

Department of Legislative Services
Maryland General Assembly
2001 Session

FISCAL NOTE

Senate Bill 84 (Senator Kelley, *et al.*)
Judicial Proceedings

Criminal Procedure - Postconviction - DNA Testing

This bill authorizes a person convicted of, and sentenced for, a felony to file a petition for postconviction DNA testing of any evidence in possession of the State that is related to the conviction.

Fiscal Summary

State Effect: Expenditures could increase by as much as \$94,500 annually in FY 2002 and FY 2003 for DNA testing. Thereafter, testing costs would be about \$31,500 annually. Additional personnel costs could be incurred for the Office of the Public Defender. Incarceration cost savings could be realized to the extent that defendants are exonerated.

Local Effect: It is expected that any workload increase for circuit courts and State's Attorneys' offices resulting from the bill could be handled using existing budgeted resources.

Small Business Effect: Potential meaningful. Small businesses that perform DNA testing could receive additional business as a result of the bill.

Analysis

Bill Summary: This bill authorizes a person convicted of, and sentenced for, a felony to file a petition for postconviction DNA testing of any evidence in possession of the State that is related to the conviction. The bill specifies the related court findings under which the court must order DNA testing. A petitioner must notify the State in writing of the

filing of such a petition. The State may file a response to the petition within 15 days after notice of the filing or within a time period determined by the court.

A court, in making such an order, must identify the specific evidence to be tested, identify the method of testing, and specify the laboratory to perform the testing from a listing of accredited laboratories maintained by the Office of the Attorney General. DNA testing ordered under these provisions must be conducted as soon as practicable and, based on a finding of necessity, the court may order testing to be completed by a certain date.

The petitioner must pay for the cost of testing. However, a court must order the State to pay for DNA testing ordered by the court if the test findings are favorable to the petitioner. A court must dismiss a petition upon an unfavorable test finding. If the test results are favorable to the petitioner, the court must order a hearing. The bill provides that these provisions must be construed and applied retroactively.

Current Law: State law and criminal procedure do not currently require, or specifically provide for, postconviction DNA testing of evidence. Generally, a convicted person may move for a new trial on the basis of newly discovered evidence, or other appropriate relief, within one year of either the imposition of sentence or exhaustion of appeals. DNA evidence is generally admissible to prove or disprove the identity of any person, provided that certain notice and discovery requirements are met. A convicted person is entitled to file one postconviction petition within ten years of the imposition of sentence, provided that the petitioner has not finally litigated or waived the issue previously unless “extraordinary cause” is shown. A court also retains a revisory power to reopen a postconviction proceeding “if the court determines that such action is in the interests of justice.”

In addition, the State is required to collect DNA samples of persons convicted of certain qualifying crimes of violence. The statute applies both prospectively as well as retroactively to currently incarcerated qualifying prisoners. The statute requires that the Crime Laboratory Division of the Department of State Police permanently retain such DNA records in a statewide database, subject to a request for expungement by a person with a profile in the database.

Background: DNA (deoxyribonucleic acid) is genetic material that is present in every cell of the human body, and may often be detectable in common criminal evidence such as hair and body fluids. It is unique and specific to an individual (except for identical twins who share identical genetic material). As technology in genetic and evidentiary testing has evolved, more attention has been given to DNA identification testing as a law

enforcement tool, used to establish either the guilt or innocence of suspected or convicted offenders.

Significant attention has been given to issues relating to when an inmate should be allowed to obtain DNA testing of evidence when either the DNA tests were not available or not as sophisticated at the time the inmate was convicted. Several states, including Maryland, and the federal government have recently considered establishing procedures for post-conviction DNA identification testing for certain felony offenses. Recent concerns about the guilt or innocence of certain convicted violent offenders in the face of post-conviction DNA testing has led to renewed debate about the imposition of the death penalty and the role of DNA testing in post-conviction reviews.

The push for postconviction DNA testing gained momentum with the creation of the Innocence Project at Benjamin Cardozo School of Law in New York in 1992. The Innocence Project was founded to help wrongly convicted prison inmates prove their innocence through DNA testing. According to news reports, 76 prisoners nationwide, including eight inmates on death row, have been released from prison because of post-conviction DNA testing that has exonerated the person who was convicted. In 16 cases the DNA testing also led to the identification of the real perpetrator of the crime. In January of 2000, Illinois Governor George Ryan imposed a moratorium on executions in his state after 13 inmates' convictions were overturned. In Maryland, Kirk Bloodsworth was convicted in 1984 of the rape and murder of a young girl but was released in 1993 after new DNA testing techniques established his innocence.

According to the National Conference of State Legislatures, within just the last year, six states have enacted new laws providing courts with broader authority to order or admit DNA evidence in post-conviction review proceedings. Two states, Illinois and New York currently provide inmates the right to postconviction identification testing using the latest DNA technology.

In 2000, Congress considered legislation to allow convicted offenders in the federal system to apply for DNA testing if the evidence to be tested: (1) is related to the initial prosecution; (2) is in the government's actual or constructive possession; and (3) was not previously subjected to DNA testing or the form of DNA testing being requested. The legislation also would prevent the government from destroying any biological material in a criminal case while the person is incarcerated, unless notice and an opportunity to test are provided. The federal proposal would also tie federal grant money to state efforts to preserve evidence and provide opportunities for DNA testing for convicted offenders. That legislation is expected to be reintroduced at the start of the new Congress in January.

In October 2000, the Standing Committee on Rules of Practice and Procedure of the Court of Appeals of Maryland issued recommendations to the Court of Appeals to amend Rule 4-331 of the Maryland Rules of Procedure to authorize a circuit court to grant a motion for new trial for a felony conviction “at any time if the motion is based upon DNA identification testing or other generally accepted scientific techniques the results of which, if proven, could show that the defendant is innocent of the crime for which the defendant was convicted.” The proposed amendment is currently pending before the Court of Appeals for its review before any rule change may take effect.

Also this past fall, the State’s Attorney for Prince George’s County announced plans to provide free DNA testing for inmates convicted of murder or sexual assaults who request testing when “relevant biological evidence would demonstrate innocence.” According to news reports, the tests would be paid for by the State’s Attorney’s Office and would be conducted by the State Police or Prince George’s County police laboratories. Montgomery County expressed interest in a similar program but wanted to explore funding sources to pay for any testing.

Although different types of DNA tests exist, according to various sources, the latest, most accurate genomic and mitochondrial DNA testing procedures can cost up to \$5,000 per test. However, according to the Office of the Public Defender, the cost of the most widely used forensic method for testing DNA samples is about \$900. The number of samples available for testing in an individual case can range from three (one evidentiary and two reference samples) to as many as 20.

State Expenditures: According to the Office of the Public Defender, this bill is likely to generate as many as 100-200 petitions of varying merit per year statewide for fiscal 2002 and 2003, and then level off to about 50 per year thereafter. The petitions could arise both from defendants who believe they have nothing to lose in filing such a petition, as well as by defendants whose trials took place before DNA testing technology was commonly used in criminal matters.

The Office of the Public Defender advises that it would need to hire a minimum of four attorneys, an investigator, an office secretary, and a legal assistant to handle the additional work that would result from the bill. The Office of the Public Defender estimates the costs for these additional personnel and associated supplies, equipment, and other operating expenses to range from \$293,400 in fiscal 2002 to \$422,700 in fiscal 2006.

Legislative Services believes that the Office of the Public Defender’s needs assessment and cost estimates are too high. Although the Office of the Public Defender would probably bear the bulk of the investigatory burden of the bill, the bill does not specifically

require the post-conviction hearings to be scheduled immediately. If hearings are spread out over time, the Office of the Public Defender could handle the additional work without hiring as many people as estimated, or possibly using existing budgeted resources.

In addition, the bill is unclear as to which State agency would be responsible for paying for DNA testing costs when the petitioner receives a favorable result from the tests. This analysis assumes that the bill's reference to the "State" as payor of DNA testing costs does not mean State's Attorneys' offices, which are locally funded. However, such costs could fall to the Judiciary or the Office of the Public Defender. In any case, if 150 petitions were to be filed in fiscal 2002 and 2003, and an average of seven tests were performed for each case at a cost of \$900 each, the costs for DNA testing under this bill would be \$945,000 per year for that period. However, the State would only be responsible for those costs when the test results are favorable to the petitioner. This would tend to be true for less than 10% of cases/petitions. Accordingly, State costs would be less than \$94,500, and that amount may be high since the more frivolous or meritless petitions would tend to be filed during the first two years of operation. If 50 petitions per year are filed after fiscal 2003, using the same assumptions, general fund expenditures for an unknown agency or entity would be about one-third of those costs annually, or \$31,500 annually.

For each hearing that is held pursuant to the bill, the Division of Correction (DOC) would incur costs for transporting the defendant between the correctional facility and the court. The DOC advises that the average cost of transporting an inmate to and from court could be handled with existing budgeted resources. To the extent that defendants are exonerated as a result of the DNA testing authorized by the bill, incarceration cost savings could be realized. Excluding overhead, the average cost of housing a DOC inmate (including medical care and variable costs) is \$288 per month.

Local Expenditures: The Judiciary advises that the bill should have no fiscal impact on the Judiciary if the above-referenced number of petitions filed annually proves to be accurate. It is expected that any workload increase for circuit courts resulting from the bill could be handled using existing budgeted resources. The Maryland State's Attorneys' Association advises that the bill is not expected to result in the need to hire additional prosecutors or other personnel.

Additional Information

Prior Introductions: A similar bill, HB 112, was introduced during the 2000 session. It received an unfavorable report from the House Judiciary Committee.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts), Office of the Attorney General, Office of the Public Defender, Office of the State's Attorneys' Coordinator, Department of Public Safety and Correctional Services (Division of Correction), Department of Legislative Services

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