



**Sub. S.B. 7**

124th General Assembly  
(As Passed by the Senate)

**Sens. Johnson, Blessing, Mead, Oelslager, Hottinger, Austria, Harris, Nein, Jacobson, Espy**

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**BILL SUMMARY**

- Establishes a mechanism pursuant to which inmates who were convicted of a felony, who were sentenced for the felony to a prison term or a sentence of death, and who on the bill's effective date have at least one year remaining on the prison term or are under the sentence of death, may request DNA testing to be performed under the bill's provisions.
- Specifies that an inmate who pleaded guilty or no contest to an offense is not eligible to request DNA testing under its provisions relative to that offense.
- Requires an inmate who is eligible to request DNA testing under its provisions to submit an application in a specified form to the court of common pleas that heard the case that resulted in the inmate's prison term or sentence of death and an acknowledgement in a specified form of certain provisions related to the mechanism.
- Permits the judge of a court of common pleas who heard the case in which an inmate was convicted of a felony and who believes that the inmate is an eligible inmate, in specified circumstances and within one year after the bill's effective date, to file an application for DNA testing for the eligible inmate.
- Provides a procedure pursuant to which an eligible inmate, within one year after the bill's effective date, may file a notice of an intention to request DNA testing under its provisions as a preliminary step to filing an application for the testing.

- Requires that an eligible inmate's application and acknowledgment must be submitted no later than one year after the bill's effective date or, if the inmate filed a timely notice of an intention to request DNA testing, not later than one year after the bill's effective date or 30 days after filing the notice, whichever is later.
- Requires the clerk of the court of common pleas to notify the prosecuting attorney who tried the eligible inmate's case and the Attorney General if an eligible inmate submits an application for DNA testing under the bill, and provides for a response by the prosecuting attorney or Attorney General, or both, that states whether the prosecuting attorney or Attorney General agrees or disagrees that the application should be accepted.
- Establishes criteria that govern the court in screening an eligible 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.
- States that the judgment of the judge of the court of common pleas accepting or rejecting an application for DNA testing is final and is not appealable by any person to any court.
- Establishes procedures for selecting the testing authority to be used for the conduct of DNA testing for an eligible inmate under the bill's provisions, precautions that must be satisfied to ensure that biological materials that are to be used in DNA testing 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 testing for eligible 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 an inmate to be used in the conduct of DNA testing under its provisions.
- Specifies the availability, and the uses that may be made, of the results of DNA testing of inmates conducted under its provisions.

- Expands the grounds for requesting relief under the Postconviction Relief Law to also permit a person to file a petition requesting relief under that Law, and permits a court to entertain a petition for relief under that 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: (a) the person or petitioner was convicted of a felony, (b) the person or petitioner is an eligible inmate for whom DNA testing was performed under the bill's provisions, and (c) the results of the DNA testing provided results that clearly establish that the person is actually innocent of that felony offense or, if the person was sentenced to death, clearly establish that the person is actually innocent of the aggravating circumstance the person was found guilty of committing and that is the basis of that sentence of death.
- Makes other changes in the Postconviction Relief Law that relate to petitions filed under that Law, the suspension of a sentence of death to which a person who files a petition under that Law is subject, and the appointment of counsel for an indigent person who has been sentenced to death and who files a petition under that Law.

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## CONTENT AND OPERATION

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

### ***Inmates who are "eligible inmates" who may apply for DNA testing***

The bill specifies that an "inmate" (see below) is eligible to request DNA testing to be conducted under its provisions only if: (1) the offense for which the inmate claims to be an eligible inmate is a felony that was committed prior to the bill's effective date, and the inmate was convicted by a judge or jury of that offense, (2) the inmate was sentenced to a prison term or sentence of death for the felony described in (1) and, on the bill's effective date, is in prison serving that prison term or under that sentence of death, and (3) on the bill's effective date, the inmate has at least one year remaining on the prison term described in (2) or the inmate is in prison under a sentence of death as described in (2). An inmate is *not eligible* to request DNA testing under this provision *regarding any offense to which the inmate pleaded guilty or no contest*. An inmate who satisfies the specified criteria is an "eligible inmate" for purposes of the bill. The bill defines an "inmate" as an inmate in a "prison" (see "**Other definitions**," below) who was sentenced by a court, or by a jury and court, of Ohio.

The bill specifies that the fact that an inmate is an eligible inmate does not, in and of itself, mean that a request for DNA testing that the inmate makes will be

granted or that DNA testing will be conducted for the inmate. The decisions as to whether the request for DNA testing will be granted or denied and as to whether DNA testing will be conducted are to be made under the bill's provisions described below. (R.C. 2953.71(F) and (K) and 2953.72(C) and (D).)

### **Application for DNA testing**

#### **In general; time for filing**

Under the bill, any eligible inmate who wishes to request DNA testing under its provisions must submit an application for the testing to the court of common pleas specified below, on a form prescribed by the Attorney General (the AG) for this purpose. The eligible inmate must submit the application within the period of time, and in accordance with the procedures, described below in "**Submission of an application to the court of common pleas.**" The eligible inmate must specify on the application the offense or offenses for which the inmate is an eligible inmate and is requesting the DNA testing. Along with the application, the eligible inmate must submit an acknowledgment, as described below in "**Acknowledgment that must accompany an application.**"

An eligible inmate must submit the application for DNA testing to the appropriate court of common pleas within whichever of the following periods applies: (1) not later than one year after the bill's effective date, or (2) if the inmate has submitted a timely notice of an intention to request DNA testing (see "**Notice of an intention to request DNA testing,**" below) not later than one year after the bill's effective date or not later than 30 days after submitting the notice, whichever is later. No court of common pleas may accept an application for DNA testing after the expiration of the applicable period of time specified above. (R.C. 2953.72(A) and 2953.73(A)(1) and (2).)

#### **Submission of an application to the court of common pleas; request on judge's own motion**

An eligible inmate must submit an application for DNA testing on a form prescribed by the AG for this purpose and to the court of common pleas that heard the case in which the inmate was convicted of the offense for which the offender is an eligible inmate and is requesting DNA testing (R.C. 2953.73(A)(1)).

If a judge of a court of common pleas who was the trial judge in a case in which an inmate was convicted of an offense for which the inmate is an eligible inmate, or that judge's successor in office, believes that the eligible inmate's case satisfies the criteria under the bill by which eligible inmate applications for DNA testing are screened, the judge on the judge's own motion may request DNA testing by filing within one year after the bill's effective date an application as

described above. The judge is not required to file an acknowledgement with that application. Upon the judge's filing of an application under this provision, the application is to be considered as if it had been filed by the eligible inmate. (R.C. 2953.73(A)(4).)

The bill specifies that, notwithstanding any provision of law regarding fees and costs, no filing fee may be required of, and no court costs may be assessed against, an eligible offender who is indigent and who submits an application for DNA testing under the bill (R.C. 2853.73(G)).

**Notice of an intention to request DNA testing**

An eligible inmate may submit a notice of an intention to request DNA testing to the court of common pleas that heard the case in which the inmate was convicted of the offense for which the inmate is requesting DNA testing. The notice may be in any form and contain any language that clearly indicates that the inmate wishes to request, and will be submitting an application for, DNA testing. It is not required to be on the form prescribed by the AG for applications for DNA testing. The eligible inmate must submit the notice of an intention to request DNA testing not later than one year after the bill's effective date.

Upon receipt of an intention to request DNA testing, the clerk of the court of common pleas to which the notice is submitted promptly must provide the eligible inmate with a copy of the application and acknowledgment forms prescribed by the AG. An eligible inmate who has submitted a notice of an intention to request DNA testing may submit an application for DNA testing not later than one year after the bill's effective date or not later than 30 days after submitting the notice, whichever is later. (R.C. 2953.73(A)(3).)

**Acknowledgment that must accompany an application**

An eligible inmate, along with an application for DNA testing, must submit an acknowledgment, on a form prescribed by the AG for this purpose, that is signed by the 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 testing of eligible inmates at a stage of a prosecution or case after the inmate has been sentenced to a prison term or a sentence of death, that any "exclusion" or "inclusion result" of DNA testing (see "Other definitions," below) rendered pursuant to those provisions may be used as described in another part of the bill by any party in any postconviction proceeding under the existing Postconviction Relief Law, as amended by the bill, and that all requests for any DNA testing made at trial will continue to be handled by the prosecuting attorney in the case;

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

(3) That the eligible inmate must submit the application and acknowledgment to the court of common pleas that heard the case in which the inmate was convicted of the offense for which the inmate is an eligible offender and is requesting the DNA testing;

(4) That the state has established a set of criteria by which eligible inmate applications for DNA testing will be screened and that a judge of a court of common pleas upon receipt of a properly filed application and accompanying acknowledgment, will apply those criteria to determine whether to accept or reject the application;

(5) That the results of DNA testing 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 DNA testing is conducted with respect to an inmate under the bill, the state will not offer the 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 court rejects an eligible inmate's application for DNA testing because the inmate does not satisfy the acceptance criteria, the state will not accept or consider subsequent applications;

(8) That the acknowledgment memorializes the bill's provisions with respect to the offering of postconviction DNA testing to 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 testing to inmates, that the court of common pleas has the sole discretion to determine whether an inmate is an eligible inmate and whether an eligible inmate's application for DNA testing satisfies the acceptance criteria and whether the application should be accepted or rejected, that the judgement of the court of common pleas is final and is not appealable by any person to any court and that no determination otherwise made by the state in the exercise of its discretion regarding the eligibility of an inmate or regarding postconviction DNA testing 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 testing to inmates are carried out does not confer

any constitutional right upon any 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 an 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 any review or appeal of, 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 DNA testing to occur, there must be an inmate sample against which other evidence may be compared, that, if an eligible inmate's application is accepted but the 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 inmate, the goal of those provisions will be frustrated, and that an inmate's refusal or hindrance constitutes a rejection by the inmate of the state's offer to conduct or facilitate DNA testing for the inmate, results in the state's offer to conduct or facilitate DNA testing for the inmate automatically being withdrawn as a matter of law, and releases the state from any agreement to conduct or facilitate DNA testing for the 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 DNA testing under its provisions, and a form to be used to provide the acknowledgment that must accompany the application form. The forms must include all information described in the bill regarding applications, spaces for an inmate to insert all information necessary to complete the forms, including, but not limited to, specifying the offense or offenses for which the inmate is an eligible inmate and is requesting the DNA testing, and any other information or material the AG determines is necessary or relevant, and instructions informing the clerk of the court of common pleas of the clerk's duties regarding the application after it is submitted to the court and the manner of fulfilling those duties. The AG must distribute copies of the forms to the Department of Rehabilitation and Correction, the Department must ensure that each prison in which inmates are housed has a supply of copies of the forms, and the Department must ensure that copies of the forms are provided free of charge to any inmate who requests them. (R.C. 2953.72(B).)

**Procedures upon submission of an application for DNA testing**

**Clerks notice to prosecuting attorney and AG; assignment to trial judge; failure to provide notice**

Upon the submission of an application for DNA testing, all of the following apply (R.C. 2953.73(B)):

(1) The clerk of the court of common pleas in which it is submitted promptly must notify the "prosecuting attorney" (see "Other definitions," below) and the AG, in writing, that the application has been submitted. The notice must include the name of the eligible inmate who submitted the application, the date on which it was submitted, and the offense or offenses for which the inmate is an eligible inmate and is requesting the DNA testing. It also must inform the prosecuting attorney and AG that the prosecuting attorney or AG has a duty or right to file a response to the application, as determined as described below in "Responses to an application," and of the date, set by the court, by which that response must be filed.

(2) The application must be assigned to the judge of that court who was the trial judge in the case in which the inmate was convicted of the offense for which the inmate is requesting DNA testing, or to the successor in office of that judge, and the judge to whom it is assigned must decide the application.

If the clerk of the court of common pleas in which an application for DNA testing is submitted does not promptly provide the notices to the prosecuting attorney and AG as required above, the jurisdiction of the court of common pleas to decide the application generally terminates and the court cannot proceed in deciding the application. But in the discretion of the court, if the clerk thereafter provides the notices to the prosecuting attorney and AG required as described above, the court may decide the application in the same manner as if the clerk had promptly provided the required notices. (R.C. 2953.73(B) and (C).)

### **Responses to an application**

If an eligible inmate submits an application for DNA testing and the inmate has not yet commenced any federal *habeas corpus* proceeding relative to the case in which the inmate was convicted of the offense for which the inmate is requesting DNA testing, *the prosecuting attorney must file a response* to the application by the date specified in the notice provided to the prosecuting attorney. In those circumstances, the AG may, but is not required to, file a response to the application. A response by the AG under this provision must be filed by the date specified in the notice provided to the AG.

If an eligible inmate submits an application for DNA testing and the inmate has commenced a federal *habeas corpus* proceeding relative to the case in which the inmate was convicted of the offense for which the inmate is requesting DNA testing, *the AG must file a response to the application* by the date specified in the notice provided to the AG. In those circumstances, the prosecuting attorney may, but is not required to, file a response to the application. A response by the prosecuting attorney under this provision must be filed by the date specified in the notice provided to the prosecuting attorney.

A response to an application that a prosecuting attorney or the AG files under these provisions must state whether the prosecuting attorney or AG agrees or disagrees that the application should be accepted and, if the prosecuting attorney or AG disagrees that the application should be accepted, a statement of the reasons for that disagreement. (R.C. 2953.73(D).)

#### **Determination by judge to accept or reject application**

The court must make the determination as to whether an application for DNA testing should be accepted or rejected. The court must expedite its decision making process as to whether the application should be accepted or rejected. The court must make the determination in accordance with the criteria and procedures set forth in the bill and must consider the application and all responses to the application filed by a prosecuting attorney or the AG under the provisions described above in "**Responses to an application.**" Upon making its determination, the court must enter a judgment that either accepts or rejects the application. If the judgment rejects the application, the court must include within the judgment the reasons for the rejection. Upon entering its judgment, the court immediately must send a copy of the judgment to the eligible inmate who filed it, the prosecuting attorney, and the AG.

A judgment of a court entered as described in the preceding paragraph is final and is not appealable by any person to any court. (R.C. 2953.73(E) and (F).)

#### **Criteria for screening applications**

##### **In general**

The court and the "testing authority" (see "**Other definitions,**" below) that will be used must screen an application for DNA testing in accordance with the criteria described below. The court must use those criteria in determining whether to accept or reject the application and must make its determination and enter its judgment, as described above in "**Determination by judge to accept or reject application.**" (R.C. 2953.74(A).)

##### **Screening criteria related to prior definitive or inconclusive DNA test**

The court must reject an application for DNA testing if a *prior definitive DNA test* has been conducted regarding the same biological evidence that the inmate seeks to have tested. If a *prior "inconclusive" DNA test* (see "**Other definitions,**" below) has been conducted regarding the same biological evidence that an inmate seeks to have tested, the court must review the inmate's application and has the discretion, on a case-by-case basis, to either accept or reject the application. The court 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**

The court may accept an application for DNA testing only if one of the following applies (R.C. 2953.74(C)):

(1) The inmate did not have a DNA test taken at trial regarding the same biological evidence that the inmate seeks to have tested, the inmate shows that DNA exclusion would have been "*outcome determinative*" (see "**Other definitions**," below) at trial, and at the time of the trial, 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 inmate had a DNA test taken at trial regarding the same biological evidence that the inmate seeks to have tested, the test was not a prior definitive DNA test subject to the denial provision described above, and the inmate shows that DNA exclusion would have been *outcome determinative* at the trial.

**Other screening criteria**

The court may accept an application for DNA testing only if all of the following apply (R.C. 2953.74(D)):

(1) The court determines pursuant to the provisions described below in "**Determinations regarding existence of biological material**," that biological material was collected from the crime scene or the victim of the offense for which the inmate is requesting the DNA testing 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**" regarding the parent sample of the biological material described in (1):

(a) The parent sample of the biological material so collected contains scientifically sufficient material to extract a test sample.

(b) The parent sample of the biological material so collected is not so minute or fragile as to risk destruction of the parent sample by the extraction described in (a); provided that the court 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 so collected has not degraded or been contaminated to the 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 court determines that, at the trial stage in the case in which the inmate was convicted of the offense for which the inmate is requesting the DNA testing, the identity of the person who committed the offense was an issue.

(4) The court determines that one or more of the defense theories asserted by the inmate at the trial stage in the case described in (3) or in a retrial of that case in an Ohio court was of such a nature that if DNA testing is conducted and an exclusion result is obtained, the exclusion result would be outcome determinative.

(5) The court determines that, if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding that inmate.

(6) The court determines pursuant to the provisions described below from the written "chain of custody" (see "*Other definitions*," below) of the parent sample of the biological material to be tested and of any test sample extracted from the parent sample, and from the totality of circumstances involved, that the parent sample and the extracted test sample are the same sample as collected and that there is no reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected.

#### **Determinations regarding existence of biological material**

The court, upon the submission of an application for DNA testing, must use "reasonable diligence" (see "*Other definitions*," below) to determine whether biological material was collected from the crime scene or victim of the offense for which the inmate is requesting the DNA sample against which a sample from the inmate can be compared and whether the parent sample of that biological material still exists at that point in time. In doing so the court 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 in which the inmate was convicted of the offense for which the inmate is requesting the DNA testing and in the appeals of, and postconviction proceedings related to, that case;

(2) All law enforcement authorities involved in the investigation of that offense;

(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**

Upon the submission of an application for DNA testing, the court 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 of the offense for which the inmate is requesting the DNA testing and 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 court a written document that contains its determination and the reasoning and rationale for that determination. The court 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 the 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 court a written document that contains its determination and the reasoning and rationale for that determination.

(3) The court must determine, from the written chain of custody of the parent sample of the biological material to be tested and of any test sample

extracted from the parent sample and from the totality of circumstances involved, whether the parent sample and the extracted test sample are the same sample as collected and whether there is any reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected. Upon making its determination, the court must prepare and retain a written document that contains its determination and the reasoning and rationale for that determination.

**Anticontamination precautions**

If an application for DNA testing is accepted and DNA testing 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 collected from the crime scene or the victim of the offense for which the inmate requested the DNA testing, and the test sample of the parent sample that is to be tested, are not contaminated during transport or the testing process (R.C. 2953.77(A)):

(1) The court 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 testing will be performed.

(2) The court, 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 testing will be performed, and the court 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 DNA testing, the court, 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 court 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 court 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 court 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 application is accepted and DNA testing is to be performed, the court must select the testing authority for the testing. A court cannot select or use a testing authority for DNA testing 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 the testing authority satisfies the criteria described below in "**Criteria for testing authority to be approved or designated.**"

If a court selects a testing authority to be used for DNA testing and the eligible 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 inmate of the state's offer to conduct or facilitate DNA testing for the inmate, the state's offer to conduct or facilitate DNA testing for the inmate automatically is withdrawn as a matter of law, and the state is released from any obligation to conduct or facilitate DNA testing for the inmate. An objection as described in this paragraph, and the resulting rejection, withdrawal, and release, do not preclude a court from accepting in the court's discretion, a subsequent application by the same eligible inmate requesting DNA testing. (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 testing, prepare a list of the approved or designated testing authorities, and provide copies of the list to all courts of common pleas. 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 courts of common pleas. 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 these provisions, 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 DNA testing is to be performed, a sample of biological material must be obtained from the inmate to be compared with the parent sample of biological material collected from the crime scene or the victim of the offense for which the inmate requested the DNA testing. The inmate's filing of the application constitutes the inmate's consent to the obtaining of the sample of biological material from the inmate. The testing authority must obtain the sample of the biological material from the inmate in accordance with medically accepted procedures.

If DNA testing is to be performed for an inmate, the court 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 inmate. The Department must provide the facility at which the sample will be obtained and must make the inmate available at that facility at the specified time. The court must provide notice to the inmate and to the inmate's counsel of the date on which, and the time and place at which, the sample will be so obtained.

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

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

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

For purposes of this provision, an inmate's "refusal to submit to the collection of a sample of biological material from the inmate" includes, but is not

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

The "extracting personnel" (see "Other definitions," below) are to make the determination as to whether an eligible inmate 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 an 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 testing, and prohibits a court from selecting or using a testing authority for DNA testing, 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 DNA testing is performed based on an application, upon completion of the testing, all of the following apply (R.C. 2953.81):

(1) The court, or a designee of the court must maintain the results of the testing 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 testing or to maintain and preserve some or all of the samples, or both. The results of the testing remain state's evidence. The samples must be preserved during the entire period of time for which the inmate is imprisoned relative to the prison term or sentence of death in question, and, if that prison term expires or the inmate is executed under that sentence of death, for a reasonable period of time of not less than 24 months after the term expires or the inmate is executed. The court 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 term expires or the inmate is executed.

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

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

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

(5) The testing authority must provide a copy of the results of the testing to the court.

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

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

(8) The state may use 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 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, as modified by the bill.

(10) A result of testing 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, as modified by the bill, 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.** (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 modifies the Postconviction Relief Law in the following ways:

(1) It expands the provision that identifies the reasons for which a claim may be brought under that Law to also permit a person to file a petition under that Law if: (a) the person has been convicted of a criminal offense that is a felony, (b) the person is an eligible inmate under the bill's definition of that term, and (c) DNA testing was performed for the person under the bill and the testing provided results that clearly establish that the person is actually innocent of that felony offense or, if the person was sentenced to death, clearly establish that the person is actually innocent of the aggravating circumstance that the person was found guilty of committing and that is the basis of that sentence of death. Similar to existing law, the person's petition must be filed in the court that imposed sentence, must state the grounds for relief relied upon, and must ask the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. (R.C. 2953.21(A)(1).)

(2) It modifies the provision that specifies that a person who has been sentenced to death and files a petition under that Law 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, so that the provision also permits the person to ask the court to render void or voidable the judgment with respect to the sentence of death (R.C. 2953.21(A)(3)).

(3) It revises the provision that currently states that, if a person who has been sentenced to death and is in a state correctional institution files a petition under that Law, "the court" may stay execution of the judgment challenged by the petition. Under the bill: (a) if a person sentenced to death files a petition under that Law that is based upon a claimed denial or infringement of the person's rights that renders the judgment void or voidable under the Ohio Constitution or the United States Constitution, the court that set the date for the execution of the sentence of death may stay execution of the judgment challenged by the person,

and (b) if a person sentenced to death files a petition under that Law that is based upon the results of DNA testing under the bill as described above in (1), execution of the sentence of death may be suspended only upon an order of the Supreme Court (R.C. 2953.21(H)).

(4) It corrects an erroneous reference to the Supreme Court adopted rule that governs the appointment of counsel to represent indigent defendants charged with or convicted of a capital offense. Existing law refers to Rule 65 of the Rules of Superintendence for the Courts of Common Pleas of Ohio, where the rule formerly was located, and the bill changes the reference to Rule 20 of the Rules of Superintendence for the Courts of Ohio, where the rule currently is located. (R.C. 2953.21(I)(2).)

(5) Finally, it 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 was convicted of a felony, the petitioner is an eligible inmate under the bill's definition of that term for whom DNA testing was performed under the bill, and the results of the DNA clearly establish that the person is actually innocent of that felony offense or, if the person was sentenced to death, clearly establish that the person is actually innocent of the aggravating circumstance the person was found guilty of committing and that is the basis of that sentence of death. 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 the 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) "Application" or "application for DNA testing" means the form by which an eligible inmate requests the state to do DNA testing on biological material from the case in which the inmate was convicted of the offense for which the inmate is an eligible inmate and is requesting the DNA testing under the bill.

(2) "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.

(3) "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.

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

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

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

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

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

(9) "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.

(10) "Offer" means the opportunity provided under the bill for an eligible inmate to request DNA testing from the state.

(11) "Outcome determinative" means that had the results of DNA testing been presented at the subject eligible inmate's trial and been found relevant and admissible with respect to the felony offense for which the subject inmate is an eligible inmate and requesting the DNA testing, no reasonable factfinder would have found the inmate guilty of that offense or, if the inmate was sentenced to death relative to that offense, would have found the inmate guilty of the

aggravating circumstance the inmate was found guilty of committing and that is the basis of that sentence of death.

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

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

(14) "Prosecuting attorney" means the prosecuting attorney who, or whose office, prosecuted the case in which the subject inmate was convicted the offense for which the inmate is an eligible inmate and is requesting the DNA testing.

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

(16) "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.

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

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## COMMENT

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:

(1) 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.

(2) 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.

(3) The court cannot appoint as counsel under the provision described above in (2) 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.)

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## HISTORY

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