

AN ACT

---

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

---

*Codification  
District of  
Columbia  
Official Code*

2001 Edition

2002 Supp.

West Group  
Publisher

To require that a criminal defendant be informed in open court prior to trial for or the entry of a plea to a crime of violence that the defendant may request or waive DNA testing of biological material pertaining to the defendant's case, to authorize convicted persons to file a petition for post-conviction DNA testing of biological material under certain circumstances, to require the court to make certain findings before issuing an order for DNA testing, to require certain notification procedures, to require the costs of DNA testing to be paid by the District of Columbia depending on certain circumstances, to require the District to preserve evidence under certain circumstances, and to authorize post-conviction motions to vacate a conviction or to grant a new trial on the grounds of actual innocence; and to amend section 23-1322 of the District of Columbia Official Code to clarify that individuals under supervised release as a result of prior criminal convictions who are charged with new criminal conduct may be held without bond for 5 days if a judicial officer also finds that the individual may flee or pose a danger to any other person or the community.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Innocence Protection Act of 2001".

Sec. 2. Definitions.

For the purposes of this act, the term:

- (1) "Actual innocence" or "actually innocent" means that the person did not commit the crime of which he or she was convicted.
- (2) "Biological material" means a sexual assault forensic examination kit, semen, vaginal fluid, blood, saliva, observable skin tissue, or hair which apparently derived from the perpetrator of a crime or, under circumstances that may be probative of the perpetrator's identity, apparently derived from the victim of a crime.
- (3) "Crime of violence" means the crimes cited in D.C. Official Code § 23-1331(4).

New  
§ 22-4031

(4) "DNA" means deoxyribonucleic acid.

(5) "DNA testing" means forensic DNA analysis of biological material.

(6) "Law enforcement agencies" means the Metropolitan Police Department, the Corporation Counsel for the District of Columbia, prosecutors, or any other governmental agency that has the authority to investigate, make arrests for, or prosecute or adjudicate District of Columbia criminal or delinquency offenses. The term "law enforcement agencies" shall include law enforcement agencies that have entered into cooperative agreements with the Metropolitan Police Department pursuant to Section 11712 of the Balanced Budget Act of 1997, approved August 5, 1997 (111 Stat. 783; D.C. Official Code § 5-133.17), to the extent the law enforcement agency is acting pursuant to such a cooperative agreement.

(7) "New evidence" means evidence that:

(A) Was not personally known and could not, in the exercise of reasonable diligence, have been personally known to the movant at the time of the trial or the plea proceeding;

(B) Was personally known to the movant at the time of the trial or the plea proceeding, but could not be produced at that time because:

(i) The presence or the testimony of a witness could not be compelled or, in the exercise of reasonable diligence by the movant, otherwise obtained; or

(ii) Physical evidence, in the exercise of the movant's reasonable diligence, could not be obtained; or

(C) Was obtained as a result of post-conviction DNA testing.

Sec. 3. Pre-conviction DNA testing.

(a) Prior to trial for or the entry of a plea to a crime of violence, the defendant shall be informed in open court of physical evidence seized or recovered in the investigation or prosecution of the case which may contain biological material and of the results of any DNA testing that has been performed on such evidence.

(b) A defendant charged with a crime of violence shall be informed in open court:

(1) That he or she may request or waive independent DNA testing prior to trial or the entry of a plea if:

(A)(i) DNA testing has resulted in the inclusion of the defendant as a source of the biological material; or

(ii) Under circumstances that are probative of the perpetrator's identity, DNA testing has resulted in the inclusion of the victim as a source of the biological material; and

(B) There is sufficient biological material to conduct another DNA test;

(2) That he or she may request or waive DNA testing of biological material prior to trial or the entry of a plea if the biological material has not been subjected to DNA testing; and

(3) Of the potential evidentiary value of DNA evidence in the defendant's case

New  
§ 22-4032

and the consequences of requesting or waiving DNA testing.

(c) A defendant who makes a knowing, intelligent, and voluntary waiver of DNA testing or independent DNA testing pursuant to subsection (b) of this section prior to trial or the entry of a plea is not eligible for post-conviction DNA testing under section 4 unless the defendant is entitled to have the conviction to which the DNA evidence relates set aside under D.C. Official Code § 23-110 or Rule 32 of the Superior Court Rules of Criminal Procedure.

Sec. 4. Post-conviction DNA testing.

New § 22-4033

(a) A person in custody pursuant to the judgment of the Superior Court of the District of Columbia for a crime of violence may, at any time after conviction or adjudication as a delinquent, apply to the court for DNA testing of biological material that:

(1) Was seized or recovered as evidence in the investigation or prosecution that resulted in the conviction or adjudication as a delinquent or can otherwise be identified as evidence in the case;

(2) Is in the actual or constructive possession of the District of Columbia or the United States, or has been retained by any other person or entity under conditions sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; and

(3)(A) Was not previously subject to DNA testing because DNA testing was not readily available in criminal cases in the District of Columbia at the time of conviction or adjudication as a delinquent;

(B) Was not previously subjected to the type of DNA testing being requested and the new type of DNA testing would have a reasonable probability of providing a more probative result than tests previously conducted;

(C) Was not previously subjected to DNA testing because of circumstances that would entitle the applicant to relief under D.C. Official Code § 23-110 or Rule 32 of the Superior Court Rules of Criminal Procedure; or

(D) Was not previously subjected to DNA testing because it is new evidence as defined in section 2(7)(A) or (B).

(b) The application shall:

(1) Include an affidavit by the applicant, under penalty of perjury, stating that the applicant is actually innocent of the crime that is the subject of the application; provided, that the denial of an application for testing or an inconclusive result produced by DNA testing shall not be admissible in any prosecution based on the filing of a false affidavit;

(2) Identify the specific evidence for which DNA testing is requested;

(3) Set forth the reason that the requested DNA testing was not previously obtained; and

(4) Explain how the DNA evidence would help establish that the applicant is actually innocent despite having been convicted at trial or having pled guilty.

(c) Unless the application and files and records of the case conclusively show that the applicant is entitled to no relief, the court shall notify the prosecution of an application made pursuant to subsection (a) of this section and shall afford the prosecution an opportunity to respond. Upon receiving notice of an application made pursuant to subsection (a) of this section, the prosecution shall take the necessary steps to ensure that any remaining biological material that was obtained in connection with the case or investigation is preserved pending the completion of proceedings under this section.

(d) The court shall order DNA testing pursuant to an application made under subsection (a) of this section upon a determination that the application meets the criteria set forth in subsections (a) and (b) of this section and there is a reasonable probability that testing will produce non-cumulative evidence that would help establish that the applicant was actually innocent of the crime for which the applicant was convicted or adjudicated as delinquent.

(e)(1) The cost of DNA testing ordered pursuant to subsection (d) of this section shall be paid by the District of Columbia, to the same extent provided for in D.C. Official Code § 11-2605, if the court finds that the applicant is financially unable to pay for the testing. If the applicant is financially able to pay for the testing, the cost shall be borne by the applicant.

(2) The court may appoint counsel for an applicant for DNA testing pursuant to this section who is financially unable to obtain adequate representation.

(3) The provisions of Chapter 26 of Title 11 of the District of Columbia Official Code (the District of Columbia Criminal Justice Act) shall apply with equal force to applications made pursuant to this section.

(f) An order granting or denying relief under this section is a final order for purposes of appeal.

Sec. 5. Preservation of evidence.

(a) Law enforcement agencies shall preserve biological material that was seized or recovered as evidence in the investigation or prosecution that resulted in the conviction or adjudication as a delinquent for a crime of violence and not consumed in previous DNA testing for 5 years or as long as any person incarcerated in connection with that case or investigation remains in custody, whichever is longer.

(b) Notwithstanding subsection (a) of this section, the District of Columbia may dispose of the biological material after 5 years, if the District of Columbia notifies any person who remains incarcerated in connection with the investigation or prosecution and any counsel of record for such person (or, if there is no counsel of record, the Public Defender Service), of the intention of the District of Columbia to dispose of the evidence and the District of Columbia affords such person not less than 180 days after the notification to make an application for DNA testing of the evidence.

(c) The District of Columbia shall not be required to preserve evidence that must be returned to its rightful owner, or is of such a size, bulk, or physical character as to render

New  
§ 22-4034

retention impracticable. If practicable, the District of Columbia shall remove and preserve portions of this material evidence sufficient to permit future DNA testing before returning or disposing of it.

(d) Whoever willfully or maliciously destroys, alters, conceals, or tampers with evidence that is required to be preserved under this section with the intent to (1) impair the integrity of that evidence, (2) prevent that evidence from being subjected to DNA testing, or (3) prevent the production or use of that evidence in an official proceeding, shall be subject to a fine of \$100,000 or imprisoned for not more than 5 years, or both.

Sec. 6. Motion to vacate a conviction or grant a new trial on the ground of actual innocence.

New  
§ 22-4035

(a) A person convicted of a criminal offense in the Superior Court of the District of Columbia may move the court to vacate the conviction or to grant a new trial on grounds of actual innocence based on new evidence.

(b) Notwithstanding the time limits in any other provision of law, a motion for relief under this section may be made at any time.

(c) The motion shall set forth specific, non-conclusory facts:

(1) Identifying the specific new evidence;

(2) Establishing how that evidence demonstrates that the movant is actually innocent despite having been convicted at trial or having pled guilty; and

(3) Establishing why the new evidence is not cumulative or impeaching.

(d)(1) The motion shall include an affidavit by the movant, under penalty of perjury, stating that movant is actually innocent of the crime that is the subject of the motion, and that the new evidence was not deliberately withheld by the movant for purposes of strategic advantage.

(2) The denial of a motion for relief under this section shall not be admissible in any prosecution based on the filing of a false affidavit.

(e)(1) Unless the motion and files and records of the case conclusively show that the movant is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto.

(2) The court may appoint counsel for an indigent movant under this section pursuant to Chapter 26 of Title 11 of the District of Columbia Official Code.

(3) The court may entertain and determine the motion without requiring production of the movant at the hearing.

(4) A movant shall be entitled to invoke the processes of discovery available under Superior Court Rules of Criminal Procedure or Civil Procedure, or elsewhere in the usages and principles of law if, and to the extent that, the judge, in the exercise of the judge's discretion and for good cause shown, grants leave to do so, but not otherwise.

(f) A motion for relief made pursuant to this section may be dismissed if it appears that

the government has been prejudiced in its ability to respond to the motion by the delay in its filing, unless the movant shows that the motion is based on grounds which the movant could not have raised by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

(g)(1) In determining whether to grant relief, the court may consider any relevant evidence, but shall consider the following:

- (A) The new evidence;
- (B) How the new evidence demonstrates actual innocence;
- (C) Why the new evidence is or is not cumulative or impeaching;
- (D) If the conviction resulted from a trial, and if the movant asserted a theory of defense inconsistent with the current claim of innocence, the specific reason the movant asserted an inconsistent theory at trial; and

(E) If the conviction resulted from a guilty plea, the specific reason the movant pleaded guilty despite being actually innocent of the crime.

(2) If, after considering the factors in paragraph (1) of this subsection, the court concludes that it is more likely than not that the movant is actually innocent of the crime, the court shall grant a new trial.

(3) If, after considering the factors in paragraph (1) of this subsection, the court concludes by clear and convincing evidence that the movant is actually innocent of the crime, the court shall vacate the conviction and dismiss the relevant count with prejudice.

(4) If the conviction resulted from a plea of guilty, and other charges were dismissed as part of a plea agreement, the court shall reinstate any charges of which the defendant has not demonstrated that the defendant is actually innocent.

(h) The court shall not be required to entertain a second or successive motion for similar relief on behalf of the same movant.

(i) An order entered on the motion is a final order for purposes of appeal.

Sec. 7. Section 23-1322 of the District of Columbia Official Code is amended as follows:

Amend  
§ 23-1322

(a) Subsection (a)(1)(C) is amended by striking the phrase "Probation or parole" and inserting the phrase "Probation, parole, or supervised release" in its place.

(b) Subsection (e)(3)(B) is amended by adding the phrase "on supervised release," after the phrase "parole,".

Sec. 8. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

**ENROLLED ORIGINAL**

Sec. 9. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 60-day period of Congressional review as provided in section 602(c)(2) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(2)), and publication in the District of Columbia Register.

---

Chairman  
Council of the District of Columbia

---

Mayor  
District of Columbia