

SUBSTITUTE FOR
HOUSE BILL NO. 5089

A bill to amend 1927 PA 175, entitled
"The code of criminal procedure,"
by amending section 16 of chapter X (MCL 770.16), as amended by
2005 PA 4.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

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CHAPTER X

Sec. 16. (1) Notwithstanding the limitations of section 2 of
this chapter, ~~a defendant convicted of a felony at trial before~~
~~January 8, 2001 who is serving a prison sentence for the felony~~
~~conviction~~ **ANY OF THE FOLLOWING INDIVIDUALS** may petition the
circuit court to order DNA testing of biological material
identified during ~~the~~ **AN** investigation leading to his or her
conviction **FOR A FELONY**, and for a new trial based on the results

1 of that testing: ~~The petition shall be filed not later than~~
2 ~~January 1, 2009.~~

3 (A) AN INDIVIDUAL CONVICTED OF A FELONY AT TRIAL OR BY A PLEA
4 OF GUILTY OR NOLO CONTENDERE BEFORE JANUARY 8, 2001.

5 (B) AN INDIVIDUAL CONVICTED OF A FELONY AT TRIAL ON OR AFTER
6 JANUARY 8, 2001 WHO ESTABLISHES BY EVIDENCE THAT IS ON THE RECORD
7 THAT BOTH OF THE FOLLOWING APPLY:

8 (i) DNA TESTING WAS NOT DONE BY THE STATE.

9 (ii) HE OR SHE REQUESTED THAT DNA TESTING BE DONE BEFORE TRIAL
10 ON IDENTIFIED BIOLOGICAL MATERIAL AND THE COURT DENIED THE REQUEST.

11 (C) AN INDIVIDUAL CONVICTED OF A FELONY AT TRIAL ON OR AFTER
12 JANUARY 8, 2001 WHO ESTABLISHES THAT ALL OF THE FOLLOWING APPLY:

13 (i) THAT DNA TESTING WAS DONE IN THE CASE OR UNDER THIS ACT.

14 (ii) THAT THE RESULTS OF THE TESTING WERE INCONCLUSIVE.

15 (iii) THAT TESTING WITH CURRENT DNA TECHNOLOGY IS LIKELY TO
16 RESULT IN CONCLUSIVE RESULTS.

17 (2) A petition under this section shall be filed **NOT LATER**
18 **THAN JANUARY 1, 2012** in the circuit court for the county in which
19 the ~~defendant~~-PETITIONER was sentenced and shall be assigned to the
20 sentencing judge or his or her successor. **THE PETITION SHALL BE**
21 **ACCOMPANIED BY A SWORN AFFIDAVIT SIGNED BY THE PETITIONER AFFIRMING**
22 **THAT HE OR SHE IS INNOCENT OF THE CRIME FOR WHICH HE OR SHE WAS**
23 **CONVICTED. THE AFFIDAVIT SHALL SPECIFY HOW THE PROPOSED TESTING OF**
24 **THE BIOLOGICAL MATERIAL WILL ESTABLISH HIS OR HER INNOCENCE.** The
25 petition shall be served on the prosecuting attorney of the county
26 in which the ~~defendant~~-PETITIONER was sentenced.

27 (3) **THE PETITION SHALL ALLEGE THAT BIOLOGICAL MATERIAL WAS**

1 COLLECTED AND IDENTIFIED DURING THE INVESTIGATION OF THE
2 PETITIONER'S CASE. IF THE PETITIONER, AFTER DILIGENT INVESTIGATION,
3 IS UNABLE TO DISCOVER THE LOCATION OF THE IDENTIFIED BIOLOGICAL
4 MATERIAL OR TO DETERMINE WHETHER THE BIOLOGICAL MATERIAL IS NO
5 LONGER AVAILABLE, THE PETITIONER MAY PETITION THE COURT FOR A
6 HEARING TO DETERMINE WHETHER THE IDENTIFIED BIOLOGICAL MATERIAL IS
7 AVAILABLE. IF THE COURT DETERMINES THAT IDENTIFIED BIOLOGICAL
8 MATERIAL WAS COLLECTED DURING THE INVESTIGATION, THE COURT SHALL
9 ORDER APPROPRIATE POLICE AGENCIES, HOSPITALS, OR THE MEDICAL
10 EXAMINER TO SEARCH FOR THE MATERIAL AND TO REPORT THE RESULTS OF
11 THE SEARCH TO THE COURT.

12 (4) BEFORE ENTERING AN ORDER FOR TAKING A BIOLOGICAL SAMPLE
13 FROM A PERSON OTHER THAN THE PETITIONER, THE COURT SHALL CONDUCT A
14 HEARING TO DETERMINE THE NECESSITY OF TAKING THAT SAMPLE. THE COURT
15 SHALL TAKE TESTIMONY AND REVIEW EVIDENCE AS NECESSARY TO MAKE THE
16 DETERMINATION. THE RULES OF EVIDENCE SHALL APPLY. BEFORE ORDERING
17 THE SAMPLE TO BE TAKEN, THE COURT MUST FIND SUBSTANTIAL AND
18 COMPELLING REASONS THAT THE BIOLOGICAL SAMPLE IS NECESSARY TO THE
19 DETERMINATION THAT THE PETITIONER DID NOT COMMIT THE CRIME FOR
20 WHICH HE OR SHE WAS CONVICTED. IF THE VICTIM IS REQUIRED TO TESTIFY
21 AT THE HEARING, THE COURTROOM SHALL BE CLOSED AND THE PETITIONER
22 SHALL NOT BE PRESENT IN THE COURTROOM. IF THE COURT DETERMINES THAT
23 A BIOLOGICAL SAMPLE FROM THE VICTIM IS NECESSARY, THE COURT SHALL
24 REQUEST THE VICTIM OR THE VICTIM'S FAMILY OR REPRESENTATIVE TO
25 APPEAR AT AN IN CAMERA MEETING WITH THE COURT. THE VICTIM MAY
26 REQUEST THE PRESENCE OF THE PROSECUTING ATTORNEY. IF THE
27 PROSECUTING ATTORNEY APPEARS AT THE IN CAMERA MEETING, THE

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1 PETITIONER'S ATTORNEY, BUT NOT THE PETITIONER, SHALL ALSO BE
 2 ALLOWED TO ATTEND THE MEETING. THE COURT SHALL EXPLAIN TO THE
 3 VICTIM THE NECESSITY FOR TAKING A BIOLOGICAL SAMPLE AND SHALL
 4 ANSWER ANY QUESTIONS THE VICTIM HAS REGARDING THE COURT'S ORDER
 5 THAT THE VICTIM PROVIDE A SAMPLE.

6 (5) ~~(3)~~—The court shall order DNA testing if the defendant
 7 ~~does~~—**COURT DETERMINES THAT** all of the following **CIRCUMSTANCES**
 8 **EXIST:**

9 (a) ~~Presents~~—**THERE IS** prima facie proof that the evidence
 10 sought to be tested is material to the issue of the ~~convicted~~
 11 ~~person's~~—**PETITIONER'S** identity as the perpetrator of, or accomplice
 12 to, the crime that resulted in the conviction.

13 ~~—(b) Establishes all of the following by clear and convincing~~
 14 ~~evidence.~~

15 (B) ~~(i)~~—A sample of identified biological material described in
 16 subsection (1) is available for DNA testing.

17 (C) ~~(ii)~~—The identified biological material described in
 18 subsection (1) was not previously subjected to DNA testing or, if
 19 previously tested, will be subject to DNA testing technology that
 20 was not available when the ~~defendant~~—**PETITIONER** was convicted.

21 (D) ~~(iii)~~—The identity of the ~~defendant~~—**PETITIONER** as the
 22 perpetrator of the crime was at issue during his or her **[trial**
 23 **PROSECUTION]** .

24 (6) ~~(4)~~—The court shall state its findings of fact on the
 25 record or shall make written findings of fact supporting its
 26 decision to grant or deny a petition brought under this section.

27 (7) ~~(5)~~—If the court grants a petition for DNA testing under
 this section, the identified biological material and a biological

1 sample obtained from the ~~defendant~~ **PETITIONER OR OTHER RELEVANT**
2 **SOURCE** shall be subjected to DNA testing by a laboratory ~~approved~~
3 ~~by the court~~ **ACCREDITED BY THE AMERICAN SOCIETY OF CRIME LAB**
4 **DIRECTORS OR A LABORATORY AGREED TO BY THE COURT, THE PROSECUTING**
5 **ATTORNEY, AND THE PETITIONER.** If the court determines that the
6 applicant is indigent, the cost of DNA testing ordered under this
7 section shall be borne by the state. The results of the DNA testing
8 shall be provided to the court and to the ~~defendant~~ **PETITIONER** and
9 the prosecuting attorney. Upon motion by either party, the court
10 may order that copies of the testing protocols, laboratory
11 procedures, laboratory notes, and other relevant records compiled
12 by the testing laboratory be provided to the court and to all
13 parties.

14 (8) ~~(6)~~—If the results of the DNA testing are inconclusive or
15 show that the ~~defendant~~ **PETITIONER** is the source of the identified
16 biological material **OR THE RESULTS ARE CONSISTENT WITH THE STATE'S**
17 **THEORY OF GUILT**, the court shall deny the motion for new trial. If
18 the DNA test results show that the ~~defendant~~ **PETITIONER** is the
19 source of the identified biological material, the ~~defendant's~~
20 **PETITIONER'S** DNA profile shall be provided to the Michigan state
21 police for inclusion under the DNA identification profiling system
22 act, 1990 PA 250, MCL 28.171 to 28.176.

23 (9) ~~(7)~~—If the results of the DNA testing show that the
24 ~~defendant~~ **PETITIONER** is not the source of the identified biological
25 material **OR OTHERWISE SUPPORT THE ASSERTIONS OF INNOCENCE IN THE**
26 **PETITIONER'S AFFIDAVIT**, the court shall appoint counsel pursuant to
27 MCR 6.505(a) and hold a hearing to determine by clear and

1 convincing evidence all of the following:

2 (A) THAT THE IDENTIFIED BIOLOGICAL MATERIAL WAS COLLECTED,
3 HANDLED, AND PRESERVED ACCORDING TO PROCEDURES THAT ALLOW THE COURT
4 TO FIND THAT THE IDENTIFIED BIOLOGICAL MATERIAL IS NOT CONTAMINATED
5 OR IS NOT SO DEGRADED THAT THE DNA PROFILE OF THE TESTED SAMPLE OF
6 THE IDENTIFIED BIOLOGICAL MATERIAL CANNOT BE DETERMINED TO BE
7 IDENTICAL TO THE DNA PROFILE OF THE SAMPLE INITIALLY COLLECTED
8 DURING THE INVESTIGATION DESCRIBED IN SUBSECTION (1).

9 (B) ~~(a)~~ That, IN CASES IN WHICH THE PETITIONER ASSERTS THAT HE
10 OR SHE WAS NOT THE SOURCE OF THE BIOLOGICAL MATERIAL, only the
11 perpetrator of the crime or crimes for which the ~~defendant~~
12 PETITIONER was convicted could be the source of the identified
13 biological material AND THAT THE PETITIONER'S PURPORTED EXCLUSION
14 AS THE SOURCE OF THE IDENTIFIED BIOLOGICAL MATERIAL, BALANCED
15 AGAINST THE OTHER EVIDENCE IN THE CASE, IS SUFFICIENT TO JUSTIFY
16 THE GRANT OF A NEW TRIAL.

17 ~~—— (b) That the identified biological material was collected,~~
18 ~~handled, and preserved by procedures that allow the court to find~~
19 ~~that the identified biological material is not contaminated or is~~
20 ~~not so degraded that the DNA profile of the tested sample of the~~
21 ~~identified biological material cannot be determined to be identical~~
22 ~~to the DNA profile of the sample initially collected during the~~
23 ~~investigation described in subsection (1).~~

24 (C) THAT, IN CASES WHERE ALLEGED BIOLOGICAL EVIDENCE FROM THE
25 VICTIM OR ANOTHER PERSON IS RELEVANT TO THE PETITIONER'S INNOCENCE
26 AS ASSERTED IN HIS OR HER AFFIDAVIT, THE COURT SHALL DETERMINE
27 WHETHER THE PURPORTED EXCULPATORY EVIDENCE, BALANCED AGAINST THE

1 OTHER EVIDENCE IN THE CASE, IS SUFFICIENT TO JUSTIFY THE GRANT OF A
2 NEW TRIAL.

3 (D) ~~(c)~~ That the defendant's purported exclusion as the source
4 of the identified biological material **EVIDENCE IS CONSISTENT WITH**
5 **THE PETITIONER'S CLAIM OF INNOCENCE**, balanced against the other
6 evidence in the case, **AND** is sufficient to justify the grant of a
7 new trial.

8 (10) ~~(8)~~ Upon **IF THERE IS A SUFFICIENT BIOLOGICAL SAMPLE, UPON**
9 motion of the ~~prosecutor~~ **PROSECUTING ATTORNEY OR THE PETITIONER**,
10 the court shall order retesting of the identified biological
11 material and shall stay the ~~defendant's~~ **PETITIONER'S** motion for new
12 trial pending the results of the DNA retesting. **IF THERE IS NOT**
13 **SUFFICIENT BIOLOGICAL MATERIAL FOR ADDITIONAL TESTING, THE PARTIES**
14 **SHALL BE NOTIFIED OF THAT FACT BEFORE ANY TEST IS CONDUCTED AND**
15 **SHALL BE PROVIDED THE OPPORTUNITY TO HAVE AN EXPERT PRESENT DURING**
16 **ANY TEST THAT IS CONDUCTED.**

17 (11) ~~(9)~~ The court shall state its findings of fact on the
18 record or make written findings of fact supporting its decision to
19 grant or deny the ~~defendant~~ **PETITIONER** a new trial under this
20 section. Notwithstanding section 3 of this chapter, an aggrieved
21 party may appeal the court's decision to grant or deny the petition
22 for DNA testing and for new trial by application for leave granted
23 by the court of appeals.

24 (12) ~~(10)~~ If the name of the victim of the felony conviction
25 described in subsection (1) is known, the prosecuting attorney
26 shall give written notice of a petition under this section to the
27 victim. The notice shall be by first-class mail to the victim's

1 last known address. Upon the victim's request, the prosecuting
2 attorney shall give the victim notice of the time and place of any
3 hearing on the petition and shall inform the victim of the court's
4 grant or denial of a new trial to the defendant **AND ANY SUBSEQUENT**
5 **HEARING RELATED TO THE ISSUE OF THE PETITIONER'S RELEASE.**

6 (13) ~~(11)~~ Effective January 1, 2001, the investigating law
7 enforcement agency shall preserve any biological material
8 identified during the investigation of a crime or crimes for which
9 any person **CONVICTED BEFORE JANUARY 1, 2001** may file a petition for
10 DNA testing under this section. **EFFECTIVE JULY 1, 2008, THE**
11 **INVESTIGATING LAW ENFORCEMENT AGENCY SHALL PRESERVE ANY BIOLOGICAL**
12 **MATERIAL IDENTIFIED DURING THE INVESTIGATION OF A CRIME OR CRIMES**
13 **FOR WHICH ANY PERSON CONVICTED AFTER JANUARY 1, 2001 MAY FILE A**
14 **PETITION FOR DNA TESTING UNDER THIS SECTION.** The identified
15 biological material shall be preserved ~~for the period of time that~~
16 ~~any person is incarcerated in connection with that case~~ **UNTIL**
17 **JANUARY 1, 2012.**