Legislative Analysis

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DNA COLLECTION: EXPAND TO INCLUDE ARRESTS FOR A VIOLENT FELONY

House Bill 4092 as enrolled
Public Act 380 of 2008
Sponsor: Rep. Aldo Vagnozzi

House Bill 6646 as enrolled
Public Act 534 of 2008
Sponsor: Rep. Kate Ebli

House Bill 6645 as enrolled
Public Act 533 of 2008
Sponsor: Rep. Rebekah Warren

Senate Bill 1549 as enrolled
Public Act 535 of 2008
Sponsor: Sen. Alan L. Cropsey

House Committee: Judiciary
Senate Committee: Judiciary (HB 4092 and SB 1549)

Second Analysis (1-20-09)

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 requirements of House Bill 4092 will cost about $1 million annually. A detailed discussion of the costs of the bills in the package 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 are 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's death. 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. He was formally charged with her murder on December 26, 2006, more than three years after Katie's death, on what would have been her 26th birthday.

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 previous 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. In addition, 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 BILLS:

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 <u>convicted</u> of a felony or attempted felony or certain misdemeanor offenses and also from juveniles found responsible for certain felony and misdemeanor offenses. From the DNA sample, a profile is obtained of 13 genetic markers unique to each individual. The profile itself consists of a digital readout of numbers and letters. It does not contain information from which a person's sex, race, or health status can be determined. The Department of State Police is required to permanently retain those DNA profiles.

HB 4092

House Bill 4092 amended 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 adds that a sample taken from persons arrested for a violent felony may 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 will take effect July 1, 2009.

HB 6645

House Bill 6645 amended the DNA Identification Profiling System Act (MCL 28.173a). Currently, if the investigating law enforcement agency or the Department of State Police already has a DNA sample from an individual, then another sample does not have to be collected upon conviction. Under the bill, if the DNA sample was inadequate for purposes of analysis, the individual will have to provide another DNA sample that is adequate for analysis.

The bill is tie-barred to Senate Bill 1549.

HB 6646

House Bill 6646 added a new section to the same act (MCL 28.175a) to restrict the use of DNA profiles of lawfully obtained DNA samples by the Department of State Police to only one or more of the following purposes:

- Law enforcement identification purposes.
- Assisting in the recovery or identification of human remains or missing persons.
- Academic, research, statistical analysis, or protocol development purposes only if personal identifiers were removed.

Further, DNA samples provided under the act could not be analyzed for identification of any medical or genetic disorder. The bill is tie-barred to Senate Bill 1549.

Senate Bill 1549

Senate Bill 1549 also amended the DNA Identification Profiling System Act (MCL 28.172, 28.175, and 28.176). The bill revised the definition of "DNA identification profile." Currently, the term means the results of the DNA identification profiling of a sample; under the bill, "DNA identification profile," or "profile," includes a paper, electronic, or digital record.

Unlawful conduct relating to DNA samples and information. Dissemination of DNA profiles is restricted under the act to criminal justice purposes, court proceedings, and limited research purposes. The bill prohibits an individual from disseminating, receiving, or otherwise using or attempting to use information in the DNA identification profile record knowing that such conduct is for a purpose not authorized by law. Further, an individual could not willfully remove, destroy, tamper with, or attempt to tamper with a DNA sample, record, or other DNA information obtained or retained under the act without lawful authority. A violation of either prohibition is a misdemeanor punishable by imprisonment for not more than one year and/or a fine of not more than $1,000.

Retention of DNA samples and profiles. Currently, the act requires permanent retention of a DNA identification profile by the Department of State Police of adults and juveniles who are convicted of, or found responsible for, a felony or specified misdemeanors. All other DNA identification profiles obtained by the department can only be retained as long as the profile is needed for a criminal investigation or criminal prosecution.

In addition to the current requirements, the bill requires the State Police Forensic Laboratory to dispose of a DNA sample or a DNA identification profile, or both, if (1) it receives a written request for disposal from the investigating police agency or prosecutor indicating that the sample or profile was no longer necessary for a criminal investigation or criminal prosecution; or (2) it receives a written request for disposal and a certified copy of a final court order establishing that the charge for which the sample had been obtained has been dismissed or resulted in an acquittal or that no charge was filed within the applicable limitations period.

The above provision would not apply if the department determined that the individual from whom the sample had been taken had otherwise become obligated to submit a sample (e.g., the person was arrested for or convicted of a different crime for which DNA collection is authorized) or if subsection 16 of the bill applied. Subsection 16 specifies that notwithstanding any other provision of the act, the department is not required to dispose of physical evidence or data obtained from a sample if evidence relating to an individual other than the person from whom the sample had been taken would be destroyed and the evidence or data relating to the other individual would otherwise be retained under Section 6.

Further, under the bill, an identification, warrant, detention, probable cause to arrest, arrest, or conviction based upon a DNA match or DNA information is not invalidated if it is later determined that one or more of the following errors occurred in good faith:

- A DNA sample was erroneously obtained.
- A DNA identification profile was erroneously retained.
- A DNA sample was not disposed of or there was a delay in disposing of the sample.
- A DNA identification profile was not disposed of or there was a delay in disposing of the profile.

The bill, as well as House Bills 6645 and 6646, took effect January 13, 2009.

FISCAL INFORMATION:

House Bill 4092: 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.

House Bills 6645-6646: The bills would have no fiscal impact on state or local units of government.

Senate Bill 1549: The bill would have an indeterminate fiscal impact for the State Police; the DSP may incur some administrative costs for disposing of the DNA samples. To the extent that the bill increased numbers of misdemeanor sentences to jail or probation, it could increase costs for local units of government. Costs of misdemeanor probation supervision and jail incarceration vary by jurisdiction. Local libraries could benefit from any increase in penal fine revenues under the bill.

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 only applies 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 (and the DNA profiles of juveniles found responsible for specified crimes). 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, Senate Bill 1549 amended that act to require disposal of the DNA samples taken from arrestees and the resulting DNA profile upon written request of an investigating law enforcement agency or prosecutor when charges are dropped or the person otherwise deemed no longer to be of interest. Therefore, once an arrestee was cleared in a criminal investigation, the statute 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 a different man, 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. Had California requested DNA testing upon arrest for certain

crimes and Mr. Turner's DNA profile been linked to evidence collected from the rape and murder victims, some of these women could be alive today. California has since enacted stiffer DNA laws. Michigan, with two of the most dangerous cities in the U.S., has now joined 14 other states in requiring DNA profiling for some or all felony arrests.

Against:

House Bill 4092 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 may not do some expect of it. First of all, while 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 will 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 have been in danger of closing in recent years. Even without the extra burden imposed by House Bill 4092, if the forensic labs should close, prosecutors and police would face 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 potential of House Bill 4092 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.

Response:

Provisions of House Bills 6645 and 6646 and Senate Bill 1549 mitigate some of the concerns initially raised by civil rights advocates while balancing the concerns of law enforcement in protecting the public safety. In particular, Senate Bill 1549 would make it a criminal offense to tamper with DNA samples or disseminate information from DNA profiles unless authorized by law. The language regarding when the Department of State Police must destroy DNA samples and DNA profile records of arrestees who are later released or cleared has been clarified. Yet, the amendments to the DNA Identification Profiling System Act would not invalidate arrests or convictions based upon a DNA match from a sample or DNA profile that should not have been obtained or that should have been disposed of if the errors occurred in good faith.

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.

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