Dennis M. Papp *Legislative Service Commission*

Sub. S.B. 262

126th General Assembly
(As Reported by S. Judiciary on Criminal Justice)

Sens. Goodman, Stivers, Clancy, Jacobson, Gardner, Padgett, Schuler, Fedor, Fingerhut, Miller

BILL SUMMARY

- Eliminates the former two-year window for filing applications for post-conviction DNA testing for eligible inmates (which expired on October 29, 2005) and instead allows an eligible inmate to request post-conviction DNA testing at any time if specified criteria are met.

- Removes the provisions that specified that the felony offense for which an inmate is incarcerated must have been committed prior to October 29, 2003, and that the inmate must have been in prison on that date in order to be eligible for post-conviction DNA testing.

- Provides for a court's consideration of all available admissible evidence in determining whether the post-conviction DNA testing program's "outcome determinative" criterion is satisfied.

- Specifies that the DNA specimen collection procedures for felons and specified misdemeanors apply regardless of when the offender's conviction occurred or guilty plea was entered.

- Declares an emergency.

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CONTENT AND OPERATION

Post-conviction DNA testing

Existing law contains a mechanism by which certain incarcerated offenders (inmates) were permitted to submit an application for DNA testing to a court of common pleas. If the application was accepted by the court, a DNA test was conducted and the results could be used in court proceedings. The mechanism was available only until October 29, 2005. (R.C. 2953.21 and 2953.71 to 2953.83.)

Procedures under mechanism and time period for applying

Existing law. Substitute S.B. 11 of the 125th General Assembly, as modified by Sub. H.B. 525 of the 125th General Assembly, allowed certain incarcerated offenders (inmates), before October 29, 2005, to submit an application for DNA testing to the court of common pleas that sentenced the inmate for the offense for which the inmate was requesting the testing. Generally, an inmate could submit an application for DNA testing if: (1) the offense for which the inmate was incarcerated and was requesting the testing was a felony that was committed prior to October 29, 2003, and the inmate was convicted by a judge or jury, (2) the inmate was sentenced to a prison term or sentence of death for the felony and on October 29, 2003, was in prison serving that prison term or under that sentence of death, (3) on the date on which the application was filed, the inmate had at least one year remaining on the prison term, or the inmate was in prison under a sentence of death, and (4) the inmate did not plead guilty or no contest to the offense for which the inmate was incarcerated and was requesting the testing (R.C. 2953.72(C)). The court, based on statutory criteria and procedures (see "***Determination of whether an application should be accepted or rejected***," below), decides whether the application should be accepted or rejected; if the court rejects the application, a limited appeal of the rejection is available (R.C. 2953.73(D) and (E)).

The two acts cited in the preceding paragraph also allowed inmates who pleaded guilty or no contest to a felony offense that was committed prior to October 29, 2003, to file an application for DNA testing regarding that felony by October 29, 2005, if: (1) the inmate was sentenced to a prison term or sentence of death for the felony and on October 29, 2003, was in prison serving that prison term or under that sentence of death, and (2) on the date on which the application was filed, the inmate had at least one year remaining on the prison term or the

inmate was in prison under a sentence of death (R.C. 2953.82(A)). However, if an inmate filed an application as described in this paragraph, the prosecuting attorney has authority to refuse the application, the decision of which cannot be appealed by the offender. If the prosecuting attorney agrees that the inmate should be permitted to obtain the DNA testing, the application is considered as if it had been made under the provisions described in the preceding paragraph that the court accepted. (R.C. 2953.82(B) to (E).)

If an inmate filed an application under the provisions described in either of the two preceding paragraphs and the application is accepted, the DNA test is conducted (R.C. 2953.77 to 2953.31, not in the bill). If the DNA test establishes, by clear and convincing evidence, the actual innocence of the inmate, the inmate may file a petition for postconviction relief asking the court to set aside or vacate the judgment or sentence or grant other appropriate relief. (R.C. 2953.21, not in the bill.)

While the time period has expired under current law during which an application for post-conviction DNA testing may be filed, the process of reviewing previously filed applications and for testing under accepted applications continues. Consequently, under current law an inmate is no longer permitted to timely file an application for DNA testing, but an application that was timely filed may still be accepted or rejected.

Operation of the bill. The bill removes the time period during which an inmate was authorized to file an application for DNA testing under the existing procedure for DNA testing, which the bill does not modify. Thus, under the bill, an inmate described above in "***Current law***" may file an application for DNA testing at any time if the inmate satisfies the other requirements in current law. The bill also removes the provisions that specified that the felony offense for which an inmate was incarcerated had to have been committed prior to October 29, 2003, and that the inmate must have been in prison on that date as a prerequisite to filing the application (the bill otherwise retains the "felony conviction" and "prison term" criteria). Thus, under the bill, if an inmate meets the other requirement of current law, the inmate can file an application for DNA testing regardless of when the offense for which the inmate is incarcerated was committed. (R.C. 2953.72(A), (C)(1)(a), and (C)(1)(b), 2953.73(A), and 2953.82(A) and (B).)

Determination of whether an application should be accepted or rejected

Existing law. Existing law specifies that, if an eligible inmate submits an application for DNA testing under the provisions described above that apply to inmates who did not plead guilty or no contest and a prior definitive DNA test has been conducted regarding the same biological evidence that the inmate seeks to

have tested, the court must reject the inmate's application. If a prior inconclusive DNA test has been conducted regarding the same biological evidence that the inmate seeks to have tested, the court must review the application and has the discretion, on a case-by-case basis, to either accept or reject the application. The court may direct a testing authority to provide the court with information that it may use 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 results.

Existing law specifies a series of criteria that must be satisfied in order for a court to approve an application for DNA testing filed by an eligible inmate under the provisions described above that apply to inmates who did not plead guilty or no contest. Among the criteria, existing law provides that, if an eligible inmate submits an application under those provisions, the court may accept the application only if one of the following applies: (1) the inmate did not have a DNA test taken at the trial stage in 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 regarding the same biological evidence that the inmate seeks to have tested, the inmate shows that "DNA exclusion" would have been "outcome determinative" (see below) at that trial stage in that case, and, at the time of the trial stage in that 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, or (2) the inmate had a DNA test taken at the trial stage in 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 regarding the same biological evidence that the inmate seeks to have tested, the test was not a prior definitive DNA test that is subject to the provisions described in the preceding paragraph, and the inmate shows that "DNA exclusion" would have been "outcome determinative" (see below) at the trial stage in that case. Other criteria that must be satisfied in order for a court to approve an application for DNA testing are described in **COMMENT** 1. (R.C. 2953.74(A) and (B).)

Existing law defines "exclusion" or "exclusion result" as 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 or, regarding a request for DNA testing made by a person who pleaded guilty or no contest to the offense, in relation to the offense for which the inmate made the request and for which the sentence of death or prison term was imposed upon the inmate (R.C. 2953.71(G)).

Existing law specifies that "outcome determinative" means that had the results of DNA testing been presented at the trial of the subject inmate requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the inmate is an eligible inmate and is requesting the DNA testing under the provisions that apply to inmates who did not plead guilty or no contest, or for which the inmate is requesting the DNA testing under the provisions that apply to inmates who pleaded guilty or no contest, 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 or circumstances the inmate was found guilty of committing and that is or are the basis of that sentence of death (R.C. 2953.71(L)).

Operation of the bill. The bill changes the "outcome determinative" criterion described above that must be satisfied in order for a court to approve an application for DNA testing filed by an eligible inmate under the provisions described above that apply to inmates who did not plead guilty or no contest. Under the bill, if an eligible inmate submits an application under those provisions, the court may accept the application only if one of the following applies: (1) the inmate did not have a DNA test taken at the trial stage in 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 regarding the same biological evidence that the inmate seeks to have tested, the inmate shows that "DNA exclusion" (unchanged by the bill), *when analyzed in the context of and upon consideration of all available admissible evidence related to the subject inmate's case* (as described in a provision the bill enacts that is summarized in the next paragraph), would have been "outcome determinative" (modified by the bill as described below) at that trial stage in that case, and, at the time of the trial stage in that 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, or (2) the inmate had a DNA test taken at the trial stage in 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 regarding the same biological evidence that the inmate seeks to have tested, the test was not a prior definitive DNA test that is subject to the provisions described in the preceding paragraph, and the inmate shows that "DNA exclusion" (unchanged by the bill), *when analyzed in the context of and upon consideration of all available admissible evidence related to the subject inmate's case* (as described in a provision the bill enacts that is summarized in the next paragraph), would have been "outcome determinative" (modified by the bill as described below) at the trial stage in that case. (R.C. 2953.74(B).)

The bill provides that, if an eligible inmate submits an application for DNA testing under R.C. 2953.73, the court, in determining whether the applicable "outcome determinative" criterion described in the preceding paragraph has been

satisfied, must consider all available admissible evidence related to the subject inmate's case (R.C. 2953.74(D)).

The bill modifies the definition of "outcome determinative," consistent with its provisions described above. Under the bill, "outcome determinative" means that, had the results of DNA testing *on the subject inmate* been presented at the trial of the subject inmate requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the inmate is an eligible inmate and is requesting the DNA testing under the provisions that apply to inmates who did not plead guilty or no contest, or for which the inmate is requesting the DNA testing under the provisions that apply to inmates who pleaded guilty or no contest, *and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the subject inmate's case* (as described in a provision the bill enacts that is summarized in the preceding paragraph), 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 or circumstances the inmate was found guilty of committing and that is or are the basis of that sentence of death (R.C. 2953.71(L)).

Miscellaneous changes

The bill makes two other changes in existing law regarding the mechanism: (1) it modifies a provision that describes one of the statements that must be in an acknowledgment that an inmate must submit with an application, so that the statement must set forth that the provisions of the DNA Testing Law (R.C. 2953.71 to 2953.81) do not give any inmate any additional Constitutional right *that the inmate did not already have* instead of setting forth that those provisions do not give any inmate any additional Constitutional right *that the inmate did not have prior to October 29, 2003* (R.C. 2953.72(A)(8)), and (2) it modifies a provision that currently requires an inmate who pleaded guilty or no contest to a felony and who wishes to request DNA testing under the DNA Testing Law to *submit an application to* the court of common pleas and *the prosecuting attorney* so that it instead requires the inmate to submit an application to the court of common pleas and, *upon submitting the application to the court, to serve a copy on the prosecuting attorney* (R.C. 2953.82(B)).

Post-conviction relief proceeding

Existing law

Existing law provides that 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, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under R.C. 2953.71 to 2953.81 or under R.C. 2953.82 (see "***Post-conviction DNA testing***," above) provided results that establish, by clear and convincing evidence, "actual innocence" (see below) of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, 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. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief. The petition generally 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; if no appeal is taken, the petition generally must be filed no later than 180 days after the expiration of the time for filing the appeal (the time for filing the petition is subject to extension under R.C. 2953.23). A petitioner must state in the original or amended petition all grounds for relief claimed by the petitioner. Generally, any ground for relief that is not so stated in the petition is waived.

The clerk of the court in which the petition is filed must docket the petition and bring it promptly to the attention of the court. The clerk immediately must forward a copy of the petition to the prosecuting attorney of that county. Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney must respond by answer or motion. Within 20 days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment must appear on the face of the record.

Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court must proceed to a prompt hearing on the issues (to be conducted under R.C. 2953.22) even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court. 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 pursuant to a request 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 rearraignment, retrial, custody, and bail. Special procedures apply regarding the filing of a petition by a person sentenced to death.

Subject to the appeal of a sentence for a felony that is authorized by R.C. 2953.08, the remedy described above 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.

As used in the provisions described above, "actual innocence" means that, had the results of the DNA testing conducted under R.C. 2953.71 to 2953.81 or under R.C. 2953.82 been presented at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death. (R.C. 2953.21.)

Operation of the bill

The bill modifies the existing post-conviction relief provisions, as they apply regarding a person for whom DNA testing that was performed under R.C. 2953.71 to 2953.81 or under R.C. 2953.82 (see "***Post-conviction DNA testing***," above), in two ways:

(1) It revises the grounds upon which a person for whom DNA testing was so performed to specify that any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under R.C. 2953.71 to 2953.81 or under R.C. 2953.82 *and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of R.C. 2953.74* (see "***Determination of whether an application should be accepted or rejected***," above), provided results that establish, by clear and convincing evidence, "actual innocence" (see (2), below) of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, 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 (R.C. 2953.21(A)(1)(a)).

(2) It modifies the definition of "actual innocence" that applies to the provisions so that "actual innocence" means that, had the results of the DNA testing conducted under R.C. 2953.71 to 2953.81 or under R.C. 2953.82 been presented at trial, *and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of R.C. 2953.74* (see "***Determination of whether an application should be accepted or rejected***," above), no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death (R.C. 2953.21(A)(1)(b)).

DNA testing of offenders

Existing law

Offenders who are subject to DNA testing. Existing law provides for the collection of a DNA specimen from certain criminal offenders, in specified circumstances. It specifies that (R.C. 2901.07(B)):

(1) A 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 pursuant to R.C. 2929.16, and a person who is convicted of or pleads guilty to a specified misdemeanor offense to which the provisions apply (see below) and who is sentenced to a term of imprisonment must submit to a DNA specimen collection procedure administered by the Director of Rehabilitation and Correction or the chief administrative officer of the jail or other detention facility in which the person is serving the term of imprisonment. If the person serves the prison term in a state correctional institution, the Director of Rehabilitation and Correction must cause the DNA specimen to be collected from the person during the intake process at the reception facility. If the person serves the community residential sanction or term of imprisonment in a jail, a community-based correctional facility, or another county, multicounty, municipal, municipal-county, or multicounty-municipal detention facility, the chief administrative officer of the jail or facility must cause the DNA specimen to be collected from the person during the intake process at the jail or facility. The law specifies a manner in which DNA specimens must be collected and provides for their delivery to BCII.

(2) If a person is convicted of or pleads guilty to a felony offense or a specified misdemeanor offense to which the provisions apply (see below), is serving a prison term, community residential sanction, or term of imprisonment for that offense, and does not provide a DNA specimen pursuant to the provision described above in (1), prior to the person's release from the prison term, community residential sanction, or imprisonment, the person must submit to, and the Director of Rehabilitation and Correction or the chief administrative officer of the jail, community-based correctional facility, or detention facility in which the person is serving the term or sanction must administer, a DNA specimen collection procedure at the state correctional institution, jail, or facility in which the person is serving the prison term, community residential sanction, or term of imprisonment. The law specifies a manner in which DNA specimens must be collected and provides for their delivery to BCII.

(3) If a person is convicted of or pleads guilty to a felony offense or a specified misdemeanor offense to which the provisions apply (see below) and the person is on probation, released on parole, under transitional control, on community control, on post-release control, or under any other type of supervised release under the supervision of a probation department or the adult parole authority, the person must submit to a DNA specimen collection procedure administered by the chief administrative officer of the probation department or the Adult Parole Authority (see **COMMENT** 2). The law specifies a manner in which DNA specimens must be collected and provides for their delivery to BCII, and a procedure that may be used if the person refuses to submit to a DNA specimen collection procedure. If the person is sent to jail or is returned to a jail, community-based correctional facility, or state correctional institution for a violation of the terms and conditions of the probation, parole, transitional control, other release, or post-release control, if the person was or will be serving a term of imprisonment, prison term, or community residential sanction for committing a felony offense or for committing a specified misdemeanor offense to which the provisions apply (see below), and if the person did not provide a DNA specimen pursuant to the provision described in (1) or (2), above, or the provision previously described in this paragraph, the person must submit to, and the Director of Rehabilitation and Correction or the chief administrative officer of the jail or community-based correctional facility must administer, a DNA specimen collection procedure at the jail, facility, or state correctional institution in which the person is serving the term or sanction. The law specifies a manner in which DNA specimens must be collected and provides for their delivery to BCII.

(4) If a person is convicted of or pleads guilty to a felony offense or a specified misdemeanor offense to which the provisions apply (see below), the person is not sentenced to a prison term, a community residential sanction in a jail or community-based correctional facility, a term of imprisonment, or any type of

supervised release under the supervision of a probation department or the Adult Parole Authority, and the person does not provide a DNA specimen under the provisions described in (1), (2), or (3), above, the sentencing court must order the person to report to the county probation department immediately after sentencing to submit to a DNA specimen collection procedure administered by the chief administrative officer of the county probation office. If the person is incarcerated at the time of sentencing, the person must submit to a DNA specimen collection procedure administered by the Director of Rehabilitation and Correction or the chief administrative officer of the jail or other detention facility in which the person is incarcerated. The law specifies a manner in which DNA specimens must be collected and provides for their delivery to BCII.

Existing law also contains a DNA specimen collection mechanism that applies to children who have been adjudicated delinquent for any act that would be a felony if committed by an adult or that would be a specified misdemeanor if committed by an adult (the specified misdemeanors are similar, but not identical, to the specified misdemeanors to which the criminal offender DNA provisions apply) (R.C. 2152.74, not in the bill).

Misdemeanor offenses to which the DNA collection provisions apply. Existing law provides that the Director of Rehabilitation and Correction, the chief administrative officer of the jail, community-based correctional facility, or other county, multicounty, municipal, municipal-county, or multicounty-municipal detention facility, or the chief administrative officer of a county probation department or the Adult Parole Authority must cause a DNA specimen to be collected in accordance with the provisions described above from a person in its custody or under its supervision who is convicted of or pleads guilty to any felony offense or to any of the following misdemeanor offenses (R.C. 2901.07(D)):

(1) A misdemeanor violation, an attempt to commit a misdemeanor violation, or complicity in committing a misdemeanor violation of R.C. 2907.04;

(2) A misdemeanor violation of any law that arose out of the same facts and circumstances and same act as did a charge against the person of a violation of R.C. 2903.01, 2903.02, 2905.01, 2907.02, 2907.03, 2907.04, 2907.05, or 2911.11 that previously was dismissed or amended or as did a charge against the person of a violation of R.C. 2907.12 as it existed prior to September 3, 1996, that previously was dismissed or amended;

(3) A misdemeanor violation of R.C. 2919.23 that would have been a violation of R.C. 2905.04 as it existed prior to July 1, 1996, had it been committed prior to that date;

(4) A sexually oriented offense or a child-victim oriented offense, both as defined in R.C. 2950.01, that is a misdemeanor, if, in relation to that offense, the offender has been adjudicated a sexual predator, child-victim predator, habitual sex offender, or habitual child-victim offender.

Operation of the bill

The bill specifies that all of the provisions that specify the categories of offenders that are subject to the DNA testing, as described above in "***Offenders who are subject to DNA testing***," apply regardless of when the conviction referred to in the provisions occurred or the guilty plea referred to in the provisions was entered (R.C. 2901.07(B)(1), (2), (3)(a), (3)(b), and (4), and (D)).

The bill includes a provision that specifies that the General Assembly declares that its purpose in amending R.C. 2901.07 in the bill is to reaffirm that it is the General Assembly's intent that, under that section as it existed prior to the bill's effective date, a person who is in any of the categories of offenders described above in "***Offenders who are subject to DNA testing***," in relation to a sentence imposed for a felony offense or a specified misdemeanor offense to which the provisions apply is subject to the DNA specimen collection provisions of that section regardless of when the conviction of or plea of guilty to the felony offense or the misdemeanor offense occurred or was entered. The General Assembly declares that it believes that those amendments are not substantive in nature and merely clarify that the provisions of the section operate as described in the preceding sentence, and that those amendments thus are remedial in nature. The General Assembly declares that it intends that the clarifying, remedial amendments to R.C. 2901.07 apply to all convicted offenders described above in "***Offenders who are subject to DNA testing***," regardless of when the conviction referred to in the provisions occurred or the guilty plea was entered. (Section 3.)

The bill does not change the DNA specimen collection mechanism that applies to delinquent children, as contained in existing R.C. 2152.74 (not in the bill).

COMMENT

1. Existing law also provides that, if an eligible inmate submits an application for DNA testing under the provisions that apply to inmates who did not plead guilty or no contest, the court may accept the application only if all of the following apply (R.C. 2953.74(C)):

(a) The court determines pursuant to R.C. 2953.75 that biological material was collected from the crime scene or the victim of the offense for which the inmate is an eligible inmate and is requesting the DNA testing and that the parent

sample of that biological material against which a sample from the inmate can be compared still exists at that point in time.

(b) The testing authority determines all of the following pursuant to R.C. 2953.76 regarding the parent sample of the biological material described in paragraph (a): (i) the parent sample of the biological material so collected contains scientifically sufficient material to extract a test sample, (ii) 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 clause (i), 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, and (iii) 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.

(c) 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 an eligible inmate and is requesting the DNA testing, the identity of the person who committed the offense was an issue.

(d) The court determines that one or more of the defense theories asserted by the inmate at the trial stage in the case described in paragraph (c), above, or in a retrial of that case in a court of this state was of such a nature that, if DNA testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative.

(e) 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.

(f) The court determines pursuant to R.C. 2953.76 from 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, 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.

2. The Court of Appeals for Summit County, in its decision in the case of *State v. Consilio* (Court of Appeals, Summit County, February 15, 2006), C.A. No. 22761, held that the changes made by Sub. H.B. 525 of the 125th General Assembly to the DNA collection provision described in paragraph (3) of

"***Offenders who are subject to DNA testing***" under "***DNA testing of offenders***," do not apply to offenders who were convicted of or pleaded guilty to an offense prior to May 18, 2005, which is the date on which the changes took effect. Sub. H.B. 525 modified that provision by expanding the category of offenders to whom it applies (e.g., all felons, etc.) and by making it apply to all offenders within the category who are under supervised release.

HISTORY

ACTION	DATE
Introduced	01-31-06
Reported, S. Judiciary on Criminal Justice	03-01-06

S0262-RS-126.doc/jc