

**First Regular Session
Seventy-fourth General Assembly
STATE OF COLORADO**

INTRODUCED

LLS NO. 23-0438.01 Michael Dohr x4347

HOUSE BILL 23-1034

HOUSE SPONSORSHIP

Daugherty,

SENATE SPONSORSHIP

(None),

House Committees
Judiciary

Senate Committees

A BILL FOR AN ACT

101 **CONCERNING MEASURES TO EXPAND POSTCONVICTION DNA TESTING.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov>.)

Under current law, an incarcerated person can motion the court for postconviction DNA testing to prove the person's actual innocence if DNA testing was not available at the time of the person's prosecution. The bill changes who can apply for postconviction DNA testing to include a person convicted of or adjudicated not guilty by reason of insanity for a felony offense in Colorado, including a person currently incarcerated; a person on parole or probation for a felony offense; a person subject to sex offender registration; or a person who has

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

completed the sentence imposed for the felony offense.

The bill allows an eligible person to apply for postconviction DNA testing:

- To show a reasonable probability that the person would not have been convicted; or
- If evidence was previously available and tested and the evidence now can be subjected to additional DNA testing that provides a reasonable likelihood of more probative results.

The bill permits the court to order postconviction DNA testing if there is a reasonable probability that the petitioner would not have been convicted or would have received a lesser sentence if favorable results had been obtained through DNA testing at the time of the original prosecution.

The bill allows a court to consider a subsequent petition with new or different grounds for relief if the court finds just cause or the interests of justice so requires.

If the results of DNA testing are favorable to the petitioner, the court shall schedule a hearing to determine appropriate relief to be granted including, but not limited to, an order setting aside or vacating the petitioner's conviction.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, 18-1-411, **add** (3.3)
3 and (3.5); and **repeal** (1) as follows:

4 **18-1-411. Postconviction testing of DNA - definitions.** As used
5 in this section and in sections 18-1-412 to 18-1-416, unless the context
6 otherwise requires:

7 (1) ~~"Actual innocence" means clear and convincing evidence such~~
8 ~~that no reasonable juror would have convicted the defendant.~~

9 (3.3) "ELIGIBLE PERSON" MEANS A PERSON CONVICTED OF A
10 FELONY OFFENSE IN COLORADO OR ADJUDICATED NOT GUILTY BY REASON
11 OF INSANITY FOR A FELONY OFFENSE IN COLORADO PURSUANT TO SECTION
12 16-8-105.5, INCLUDING A PERSON CURRENTLY INCARCERATED; A PERSON
13 ON PAROLE OR PROBATION FOR A FELONY OFFENSE; A PERSON SUBJECT TO

1 SEX OFFENDER REGISTRATION PURSUANT TO SECTION 16-22-103; OR A
2 PERSON WHO HAS COMPLETED THE SENTENCE IMPOSED FOR THE FELONY
3 OFFENSE;

4 (3.5) "FAVORABLE RESULT" MEANS A RESULT THAT INDICATES A
5 REASONABLE PROBABILITY THAT THE PETITIONER WOULD NOT HAVE BEEN
6 CONVICTED. A FAVORABLE RESULT INCLUDES AN EXCULPATORY RESULT
7 REGARDING THE PETITIONER OR AN INCULPATORY RESULT REGARDING AN
8 ALTERNATE SUSPECT.

9 **SECTION 2.** In Colorado Revised Statutes, 18-1-412, **amend** (1),
10 (3), and (9) as follows:

11 **18-1-412. Procedure for application for DNA testing -**
12 **appointment of counsel.** (1) An ~~incarcerated~~ ELIGIBLE person may apply
13 AT ANY TIME to the district court in the district where the conviction was
14 secured for DNA testing concerning the conviction and sentence. ~~the~~
15 ~~person is currently serving.~~

16 (3) If the motion, files, and record of the case show to the
17 satisfaction of the court that the petitioner is not entitled to relief based on
18 the criteria specified in section 18-1-413, the court shall deny the motion
19 without a hearing and without appointment of counsel. ~~The court may~~
20 ~~deny a second or subsequent motion requesting relief pursuant to this~~
21 ~~section.~~

22 (9) Upon motion of the defendant or ~~his or her~~ THE DEFENDANT'S
23 counsel, the court shall order a database search by a law enforcement
24 agency IN BOTH NATIONAL AND LOCAL DATABASES if the court determines
25 that a reasonable probability exists that the database search will produce
26 exculpatory or mitigating evidence relevant to a claim of wrongful
27 conviction or sentencing. DNA profiles must meet current national DNA

1 database index system eligibility standards and conform to current federal
2 bureau of investigation quality assurance standards in order to be eligible
3 for search against the state index system.

4 **SECTION 3.** In Colorado Revised Statutes, 18-1-413, **amend** (1)
5 introductory portion, (1)(a), (1)(b), and (1)(c); and **add** (2) as follows:

6 **18-1-413. Content of application for DNA testing.** (1) ~~A court~~
7 ~~shall not order DNA testing unless the petitioner demonstrates by a~~
8 ~~preponderance of the evidence that~~ THE COURT SHALL ORDER DNA
9 TESTING IF:

10 (a) ~~Favorable results of the DNA testing will demonstrate the~~
11 ~~petitioner's actual innocence~~ IT FINDS A REASONABLE PROBABILITY THAT
12 THE PETITIONER WOULD NOT HAVE BEEN CONVICTED OR WOULD HAVE
13 RECEIVED A LESSER SENTENCE IF FAVORABLE RESULTS HAD BEEN
14 OBTAINED THROUGH DNA TESTING AT THE TIME OF THE ORIGINAL
15 PROSECUTION;

16 (b) A law enforcement agency collected biological evidence
17 pertaining to the offense; ~~and retains actual or constructive possession of~~
18 ~~the evidence that allows for reliable DNA testing;~~

19 (c) (I) ~~Conclusive~~ DNA results were not available prior to the
20 petitioner's conviction OR, IF PREVIOUSLY AVAILABLE AND TESTED, THE
21 EVIDENCE NOW CAN BE SUBJECTED TO ADDITIONAL DNA TESTING THAT
22 PROVIDES A REASONABLE LIKELIHOOD OF MORE PROBATIVE RESULTS; and

23 (II) The petitioner did not secure THE REQUESTED DNA testing
24 prior to ~~his or her~~ THE PETITIONER'S conviction because DNA testing was
25 not reasonably available or for reasons that constitute justifiable excuse,
26 ineffective assistance of counsel, or excusable neglect; and

27 (2) A PETITIONER MAY FILE A SUBSEQUENT PETITION WITH NEW

1 GROUND FOR RELIEF NOT RAISED IN THE PRIOR PETITION IF THE
2 PETITIONER EXERCISED DUE DILIGENCE TO RAISE ALL VIABLE CLAIMS AT
3 THE TIME OF THE INITIAL PETITION OR IF THE PETITIONER WAS NOT
4 GRANTED A HEARING ON THE INITIAL PETITION AND THE SUBSEQUENT
5 PETITION RAISES VIABLE GROUNDS FOR RELIEF. IF THE COURT DETERMINES
6 THESE CRITERIA ARE SATISFIED, THE COURT MAY CONSIDER THE
7 SUBSEQUENT PETITION IF THE COURT FINDS GOOD CAUSE OR THAT THE
8 INTERESTS OF JUSTICE SO REQUIRE. IF THE COURT CONSIDERS THE
9 SUBSEQUENT PETITION, THE COURT SHALL DETERMINE WHETHER TO
10 GRANT THE PETITION PURSUANT TO SUBSECTION (1) OF THIS SECTION.

11 **SECTION 4.** In Colorado Revised Statutes, 18-1-414, **amend** (3);
12 and **add** (2)(d) as follows:

13 **18-1-414. Preservation of evidence.** (2) (d) UPON RECEIPT OF A
14 MOTION FOR POSTCONVICTION DNA TESTING, THE STATE SHALL PREPARE
15 AN INVENTORY OF THE EVIDENCE RELATED TO THE CASE AND ISSUE A COPY
16 OF THE INVENTORY TO THE PETITIONER AND THE COURT.

17 (3) ~~Except as provided in subsection (2) of this section, this~~
18 ~~section does not create a duty to preserve biological evidence.~~
19 Notwithstanding the provisions of subsection (2) of this section, this
20 section does not create a liability on the part of a law enforcement agency
21 for failing to preserve biological evidence.

22 **SECTION 5.** In Colorado Revised Statutes, **amend** 18-1-415 as
23 follows:

24 **18-1-415. Testing - payment.** ~~All testing shall be performed at a~~
25 ~~law enforcement facility, and the petitioner shall pay for the testing.~~ IF
26 THE COURT ORDERS DNA TESTING, THE TESTING MUST BE CONDUCTED BY
27 A FACILITY MUTUALLY AGREED UPON BY THE PETITIONER AND THE STATE

1 AND APPROVED BY THE COURT. IF THE PARTIES CANNOT AGREE, THE
2 COURT SHALL DESIGNATE THE TESTING FACILITY. THE PETITIONER SHALL
3 PAY FOR THE TESTING. THE PARTIES SHALL CONSULT AND NEGOTIATE ON
4 AN AGREEMENT ON TESTING METHODS AND TECHNIQUES. IF THE PARTIES
5 CANNOT AGREE, THE COURT SHALL DESIGNATE THE TESTING METHODS
6 AND TECHNIQUES, CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES.
7 IN CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES, THE COURT
8 SHALL CONSIDER WHETHER THE TESTING WOULD BE CONSUMPTIVE IN
9 NATURE, WHETHER THE TESTING WOULD ALLOW FOR THE BEST POSSIBLE
10 COLLECTION OF EVIDENCE, AND WHETHER THE TESTING WOULD ALLOW
11 FOR THE MOST PROBATIVE RESULTS TO BE OBTAINED. If the petitioner is
12 indigent and represented by either the public defender or alternate defense
13 counsel, and with the approval of the public defender or the alternate
14 defense counsel, the costs of the testing shall be paid from ~~their~~ THE
15 PUBLIC DEFENDER'S BUDGET OR THE ALTERNATE DEFENSE COUNSEL'S
16 budget.

17 **SECTION 6.** In Colorado Revised Statutes, 18-1-416, **amend** (1);
18 and **add** (1.5) and (3) as follows:

19 **18-1-416. Results of the DNA test.** (1) Notwithstanding any law
20 or rule of procedure that bars a motion for postconviction review as
21 untimely OR SUCCESSIVE, a petitioner may use the results of a DNA test
22 ordered pursuant to section 18-1-413 as the grounds for filing a motion
23 for postconviction review ~~under~~ PURSUANT TO section 18-1-410 and the
24 Colorado rules of criminal procedure.

25 (1.5) IF FORENSIC DNA TESTING ORDERED PROVIDES A FAVORABLE
26 RESULT TO THE PETITIONER, THE COURT SHALL SCHEDULE A HEARING TO
27 DETERMINE THE APPROPRIATE RELIEF TO BE GRANTED. BASED ON THE

1 RESULTS OF THE TESTING AND ANY EVIDENCE OR OTHER INFORMATION
2 PRESENTED AT THE HEARING, THE COURT SHALL ENTER AN ORDER THAT
3 SERVES THE INTERESTS OF JUSTICE, INCLUDING, BUT NOT LIMITED TO, AN
4 ORDER SETTING ASIDE OR VACATING THE PETITIONER'S JUDGMENT OF
5 CONVICTION.

6 (3) THE COURT SHALL ENSURE COMPLIANCE WITH THE
7 NOTIFICATION PROCEDURES AND RIGHTS AFFORDED TO VICTIMS PROVIDED
8 FOR IN SECTIONS 24-4.1-302.5 AND 24-4.1-303.

9 **SECTION 7. Safety clause.** The general assembly hereby finds,
10 determines, and declares that this act is necessary for the immediate
11 preservation of the public peace, health, or safety.