

**422.285 Person convicted of certain offenses may request DNA testing -- Right to counsel -- Deposit -- Court orders -- Cost -- Access to reports -- Preservation of evidence -- Dismissal -- Hearing when results favorable to petitioner.**

- (1)
  - (a) Except as provided in paragraph (b) of this subsection, a person who was convicted of a capital offense, a Class A felony, a Class B felony, or any offense designated a violent offense under KRS 439.3401 and who meets the requirements of this section may at any time request the forensic deoxyribonucleic acid (DNA) testing and analysis of any evidence that is in the possession or control of the court or Commonwealth, that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence.
  - (b) This subsection shall not apply to offenses under KRS Chapter 218A, unless the offense was accompanied by another offense outside of that chapter for which testing is authorized by paragraph (a) of this subsection.
- (2) Upon receipt of a request under this section accompanied by a supporting affidavit containing sufficient factual averments to support the request from a person who meets the requirements of subsection (5)(f) of this section at the time the request is made for an offense to which the DNA relates, the court shall:
  - (a) If the petitioner is not represented by counsel, appoint the Department of Public Advocacy to represent the petitioner for purposes of the request, pursuant to KRS 31.110(2)(c); or
  - (b) If the petitioner is represented by counsel or waives appointment of counsel in writing or if the Department of Public Advocacy has previously withdrawn from representation of the petitioner for purposes of the request, require the petitioner to deposit an amount certain with the court sufficient to cover the reasonable costs of the testing being requested.
- (3) Counsel representing the petitioner shall be provided a reasonable opportunity to investigate the petitioner's request and shall be permitted to supplement the request. Pursuant to KRS 31.110(2)(c), the petitioner shall have no further right to counsel provided by the Department of Public Advocacy on the matter if counsel determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his or her own expense. If the Department of Public Advocacy moves to withdraw as counsel for petitioner and the court grants the motion, the court shall proceed as directed under subsection (2)(b) of this section.
- (4) Upon receipt of the deposit required under subsection (2)(b) of this section or a motion from counsel provided by the Department of Public Advocacy to proceed, the court shall provide notice to the prosecutor and an opportunity to respond to the petitioner's request.
- (5) After due consideration of the request and any supplements and responses thereto, the court shall order DNA testing and analysis if the court finds that all of the following apply:
  - (a) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through

DNA testing and analysis;

- (b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted;
  - (c) The evidence was not previously subjected to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and may resolve an issue not previously resolved by the previous testing and analysis;
  - (d) Except for a petitioner sentenced to death, the petitioner was convicted of the offense after a trial or after entering an Alford plea;
  - (e) Except for a petitioner sentenced to death, the testing is not sought for touch DNA, meaning casual or limited contact DNA; and
  - (f) The petitioner is still incarcerated or on probation, parole, or other form of correctional supervision, monitoring, or registration for the offense to which the DNA relates.
- (6) After due consideration of the request and any supplements and responses thereto, the court may order DNA testing and analysis if the court finds that all of the following apply:
- (a) A reasonable probability exists that either:
    - 1. The petitioner's verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or
    - 2. DNA testing and analysis will produce exculpatory evidence;
  - (b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be conducted;
  - (c) The evidence was not previously subject to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and that may resolve an issue not previously resolved by the previous testing and analysis;
  - (d) Except for a petitioner sentenced to death, the petitioner was convicted of the offense after a trial or after entering an Alford plea;
  - (e) Except for a petitioner sentenced to death, the testing is not sought for touch DNA, meaning casual or limited contact DNA; and
  - (f) The petitioner is still incarcerated or on probation, parole, or other form of correctional supervision, monitoring, or registration for the offense to which the DNA relates.
- (7) The provisions of KRS 17.176 to the contrary notwithstanding, the petitioner shall pay the costs of all testing and analysis ordered under this section. If the court determines that the petitioner is a needy person using the standards set out in KRS 31.120 and the Department of Public Advocacy so moves, the court shall treat the costs of testing and analysis as a direct expense of the defense for the purposes of authorizing payment under KRS 31.185.
- (8) If the prosecutor or defense counsel has previously subjected evidence to DNA testing and analysis, the court shall order the prosecutor or defense counsel to provide all the parties and the court with access to the laboratory reports that were prepared in connection with the testing and analysis, including underlying

data and laboratory notes. If the court orders DNA testing and analysis pursuant to this section, the court shall order the production of any laboratory reports that are prepared in connection with the testing and analysis and may order the production of any underlying data and laboratory notes.

- (9) If a petition is filed pursuant to this section, the court shall order the state to preserve during the pendency of the proceeding all evidence in the state's possession or control that could be subjected to DNA testing and analysis. The state shall prepare an inventory of the evidence and shall submit a copy of the inventory to the defense and the court. If the evidence is intentionally destroyed after the court orders its preservation, the court may impose appropriate sanctions, including criminal contempt.
- (10) The court may make any other orders that the court deems appropriate, including designating any of the following:
  - (a) The preservation of some of the sample for replicating the testing and analysis; and
  - (b) Elimination samples from third parties.
- (11) If the results of the DNA testing and analysis are not favorable to the petitioner, the court shall dismiss the petition. The court may make further orders as it deems appropriate, including any of the following:
  - (a) Notifying the Department of Corrections and the Parole Board;
  - (b) Requesting that the petitioner's sample be added to the Department of Kentucky State Police database; and
  - (c) Providing notification to the victim or family of the victim.
- (12) Notwithstanding any other provision of law that would bar a hearing as untimely, if the results of the DNA testing and analysis are favorable to the petitioner, the court shall order a hearing and make any further orders that are required pursuant to this section or the Kentucky Rules of Criminal Procedure.

**Effective:** June 29, 2017

**History:** Amended 2017 Ky. Acts ch. 167, sec. 17, effective June 29, 2017. -- Amended 2013 Ky. Acts ch. 77, sec. 1, effective June 25, 2013. -- Amended 2007 Ky. Acts ch. 85, sec. 307, effective June 26, 2007. -- Created 2002 Ky. Acts ch. 154, sec. 1, effective July 15, 2002.

**Legislative Research Commission Note (7/15/2002).** Under the authority of KRS 7.136, the Reviser of Statutes has corrected a manifest clerical or typographical error in the second sentence of subsection (5) of this section as enacted in 2002 Ky. Acts ch. 154, sec. 1, by inserting "and" after the second appearance of "testing and analysis."