

Legislative Analysis



DNA COLLECTION: EXPAND TO INCLUDE ARRESTS FOR A VIOLENT FELONY

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House Bill 4092 as passed by the House
Sponsor: Rep. Aldo Vagnozzi
Committee: Judiciary

First Analysis (2-25-08)

BRIEF SUMMARY: The bill would require DNA testing of all persons arrested for a violent felony.

FISCAL IMPACT: The Department of State Police has determined that compliance with the bill's requirements will cost about \$1 million annually. A detailed discussion of the costs follows later in the analysis.

THE APPARENT PROBLEM:

Under current law, a person who is convicted of a felony or certain misdemeanor offenses must provide a DNA sample. The biologic sample is then used to create a DNA profile, which the Department of State Police is required to permanently retain. A DNA profile can be stored electronically in a searchable database. This profile contains only 13 out of millions of genetic markers; the 13 markers provide information used to identify one person from another, but do not contain any other information specific to a person, such as genetic markers for certain diseases.

CODIS, the DNA database operated by the FBI (and in which states can elect to share DNA profiles), originally consisted of two indexes: one with DNA profiles of convicted offenders and one with DNA profiles from samples obtained from crime scenes. More recently, CODIS added an Arrestee Index, a Missing or Unidentified Persons Index, and a Missing Persons Reference Index. Local, state, and federal law enforcement agencies can upload and run DNA profiles collected from crime scenes or obtained from offenders against any of these indexes to see if a match occurs. For example, a DNA profile obtained from a sample at a crime scene that matches profiles from other crime scenes may alert investigators to crimes that are linked; for example, it may tell them that they may be looking for a serial murderer. A match of DNA from a crime scene with an offender in the Convicted Offender Index or Arrestee Index may give law enforcement investigators a lead to a suspect.

Testimony given before the House Judiciary Committee illustrated how important collecting DNA samples from arrestees can be. Jayann Sepich from New Mexico told of how her daughter, Katie, was brutally raped, murdered, and set on fire in August of 2003. DNA evidence was collected from under her fingernails. Even though investigators ran the DNA profile through CODIS weekly, no matches were made. However, just three months after Katie was murdered, a man was arrested on aggravated burglary charges for

breaking into the home of two women with, according to Ms. Sepich, intent to rape and murder them. The women fled to a bathroom, locked the door, and called police on a cell phone. Gabriel Avilla was arrested at the scene and in March of 2004, convicted of that crime. He was released on bond prior to sentencing and, before a DNA sample was collected, fled to Mexico. Mr. Avilla wasn't rearrested until August of 2005, two years after Katie died. When a DNA sample was finally taken, it matched the evidence collected in Katie's case. Mr. Avilla confessed to Katie's murder when confronted with the DNA evidence linking him to the crime. On December 26, 2006, what would have been Katie's 26th birthday, he was formally charged for her murder—more than three years after her death.

Katie's Law, which requires DNA for most felony arrests to be included in the CODIS database, took effect in New Mexico in January 1, 2007. Reportedly, states which have adopted similar laws have been able to solve more cold cases. According to Katie's mother, within the first 11 months after the law went into effect in New Mexico, investigators were able to solve two homicides, two sexual assaults, and five property crimes by matching DNA profiles of arrestees with evidence collected at crime scenes. Had such a law been in effect in New Mexico at the time Katie's murderer was arrested on the subsequent burglary charge, Gabriel Avilla would have been linked to Katie's murder much earlier and would not have been released on bond prior to sentencing on the burglary charge, and many law enforcement dollars spent on investigating the crime and bringing him to justice could have been saved. Moreover, it is not known what crimes he may have committed while eluding authorities.

Recently, several other states have expanded their laws regarding DNA collection and retention to include certain arrestees. Citing a need for increased public safety, some believe that Michigan should adopt a similar law.

THE CONTENT OF THE BILL:

Public Acts 84-91 of 2001 amended various statutes to require that DNA samples be obtained from adults (and from juveniles tried as adults) who are convicted of a felony or attempted felony or certain misdemeanor offenses and also from juveniles found responsible for certain felony and misdemeanor offenses. The Department of State Police is required to permanently retain those DNA profiles.

House Bill 4092 would amend the Michigan Penal Code (MCL 750.520m) to require an individual arrested for a violent felony, as defined in the Corrections Code, to provide samples for chemical testing for DNA identification profiling or a determination of the sample's genetic markers.

Currently, the county sheriff or the investigating law enforcement agency is required to collect and transmit the samples as required under the DNA Identification Profiling System Act. The bill would add that a sample taken from persons arrested for a violent felony could be transmitted to the Department of State Police upon collection.

("Violent felony" is defined in the Corrections Code to mean the following crimes: felonious assault/armed; assault with intent to commit murder; assault with intent to do great bodily harm less than murder; assault with intent to maim; assault with intent to commit felony not otherwise specified; assault with intent to rob and steal (unarmed); assault with intent to rob and steal (armed); first degree murder; second degree murder; manslaughter; kidnapping; prisoner taking a hostage; leading, taking away, enticing child under 14; mayhem (with intent to maim, disfigure, or cut out facial features, limb, or organ); criminal sexual conduct (CSC) 1st, 2nd, 3rd, and 4th degree; assault with intent to commit CSC 1st, 2nd, or 3rd degree; armed, aggravated assault; carjacking; use of force or violence to commit a larceny of money or property.)

The bill would take effect October 1, 2008.

FISCAL INFORMATION:

According to the Department of State Police, the following staff and equipment would be needed to fully implement the bill's provisions: scientists (4 FTEs = \$422,800), latent print specialist (1 FTE = \$121,300), technician (1 FTE = \$86,500), DNA kits (6,000 @ \$40 each = \$240,000), and equipment/maintenance/CSS&M (\$129,400) for a total of one million dollars.

ARGUMENTS:

For:

There appears to be some confusion over the scope of the legislation. House Bill 4092 would not, as some believe, require DNA testing of every person arrested for any crime. The application is much narrower; it would only apply to persons arrested for violent felonies. The definition of "violent felony" includes serious assaultive crimes such as rape, murder, kidnapping, armed robbery, and maiming or disfiguring a person. The definition also includes criminal sexual conduct in the fourth degree, which, though classified as a misdemeanor, is treated as a felony because the maximum term of imprisonment that can be imposed for a conviction is greater than one year.

The bill also would not, as some seem to fear, create a permanent database of the DNA profiles of innocent persons. House Bill 4092, in amending the Michigan Penal Code, only speaks to when law enforcement agencies must collect DNA samples and create DNA profiles. Currently, the penal code restricts DNA collection and profiling to persons convicted of felonies, attempted felonies, and certain misdemeanors (mostly relating to sex crimes). House Bill 4092 would expand that pool to include those arrested for violent felonies. The bill itself does not speak to the length of time those samples and profiles would be retained.

However, a separate act, the DNA Identification Profiling System Act, does address these concerns. The DNA Identification Profiling System Act (MCL 28.171-28.176) requires the Department of State Police to permanently retain the DNA profiles of persons convicted of felonies, attempted felonies, and specified misdemeanors. But, the act

already provides for disposal of a DNA profile once a person is cleared as a suspect. Section 6 (11) of that act says: *Any other DNA identification profile obtained by the department shall not be permanently retained by the department but shall be retained only as long as it is needed for a criminal investigation for criminal prosecution.*

Further, subsection 12 of the same section requires the lab, after an individual has been eliminated as a suspect in a crime, to dispose of the DNA sample and the DNA profile in the manner prescribed by the act (which includes documentation of the destruction of the sample and DNA profile record in the presence of a witness).

Therefore, once an arrestee was cleared in a criminal investigation, current law already would require that both the DNA sample and the DNA profile record be disposed of.

For:

By some reports, Michigan has over 6,000 unsolved criminal cases. According to the Department of State Police, running the DNA profile of convicted offenders against the state and national DNA databases results in about one hit on a cold case per day. More of these cold cases could be solved if DNA profiles from people who are arrested for violent crimes could be compared to DNA evidence left at crime scenes. Not only would this increase public safety by identifying dangerous individuals and bringing them to justice, it would also save taxpayer money by not prosecuting and incarcerating the wrong person, and paying judgments or settlements for wrongful conviction when the truth is eventually borne out. Moreover, many violent offenders are repeat lawbreakers, though they may not have been convicted of a crime that would have allowed retention of a DNA profile.

For example, areas of Los Angeles, California were terrorized by a string of related rape/murders of black women for almost 20 years. A mentally impaired custodian at a school near where three of the victims were found was declared guilty of those three murders and imprisoned for 11 years. He was released only when DNA evidence collected from a rape victim who was able to identify her attacker linked those three rape/murders and almost a dozen more to Chester Turner. The city paid the exonerated man \$720,000. Mr. Turner had been arrested many times during the decades he raped and murdered women, and was even a registered sex offender for multiple convictions for lewd behavior, yet never had been required to submit to DNA testing and profiling. Some of these women may be alive today had California requested DNA testing upon arrest for certain crimes. California has since enacted stiffer DNA laws. Reportedly, about 11 states now require DNA profiling for some or all felony arrests. Michigan, with two of the most dangerous cities in the U.S., needs to follow suit.

Against:

The bill is seen as a tool to catch repeat offenders whose DNA profiles are not in the system—potentially solving crimes faster. However, the bill in reality will not do what may be expected of it. First of all, whereas a suspect's fingerprints can be taken, uploaded to the state and national fingerprint databases, and results returned in a couple of hours, a DNA test is very slow. The average time for the results on a DNA test is four

to six months, with some prosecutors waiting up to eight months for results on cases about to go to trial. In fact, sometimes, a trial ends before the DNA results come back. Unless the state intends to hold all arrestees covered under the bill until DNA results either link them to a crime or exonerate them, many of the arrestees could have the charges dismissed long before the DNA results are in. And, under the DNA profiling act, these samples would have to be destroyed as soon as the person was ruled out as a suspect—meaning that many samples collected would never be tested to begin with.

For a person who had to provide a DNA sample based on an arrest (rather than under a court warrant, which already must show probable cause), this long waiting period could be excruciating. For example, a *Lansing State Journal* article entitled "Short-staffed state police see cases pile up" dated Feb. 13, 2008, a high school student accused of a sex crime has had his life turned upside down while waiting nearly 18-months for DNA results to clear him (a first test, which took eight months, was inconclusive; a second test is now pending). Meanwhile, he has had to change schools and his grades have been affected. Expanding the pool of persons subject to providing DNA samples, as the bill would do, would only amplify the number of innocent individuals who also would have their lives significantly impacted.

Further, the bill would be too costly. The Department of State Police estimates the additional testing and profiling requirements to cost about \$1 million annually. However, the state is so strapped for cash that two forensic labs may be closed this fiscal year and forensic scientists and technicians laid off. Even without the extra burden imposed by the bill, if the labs close, prosecutors and police will already be facing greater delays in getting back results for individuals for whom a court already decided there was probable cause to believe they were involved in the crime.

Against:

Opponents of the legislation have raised concerns regarding the bill's potential to lead to invasion of privacy or police harassment. Currently, a person can be compelled to provide a DNA sample only upon a court-issued warrant or upon a conviction of a felony or certain misdemeanors. Under the bill, however, a person would have to provide a DNA sample—with no court oversight—merely on the basis of being arrested for a crime classified as a violent felony, regardless of whether or not probable cause linking the person to the crime existed. The potential for abuse on the part of overzealous law enforcement officers arresting individuals for the sole purpose of forcing collection of DNA must be raised as a concern. Furthermore, many arrests are dismissed before going to arraignment, and more are dismissed at arraignment. If arrests of individuals deemed as "suspicious" or "troublemakers" by authorities increase as a means just to collect DNA and run profiles against the various CODIS databases, the already overburdened court system could be further burdened.

Against:

The definition of "violent felony" in the penal code is outdated and doesn't include the addition of newer crime categories such as terrorism, torture, and human trafficking.

POSITIONS:

The Oakland County Sheriff supports the bill. (2-13-08)

The Department of State Police is neutral on the bill. (2-13-08)

The Prosecuting Attorneys Association of Michigan (PAAM) is monitoring the bill at this time. (2-13-08)

The American Civil Liberties Union of Michigan opposes the bill. (2-13-08)

The Criminal Defense Attorneys of Michigan (CDAM) oppose the bill. (2-13-08)

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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.