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Sen. Johnson

BILL SUMMARY

- Establishes a mechanism pursuant to which inmates who are under a sentence of death on its effective date, or who are sentenced to death on or after its effective date for an offense committed prior to its effective date, may request a DNA test to be performed under its provisions.
- Requires a capital inmate who is eligible to request a DNA test under its provisions to submit an application in a specified form to the prosecuting attorney who handled the case that resulted in the inmate's sentence or death or the Attorney General and an acknowledgement in a specified form of certain provisions related to the mechanism.
- Requires that an eligible capital inmate's application and acknowledgment must be submitted no later than one year after the bill's effective date.
- Provides procedures for determining whether the prosecuting attorney or the Attorney General is to make the determination as to whether an eligible capital inmate's application should be accepted or rejected.
- Establishes criteria that govern the prosecuting attorney or the Attorney General, as appropriate, in screening an eligible capital inmate's application and in determining whether to accept or reject the application, and specifies that the application may be accepted only if the criteria are satisfied.
- Establishes procedures for selecting the testing authority to be used for the conduct of DNA tests for an eligible capital inmate under its provisions, precautions that must be satisfied to ensure that biological materials that are to be used in the DNA test are not contaminated during

transport or the testing process, and "chain of custody" provisions regarding the biological samples so used.

- Requires the Attorney General to approve or designate testing authorities that may be used for the conduct of DNA tests for eligible capital inmates under its provisions and establishes criteria that a testing authority must satisfy in order to be so approved or designated.
- Establishes procedures for obtaining biological material from a capital inmate to be used in the conduct of a DNA test under its provisions.
- Specifies the availability, and the uses that may be made, of the results of DNA tests of capital inmates conducted under its provisions.
- Modifies the Postconviction Relief Law to permit a court to entertain a petition for relief under the Law that is filed after the expiration of the Law's 180-day period of limitations or a second petition or successive petitions for similar relief on behalf of a petitioner if: (1) the petitioner is a capital inmate for whom a DNA test was performed under the bill's provisions, and (2) the results of the DNA test were an "exclusion result" regarding the petitioner in relation to the offense for which the sentence of death was imposed upon the petitioner.

TABLE OF CONTENTS

Inmates who are "eligible capital inmates" who may apply for a DNA test.....	3
Application for a DNA test	4
In general	4
Filing with a prosecuting attorney.....	4
Filing with the Attorney General.....	5
Acknowledgment that must accompany an application.....	5
Attorney General's duty to prescribe forms	7
Determination of accepting authority.....	7
Criteria for screening applications.....	8
In general	8
Screening criteria related to prior definitive or inconclusive DNA test.....	8
Screening criteria related to outcome determinativeness of DNA test.....	9
Other screening criteria	9
Determinations regarding existence of biological material.....	10
Determinations regarding quantity and quality of biological material	11
Anticontamination precautions	12
Selection of testing authority; approval or designation of testing authorities	13

Selection of testing authority; effect of inmate's objection to selected authority.....	13
Attorney General's approval or designation of testing authorities.....	14
No right to challenge or appeal approval, selection, or use	14
Obtaining inmate DNA sample.....	14
In general	14
Inmate's refusal to submit to, or hindrance of, collection of sample	15
Criteria for testing authority to be approved or designated.....	15
Distribution and use of DNA test results.....	16
Changes in the Postconviction Relief Law.....	17
Existing law.....	17
Operation of the bill	18
Other definitions	19

CONTENT AND OPERATION

The bill establishes a mechanism pursuant to which inmates under a sentence of death who are "eligible capital inmates" under its definition of that term may request and, in specified circumstances, be accepted for a DNA test to be conducted under its provisions.

Inmates who are "eligible capital inmates" who may apply for a DNA test

The bill specifies that a "capital inmate" (see below) is eligible to request a DNA test to be conducted under its provisions only if: (1) the capital inmate is a capital inmate on the bill's effective date, or (2) the capital inmate becomes a capital inmate on or after the bill's effective date, and the inmate's sentence of death that makes the inmate a capital inmate was imposed for an offense committed prior to the bill's effective date. An inmate who satisfies either criterion is an "eligible capital inmate" for purposes of the bill. The bill defines a "capital inmate" as an inmate in a "prison" (see **Other definitions**, below) who has been sentenced to death by a court, or by a jury and court, of Ohio (see **COMMENT 1**).

The bill specifies that the fact that a capital inmate is an eligible capital inmate does not, in and of itself, mean that a request for DNA testing that the capital inmate makes will be granted or that a DNA test will be granted for the capital inmate. The decisions as to whether the request for DNA testing will be granted or denied and as to whether a DNA test will be conducted are to be made under the bill's provisions described below. (R.C. 2953.71(D) and (H) and 2953.72(C).)

Application for a DNA test

In general

Under the bill, any eligible capital inmate who wishes to request a DNA test under its provisions must submit an application for a test on a form prescribed by the Attorney General (the AG) for this purpose and in accordance with the provisions described in the next paragraph. The eligible capital inmate must submit the application no later than one year after the bill's effective date and must submit the application to either the prosecuting attorney or the AG, as described below in "Filing with a prosecuting attorney" and "Filing with the Attorney General." Neither the AG nor any prosecuting attorney may accept an application for a DNA test under those provisions after the date that is one year after the bill's effective date. Along with the application, the eligible capital inmate must submit an acknowledgment, as described below in "Acknowledgment that must accompany an application." (R.C. 2953.72(A) and 2953.73(A).)

Filing with a prosecuting attorney

An eligible capital inmate who has been sentenced to death and who has not yet commenced any federal *habeas corpus* proceeding relative to the case in which the sentence of death was imposed may submit an application for DNA testing to the prosecuting attorney. That type of eligible capital inmate may submit an application for DNA testing to the AG, but, upon receipt of the application, the AG must transfer the application to the prosecuting attorney.

If the prosecuting attorney believes that an eligible capital inmate's case satisfies the criteria by which eligible capital inmate applications for DNA testing are screened, as described below in "Criteria for screening applications," the prosecuting attorney on the prosecuting attorney's own motion, may request DNA testing by filing an application as described in the bill. The prosecuting attorney is not required to file an acknowledgment with that application. Upon the prosecuting attorney's filing of an application, the application is to be considered as if it had been filed by the capital inmate.

Upon receiving an application from an eligible capital inmate, a prosecuting attorney may entirely defer to the AG the decision as to whether the application should be accepted or rejected. Upon receiving an application from an eligible capital inmate, a prosecuting attorney may request prosecutorial assistance from the AG, and, upon making the request, the prosecuting attorney may, but is not required to, defer to the AG the decision as to whether the application should be accepted or rejected. (R.C. 2953.73(B).)

Filing with the Attorney General

An eligible capital inmate who has been sentenced to death and who has commenced a federal *habeas corpus* proceeding relative to the case in which the sentence of death was imposed may submit an application for DNA testing to the AG. That type of eligible capital inmate may submit an application for DNA testing to the prosecuting attorney, but, upon receipt of the application, the prosecuting attorney must transfer the application to the AG. Upon receiving an application under this paragraph, the AG initially must defer to the prosecuting attorney the determination as to whether the application should be accepted or rejected, and the prosecuting attorney must proceed as if the application had been filed with the prosecuting attorney (see "**Filing with a prosecuting attorney**," above).

If the AG believes that an eligible capital inmate's case satisfies the criteria by which eligible capital inmate applications for DNA testing are screened, the AG on the AG's own motion, may request DNA testing through the prosecuting attorney by filing an application as described in the bill. The AG is not required to file an acknowledgement with that application. Upon the AG's filing of the application, the application is to be considered as if it had been filed by the capital inmate.

If the prosecuting attorney has denied an eligible capital inmate's application and the capital inmate has filed a federal *habeas corpus* proceeding relative to the case in which the sentence of death was imposed, the capital inmate may request the AG to reconsider the application if the request is made within 30 days after the date on which the prosecuting attorney denied the application. (R.C. 2953.73(C).)

Acknowledgment that must accompany an application

If an eligible capital inmate submits an application requesting a DNA test, along with the application, the eligible capital inmate must submit an acknowledgment, on a form prescribed by the AG for this purpose, that is signed by the capital inmate and that sets forth all of the following (R.C. 2953.72(A)):

(1) That the bill's provisions contemplate only offers for DNA tests of eligible capital inmates at a stage of a prosecution or case after the capital inmate has been sentenced to death, that any "exclusion" or "inclusion DNA test result" (see "**Other definitions**," below) rendered pursuant to those provisions may be used by any party in any postconviction proceeding under the existing Postconviction Relief Law, and that all requests for any DNA test made at trial will continue to be handled by the prosecuting attorney in the case;

(2) That the process of conducting a postconviction DNA test for an eligible capital inmate under the bill begins when the capital inmate submits an application and the required acknowledgment;

(3) That the eligible capital inmate may submit the application and acknowledgment either to the prosecuting attorney or to the AG and that, when they are so submitted, the recipient will ensure that they are delivered to the appropriate "prosecuting authority" (see "Other definitions," below);

(4) That the state has established a set of criteria by which eligible capital inmate applications for DNA testing will be screened, that a prosecuting attorney or the AG upon receipt of a properly filed application and accompanying acknowledgment, will apply those criteria as the "accepting authority" (see "Other definitions," below) to determine whether to accept or reject the application, and that no determination made by the accepting authority regarding the acceptance or rejection of an application is appealable to any court;

(5) That the results of a DNA test conducted under the bill will be provided as described below under "Distribution and use of DNA test results" to all parties in the postconviction proceedings and will be reported to various courts;

(6) That, if a DNA test is conducted with respect to a capital inmate under the bill, the state will not offer the capital inmate a retest if an inclusion result is achieved relative to the test, and that, if the state were to offer a retest after an inclusion result, the policy would create an atmosphere in which endless testing could occur and in which postconviction proceedings could be stalled for many years;

(7) That, if the accepting authority rejects an eligible capital inmate's application for DNA testing because the capital inmate does not satisfy the acceptance criteria, the state will not accept or consider subsequent applications, but the state may reconsider the application in the limited circumstances described below in "Determination of accepting authority";

(8) That the acknowledgment memorializes the bill's provisions with respect to the offering of postconviction DNA tests to capital inmates, that those provisions do not give any inmate any additional constitutional right that the inmate did not have prior to the bill's effective date, that the state has no duty or obligation to offer postconviction DNA tests to inmates, that the state has the sole discretion to determine whether a capital inmate is an eligible capital inmate and whether an eligible capital inmate's application for DNA testing satisfies the acceptance criteria and whether the application should be accepted or rejected, and that no determination made by the state in the exercise of its discretion regarding

the acceptance or rejection of an application or otherwise made by the state regarding postconviction DNA tests under the bill is appealable to any court;

(9) That the manner in which the bill's provisions with respect to the offering of postconviction DNA tests to capital inmates are carried out does not confer any constitutional right upon any capital inmate, that the state has established guidelines and procedures relative to those provisions to ensure that they are carried out with both justice and efficiency in mind, and that a capital inmate who participates in any phase of the mechanism contained in those provisions does not gain as a result of the participation any constitutional right to challenge, or any right to appeal, the manner in which those provisions are carried out;

(10) That the most basic aspect of the bill's provisions is that, in order for a DNA test to occur, there must be an inmate sample against which other evidence may be compared, that, if an eligible capital inmate's application is accepted but the capital inmate subsequently refuses to submit to the collection of the sample of "biological material" (see *Other definitions*," below) or hinders the state from obtaining a sample of biological material from the capital inmate, the goal of those provisions will be frustrated, and that a capital inmate's refusal or hindrance constitutes a rejection by the capital inmate of the state's offer to conduct or facilitate a DNA test for the capital inmate, results in the state's offer to conduct or facilitate a DNA test for the inmate automatically being withdrawn as a matter of law, and releases the state from any agreement to conduct or facilitate a DNA test for the capital inmate.

Attorney General's duty to prescribe forms

The bill requires the AG to prescribe a form to be used to make an application for a DNA test, and a form to be used to provide the acknowledgment that must accompany the application form. The AG must distribute copies of the forms to the Department of Rehabilitation and Correction, the Department must ensure that each state correctional institution in which capital inmates are housed has a supply of the forms, and the Department must ensure that copies of the forms are provided free of charge to any capital inmate who requests them. (R.C. 2953.72(B).)

Determination of accepting authority

The bill specifies that, upon the submission of an application for DNA testing, except as described in this paragraph, the prosecuting attorney involved in the case is the accepting authority and must make the determination as to whether the application should be accepted or rejected. The AG is the accepting authority

and must make the determination as to whether the application should be accepted or rejected only if one or more of the following applies (R.C. 2953.73(D)):

(1) The prosecuting attorney involved in the case elects to entirely defer to the AG the decision as to whether the application should be accepted or rejected.

(2) The prosecuting attorney involved in the case requests prosecutorial assistance from the AG and, upon making the request, defers to the AG the decision as to whether the application should be accepted or rejected.

(3) The AG believes that the case of the eligible capital inmate satisfies the criteria by which capital inmate applications for DNA testing are screened, and the AG on the AG's own motion files an application requesting DNA testing through the prosecuting attorney.

(4) The prosecuting attorney involved in the case has denied the eligible capital inmate's application, the capital inmate has commenced a *federal habeas corpus* proceeding, and the capital inmate has requested the AG to reconsider the application, and the capital inmate filed the application within 30 days after the date on which the prosecuting attorney denied the application.

Criteria for screening applications

In general

The bill provides that, if an eligible capital inmate submits an application for a DNA test, the accepting authority and the "testing authority" (see "**Other definitions**," below) that will be used must screen the application in accordance with the criteria described below, and the accepting authority must use those criteria in determining whether to accept or reject the application. No determination made by the accepting authority regarding the acceptance or rejection of an application is appealable to any court. (R.C. 2953.74(A).)

Screening criteria related to prior definitive or inconclusive DNA test

If an eligible capital inmate submits an application for DNA testing and a *prior definitive DNA test* has been conducted regarding the same biological evidence that the capital inmate seeks to have tested, the accepting authority must reject the inmate's application. If an eligible capital inmate files an application for DNA testing and a *prior "inconclusive" DNA test* (see "**Other definitions**," below) has been conducted regarding the same biological evidence that the capital inmate seeks to have tested, the accepting authority must review the application and has the discretion, on a case-by-case basis, to either accept or reject the application. The accepting authority may consult with a testing authority in determining whether prior DNA test results were definitive or inconclusive and whether to

accept or reject an application in relation to which there were prior inconclusive DNA test results. (R.C. 2953.74(B).)

Screening criteria related to outcome determinativeness of DNA test

If an eligible capital inmate submits an application for DNA testing under the bill, the accepting authority may accept the application only if one of the following applies (R.C. 2953.74(C)):

(1) The capital inmate did not have a DNA test taken at the trial stage in the case that resulted in the sentence of death being imposed upon the capital inmate regarding the same biological evidence that the capital inmate seeks to have tested, the capital inmate shows that DNA exclusion would have been "outcome determinative" (see "**Other definitions**," below) at the trial stage in the case, and at the time of the trial stage in the case, DNA testing was not generally accepted, the results of DNA testing were not generally admissible in evidence, or DNA testing was not yet available.

(2) The capital inmate had a DNA test taken at the trial stage in the case that resulted in the sentence of death being imposed upon the capital inmate regarding the same biological evidence that the capital inmate seeks to have tested, the test was not a prior definitive DNA test subject to the denial provision described above, and the capital inmate shows that DNA exclusion would have been *outcome determinative* at the trial stage in the case.

Other screening criteria

If an eligible capital inmate submits an application for DNA testing, the accepting authority may accept the application only if all of the following apply (R.C. 2953.74(D)):

(1) The accepting authority determines pursuant to the provisions described below in "**Determinations regarding existence of biological material**," that biological material was collected from the crime scene or victim and that the "parent sample" (see "**Other definitions**," below) of that biological material against which a sample from the inmate can be compared still exists at that point in time;

(2) The testing authority determines all of the following pursuant to the provisions described below in "**Determinations regarding quantity and quality of biological material**":

(a) The parent sample of the biological material collected from the crime scene or victim contains scientifically sufficient material to extract a test sample.

(b) The parent sample of the biological material collected from the crime scene or victim is not so minute or fragile as to risk destruction of the parent sample by the extraction described in (a); provided that the accepting authority may determine in its discretion, on a case-by-case basis, that, even if the parent sample of the biological material so collected is so minute or fragile as to risk destruction of the parent sample by the extraction, the application should not be rejected solely on the basis of that risk.

(c) The parent sample of the biological material collected from the crime scene or victim has not degraded or been contaminated to such an extent that it has become scientifically unsuitable for testing, and the parent sample otherwise has been preserved, and remains, in a condition that is scientifically suitable for testing.

(3) The accepting authority determines that, at the trial stage in the case that resulted in the sentence of death being imposed upon the capital inmate, the identity of the person who committed the offense was an issue.

(4) The accepting authority determines that one or more of the defense theories asserted by the capital inmate at the trial stage in the case described in (3), asserted by the capital inmate in a retrial of that case, or accepted by the court in postconviction proceedings in an Ohio court was of such a nature that if a DNA test is conducted and an exclusion result is obtained, the favorable result (this probably should say "the exclusion result") would exonerate the capital inmate.

(5) The accepting authority determines that, if a DNA test is conducted and an exclusion result is obtained, the results of the test will be outcome determinative regarding that capital inmate.

(6) The accepting authority determines pursuant to the provisions described below that the "chain of custody" (see "*Other definitions*," below) of the parent sample of the biological material to be tested, and any test sample extracted from the parent sample, is verifiable from the time it first was collected or extracted until the time that it is to be used in the requested DNA test.

Determinations regarding existence of biological material

The bill provides that, if an eligible capital inmate submits an application for a DNA test, the accepting authority must use "reasonable diligence" (see "*Other definitions*," below) to determine whether biological material was collected from the crime scene or victim against which a sample from the capital inmate can be compared and whether the parent sample of that biological material still exists at that point in time. In using reasonable diligence to make those

determinations, the accepting authority must rely upon all relevant sources, including, but not limited to, all of the following (R.C. 2953.75):

(1) All prosecuting authorities in the case that resulted in the imposition of the sentence of death upon the capital inmate and in the appeals of, and postconviction proceedings related to, that case;

(2) All law enforcement authorities involved in the investigation of the offense for which the sentence of death was imposed upon the capital inmate;

(3) All "custodial agencies" (see "*Other definitions*," below) involved at any time with the biological material in question;

(4) The "custodian" (see "*Other definitions*," below) of all custodial agencies described in (3);

(5) All crime laboratories involved at any time with the biological material in question;

(6) All other reasonable sources.

Determinations regarding quantity and quality of biological material

If an eligible capital inmate submits an application for a DNA test, the accepting authority and the testing authority must make determinations regarding the quantity and quality of the parent sample of the biological material collected from the crime scene or victim that is to be tested, and of the chain of custody regarding that parent sample, as follows (R.C. 2953.76):

(1) The testing authority must determine whether there is a scientifically sufficient quantity of the parent sample to test and whether the parent sample is so minute or fragile that there is a substantial risk that the parent sample could be destroyed in testing. The testing authority may determine that there is not a sufficient quantity to test in order to preserve the state's ability to present in the future the original evidence presented at trial, if another trial is required. Upon making its determination under this provision, the testing authority must prepare and provide to the prosecuting attorney or AG a written document that contains its determination and the reasoning and rationale for that determination. The accepting authority may determine in its discretion, on a case-by-case basis, that, even if the parent sample of the biological material so collected is so minute or fragile as to risk destruction of the parent sample by the extraction, the application should not be rejected solely on the basis of that risk.

(2) The testing authority must determine whether the parent sample has degraded or been contaminated to an extent that it has become scientifically

unsuitable for testing and whether the parent sample otherwise has been preserved, and remains, in a condition that is suitable for testing. Upon making its determination, the testing authority must prepare and provide to the prosecuting attorney or AG a written document that contains its determination and the reasoning and rationale for that determination.

(3) The accepting authority must determine whether the chain of custody of the parent sample of the biological material to be tested, and of any test sample extracted from the parent sample, is verifiable from the time it first was collected or extracted until the time that it is to be used in the requested DNA test. Upon making its determination, the accepting authority must prepare and retain a written document that contains its determination and the reasoning and rationale for that determination.

Anticontamination precautions

If an eligible capital inmate submits an application for a DNA test and if the application is accepted and a DNA test is to be performed, the specified person or entity must satisfy all of the applicable following precautions to ensure that the parent sample of the biological material, and the test sample of the parent sample that is extracted and actually is to be tested, are not contaminated during transport or the testing process (R.C. 2953.77(A)):

(1) The accepting authority and the testing authority must maintain and document the chain of custody of the parent sample and the test sample actually to be tested between the time they are removed from their place of storage or the time of their extraction to the time at which the DNA test will be performed.

(2) The accepting authority, the testing authority, and the law enforcement and prosecutorial personnel involved in the process, or any combination of those entities and persons, must coordinate the transport of the parent sample and the test sample actually to be tested between their place of storage and the place where the DNA test will be performed, and the accepting authority and testing authority must document the transport procedures so used.

(3) The testing authority must determine and document the custodian of the parent sample and the test sample actually to be tested after they are in the possession of the testing authority.

(4) The testing authority must maintain and preserve the parent sample and the test sample actually to be tested after they are in the possession of the testing authority and must document the maintenance and preservation procedures used.

(5) After the testing, the accepting authority, the testing authority, and the original custodial agency of the parent sample, or any combination of those entities, must coordinate the return of the remaining parent sample back to its place of storage with the original custodial agency or to any other place determined in accordance with this paragraph and the provisions discussed below in "*Distribution and use of DNA test results*." The accepting authority and testing authority are responsible for determining the custodial agency to maintain any newly created, extracted, or collected DNA material resulting from the testing. The accepting authority and testing authority must document the return procedures for original materials and for any newly created, extracted, or collected DNA material resulting from the testing, and also the custodial agency to which those materials should be taken.

The accepting authority or testing authority must provide the documentation required under the provisions described above in writing and must maintain that documentation (R.C. 2953.77(B)).

Selection of testing authority; approval or designation of testing authorities

Selection of testing authority; effect of inmate's objection to selected authority

If an eligible capital inmate submits an application for a DNA test and if the application is accepted and a DNA test is to be performed, the prosecuting attorney or AG, as specified in this paragraph, must select the testing authority to be used for the test. Regardless of whether the accepting authority is a prosecuting attorney or the AG, the prosecuting attorney has the initial opportunity to select the testing authority to be used for the test. If the prosecuting attorney defers selection of the testing authority to be used for the test, regardless of whether the accepting authority is a prosecuting attorney or the AG, the AG must select the testing authority to be used for the test. A prosecuting attorney or the AG cannot select or use a testing authority for a DNA test unless the AG approves or designates it pursuant to the provisions described below in "*Attorney General's approval or designation of testing authorities*" and unless it satisfies the criteria described below in "*Criteria for testing authority to be approved or designated*."

If a prosecuting attorney or the AG selects a testing authority to be used for a DNA test and the eligible capital inmate for whom the test is to be performed objects to the use of the selected testing authority, the objection constitutes a rejection by the capital inmate of the state's offer to conduct or facilitate a DNA test for the inmate, the state's offer to conduct or facilitate a DNA test for the capital inmate automatically is withdrawn as a matter of law, and the state is released from any obligation to conduct or facilitate a DNA test for the capital inmate. An objection as described in this paragraph, and the resulting rejection,

withdrawal, and release, do not preclude a prosecuting attorney or the AG from accepting in the prosecuting attorney's or AG's discretion, a subsequent application by the same eligible capital inmate requesting a DNA test. (R.C. 2953.78(A) and (B).)

Attorney General's approval or designation of testing authorities

The AG must approve or designate testing authorities that may be selected and used for the conduct of DNA tests, prepare a list of the approved or designated testing authorities, and provide copies of the list to all prosecuting attorneys. The AG must update the list as appropriate to reflect changes in the approved or designated testing authorities and must provide copies of the updated list to all prosecuting attorneys. The AG cannot approve or designate a testing authority unless the testing authority satisfies the criteria described below. (R.C. 2953.78(C).)

No right to challenge or appeal approval, selection, or use

The AG's approval or designation of testing authorities under this provision, and the selection and use of any such approved or designated testing authority, do not afford an inmate any right to subsequently challenge the approval, designation, selection, or use, and an inmate may not appeal to any court the approval, designation, selection, or use (R.C. 2953.78(D)).

Obtaining inmate DNA sample

In general

If an eligible capital inmate submits an application for a DNA test and if the application is accepted and a DNA test is to be performed, a sample of biological material must be obtained from the capital inmate in accordance with the bill's provisions described below, to be compared with the parent sample of biological material. The capital inmate's filing of the application constitutes the capital inmate's consent to the obtaining of the sample of biological material from the capital inmate. The testing authority must obtain the sample of the biological material from the capital inmate in accordance with medically accepted procedures.

If a DNA test is to be performed for a capital inmate as described in the preceding paragraph, the accepting authority must contact the Department of Rehabilitation and Correction and coordinate with the Department the date on which, and the time and place at which, the sample of biological material will be obtained from the capital inmate. The Department must provide the facility at which the sample will be obtained and must make the capital inmate available at

that facility at the specified time. The accepting authority must provide notice to the capital inmate and to the capital inmate's counsel of the date on which, and the time and place at which, the sample will be so obtained.

The accepting authority also must coordinate with the testing authority regarding the obtaining of the sample from the capital inmate. (R.C. 2953.79(A) and (B).)

Inmate's refusal to submit to, or hindrance of, collection of sample

If a DNA test is to be performed for a capital inmate, and the capital inmate refuses to submit to the collection of the sample of biological material from the capital inmate or hinders the state from obtaining a sample of biological material from the capital inmate, the capital inmate's refusal or hindrance constitutes a rejection by the capital inmate of the state's offer to conduct or facilitate a DNA test for the capital inmate, the state's offer to conduct or facilitate a DNA test for the capital inmate automatically is withdrawn as a matter of law, and the state is released from any obligation to conduct or facilitate a DNA test for the capital inmate.

For purposes of this provision, a capital inmate's "refusal to submit to the collection of a sample of biological material from the capital inmate" includes, but is not limited to, the capital inmate's rejection of the physical manner in which a sample of the capital inmate's biological material is to be taken; and a capital inmate's "hindrance of the state in obtaining a sample of biological material from the capital inmate" includes, but is not limited to, the capital inmate being physically or verbally uncooperative or antagonistic in the taking of a sample of the capital inmate's biological material.

The "extracting personnel" (see "Other definitions," below) are to make the determination as to whether an eligible capital inmate for whom a DNA test is to be performed is refusing to submit to the collection of a sample of biological material from the inmate or is hindering the state from obtaining a sample of biological material from the inmate at the time and date of the scheduled collection of the sample. If the extracting personnel determine that a capital inmate is refusing to submit to the collection of a sample or is hindering the state from obtaining a sample, the extracting personnel must document in writing the conditions that constitute the refusal or hindrance and must maintain the documentation. (R.C. 2953.79(C) and (D).)

Criteria for testing authority to be approved or designated

The bill prohibits the AG from approving or designating a testing authority for conducting DNA tests under its provisions, and prohibits a prosecuting

attorney and the AG from selecting or using a testing authority for a DNA test under its provisions, unless the testing authority satisfies all of the following criteria: (1) it is in compliance with nationally accepted quality assurance standards for forensic DNA testing, as published in the quality assurance standards for forensic DNA testing laboratories issued by the Director of the Federal Bureau of Investigation, (2) it undergoes an annual "internal audit" or "external audit" (see below) for quality assurance, in conformity with the standards identified in clause (1), and (3) at least once in the preceding two-year period, and at least once each two-year period thereafter, it undergoes an "external audit" for quality assurance, in conformity with the standards identified in clause (1).

As used in this provision, "external audit" means a quality assurance review of a testing authority that is conducted by a forensic DNA testing agency outside of, and not affiliated with, the testing authority; and "internal audit" means an internal review of a testing authority that is conducted by the testing authority itself. (R.C. 2953.80.)

Distribution and use of DNA test results

If an eligible capital inmate submits an application for a DNA test and if a DNA test is performed based on that application, upon completion of the test, all of the following apply (R.C. 2953.81):

(1) The prosecuting attorney, the AG, or a designee of the prosecuting attorney or AG must maintain the results of the test and must maintain and preserve both the parent sample of the biological material used and the inmate sample of the biological material used. The testing authority may be designated as the person to maintain the results of the test or to maintain and preserve some or all of the samples, or both. The test results remain state's evidence. The samples must be preserved during the entire period of time for which the capital inmate is imprisoned relative to the sentence of death in question, and, if the capital inmate is executed under that sentence, for a reasonable period of time of not less than 24 months after the capital inmate is executed. The prosecuting attorney or AG must determine the period of time that is reasonable for purposes of this provision, provided that the period cannot be less than 24 months after the capital inmate is executed.

(2) The results of the test are a public record.

(3) The accepting authority or the testing authority must provide a copy of the results of the test to the prosecuting attorney, the AG, and the subject capital inmate.

(4) If the postconviction proceeding in question is pending at that time in an Ohio court, the accepting authority or the testing authority must provide a copy of the results of the test to that Ohio court, and if it is pending in a federal court, the accepting authority or the testing authority must provide a copy of the results of the test to that federal court.

(5) The accepting authority or the testing authority must provide a copy of the results of the test to the Ohio court that sentenced the capital inmate to the sentence of death in question.

(6) The capital inmate or the state may enter the test results into a postconviction proceeding under the existing Postconviction Relief Law only if the results of the test are an *exclusion DNA result* or an *inclusion DNA result* and subject to the limitations described in (7) to (10), below.

(7) The capital inmate may enter an *exclusion result* for the purpose of establishing substantive grounds for a postconviction hearing under the portion of the existing Postconviction Relief Law.

(8) The state may enter an *inclusion result* for the purpose of foreclosing and discrediting claims of "actual innocence" in any current or subsequent proceeding in an Ohio court or a federal court.

(9) By making the application for DNA testing, and by accepting and agreeing to the testing, the capital inmate agrees that appropriate *exclusion* or *inclusion results*, as described above in (6) to (8), may be used in postconviction proceedings in support of a second petition or successive petition pursuant to, and in satisfaction of, certain requirements set forth in the existing Postconviction Relief Law.

(10) A test result that is an *inconclusive result* or a "no result" cannot be entered into or offered for use in any proceeding under the existing Postconviction Relief Law or in any other postconviction proceeding.

Changes in the Postconviction Relief Law

Existing law

In general. R.C. 2953.21 to 2953.23 contain the Postconviction Relief Law. Under that Law, any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to

grant other appropriate relief. Subject to the exception described in the next paragraph, the petition must be filed *no later than 180 days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the Supreme Court.* Subject to the exception, if no appeal is taken, the petition must be *filed no later than 180 days after the expiration of the time for filing the appeal.* At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings; thereafter, the petitioner may amend the petition with leave of court. The provisions of the Law pertaining to the content of the petition, the court's consideration of the petition, the court's findings and orders regarding the petition, and the exclusivity of the Law's remedy, and special provisions of the Law that pertain to prisoners under a sentence of death, are discussed in **COMMENT 2.** (R.C. 2953.21.)

Filing of petition after the expiration of period of limitations; second or subsequent petitions. The Postconviction Relief Law specifies that, regardless of whether a hearing is held on a petition filed under the Law, *a court may not entertain a petition filed after the expiration of the 180-day period of limitations described above or a second petition or successive petitions for similar relief on behalf of a petitioner unless both of the following apply:*

(1) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to that period of limitations or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

An order awarding or denying relief sought in a petition filed under the Postconviction Relief Law is a final judgment and may be appealed. (R.C. 2953.23.)

Operation of the bill

The bill expands existing law by providing an additional set of circumstances in which a court may entertain a petition filed after the expiration of

the 180-day period of limitations described above or a second petition or successive petitions for similar relief on behalf of a petitioner. Under the bill, a court also may entertain a petition filed after the expiration of the 180-day period of limitations described above or a second or successive petition if the petitioner is a capital inmate for whom a DNA test was performed under the bill's provisions described above, and the results of the DNA test were an "exclusion result" regarding the petitioner in relation to the offense for which the sentence of death was imposed upon the petitioner. The bill also makes related conforming and clarifying changes in the Law. (R.C. 2953.21(A)(2) and 2953.23.)

Other definitions

In addition to certain defined terms that are discussed in prior portions of this analysis, the bill defines the following terms for use in its provisions (R.C. 2953.71):

(1) "Accepting authority" means either the prosecuting attorney that is making the determination as to whether to accept or reject an application for DNA testing, or the AG, if the Attorney General is making the determination as to whether to accept or reject an application for DNA testing. The filing of an application for DNA testing with a prosecuting attorney or the AG does not, in and of itself, make that prosecuting attorney or the AG the accepting authority relative to that application.

(2) "Application" or "application for DNA testing" means the form by which an eligible capital inmate requests the state to do a DNA test on biological material from the inmate's case under the bill.

(3) "Biological material" means blood, white blood cells, skin, tissue, sperm, saliva, vaginal swabs, mouth swabs, mouth scrapings, bones, hair, and any other biological substance of a similar nature.

(4) "Chain of custody" means a record that tracks a subject sample of biological material from the time the biological material was first obtained until the time it currently exists in its place in storage and, in relation to a DNA sample, a record that tracks the DNA sample from the time it was first obtained until it currently exists in its place of storage. For purposes of this provision, examples of when biological material is first obtained include, but are not limited to, obtaining the material at the scene of a crime, from a victim, from an inmate, or in any other manner or time as is appropriate in the facts and circumstances present.

(5) "Custodial agency" means the group or entity that has the responsibility to maintain biological material in question.

(6) "Custodian" means the person who is the primary representative of a custodial agency.

(7) "Exclusion" or "exclusion result" means a result of DNA testing that scientifically precludes or forecloses the subject capital inmate as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the sentence of death was imposed upon the capital inmate.

(8) "Extracting personnel" means medically approved personnel who are employed to physically obtain an inmate DNA specimen for purposes of DNA testing under the bill.

(9) "Inclusion" or "inclusion result" means a result of DNA testing that scientifically cannot exclude, or that holds accountable, the subject capital inmate as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the sentence of death imposed upon the capital inmate.

(10) "Inconclusive" or "inconclusive result" means a result of DNA testing that is rendered when a scientifically appropriate and definitive DNA analysis or result, or both, cannot be determined.

(11) "Offer" means the opportunity provided under the bill for an eligible capital inmate to request from the state a DNA test.

(12) "Outcome determinative" means that the results of a DNA test are exonerating in nature in that the test excludes the subject capital inmate as the source of the biological evidence in question and the exclusion makes it physically or legally impossible for the inmate to have committed the offense for which the sentence of death was imposed.

(13) "Parent sample" means the biological material first obtained from a victim or a crime scene and from which a sample will be presently taken to do a DNA comparison to the DNA of the capital subject inmate under the bill.

(14) "Prison" has the same meaning as in the existing Criminal Sentencing Law, not in the bill.

(15) "Prosecuting attorney" means the prosecuting attorney who, or whose office, prosecuted the case in which the subject capital inmate was convicted of or pleaded guilty to the offense for which the sentence of death was imposed.

(16) "Prosecuting authority" means the prosecuting attorney or the AG.

(17) "Reasonable diligence" means a degree of diligence that is comparable to the diligence a reasonable person would employ in searching for information regarding an important matter in the person's own life.

(18) "Testing authority" means a laboratory at which a DNA test will be conducted under the bill.

COMMENT

1. Under existing law, unchanged by the bill, the only offense for which a sentence of death ever may be imposed by an Ohio court is the offense of aggravated murder. In order for a sentence of death to be imposed for that offense, the offender must be convicted of the offense and one or more specifications of an aggravating circumstance, and the sentencing authority (either the trial jury and the trial court, or the three-judge panel that tried the case) must determine at a sentencing hearing that the aggravating circumstances of which the offender was convicted outweigh the mitigating factors in the case. Generally, a person who commits an aggravated murder while under 18 years of age cannot be sentenced to death. (R.C. 2903.01, and 2929.02 through 2929.06.)

2. The Postconviction Relief Law, contained in R.C. 2953.21 to 2953.23, specifies that, in a petition for relief filed under its provisions, the petitioner must state in the original or amended petition all grounds for relief claimed by the petitioner and, except as provided in R.C. 2953.23 (see the main body of the analysis), any ground for relief that is not so stated in the petition is waived. If the petitioner was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. A petitioner upon whom a sentence of death has been imposed may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance.

The court must consider a petition that is timely filed under the Law even if a direct appeal of the judgment is pending. Before granting a hearing on the petition, the court must determine whether there are substantive grounds for relief. In making the determination, the court must consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of

the court, and the court reporter's transcript. The Law sets forth other procedures that apply regarding petitions filed under it and hearings on those petitions.

If the court does not find grounds for granting relief, it must make and file findings of fact and conclusions of law and enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court and the court finds grounds for granting relief, it must make and file findings of fact and conclusions of law and enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, must discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail.

The Law states that, subject to the appeal of a sentence for a felony that is authorized by existing R.C. 2953.08 (not in the bill), the remedy it contains is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

Special provisions of the Law apply regarding prisoners who are under a sentence of death:

(a) Upon the filing of a petition by such a prisoner in a state correctional institution, the court may stay execution of the judgment challenged by the petition.

(b) If such a prisoner intends to file a petition, except as described below, the court must appoint counsel to represent the prisoner upon a finding that the prisoner is indigent and that the prisoner either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject it. The court may decline to appoint counsel only upon a finding, after a hearing if necessary, that the prisoner rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the prisoner is not indigent.

(c) The court cannot appoint as counsel under the provision described above in (2)(b) an attorney who represented the petitioner at trial in the case to which the petition relates unless the prisoner and the attorney expressly request the appointment. The court may appoint as counsel under that provision only an attorney who is certified under Rule 65 (should be Rule 20) of the Rules of Superintendence for Courts of Common Pleas to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has

been imposed. The ineffectiveness or incompetence of counsel during proceedings under the Law does not constitute grounds for relief in a proceeding under the Law, in an appeal of any action under the Law, or in an application to reopen a direct appeal. (R.C. 2953.21.)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-30-01	p. 91

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