Legislative Analysis

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EXPAND ELIGIBILITY FOR DNA TESTING OF EVIDENCE & CORRECT DATABASE AFTER EXONERATION

House Bill 4260 as passed by the House
House Bill 5089 as passed by the House
Sponsor: Rep. Paul Condino
Committee: Judiciary

First Analysis (7-11-08)

BRIEF SUMMARY: The bills would:

- Extend the time period for a petition to retest DNA evidence in a felony conviction and request a new trial.
- Expand the eligibility of convicted felons who could request the retest of DNA evidence and new trial.
- Revise the criteria used by a court to justify a new trial.
- Require the court to notify the State Police and Corrections Department of the final disposition of any case in which a conviction was vacated and the charges dismissed or the defendant acquitted.
- Require those departments to remove information pertaining to the conviction from their criminal databases.

FISCAL IMPACT: The bills would have an indeterminate fiscal impact on the Judiciary and the State Police, depending upon the number of convictions overturned based on new DNA tests and analysis and any new trials granted, as well as upon the number of petitions, hearings, and indigent counsel assigned. See *FISCAL INFORMATION* below for more detail.

THE APPARENT PROBLEM:

Even in one of the best criminal justice systems in the world, sometimes the scales of justice become imbalanced and innocent people are convicted of crimes they did not commit. According to an Innocence Project spokeswoman, the leading causes of wrongful convictions include 1) *mistaken eyewitness identification testimony* (a factor in 77 percent of post-conviction DNA exoneration cases); 2) *lab error* (in 65 percent of convictions); 3) *false confessions and incriminating statements* (in 25 percent of convictions); and 4) *jailhouse informants contributing to wrongful convictions* (in 15 percent of cases). Nationwide, 218 people have been exonerated by the testing or retesting of DNA evidence.

In 2000, the Michigan legislature enacted Public Act 402 to provide a way for defendants to seek new trials when DNA evidence might exonerate them of crimes for which they had been convicted and sent to prison. In Michigan, two people have been exonerated of crimes and released from prison. Their cases were helped by lawyers and law students

working at the Thomas M. Cooley Law School Innocence Project. However, some aspects of the law have proven problematic. For example, only those currently serving a prison sentence may file a petition for DNA testing, although individuals who have completed serving their sentences may also desire to prove their innocence using the new DNA technology. Also, the current law only applies to defendants who were convicted prior to January 8, 2001, a time when the use of DNA evidence was not widely utilized; although DNA testing of evidence became more commonplace after that date, the technology has greatly improved since then and could be useful in certain cases, such as when DNA testing was originally inconclusive. In addition, individuals who pled guilty are not entitled to bring a petition under the current statute. And yet, of the 218 exonerations nationwide, nearly 25 percent of those exonerated through DNA testing confessed or admitted to crimes they did not commit. Further, those exonerated of crimes have had difficulty expunging their names from the electronic databases maintained by law enforcement agencies. Finally, the current law contains a January 1, 2009 sunset, so that anyone intending to file a post-conviction petition for DNA testing must do so by that date.

To address these and other issues, legislation has been introduced to update and make more efficient the law that allows both those wrongfully convicted to challenge their incarceration using new evidence, and prosecutors to ensure that only the guilty are convicted of crimes in the criminal justice system.

THE CONTENT OF THE BILLS:

The bills would extend the time period for a petition to retest DNA evidence in a felony conviction and request a new trial, expand the eligibility of convicted felons who could request the retest of DNA evidence and new trial, revise the criteria used by a court to justify a new trial, require the court to notify the Departments of State Police and Corrections of the final disposition of a case overturned, and require those departments to remove information pertaining to the conviction from their criminal databases.

House Bill 5089 (H-1)

Currently, Chapter X of the Code of Criminal Procedure permits individuals convicted of a felony at trial prior to January 8, 2001, who are currently serving a prison sentence for that felony to petition the circuit court for a DNA test of biological materials identified in the investigation that led to the conviction and for a new trial based on the results of that test. The code provides that the petition must be filed before January 1, 2009. House Bill 5089 would amend the code (MCL 770.16) to revise these provisions.

Eligibility to petition to test DNA and petition for a new trial. The bill would remove the January 1, 2009 sunset provision for filing a petition for a DNA test and a new trial based on those results; instead, the bill would specify the petition could not be filed later than January 1, 2012. Also, the bill would allow any of the following to petition for DNA testing and a new trial:

- Any individual convicted of a felony at a trial, a plea of guilty, or a plea of *nolo contendere* (no contest) before January 8, 2001.
- An individual convicted of a felony at trial on or after January 8, 2001 who establishes by evidence that is on the record that both of the following apply: (1) DNA testing was not done by the state; and (2) he or she requested that DNA testing be done before trial on identified biological material and the court denied the request.
- An individual convicted of a felony at trial on or after January 8, 2001 who establishes that all of the following apply: (1) that DNA testing was done in the case or under this act; (2) that the results of the testing were inconclusive; and (3) that testing with current DNA technology is likely to result in conclusive results.

The petition. In addition to current requirements, the bill would require that the petition be filed not later than January 1, 2012, and accompanied by a sworn affidavit, signed by the petitioner, affirming that he or she was innocent of the crime for which he or she had been convicted. The affidavit would have to specify how the proposed testing of the biological material would establish his or her innocence.

New responsibility for a court. Under the bill, the petition would have to allege that biological material was collected and identified during the investigation of the petitioner's case. If the petitioner, after diligent investigation, was unable to discover the location of the identified biological material or to determine whether the material was no longer available, then the petitioner could petition the court for a hearing to determine whether the material was available. If the court determined that the material was collected during the investigation, then the court would order the appropriate police agencies, hospitals, or the medical examiner to search for the material, and to report the results of the search to the court.

Before entering an order for taking a biological sample from a person other than the petitioner, the court would have to conduct a hearing to determine the necessity of taking that sample. In making the determination, the court would have to take testimony and review evidence as necessary. The rules of evidence would apply.

Before ordering the sample, the court would have to find substantial and compelling reasons that the biological sample was necessary to the determination that the petitioner did not commit the crime for which he or she had been convicted.

If the victim were required to testify at the hearing, the courtroom would have to be closed and the petitioner could not be present. If the court determined that a sample from the victim was necessary, the court would have to request the victim or his or her family or representative to appear at an *in camera* meeting with the court (in the judge's chamber). The victim could request the presence of the prosecuting attorney. If the prosecuting attorney appeared at the *in camera* meeting, the petitioner's attorney (but not the petitioner) would also be allowed to attend. The court would have to explain to the victim the necessity for taking the DNA sample and would have to answer any questions the victim had regarding the court's order that he or she provide a sample.

Miscellaneous revisions. Currently, the court is required to order DNA testing if the defendant presents *prima facie* proof that the evidence sought to be tested is material to the issue of his or her identity as the perpetrator of, or accomplice to, the crime that resulted in conviction and the defendant established certain circumstances by clear and convincing evidence. Instead, the bill would require the court to order DNA testing if it determined that those circumstances existed, and it would delete the requirement that those circumstances be established by clear and convincing evidence. This means that the level of proof for these circumstances, which include the availability of the evidence for retesting, would drop to "preponderance of the evidence" or, in other words, 51 percent likely.

Under current law, if the court grants a petition for DNA testing, the sample obtained from the defendant is subjected to DNA testing by a court-approved laboratory. The bill instead would subject a sample from the petitioner or other relevant source to testing by a laboratory accredited by the American Society of Crime Lab Directors, or a laboratory agreed to by the court, the prosecuting attorney, and the petitioner. (The state is required to bear the cost of DNA testing ordered under this provision if the applicant is indigent.) References to the "defendant" would be changed to instead refer to the "petitioner."

Existing law also requires the court to deny the motion for a new trial if the results of the DNA testing are inconclusive or show that the defendant is the source of the identified biological material. Under the bill, the new trial could also be denied if the results were consistent with the state's theory of guilt.

Currently, if the testing shows that the defendant was not the source of the identified biological material, the court must appoint counsel under the court rules and hold a hearing to determine certain circumstances by clear and convincing evidence. The bill would specify instead that the court would have to appoint counsel and hold a hearing if the test results showed either the petitioner was not the source of the identified material or the results otherwise supported the assertions of innocence in the individual's affidavit.

Moreover, the bill would make several revisions to the list of circumstances to be reviewed by the court. Under the bill, the court would be required to appoint counsel and hold a hearing to determine by clear and convincing evidence all of the following:

- That the identified biological material was collected, handled, and preserved according to procedures that allow the court to find that the identified biological material is not contaminated or is not so degraded that the DNA profile of the tested sample cannot be determined to be identical to the DNA profile of the sample initially collected during the investigation.
- In cases in which the petitioner asserts that he or she is not the source of the biological materials, only the perpetrator of the crime for which the petitioner was convicted could be the source of the identified biological material, and that the petitioner's purposed exclusion as the source of the material, balanced against the other evidence in the case, is sufficient to justify the grant of a new trail.
- That, in cases where alleged biological evidence from the victim or another person is relevant to the petitioner's innocence as asserted in his or her affidavit,

the court shall determine whether the purposed exculpatory evidence, balanced against the other evidence in the case is sufficient to justify the grant of a new trial.

- That the evidence is consistent with the petitioner's claim of innocence, balanced against the other evidence in the case, and is sufficient to justify the grant of a new trial.

Currently, upon motion of the prosecutor, the court must order retesting of the identified biological material and stay the defendant's motion for new trial pending the results of the DNA retesting. The bill would revise this provision to say that *if there was a sufficient biological sample, upon motion by the prosecuting attorney or the petitioner*, the court would have to order retesting and stay the *petitioner's* motion for new trial pending the results of the DNA retesting. The bill would also add that if there were not sufficient biological material for additional testing, the parties must be notified of that fact before any test was conducted and must be provided the opportunity to have an expert present during any test that was conducted.

Current law also provides that if the name of the victim of the felony conviction is known, the prosecuting attorney must give written notice of a petition under these provisions to the victim and that upon the victim's request, the prosecuting attorney must also give the victim notice of the time and place of any hearing on the petition and must inform the victim of the court's grant or denial of a new trial to the defendant. The bill would retain this provision, and add "any subsequent hearing related to the issue of the petitioner's release."

Currently, the law specifies that effective January 1, 2001, the investigating law enforcement agency must preserve any biological material identified during the investigation of a crime for which any person is conviction may file a petition for DNA testing. The identified biological material must be preserved for the period of time that any person is incarcerated in connection with that case. House Bill 5089 would revise these provisions as follows:

1) Effective July 1, 2001, the investigating law enforcement agency would have to preserve any biological material identified during the investigation of a crime or crimes for which any person *convicted before January 1, 2001* may file a petition for DNA testing under Section 16 of the act.

2) Effective July 1, 2008, the investigating law enforcement agency would have to preserve any biological material identified during the investigation of a crime for which any person convicted after January 1, 2001 may file a petition for DNA testing.

The identified material would have to be preserved until January 1, 2012, which is the last day that a petition for DNA testing and a new trial based on the results could be filed under Section 16.

The bill would amend the Code of Criminal Procedure (MCL 769.16a) to require a court to immediately notify the Department of State Police and the Department of Corrections when a conviction was overturned, and then require those departments to remove the information pertaining to the conviction from their databases.

In general, court clerks are required to report to the Michigan State Police (MSP) the final disposition of a case involving a felony charge, certain misdemeanors (those with a maximum sentence of 92 days or less are excluded), certain local ordinances, or certain criminal contempt charges. Among numerous required information, the final disposition report must include the finding of the judge or jury, including a finding of guilty, guilty but mentally ill, not guilty, or not guilty by reason of insanity, or the person's plea of guilty, *nolo contendere*, or guilty but mentally ill. If the person was convicted, the report must also include the offense of which the person had been convicted and a summary of any sentence imposed.

The bill would specify that for any conviction that had been reported as described above, the clerk of the court entering a subsequent disposition in the case would have to immediately report the final disposition to the Departments of State Policy and Corrections if the judgment of conviction had been vacated and either the accusatory instrument had been dismissed or upon retrial or by court finding, whether appellate or otherwise, the defendant had been determined to be not guilty. The final disposition would be reported on forms approved by the State Court Administrator. The MSP and DOC would then be required to immediately enter the disposition into each database they maintain concerning criminal convictions and also remove from each of those databases available to the public all information indicating that the person had been convicted of the offense.

BACKGROUND INFORMATION:

According to the Innocence Project, DNA evidence has exonerated 218 people wrongfully incarcerated. (This is as of July 2008). In 84 of these cases, the true suspect or perpetrator was identified through the retesting of the DNA evidence.

The exonerations have been won in 31 states, and the average length of time served by those exonerated is 12 years in prison. (The total number of years served by those wrongfully convicted exceeds 2,500 years.) Sixteen exonerees spent time on death row. The average age of exonerees at the time of their wrongful convictions is 26. Of the 218 exonerees, 134 are African American, 59 Caucasian, 19 Latino, one Asian American, and five whose race was unknown.

The Innocence Project has identified several systemic defects in the criminal justice system contributing to the number of wrongful convictions. These factors include mistaken eye witness identification testimony (a factor in 77 percent of wrongful convictions), lab error and junk science (65 percent of cases), false confessions and incriminating statements (25 percent), and jailhouse snitches/informants (15 percent).

Twenty-three states, the federal government, and the District of Columbia have laws to compensate people who were wrongfully incarcerated; Michigan does not currently have such a law, but House Bills 4250 and 4251, which have been reported by the House Judiciary Committee, would address the issue.

FISCAL INFORMATION:

House Bill 4260. The bill would have an indeterminate fiscal impact on the Judiciary, depending upon the number of convictions overturned and any new trials granted. Under this bill, courts may experience an increase in administrative costs due to the additional reporting responsibilities assigned to court clerks. The bill would have an indeterminate fiscal impact for the Department of State Police. The State Police may experience some administrative costs for entering and maintaining the disposition information in various databases.

House Bill 5089. The bill would have an indeterminate fiscal impact on the Judiciary, depending upon the number of petitions, hearings, new trials, and indigent counsel assigned. The bill would have an indeterminate fiscal impact for the Department of State Police. Under this bill, it is unknown how many DNA tests would be performed by the State Police crime laboratory, how many applicants would be indigent and unable to pay the testing costs, and how many applicants would request that the tests be performed by another laboratory, thus requiring the applicant to pay for the testing.

ARGUMENTS:

For:

In Michigan, two people have been released from prison, having been exonerated of their crimes by DNA evidence. Nationwide, more than 218 people have been found to be wrongfully convicted. In order to ensure that only the guilty are sentenced to prison for their crimes, representatives of the Michigan Prosecuting Attorneys Association and the Thomas M. Cooley Law School Innocence Project (a volunteer group of law students and criminal defense attorneys who review the petitions for assistance) have worked together to make recommendations that would update and make more efficient Michigan's law that gives those convicted of felonies the opportunity to overturn their convictions with new DNA testing of biological evidence.

These bills are good ones and represent a compromise between various members of the criminal justice system. They allow some individuals who have completed serving their sentences to prove their innocence using the new DNA technology (when currently, only those serving a prison sentence may apply). In addition, they allow some individuals who pled guilty to bring a petition (when currently those who plead guilty are prohibited from doing so). This is a necessary change in the law since of the 218 exonerations nationwide, nearly 25 percent of those exonerated through DNA testing confessed or admitted to crimes they did not commit. The reasons an innocent person may confess to a crime vary, but include long hours of interrogation, deceptive techniques of interrogators, cognitive deficiencies, and mental illness. Further, House Bill 4260 enables all those exonerated, whether by retesting DNA evidence or a subsequent

acquittal or dismissal of charges for other reasons, to expunge their names from the electronic databases maintained by law enforcement agencies. Finally, these bills extend the current law's January 1, 2009 sunset to 2012, so that anyone intending to file a post-conviction petition for DNA testing would have three more years to do so.

For:

Critics of past attempts to expand the eligibility regarding which felons can petition for retesting of DNA evidence have argued that doing so would open a veritable floodgate of requests and an almost endless cycle of appeals that would smother already overburdened courts. House Bill 5089 would have a much narrower application than previous attempts.

For example, the bill would extend eligibility to file petitions to felons who confessed to the crime or pled no contest. However, this provision would only apply to felons convicted prior to January 8, 2001. Also, although eligibility under the bill would extend to convicted felons whether incarcerated or those who have completed their sentences, a petition would not be automatically granted; the same criteria used by courts now to determine whether a petition should go forward would apply, although at a slightly lower level of proof (preponderance of the evidence instead of by clear and convincing evidence).

Further, though felons convicted after January 8, 2001 could also petition for retesting of the DNA evidence in their cases, eligibility would only extend to those cases in which DNA evidence had never been tested at the time and a request to do so by the defendant had been denied by the court and to those cases in which DNA testing was done but was inclusive and retesting with the newer technologies would likely result in conclusive results.

Finally, the ability for felons to request retesting of DNA evidence would expire in a little over three years. Sunsetting the petition process as of January 1, 2012 acknowledges that DNA testing is now performed routinely during criminal investigations and that the technologies used in the testing process are highly accurate.

Even with these reforms, supporters of the bill do not expect very many petitions to be successful. After all, since the 2000 legislation that created this petition process, the Innocence Project has screened at least 3,500 applications for assistance. Of those, only two cases were strong enough to meet all the required criteria and be granted the right to have the DNA evidence tested. Still, many feel that even if one innocent person is identified and able to overturn his or her conviction under the changes proposed by the bill, then the reform will be well worth it.

Against:

House Bill 5089 (H-1) would allow petitions by eligible felons to be filed up to and including January 1, 2012. Further, a petitioner who is unable to find the location of the DNA evidence, or to determine if the evidence is still in existence, would be allowed to petition the court for a hearing to compel various entities to search for the materials. Under the bill, a petitioner could also petition for DNA samples to be compelled of other suspects or the victim. However, the bill would also allow investigating law enforcement

agencies to destroy evidence containing the biological material pertaining to those cases as of the same date - January 1, 2012.

Acting under the assumption that, depending on its caseload, it may be a matter of several weeks to several months before a court acted on a petition, the evidence that could have cleared a petitioner could be destroyed before a court even issued its determination to allow the retesting of the DNA or before the petitioner could locate the evidence. Therefore, a buffer period is needed between the last date a petition could be filed and the date when the evidence could be destroyed sufficient for the petition process and any subsequent hearings to be completed.

Against:

The procedural process for the petition to retest DNA evidence is unclear. If a petitioner cannot locate the biological materials collected in his or her case, House Bill 5089 (H-1) would allow the petitioner to petition the court for a hearing to determine if the evidence was still available; if so, the court must compel the police agency, hospital, or medical examiner involved in the investigation of the crime to search for the materials. However, since the bill would require proof – by preponderance of the evidence – that the DNA evidence in question is still available, it is unclear when the petition for the hearing regarding the location of that evidence would be filed. For instance, would it precede, or be subsequent to, the original petition for retesting the DNA evidence?

POSITIONS:

The Thomas Cooley Innocence Project supports the bills. (3-19-08)

The Justice Project supports the bills. (10-23-07)

The State Bar of Michigan supports House Bill 4260. (3-19-08)

The Eaton County Prosecuting Attorney supports House Bill 5089. (3-19-08)

The Ken Wyniemko Foundation supports House Bill 5089. (3-19-08)

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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.