in any material aspect. For
204 purposes of this act, evidence that has been in the custody of law
205 enforcement, other government officials or a public or private
206 hospital shall be presumed to satisfy the chain of custody
207 requirement of this subsection; and

208 (c) The testing is materially relevant, and may provide
209 significant proof of the convicted person's actual innocence.

210 (4) If the court finds that all of the above criteria have
211 been met, the court shall order that the requested forensic DNA
212 testing be conducted. A copy of the order shall be served on the
213 Attorney General, the district attorney of the county where the
214 applicant was convicted and the law enforcement agency that has
215 possession of the evidence to be tested, including but not limited
216 to sheriffs, the Department of Public Safety, local police
217 agencies and crime laboratories. If the court finds that the
218 applicant did not satisfy all of the above requirements, it shall
219 dismiss the application. An applicant may appeal the dismissal of
220 the application for DNA testing to the Mississippi Supreme Court.

221 (5) Testing shall be conducted by a laboratory mutually
222 agreed upon by the applicant and the district attorney. In the
223 event that the two parties cannot agree, the court shall designate
224 a laboratory that is accredited by the American Society of Crime
225 Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) in
226 forensic DNA analysis to perform the tests.

227 (6) (a) The costs of testing shall be borne by the
228 applicant, unless the applicant is found to be indigent, in which
229 case the costs of testing shall be borne by the state.

230 (b) There is hereby created in the state treasury a
231 special fund designated as the Indigent Inmates' Post Conviction
232 DNA Testing Fund. The fund shall consist of money specially
233 appropriated by the Legislature that may be reimbursed through
234 grant monies received from United States Department of Justice
235 grants to cover the costs of providing indigent inmates with DNA
236 testing. The fund shall be administered by the Administrative
237 Office of the Courts. The fund shall be segregated from all other
238 funds and shall be used exclusively for the purposes established
239 under the provisions of this section.

240 (7) The results of the testing shall be forwarded to the
241 applicant, the trial court, and the district attorney. If the
242 results are favorable to the petitioner, the court shall schedule
243 a hearing to determine the appropriate relief to be granted.
244 Based on the results of the testing and any evidence or other
245 matter presented at the hearing, the court shall thereafter enter
246 any order that serves the interests of justice, including any of
247 the following:

248 (a) An order setting aside or vacating the petitioner's
249 judgment of conviction or judgment of not guilty by reason of
250 insanity;

251 (b) An order granting the petitioner a new trial or
252 fact-finding hearing;

253 (c) An order granting the petitioner a new sentencing
254 hearing, commitment hearing or dispositional hearing;

255 (d) An order discharging the petitioner from custody;

256 (e) An order specifying the disposition of any evidence
257 that remains after the completion of the testing;

258 (f) An order granting the petitioner additional
259 discovery on matters related to DNA test results or the conviction
260 or sentence under attack, including, but not limited to, documents
261 pertaining to the original criminal investigation or the
262 identities of other suspects; or

263 (g) An order directing the state to place any
264 unidentified DNA profile(s) obtained from post-conviction DNA
265 testing into state and/or federal databases.

266 (8) If the results of the tests are not favorable to the
267 petitioner, the court:

268 (a) Shall dismiss the petition; and

269 (b) May make any further orders that are appropriate,
270 including those that:

271 (i) Provide that the parole board or a probation
272 department be notified of the test results;

273 (ii) Request that the petitioner's DNA profile be
274 added to the state's convicted offender database.

275 (8) Filing an application under this section shall not
276 preclude or substitute for an application for post conviction
277 relief based on any other provision of the Uniform Post Conviction
278 Relief Act.

279 **SECTION 3.** This act shall take effect and be in force from
280 and after July 1, 2007.