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**SFA**



**BILL ANALYSIS**

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Senate Bill 1395 (Substitute S-2 as reported)  
Sponsor: Senator Bill Schuette  
Committee: Judiciary

Date Completed: 11-27-00

### RATIONALE

In recent years, technological progress in genetic testing has made DNA evidence a predominant forensic technique for identifying criminals. When a biological sample, such as blood, hair, or semen, is left at a crime scene or on a victim, DNA testing can compare that sample with one taken from a suspect. If the test result is conclusive, it can serve either to exonerate the suspect or to confirm his or her guilt. Reportedly, based on DNA testing, over 100 people nationwide have been found innocent of crimes for which they were convicted.

Although DNA testing is available for cases that presently are being investigated or tried, many current inmates were convicted before the testing was first developed, or before today's more sophisticated testing became available. In many of these cases, a biological sample from the crime scene was not collected or preserved. In other cases, genetic material might still be available and could be subjected to testing. Thus, some inmates are bringing motions for the release and testing of this evidence, and for a new trial if a test result excludes the convicted person as the source of the crime scene sample. Apparently, however, it is not clear under Michigan law whether inmates are entitled to have their requests granted, or what procedure is appropriate for making or responding to these motions. It has been suggested that statutory guidelines should be created to address these issues.

### CONTENT

The bill would amend the Code of Criminal Procedure to do the following:

- Allow defendants serving a sentence for a felony to petition for DNA testing and a new trial.
- Provide that a petition would have to be filed within 365 days after the bill's effective date.
- Permit a court to order DNA testing if the defendant established certain factors by clear and convincing evidence.

- Require the court to deny the motion for a new trial if the testing results were inconclusive or showed that the defendant was the source of the genetic material.
- Provide that, if the testing results showed that the defendant was not the source of the genetic material, the court would have to determine certain factors by clear and convincing evidence, including whether the defendant's purported exclusion justified a new trial.
- Require the court to order retesting upon the prosecutor's motion.
- Allow a party to apply for leave to appeal to the Court of Appeals.
- Provide that, if a petition were filed, the court would have to order the preservation of all evidence in the State's possession or control that could be subjected to DNA testing.
- Provide for notice to the felony victim of the petition and a hearing.

The bill would take effect on January 1, 2001. It is described in more detail below.

A defendant who was convicted of a felony at trial before the bill's effective date and who was serving a prison sentence for the felony conviction could petition the circuit court to order DNA testing of genetic material identified during the investigation leading to the conviction, and for a new trial based on the results of that testing. The petition would have to be filed within 365 days after the bill's effective date.

The petition would have to be filed in the circuit court in which the defendant was sentenced, and assigned to the sentencing judge or his or her successor. The petition would have to be served on the prosecuting attorney of the county where the defendant was convicted.

The court would be permitted to order DNA testing if the defendant established all of the following by clear

and convincing evidence:

- A sample of genetic material identified during the investigation was available for DNA testing.
- The genetic material was not previously subject to DNA testing or, if previously tested, would be made subject to DNA testing technology that was not available when the defendant was convicted.
- The identity of the defendant as the perpetrator of the crime was at issue during his or her trial.

If the court granted the petition for DNA testing, the genetic material and a genetic sample obtained from the defendant would have to be subjected to DNA testing by a laboratory approved by the court. The results of the testing would have to be provided to the court, the defendant, and the prosecutor. Upon motion by either party, the court could order that the testing protocols, laboratory results, laboratory notes, and other relevant records compiled by the testing laboratory be provided to the court and to all parties.

If the testing results were inconclusive or showed that the defendant was the source of the genetic material, the court would have to deny the motion for a new trial. If the results showed that the defendant was the source of the genetic material, his or her DNA profile would have to be given to the Michigan State Police for inclusion under the DNA Identification Profiling System Act.

If the testing results showed that the defendant was not the source of the genetic material, the court would have to hold a hearing to determine by clear and convincing evidence all of the following:

- That only the perpetrator of the crime or crimes for which the defendant was convicted could be the source of the genetic material.
- That the genetic material was collected, handled, and preserved by procedures that allowed the court to find that it was not contaminated or was not so degraded that the DNA profile of the tested sample of the genetic material could not be determined to be identical to the DNA profile of the sample initially collected during the investigation leading to the conviction.
- That the defendant's purported exclusion as the source of the genetic material, balanced against the other evidence in the case, was sufficient to justify granting a new trial.

Upon the prosecutor's motion, the court would have to order retesting of the genetic material and stay the defendant's motion for a new trial pending the results of the retesting.

The court would have to state its findings of fact on the record or make written findings of fact supporting its decision to grant or deny the petition for DNA

testing or to grant or deny the defendant a new trial. An aggrieved party could appeal the court's decision by application for leave granted by the Court of Appeals.

If the name of the felony victim were known, the prosecuting attorney would have to give written notice of the petition to the victim. The notice would have to be by first-class mail to the victim's last known address. Upon the victim's request, the prosecutor would have to give the victim notice of the time and place of any hearing on the petition and inform the victim of the court's grant or denial of a new trial to the defendant.

If a petition were filed under the bill, the court would have to order the State to preserve, while the proceeding was pending, all evidence in the State's possession or control that could be subjected to DNA testing. The State would have to prepare an inventory of the evidence and submit a copy of the inventory to the defense and the court. If the evidence were intentionally destroyed after the court ordered its preservation, the court could impose appropriate sanctions, including criminal contempt, for a knowing violation.

MCL 770.2 et al.

## **BACKGROUND**

### **DNA Testing**

Human cells that contain a nucleus, such as those found in hair and skin, hold chromosomes that contain an essential component of all living matter known as deoxyribonucleic acid (DNA). DNA is the complex molecule that houses genetic instructions and transmits hereditary patterns. The genetic code, found in a DNA molecule, is made up of long strands that transmit instructions for general human characteristics, such as arms and legs, and shorter sequences (called "markers") that give instructions for characteristics that distinguish individuals from each other. Except in the case of identical twins, each person's genetic code is unique to that individual.

Genetic testing was first developed in England in the early 1980s. Originally, crime laboratories relied primarily on "restrictive fragment length polymorphism" (RFLP) testing, which requires a comparatively large quantity (100,000 or more cells) of good quality DNA. Most laboratories now are shifting to tests based on the "polymerase chain reaction" (PCR) method, a kind of molecular copying technique that can generate reliable data from extremely small samples of DNA (50 to 100 cells).

Several basic steps are performed during DNA

testing regardless of the type of test being done. The general procedure includes: 1) the isolation of the DNA from an evidence sample containing DNA of unknown origin and, generally at a later time, the isolation of DNA from a sample (e.g., blood) obtained from a known individual; 2) the processing of the DNA so that test results may be obtained; 3) the determination of the DNA test results (or types) from specific regions of the DNA; and 4) the comparison and interpretation of the test results from the unknown and known samples to determine whether the known individual is not the source of the DNA or is included as a possible source of the DNA ("Postconviction DNA Testing: Recommendations for Handling Requests", by the Working Group on Postconviction Issues of the National Commission on the Future of DNA Evidence).

#### Michigan Court Rule

Subchapter 6.500 of the Michigan Court Rules was adopted in 1989 to establish a procedure for postappeal proceedings challenging criminal convictions. According to the 1989 Staff Comment, "It provides the exclusive means to challenge convictions in Michigan courts for a defendant who has had an appeal by right or by leave, who has unsuccessfully sought leave to appeal, or who is unable to file an application for leave to appeal to the Court of Appeals because 18 months have elapsed since the judgment."

A defendant seeking relief under Subchapter 6.500 must bring a motion to set aside or modify the judgment, and has the burden of establishing that he or she is entitled to relief. The court may not grant relief if any of the following applies:

- The conviction is still subject to challenge on appeal.
- The issues raised were previously decided against the defendant in an appeal or a proceeding under Subchapter 6.500, unless there has been a retroactive change in the law that undermines the previous decision.
- The defendant could have raised the issue in a prior appeal or motion under Subchapter 6.500, unless he or she demonstrates both good cause for failure to raise the issue previously and actual prejudice from the alleged error.

Also, only one motion may be filed with regard to a conviction, unless a subsequent motion is based on a retroactive change in the law or on newly discovered evidence.

If a defendant requests appointment of counsel and the court determines that he or she is indigent, the court may appoint counsel for the defendant at any time in the proceedings. The court is required to appoint counsel if it directs oral argument or an evidentiary hearing to be held.

#### Innocence Project

The Innocence Project is a clinical law program founded in 1992 by Barry Scheck and Peter Neufeld at the Benjamin N. Cardozo School of Law in New York. Relying on volunteer attorneys and law students, the project reviews the cases of inmates who claim that they were wrongfully convicted before advanced DNA testing was available. When convincing claims of innocence are made, the project assists the inmates in pursuing DNA testing, obtaining a retrial, and establishing innocence. As of July 2000, the Innocence Project was handling 200 cases across the nation, including seven in Michigan ("Inmate Seeks DNA Tests to Set Him Free", *The*

*Detroit News*, 7-11-00).

Similarly, the Thomas M. Cooley Law School, in Lansing, is initiating the Michigan Innocence Project. Law school faculty and students, as well as volunteer attorneys, initially will screen requests for assistance and determine whether DNA or other new evidence might exonerate an inmate. Meritorious cases then will be forwarded defense attorneys in the State who have agreed to work for free. The school plans to begin the project officially in January, and expects to have screening protocol developed by the end of February.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

Since DNA testing can prove the innocence of wrongly convicted individuals, it is essential that the State have standards to guide courts in these matters. Currently, an inmate who claims that he or she is innocent can bring a motion under Subchapter 6.500 of the Michigan Court Rules. As a practical matter, however, the defendant must show the existence of newly discovered evidence in order to obtain relief. While some people believe that a DNA sample meets this standard, if the material either was not tested before or was not subject to sophisticated testing, not everyone agrees. One case in point involves a prisoner in Calhoun County, where the prosecutor and the judge have denied requests to release available evidence that could be tested ("Inmate Seeks DNA Tests to Set Him Free", *Detroit News*, 7-11-00). In another Calhoun County case, the State Police received permission from the prosecutor to destroy evidence that had not been tested, and the judge denied the defendant's motion for a new trial ("Two Ex-Cops Say Wrong Man is Jailed for Murder...", *Detroit Free Press*, 6-14-00). Both of these cases are before the Michigan Court of Appeals.

By creating a procedural framework and standards for postconviction DNA testing, the bill would ensure that these matters were not handled arbitrarily or inconsistently, and that the courts were not flooded with meritless petitions. In addition, the bill would require the preservation of genetic evidence once a petition was filed. These provisions would help both to exonerate innocent individuals, and to ensure that the real perpetrators did not escape punishment.

According to the National Conference of State Legislatures, other states already have enacted laws governing postconviction relief or the preservation of DNA evidence. These states include Arizona, California, Delaware, Illinois, Minnesota, New York, Oklahoma, Tennessee, and Washington.

**Response:** The bill also should require the preservation of all existing DNA evidence to ensure that it is not arbitrarily, accidentally, or maliciously destroyed before it can be tested. The second Calhoun County case mentioned above is a good example of the need for such a requirement. Regardless of whether the prosecutor knew that police officers were pursuing an investigation (which is a matter in dispute), the State Police apparently destroyed the evidence after submitting a routine request for permission to do so, in order to make room in storage. Furthermore, DNA testing became vastly more sophisticated only a few years ago, and is likely to continue to improve. At the same time, convicted offender databases and databases of probative samples from unsolved crimes are being developed rapidly. These databases will be very helpful in linking previously unrelated cases and screening individuals already convicted of a crime, but only if DNA evidence is available for testing.

### **Supporting Argument**

The bill would protect the interests of crime victims by requiring that they be notified of petitions for DNA testing and hearings. Existing law provides for many victims' rights before trial and during prosecution. Victims also should be informed when a convicted felon might be retried, since reexamining a conviction can be very destabilizing for a victim and his or her family. In addition, the bill's time limit would allow closure for victims, who should not be subjected to the endless possibility that an inmate could be someday seek DNA testing and be released.

**Response:** The one-year time limit would not serve the cause of justice or the interests of anyone, including victims, particularly if it meant that the actual perpetrator was on the streets while an innocent person was behind bars. Under the existing court rules, there is no deadline on motions for postconviction relief when a defendant discovers new evidence. Genetic material, which can be far more reliable than other types of evidence, should not be treated differently.

### **Supporting Argument**

The bill would address concerns about unreliable DNA samples, by requiring a court to determine, by clear and convincing evidence, that genetic material was collected, handled, and preserved by procedures that allowed the court to find that it was not contaminated or unacceptably degraded. Genetic material that is many years old might not have been collected properly in the first place, or might not have been properly stored. Despite the sophistication of today's technology, contaminated evidence could produce a false exclusion or an indeterminate analysis. By requiring a court to determine the integrity of a DNA sample, the bill would ensure that defendants were not exonerated on the basis of questionable evidence. In addition, a court would have to order retesting, upon a prosecutor's motion.

### **Opposing Argument**

The bill's 365-day deadline could lead to the filing of numerous unwarranted petitions. The Michigan Innocence Project at Cooley Law School has not yet gotten off the ground and will not begin screening cases for several months into the new year. After that, it is expected to take five or six months before meritorious cases are selected for referral to defense attorneys. The project, which has limited resources, already has begun to receive inquiries from inmates and anticipates thousands of requests.

Instead of the careful and deliberate screening process that is planned, a flood of petitions could be filed simply to meet the bill's timetable. Even so, a number of innocent inmates could miss the deadline for a variety of reasons. Many incarcerated individuals have few resources in terms of education, intelligence, money, friends, legal assistance, reasoning ability, or mental stability. If a wrongly convicted individual is behind bars, while a guilty person is free, there should be no limit on the amount of time the innocent person has to come forward with exculpatory evidence. Reportedly, only one other state has a time limit, which is two and a half years, and model legislation from the Cardozo Law School contains no time limit.

Furthermore, the need for postconviction DNA testing will wane over time. Experts in the field anticipate that, within a decade, DNA testing with highly discriminating results will be performed in all cases in which biological evidence is relevant, and advanced technologies will become commonplace in all laboratories. In the meantime, there is a finite number of cases that would qualify for DNA testing, particularly considering the scarcity of biological samples that were properly collected and well preserved.

### **Opposing Argument**

Although the bill is designed to create statewide, consistent standards, it still would be entirely within a court's discretion to grant or deny DNA testing, even after a defendant established by clear and convincing evidence that a sample was available for testing, the sample had not been tested before or had not been tested with advanced technology, and the identity of the perpetrator was at issue during the trial. If a defendant met this requirement, the court should be required to order testing. This would ensure that petitions were dealt with uniformly and fairly. If the test results showed that the defendant was not the source of the material, the court still would have to decide whether the defendant's purported exclusion, balanced against the other evidence, was sufficient to justify granting a new trial. Since the court would be required to deny a new trial if the testing results were inconclusive, genetic material that was unreliable would not

exonerate a defendant.

**Response:** A defendant could appeal a judge's decision to deny DNA testing.

### **Opposing Argument**

Under the bill, if test results showed that a defendant was not the source of genetic material, the court would have to make certain determinations by "clear and convincing evidence", in deciding whether to grant a new trial. This standard of proof is higher than that required for all other types of exculpatory evidence in this State. The standard set by the Michigan Supreme Court is whether it is *reasonably likely* that newly discovered evidence would have produced a different result if it had been available at trial (*People v Barbara*, 400 Mich 351). Since DNA test results actually are more reliable than other types of evidence that can trigger a new trial (such as eye-witness testimony), a higher standard of proof is neither necessary nor justified. Furthermore, the hearing in question simply would be for the purpose of deciding whether to grant a new trial--it would not address the issue of the defendant's guilt or innocence.

**Response:** Someone who is behind bars already has been tried and given due process. The conviction should not be easily overturned. If a judge denied a new trial, the defendant could appeal that decision.

Legislative Analyst: S. Lowe

### **FISCAL IMPACT**

The bill would have an indeterminate impact on the State and local units of government. The impact that the bill would have on the number of petitions for DNA tests and potential new trials resulting from the tests is not determinable. The bill does not address the issue of who would pay for DNA testing that would be ordered by the circuit court.

The bill also would have an indeterminate fiscal impact on the Department of Corrections. To the extent that offenders incorrectly convicted of crimes could be found not guilty upon a new trial based on the results of DNA evidence, the prison population could be reduced. However, there are no data to indicate whether this would result in a reduction in the prison population or the magnitude of a reduction.

There would be additional, more immediate costs for the Department of Corrections including the costs of obtaining DNA samples from prisoners, transport of prisoners for retrial, and payments to counties for retention of prisoners during retrial. However, there is no basis for estimating these costs.

The bill would have no fiscal impact on the Department of State Police.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.