Diana C. Talarek *Legislative Service Commission*

Bill Analysis

H.B. 218

127th General Assembly
(As Introduced)

Rep. Chandler

BILL SUMMARY

- Repeals the special procedure through which an inmate who pleaded guilty or no contest to a felony may obtain post-conviction DNA testing and instead permits such an inmate to apply for post-conviction DNA testing in the same manner as an inmate who was convicted of a felony may apply.

CONTENT AND OPERATION

The bill

The bill repeals the special procedure, described below in "***Post-conviction DNA testing for an inmate who pleaded guilty or no contest***," through which an inmate who pleaded guilty or no contest to a felony may obtain post-conviction DNA testing and instead permits such an inmate to apply for post-conviction DNA testing in the same manner as an inmate who was convicted of a felony may apply, described below in "***Post-conviction DNA testing for an eligible inmate***" (repeal of R.C. 2953.82, conforming changes in R.C. 109.573(I), 2953.21, 2953.23(A)(2), 2953.71, 2953.72, 2953.73(A)(2), 2953.74, 2953.75(A)(1), 2953.83, and 2953.84).

Post-conviction DNA testing for an inmate who pleaded guilty or no contest

Under current law, repealed by the bill, if an inmate pleaded guilty or no contest to a felony offense, that inmate may file an application for post-conviction DNA testing regarding that felony if: (1) the inmate was sentenced to a prison term or sentence of death for the felony and is 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. Upon submitting the application to the court, the inmate must serve a copy on the prosecuting attorney.

Within 45 days after the application is filed, the prosecuting attorney must file a statement with the court that indicates whether the prosecuting attorney agrees or disagrees that the inmate should be permitted to obtain DNA testing. If the prosecuting attorney fails to file a statement of agreement or disagreement, the court may order the prosecuting attorney to do so within 15 days of the order. If the prosecuting attorney agrees, the application must be accepted, and DNA testing must proceed in the same manner as if the application was filed by an inmate who was convicted of a felony offense, which is described below. However, if a prosecuting attorney disagrees that an inmate should be able to obtain DNA testing, the prosecuting attorney's decision is final and is not appealable by any person to any court. Additionally, current law specifies that no court has authority, without agreement of the prosecuting attorney, to order DNA testing regarding that inmate and the offense or offenses for which the inmate requested DNA testing.[1] (R.C. 2953.82.)

Post-conviction DNA testing for an eligible inmate

Current law, as amended by the bill, permits an inmate to file a petition for post-conviction DNA testing if all of the following apply (R.C. 2953.72(C), termed an "eligible inmate"):

(1) The offense for which the inmate claims to be an eligible inmate is a felony, and the inmate was convicted by a judge or jury of that offense *or the inmate pleaded guilty or no contest to that offense* (italicized language removed by the bill).

(2) The inmate was sentenced to a prison term or sentence of death for the felony and is in prison serving that term or sentence.

(3) On the date on which the application is filed, the inmate has at least one year remaining on the prison term or the inmate is in prison under a sentence of death.

An eligible inmate may file a post-conviction DNA testing petition with the court of common pleas that sentenced the inmate for the offense for which the inmate is an eligible inmate and is requesting DNA testing. The inmate must also serve a copy of the petition on the prosecuting attorney that prosecuted the applicable offense and the Attorney General. The prosecuting attorney and the Attorney General may file a response to the petition within 45 days after the application was filed (with a copy served on the inmate). (R.C. 2953.73.)

[1] These provisions regarding a prosecuting attorney's authority to deny DNA testing have recently been held unconstitutional by the Ohio Supreme Court (see **COMMENT**).

Based on specified criteria and procedures (see R.C. 2953.74 through 2953.76), the court is responsible for accepting or rejecting an application for post-conviction DNA testing. If the court rejects the application for testing, the decision is appealable only as follows (R.C. 2953.73(E)):

(1) If the inmate was sentenced to death for the offense for which DNA testing is sought, the inmate may seek leave of the Supreme Court to appeal the rejection; courts of appeal have no jurisdiction.

(2) If the inmate was not sentenced to death, the rejection is a final, appealable order, and the inmate may appeal it to the applicable court of appeals.

If the application is accepted, the court must require that the chain of custody of relevant biological material remain intact and must select a testing authority. The testing authority is then responsible for obtaining a sample of the inmate's biological material to compare to the parent sample of biological material collected from the crime scene or the victim. If the inmate refuses to provide a sample or hinders the collection, the court must rescind its prior acceptance of the application and deny the application. (R.C. 2953.77 through 2953.80, not in the bill.)

After DNA testing is performed, the court must require the state to maintain the test results, the parent sample, and the inmate's sample of biological material. The results remain state's evidence. The samples must be retained for the entire period of the inmate's sentence for which DNA testing was conducted and for at least 24 months after the expiration of the prison term or the inmate's execution. The test results are a public record and must be provided to the inmate, the prosecuting attorney, the Attorney General, the court that decided the DNA application, and any court in which post-conviction proceedings are pending. (R.C. 2953.81, not in the bill.)

If post-conviction DNA testing is analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case and provides results that establish, by clear and convincing evidence, "actual innocence" of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance, the inmate may file a petition in the court that imposed the 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. "Actual innocence" means that, had the results of the DNA testing 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 R.C. 2953.74(D), 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 and 2953.23.)

COMMENT

R.C. 2953.82(D) states that if a prosecuting attorney disagrees that the inmate should be permitted to obtain DNA testing under R.C. 2953.82, the prosecuting attorney's disagreement is final and is not appealable by any person to any court, and no court has authority, without agreement of the prosecuting attorney, to order DNA testing regarding that inmate and the offense or offenses for which the inmate requested DNA testing in the application. The Ohio Supreme Court in *State v. Sterling* (2007), 113 Ohio St.3d 255, held that R.C. 2953.82(D) interferes with the exercise of judicial authority, the separation of powers doctrine, and is unconstitutional. The Court stated the following:

> With the enactment of R.C. 2953.82(D), the General Assembly has authorized a prosecuting attorney to disagree with an application for DNA testing presented by an inmate who has pleaded guilty or no contest to a felony offense and has also made that disagreement final and not appealable by any person to any court, thereby confining the exercise of judicial authority to those instances where the prosecutor agrees with the application. The legislature, however, may not impede the judiciary in its province to determine guilt in a criminal matter—and DNA testing results affect that issue—nor can it delegate to the executive branch of government the power to exercise judicial control.
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> Insofar as the statute authorizes a prosecuting attorney to agree or disagree with an inmate's request for DNA testing, it comports with the exercise of authority by the executive department of government because the prosecutor is charged with the responsibility to prove guilty beyond a reasonable doubt. However, those portions of the statute that make the prosecuting attorney's disagreement final, and not appealable to any court, and that deprive the court of its ability to act without the prosecutor's agreement interfere with the court's function in determining guilty which is solely the province of the judicial branch of government.

After determining that division (D) was unconstitutional, the Court found that severance was appropriate. Thus, division (D) currently has no effect.

HISTORY

ACTION	DATE
Introduced	05-09-07

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