

**524.140 Disposal of evidence that may be subject to DNA testing -- Motion to destroy -- Liability for destruction -- Penalty -- Retention of biological material.**

- (1) As used in this section:
  - (a) "Defendant" means a person charged with a:
    1. Capital offense, Class A felony, Class B felony, or Class C felony; or
    2. Class D felony under KRS Chapter 510; and
  - (b) "Following trial" means after:
    1. The first appeal authorized by the Constitution of Kentucky in a criminal case has been decided; or
    2. The time for the first appeal authorized by the Constitution of Kentucky in a criminal case has lapsed without an appeal having been filed.
- (2) No item of evidence gathered by law enforcement, prosecutorial, or defense authorities that may be subject to deoxyribonucleic acid (DNA) evidence testing and analysis in order to confirm the guilt or innocence of a criminal defendant shall be disposed of prior to trial of a criminal defendant unless:
  - (a) The prosecution has determined that the defendant will not be tried for the criminal offense;
  - (b) The prosecution has made a motion before the court in which the case would have been tried to destroy the evidence; and
  - (c) The court has, following an adversarial proceeding in which the prosecution and the defendant were heard, authorized the destruction of the evidence by court order.
- (3) No item of evidence gathered by law enforcement, prosecutorial, or defense authorities that may be subject to deoxyribonucleic acid (DNA) evidence testing and analysis in order to confirm the guilt or innocence of a criminal defendant shall be disposed of following the trial unless:
  - (a) The evidence, together with DNA evidence testing and analysis results, has been presented at the trial, and the defendant has been found guilty, pled guilty, or entered an Alford plea at the trial;
  - (b) The evidence was not introduced at the trial, or if introduced at the trial was not the subject of DNA testing and analysis, and the defendant has been found guilty, pled guilty, or entered an Alford plea at the trial, and the trial court has ordered the destruction of the evidence after an adversarial hearing conducted upon motion of either the prosecution or the defendant;
  - (c) The trial resulted in the defendant being found not guilty or the charges were dismissed after jeopardy attached, whether or not the evidence was introduced at the trial or was subject to DNA testing and analysis or not, and the trial court ordered the destruction of the evidence after an adversarial hearing conducted upon motion of either the prosecution or the defendant; or
  - (d) The trial resulted in the dismissal of charges against the defendant, and the defendant may be subject to retrial, in which event the evidence shall be

retained until after the retrial, which shall be considered a new trial for the purposes of this section.

- (4) The burden of proof for a motion to destroy evidence that may be subject to DNA testing and analysis shall be upon the party making the motion, and the court may permit the destruction of the evidence under this section upon good cause shown favoring its destruction.
- (5) It is recognized by the General Assembly that the DNA evidence laboratory testing and analysis procedure consumes and destroys a portion of the evidence or may destroy all of the evidence if the sample is small. The consuming and destruction of evidence during the laboratory analysis process shall not result in liability for its consumption or destruction if the following conditions are met:
  - (a) The Department of Kentucky State Police laboratory uses a method of testing and analysis which preserves as much of the biological material or other evidence tested and analyzed as is reasonably possible; or
  - (b) If the Department of Kentucky State Police laboratory knows or reasonably believes that the entire sample of evidence to be tested and analyzed that the laboratory, prior to the testing or analysis of the evidence, notifies in writing the court which ordered the testing and analysis and counsel for all parties:
    1. That the entire sample of evidence may be destroyed by the testing and analysis;
    2. The possibility that another laboratory may be able to perform the testing and analysis in a less destructive manner with at least equal results;
    3. The name of the laboratory capable of performing the testing and analysis, the costs of testing and analysis, the advantages of sending the material to that other laboratory, and the amount of biological material or other evidence which might be saved by alternative testing and analysis; and
    4. The Department of Kentucky State Police laboratory follows the directive of the court with regard to the testing and analysis; or
  - (c) If the Department of Kentucky State Police laboratory knows or reasonably believes that so much of the biological material or evidence may be consumed or destroyed in the testing and analysis that an insufficient sample will remain for independent testing and analysis that the laboratory follows the procedure specified in paragraph (b) of this subsection.
- (6) Destruction of evidence in violation of this section shall be a violation of KRS 524.100.
- (7) Subject to KRS 422.285(6), the appropriate governmental entity shall retain any biological material secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for DNA testing and analysis.

**Effective:** June 26, 2007

**History:** Amended 2007 Ky. Acts ch. 85, sec. 328, effective June 26, 2007. -- Created  
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