

CHAPTER 90

CRIMINAL LAW AND PROCEDURE

SENATE BILL 03-164

BY SENATOR(S) Gordon, Fitz-Gerald, Groff, Grossman, Hanna, Linkhart, Nichol, Sandoval, Tapia, Tupa, and Windels;
also REPRESENTATIVE(S) Hefley, Boyd, Carroll, Garcia, Hodge, Jahn, Lee, Madden, Merrifield, Pommer, Stafford, and
Stengel.

AN ACT**CONCERNING CREATION OF A POST-CONVICTION DNA EVIDENCE PROCEDURE.**

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

SECTION 1. Part 4 of article 1 of title 18, Colorado Revised Statutes, is amended
BY THE ADDITION OF THE FOLLOWING NEW SECTIONS to read:

18-1-411. Post-conviction 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.

(2) "ACTUAL OR CONSTRUCTIVE POSSESSION" MEANS THE BIOLOGICAL EVIDENCE
IS MAINTAINED OR STORED ON THE PREMISES OF THE LAW ENFORCEMENT AGENCY OR
AT ANOTHER LOCATION OR FACILITY UNDER THE CUSTODY OR CONTROL OF THE LAW
ENFORCEMENT AGENCY, INCLUDING PURSUANT TO AN AGREEMENT OR CONTRACT
WITH THE LAW ENFORCEMENT AGENCY AND A THIRD-PARTY SERVICE PROVIDER, IN
COLORADO OR ELSEWHERE.

(3) "DNA" MEANS DEOXYRIBONUCLEIC ACID.

(4) "INCARCERATED" MEANS PHYSICALLY HOUSED IN A DEPARTMENT OF
CORRECTIONS FACILITY, A PRIVATE CORRECTIONAL FACILITY UNDER CONTRACT WITH
THE DEPARTMENT OF CORRECTIONS, OR A COUNTY JAIL FOLLOWING A FELONY
CONVICTION, OR IN A JUVENILE FACILITY FOLLOWING ADJUDICATION FOR AN OFFENSE
THAT WOULD HAVE BEEN A FELONY IF COMMITTED BY AN ADULT, OR UNDER PAROLE

*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions
from existing statutes and such material not part of act.*

SUPERVISION.

18-1-412. Procedure for application for DNA testing - appointment of counsel. (1) AN INCARCERATED PERSON MAY APPLY 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.

(2) A MOTION FILED PURSUANT TO THIS SECTION SHALL INCLUDE SPECIFIC FACTS SUFFICIENT TO SUPPORT A PRIMA FACIE SHOWING THAT POST-CONVICTION RELIEF IS WARRANTED UNDER THE CRITERIA SET FORTH IN SECTION 18-1-413. THE MOTION SHALL INCLUDE THE RESULTS OF ALL PRIOR DNA TESTS, REGARDLESS OF WHETHER A TEST WAS PERFORMED BY THE DEFENSE OR THE PROSECUTION.

(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.

(4) IF THE COURT DOES NOT DENY THE PETITIONER'S MOTION FOR TESTING, THE COURT SHALL APPOINT COUNSEL IF THE COURT DETERMINES THE PETITIONER IS INDIGENT AND HAS REQUESTED COUNSEL. THE COURT SHALL FORWARD A COPY OF THE MOTION FOR DNA TESTING TO THE DISTRICT ATTORNEY.

(5) COUNSEL FOR THE DEFENDANT MAY REQUEST THE COURT TO SET THE MATTER FOR A HEARING, IF, UPON INVESTIGATION OF THE PETITIONER'S MOTION FOR TESTING, COUNSEL BELIEVES SUFFICIENT GROUNDS EXIST TO SUPPORT AN ORDER FOR DNA TESTING. IF THE PETITIONER REPRESENTS HIMSELF OR HERSELF, THE COURT MAY SET THE MATTER FOR A HEARING UPON HIS OR HER REQUEST.

(6) FOLLOWING A REQUEST FOR A HEARING, THE COURT SHALL ALLOW THE DISTRICT ATTORNEY A REASONABLE AMOUNT OF TIME, BUT NOT LESS THAN THIRTY DAYS, TO RESPOND TO THE MOTION AND ANY SUPPLEMENT FILED BY THE PETITIONER'S COUNSEL AND TO PREPARE FOR THE HEARING.

(7) A COURT SHALL NOT ORDER DNA TESTING WITHOUT A HEARING, EXCEPT UPON WRITTEN STIPULATION OF THE DISTRICT ATTORNEY.

(8) THE COURT SHALL DENY A MOTION FOR PRODUCTION OF TRANSCRIPTS UNLESS THE PETITIONER MAKES A PRIMA FACIE SHOWING THAT A TRANSCRIPT WILL BE NECESSARY AT A HEARING CONDUCTED PURSUANT TO THIS SECTION.

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:

(a) FAVORABLE RESULTS OF THE DNA TESTING WILL DEMONSTRATE THE PETITIONER'S ACTUAL INNOCENCE;

(b) 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 DNA RESULTS WERE NOT AVAILABLE PRIOR TO THE PETITIONER'S CONVICTION; AND

(II) THE PETITIONER DID NOT SECURE DNA TESTING PRIOR TO HIS OR HER CONVICTION BECAUSE DNA TESTING WAS NOT REASONABLY AVAILABLE OR FOR REASONS THAT CONSTITUTE JUSTIFIABLE EXCUSE, INEFFECTIVE ASSISTANCE OF COUNSEL, OR EXCUSABLE NEGLIGENCE; AND

(d) THE PETITIONER CONSENTS TO PROVIDE A BIOLOGICAL SAMPLE FOR DNA TESTING.

18-1-414. Preservation of evidence. (1) A PETITIONER SHALL NOT BE ENTITLED TO RELIEF BASED SOLELY ON AN ALLEGATION THAT A LAW ENFORCEMENT AGENCY FAILED TO PRESERVE BIOLOGICAL EVIDENCE.

(2) A COURT GRANTING A MOTION FOR HEARING PURSUANT TO SECTION 18-1-412 SHALL ORDER THE APPROPRIATE LAW ENFORCEMENT AGENCY TO PRESERVE EXISTING BIOLOGICAL EVIDENCE FOR DNA TESTING.

(3) NOTWITHSTANDING THE PROVISIONS OF SUBSECTION (2) OF THIS SECTION, THIS SECTION DOES NOT CREATE A DUTY TO PRESERVE BIOLOGICAL EVIDENCE NOR DOES IT CREATE A LIABILITY ON THE PART OF A LAW ENFORCEMENT AGENCY FOR FAILING TO PRESERVE BIOLOGICAL EVIDENCE.

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 PETITIONER IS INDIGENT AND REPRESENTED BY EITHER THE PUBLIC DEFENDER OR ALTERNATIVE DEFENSE COUNSEL, AND WITH THE APPROVAL OF THE PUBLIC DEFENDER OR THE ALTERNATIVE DEFENSE COUNSEL, THE COSTS OF THE TESTING SHALL BE PAID FROM THEIR BUDGET.

18-1-416. Results of the DNA test. (1) NOTWITHSTANDING ANY LAW OR RULE OF PROCEDURE THAT BARS A MOTION FOR POST-CONVICTION REVIEW AS UNTIMELY, 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 POST-CONVICTION REVIEW UNDER SECTION 18-1-410 AND THE COLORADO RULES OF CRIMINAL PROCEDURE.

(2) THE TESTING LABORATORY SHALL MAKE THE RESULTS OF A DNA TEST ORDERED PURSUANT TO SECTION 18-1-413 AVAILABLE TO THE COMBINED DNA INDEX SYSTEM AND TO ANY COLORADO, FEDERAL, OR OTHER LAW ENFORCEMENT DNA DATABASES.

SECTION 2. Effective date. This act shall take effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state constitution; except that, if a referendum petition

is filed against this act or an item, section, or part of this act within such period, then the act, item, section, or part, if approved by the people, shall take effect on the date of the official declaration of the vote thereon by proclamation of the governor.

Approved: March 28, 2003