

**POST-CONVICTION USE OF DNA  
EVIDENCE TO PROVE INNOCENCE**

**Senate Bill 1395 (Substitute H-1)  
First Analysis (12-6-00)**

**Sponsor: Sen. Bill Schuette**  
**House Committee: Criminal Law and  
Corrections**  
**Senate Committee: Judiciary**

***THE APPARENT PROBLEM:***

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

***THE CONTENT OF THE BILL:***

The bill would amend the Code of Criminal Procedure to allow certain defendants serving a sentence for a felony to petition for DNA testing and a new trial. The bill would take effect on January 1, 2001.

Under the bill, a defendant who was tried and convicted of a felony before the bill's effective date and

was serving a prison sentence for that conviction could petition the circuit court to order DNA testing of biological material that had been identified during the investigation that led to the conviction, and for a new trial based on the results of that testing. The petition for the testing would have to be filed no later than January 1, 2006.

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

The court would be required to order DNA testing if the defendant presented 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 his or her conviction; and established all of the following by clear and convincing evidence:

- A sample of biological material identified during the investigation was available for DNA testing.
- The identified biological material was not previously subject to DNA testing or, if previously tested, would be made 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 granted the petition for DNA testing, the identified biological material and a biological sample obtained from the defendant would have to be subjected to DNA testing by a laboratory approved by the court. If the court determined that the applicant was indigent, the cost of the DNA testing would be paid by the state. The results of the testing would have

to be provided to the court, the defendant, and the prosecutor. Upon motion by either party, the court could 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 were inconclusive or showed that the defendant was the source of the identified biological material, the court would have to deny the motion for a new trial. If the results showed that the defendant was the source of the identified biological material, his or her DNA profile would have to be given to the Michigan State Police for inclusion under the DNA Identification Profiling System Act.

If the testing results showed that the defendant was not the source of the identified biological material, the court would have appoint counsel under the court rules 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 allowed the court to find that it was not contaminated or was not so degraded that the DNA profile of the tested sample of the identified biological material could not 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, was sufficient to justify granting a new trial.

Upon the prosecutor's motion, the court would have to order retesting of the identified biological material and stay the defendant's motion for a new trial pending the results of the retesting.

The court would have to 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 could appeal the court's decision by application for leave granted by the court of appeals.

If the name of the felony victim were known, the prosecuting attorney would have to give written notice of the petition to the victim. The notice would have to

be by first-class mail to the victim's last known address. Upon the victim's request, the prosecutor would have to 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.

As of January 1, 2001, an investigating law enforcement agency would be required to preserve any biological material identified during a crime investigation that could be used for DNA testing under the bill's provisions. The identified biological material would have to be preserved for the length of time that the person was incarcerated in connection with that case.

Finally, the bill would also strike several obsolete references to the Detroit recorder's court.

MCL 770.2 et al.

### ***HOUSE COMMITTEE ACTION:***

The committee adopted a substitute for the bill to require the state to pay for the cost of a DNA test where the defendant was determined to be indigent and to require that the defendant be assigned counsel before a hearing was held on the results of the DNA test. The committee also specified that a testing laboratory would only have to provide *copies*, not originals, of testing protocols and laboratory procedures, notes, and other relevant records.

### ***BACKGROUND INFORMATION:***

The following information is from the Senate Fiscal Agency's analysis of an earlier version of the bill. That analysis is dated 11-27-00.

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.

If a defendant requests appointment of counsel and the court determines that he or she is indigent, the court may appoint counsel for the defendant at any time in the proceedings. The court is required to appoint counsel if it directs oral argument or an evidentiary hearing to 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, is initiating 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 plans to begin the project officially in January, and expects to have screening protocol developed by the end of February.

### ***FISCAL IMPLICATIONS:***

According to the House Fiscal Agency, the bill would have an indeterminate impact on the state and local units of government, depending upon the numbers of petitions, DNA tests, new trials, indigent counsel assigned, the number of prisoners released, and any impact from the procedures for the preservation of evidence. (12-5-00)

## **ARGUMENTS:**

### **For:**

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 have 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 would ensure that these matters were not handled arbitrarily or inconsistently, and that the courts were not flooded with meritless petitions. In addition, the bill would require the preservation of biological evidence once a petition was filed. These provisions would help both to exonerate innocent individuals, and to ensure that the real perpetrators did not escape punishment.

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

### **For:**

The bill would 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 would allow closure for victims, who should not be subjected to the

endless possibility that an inmate could be someday seek DNA testing and be released.

### **Response:**

The five-year time limit would not serve the cause of justice or the interests of anyone, including victims, particularly if it meant that the actual perpetrator was on the streets while an innocent person was behind bars. 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.

### **For:**

The bill would address concerns about unreliable DNA samples, by requiring a court to determine, by clear and convincing evidence, that genetic material was collected, handled, and preserved by procedures that allowed 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 would ensure that defendants were not exonerated on the basis of questionable evidence. In addition, a court would have to order retesting, upon a prosecutor's motion.

### **Against:**

The bill's five-year deadline could lead to the filing of numerous unwarranted petitions. The Michigan Innocence Project at Cooley Law School has not yet gotten off the ground and will not begin screening cases for several months into the new year. After that, it is expected to take five or six months before meritorious cases are selected for referral to defense attorneys. The project, which has limited resources, already has begun to receive inquiries from inmates and anticipates thousands of requests.

Instead of the careful and deliberate screening process that is planned, a flood of petitions could be filed simply to meet the bill's timetable. Even so, a number of innocent inmates could miss the deadline for a variety of reasons. Many incarcerated individuals have few resources in terms of education, intelligence, money, friends, legal assistance, reasoning ability, or mental stability. 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. Reportedly, only one other state has a time limit, which is two and a half years, and model legislation from the Cardozo Law School contains no time limit.

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 would qualify for DNA testing, particularly considering the scarcity of biological samples that were properly collected and well preserved.

***Against:***

Under the bill, if test results showed that a defendant was not the source of biological material, the court would have to 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. Furthermore, the hearing in question simply would be for the purpose of deciding whether to grant a new trial--it would 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 denied a new trial, the defendant could appeal that decision.

***Against:***

The bill would only apply to defendants who had been tried and convicted, thereby excluding prisoners who had pleaded guilty from being allowed to use DNA evidence to prove their innocence. How an innocent person ended up wrongfully imprisoned should not serve as a bar to proving his or her innocence. There is no good reason to limit the opportunity to exonerate an innocent prisoner to those people who went to trial. Further, the bill would limit the preservation of

evidence provisions to cases that would come under the bill's purview. This would mean that evidence from cases where the defendant pled guilty would not be preserved.

***Response:***

It is unlikely that an innocent person would plead guilty to a crime. Given the potential costs involved, it is not unreasonable to limit the testing of samples to those people who actually have continued to assert their innocence throughout the process, as opposed to allowing prisoners who have admitted their guilt by entering a guilty plea to now claim that biological evidence will prove them innocent.

***POSITIONS:***

The Prosecuting Attorneys Association of Michigan supports the bill. (12-5-00)

The Cooley Innocence Project supports the concept of the bill, but has reservations about the impact on people who have pled guilty and provisions that limit the preservation of evidence to cases in which the defendant was tried and found guilty. (12-5-00)

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#This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.