HOUSE BILL NO. 77

INTRODUCED BY L. JENT

BY REQUEST OF THE DEPARTMENT OF JUSTICE

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING A PROCEDURE FOR DNA TESTING OF A PERSON CONVICTED OF A FELONY WHO IS SERVING A TERM OF INCARCERATION AND WHO DID NOT PLEAD GUILTY TO THE FELONY; AND REQUIRING THE STATE TO PRESERVE SCIENTIFIC IDENTIFICATION EVIDENCE THAT THE STATE HAS REASON TO BELIEVE CONTAINS DNA MATERIAL AND THAT IS OBTAINED IN CONNECTION WITH A FELONY FOR WHICH A CONVICTION IS OBTAINED AGAINST A PERSON WHO DID NOT PLEAD GUILTY."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Petition for DNA testing.** (1) A person convicted of a felony who is serving a term of incarceration and who did not plead guilty to the felony may file a written petition for performance of DNA testing, as defined in 44-6-101, in the court that entered the judgment of conviction. The petition must include the petitioner's statement that the petitioner was not the perpetrator of the felony that resulted in the conviction and that DNA testing is relevant to the assertion of innocence. The petition must be verified by the petitioner under penalty of perjury and must:

(a) explain why the identity of the perpetrator of the felony was or should have been a significant issue in the case;

(b) present a prima facie case that the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect;

(c) explain, in light of all the evidence, how the requested testing would establish the petitioner's innocence of the felony;

(d) make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought;

(e) reveal the results of any DNA or other known biological testing that was previously conducted by the prosecution or defense; and

(f) state whether a petition was previously filed under this section and the results of the proceeding.

(2) If the petition does not contain the information required in subsection (1), the court shall return the petition to the petitioner and advise the petitioner that the matter cannot be considered without the missing information.

(3) If subsection (1) is complied with, the court shall order a copy of the petition to be served on the attorney general, the county attorney in the county of conviction, and, if known, the laboratory or government agency holding the evidence sought to be tested. The court shall order that any responses to the petition must be filed within a reasonable time after the date of service under this subsection.

(4) The court may order a hearing on the petition. The hearing must be before the judge who conducted the trial, unless the court determines that that judge is unavailable. Upon request of any party, the court may in the interest of justice order the petitioner to be present at the hearing. The court may consider evidence whether or not it was introduced at the trial.

(5) The court shall grant the petition if it determines that the petition is not made for the purpose of delay and that:

(a) the evidence to be tested:

(i) was secured in relation to the trial that resulted in the conviction;

(ii) is available; and

(iii) is in a condition that would permit the requested testing;

(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, degraded, contaminated, altered, or replaced in any material aspect;

(c) the identity of the perpetrator of the felony was or should have been a significant issue in the case;

(d) the petitioner has made a prima facie showing that the evidence sought to be tested is material to the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction;

(e) the requested testing results would establish, in light of all the evidence, whether the petitioner was the perpetrator of the felony that resulted in the conviction; and

(f) the evidence sought to be tested was not previously tested or was tested previously but another test would provide results that are reasonably more discriminating and probative on the question of whether the petitioner was the perpetrator of the felony that resulted in the conviction or would have a reasonable probability of contradicting the prior test results.

(6) If the court grants the petition, the court shall identify the evidence to be tested. The testing must be conducted by a laboratory mutually agreed upon by the petitioner, the attorney general, and the county attorney in the county of conviction. If the parties cannot agree on a laboratory, the court shall direct the state crime

laboratory to conduct the testing. At the request of the attorney general or the county attorney of the county of conviction, the court shall order the evidence submitted to an additional laboratory designated by the requester for additional testing. The court shall impose reasonable conditions on the testing designed to protect the parties' interests in the integrity of the evidence and the testing process.

(7) Testing ordered by the court must be conducted as soon as practicable, and if the court finds that a gross miscarriage of justice would otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, the court shall order a laboratory in this state to give the testing priority over any other pending casework of the laboratory.

(8) The test results must be fully disclosed to the parties.

(9) If the test results are inconclusive, the court may order further appropriate testing or terminate the proceeding. If the test results are not favorable to the petitioner, the court shall:

(a) notify the board of pardons and parole;

(b) order the petitioner's test sample to be included in the DNA identification index established under 44-6-102 and the federal combined DNA index system (CODIS) offender database;

(c) notify any victim and the family of the victim that the test results were not favorable to the petitioner; and

(d) terminate the proceeding.

(10) If the test results are favorable to the petitioner, the court shall order a hearing and after the hearing shall make appropriate orders pursuant to applicable statutes regarding postconviction proceedings.

(11) The court shall order a petitioner who is able to do so to pay the costs of testing. If the petitioner is unable to pay, the court shall order the state to pay the costs of testing. The court shall order additional testing requested by the attorney general or the county attorney of the county of conviction to be paid for by the state.

(12) The grant or denial of a petition or hearing under this section is not appealable.

(13) The remedy provided by this section is in addition to any remedy available under part 1 of this chapter.

NEW SECTION. **Section 2. Preservation and disposal of scientific identification evidence obtained in criminal proceeding.** (1) The state shall preserve scientific identification evidence that the state has reason to believe contains DNA material and that is obtained in connection with a felony for which a conviction is obtained against a person who did not plead guilty. The state shall preserve the evidence for 3 years after the imposition of sentence or for any period beyond 3 years that is required by a court order issued within

3 years after the imposition of sentence.

(2) The state may propose to dispose of scientific identification evidence before the expiration of the time period described in subsection (1) if the state notifies the convicted person and any attorney of record for the convicted person. The notification must include a description of the scientific identification evidence, a statement that the state will dispose of the evidence unless a party files an objection in writing within 120 days from the date of service of the notification in the court that entered the judgment, and the name and mailing address of the court where an objection may be filed. If an objection to the disposition of the evidence is not filed within that 120-day period, the state may dispose of the evidence. If a written objection is filed, the court shall consider the reasons for and against disposition of the evidence, may hold a hearing on the proposed disposition of the evidence, and shall issue an order ruling on the matter as required by the interests of justice and the integrity of the criminal justice system.

(3) If a party objects to the disposition of the scientific identification evidence, the state has the burden of proving by a preponderance of the evidence that the evidence should be disposed of.

NEW SECTION. **Section 3. Codification instruction.** [Sections 1 and 2] are intended to be codified as an integral part of Title 46, chapter 21, and the provisions of Title 46 apply to [sections 1 and 2].

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