

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2009

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HOUSE BILL 1190

Short Title: Preservation of DNA & Biological Evidence. (Public)

Sponsors: Representatives Glazier, Stam, Ross (Primary Sponsors); Blue, Faison, Harrison, and Lucas.

Referred to: Science and Technology, if favorable, Judiciary II.

April 8, 2009

A BILL TO BE ENTITLED

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.

(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.



- 1 (4) "DNA Sample" in this Article means a ~~blood~~ blood, buccal, or any other  
2 sample provided by any person convicted of offenses covered by this Article  
3 or submitted to the SBI Laboratory for analysis pursuant to a criminal  
4 investigation.
- 5 (5) "FBI" means the Federal Bureau of Investigation.
- 6 (6) "SBI" means the State Bureau of Investigation. The SBI is responsible for  
7 the policy management and administration of the State DNA identification  
8 record system to support law enforcement, and for liaison with the FBI  
9 regarding the State's participation in CODIS.
- 10 (7) "State DNA Database" means the SBI's DNA identification record system to  
11 support law enforcement. It is administered by the SBI and provides DNA  
12 records to the FBI for storage and maintenance in CODIS. The SBI's DNA  
13 Database system is the collective capability provided by computer software  
14 and procedures administered by the SBI to store and maintain DNA records  
15 related to forensic casework, to convicted offenders required to provide a  
16 DNA sample under this Article, and to anonymous DNA records used for  
17 research or quality control.
- 18 (8) "State DNA Databank" means the repository of DNA samples collected  
19 under the provisions of this Article."

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

21 **"§ 15A-267. Access to DNA samples from crime scene.**

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

- 23 (1) Any DNA analyses performed in connection with the case in which the  
24 defendant is charged.
- 25 (2) Any biological material, that has not been DNA tested, that was collected  
26 from the crime scene, the defendant's residence, or the defendant's property.
- 27 (3) A complete inventory of all physical evidence collected in connection with  
28 the investigation.

29 (b) Access as provided for in subsection (a) of this section shall be governed by G.S.  
30 15A-902 and G.S. 15A-952.

31 (c) Upon a defendant's motion made before trial in accordance with G.S. 15A-952, the  
32 court ~~may~~ shall order the SBI or another laboratory accredited by the American Society of  
33 Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) to perform DNA  
34 testing and for the SBI to run DNA Database comparisons of any biological material collected  
35 in connection with the case in which the defendant is charged upon a showing of all of the  
36 following:

- 37 (1) That the biological material is relevant to the investigation.
- 38 (2) That the biological material was not previously DNA tested or that more  
39 accurate testing procedures are now available that were not available at the  
40 time of previous testing and there is a reasonable possibility that the result  
41 would have been different.
- 42 (3) That the testing is material to the defendant's defense.

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

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

48 **"§ 15A-268. Preservation of biological evidence.**

49 (a) As used in this section, the term "biological evidence" includes the contents of a  
50 sexual assault examination kit or any item that contains blood, semen, hair, saliva, skin tissue,  
51 fingerprints, or other identifiable human biological material, material which may reasonably be

1 used to incriminate or exculpate any person in the criminal investigation, whether that material  
2 is catalogued separately on a slide or swab, in a test tube, or some other similar method, or is  
3 present on clothing, ligatures, bedding, other household materials, drinking cups, cigarettes, or  
4 any other item of evidence.

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

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

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

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

34 (a5) The duty to preserve shall not apply if the defendant knowingly and voluntarily  
35 waives the right to preservation and DNA testing of biological evidence in a court proceeding.  
36 Otherwise, the right to preservation of biological evidence under this section and the right to  
37 DNA testing of that evidence can not be waived. The prohibition against waiver of the right  
38 provided under this section applies to, but is not limited to, a waiver that is given as part of an  
39 agreement resulting in a plea of guilty or nolo contendere.

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.

45 (1b) For conviction of homicides, sex offenses, assaults, kidnappings, burglaries,  
46 robberies, and arsons or burnings resulting in sentences in Classes B1-E, the  
47 evidence shall be preserved during the period of incarceration and  
48 mandatory supervised release, including sex offender registration pursuant to  
49 Article 27A of Chapter 14 of the General Statutes, except in cases where the  
50 person convicted entered and was convicted on a plea of guilty, in which

- 1 case the evidence shall be preserved for the earlier of three years from the  
2 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 homicide  
19 and rape in which no charges are filed shall be preserved for the period of  
20 time that the crime remains unsolved.
- 21 (6) A governmental entity in custody of biological evidence unrelated to a  
22 criminal investigation or prosecution referenced by subdivisions (1), (2), or  
23 (3) of this subsection may dispose of the evidence in accordance with the  
24 rules of its governing 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 to~~  
37 ~~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 to dispose of the evidence if the  
42 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 subsection shall require the governmental entity custodial agency~~  
5 ~~to take reasonable measures to remove or preserve portions of evidence suitable for future~~  
6 ~~biological testing or likely to contain biological evidence related to the offense through~~  
7 ~~cuttings, swabs, or other means consistent with the best scientific methods available at the time~~  
8 ~~in a quantity sufficient to permit DNA testing before returning or disposing of the evidence.~~  
9 ~~The court may provide the defendant an opportunity to take reasonable measures to preserve~~  
10 ~~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 shall 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 shall be retained.

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

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

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

36 "**§ 15A-269. Request for postconviction DNA testing.**

37 (a) A defendant may make a motion before the trial court that entered the judgment of  
38 conviction against the defendant for performance of DNA testing and, if testing complies with  
39 FBI requirements, uploading to CODIS of any profiles obtained from the testing, if the  
40 biological evidence that meets all of the following conditions:

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

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

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

7 (b1) If the court orders DNA testing, such testing shall be conducted by an ACLAD/LAB  
8 accredited facility mutually agreed upon by the petitioner and the State and approved by the  
9 court. If the parties cannot agree, the court shall designate the testing facility and provide the  
10 parties with reasonable opportunity to be heard on the issue.

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

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

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

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

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

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

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

33 **"§ 15A-270.1. Right to appeal denial of defendant's motion for DNA testing.**

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

37 **SECTION 7.** This act becomes effective December 1, 2009, and applies to  
38 offenses committed on or after that date.