

Senate Bill 119

By: Senators Adelman of the 42nd, Kemp of the 3rd, Meyer von Bremen of the 12th and Reed of the 35th

AS PASSED SENATE

A BILL TO BE ENTITLED

AN ACT

1 To amend Title 5 of the Official Code of Georgia Annotated, relating to appeal and error, so
2 as to provide that a request for postconviction DNA testing shall be made through an
3 extraordinary motion for new trial; to provide for postconviction DNA testing of evidence
4 in certain criminal cases; to provide procedures, limitations, conditions, and standards for the
5 conduct of postconviction DNA testing of evidence; to provide for appeals by either party
6 in cases where DNA testing is requested; to change provisions relating to when orders,
7 decisions, or judgments are appealable by the state; to amend Title 17 of the Official Code
8 of Georgia Annotated, relating to criminal procedure, so as to provide standards for the
9 retention of evidence in criminal cases; to provide for victim notification when an accused
10 files an extraordinary motion for new trial; to provide for other related matters; to provide
11 an effective date and applicability; to repeal conflicting laws; and for other purposes.

12 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

13 **SECTION 1.**

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

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

21 (2) The filing of the motion as provided in paragraph (1) of this subsection shall not
22 automatically stay an execution.

23 (3) The motion shall be verified by the petitioner and shall show or provide the
24 following:

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

1 (B) The evidence was not subjected to the requested DNA testing because the
2 existence of the evidence was unknown to the petitioner or to the petitioner's trial
3 attorney prior to trial or because the technology for the testing was not available at the
4 time of trial;

5 (C) The identity of the perpetrator was, or should have been, a significant issue in the
6 case;

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

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

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

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

19 (H) The names, addresses, and telephone numbers of all persons or entities who may
20 testify for the petitioner and a description of the subject matter and summary of the
21 facts to which each person or entity may testify.

22 (4) The petitioner shall state:

23 (A) That the motion is not filed for the purpose of delay; and

24 (B) That the issues raised by the petitioner and the requested DNA testing have not
25 been litigated in a prior proceeding in the courts of this state or the United States.

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

30 (6)(A) If, after the state files its response, if any, and the court determines that the
31 motion complies with the requirements of paragraphs (3) and (4) of this subsection, the
32 court shall order a hearing to occur after the state has filed its response, but not more
33 than 90 days from the date the motion was filed.

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

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

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

7 (E) The purpose of the hearing shall be to allow the parties to be heard on the issue of
8 whether the petitioner's motion complies with the requirements of paragraphs (3) and
9 (4) of this subsection, whether upon consideration of all of the evidence there is a
10 reasonable probability that the verdict would have been different if the results of the
11 requested DNA testing had been available at the time of trial, and whether the
12 requirements of paragraph (7) of this subsection have been established.

13 (7) The court shall grant the motion for DNA testing if it determines that the petitioner
14 has met the requirements set forth in paragraphs (3) and (4) of this subsection and that all
15 of the following have been established:

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

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

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

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

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

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

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

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

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

9 (10) If a motion is filed pursuant to this subsection the court shall order the state to
10 preserve during the pendency of the proceeding all evidence that contains biological
11 material, including, but not limited to, stains, fluids, or hair samples in the state's
12 possession or control.

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

15 (12) The judge shall set forth by written order the rationale for the grant or denial of the
16 motion for new trial filed pursuant to this subsection.

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

19 SECTION 2.

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

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

26 SECTION 3.

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

30 "17-5-55.

31 (a) In all criminal cases, the court shall designate either the clerk of court, the court
32 reporter, or any other officer of the court to be the custodian of any property that is
33 introduced into evidence at trial while the trial is pending. Property introduced into
34 evidence shall be identified or tagged with an exhibit number. After verdict and judgment

1 has been entered in any criminal case, the person who has custody of the physical evidence
2 introduced in the case shall inventory the evidence and create an evidence log within 30
3 days of the entry of the judgment. The evidence log shall contain the case number, style
4 of the case, description of the item, exhibit number, the name of the person creating the
5 evidence log, and the location where the physical evidence is stored. After the evidence
6 log is completed, the judge shall designate the clerk of court, the prosecuting attorney, or
7 the law enforcement agency involved in prosecuting the case to obtain and store the
8 evidence, and a notation shall appear in the evidence log indicating the transfer of
9 evidence. If evidence is transferred to any other party, the evidence log shall be annotated
10 to show the identity of the person or entity receiving the evidence, the date of the transfer,
11 and the location of the evidence. The signature of any person or entity to which physical
12 evidence is transferred shall be captured through electronic means that will be linked to the
13 evidence log or the use of a property transfer form that will be filed with the evidence log.
14 When physical evidence, other than audio or video recordings, is transferred to any person
15 or entity, a photograph or other visual image of the evidence shall be made and placed in
16 the case file.

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

23 (c) Documents, photographs, and similar evidence shall be maintained and disposed of in
24 accordance with records retention schedules adopted in accordance with Article 5 of
25 Chapter 18 of Title 50, known as the 'Georgia Records Act.' Other physical evidence that
26 contains biological material, including, but not limited to, stains, fluids, or hair samples that
27 relate to the identity of the perpetrator of the crime, shall be maintained in accordance with
28 Code Section 17-5-56. A party to an extraordinary motion for new trial or a habeas corpus
29 action in which DNA testing is sought that was filed prior to the expiration of the time
30 prescribed for the preservation of evidence by this Code section, may apply to the court in
31 which the defendant was convicted for an order directing that the evidence be preserved
32 beyond the time period prescribed by this Code section and until judgment in the action
33 shall become final.

34 (d) Except as is otherwise provided in subsections (b) and (c) of this Code section or by
35 law, following the expiration of the period of time set forth in subsections (b) and (c) of
36 this Code section, physical evidence may be disposed of in accordance with the provisions

1 of Article 5 of Chapter 12 of Title 50, known as the 'Disposition of Unclaimed Property
2 Act' or, in the case of property of historical or instructional value, as provided in Code
3 Section 17-5-53.

4 17-5-56.

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

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

19 **SECTION 4.**

20 Said title is further amended by striking paragraph (1) of subsection (a) of Code Section
21 17-17-12, regarding notification to a victim of an accused's motion for new trial or appeal
22 including death penalty cases, and inserting in lieu thereof the following:

23 "(1) That the accused has filed a motion for new trial, ~~or~~ an appeal of his or her
24 conviction, or an extraordinary motion for new trial;"

25 **SECTION 5.**

26 This Act shall become effective upon its approval by the Governor or upon its becoming law
27 without such approval. Notwithstanding the provisions of subsection (b) of Code Section
28 5-5-41, any person convicted of a serious violent felony as defined in Code Section
29 17-10-6.1, which conviction was imposed prior to the effective date of this Act, who has,
30 prior to the effective date of this Act, filed an extraordinary motion for new trial, may file an
31 extraordinary motion for new trial pursuant to Section 1 of this Act if the issue of DNA
32 testing was not raised in the prior extraordinary motion for new trial. In any extraordinary
33 motion for new trial allowed pursuant to Section 1 of this Act, the court shall not have

1 jurisdiction to reconsider any other issue raised in the first extraordinary motion for new trial.
2 Notwithstanding the provisions of subparagraph (c)(4)(B) of Code Section 5-5-41, any
3 person convicted of a serious violent felony as defined in Code Section 17-10-6.1, which
4 conviction was imposed prior to the effective date of this Act, who has, prior to the effective
5 date of this Act, previously litigated in a court of this state or the United States the issue of
6 postconviction DNA testing and who was denied DNA testing may file an extraordinary
7 motion for new trial pursuant to Section 1 of this Act.

8 **SECTION 6.**

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