

CHAPTER 15

CRIMINAL LAW AND PROCEDURE

HOUSE BILL 23-1034

BY REPRESENTATIVE(S) Daugherty and Soper, Amabile, Armagost, Bacon, Bockenfeld, Boesenecker, Brown, deGruy Kennedy, Dickson, Duran, English, Epps, Frizzell, Froelich, Garcia, Gonzales-Gutierrez, Hamrick, Herod, Jodeh, Joseph, Kipp, Lieder, Lindsay, Mabrey, Marshall, Mauro, McLachlan, Ortiz, Parenti, Ricks, Sirota, Snyder, Story, Valdez, Velasco, Weinberg, Weissman, Willford, Young, McCluskie;
also SENATOR(S) Gonzales and Simpson, Bridges, Cutter, Exum, Ginal, Jaquez Lewis, Kolker, Marchman, Moreno, Priola, Roberts, Rodriguez, Smallwood, Sullivan, Van Winkle, Will, Fenberg.

AN ACT**CONCERNING MEASURES TO EXPAND POSTCONVICTION DNA TESTING.**

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

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

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

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

(3.3) "ELIGIBLE PERSON" MEANS A PERSON CONVICTED OF A FELONY OFFENSE IN COLORADO OR ADJUDICATED NOT GUILTY BY REASON OF INSANITY FOR A FELONY OFFENSE IN COLORADO PURSUANT TO SECTION 16-8-105.5, INCLUDING A PERSON CURRENTLY INCARCERATED; A PERSON ON PAROLE OR PROBATION FOR A FELONY OFFENSE; A PERSON SUBJECT TO SEX OFFENDER REGISTRATION PURSUANT TO SECTION 16-22-103; OR A PERSON WHO HAS COMPLETED THE SENTENCE IMPOSED FOR THE FELONY OFFENSE;

(3.5) "FAVORABLE RESULT" MEANS A RESULT THAT INDICATES A REASONABLE PROBABILITY THAT THE PETITIONER WOULD NOT HAVE BEEN CONVICTED.

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

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

as follows:

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

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

(9) Upon motion of the defendant or ~~his or her~~ THE DEFENDANT'S counsel, the court shall order a database search by a law enforcement agency IN BOTH NATIONAL AND LOCAL DATABASES if the court determines that a reasonable probability exists that the database search will produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing. DNA profiles must meet current national DNA database index system eligibility standards and conform to current federal bureau of investigation quality assurance standards in order to be eligible for search against the state index system.

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

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

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

(b) IT FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT a law enforcement agency collected biological evidence pertaining to the offense; ~~and retains actual or constructive possession of the evidence that allows for reliable DNA testing;~~

(c) (I) ~~Conclusive~~ IT FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT DNA results were not available prior to the petitioner's conviction ~~and~~ OR, IF PREVIOUSLY AVAILABLE AND TESTED, THE EVIDENCE CAN BE SUBJECTED TO MORE ADVANCED, SCIENTIFICALLY RELIABLE DNA TESTING THAT PROVIDES A REASONABLE LIKELIHOOD OF MORE PROBATIVE RESULTS; OR

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

(2) A PETITIONER MAY ONLY FILE A SUBSEQUENT PETITION WITH NEW GROUNDS FOR RELIEF NOT RAISED IN THE PRIOR PETITION IF THE PETITIONER EXERCISED DUE

DILIGENCE TO RAISE ALL VIABLE CLAIMS AT THE TIME OF THE INITIAL PETITION OR IF THE PETITIONER WAS NOT GRANTED A HEARING ON THE INITIAL PETITION AND THE SUBSEQUENT PETITION RAISES VIABLE GROUNDS FOR RELIEF. IF THE COURT DETERMINES THESE CRITERIA ARE SATISFIED, THE COURT MAY CONSIDER THE SUBSEQUENT PETITION IF THE PETITIONER ESTABLISHES GOOD CAUSE WHY A SUCCESSIVE PETITION SHOULD BE CONSIDERED OR THE COURT FINDS THAT THE INTERESTS OF JUSTICE SO REQUIRE. IF THE COURT CONSIDERS THE SUBSEQUENT PETITION, THE COURT SHALL DETERMINE WHETHER TO GRANT THE PETITION PURSUANT TO SUBSECTION (1) OF THIS SECTION.

SECTION 4. In Colorado Revised Statutes, 18-1-414, **add** (2)(d) as follows:

18-1-414. Preservation of evidence. (2) (d) WHEN A MOTION FOR POSTCONVICTION DNA TESTING IS GRANTED, THE PRIMARY INVESTIGATIVE AGENCY THAT HANDLED THE CASE SHALL PREPARE AN INVENTORY OF THE EVIDENCE RELATED TO THE CASE AND ISSUE A COPY OF THE INVENTORY TO THE PETITIONER AND THE COURT.

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

18-1-415. Testing - payment. ~~All testing shall be performed at a law enforcement facility, and the petitioner shall pay for the testing.~~ IF THE COURT ORDERS DNA TESTING, THE TESTING MUST BE CONDUCTED BY THE COLORADO BUREAU OF INVESTIGATION; EXCEPT THAT THE COURT, UPON REQUEST OF THE PETITIONER AND AFTER THE PETITIONER ESTABLISHES GOOD CAUSE, MAY ORDER TESTING BY ANOTHER TESTING LABORATORY OR AGENCY THAT CONFORMS TO THE CURRENT VERSION OF ISO/IEC 17025 REQUIREMENTS, THE APPROPRIATION QUALITY ASSURANCE STANDARDS REQUIRED BY THE FEDERAL BUREAU OF INVESTIGATION, AND FORENSIC-SPECIFIC REQUIREMENTS AND IS ACCREDITED BY AN ORGANIZATION THAT IS SIGNATORY TO THE INTERNATIONAL LABORATORY ACCREDITATION COOPERATION MUTUAL RECOGNITION ARRANGEMENTS FOR TESTING LABORATORIES. THE PETITIONER SHALL PAY FOR THE TESTING. THE PARTIES SHALL CONSULT AND NEGOTIATE ON AN AGREEMENT ON TESTING METHODS AND TECHNIQUES. IF THE PARTIES CANNOT AGREE, THE COURT SHALL DESIGNATE THE TESTING METHODS AND TECHNIQUES, CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES. IN CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES, THE COURT SHALL CONSIDER WHETHER THE TESTING WOULD BE CONSUMPTIVE IN NATURE, WHETHER THE TESTING WOULD ALLOW FOR THE BEST POSSIBLE COLLECTION OF EVIDENCE, AND WHETHER THE TESTING WOULD ALLOW FOR THE MOST PROBATIVE RESULTS TO BE OBTAINED. If the petitioner is indigent and represented by either the public defender or alternate defense counsel, and with the approval of the public defender or the alternate defense counsel, the costs of the testing shall be paid from ~~their~~ THE PUBLIC DEFENDER'S BUDGET OR THE ALTERNATE DEFENSE COUNSEL'S budget.

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

18-1-416. Results of the DNA test. (1) Notwithstanding any law or rule of procedure that bars a motion for postconviction review as untimely OR SUCCESSIVE, a petitioner may use the results of a DNA test ordered pursuant to section 18-1-413

as the grounds for filing a motion for postconviction review ~~under~~ PURSUANT TO section 18-1-410 and the Colorado rules of criminal procedure.

(1.5) IF FORENSIC DNA TESTING ORDERED PROVIDES A FAVORABLE RESULT TO THE PETITIONER, THE COURT SHALL SCHEDULE A HEARING WITHIN THIRTY DAYS AFTER THE RESULT TO DETERMINE THE APPROPRIATE RELIEF TO BE GRANTED. BASED ON THE RESULTS OF THE TESTING AND ANY EVIDENCE OR OTHER INFORMATION PRESENTED AT THE HEARING, THE COURT SHALL ENTER AN ORDER WITHIN THIRTY DAYS AFTER THE HEARING THAT SERVES THE INTERESTS OF JUSTICE, INCLUDING, BUT NOT LIMITED TO, AN ORDER SETTING ASIDE OR VACATING THE PETITIONER'S JUDGMENT OF CONVICTION.

(3) THE COURT SHALL ENSURE COMPLIANCE WITH THE NOTIFICATION PROCEDURES AND RIGHTS AFFORDED TO VICTIMS PROVIDED FOR IN SECTIONS 24-4.1-301 TO 24-4.1-305.

SECTION 7. In Colorado Revised Statutes, 24-4.1-302, **amend** (2)(u); and **add** (2)(u.5) as follows:

24-4.1-302. Definitions. As used in this part 3, and for no other purpose, including the expansion of the rights of any defendant:

(2) "Critical stages" means the following stages of the criminal justice process:

(u) The decision, whether by court order, stipulation of the parties, or otherwise, to conduct postconviction DNA testing ~~to establish the actual innocence of the person convicted of a crime against the victim~~ pursuant to section 18-1-413, the results of any such postconviction DNA testing, and court proceedings initiated based on the result of the postconviction DNA testing. An inmate's written or oral request for such testing is not a "critical stage".

(u.5) A HEARING HELD PURSUANT TO SECTION 18-1-416 (1.5);

SECTION 8. In Colorado Revised Statutes, 24-4.1-303, **amend** (11)(b) as follows:

24-4.1-303. Procedures for ensuring rights of victims of crimes. (11) The district attorney shall inform a victim of the following:

(b) Any of the critical stages specified in section 24-4.1-302 (2)(a) to (2)(j), ~~and~~ (2)(l), AND (2)(u.5) of a criminal proceeding relating to a person accused of a crime against the victim; except that the district attorney shall not be obligated to inform the victim of any appellate review undertaken by the attorney general's office;

SECTION 9. Effective date - applicability. This act takes effect on October 1, 2023, and applies to petitions filed on or after said date.

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

Approved: March 10, 2023