Ohio Legislative Service Commission

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Fiscal Note & Local Impact Statement

Bill: Sub. S.B. 77 of the 128th G.A. (LSC 128 0598-6)

Date: January 12, 2010

Status: In House Criminal Justice

Sponsor: Sen. Goodman

Local Impact Statement Procedure Required: Yes

Contents: DNA testing, preservation of biological evidence, custodial interrogations, and witness identification

State Fiscal Highlights

STATE AGENCY*	FY 2010 – FUTURE YEARS
Office of the Attorney General	
Revenues	- 0 -
Expenditures	Increase related to: (1) additional DNA collection and testing costs (starting around FY 2012, up to $1.9 million or more annually), (2) possible requirement that certain DNA information will need to be expunged, (3) additional post-conviction DNA testing applications (likely minimal annual cost), (4) staffing the Preservation of Biological Evidence Task Force, and (5) adopting rules associated with eyewitness identification
Supreme Court	
Revenues	- 0 -
Expenditures	Potential one-time increase, likely minimal at most, to review existing jury instructions
Rehabilitation and Correction	
Revenues	- 0 -
Expenditures	Potential minimal annual decrease in costs associated with taking DNA samples of certain offenders during the inmate intake process
Division of Criminal Justice Services (Department of Public Safety)	
Revenues	- 0 -
Expenditures	Ongoing increase, potentially more than minimal, to administer and conduct required training programs
State law enforcement agencies (including, but not limited to, Ohio State Highway Patrol and law enforcement personnel of colleges and universities)	
Revenues	- 0 -
Expenditures	Potential annual increase of uncertain magnitude to: (1) collect DNA samples, (2) train employees and store evidence, and (3) implement eye witness identification and interrogation procedures

Note: The state fiscal year is July 1 through June 30. For example, FY 2010 is July 1, 2009 – June 30, 2010.
* It is uncertain what funding sources the state agencies noted above will utilize to pay for their likely or potential costs.

- **Office of the Attorney General.** The Office of the Attorney General, specifically the Bureau of Criminal Identification and Investigation (BCII), will likely experience an increase in expenditures related to: (1) DNA testing of felony arrestees (estimated at $1.9 million annually beginning in FY 2012), (2) expungement duties related to felony arrestees who are ultimately not convicted as well as certain convicted offenders whose convictions are overturned, (3) cost for additional requests for post-conviction DNA testing (not likely to exceed minimal annually), (4) staffing the Preservation of Biological Evidence Task Force and developing rules related to the storage of biological evidence, and (5) adopting rules related to eyewitness identification procedures.
- **Supreme Court.** The potential one-time cost for the Supreme Court to review existing jury instructions would likely be minimal at most.
- **Department of Rehabilitation and Correction.** The Department may realize a minimal at most savings, as presumably DNA samples would be taken sooner and fewer DNA samples would need to be collected and submitted to BCII by the prison system's inmate reception centers.
- **Office of Criminal Justice Services (Department of Public Safety).** It appears that the annual cost for the Division of Criminal Justice Services to administer and conduct the required training programs will exceed minimal, which means an ongoing expense estimated to be in excess of $100,000 per year.
- **State law enforcement agencies.** The cumulative annual cost of the bill's provisions on state law enforcement agencies (collection of DNA samples, evidence storage, eyewitness identification procedures, and recording and storage of custodial interrogations) is uncertain.

Local Fiscal Highlights

LOCAL GOVERNMENT	FY 2010 – FUTURE YEARS
Counties, Municipalities, and Townships (law enforcement, prosecutors, courts, and clerks of courts)	
Revenues	- 0 -
Expenditures	Increase, potentially exceeding minimal in certain jurisdictions, as a function of: (1) taking DNA samples from all felony arrestees, (2) training employees in, and then, storing evidence, (3) implementing eye witness identification procedures, and (4) implementing custodial interrogation procedures

Note: For most local governments, the fiscal year is the calendar year. The school district fiscal year is July 1 through June 30.

- **DNA sample collection.** Depending upon the timing of DNA sample collection, a local law enforcement agency may need to have trained personnel available or transport the arrested person to the nearest location with the capability of taking and processing a DNA sample. The cost for any given local law enforcement agency to ensure that a DNA sample is collected from all felony arrestees is uncertain.
- **Preservation of biological evidence.** Costs for local governments would likely occur subsequent to the establishment of the required biological evidence system, as, at a minimum, relevant local government employees will need to be trained. The magnitude of these potential training-related costs is uncertain. Additional local cost points include the possibility of the need for continuing training and the training of newer employees.
- **Preservation and retention standards.** Although the one-time and ongoing costs for various jurisdictions to adhere to the required preservation and retention standards are problematic to quantify, it would not be surprising if those costs for certain jurisdictions exceed minimal, with the threshold for minimal being an estimated expense in excess of $5,000 per year. Early destruction of biological evidence is permitted after giving notice by certified mail to certain parties.
- **Eyewitness identification procedures.** Law enforcement agencies may experience one-time costs associated with training and implementing the new eyewitness identification standards, the magnitude of which for any given jurisdiction is uncertain. It also seems likely that the new standards would require additional ongoing administrative costs related to the documentation requirements, but these associated costs are not expected to exceed minimal. Once in place, these procedures would likely create no more than a negligible ongoing administrative expense.
- **Custodial interrogations.** Since the bill limits the recording (as well as the storage of those recordings) of interrogations to those occurring in places of detention, it seems likely that any additional administrative costs associated with complying with this provision of the bill would be minimal at most on an ongoing basis.

Detailed Fiscal Analysis

Overview

The bill makes various changes relative to DNA testing, preservation of biological evidence, and other procedures related to criminal investigations. For the purposes of this fiscal analysis, the bill most notably:

I. Mandates the collection of a DNA sample from all persons 18 years of age or older who are arrested for a felony offense (effective July 1, 2011);

II. Expands DNA testing for certain convicted felons and eliminates the DNA testing mechanism for felons who pleaded guilty or no contest to the offense and provides for the sealing of official records of persons who have their convictions vacated and set aside due to DNA testing;

III. Establishes the Preservation of Biological Evidence Task Force;

IV. Provides for certain standards for the preservation and accessibility of biological evidence in certain criminal or delinquency investigations or proceedings;

V. Makes changes to eyewitness identification procedures; and

VI. Provides for the electronic or audio recording of certain custodial interrogations.

This fiscal analysis is organized by the topic areas briefly described above, with the potential fiscal effects for the state and/or the state's political subdivisions analyzed within each of those sections. Since the source of funds for paying the costs of affected state agencies is uncertain, each state agency's costs are analyzed in a general manner. That said, it appears likely that General Revenue Fund (GRF) appropriations will be the primary source of funding, with various non-GRF funds providing supplemental moneys.

I. DNA testing for all felony arrests

The bill requires that a DNA sample be collected by the arresting law enforcement agency from all persons 18 years of age or older who are arrested for a felony offense. If, for some reason, the sample is not collected at the time of arrest, a sample is to be taken at the time of conviction.

Under current law, any person who is convicted of or pleads guilty to a felony offense and who is sentenced to a prison term or to a community residential sanction in a jail or community-based correctional facility or who is convicted of or pleads guilty to certain misdemeanor offenses[1] and who is sentenced to a term of imprisonment must

[1] The misdemeanor offenses for which an offender is required to provide a DNA sample are: (1) unlawful sexual conduct with a minor, including complicity in committing or an attempt to commit the offense, (2) a violation of any law arising from the same facts and circumstances and same act as did a charge

submit to a DNA sample collection procedure. Currently, the Office of the Attorney General's Bureau of Criminal Identification and Investigation (BCII) contracts with an out-of-state vendor for DNA testing, the costs of which are paid by BCII. However, the Office of the Attorney General is planning to discontinue the use of outside vendors in the near future, as BCII plans to have an in-house laboratory in place to perform these testing services. As such, the potential cost increase associated with performing DNA testing on all felony arrestees is based on the assumption that the in-house laboratory will be fully operational at the time of implementation.

Office of the Attorney General

Upon enactment of the bill and the subsequent effective date of this provision (July 1, 2011), the number of DNA samples to be taken by local government entities and subsequently tested by BCII will increase. In 2008, approximately 58,000 DNA samples for convicted offenders were tested. If the Attorney General's in-house testing laboratory was in place during 2008, BCII estimates that the costs to perform these tests would have been $2.6 million.[2]

In order to determine the number of new DNA samples that would require testing, the Office of the Attorney General focused on estimating the number of new felony arrests that, under current law and practice, would not be subject to DNA testing. In theory, this number would represent persons who would fall into one of the following categories:

(1) Persons who are arrested for the commission of felony offenses that require DNA sample submission upon conviction, but are subsequently acquitted or the charges are dismissed/dropped or plea bargained to a lesser charge.

(2) Persons who are arrested for the commission of new felony offenses that were not previously subjected to DNA sample submission in the past.

The Office of the Attorney General estimates, based on current arrest and conviction rates, that the number of DNA samples to be tested would increase by approximately 45,000 per year. If this estimate represents a reasonable approximation of the population of offenders that would be required to submit DNA samples for

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against the person of aggravated murder, murder, kidnapping, rape, sexual battery, unlawful sexual conduct with a minor, gross sexual imposition, or aggravated burglary, or of felonious sexual penetration as it existed prior to September 3, 1996, which charge was previously dismissed or amended, (3) a violation of interference with custody that would have been child stealing under R.C. 2905.04 as it existed prior to July 1, 1996, had the interference with custody violation been committed prior to that date, or (4) a sexually oriented offense or a child-victim oriented offense, as defined by the Sex Offender Registration and Notification Law, if in relation to the offense, the offender is a tier III sex offender/child-victim offender.

[2] In 2008, the Office of the Attorney General expended approximately $2 million in contract services for outside DNA testing. While it appears that in-house testing will be relatively more costly, the Office believes that testing will be performed more timely, and over time, increased efficiencies will help to decrease the testing costs.

analysis in future years, then it is possible that testing costs could increase by $1.9 million annually. The table below summarizes the likely fiscal effects of this expansion to the existing DNA collection and analysis system on certain state agencies.

Likely Fiscal Effect of DNA Collection Expansion on Certain State Agencies		
State Agency	**Activity**	**Likely Fiscal Effect**
Attorney General (BCII)	DNA sample collection and testing (including supplies, postage, and testing)	$1.9 million annual cost increase
Attorney General (BCII)	Expungement of DNA sample for cases not resulting in a felony conviction	Federal law may require the state to provide for expungement of DNA information for a person who is not convicted. If expungement is automatic, then BCII would presumably have to expend additional resources in order to monitor the final disposition of active felony cases.
Rehabilitation and Correction (DRC)	DNA sample collection at state inmate reception centers	Minimal annual savings, as presumably DNA samples would be sooner and fewer DNA samples would need to be collected by DRC.

Note: It is unclear which funding source the Office of the Attorney General will utilize to fund these increased costs. Generally, the Victims of Crime/Reparations Fund (Fund 4020) is utilized for DNA sample collection and testing; however, due to diminished cash reserves in the fund, the Attorney General has recently temporarily halted the use of this fund for those purposes and is instead relying on a mix of various other funding sources.

Law enforcement generally

Under the state's existing DNA sample collection system, buccal testing kits are supplied free of charge (postage included) by the state (BCII) to various local law enforcement agencies, probation offices, and inmate intake centers throughout the state. DNA samples are collected either at the time of conviction or when the offender arrives at prison or their respective probation office.

Presumably, if DNA testing is required to take place at the time of arrest, these duties would then be undertaken by law enforcement at the time of booking. As such, some jurisdictions may realize a cost savings as fewer post-conviction DNA samples would need to be collected, while other jurisdictions may experience a cost increase if not currently required to collect such samples or required to collect additional samples.

Potential additional cost points for law enforcement agencies generally are as follows:

- **Transportation.** Depending upon the timing of DNA sample collection, a local law enforcement agency may be required to transport the arrested person to the nearest location with the capability of taking and processing a DNA sample. As a result, the arresting agency could incur additional time (i.e., overtime costs) and transportation costs, as law enforcement personnel would have to travel to and from the sample collection point. For example, it is unclear how this policy would be implemented in situations where a person is charged with a felony offense, but not arrested (i.e., instances when a summons is issued in lieu of arrest).

- **Contracts.** Some law enforcement agencies contract for the collection and submission of DNA samples, for example, with the local health department. Presumably, the cost of such a contract would increase to reflect the additional number of DNA samples to be collected on behalf of the law enforcement agency and submitted to BCII.
- **Training.** If the timing and/or location of DNA sample collection changes, then certain local law enforcement agencies may incur the cost of ensuring that the appropriate personnel are trained in the proper procedures and guidelines for collecting and submitting a DNA sample.
- **Quality control.** It seems likely that with an increase in the number of DNA samples, there would be a related increase in the number of improperly collected or submitted samples, including sample kit failures, that in turn require the collection, submission, and testing of a new sample.

II. Convicted offender DNA testing

The bill modifies the current law process authorizing certain convicted felons to apply for and, if specified criteria are satisfied, obtain DNA testing. More specifically, the bill expands the categories of convicted felons for whom the DNA application process is available to include: (1) convicted felons who were sentenced to a prison term but who have been paroled, are under probation, are under post-release control, or have been released from prison and are under a community control sanction regarding the felony, (2) convicted felons who were not sentenced to a prison term or sentence of death, but were sentenced to a community control sanction and are under that community control sanction, or (3) convicted felons whose offense was a sexually oriented offense or child-victim oriented offense and who have duties under the Sex Offender Registration and Notification Law relative to the felony. The bill removes the requirement that convicted felons serving a prison term for the felony have at least one year remaining on the term when their application for DNA testing is filed, and repeals the mechanism in current law that allows felons who are inmates in a prison, who were sentenced by a court, or by a jury and a court, and who pleaded guilty or no contest to the felony to file an application for DNA testing regarding that felony.

State and local fiscal effects

As a result of previously enacted legislation, originally establishing the process for the testing of inmates who had no access to DNA at their trials, more than 25,000 inmates were eligible to apply, but only about 300 or so actually applied for testing. More than 200 of these applications were denied. Inmates that comprise the current prison population, as well as those on post-release control or some other form of community sanction, will presumably already have had access to DNA testing as a result of previous legislation, or during their trial process if DNA evidence was applicable.

Staff of the Office of the Attorney General anticipates that very few requests for post-conviction DNA testing will result from this provision in any given year. That would suggest that the potential annual costs for the Attorney General and any affected courts of common pleas, clerks of courts, and county prosecutors to process these applications would be no more than minimal.

III. Preservation of Biological Evidence Task Force

The bill creates the Preservation of Biological Evidence Task Force within the Bureau of Criminal Identification and Investigation (BCII), consisting of officers and employees of the Bureau, and representatives from four associations (coroners, prosecutors, chiefs of police, and sheriffs) and the Ohio Public Defender's Office. The task force is charged with establishing a system regarding the proper preservation of biological evidence in Ohio, specifically: (1) devising standards regarding the proper collection, retention, and cataloguing of biological evidence for certain ongoing investigations and prosecutions, and (2) recommending practices, protocols, models, and resources for the cataloguing and accessibility of preserved biological evidence already in the possession of governmental evidence-retention entities.

The bill also requires the Division of Criminal Justice Services of the Department of Public Safety, in consultation with the Preservation of Biological Evidence Task Force, to administer and conduct training programs for law enforcement officers and other relevant employees who are charged with preserving and cataloguing biological evidence.

State fiscal effects

System development. Presumably, all of the costs associated with developing and establishing the required biological evidence system will be paid for by BCII. At this time, the implementation date for such a system is uncertain. That said, the one-time costs to establish the system and the ongoing costs for its maintenance appear unlikely to exceed minimal.

Training costs. Based on our initial conversations with Department of Public Safety staff, it appears that the annual cost for the Division of Criminal Justice Services to administer and conduct the required training programs will exceed minimal, which means an ongoing expense estimated to be in excess of $100,000 per year.

Local fiscal effects

Training costs. Costs for local governments would likely occur subsequent to the establishment of the required biological evidence system, as, at a minimum, relevant local government employees will need to be trained. The potential cost for any affected local government would be a function of the number of employees to be trained, the duration of the training, and the location of the training site. Although the state would appear to assume the costs of delivery, the local government would presumably absorb any associated employee time and travel costs. The magnitude of these potential

training-related costs is uncertain. Additional local cost points include the possibility of the need for continuing training and the training of newer employees.

IV. Preservation and retention standards

Generally, the bill requires the preservation of biological evidence for certain specified offenses for certain periods of time by governmental evidence-retention entities.[3] These offenses include: (1) aggravated murder, (2) murder, (3) voluntary or involuntary manslaughter, (4) reckless or negligent homicide, (5) aggravated vehicular homicide, (6) rape or attempted rape, (7) sexual battery, and (8) certain cases of gross sexual imposition (generally pertaining to cases where the victim is less than 13 years of age). Biological evidence is defined as the contents of a sexual assault examination kit, or any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or any other identifiable biological material that was collected as part of a criminal investigation or delinquent child investigation and that reasonably may be used to incriminate or exculpate any person for an offense or delinquent act.

The bill permits a governmental evidence-retention entity that possesses biological evidence to destroy the evidence before the expiration of the applicable period of time only if certain conditions are met. The bill also provides that, under certain circumstances, a governmental evidence-retention entity may destroy biological material held as evidence five years after a person pleads guilty or no contest to an offense specified by the bill. While it is difficult to quantify the potential fiscal effect of this provision, it is likely to result in a decrease in the potential costs associated with the retention of biological evidence for local governmental entities from what those costs might otherwise have been under the prior version of the bill. The magnitude of these potential cost savings would depend upon the amount of evidence collected and stored and how vigorous the collecting entity acts in maintaining its own evidence retention schedule.

State and local fiscal effects

One-time and ongoing storage costs. It is uncertain how state and local governmental entities will choose to implement the retention policies mandated by the bill. Further complicating this portion of the fiscal analysis are the potential effects of the biological evidence system to be established by the Preservation of Biological Evidence Task Force at some unspecified future point in time.

Currently, there are no statewide standards regulating the collection, storage, and retention of biological evidence. Retention policies vary from jurisdiction to jurisdiction. According to the Buckeye State Sheriffs' Association and the Office of the Attorney General, evidence is often retained by the clerk of court, although, at times,

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[3] "Governmental evidence-retention entity" is defined as any law enforcement agency, prosecutor's office, court, public hospital, crime laboratory, or other governmental or public entity or individual within this state that is charged with the collection, storage, or retrieval of biological evidence, or any official or employee of any such entity or individual.

evidence is returned to the law enforcement agency which was involved in the original investigation. In some instances, evidence is retained by the local prosecutor.

It seems probable that the Preservation of Biological Evidence Task Force will issue storage guidelines that will help to ensure that DNA and associated biological samples are maintained in a setting that will promote optimal preservation and thus delay degradation. It also seems reasonable to assume that most governmental evidence-retention entities will need to modify existing structures, construct new structures, or contract with various qualified private vendors in order to properly store biological evidence for the period of time mandated by the bill. It is also possible that certain jurisdictions might construct and maintain "regional" storage locations, or that a statewide repository would be recommended by the task force.

Although the one-time and ongoing costs for various jurisdictions to adhere to the required preservation and retention standards are problematic to quantify, it would not be surprising it those costs for certain jurisdictions exceed minimal, with the threshold for minimal being an estimated expense in excess of $5,000 per year.

Notification costs. The bill allows for the early destruction of biological evidence, after giving notice by certified mail to certain parties, including but not limited to the person who was required to provide a DNA sample, the attorney of record, the State Public Defender, the prosecutor of record, and the Attorney General. It is unclear how often a governmental evidence-retention entity will seek the early destruction of biological evidence. Therefore, the cost to establish and maintain the required notification system is uncertain.

V. Eyewitness identification procedures

The bill contains provisions that will govern the conduct of lineups for purposes of the identification by an eyewitness of persons suspected of committing an offense. It specifies that, prior to conducting any live lineup or photo lineup, any law enforcement agency or criminal justice entity in Ohio that conducts live lineups or photo lineups must adopt specific procedures for conducting the lineups.

The bill also provides that the Office of the Attorney General may adopt rules prescribing specific procedures to be followed for the administration by law enforcement agencies and criminal justice entities of photo lineups, live lineups, and showups (an identification procedure in which an eyewitness is presented with a single suspect). The bill requests the Supreme Court of Ohio review existing jury instructions as they pertain to eyewitness identification.

State and local fiscal effects

Law enforcement agencies. Law enforcement agencies may experience one-time costs associated with training and implementing the new eyewitness identification standards, the magnitude of which for any given jurisdiction is uncertain. It also seems likely that the new standards would require additional ongoing administrative costs related to the documentation requirements, but these associated costs are not expected

to exceed minimal. Once in place, these procedures would likely create no more than a negligible ongoing administrative expense.

Attorney General. To the degree that such costs could be quantified, the one-time cost for the Attorney General to adopt rules prescribing specific procedures to be followed by law enforcement agencies and criminal justice entities would likely be minimal at most.

Supreme Court of Ohio. To the degree that such costs could be quantified, the one-time cost for the Supreme Court to review existing jury instructions would likely be minimal at most.

VI. Custodial interrogations

The bill states that when a custodial interrogation for certain offenses[4] takes place in a place of detention, any statements made are considered to be voluntary. If these statements are recorded, the bill requires law enforcement personnel to clearly identify and catalogue every electronic recording of a custodial interrogation and every recording of a part of a custodial interrogation recorded under the audio recording exception. The law enforcement agency must preserve the recording until the later of when all appeals, post-conviction relief proceedings, and *habeas corpus* proceedings are final and concluded or the expiration of the period of time within which such appeals and proceedings must be brought. Recordings may be discarded if no criminal proceeding is brought against a person who was the subject of the custodial interrogation.

Custodial interrogation is defined as any interrogation involving a law enforcement officer's questioning that is reasonably likely to elicit incriminating responses and in which a reasonable person in the subject's position would consider himself or herself to be in custody, beginning when a person should have been advised of the person's right to counsel and right to remain silent and of the fact that anything the person says could be used against the person and ending when the questioning has completely finished.

State and local fiscal effects

Law enforcement agencies. Since the bill limits the recording (as well as the storage of those recordings) of such interrogations to those occurring in places of detention, it seems likely that any additional law enforcement costs associated with complying with this provision of the bill would be minimal at most on an ongoing basis.

[4] These offenses include: (1) aggravated murder, (2) murder, (3) voluntary manslaughter, (4) involuntary manslaughter that is a felony of the first or second degree, (5) aggravated vehicular homicide that is a felony of the first or second degree, (6) rape or attempted rape, and (7) sexual battery.