

The House Committee on Judiciary offers the following substitute to HB 599:

A BILL TO BE ENTITLED  
AN ACT

To amend Title 5 of the Official Code of Georgia Annotated, relating to appeal and error, so as to provide that a request for postconviction DNA testing shall be made through an extraordinary motion for new trial; to provide for postconviction DNA testing of evidence in certain criminal cases; to provide procedures, conditions, and standards for the conduct of postconviction DNA testing of evidence; to provide for appeals by either party in cases where DNA testing is requested; to change provisions relating to when orders, decisions, or judgments are appealable by the state; to amend Article 3 of Chapter 5 of Title 17 of the Official Code of Georgia Annotated, relating to disposition of property seized, so as to provide standards for the retention of evidence in criminal cases; to provide for other related matters; to provide an effective date and applicability; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

**SECTION 1.**

Title 5 of the Official Code of Georgia Annotated, relating to appeal and error, is amended by adding a new subsection to the end of Code Section 5-5-41, relating to general requirements for extraordinary motions for new trial, to read as follows:

"(c)(1) Subject to the provisions of subsections (a) and (b) of this Code section, a person convicted of a serious violent felony as defined in Code Section 17-10-6.1 may make a written motion before the trial court that entered the judgment of conviction in his or her case, for the performance of forensic deoxyribonucleic acid (DNA) testing.

(2) The motion shall be verified by the convicted person and shall provide all of the following information:

(A) Establish that evidence that potentially contains deoxyribonucleic acid (DNA) was obtained in relation to the crime and subsequent indictment, which resulted in his or her conviction;

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(B) Establish that the evidence was not subjected to the testing which is now being requested because the existence of the evidence was unknown to the petitioner or to the petitioner's trial attorney prior to trial or because the technology for the testing was not available at the time of trial;

(C) Establish why the identity of the perpetrator was, or should have been, a significant issue in the case;

(D) Show, in light of all the evidence in the case, how the requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction;

(E) Identify the evidence to be tested by its description and, if known, its present location, its origin and the date, time, and means of its original collection;

(F) Reveal the results of any DNA or other biological evidence testing that was conducted previously by either the prosecution or the defense, if known;

(G) If known, identify the names, addresses, and telephone numbers of all persons or entities who are known or believed to have possession of any evidence described by subparagraphs (A) through (F) of this paragraph, and any persons or entities who have provided any of the information contained in petitioner's motion, indicating which person or entity has which items of evidence or information;

(H) Identify the names, addresses, and telephone numbers of all persons who may testify for the petitioner and identify the subject matter and summary of the facts to which each person may testify;

(I) Affirmatively state that the motion is not made for the purpose of delay; and

(J) Show that the issues raised by the petitioner and the requested DNA testing have not been litigated previously in a prior proceeding in the courts of this state or the United States.

(3) The motion shall be served upon the district attorney and the Attorney General. The state shall file its response, if any, within 60 days of being served with the motion. The state shall be given notice and an opportunity to respond to any hearing conducted pursuant to this subsection.

(4)(A) If, after the state files its response, if any, and the court determines that the motion complies with the requirements of paragraph (2) of this subsection, the court shall order a hearing to occur after the state has filed its response, but not more than 90 days from the date the motion was filed.

(B) The motion shall be heard by the judge who conducted the trial that resulted in the petitioner's conviction unless the presiding judge determines that the trial judge is unavailable.

(C) Upon request of either party, the court may order, in the interest of justice, that the petitioner be at the hearing on the motion. The court may, in its discretion, receive additional memoranda of law or evidence from the parties for up to 30 days after the hearing.

(D) The petitioner and the state may present evidence by sworn and notarized affidavits or testimony; provided, however, any affidavit shall be served on the opposing party at least 15 days prior to the hearing.

(E) The purpose of the hearing shall be to allow the state to be heard on the issue of whether the petitioner's motion complies with the requirements of paragraph (2) of this subsection, whether upon consideration of all of the evidence there is a reasonable probability that the verdict would have been different if the results of the requested DNA testing had been available at the time of trial, and whether the requirements of paragraph (5) of this subsection have been established.

(5) The court shall grant the motion for DNA testing if it determines that the petitioner has met the burden of proof set forth in paragraph (2) of this subsection, and that all of the following have been established:

(A) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;

(B) The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(C) The evidence was not tested previously or, if tested previously, the requested DNA test would provide results that are reasonably more discriminating or probative of the identity of the perpetrator than prior test results;

(D) The motion is not made for the purpose of delay;

(E) The identity of the perpetrator of the crime was a significant issue in the case;

(F) The testing requested employs a scientific method that has reached a scientific state of verifiable certainty such that the procedure rests upon the laws of nature; and

(G) The petitioner has made a prima facie showing that the evidence sought to be tested is material to the issue of the petitioner's identity as the perpetrator of, or accomplice to, the crime, aggravating circumstance, or similar transaction that resulted in the conviction.

(6) If the court orders testing pursuant to this subsection, the court shall determine the method of testing and responsibility for payment for the cost of testing, if necessary, and may require the petitioner to pay the costs of testing if the court determines that the petitioner has the ability to pay. If the petitioner is indigent, the cost shall be paid from the fine and forfeiture fund as provided in Article 3 of Chapter 5 of Title 15.

(7) If the court orders testing pursuant to this subsection, the court shall order that the evidence be tested by the Division of Forensic Sciences of the Georgia Bureau of Investigation. In addition, the court may also authorize the testing of the evidence by a laboratory that meets the standards of the DNA advisory board established pursuant to the DNA Identification Act of 1994, Section 14131 of Title 42 of the United States Code, to conduct the testing. The court shall order that a sample of the petitioner's DNA be submitted to the Division of Forensic Sciences of the Georgia Bureau of Investigation and that the DNA analysis be stored and maintained by the bureau in the DNA data bank.

(8) If a motion is filed pursuant to this subsection the court shall order the state to preserve during the pendency of the proceeding all evidence that contains biological material, stains, fluids, or hair samples in the state's possession or control.

(9) The result of any test ordered under this subsection shall be fully disclosed to the petitioner, the district attorney, and the Attorney General.

(10) The judge shall set forth by written order the reason or reasons for the grant or denial of the motion for new trial filed pursuant to this subsection.

(11) The petitioner or the state may appeal an order, decision, or judgment rendered pursuant to this Code section."

## **SECTION 2.**

Said title is further amended by striking the "or" at the end of paragraph (5) of subsection (a), the period at the end of paragraph (6) of subsection (a) and inserting a "; or", and adding a new paragraph to subsection (a) of Code Section 5-7-1, relating to orders, decisions, or judgments appealable by the state, to read as follows:

"(7) From an order, decision, or judgment of a superior court granting an extraordinary motion for new trial."

## **SECTION 3.**

Article 3 of Chapter 5 of Title 17 of the Official Code of Georgia Annotated, relating to disposition of property seized, is amended by adding new Code sections at the end of the article to read as follows:

"17-5-55.

(a) In all criminal cases, the court shall designate either the clerk of court, the court reporter, or any other officer of the court to be the custodian of any property that is introduced into evidence at trial. Property introduced into evidence shall be identified or tagged with an exhibit number. After verdict and judgment has been entered in any criminal case, the clerk of court or court reporter who has custody of the physical evidence introduced in the case shall inventory the evidence and create a log of the evidence. The

1 log shall contain the case number, style of the case, description of the item, exhibit number,  
2 the name of the custodian, and the location where the physical evidence is stored. If  
3 evidence is transferred to a third party other than the court reporter or the clerk of court, the  
4 log shall be annotated to show the identity of the person or entity receiving the evidence,  
5 the date of the transfer, and the location of the evidence. The signature of any person or  
6 entity to which physical evidence is transferred shall be captured through electronic means  
7 that will be linked to the log of evidence or the use of a property transfer form that will be  
8 filed with the log of evidence. When physical evidence, other than audio or video  
9 recordings, is transferred to any person or entity other than the clerk of court or court  
10 reporter, a photograph or other visual image of the evidence shall be made and placed in  
11 the case file.

12 (b) Physical evidence classified as dangerous or contraband by state or federal law,  
13 including but not limited to items described by state or federal law as controlled substances,  
14 dangerous drugs, explosives, weapons, ammunition, biomedical waste, hazardous  
15 substances, or hazardous waste shall be properly secured in a manner authorized by state  
16 or federal law. This evidence may be transferred to a government agency authorized to  
17 store or dispose of the material.

18 (c) Documents, photographs, and similar evidence shall be maintained and disposed of in  
19 accordance with records retention schedules adopted in accordance with Article 5 of  
20 Chapter 18 of Title 50, known as the 'Georgia Records Act.' Other physical evidence that  
21 contains biological material, stains, fluids, or hair samples that relate to the identity of the  
22 perpetrator of the crime, shall be maintained in accordance with Code Section 17-5-56. A  
23 party to an extraordinary motion for new trial or a habeas corpus action in which DNA  
24 testing is requested that was filed prior to the expiration of the time prescribed for the  
25 preservation of evidence by this Code section, may apply to the court in which the  
26 defendant was convicted for an order directing that the evidence be preserved beyond the  
27 time period prescribed by this Code section and until judgment in the action shall become  
28 final.

29 (d) Except as is otherwise provided in subsections (b) and (c) of this Code section or by  
30 law, following the expiration of the period of time set forth in subsections (b) and (c) of  
31 this Code section, physical evidence may be disposed of in accordance with the provisions  
32 of Article 5 of Chapter 12 of Title 50, known as the 'Disposition of Unclaimed Property  
33 Act' or, in the case of property of historical or instructional value, as provided in Code  
34 Section 17-5-53.

1 17-5-56.

2 (a) Except as otherwise provided in Code Section 17-5-55, on or after the effective date  
3 of this Code section, governmental entities in possession of any physical evidence in a  
4 criminal case, including, but not limited to, a law enforcement agency or a prosecuting  
5 attorney, shall maintain any physical evidence collected at the time of the crime that  
6 contains biological material, stains, fluids, or hair samples that relate to the identity of the  
7 perpetrator of the crime as provided in this Code section. Biological samples collected  
8 directly from any person for use as reference materials for testing or collected for the  
9 purpose of drug or alcohol testing shall not be preserved.

10 (b) In a case in which the death penalty is imposed, the evidence shall be maintained until  
11 the sentence in the case has been carried out. In a case that involves the prosecution of a  
12 serious violent felony as defined by Code Section 17-10-6.1, the evidence shall be  
13 maintained for ten years after judgment in the criminal case becomes final or ten years after  
14 the effective date of this Code section, whichever is later. Evidence in all other felony and  
15 misdemeanor cases may be purged."

#### 16 **SECTION 4.**

17 This Act shall become effective upon its approval by the Governor or upon its becoming law  
18 without such approval. Notwithstanding the provisions of subsection (b) of Code Section  
19 5-5-41, any person convicted of a serious violent felony as defined in Code Section  
20 17-10-6.1, which conviction was imposed prior to the effective date of this Act, who has,  
21 prior to the effective date of this Act, filed an extraordinary motion for new trial, may file an  
22 extraordinary motion for new trial pursuant to Section 1 of this Act if the issue of DNA  
23 testing was not raised in the prior extraordinary motion for new trial. In any extraordinary  
24 motion for new trial allowed pursuant to Section 1 of this Act, the court shall not have  
25 jurisdiction to reconsider any other issue raised in the first extraordinary motion for new trial.  
26 Notwithstanding the provisions of subparagraph (c)(2)(J) of Code Section 5-5-41, any person  
27 convicted of a serious violent felony as defined in Code Section 17-10-6.1, which conviction  
28 was imposed prior to the effective date of this Act, who has, prior to the effective date of this  
29 Act, previously litigated in a court of this state or the United States the issue of  
30 postconviction DNA testing and who was denied DNA testing may file an extraordinary  
31 motion for new trial pursuant to Section 1 of this Act.

#### 32 **SECTION 5.**

33 All laws and parts of laws in conflict with this Act are repealed.