

Department of Legislative Services
Maryland General Assembly
2013 Session

FISCAL AND POLICY NOTE
Revised

House Bill 292

(Chair, Judiciary Committee)(By Request - Departmental
- State Police)

Judiciary

Judicial Proceedings

**Public Safety - Statewide DNA Data Base System - DNA Sample Collection on
Arrest - Reporting Requirement and Repeal of Sunset**

This departmental bill repeals the December 31, 2013 termination date for Chapter 337 of 2008 (SB 211), which (1) requires a DNA sample to be taken from any individual charged with specified crimes of violence, felony burglary, and attempts to commit those offenses and (2) establishes requirements for the collection, testing, use, and disposal of DNA samples taken from an individual, as well as additional expungement criteria.

The bill also shifts responsibility for the compilation of data on crime scene DNA collection and analysis under Chapter 337 from the Office of Legislative Audits (OLA) to the Governor's Office of Crime Control and Prevention (GOCCP). OLA continues to review, evaluate, and report on the data.

Fiscal Summary

State Effect: General and federal fund expenditures of \$208,900 per year continue for the Department of State Police (DSP) to continue to perform the functions of Chapter 337 of 2008. Funds are budgeted for this function to continue. GOCCP can fulfill its responsibilities under the bill with existing budgeted resources.

Local Effect: The bill's requirements can be met with existing local resources.

Small Business Effect: DSP has determined that this bill has minimal or no impact on small business (attached). The Department of Legislative Services concurs with this assessment. (The attached assessment does not reflect amendments to the bill.)

Analysis

Current Law: Chapter 337 of 2008 instituted several requirements and procedures regarding the collection of DNA from individuals charged with specified crimes.

Expanded Collection and Testing of DNA: Chapter 337 requires a DNA sample to be taken from any individual charged with specified crimes of violence or felony burglary, with the exception of mayhem. An individual from whom a DNA sample is collected must be given a notice informing the individual of the expungement process related to a DNA sample and record. The notice is to be given at the time of the DNA sample collection. The DNA sample must be taken at a facility specified by the Secretary of State Police at the time the individual is charged.

Chapter 337 requires the testing, as soon as reasonably possible, of DNA evidence collected from a crime scene or at a hospital as evidence of a sexual assault if law enforcement considers the evidence to be relevant to the identification or exoneration of a suspect. This requirement terminates, however, if Chapter 337 terminates.

Placement of DNA Sample into Database and Destruction of DNA Sample: A DNA sample collected from an individual charged with a crime of violence or felony burglary may not be tested or placed in the DNA database system prior to the first scheduled arraignment date unless the individual consents to or requests testing prior to arraignment for the purpose of having the sample checked against a sample that has been processed from the crime scene or the hospital. A DNA sample must be immediately destroyed if all qualifying criminal charges are determined to be unsupported by probable cause, and notice must be sent to the defendant and the defendant's counsel of record that the sample was destroyed. In a criminal case in which all the charges are disposed of by acquittal, dismissal, probation before judgment, *nolle prosequi*, or *stet*, the court is required to advise the defendant of any applicable expungement rights of the DNA sample and record.

Expungement of DNA Record: Any DNA samples and records generated as part of a criminal investigation or prosecution must be destroyed or expunged automatically from the State DNA database within 60 days if a criminal action begun against the individual relating to the crime does not result in a conviction, is finally reversed or vacated and no new trial is permitted, or results in the granting of an unconditional pardon. A DNA sample or record may not be automatically destroyed or expunged if the criminal action is placed on the *stet* docket or the individual receives probation before judgment. A letter documenting the expungement must be sent to the defendant and the defendant's attorney.

Unauthorized Acts: A person may not willfully test a DNA sample for information that does not relate to the authorized identification of an individual. A person is also prohibited from performing a database search for the purpose of the identification of an offender in connection with a crime for which the offender may be a biological relative of the individual from whom the DNA sample was acquired. Violations of these provisions are punishable by up to five years imprisonment and/or a \$5,000 fine.

A person is also prohibited from willfully failing to destroy a DNA sample for which notification has been sent stating that the DNA sample has been destroyed or for which destruction has been ordered. Violators are subject to imprisonment of up to one year or a maximum fine of \$1,000.

Postconviction Proceedings: Chapter 337 expanded the provisions regarding postconviction review by authorizing a person convicted of specified offenses, as part of a postconviction proceeding, to petition for a search by a law enforcement agency of a database or log for the purpose of identifying the source of physical evidence used for DNA testing. A petitioner is permitted to move for a new trial on the grounds that the conviction was based on unreliable scientific evidence and a substantial possibility exists that the petitioner would not have been convicted without the evidence. A court must order the search if it finds that a reasonable probability exists that such a search has the potential to produce exculpatory evidence relating to a postconviction claim. The court may order a new trial on a finding that such action is in the interest of justice and, on a finding that a substantial possibility exists that the petitioner would not have been convicted if the DNA testing results had been known or introduced at trial, must order a new trial. If the State is unable to produce scientific evidence as required, the court must hold a hearing to determine whether the failure to produce evidence was the result of intentional and willful destruction. The court must order a postconviction hearing to be conducted if specified determinations and findings are made.

Reporting Requirements and Audits: Chapter 337 requires DSP to submit an annual report to the Governor and the General Assembly that contains specified information, including the total expenses incurred for the operation and management of the DNA database and a detailed analysis of the investigations aided by DNA profiles. Local law enforcement agencies are required to report information annually to DSP to assist with its compliance with the reporting requirements.

Local law enforcement agencies and DSP must also report specified information relating to crime scene DNA collection and analysis to OLA. OLA is required to compile and evaluate the reported information and submit an annual summary report to the Governor and the General Assembly.

Effect of Termination of Chapter 337 of 2008: Should Chapter 337 terminate, the relevant statutory provisions will revert to the language used prior to January 1, 2009. The main statutory provisions that will take effect as a result of the termination of Chapter 337 of 2008 are listed below.

- **Collection of DNA Samples:** DNA samples will be collected from individuals convicted of a felony, fourth degree burglary, or breaking and entering into a vehicle. DNA samples are collected at the correctional facility where the person is confined, at a facility designated by the director of the Crime Laboratory for individuals on probation or not sentenced to imprisonment, or at a suitable location in a circuit court at the time of sentencing.
- **Storage of DNA Samples:** The State Police Crime Laboratory is required to store and maintain each DNA identification record in the statewide DNA database. Matches between evidence samples and database entries may only be used as probable cause. Matches are not admissible at trial unless confirmed by additional testing.
- **Expungement:** Effective December 31, 2013, an individual whose DNA record or profile is included in the statewide DNA database system and whose DNA sample is stored in the statewide DNA repository may request that his/her information be expunged on the grounds that the conviction that facilitated the sample's inclusion meets the expungement criteria under the Criminal Procedure Article. The expungement proceedings for a DNA record or profile must be conducted in accordance with the expungement requirements under the Criminal Procedure Article. On receipt of an order of expungement, the director must purge any DNA record, DNA sample, or other identifiable information covered by the order from the statewide DNA database system and the statewide DNA repository.
- **Postconviction Proceedings:** An individual convicted of specified offenses, as part of a postconviction proceeding, will no longer be able to petition for a search by a law enforcement agency of a database or log for the purpose of identifying the source of physical evidence used for DNA testing. Instead, the individual may petition for DNA testing of specified evidence relating to the judgment of conviction. The court must order DNA testing if the court finds that a reasonable probability exists that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing and the requested DNA test employs a method generally accepted within the relevant scientific community.

- **Unauthorized Acts:** Disclosure of DNA information to unauthorized persons or obtaining DNA information without authorization are misdemeanor offenses, punishable by maximum penalties of three years incarceration and/or a \$1,000 fine.

Background: All states require individuals convicted of certain crimes to provide a DNA sample. In addition, according to the National Institute of Justice, laws authorizing collection of DNA samples from individuals arrested for or charged with certain qualifying offenses have been enacted by 28 states and the federal government. Constitutional challenges to laws requiring DNA collection from convicted criminals under the Fourth Amendment (prohibiting unreasonable searches and seizures), Eighth Amendment (prohibiting cruel and unusual punishment), and the Ex Post Facto Clause (prohibiting criminalization or punishment of behavior that was not criminal or punishable at the time of its commission) of the U.S. Constitution have been largely unsuccessful. Federal and state courts are divided, however, on the constitutionality of requiring arrestees to submit to DNA sample collection.

DNA Collection Requirements: In addition to the samples collected under Chapter 337, DNA samples are collected from individuals convicted of a felony, fourth degree burglary, or breaking and entering a vehicle. State law defines a “crime of violence” to include several specific crimes, including abduction, arson, kidnapping, manslaughter, murder, rape, carjacking, first or second degree sexual offense, and various types of assault. These DNA samples are collected by a trained designee at (1) the correctional facility where the individual is confined; (2) a facility designated by the director of the crime laboratory for an individual on probation or not sentenced to imprisonment; or (3) a suitable location in a circuit court at the time of sentencing.

The State Police Crime Laboratory is required to store and maintain each DNA identification record in the statewide DNA database. Matches between evidence samples and database entries may only be used as probable cause and are not admissible at trial unless confirmed by additional testing.

King v. State: In April 2012, the Maryland Court of Appeals struck down the State’s DNA collection statute as applied to arrestees when it held in *King v. State*, 425 Md. 550 (2012) that the DNA sample taken from Alonzo Jay King, Jr. was an unconstitutional search as applied to the facts in that case. The court reviewed its previous decision upholding the DNA collection statute as applied to individuals convicted but found that the presumption of innocence for arrestees affords them greater protections.

According to the court, mere arrestees have an expectation of privacy to be free from warrantless searches of their biological material and the vast amount of personal information contained within that material. The court cited the expungement provisions

in the DNA collection law as evidence of the superior privacy rights of individuals who have not been convicted. Stopping short of holding the law unconstitutional on its face, the court found that taking the DNA sample from King was an impermissible search as applied to that case but recognized that very limited circumstances may exist in which collection of DNA would be necessary to identify an arrestee who has altered his or her fingerprints or facial features. Police initially suspended DNA collection from arrestees in the wake of the ruling.

The State appealed the *King* decision to the U.S. Supreme Court, and Chief Justice Roberts issued an opinion in July 2012 granting a stay of the decision, saying that there was a “fair prospect” the Supreme Court would grant *certiorari* and overturn the decision. Following the Roberts opinion, police resumed collecting DNA samples from arrestees. On November 9, 2012, the Supreme Court agreed to review the Court of Appeals decision. The court heard oral arguments in the case on February 26, 2013.

State Expenditures: According to the *2011 Maryland State Police Forensic Sciences Division Statewide DNA Database Report*, the total expenses in fiscal 2011 to operate the Statewide DNA Database System were \$1,311,827.38. However, this figure represents the cost of operating the entire database system, including DNA samples other than the ones included in Chapter 337. This figure also includes personnel costs and overhead expenses for equipment and maintenance. This estimate assumes that personnel and overhead costs will continue regardless of the outcome of this legislation, and that the expenditures associated with the repeal of the termination date of Chapter 337 of 2008 are the collection, storage, and analysis of eligible samples under Chapter 337.

Based on the information below, annual general fund and federal fund expenditures totaling \$208,873 continue for DSP to continue the collection and analysis of DNA samples pursuant to Chapter 337 of 2008. In the absence of evidence to the contrary, this estimate assumes that general funds are used to finance sample collection, storage, and postage costs.

Collection of Samples: DSP advises that it receives 8,000 sample collection kits per year for individuals arrested and charged with specified crimes, at a cost of \$7.50 per kit. As a result, general fund expenditures of \$60,000 per year continue for DSP to purchase collection kits.

Postage Costs: DSP estimates postage costs at \$1.25 per collection kit. Applying this figure to the 8,000 collection kits mailed to DSP each year for individuals affected by this bill results in continued DSP general fund expenditures of \$10,000 per year.

Analysis of Samples: DSP advises that it receives federal grant funds of \$120,000 per year and general funds of \$100,000 to conduct all DNA testing, including DNA testing

for individuals outside of the population affected by Chapter 337 of 2008. Both of these funding sources are expected to continue. Of the approximately 10,000 DNA samples analyzed by DSP each year, approximately 4,000 are for individuals arrested or charged, representing 40% of the total number of samples analyzed per year. Extrapolating this 40% figure to the funding levels results in continued annual expenditures of \$48,000 in federal funds and \$40,000 in general funds.

Storage of Samples: DSP did not provide any information regarding annual storage costs for collected samples or the source of funding for this expenditure. However, DSP's fiscal 2009 estimate for the legislation as introduced estimated \$50,873 in annual storage costs. Assuming that this estimate remains accurate, DSP will continue to incur annual general fund expenditures of \$50,873 for the storage of eligible samples.

The Department of Public Safety and Correctional Services' (DPSCS) Division of Pretrial Detention Services advises that DPSCS will continue to incur additional expenditures based upon the need to perform the functions required by Chapter 337 of 2008, but cannot reliably determine the extent of this increase at this time. The Department of Legislative Services disagrees with this assessment, since arrestees go through a complete medical diagnostic at intake, including a DNA swab for eligible individuals, which is one small step in the process and included in the inmate medical budget. The Governor's proposed inmate medical budget for fiscal 2014 is \$157.0 million.

Local Expenditures: Caroline and Montgomery counties advise that the bill does not result in a fiscal impact. Prince George's County advises that it will continue to perform the functions of Chapter 337 and that training costs for this function are already budgeted or will be absorbed within existing resources.

Additional Comments: Chapter 337 of 2008 requires the Office of Legislative Audits (OLA) to compile reports on statistics for crime scene DNA evidence from DSP and local law enforcement agencies. The latest review by OLA (issued in April 2011) noted that reporting of crime scene DNA evidence collection data was often not reliable, based upon a review of six selected local law enforcement agencies. OLA stated that the absence of clear guidance in State law, regulations, and the reporting form contributed to inconsistencies in the methods used to report data.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Caroline, Montgomery, and Prince George's counties; Department of Natural Resources; Judiciary (Administrative Office of the Courts); Department of State Police; Governor's Office of Crime Control and Prevention; Department of Public Safety and Correctional Services; State's Attorneys' Association; Maryland Department of Transportation; National Institute of Justice; SCOTUSblog; Department of Legislative Services

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ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Public Safety – Statewide DNA Database System – Sample Collection
Upon Arrest – Repeal of Sunset

BILL NUMBER: HB 292

PREPARED BY: Maryland State Police

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL
BUSINESS

OR

WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL
BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS

The proposed legislation will have no impact on small business in Maryland.