

Department of Legislative Services
Maryland General Assembly
2015 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 583

(Senator Pugh, *et al.*)

Judicial Proceedings

Judiciary

DNA Evidence - Postconviction Review

This bill expands the group of persons who may file petitions for postconviction DNA testing or database/log searches to an individual convicted of a crime of violence, as defined under § 14-101 of the Criminal Law Article. Though the bill expands the offenses eligible for postconviction DNA testing, the bill applies the existing statutory requirement that the State preserve scientific identification evidence meeting specified criteria to the offenses eligible for postconviction DNA statute *under current law* (murder in the first degree, murder in the second degree, manslaughter, rape in the first degree, rape in the second degree, sexual offense in the first degree, and sexual offense in the second degree).

Fiscal Summary

State Effect: Potential significant increase in general fund expenditures if the Department of State Police (DSP) has to absorb the cost of expanded DNA testing for defendants who cannot afford to pay for the tests. The extent to which this may occur cannot be reliably determined at this time and is dependent on the increased volume of requests for testing resulting from the bill, the availability of grant funds, and judicial determinations on cost absorption. Revenues are not affected.

Local Effect: The bill does not materially affect local finances.

Small Business Effect: Potential meaningful effect if small business labs receive requests for testing as a result of the bill.

Analysis

Current Law: As part of a postconviction proceeding, a person convicted of murder in the first degree, murder in the second degree, manslaughter, rape in the first degree, rape in the second degree, sexual offense in the first degree, or sexual offense in the second degree may petition for (1) DNA testing of scientific identification evidence that the State is required to preserve pursuant to specified statutory requirements and that is related to the judgment of conviction or (2) 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.

The State must preserve scientific identification evidence that (1) the State has reason to know contains DNA material and (2) is secured in connection with the offenses listed above. The State must preserve this scientific identification evidence for the time of the sentence, including any consecutive sentence imposed in connection with the offense.

Section 14-101 of the Criminal Law Article defines a “crime of violence” as (1) abduction; (2) arson in the first degree; (3) kidnapping; (4) manslaughter, except involuntary manslaughter; (5) mayhem; (6) maiming; (7) murder; (8) rape; (9) robbery; (10) carjacking (including armed carjacking); (11) first- and second-degree sexual offenses; (12) use of a handgun in the commission of a felony or other crime of violence; (13) child abuse in the first degree; (14) sexual abuse of a minor younger than age 13 under specified circumstances; (15) an attempt to commit crimes (1) through (14); (16) continuing course of conduct with a child; (17) assault in the first degree; or (18) assault with intent to murder, rape, rob, or commit a sexual offense in the first or second degree.

State Fiscal Effect: General fund expenditures may increase significantly if DSP is asked to absorb the costs of DNA tests for defendants who cannot afford to pay for the tests. The extent to which this may happen cannot be reliably determined at this time and

is dependent on the increase in the volume of requests for testing resulting from the bill, the availability of grant funds, and judicial determinations.

Office of the Public Defender: In 2008, the University of Baltimore School of Law took over the Innocence Project Unit of the Office of the Public Defender (OPD). For the past five years, all requests for postconviction DNA testing received by OPD have been sent to the Innocence Project for screening and possible pursuit of testing. All DNA testing has been funded through a postconviction DNA testing grant from the National Institute of Justice administered by the University of Baltimore, and the Innocence Project advises that it has never asked for a State or county lab to perform DNA testing. Furthermore, the Innocence Project advises that OPD has not received additional funding to cover the costs of postconviction DNA testing since the statute was enacted. The Innocence Project advises that in the relatively small minority of cases in which DNA testing could generate results material to issues surrounding the conviction, the evidence is typically lost, destroyed, or unavailable for any one of a number of reasons, resulting in few cases proceeding to the testing phase.

According to the Innocence Project, unless the State lab consents to perform testing at no cost, the lab could not legally be required to provide testing to a convicted defendant free of charge, since the statute does not confer a right of counsel on a convicted defendant seeking testing, and the person seeking testing must pay for the tests.

The Innocence Project advises that it typically receives approximately 10 direct requests each year for testing and additional cases where the Innocence Project has identified a need for testing when the person seeking assistance has not identified such a need. Few of the 10 annual requests result in testing. The Innocence Project estimates that tests can cost anywhere from \$800 to \$3,000 per sample, depending on the test. However, the Innocence Project advises that the cost for each test is normally in the lower range of \$800.

The Innocence Project advises that in the event that federal funding is not available to pay the costs of testing, assistance with funding can be obtained from other sources.

Department of State Police: DSP advises that the bill's expansion of offenses eligible for postconviction DNA testing has the potential to significantly increase workload and expenditures for the State Crime Lab. According to DSP, the bill has the potential to increase the DNA workload of the DSP's Forensic Sciences Division by up to 17 times. However, that determination is based on Uniform Crime Report data, which is based on **reported crimes**, not convictions. A conviction for a violent crime is what triggers the right to postconviction DNA testing under the bill.

DSP advises that it did not test any postconviction DNA cases in fiscal 2014 and that OPD has traditionally opted to outsource this testing. DSP expresses concern that it will be asked to conduct this testing should the expanded list of crimes eligible for testing under the bill result in a marked increase in testing to the point that OPD resources are exhausted.

DSP advises that it does not bill petitioners and almost all petitioners are indigent and unable to pay for testing. DSP advises that it raised this point with the Judiciary several years ago, and was advised by members of the Judiciary that indigence should not limit a person from obtaining justice. DSP estimates the cost of DNA testing to range from \$2,000 to \$15,000 per case, depending on the complexity of the case.

Though statute requires a petitioner to pay for the cost of DNA testing, should a court determine that an indigent defendant does not need to pay for postconviction DNA testing, general fund expenditures may increase for DSP to accommodate additional testing. However, the extent to which this is even likely to occur depends on (1) the number of additional testing requests generated by the bill; (2) the availability of external funding (grants, etc.) for DNA tests so that testing can be outsourced to other labs without the use of State funds or State facilities; (3) whether courts require DSP to absorb the cost of DNA testing for an indigent defendant when external funding is not available; and (4) the actual cost of the DNA tests.

Statute requires the State to preserve scientific identification evidence that (1) the State has reason to know contains DNA material and (2) is secured in connection with the offenses eligible for postconviction DNA testing. The State must preserve this scientific identification evidence for the duration of the sentence, including any consecutive sentence imposed in connection with the offense. DSP advises that all of the evidence associated with these cases is returned to the submitting investigator.

Additional Information

Prior Introductions: None.

Cross File: HB 1000 (Delegate Rosenberg, *et al.*) - Judiciary.

Information Source(s): Office of the Public Defender, Department of State Police, Judiciary (Administrative Office of the Courts), Innocence Project, Department of Legislative Services

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