

## LEGISLATIVE BILL 659

Approved by the Governor May 25, 2001

Introduced by Chambers, 11

AN ACT relating to criminal procedure; to amend sections 29-2101 to 29-2103, 29-3922, 29-3929, and 29-3930, Reissue Revised Statutes of Nebraska, and sections 29-3921 and 29-3931, Revised Statutes Supplement, 2000; to adopt the DNA Testing Act; to change provisions relating to motions for new trial and the County Revenue Assistance Act; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 10 of this act shall be known and may be cited as the DNA Testing Act.

Sec. 2. It is the intent of the Legislature that wrongfully convicted persons have an opportunity to establish their innocence through deoxyribonucleic acid, DNA, testing.

Sec. 3. The Legislature finds and declares:

(1) Over the past decade, DNA testing has emerged as the most reliable forensic technique for identifying persons when biological material is found at a crime scene or transferred from the victim to the person responsible and transported from the crime scene;

(2) Because of its scientific precision and reliability, DNA testing can, in some cases, conclusively establish the guilt or innocence of a criminal defendant. In other cases, DNA may not conclusively establish guilt or innocence but may have significant probative value to a finder of fact;

(3) While DNA testing is increasingly commonplace in pretrial investigations currently, it was not widely available in cases prior to 1994. Moreover, new forensic DNA testing procedures, such as polymerase chain reaction amplification, DNA short tandem repeat analysis, and mitochondrial DNA analysis, make it possible to obtain results from minute samples that previously could not be tested and to obtain more informative and accurate results than earlier forms of forensic DNA testing could produce. As a result, in some cases, convicted inmates have been exonerated by new DNA tests after earlier tests had failed to produce definitive results;

(4) Because DNA testing is often feasible on relevant biological material that is decades old, it can in some circumstances prove that a conviction which predated the development of DNA testing was based upon incorrect factual findings. DNA evidence produced even decades after a conviction can provide a more reliable basis for establishing a correct verdict than any evidence proffered at the original trial. DNA testing, therefor, can and has resulted in postconviction exoneration of innocent men and women;

(5) In the past decade, there have been multiple postconviction exonerations in the United States and Canada based upon DNA testing. In addition, a disturbing number of persons sentenced to death have been exonerated through postconviction DNA testing, some of these exonerations coming within days of their execution date;

(6) DNA testing responds to serious concerns regarding wrongful convictions, especially those arising out of mistaken eyewitness identification testimony; and

(7) There is a compelling need to ensure the preservation of biological material for postconviction DNA testing, for a limited period.

Sec. 4. For purposes of the DNA Testing Act, exculpatory evidence means evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody.

Sec. 5. (1) Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing of any biological material that:

(a) Is related to the investigation or prosecution that resulted in such judgment;

(b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and

(c) Was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable

likelihood of more accurate and probative results.

(2) Notice of such motion shall be served by the person in custody upon the county attorney of the county in which the prosecution was held.

(3) Upon receiving notice of a motion filed pursuant to subsection (1) of this section, the county attorney shall take such steps as are necessary to ensure that any remaining biological material that was secured by the state or a political subdivision in connection with the case is preserved pending the completion of proceedings under the DNA Testing Act.

(4) The county attorney shall prepare an inventory of all evidence that was secured by the state or a political subdivision in connection with the case and shall submit a copy of the inventory to the person or the person's counsel and to the court. If evidence is intentionally destroyed after notice of a motion filed pursuant to this section, the court shall impose appropriate sanctions, including criminal contempt.

(5) Upon consideration of affidavits or after a hearing, the court shall order DNA testing pursuant to a motion filed under subsection (1) of this section upon a determination that such testing was effectively not available at the time of trial, that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and that such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.

(6) All forensic DNA tests shall be performed by a laboratory which is accredited by the American Society of Crime Laboratory Directors - LAB - Laboratory Accreditation Board or the National Forensic Science Technology Center or by any other national accrediting body or public agency which has requirements that are substantially equivalent to or more comprehensive than those of the society or center.

Sec. 6. The cost of DNA testing ordered under subsection (5) of section 5 of this act shall be paid by the person filing the motion, unless the court determines such person to be indigent. If the person filing such motion is determined by the court to be indigent, the costs shall be paid by the state in the following manner:

(1) If the Commission on Public Advocacy has been appointed to represent the person filing the motion, as determined under section 7 of this act, the costs of testing shall be paid by the commission from the County Revenue Assistance Fund; and

(2) If the Commission on Public Advocacy has not been appointed to represent the person filing the motion, the court shall hold a hearing to determine the costs for DNA testing. The court shall order the commission to pay such costs. The order shall be forwarded by the clerk of the court to the commission, along with copies of all invoices for such DNA testing. Upon receipt, the commission shall pay such costs from the County Revenue Assistance Fund.

Sec. 7. Upon a showing by the person that DNA testing may be relevant to the person's claim of wrongful conviction, the court shall appoint counsel for an indigent person as follows:

(1) The court shall first contact the chief counsel for the Commission on Public Advocacy to inquire if the commission is able to accept the appointment. If the chief counsel determines that the commission can accept the appointment, then the court shall appoint the commission pursuant to the County Revenue Assistance Act; and

(2) If the chief counsel declines the appointment because of a conflict of interest or the case would exceed the caseload standards set by the commission, then the court shall appoint an attorney licensed to practice law in this state with at least five years experience in felony litigation to represent the indigent person at all stages of the proceedings. Counsel appointed under this subdivision, other than the public defender, shall obtain leave of court before proceeding beyond an initial direct appeal to either the Court of Appeals or the Supreme Court to any further direct, collateral, or postconviction appeals to state or federal courts. Counsel appointed under this subdivision shall file an application for fees and expenses in the district court which appointed him or her for all fees and expenses reasonable necessary to permit him or her to effectively and competently represent the client. The court, upon hearing the application, shall fix reasonable attorney's fees and expenses. The court's order shall require that such fees and expenses be paid by the Commission on Public Advocacy from the County Revenue Assistance Fund. Upon receipt of the order, the commission shall pay such fees and expenses in the full amount determined by the court.

Sec. 8. (1) The results of the final DNA or other forensic testing ordered under subsection (5) of section 5 of this act shall be disclosed to the county attorney, to the person filing the motion, and to the person's

attorney.

(2) Upon receipt of the results of such testing, any party may request a hearing before the court when such results exonerate or exculpate the person. Following such hearing, the court may, on its own motion or upon the motion of any party, vacate and set aside the judgment and release the person from custody based upon final testing results exonerating or exculpating the person.

(3) If the court does not grant the relief contained in subsection (2) of this section, any party may file a motion for a new trial under sections 29-2101 to 29-2103.

Sec. 9. Nothing in the DNA Testing Act shall be construed to limit the circumstances under which a person may obtain DNA testing or other postconviction relief under any other provision of law.

Sec. 10. (1) Notwithstanding any other provision of law and subject to subsection (2) of this section, state agencies and political subdivisions shall preserve any biological material secured in connection with a criminal case for such period of time as any person remains incarcerated in connection with that case.

(2) State agencies or political subdivisions that have secured biological material for use in criminal cases may dispose of biological material before expiration of the period of time specified in subsection (1) of this section if:

(a) The state agency or political subdivision which secured the biological material for use in a criminal case notifies any person who remains incarcerated in connection with the case, such person's counsel of record, or if there is no counsel of record, the public defender, if applicable, in the county in which the judgment of conviction of such person was entered. The notice shall include:

(i) The intention of the state agency or political subdivision to dispose of the material after ninety days after receipt of the notice; and

(ii) The provisions of the DNA Testing Act;

(b) The person, such person's counsel of record, or the public defender does not file a motion under section 5 of this act within ninety days after receipt of notice under this section; and

(c) No other provision of law or court order requires that such biological material be preserved.

(3) The person, such person's counsel of record, or the public defender who receives notice under subdivision (2)(a) of this section, may, in lieu of a motion under section 5 of this act, request in writing to take possession of the biological material for the purpose of having the material available for any future discovery of scientific or forensic techniques. Copies of any such written request shall be provided to both the court and to the county attorney. The costs of acquisition, preservation, and storage of any such material shall be at the expense of the person.

Sec. 11. Section 29-2101, Reissue Revised Statutes of Nebraska, is amended to read:

29-2101. A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following ~~reasons~~ grounds affecting materially his or her substantial rights: (1) Irregularity in the proceedings of the court, ~~or~~ of the prosecuting attorney, or of the witnesses for the state, ~~or in~~ any order of the court, ~~or~~ abuse of discretion, by which the defendant was prevented from having a fair trial; (2) misconduct of the jury, ~~of~~ the prosecuting attorney, or of the witnesses for the state; (3) accident or surprise which ordinary prudence could not have guarded against; (4) ~~that~~ the verdict is not sustained by sufficient evidence or is contrary to law; (5) newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial; ~~or~~ (6) newly discovered exculpatory DNA or similar forensic testing evidence obtained under the DNA Testing Act; or (7) error of law occurring at the trial.

Sec. 12. Section 29-2102, Reissue Revised Statutes of Nebraska, is amended to read:

29-2102. The ~~causes enumerated~~ grounds set forth in subdivisions (2), (3), and ~~(5)~~ (6) of section 29-2101 ~~must be sustained~~ shall be supported by affidavits showing ~~their~~ the truth, of such grounds, and the grounds may be controverted by affidavits. The ground set forth in subdivision (5) of section 29-2101 shall be supported by evidence of the truth of the ground in the form of affidavits, depositions, or oral testimony.

Sec. 13. Section 29-2103, Reissue Revised Statutes of Nebraska, is amended to read:

29-2103. (1) A motion for new trial shall be made by written application and may be filed either during or after the term of the court at

which the verdict was rendered.

(2) A motion for a new trial shall state the grounds under section 29-2101 which are the basis for the motion and shall be supported by evidence as provided in section 29-2102.

(3) A motion for new trial based on the grounds set forth in subdivision (1), (2), (3), (4), or (7) of section 29-2101 shall be filed within ten days after the verdict was rendered unless such filing is unavoidably prevented, and the grounds for such motion may be stated by directly incorporating the appropriate language of section 29-2101 without further particularity.

(4) A motion for new trial based on the grounds set forth in subdivision (5) of section 29-2101 shall be filed within a reasonable time after the discovery of the new evidence and cannot be filed more than three years after the date of the verdict.

(5) A motion for new trial based on the grounds set forth in subdivision (6) of section 29-2101 shall be filed within ninety days after a final order is issued under section 8 of this act or within ninety days after the hearing if no final order is entered, whichever occurs first. The application for a new trial shall be by motion upon written grounds, and may be filed either within or without the term at which the verdict is rendered. It shall, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, be filed within ten days after the verdict was rendered unless unavoidably prevented. In assigning the grounds for such motion, it shall be sufficient to assign the same in the language of the statute and without further or other particularity. In any criminal case where it shall be made to appear upon the motion of the defendant for a new trial, supported by affidavits, depositions or oral testimony, that the defendant has discovered new evidence material to his defense which he could not with reasonable diligence have discovered and produced during the term within which the verdict upon which he was sentenced was rendered, the district court may set aside such sentence and grant a new trial, PROVIDED, that such motion is filed within a reasonable time after the discovery of the new evidence, AND PROVIDED FURTHER, that such motion must be filed within three years after the date of such verdict, and such motion and the procedure herein provided shall be the exclusive method and procedure for reviewing criminal cases after the expiration of the term at which such verdict is rendered.

Sec. 14. Section 29-3921, Revised Statutes Supplement, 2000, is amended to read:

29-3921. The County Revenue Assistance Fund is created. The fund shall be used for the operations of the commission. The fund shall consist of money appropriated from the General Fund and money remitted pursuant to section 29-3931. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

Sec. 15. Section 29-3922, Reissue Revised Statutes of Nebraska, is amended to read:

29-3922. For purposes of the County Revenue Assistance Act:

(1) Chief counsel means an attorney appointed to be the primary administrative officer of the commission pursuant to section 29-3928;

(2) Commission means the Commission on Public Advocacy;

(3) Commission staff means attorneys, investigators, and support staff who are performing work for the capital litigation division, appellate division, DNA testing division, and major case resource center;

(4) Contracting attorney means an attorney contracting to act as a public defender pursuant to sections 23-3404 to 23-3408;

~~(4)~~ (5) Court-appointed attorney means an attorney other than a contracting attorney or a public defender appointed by the court to represent an indigent person;

~~(5)~~ (6) Indigent defense services means legal services provided to indigent persons by an indigent defense system;

~~(6)~~ (7) Indigent defense system means a system of providing services, including any services necessary for litigating a case, by a contracting attorney, court-appointed attorney, or public defender;

~~(7)~~ (8) Indigent person means a person who is indigent and unable to obtain legal counsel as determined pursuant to rules of the Supreme Court; and

~~(8)~~ (9) Public defender means an attorney appointed or elected pursuant to sections 23-3401 to 23-3403.

Sec. 16. Section 29-3929, Reissue Revised Statutes of Nebraska, is amended to read:

29-3929. The primary duties of the chief counsel shall be to

provide direct legal services to indigent defendants, and the chief counsel shall:

- (1) Supervise the operations of the appellate division, the capital litigation division, the DNA testing division, and the major case resource center;
- (2) Prepare a budget and disburse funds for the operations of the commission;
- (3) Present to the commission an annual report on the operations of the commission, including an accounting of all funds received and disbursed, an evaluation of the cost effectiveness of the commission, and recommendations for improvement;
- (4) Convene or contract for conferences and training seminars related to criminal defense;
- (5) Perform other duties as directed by the commission;
- (6) Establish and administer projects and programs for the operation of the commission;
- (7) Appoint and remove employees of the commission and delegate appropriate powers and duties to them;
- (8) Adopt and promulgate rules and regulations for the management and administration of policies of the commission and the conduct of employees of the commission;
- (9) Transmit monthly to the commission a report of the operations of the commission for the preceding calendar month;
- (10) Execute and carry out all contracts, leases, and agreements authorized by the commission with agencies of federal, state, or local government, corporations, or persons; and
- (11) Exercise all powers and perform all duties necessary and proper in carrying out his or her responsibilities.

Sec. 17. Section 29-3930, Reissue Revised Statutes of Nebraska, is amended to read:

29-3930. The following divisions are established within the commission:

- (1) The capital litigation division shall be available to assist in the defense of capital cases in Nebraska, subject to caseload standards of the commission;
- (2) The appellate division shall be available to prosecute appeals to the Court of Appeals and the Supreme Court, subject to caseload standards of the commission; ~~and~~
- (3) The DNA testing division shall be available to assist in representing persons who are indigent who have filed a motion pursuant to the DNA Testing Act, subject to caseload standards; and
- (4) The major case resource center shall be available to assist public defenders, contracting attorneys, or court-appointed attorneys with the defense of a felony offense, subject to caseload standards of the commission.

Sec. 18. Section 29-3931, Revised Statutes Supplement, 2000, is amended to read:

29-3931. ~~(1)~~ In cases in which the capital litigation division, ~~or appellate division, or major case resource center~~ has been appointed, the chief counsel shall make a showing to the county or district court for the county in which the prosecution arose regarding the commission's cost of defense. The chief counsel shall consider the complexity of the case, the amount of expenses involved, and the ability of the county to pay the costs, in determining how often to make a showing to the court. A showing shall be made no more than once a month and shall be made once after the case is completed. The cost shall be based upon ~~(1)~~ ~~(a)~~ the actual time spent by commission staff attorneys and their hourly rates of pay, including benefits, ~~(2)~~ ~~(b)~~ a reasonable amount for administrative and support staff time, ~~(3)~~ ~~(c)~~ the actual expenditures for litigation support, such as expert witnesses, depositions, photocopying, printing, and travel and lodging expenses, and ~~(4)~~ ~~(d)~~ a reasonable amount for office overhead, including rent, telephone, and utilities. The cost of defense shall not include any expense incurred by the commission's staff for travel time or mileage between the commission's office and the place where the particular case's venue is had or for lodging and meals when the staff must be away from the office for more than one day. After a hearing, the county or district court shall order the county to pay one-third of the commission's cost of defense. The county shall pay the costs to the commission which shall remit the amount to the State Treasurer for credit to the County Revenue Assistance Fund. In cases in which commission staff is using money to represent indigent clients and that money is associated with any federal grant money or state match money, the chief counsel shall only bill counties for actual expenditures for litigation support, such as expert witnesses, depositions, photocopying, printing, and

travel and lodging expenses.

(2) In cases under the DNA Testing Act, costs shall be paid as provided in such act.

Sec. 19. Original sections 29-2101 to 29-2103, 29-3922, 29-3929, and 29-3930, Reissue Revised Statutes of Nebraska, and sections 29-3921 and 29-3931, Revised Statutes Supplement, 2000, are repealed.