

Department of Legislative Services
Maryland General Assembly
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FISCAL NOTE
Revised

Senate Bill 694 (Senator Hughes, *et al.*)

Judicial Proceedings

Judiciary

Criminal Procedure - DNA Evidence - Postconviction Review

This bill authorizes a person who is convicted of manslaughter, murder in any degree, or first or second degree rape or sexual offense to file a petition for postconviction DNA testing of “scientific identification evidence” in the possession of the State that is related to the judgment of conviction.

Fiscal Summary

State Effect: Potentially significant increase in expenditures for the State Police for additional evidence storage space, including refrigeration facilities. General fund expenditures could increase by \$31,500 annually beginning in FY 2002 for the Office of the Public Defender.

Local Effect: Significant increases in expenditures for local law enforcement agencies. **This bill may impose a mandate on a unit of local government.**

Small Business Effect: Minimal.

Analysis

Bill Summary: A court is required to order DNA testing of evidence if the court finds that: (1) the scientific identification evidence was not previously subjected to the test requested for reasons beyond the control of the petitioner or the type of DNA test requested is different from tests previously conducted and would have a reasonable likelihood of providing a more probative result than tests previously conducted; (2) the evidence was secured in relation to the crime for which the petitioner was convicted; (3) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; (4) identity was an issue at trial; (5) a reasonable probability exists that the DNA testing will

produce results materially relevant to the petitioner's assertion of innocence; and (6) the requested DNA test employs a method of testing generally accepted within the relevant scientific community.

The bill requires a petitioner to notify the State in writing that a petition has been filed and provides the State with 15 days, or a time period ordered by the court, to respond to the petition.

The bill requires the court to make specific identifications in ordering DNA testing, including: (1) identifying the specific scientific identification evidence to be tested; (2) identifying the method of testing to be used; and (3) selecting the laboratory where the testing is to be performed. The laboratory where the test is to be performed should be chosen from a list of accredited laboratories to be maintained by the Office of the Attorney General. The court must order DNA testing to be conducted as soon as practicable or, based on a finding of necessity, by a date ordered by the court.

The petitioner is required to pay for the DNA testing, unless the results of the testing are favorable to the petitioner. If the results are favorable to the petitioner, the court must order the State to pay the costs. If the results of the DNA testing are unfavorable to the petitioner, the bill requires the court to dismiss the petition. However, if the results are favorable to the petitioner, the court must either open a postconviction proceeding if no postconviction proceeding has been previously initiated by the petitioner or reopen a previously opened postconviction proceeding.

The bill requires the State to preserve any scientific identification evidence that was secured in connection with the conviction and that the State has reason to know contains DNA material, for a period of three years after the imposition of sentence, or for a period beyond three years pursuant to a specific order by the Court of Appeals or Court of Special Appeals in a specific case.

The State is required to make the scientific identification evidence available to parties in the case under mutually agreeable terms. If an agreement cannot be reached, the party requesting the testing may seek a court order setting the terms under which the evidence will be made available for testing.

The State may dispose of scientific identification evidence before the expiration of the time period if the State notifies the person who is incarcerated and that person's attorney and the Office of the Public Defender for the judicial district in which the judgment of conviction was entered. The notice must include a description of the scientific identification evidence, a statement that the State intends to dispose of the evidence, a statement that the State will dispose of the evidence unless a party files an objection within 120 days of the notice, and the name and mailing address of the circuit court where an objection may be filed.

Unless another law or court order requires the preservation of the scientific identification evidence, and if no objection is timely filed, the State may dispose of the evidence. If a person files a timely objection, the court must consider the reasons for and against disposition of the evidence, may hold a hearing, and must issue an order disposing of the matter as required by the interests of justice and the integrity of the criminal justice system. The State has the burden of providing by a preponderance of the evidence that the evidence should be disposed.

The bill applies to any person incarcerated on or after October 1, 2001. Similarly, provisions concerning the retention and disposition of scientific identification evidence apply to evidence in the possession of the State on or after October 1, 2001, regardless of when the person was convicted.

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 postconviction DNA identification testing for certain felony offenses.

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 postconviction 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.

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

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.

The State Police and local law enforcement agencies routinely destroy substantial amounts of confiscated drugs and other dated evidentiary material monthly.

There are currently eight State or local crime laboratories in Maryland operated by the following entities: (1) State Police; (2) Baltimore City; (3) Baltimore County; (4) Anne Arundel County; (5) Prince George's County; (6) Montgomery County; (7) Hagerstown; and (8) Ocean City.

State Expenditures: In fiscal 2002 the Crime Laboratory Division of the State Police expects to collect and analyze 8,000 DNA samples, mainly from inmates in Division of Correction facilities convicted of certain violent crimes.

To the extent that scientific identification evidence would be returned to the State Police after trial, the State Police would be responsible for storage under this bill. Depending on the nature of the evidence and means necessary for "secure" storage (including probable refrigeration), this may need to occur at the individual barracks or at the State Crime Laboratory in Pikesville. The State Police have been unable to estimate potential additional storage resource needs without any direct experience under the bill, but advise that it could grow significantly beyond current capacities.

While the number of additional motions for retrials or resentencing under this bill cannot reliably be predicted, it is expected to be small. The Public Defender advises that since the vehicle for relief under this bill is a motion for resentencing or a new trial, rather than a postconviction petition, the motions will be generally initiated by defense attorneys rather than inmates, and will tend to be only after an investigation and an evaluation of merit. In fiscal 2000 there were approximately ten cases involving prison inmates investigated by the Public Defender for possible DNA evidence. In each such case, the evidence in question had been destroyed.

In any event, the Public Defender estimates that, under this bill, less than five motions involving DNA tests would arise per year. At an average cost of about \$900 per test, and an average of seven tests per case, these costs would be less than \$31,500 per year. It is assumed that favorable test outcomes would result in an inmate's release without prolonged litigation. Without any direct experience under the bill, the Public Defender is unsure as to whether this bill would result in additional manpower needs.

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, minimal 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: Different jurisdictions currently have different policies on the retention of evidence. For example, Baltimore City advises that, due to limited storage space, the Baltimore City Police Department keeps evidence until 90 days after a

conviction, unless there is an appeal, in which case the evidence is kept until all appeals have been exhausted. Prince George's County advises that the Prince George's County Police Department stores evidence indefinitely, but evidence may be destroyed with the concurrence of the investigator, the State's Attorney, and the County Attorney. Frederick County advises it would need additional storage space plus an additional deputy to process associated paperwork. It is expected that for most or all jurisdictions, the bill would require additional storage space, including refrigeration facilities for evidence such as DNA and blood samples. The expenses that would be incurred by law enforcement agencies for the additional storage facilities required by the bill cannot be reliably estimated, but it is expected that such expenses would be significant over time.

Any need for additional hearings under the bill, could be handled with the existing budgeted resources of the circuit courts.

Additional Information

Prior Introductions: A bill requiring the mandatory retention and storage of evidence, HB 1081, 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 Public Defender, Office of the State's Attorneys' Coordinator, Department of Public Safety and Correctional Services (Division of Correction), Department of State Police (Crime Laboratory Division), Department of Legislative Services

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