

# HOUSE BILL No. 5089

August 8, 2007, Introduced by Reps. Condino, Donigan, Vagnozzi, Alma Smith, Scott, Virgil Smith, Warren, Bieda, Wenke and Meadows and referred to the Committee on Judiciary.

A bill to amend 1927 PA 175, entitled  
"The code of criminal procedure,"  
by amending section 16 of chapter X (MCL 770.16), as amended by  
2005 PA 4.

## THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1  
2  
3  
4  
5  
6  
7  
8  
9

### CHAPTER X

Sec. 16. (1) Notwithstanding the limitations of section 2 of  
this chapter, ~~a defendant convicted of a felony at trial before~~  
~~January 8, 2001 who is serving a prison sentence for the felony~~  
~~conviction~~ **ANY OF THE FOLLOWING INDIVIDUALS** may petition the  
circuit court to order DNA testing of biological material  
identified during ~~the~~ **AN** investigation leading to his or her  
conviction **FOR A FELONY**, and for a new trial based on the results  
of that testing: ~~. The petition shall be filed not later than~~

1 ~~January 1, 2009.~~

2 (A) AN INDIVIDUAL CONVICTED OF THE CRIME PURSUANT TO A TRIAL  
3 OR PLEA OF GUILTY OR NOLO CONTENDERE.

4 (B) AN INDIVIDUAL INCARCERATED, SERVING A SENTENCE OF  
5 PROBATION, OR RELEASED ON PAROLE FOR THE FELONY.

6 (C) AN INDIVIDUAL WHO HAS COMPLETED SERVING HIS OR HER  
7 SENTENCE FOR THE FELONY.

8 (2) A petition under this section shall be filed in the  
9 circuit court for the county in which the ~~defendant~~ INDIVIDUAL was  
10 sentenced and shall be assigned to the sentencing judge or his or  
11 her successor. THE PETITION SHALL BE ACCOMPANIED BY A SWORN  
12 AFFIDAVIT SIGNED BY THE DEFENDANT AFFIRMING THAT HE OR SHE IS  
13 INNOCENT OF THE CRIME FOR WHICH HE OR SHE WAS CONVICTED. THE  
14 AFFIDAVIT SHALL SPECIFY HOW THE PROPOSED TESTING OF THE BIOLOGICAL  
15 MATERIAL WILL ESTABLISH HIS OR HER INNOCENCE. The petition shall be  
16 served on the prosecuting attorney of the county in which the  
17 ~~defendant~~ INDIVIDUAL was sentenced.

18 (3) AN INDIVIDUAL WHO HAS PREVIOUSLY FILED A PETITION UNDER  
19 THIS SECTION MAY FILE A SUBSEQUENT PETITION UNDER THIS SECTION  
20 ASSERTING NEW OR DIFFERENT GROUNDS FOR RELIEF INCLUDING, BUT NOT  
21 LIMITED TO, FACTUAL, SCIENTIFIC, OR LEGAL ARGUMENTS NOT PREVIOUSLY  
22 MADE OR THE AVAILABILITY OF MORE ADVANCED DNA TECHNOLOGY.

23 (4) NOTWITHSTANDING SUBSECTION (3), THE COURT MAY HEAR A  
24 SUBSEQUENT PETITION UNDER THIS SECTION IF THE COURT DETERMINES IT  
25 IS IN THE INTERESTS OF JUSTICE TO DO SO.

26 (5) IF THE INDIVIDUAL ALLEGES IN HIS OR HER PETITION THAT  
27 BIOLOGICAL MATERIAL WAS COLLECTED DURING THE INVESTIGATION LEADING

1 TO HIS OR HER CONVICTION, THE PROSECUTING ATTORNEY SHALL DO 1 OF  
2 THE FOLLOWING WITHIN 28 DAYS AFTER THE PETITION IS FILED OR AS  
3 OTHERWISE AGREED TO BY THE INDIVIDUAL AND THE PROSECUTING ATTORNEY  
4 AND ORDERED BY THE COURT:

5 (A) PRODUCE THE IDENTIFIED BIOLOGICAL MATERIAL FOR TESTING  
6 UNDER THIS SECTION.

7 (B) FILE A WRITTEN RESPONSE AND SUPPORTING AFFIDAVIT SETTING  
8 FORTH IN DETAIL WHY THE BIOLOGICAL MATERIAL IS UNAVAILABLE FOR  
9 TESTING. THE AFFIDAVIT SHALL INCLUDE ALL OF THE FOLLOWING:

10 (i) INFORMATION REGARDING THE SPECIFIC LOCATIONS SEARCHED,  
11 INCLUDING POLICE AGENCIES, LABORATORIES, AND PUBLIC AND PRIVATE  
12 HOSPITALS.

13 (ii) INFORMATION REGARDING THE TIME, PLACE, AND MANNER OF THE  
14 DESTRUCTION OF THE BIOLOGICAL MATERIAL, IF APPLICABLE.

15 (iii) ANY DOCUMENTS RELEVANT TO THE LOSS OR DESTRUCTION OF THE  
16 EVIDENCE.

17 (6) BEFORE ENTERING AN ORDER FOR TAKING A BIOLOGICAL SAMPLE  
18 FROM A PERSON OTHER THAN THE DEFENDANT, THE COURT SHALL CONDUCT A  
19 HEARING TO DETERMINE THE NECESSITY OF TAKING THAT SAMPLE. THE COURT  
20 SHALL TAKE TESTIMONY AND REVIEW EVIDENCE AS NECESSARY TO MAKE THIS  
21 DETERMINATION. THE RULES OF EVIDENCE SHALL APPLY. THE COURT MUST  
22 FIND SUBSTANTIAL AND COMPELLING REASONS THAT THE BIOLOGICAL SAMPLE  
23 IS NECESSARY TO THE DETERMINATION THAT THE DEFENDANT DID NOT COMMIT  
24 THE CRIME FOR WHICH HE OR SHE WAS CONVICTED BEFORE ORDERING THE  
25 SAMPLE. IF THE VICTIM IS REQUIRED TO TESTIFY AT THE HEARING, THE  
26 COURTROOM SHALL BE CLOSED AND THE DEFENDANT SHALL NOT BE PRESENT IN  
27 THE COURTROOM. IF THE COURT DETERMINES THAT A BIOLOGICAL SAMPLE

1 FROM THE VICTIM IS NECESSARY, THE COURT SHALL REQUEST THE VICTIM OR  
2 THE VICTIM'S FAMILY OR REPRESENTATIVE TO APPEAR AT AN IN CAMERA  
3 MEETING WITH THE COURT. THE VICTIM MAY REQUEST THE PRESENCE OF THE  
4 PROSECUTING ATTORNEY. IF THE PROSECUTING ATTORNEY APPEARS AT THE IN  
5 CAMERA MEETING, DEFENSE COUNSEL, BUT NOT THE DEFENDANT, SHALL ALSO  
6 BE ALLOWED TO ATTEND THE MEETING. THE COURT SHALL EXPLAIN TO THE  
7 VICTIM THE NECESSITY FOR TAKING A BIOLOGICAL SAMPLE AND SHALL  
8 ANSWER ANY QUESTIONS THE VICTIM HAS REGARDING THE COURT'S ORDER  
9 THAT THE VICTIM PROVIDE A SAMPLE.

10 (7) ~~(3)~~ The court shall order DNA testing if the defendant  
11 ~~does~~ COURT DETERMINES THAT all of the following CIRCUMSTANCES  
12 EXIST:

13 (a) ~~Presents~~ THERE IS prima facie proof that the evidence  
14 sought to be tested is material to the issue of the convicted  
15 person's INDIVIDUAL'S identity as the perpetrator of, or accomplice  
16 to, the crime that resulted in the conviction.

17 ~~— (b) Establishes all of the following by clear and convincing~~  
18 ~~evidence:~~

19 (B) ~~(i)~~ A sample of identified biological material described in  
20 subsection (1) is available for DNA testing.

21 (C) ~~(ii)~~ The identified biological material described in  
22 subsection (1) was not previously subjected to DNA testing or, if  
23 previously tested, ~~will be subject to DNA testing technology that~~  
24 ~~was not available when the defendant was convicted~~ WAS NOT TESTED  
25 BY CURRENTLY ACCEPTED DNA TECHNOLOGY.

26 (D) ~~(iii)~~ The identity of the defendant as the perpetrator of  
27 the crime was at issue during his or her trial.

1       (8) ~~(4)~~—The court shall state its findings of fact on the  
2 record or shall make written findings of fact supporting its  
3 decision to grant or deny a petition brought under this section.

4       (9) ~~(5)~~—If the court grants a petition for DNA testing under  
5 this section, the identified biological material and a biological  
6 sample obtained from the ~~defendant~~ **INDIVIDUAL OR OTHER RELEVANT**  
7 **SOURCE** shall be subjected to DNA testing ~~by a laboratory approved~~  
8 ~~by the court~~ **THE DEPARTMENT OF STATE POLICE CRIME LABORATORY**. If  
9 the court determines that the applicant is indigent, the cost of  
10 DNA testing ordered under this section shall be borne by the state.  
11 **THE DEFENDANT MAY REQUEST THE COURT TO ORDER THE IDENTIFIED**  
12 **BIOLOGICAL MATERIAL AND BIOLOGICAL SAMPLE TESTED BY ANOTHER**  
13 **LABORATORY. THE LABORATORY MUST BE APPROVED BY THE COURT AND THE**  
14 **DEFENDANT SHALL BE RESPONSIBLE FOR ALL COSTS OF THE TESTING.** The  
15 results of the DNA testing shall be provided to the court and to  
16 the ~~defendant~~ **INDIVIDUAL** and the prosecuting attorney. Upon motion  
17 by either party, the court may order that copies of the testing  
18 protocols, laboratory procedures, laboratory notes, and other  
19 relevant records compiled by the testing laboratory be provided to  
20 the court and to all parties.

21       (10) ~~(6)~~—If the results of the DNA testing are inconclusive or  
22 show that the ~~defendant~~ **INDIVIDUAL** is the source of the identified  
23 biological material **OR THE RESULTS ARE CONSISTENT WITH THE STATE'S**  
24 **THEORY OF GUILT**, the court shall deny the motion for new trial. If  
25 the DNA test results show that the ~~defendant~~ **INDIVIDUAL** is the  
26 source of the identified biological material, the ~~defendant's~~  
27 **INDIVIDUAL'S** DNA profile shall be provided to the Michigan state

1 police for inclusion under the DNA identification profiling system  
2 act, 1990 PA 250, MCL 28.171 to 28.176.

3 (11) ~~(7)~~—If the results of the DNA testing show that the  
4 ~~defendant~~ **INDIVIDUAL** is not the source of the identified biological  
5 material **OR OTHERWISE SUPPORT THE ASSERTIONS OF INNOCENCE IN THE**  
6 **INDIVIDUAL'S AFFIDAVIT**, the court shall appoint counsel pursuant to  
7 MCR 6.505(a) and hold a hearing to determine by clear and  
8 convincing evidence all of the following:

9 (A) **THAT THE IDENTIFIED BIOLOGICAL MATERIAL WAS COLLECTED,**  
10 **HANDLED, AND PRESERVED ACCORDING TO PROCEDURES THAT ALLOW THE COURT**  
11 **TO FIND THAT THE IDENTIFIED BIOLOGICAL MATERIAL IS NOT CONTAMINATED**  
12 **OR IS NOT SO DEGRADED THAT THE DNA PROFILE OF THE TESTED SAMPLE OF**  
13 **THE IDENTIFIED BIOLOGICAL MATERIAL CANNOT BE DETERMINED TO BE**  
14 **IDENTICAL TO THE DNA PROFILE OF THE SAMPLE INITIALLY COLLECTED**  
15 **DURING THE INVESTIGATION DESCRIBED IN SUBSECTION (1).**

16 (B) ~~(a)~~—That, **IN CASES IN WHICH THE INDIVIDUAL ASSERTS THAT HE**  
17 **OR SHE WAS NOT THE SOURCE OF THE BIOLOGICAL MATERIAL**, only the  
18 perpetrator of the crime or crimes for which the ~~defendant~~  
19 **INDIVIDUAL** was convicted could be the source of the identified  
20 biological material **AND THAT THE INDIVIDUAL'S PURPORTED EXCLUSION**  
21 **AS THE SOURCE OF THE IDENTIFIED BIOLOGICAL MATERIAL, BALANCED**  
22 **AGAINST THE OTHER EVIDENCE IN THE CASE, IS SUFFICIENT TO JUSTIFY**  
23 **THE GRANT OF A NEW TRIAL.**

24 ~~—— (b) That the identified biological material was collected,~~  
25 ~~handled, and preserved by procedures that allow the court to find~~  
26 ~~that the identified biological material is not contaminated or is~~  
27 ~~not so degraded that the DNA profile of the tested sample of the~~

1 ~~identified biological material cannot be determined to be identical~~  
2 ~~to the DNA profile of the sample initially collected during the~~  
3 ~~investigation described in subsection (1).~~

4 (C) THAT, IN CASES WHERE ALLEGED BIOLOGICAL EVIDENCE FROM THE  
5 VICTIM OR ANOTHER PERSON IS RELEVANT TO THE INDIVIDUAL'S INNOCENCE  
6 AS ASSERTED IN HIS OR HER AFFIDAVIT, THE COURT SHALL DETERMINE  
7 WHETHER THE PURPORTED EXCULPATORY EVIDENCE, BALANCED AGAINST THE  
8 OTHER EVIDENCE IN THE CASE, IS SUFFICIENT TO JUSTIFY THE GRANT OF A  
9 NEW TRIAL.

10 (D) ~~(e) That the defendant's purported exclusion as the source~~  
11 ~~of the identified biological material~~ EVIDENCE IS CONSISTENT WITH  
12 THE INDIVIDUAL'S CLAIM OF INNOCENCE, balanced against the other  
13 evidence in the case, AND is sufficient to justify the grant of a  
14 new trial.

15 (12) ~~(8) Upon~~ IF THERE IS A SUFFICIENT BIOLOGICAL SAMPLE, UPON  
16 motion of the ~~prosecutor~~ PROSECUTING ATTORNEY OR THE INDIVIDUAL,  
17 the court shall order retesting of the identified biological  
18 material and shall stay the ~~defendant's~~ INDIVIDUAL'S motion for new  
19 trial pending the results of the DNA retesting. IF THERE IS NOT  
20 SUFFICIENT BIOLOGICAL MATERIAL FOR ADDITIONAL TESTING, THE PARTIES  
21 SHALL BE NOTIFIED OF THAT FACT BEFORE ANY TEST IS CONDUCTED AND  
22 SHALL BE PROVIDED THE OPPORTUNITY TO HAVE AN EXPERT PRESENT DURING  
23 ANY TEST THAT IS CONDUCTED.

24 (13) ~~(9) The~~ court shall state its findings of fact on the  
25 record or make written findings of fact supporting its decision to  
26 grant or deny the ~~defendant~~ INDIVIDUAL a new trial under this  
27 section. Notwithstanding section 3 of this chapter, an aggrieved

1 party may appeal the court's decision to grant or deny the petition  
2 for DNA testing and for new trial by application for leave granted  
3 by the court of appeals.

4 (14) ~~(10)~~—If the name of the victim of the felony conviction  
5 described in subsection (1) is known, the prosecuting attorney  
6 shall give written notice of a petition under this section to the  
7 victim **WHEN AN ORDER FOR TESTING HAS BEEN ENTERED**. The notice shall  
8 be by first-class mail to the victim's last known address. Upon the  
9 victim's request, the prosecuting attorney shall give the victim  
10 notice of the time and place of ~~any hearing on the petition and~~  
11 ~~shall inform the victim of the court's grant or denial of a new~~  
12 ~~trial to the defendant~~ **THE MOTION FOR NEW TRIAL HEARING OR ANY**  
13 **SUBSEQUENT HEARING RELATED TO THE ISSUE OF THE INDIVIDUAL'S**  
14 **RELEASE.**

15 (15) ~~(11)~~—Effective January 1, 2001, the investigating law  
16 enforcement agency shall preserve any biological material  
17 identified during the investigation of a crime or crimes for which  
18 ~~any person~~ **AN INDIVIDUAL** may file a petition for DNA testing under  
19 this section. The identified biological material shall be preserved  
20 for the period of time that ~~any person~~ **THE INDIVIDUAL** is  
21 incarcerated in connection with that case.