

Code of Laws of South Carolina 1976 Annotated [Currentness](#)

Title 17. Criminal Procedures

▢ [Chapter 28](#). Post-Conviction DNA Testing and Preservation of Evidence

→ [Article 1](#). Post-Conviction DNA Procedures ([Refs & Annos](#))

→ **§ 17-28-10. Citation of Article.**

This article may be cited as the “Access to Justice Post-Conviction DNA Testing Act”.

### **§ 17-28-20. Definitions.**

For purposes of this article:

- (1) “Biological material” means any blood, tissue, hair, saliva, bone, or semen from which DNA marker groupings may be obtained. This includes material catalogued separately on slides, swabs, or test tubes or present on other evidence including, but not limited to, clothing, ligatures, bedding, other household material, drinking cups, or cigarettes.
- (2) “Custodian of evidence” means an agency or political subdivision of the State including, but not limited to, a law enforcement agency, a solicitor's office, the Attorney General's Office, a county clerk of court, or a state grand jury that possesses and is responsible for the control of evidence during a criminal investigation or proceeding, or a person ordered by a court to take custody of evidence during a criminal investigation or proceeding.
- (3) “DNA” means deoxyribonucleic acid.
- (4) “DNA profile” means the results of any testing performed on a DNA sample.
- (5) “DNA record” means the tissue or saliva samples and the results of the testing performed on the samples.
- (6) “DNA sample” means the tissue, saliva, blood, or any other bodily fluid taken at the time of arrest from which identifiable information can be obtained.
- (7) “Incarceration” means serving a term of confinement in the custody of the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice and does not include a person on probation, parole, or under a community supervision program.
- (8) “Law enforcement agency” means a lawfully established federal, state, or local public agency that is re-

sponsible for the prevention and detection of crime and the enforcement of penal, traffic, regulatory, game, immigration, postal, customs, or controlled substances laws.

(9) “Physical evidence” means an object, thing, or substance that is or is about to be produced or used or has been produced or used in a criminal proceeding related to an offense enumerated in [Section 17-28-30](#), and that is in the possession of a custodian of evidence.

**§ 17-28-30. Offenses for which post-conviction DNA testing available.**

(A) A person who pled not guilty to at least one of the following offenses, was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication:

- (1) murder ([Section 16-3-10](#));
- (2) killing by poison ([Section 16-3-30](#));
- (3) killing by stabbing or thrusting ([Section 16-3-40](#));
- (4) voluntary manslaughter ([Section 16-3-50](#));
- (5) homicide by child abuse ([Section 16-3-85\(A\)\(1\)](#));
- (6) aiding and abetting a homicide by child abuse ([Section 16-3-85\(A\)\(2\)](#));
- (7) lynching in the first degree ([Section 16-3-210](#));
- (8) killing in a duel ([Section 16-3-430](#));
- (9) spousal sexual battery ([Section 16-3-615](#));
- (10) criminal sexual conduct in the first degree ([Section 16-3-652](#));
- (11) criminal sexual conduct in the second degree ([Section 16-3-653](#));
- (12) criminal sexual conduct in the third degree ([Section 16-3-654](#));

- (13) criminal sexual conduct with a minor ([Section 16-3-655](#));
- (14) arson in the first degree resulting in death ([Section 16-11-110\(A\)](#));
- (15) burglary in the first degree for which the person is sentenced to ten years or more ([Section 16-11-311\(B\)](#));
- (16) armed robbery for which the person is sentenced to ten years or more ([Section 16-11-330\(A\)](#));
- (17) damaging or destroying a building, vehicle, or property by means of an explosive incendiary resulting in death ([Section 16-11-540](#));
- (18) abuse or neglect of a vulnerable adult resulting in death ([Section 43-35-85\(F\)](#));
- (19) sexual misconduct with an inmate, patient, or offender ([Section 44-23-1150](#));
- (20) unlawful removing or damaging of an airport facility or equipment resulting in death ([Section 55-1-30 \(3\)](#));
- (21) interference with traffic-control devices or railroad signs or signals resulting in death ([Section 56-5-1030\(B\)\(3\)](#));
- (22) driving a motor vehicle under the influence of alcohol or drugs resulting in death ([Section 56-5-2945](#));
- (23) obstruction of railroad resulting in death ([Section 58-17-4090](#)); or
- (24) accessory before the fact ([Section 16-1-40](#)) to any offense enumerated in this subsection.

(B) A person who pled guilty or nolo contendere to at least one of the offenses enumerated in subsection (A), was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication no later than seven years from the date of sentencing.

#### **§ 17-28-40. Form and contents of application.**

- (A) The application must be made on such form as prescribed by the Supreme Court.

(B) The application must be verified by the applicant and filed under the original indictment number or petition with the clerk of court of the general sessions court or family court in which the conviction or adjudication took place. Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct.

(C) The application must, under penalty of perjury:

(1) identify the proceedings in which the applicant was convicted or adjudicated;

(2) give the date of the entry of the judgment and sentence and identify the applicant's current place of incarceration;

(3) identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication;

(4) make a reasonable attempt to identify the physical evidence or biological material that should be tested and the specific type of DNA testing that is sought;

(5) explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;

(6) explain why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, provide the results of the testing and explain how the requested DNA test would provide a substantially more probative result;

(7) explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching; and

(8) provide that the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

**§ 17-28-50. Application for testing; notification of prosecutor, custodian of evidence, and victim; dismissal; successive applications.**

(A) The clerk shall file the application upon its receipt and promptly bring it to the attention of the court and deliver for docketing a copy to the solicitor of the circuit in which the applicant was convicted or adjudicated.

The Attorney General and the appropriate custodian of evidence shall be notified by the solicitor. The victim shall be notified pursuant to the provisions of Article 15, Chapter 3, Title 16.

(B) Within ninety days after the forwarding of the application, or upon any further time the court may fix, the solicitor of the circuit in which the applicant was convicted or adjudicated, or the Attorney General if the Attorney General prosecuted the case, shall respond to the application. Within ninety days after the docketing of the application, or within any further time the court may fix, the victim may respond as provided in Article 15, Chapter 3, Title 16. The court may proceed with a hearing if the solicitor or Attorney General, as applicable, or the victim does not respond to the application.

(C) At any time prior to entry of judgment the court may, when appropriate, issue orders for amendment of the application and for any documents related to the application including, but not limited to, pleadings, motions, and requests for extensions of time. In considering the application and related documents, the court shall take account of substance, regardless of defects of form. When the court is satisfied, on the basis of the application, the responses, or the motion of the solicitor or Attorney General, as applicable, that the applicant is not entitled to DNA testing and no purpose would be served by any further proceedings, it may indicate to the applicant and the solicitor or Attorney General, as applicable, its intention to summarily dismiss the application and its reasons for so doing. The victim shall be notified of the proposed dismissal pursuant to the provisions of Article 15, Chapter 3, Title 16. The court shall make specific findings of fact and expressly state its conclusions of law. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed, grant leave to file an amended application, or direct that the proceedings otherwise continue.

(D) If the applicant has filed a previous application for DNA testing, the applicant may file a successive application, provided the applicant asserts grounds for DNA testing which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

#### **§ 17-28-60. Costs and expenses; appointment of counsel for indigent applicant.**

If the applicant is unable to pay court costs and expenses of counsel, these costs and expenses shall be made available to the applicant in amounts and to the extent provided pursuant to [Section 17-27-60](#). The applicant must request counsel at the time he files his application. The court must appoint counsel for an indigent applicant after the court has determined that the application is sufficient to proceed to a hearing but prior to the actual hearing. If counsel has been appointed for the applicant in an ongoing post-conviction relief proceeding, then the counsel appointed in the post-conviction relief proceeding shall also serve as counsel for purposes of this article. The performance of counsel pursuant to this article shall not form the basis for relief in any post-conviction relief proceeding.

#### **§ 17-28-70. Preservation and management of physical evidence and biological material; wilful destruction of evidence.**

(A) The court shall order a custodian of evidence to preserve all physical evidence and biological material related to the applicant's conviction or adjudication pursuant to the provisions of Article 3, Chapter 28, Title 17.

(B) The custodian of evidence shall prepare an inventory of the physical evidence and biological material and issue a copy of the inventory to the applicant, the solicitor or Attorney General, as applicable, and the court.

(C) For physical evidence or biological material that the custodian of evidence asserts has been lost or destroyed, the court shall order a custodian of evidence to locate and provide the applicant and the solicitor or Attorney General, as applicable, with a copy of any document, note, log, or report relating to the physical evidence or biological material.

(D) If no physical evidence or biological material is discovered, the court may order a custodian of evidence, in collaboration with law enforcement, to search physical evidence and biological material in the custodian of evidence's possession that would reasonably be expected to produce relevant physical evidence or biological material. The order shall provide that any physical evidence and biological material subject to this search must be adequately protected by the custodian of evidence, in collaboration with law enforcement, from interference by a third party, including, but not limited to, alteration, contamination, destruction, or tampering with the physical evidence and biological material and any chain of custody related to the physical evidence and biological material.

(E) A person who wilfully and maliciously destroys, alters, conceals, or tampers with physical evidence or biological material that is required to be preserved pursuant to this section with the intent to impair the integrity of the physical evidence or biological material, prevent the physical evidence or biological material from being subjected to DNA testing, or prevent the production or use of the physical evidence or biological material in an official proceeding, is subject to the provisions of [Section 17-28-350](#).

#### **§ 17-28-80. Preservation of test reports.**

For any physical evidence or biological material previously subjected to DNA testing whether by the applicant or the solicitor or Attorney General, as applicable, the court shall order the production of all written reports and laboratory reports prepared in connection with the DNA testing, including the underlying data and laboratory notes.

#### **§ 17-28-90. Hearing; factors to be proved; orders relating to DNA samples.**

(A) The application must be heard in, and before a judge of, the general sessions court or family court in which the conviction or adjudication took place. A record of the proceedings must be made and preserved. All rules and statutes applicable in criminal proceedings are available to the applicant and the solicitor or Attorney General, as applicable.

(B) The court shall order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant has established each of the following factors by a preponderance of the evidence:

(1) the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;

(2) the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;

(3) the physical evidence or biological material sought to be tested is material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;

(4) the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;

(5) if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching;

(6) the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and

(7) the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

(C) The court shall order that any sample taken of the applicant's DNA for purposes of DNA testing pursuant to this article or for submission to SLED pursuant to subsection (F) be taken by a correctional health nurse technician, physician, registered professional nurse, licensed practical nurse, laboratory technician, or other appropriately trained health care worker. The applicant's counsel, if any, and the solicitor or Attorney General, as applicable, must be allowed to observe the taking of any sample.

(D) The court shall order that the applicant's DNA sample and the physical evidence or biological material be tested by SLED, a local Combined DNA Index System (CODIS) laboratory, or prior to any testing, any other

laboratory approved by SLED, in an effort to ensure that the results may be entered into the State DNA Database and Combined DNA Index System. Any other type of DNA testing ordered by the court shall be conducted in consultation with SLED or a local CODIS laboratory.

(E) The court shall order that the applicant pay the costs of the DNA testing. If the applicant is indigent, the costs of the DNA testing shall be paid by the State.

(F) The court shall order that a sample of the applicant's DNA be submitted to SLED to compare with profiles in the State DNA Database and any federal or other law enforcement DNA database in compliance with National DNA Index System (NDIS) procedures. The sample must be submitted regardless of any previous samples submitted by the applicant. If the comparison matches a DNA profile for the offense for which the applicant was convicted or adjudicated, the DNA profile may be retained in the State DNA Database. If the comparison does not match a DNA profile for the offense for which the applicant was convicted or adjudicated, but results in a match with a DNA profile for any other offense, the DNA profile may be retained in the State DNA Database. SLED shall notify the appropriate law enforcement agency. If the comparison does not match a DNA profile for any offense, the DNA record must be destroyed. Any previous profiles must be maintained by SLED subject to the State DNA Database Act. SLED shall report to the court, the applicant, and the solicitor or Attorney General, as applicable, the results of all DNA database comparisons. The victim must be notified of the results of all DNA database comparisons pursuant to Article 15, Chapter 3, Title 16.

(G) The applicant and the solicitor or Attorney General, as applicable, shall have the right to appeal a final order denying or granting DNA testing by a writ of certiorari to the Court of Appeals or the Supreme Court as provided by the South Carolina Appellate Court Rules.

#### **§ 17-28-100. Disclosure and use of test results; motion for new trial.**

(A) The results of the DNA test must be fully disclosed to the court, the applicant, and the solicitor or Attorney General, as applicable. The victim shall be notified of the results of the DNA test pursuant to Article 15, Chapter 3, Title 16. The court shall order the production of any written reports and laboratory reports prepared in connection with the DNA testing, including underlying data and notes.

(B) The results of the DNA test may be used by the applicant, solicitor, or Attorney General in any post-conviction proceeding or trial. If the results of the DNA test are exculpatory, the applicant may use the exculpatory results of the DNA test as grounds for filing a motion for new trial pursuant to the South Carolina Rules of Criminal Procedure. If the results of the DNA test are inconclusive, the court may allow for additional DNA testing or may dismiss the application. If the results of the DNA test are inculpatory, the court shall dismiss the application and shall, on motion of the solicitor or Attorney General, as applicable:

(1) make a determination whether the applicant's assertion of actual innocence was intentionally false and, as a result, hold the applicant in contempt of court;



(2) assess against the applicant the cost of any DNA testing not already paid by the applicant;

(3) forward the findings to the South Carolina Department of Corrections, who may use such finding to deny good conduct credit; and

(4) forward the findings to the Department of Probation, Parole and Pardon Services, who may use the findings to deny parole.

(C) Except as otherwise provided in this article, DNA records, results, and information taken from the applicant are exempt from any law requiring disclosure of information to the public.

**§ 17-28-110. Consent to testing.**

(A) Nothing in this article prohibits a person and a solicitor or the Attorney General, as applicable, from consenting to and conducting post-conviction DNA testing by agreement of the parties. The person may use the exculpatory results of the DNA test as the grounds for filing a motion for new trial pursuant to the South Carolina Rules of Criminal Procedure.

(B) Nothing in this article prohibits a person from filing an application for post-conviction relief pursuant to Chapter 27, Title 17.

(C) Unless there is an act of gross negligence or intentional misconduct this article may not be construed to give rise to a claim for damages against the State of South Carolina, a political subdivision of the State, or an employee of the State or a political subdivision of the State. Failure of a custodian of evidence to preserve physical evidence or biological material pursuant to this article does not entitle the applicant to any relief from conviction or adjudication but does not prohibit a person from presenting this information at a subsequent hearing or trial.

**§ 17-28-120. Administration expenditure limitation.**

No more than one hundred fifty thousand dollars may be expended from the general fund in any fiscal year to administer the provisions of this article.

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