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SFA**BILL ANALYSIS**

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Senate Bill 1395 (as enrolled)
Sponsor: Senator Bill Schuette
Senate Committee: Judiciary
House Committee: Criminal Law and Corrections

PUBLIC ACT 402 of 2000

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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 has not been clear under Michigan law whether inmates were entitled to have their requests granted, or what procedure was appropriate for making or responding to these motions. It was suggested that statutory guidelines should be created to address these issues.

CONTENT

The bill amended 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 must be filed by January 1, 2006.
- Require a court to order DNA testing if the

- defendant establishes certain factors by clear and convincing evidence.
- Require the State to pay for testing if the defendant is indigent.
- Require the court to deny the motion for a new trial if the testing results are inconclusive or show that the defendant is the source of the genetic material.
- Provide that, if the testing results show that the defendant is not the source of the genetic material, the court must determine certain factors by clear and convincing evidence, including whether the defendant's purported exclusion justifies a new trial.
- Provide for the appointment of counsel if the defendant is indigent.
- 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 for notice to the felony victim of the petition and a hearing.
- Require investigating law enforcement agencies to preserve evidence that may be subjected to DNA testing under the bill.

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

Under the bill, a defendant who was convicted of a felony at trial before the bill's effective date and who is serving a prison sentence for the felony conviction may petition the circuit court to order DNA testing of biological material identified during the investigation leading to the conviction, and for a new trial based on the results of that testing. The petition must be filed by January 1, 2006.

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

The court must order DNA testing if the defendant does both of the following: 1) presents prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction; and 2) establishes all of the following by clear and convincing evidence:

- A sample of biological material identified during the investigation is available for DNA testing.
- The identified biological material was not previously subject to DNA testing or, if previously tested, will be 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 grants the petition for DNA testing, the identified biological material and a biological sample obtained from the defendant must be subjected to DNA testing by a laboratory approved by the court. If the court determines that the applicant is indigent, the State must bear the cost of DNA testing ordered under the bill. The results of the testing must be provided to the court, the defendant, and the prosecutor. Upon motion by either party, the court may order that copies of 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 show that the defendant is the source of the identified biological material, the court must deny the motion for a new trial, and the defendant's DNA profile must be given to the Michigan State Police for inclusion under the DNA Identification Profiling System Act. If the testing results are inconclusive, the court must deny the motion for a new trial.

If the testing results show that the defendant is not the source of the genetic material, the court must appoint counsel pursuant to Michigan Court Rule 6.505(A) and 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 identified biological material.
- That the identified biological material was collected, handled, and preserved by procedures that allow the court to find that it is not contaminated or is not so degraded that the DNA profile of the tested sample of the identified biological material cannot 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 identified biological material, balanced against the other evidence in the case, is sufficient to justify granting a new trial.

(Michigan Court Rule 6.505(A), which is described below in BACKGROUND, provides for the appointment of counsel for an indigent defendant.)

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

The court must 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 may appeal the court's decision by application for leave granted by the Court of Appeals.

If the name of the felony victim is known, the prosecuting attorney must give written notice of the petition to the victim. The notice must be by first-class mail to the victim's last known address. Upon the victim's request, the prosecutor must 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.

Effective January 1, 2001, the investigating law enforcement agency must preserve any biological material identified during the investigation of a crime

or crimes for which any person may file a petition for DNA testing under the bill. The material must be preserved for the period of time that any person is incarcerated in connection with that case.

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.

Under Michigan Court Rule 6.505(A), if a defendant has requested appointment of counsel, and the court has determined that the defendant is indigent, the court may appoint counsel for the defendant at any time during the proceedings under Subchapter 6.500. Counsel must be appointed if the court directs that oral argument or an evidentiary hearing 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, has initiated 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 to defense attorneys in the State who have agreed to work for free. The school is beginning the project officially in January 2001, 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 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 will ensure that these matters are not handled arbitrarily or inconsistently, and that the courts are not flooded with meritless petitions. In addition, the bill requires the preservation of biological evidence identified during the investigation of a crime for which someone may file a petition under the bill. These provisions will help both to exonerate innocent individuals, and to ensure that the real perpetrators do not escape punishment.

According to the National Conference of State Legislatures, other states also 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.

Supporting Argument

The bill will 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 will allow closure for victims, who should not be subjected to the endless possibility that an inmate might someday seek DNA testing and be released.

Supporting Argument

The bill addresses concerns about unreliable DNA samples, by requiring a court to determine, by clear and convincing evidence, that biological material was collected, handled, and preserved by procedures that allow the court to find that it was not contaminated or unacceptably degraded. Biological 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 will ensure that defendants are not exonerated on the basis of questionable evidence. In addition, a court must order retesting, upon a prosecutor's motion.

Opposing Argument

The bill's five-year time limit will not serve the cause of justice or the interests of anyone, including victims. 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. Many incarcerated individuals have few resources in terms of education, intelligence, money, friends, legal assistance, reasoning ability, or mental stability, and simply may be unaware of or incapable of understanding this legislation. Also, 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.

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 qualify for DNA testing, particularly considering the scarcity of biological

samples that were properly collected and well preserved.

Opposing Argument

The bill applies only to defendants who were convicted of a felony “at trial”, which means that a defendant who pleaded guilty or no contest will not be eligible to bring a petition for DNA testing and a new trial. Many innocent defendants enter into plea bargains, upon the advice of their attorney, in order to avoid the risk of a longer prison sentence. This may happen, for example, when prosecutors’ cases are weak and they are eager to deal. If an innocent person has been imprisoned, it should not matter how he or she was convicted. Moreover, at the time these defendants pleaded guilty, they had no way of knowing that, as a result, they would be denied an opportunity to prove their innocence in the future.

Opposing Argument

The bill requires the preservation of biological material only if it was identified during the investigation of a crime for which someone may file a petition under the bill. Therefore, the preservation requirement applies only to evidence concerning defendants who were convicted (at trial) before the bill’s effective date. There should be a statutory requirement for the preservation of all existing DNA evidence, and evidence collected in future investigations, to ensure that it is not arbitrarily, accidentally, or maliciously destroyed before it can be tested. 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.

Opposing Argument

Under the bill, if test results show that a defendant is not the source of genetic material, the court must 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.

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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.

Furthermore, the hearing in question simply will be for the purpose of deciding whether to grant a new trial—it will 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 denies a new trial, the defendant may apply for leave to appeal that decision.

Legislative Analyst: S. Lowe

FISCAL IMPACT

The bill will have an indeterminate impact on the State and local units of government. The impact that the bill will have on the number of petitions for DNA tests and potential new trials resulting from the tests is not determinable.

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

There will be additional, more immediate costs for the Department of Corrections, including the costs of obtaining DNA samples from prisoners, transporting prisoners for retrial, and paying counties to retain prisoners during retrial. However, there is no basis for estimating these costs.

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

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