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SENATE BILL 491

**51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013**

INTRODUCED BY

Cisco McSorley

AN ACT

RELATING TO CRIMINAL PROCEDURE; ENACTING THE POST-CONVICTION  
DNA TESTING ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. SHORT TITLE.--This act may be cited at the  
"Post-Conviction DNA Testing Act".

SECTION 2. LEGISLATIVE INTENT.--The legislature finds  
that:

A. existing New Mexico law regarding consideration  
of new evidence post-conviction fails to adequately account for  
the enduring probative value of DNA evidence;

B. United States Attorney General Eric Holder  
expressed his hope, in the interest of justice and identifying  
the true perpetrators of crimes, that "all levels of government  
will follow the federal government's lead by working to expand

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1 access to DNA evidence";

2 C. emerging DNA testing technologies can enhance  
3 the quality of justice;

4 D. the scientifically reliable results of DNA  
5 testing provide the certainty and finality that bolster the  
6 public's trust in New Mexico's criminal justice system;

7 E. in addition to the wrongfully convicted and  
8 their families, crime victims, law enforcement, prosecutors,  
9 courts and the public are harmed whenever individuals guilty of  
10 crimes elude justice while innocent individuals are imprisoned  
11 for crimes they did not commit; and

12 F. New Mexico must enhance its procedures for  
13 considering post-conviction DNA testing so that all credible  
14 claims of innocence based on newly discovered evidence can be  
15 properly evaluated.

16 SECTION 3. DEFINITIONS.--As used in the Post-Conviction  
17 DNA Testing Act:

18 A. "biological evidence" means the contents of a  
19 sexual assault examination kit and any item that contains  
20 blood, semen, hair, saliva, skin tissue, fingernail scrapings,  
21 bone, bodily fluids or other identifiable biological material  
22 that was collected as part of the criminal investigation or may  
23 reasonably be used to incriminate or exculpate any person for  
24 the offense. This definition applies whether that material is  
25 catalogued separately, such as on a slide, swab or in a test

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1 tube, or is present on other evidence, including clothing,  
2 ligatures, bedding or other household material, such as  
3 drinking cups and cigarettes; and

4 B. "document" or "documents" means any tangible  
5 thing upon which any expression, communication or  
6 representation has been recorded by any means, and includes any  
7 writing, including electronic writing; recording; drawing; map;  
8 graph or chart; photograph; and other data compilation in the  
9 actual or constructive possession, custody, care or control of  
10 the government that pertains, directly or indirectly, in whole  
11 or in part, to any other matter relevant to the issues  
12 addressed in the Post-Conviction DNA Testing Act.

13 SECTION 4. PETITION FOR POST-CONVICTION DNA TESTING.--

14 Notwithstanding any other provision of law governing  
15 post-conviction relief, a person who is convicted of a crime  
16 and who asserts that the person did not commit that crime may  
17 at any time file a petition requesting forensic DNA testing of  
18 any biological evidence secured in relation to the  
19 investigation or prosecution attendant to the conviction.

20 Persons eligible for testing shall include any of the  
21 following:

22 A. persons currently incarcerated, civilly  
23 committed, on parole or probation or subject to sex offender  
24 registration;

25 B. persons convicted on a plea of not guilty,

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1 guilty or nolo contendere;

2 C. persons deemed to have provided a confession or  
3 admission related to the crime, either before or after  
4 conviction; and

5 D. persons who have finished serving their  
6 sentences.

7 SECTION 5. PROCEEDINGS.--A petitioner pursuant to the  
8 provisions of Section 4 of the Post-Conviction DNA Testing Act  
9 shall be granted full, fair and prompt proceedings upon the  
10 filing of a motion pursuant to that act. The petitioner shall  
11 serve a copy of such motion upon the attorney for the state.  
12 The state shall file its response to the motion within thirty  
13 days of the receipt of service. The court shall hear the  
14 motion no sooner than thirty days and no later than ninety days  
15 after its filing.

16 SECTION 6. ORDER FOR POST-CONVICTION TESTING.--The court  
17 shall order testing upon the filing of a motion for post-  
18 conviction DNA testing, but only after the court provides the  
19 state with notice and an opportunity to respond and the court  
20 holds a hearing on the motion in which it finds:

21 A. a reasonable probability that the petitioner  
22 would not have been convicted or would have received a lesser  
23 sentence if favorable results had been obtained through DNA  
24 testing at the time of the original prosecution;

25 B. one or more of the items of evidence that the

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1 petitioner seeks to have tested still exist;

2 C. the evidence to be tested was secured in  
3 relation to the offense underlying the challenged conviction  
4 and:

5 (1) was not previously subjected to DNA  
6 testing; or

7 (2) although previously subjected to DNA  
8 testing, can be subjected to additional DNA testing that could  
9 provide a reasonable likelihood of more probative results;

10 D. the chain of custody of the evidence to be  
11 tested establishes that the evidence has not been tampered  
12 with, replaced or altered in any material respect or, if the  
13 chain of custody does not establish the integrity of the  
14 evidence, the testing itself has the potential to establish the  
15 integrity of the evidence. For purposes of the Post-Conviction  
16 DNA Testing Act, evidence that has been in the custody of law  
17 enforcement, other governmental officials or a public or  
18 private hospital shall be presumed to satisfy the  
19 chain-of-custody requirement of this subsection, absent  
20 specific evidence of material tampering, replacement or  
21 alteration; and

22 E. the application for testing is made to  
23 demonstrate innocence or the appropriateness of a lesser  
24 sentence and not solely to unreasonably delay the execution of  
25 sentence or the administration of justice.

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1           **SECTION 7. COURT-ORDERED ACCESS TO COMBINED DNA INDEX**

2           SYSTEM.--For purposes of making an application pursuant to  
3           Section 31-1A-2 NMSA 1978, for purposes of making a credible  
4           application for executive clemency or, before trial, for  
5           purposes of obtaining exculpatory evidence, a court may order  
6           that a law enforcement entity that has access to the combined  
7           DNA index system submit the DNA profile obtained from probative  
8           biological material from crime scene evidence to determine  
9           whether it matches a profile of a known individual or a profile  
10          from an unsolved crime. The petitioner must show that the DNA  
11          profile derived from probative biological material from crime  
12          scene evidence complies with the federal bureau of  
13          investigation's requirements for the uploading of crime scene  
14          profiles to the national DNA index system.

15           **SECTION 8. COUNSEL.--**

16           A. The court may appoint counsel for an indigent  
17          petitioner at any time during proceedings pursuant to the  
18          Post-Conviction DNA Testing Act.

19           B. If the petitioner has filed pro se, the court  
20          shall appoint counsel for the petitioner upon a showing that  
21          DNA testing may be material to the petitioner's claim of  
22          wrongful conviction.

23           C. The court, in its discretion, may refer pro se  
24          requests for DNA testing to qualified parties for further  
25          review, without appointing the parties as counsel at that time.

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1 Such qualified parties may include, but shall not be limited  
2 to, indigent defense organizations or clinical legal education  
3 programs.

4 D. If the petitioner has retained private pro bono  
5 counsel that may include, but shall not be limited to, counsel  
6 from a nonprofit organization that represents indigent persons,  
7 the court may, in its discretion, award reasonable attorney  
8 fees and costs at the conclusion of the litigation.

9 SECTION 9. DISCOVERY.--

10 A. At any time after a petition has been filed  
11 pursuant to the Post-Conviction DNA Testing Act, the court may  
12 order:

13 (1) the state to locate and provide the  
14 petitioner with any documents, notes, logs or reports relating  
15 to items of physical evidence collected in connection with the  
16 case or otherwise assist the petitioner in locating items of  
17 biological evidence that the state contends have been lost or  
18 destroyed;

19 (2) the state to take reasonable measures to  
20 locate biological evidence that may be in its custody;

21 (3) the state to assist the petitioner in  
22 locating evidence that may be in the custody of a public or  
23 private hospital, public or private laboratory or other  
24 facility; and

25 (4) the production of laboratory documents of

1 analyses performed from the time of evidence intake to  
2 disposition, in the original form provided by the laboratory as  
3 prepared in connection with the examination or analysis of any  
4 items collected as evidence that may contain biological  
5 material. This includes the underlying data and laboratory  
6 notes prepared in connection with DNA tests, presumptive tests  
7 for the presence of biological material, serological tests and  
8 analyses of trace evidence, if the evidence had been subjected  
9 to such testing. Any and all items from the requested case  
10 file shall be made available, including digital files and  
11 non-photocopied, photograph-quality prints of photographs  
12 taken.

13 B. If the prosecution or the petitioner previously  
14 conducted any DNA or other biological-evidence testing without  
15 knowledge of the other party, such testing shall be revealed in  
16 the motion for testing or response.

17 C. If the court orders new post-conviction DNA  
18 testing in connection with a proceeding brought pursuant to the  
19 Post-Conviction DNA Testing Act, the court shall order the  
20 production of any laboratory reports prepared in connection  
21 with the DNA testing. The court may, in its discretion, also  
22 order production of the underlying data or other laboratory  
23 documents.

24 D. The results of any post-conviction DNA testing  
25 conducted pursuant to the Post-Conviction DNA Testing Act shall

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1 be disclosed to the prosecution, the petitioner and the court.

2 E. Upon receipt of a motion for post-conviction DNA  
3 testing, the state shall prepare an inventory of the evidence  
4 related to the case and issue a copy of the inventory to the  
5 prosecution, the petitioner and the court.

6 SECTION 10. PRESERVATION OF EVIDENCE.--

7 A. Notwithstanding any other provision of law,  
8 every appropriate governmental entity shall retain and  
9 catalogue each item of physical evidence that contains  
10 biological material secured in connection with a criminal case  
11 in the amount and manner sufficient to develop a DNA profile  
12 from the biological material contained in or included on the  
13 evidence for the period of time that any person is  
14 incarcerated, civilly committed, on parole or probation or  
15 subject to sex offender registration.

16 B. The requirements set forth in this section shall  
17 apply with or without the filing of a petition for post-  
18 conviction DNA testing.

19 C. In cases where a petition for post-conviction  
20 DNA testing has been filed pursuant to the Post-Conviction DNA  
21 Testing Act, the state shall prepare an inventory of the  
22 evidence related to the case and submit a copy of the inventory  
23 to the petitioner and the court.

24 D. If biological evidence is destroyed after the  
25 filing of a petition pursuant to the Post-Conviction DNA

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1 Testing Act, the court may impose appropriate sanctions on the  
2 responsible party or parties. If the court finds that  
3 biological evidence was destroyed in violation of the  
4 provisions of the Post-Conviction DNA Testing Act, it shall  
5 consider appropriate remedies.

6 E. The requirements set forth in this section shall  
7 apply to biological evidence that is in the custody of a law  
8 enforcement agency in New Mexico on the effective date of the  
9 Post-Conviction DNA Testing Act.

10 SECTION 11. CHOICE OF LABORATORY.--

11 A. If the court orders DNA testing, such testing  
12 shall be conducted by a facility mutually agreed upon by the  
13 petitioner and the state and approved by the court.

14 B. If the parties cannot agree, the court shall  
15 designate the testing facility and provide parties with a  
16 reasonable opportunity to be heard on the choice-of-laboratory  
17 issue.

18 C. The court shall impose reasonable conditions on  
19 the testing to protect the parties' interests in the integrity  
20 of the evidence and the testing process.

21 SECTION 12. PAYMENT.--

22 A. If a state or county crime laboratory performs  
23 post-conviction DNA testing pursuant to the Post-Conviction DNA  
24 Testing Act, the state shall bear the costs of such testing.

25 B. If testing is performed at a private laboratory,

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1 the court may require either the petitioner or the state to pay  
2 for the testing, as the interests of justice require.

3 C. If the state or county crime laboratory does not  
4 have the ability or resources to conduct the type of DNA  
5 testing to be performed, the state shall bear the costs of  
6 testing at a private laboratory that has such capabilities.

7 SECTION 13. APPEAL.--The petitioner shall have the right  
8 to appeal a decision denying post-conviction DNA testing.

9 SECTION 14. SUCCESSIVE PETITIONS.--

10 A. If the petitioner has filed a prior petition for  
11 DNA testing pursuant to the Post-Conviction DNA Testing Act or  
12 any other provision of law, the petitioner may file and the  
13 court shall adjudicate a successive petition or petitions  
14 pursuant to the Post-Conviction DNA Testing Act; provided that  
15 the petitioner asserts new or different grounds for relief,  
16 including factual, scientific or legal arguments not previously  
17 presented or the availability of more advanced DNA technology.

18 B. The court may also, in its discretion,  
19 adjudicate any successive petition if the interests of justice  
20 so require.

21 SECTION 15. ADDITIONAL ORDERS.--

22 A. The court may, in its discretion, make such  
23 other orders as may be appropriate, including the designation  
24 of:

25 (1) the type of DNA analysis to be used;

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- 1 (2) the testing procedures to be followed;  
2 (3) the preservation of some portion of the  
3 sample for testing replication;  
4 (4) additional DNA testing, if the results of  
5 the initial testing are inconclusive or otherwise merit  
6 additional scientific analysis; or  
7 (5) the collection and DNA testing of  
8 elimination samples from third parties.

9 B. DNA profile information from biological samples  
10 taken from any person pursuant to a motion for post-conviction  
11 DNA testing shall be exempt from any law requiring disclosure  
12 of information to the public.

13 SECTION 16. PROCEDURE FOLLOWING TEST RESULTS.--

14 A. If the results of forensic DNA testing ordered  
15 pursuant to the Post-Conviction DNA Testing Act are favorable  
16 to the petitioner, the court shall schedule a hearing to  
17 determine the appropriate relief to be granted. Based on the  
18 results of the testing and any evidence or other matter  
19 presented at the hearing, the court shall thereafter enter any  
20 order that serves the interests of justice, including an order:

- 21 (1) setting aside or vacating the petitioner's  
22 judgment of conviction, judgment of not guilty by reason of  
23 mental disease or defect or adjudication of delinquency;  
24 (2) granting the petitioner a new trial or  
25 fact-finding hearing;

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1 (3) granting the petitioner a new sentencing  
2 hearing, commitment hearing or dispositional hearing;

3 (4) discharging the petitioner from custody;

4 (5) specifying the disposition of any evidence  
5 that remains after the completion of the testing;

6 (6) granting the petitioner additional  
7 discovery on matters related to DNA test results or the  
8 conviction or sentence being challenged, including documents  
9 pertaining to the original criminal investigation or the  
10 identities of other suspects; and

11 (7) directing the state to place any  
12 unidentified DNA profiles obtained from post-conviction DNA  
13 testing into state or federal databases.

14 B. If the results of the tests are not favorable to  
15 the petitioner, the court:

16 (1) shall dismiss the petition; and

17 (2) may make further orders that are  
18 appropriate, including those that:

19 (a) provide that the parole board or a  
20 probation department be notified of the test results; and

21 (b) request that the petitioner's DNA  
22 profile be added to the state's convicted offender database.

23 SECTION 17. REACTIVATION OF VICTIM SERVICES.--When a  
24 motion is filed to vacate a conviction based on favorable post-  
25 conviction DNA testing results, the state may, upon request,

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1 reactivate victim services for the victim of the crime being  
2 reinvestigated during the reinvestigation of the case, the  
3 pendency of the proceedings and, as determined by the court  
4 after consultation with the victim or victim advocate,  
5 following final adjudication of the case.

6 SECTION 18. CONSENT.--

7 A. Nothing in the Post-Conviction DNA Testing Act  
8 shall prohibit a convicted person and the state from consenting  
9 to and conducting post-conviction DNA testing by agreement of  
10 the parties without filing a motion for post-conviction DNA  
11 testing pursuant to the Post-Conviction DNA Testing Act.

12 B. Notwithstanding any other provision of law  
13 governing post-conviction relief, if DNA test results are  
14 obtained under testing conducted upon consent of the parties  
15 that are favorable to the petitioner, the petitioner may file  
16 and the court shall adjudicate a motion for post-conviction  
17 relief based on the DNA test results pursuant to Section 16 of  
18 the Post-Conviction DNA Testing Act.

19 SECTION 19. EFFECTIVE DATE.--The effective date of the  
20 provisions of this act is July 1, 2013.