Ohio Legislative Service Commission

Bill Analysis

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(As Reported by H. Criminal Justice)

Sens. Goodman, Seitz, R. Miller, Stewart, Schuring, D. Miller, Kearney, Cates, Coughlin, Fedor, Gibbs, Gillmor, Harris, Husted, Niehaus, Patton, Sawyer, Schiavoni, Smith, Strahorn, Turner, Wagoner, Wilson, Morano

BILL SUMMARY

- Requires a person who is 18 years of age or older and who is arrested on or after July 1, 2011, for a felony offense to submit to a DNA specimen collection procedure administered by the head of the arresting law enforcement agency.

- In the mechanism that authorizes certain convicted felons to apply for and, if specified criteria are satisfied, obtain DNA testing: (1) expands the categories of convicted felons for whom the mechanism is available so that it also is available for: (a) 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, (b) 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 (c) 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, (2) 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, (3) specifies that convicted felons are not eligible to submit an application for DNA testing if they die prior to submitting the application, and (4) conforms the other provisions of the mechanism with the changes described in clause (1) of this dot point.

- Repeals the mechanism 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 and

modifies the state's postconviction relief law so that the postconviction relief law still will be available to felons who use the mechanism prior to its repeal.

- Defines "custodial interrogation" 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, as specified by the United States Supreme Court in *Miranda v. Arizona* and subsequent decisions, and ending when the questioning has completely finished.

- Generally requires the preservation of "biological evidence" for certain specified offenses for specified periods of time by "governmental evidence-retention entities."

- Defines "biological evidence" 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.

- Defines "governmental evidence-retention entity" 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.

- Establishes within the Bureau of Criminal Identification and Investigation a Preservation of Biological Evidence Task Force to establish a system regarding the proper preservation of biological evidence in Ohio.

- 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 regarding the methods and procedures referenced in the bill's provisions that require or relate to the preservation of biological evidence.

- Requires any law enforcement agency or criminal justice entity in Ohio that conducts "live lineups" or "photo lineups" to adopt specific procedures for conducting the lineups prior to conducting any on or after the bill's effective date

and identifies mandatory requirements that at a minimum must be imposed under the procedures.

- Defines a "live lineup" as an identification procedure in which a group of persons, including the suspected perpetrator of an offense and other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator of the offense.

- Defines a "photo lineup" as an identification procedure in which an array of photographs, including a photograph of the suspected perpetrator of an offense and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator of the offense.

- Permits, as an exception to the prohibition against divulging confidential information under the sealing law, the Bureau of Criminal Identification and Investigation or any authorized employee of the Bureau participating in the investigation of criminal activity to release, disseminate, or otherwise make available to, or discuss with, a person directly employed by a law enforcement agency DNA records collected in the DNA database or fingerprints filed for record by the Superintendent of the Bureau.

- Prohibits DNA records collected in the DNA database and fingerprints filed for the record by the Superintendent of the Bureau from being sealed unless the Superintendent receives a certified copy of a final court order establishing that the offender's conviction has been overturned.

- Requires a court that enters a judgment that vacates and sets aside the conviction of a person because of DNA testing to issue 90 days after the court vacates and sets aside the conviction an order directing that all official records pertaining to the case involving the vacated conviction be sealed and that the proceedings in the case are deemed not to have occurred and provides procedures for sealing those records.

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Existing law

Under R.C. 2901.07(B), 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 any of the misdemeanor offenses listed in the section and who is sentenced to a term of imprisonment must submit to a DNA specimen collection procedure. The *misdemeanor* offenses for which R.C. 2901.07(B) requires an offender to provide a DNA specimen 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 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. Additionally, R.C. 2929.13(H) requires an offender being sentenced for a sexually oriented offense or a child-victim oriented offense that is as felony committed on or after January 1, 1997, to submit to a DNA specimen collection procedure under R.C. 2901.07. R.C. 2929.23(A) requires an offender being sentenced for a misdemeanor sexually oriented offense or child-victim oriented offense committed on or after January 1, 1997, and whom the judge imposing sentence has determined to be a tier III sex offender/child-victim offender, to submit to a DNA specimen collection procedure under R.C. 2901.07.

R.C. 2901.07 requires the DNA specimen collection procedure to be administered by the Director of Rehabilitation and Correction or the chief administrative officer of the jail or detention facility in which the offender is serving a term of imprisonment. If an offender serves the prison term in a state correctional institution, the Director must cause the DNA specimen to be collected during the intake process at the reception facility designated by the Director. If the offender serves the community residential sanction or term of imprisonment in a jail, community-based correctional facility, or another county, multicounty, municipal, municipal-county, or multicounty-municipal detention facility, the chief administrative officer of the jail, correctional facility, or detention facility must cause the DNA specimen to be collected during the intake process at the jail or facility. (R.C. 2901.07(B)(1).) If the offender *does not* provide a DNA specimen during the intake process, the offender must submit prior to the offender's release from custody to a DNA specimen collection procedure administered by the Director or the chief administrative officer of the jail, correctional facility, or detention facility in which the offender is serving the term of imprisonment, community residential sanction, or prison term (R.C. 2901.07(B)(2)).

Under R.C. 2901.07(B)(3)(a), if the offender is on probation, released on parole, under transitional control, on community control or post-release control, or under any other type of supervised release under the supervision of a probation department or the Adult Parole Authority, the offender must submit to a DNA specimen collection procedure administered by the chief administrative officer of the probation department or the Adult Parole Authority. If the offender refuses to submit to the DNA specimen collection procedure, the offender is in violation of a condition of parole, probation, transitional control, other release, or post-release control and is subject to arrest under

R.C. 2967.15. The offender must submit to the DNA specimen collection procedure upon their incarceration or return to a jail, correctional facility, or correctional institution, to be administered by the Director of Rehabilitation and Correction or chief administrative officer of the jail, correctional facility, or correctional institution. (R.C. 2901.07(B)(3)(a) and (b).)

If an offender 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 has not otherwise provided a DNA specimen, 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 an offender is incarcerated at the time of sentencing, the offender 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 offender is incarcerated. (R.C. 2901.07(B)(4).)

Operation of the bill

The bill requires a person who is 18 years of age or older and who is arrested on or after July 1, 2011, for a felony offense to submit to a DNA specimen collection procedure administered by the head of the arresting law enforcement agency. The head of the arresting law enforcement agency must cause the DNA specimen to be collected from the person during the intake process at the jail, community-based correctional facility, detention facility, or law enforcement agency office or station to which the arrested person is taken after the arrest. The head of the arresting law enforcement agency must cause the DNA specimen to be collected in accordance with the specified statutory collection procedure (discussed in "**Collection of DNA specimens**," below). (R.C. 2901.07(B)(1).)

The bill also clarifies that the procedures described under "**Existing law**" above do not apply if a person is subject to the procedures described in the bill (R.C. 2901.07(B)(2), (3), (4)(b), and (5)).

The bill defines "head of the arresting law enforcement agency" to mean whichever of the following is applicable regarding the arrest in question (R.C. 2901.07(A)(4)):

(1) If the arrest was made by a sheriff or a deputy sheriff, the sheriff who made the arrest or who employs the deputy sheriff who made the arrest;

(2) If the arrest was made by a law enforcement officer of a law enforcement agency of a municipal corporation, the chief of police, marshal, or other chief law enforcement officer of the agency that employs the officer who made the arrest;

(3) If the arrest was made by a constable or a law enforcement officer of a township police department or police district police force, the constable who made the arrest or the chief law enforcement officer of the department or agency that employs the officer who made the arrest;

(4) If the arrest was made by the Superintendent or a trooper of the State Highway Patrol, the Superintendent of the State Highway Patrol;

(5) If the arrest was made by a law enforcement officer not identified in paragraphs (1) to (4) above, the chief law enforcement officer of the law enforcement agency that employs the officer who made the arrest.

Collection of DNA specimens

Existing law

Under existing law, if the DNA specimen is collected by withdrawing blood from the person or a similarly invasive procedure, a physician, registered nurse, licensed practical nurse, duly licensed clinical laboratory technician, or other qualified medical practitioner must collect in a medically approved manner the DNA specimen required to be collected. If the DNA specimen is collected by swabbing for buccal cells or a similarly noninvasive procedure, R.C. 2901.07 does not require that the DNA specimen be collected by a qualified medical practitioner of that nature. No later than 15 days after the date of the collection of the DNA specimen, the Director of Rehabilitation and Correction or the chief administrative officer of the jail, community-based correctional facility, or other county, multicounty, municipal, municipal-county, or multi-municipal detention facility, in which the person is serving the prison term, community residential sanction, or term of imprisonment must cause the DNA specimen to be forwarded to the Bureau of Criminal Identification and Investigation in accordance with procedures established by the Superintendent of the Bureau. The Bureau must provide the specimen vials, mailing tubes, labels, postage, and instructions needed for the collection and forwarding of the DNA specimen to the Bureau. (R.C. 2901.07(C).)

Existing law also requires 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 to cause a DNA specimen to be collected in accordance with the procedures

described in "**Submission of DNA specimen**" and "**Collection of DNA specimen**" above (R.C. 2901.07(D)).

Operation of the bill

The bill includes the head of the arresting law enforcement agency regarding a DNA specimen taken from a person who is 18 years of age or older and is arrested for a felony offense among the persons who must cause the DNA specimen to be forwarded to the Bureau of Criminal Identification and Investigation (R.C. 2901.07(C)). The bill also removes the requirement that the specified persons listed above cause a DNA specimen to be collected in accordance with the procedures described in "**Submission of DNA specimen**" and "**Collection of DNA specimen**" above and instead provides that the DNA collection duty under R.C. 2901.07(B)(1) applies to any person who is 18 years of age or older and who is arrested on or after July 1, 2011, for any felony offense and that the DNA specimen collection duties set forth in R.C. 2901.07(B)(2), (3), (4)(a), (4)(b), and (5) apply to any person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to any felony offense or any of the misdemeanor offenses described under "**Submission of a DNA specimen**" above (R.C. 2901.07(D)).

DNA testing--offender who is convicted of a felony

Eligibility to apply

Existing law

The existing post-conviction DNA testing law allows certain convicted felons who are inmates in a prison and who were sentenced by a court or by a jury and a court to submit an application for DNA testing to the court of common pleas that sentenced the inmate for the offense for which the inmate is requesting the testing. Generally, a convicted felon may submit an application for DNA testing if the felon is an "eligible inmate." Existing law defines an "inmate" as an inmate in a prison who was sentenced by a court, or by a jury and a court, of Ohio. To be an "eligible inmate" under existing law, an inmate must satisfy all of the following criteria: (1) the offense for which the inmate is incarcerated and is requesting the testing is a felony, 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 and is in prison serving that prison term or under that sentence of death, (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, and (4) the inmate did not plead guilty or no contest to the offense for which the inmate is incarcerated and is requesting the testing (R.C. 2953.71(F) and (K) and 2953.72(C)). The court, based on statutory criteria and procedures (see **COMMENT** 1 for a summary of the procedures), decides whether an

inmate's 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).)

If an inmate files an application under the provisions described in the preceding paragraph and the application is accepted, the DNA test is conducted in accordance with specified procedures (R.C. 2953.77 to 2953.81; see **COMMENT** 1). If the DNA test is performed and, when analyzed in the context of and upon consideration of all admissible evidence related to the inmate's case, it provided results that establish by clear and convincing evidence the actual innocence of the inmate of that felony offense or, if the inmate was sentenced to death, establish by clear and convincing evidence actual innocence of the aggravating circumstance the inmate was found guilty of committing and that is or are the basis of that sentence of death, 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. A court may entertain a petition for postconviction relief filed by an inmate in these circumstances even if the period that generally is prescribed for the filing of such a petition has expired or the inmate has filed a previous petition requesting similar relief. (R.C. 2953.21 and 2953.23.)

Operation of the bill

The bill broadens the criteria that a convicted felon must satisfy in order to be eligible to submit an application for DNA testing so that certain convicted felons who are not inmates in a prison at the time in question might qualify as being eligible to submit an application. Under the bill, generally, a convicted felon may submit an application for DNA testing if the felon is an "eligible offender" (replacing the existing "eligible inmate"). The bill defines an "offender" as a criminal offender who was sentenced by a court or by a jury and a court of Ohio (replacing the existing definition of "inmate"). To be an "eligible offender" under the bill, an offender must satisfy all of the following criteria (R.C. 2953.71(F) and (K) and 2953.72(C)):

(1) The offense for which the offender is requesting the testing is a felony, and the offender was convicted by a judge or jury of that offense.

(2) One of the following applies (language added by the bill is in italics): (a) the *offender* was sentenced to a prison term or sentence of death for that felony, and the *offender* is in prison serving that prison term or under that sentence of death, *has been "paroled" or is under probation regarding that felony, is under "post-release control" regarding that felony, or has been released from that prison term and is under a "community control sanction" regarding that felony, (b) the offender was not sentenced to a prison term or sentence of death for the felony, but was sentenced to a community control sanction for that felony and is under that community control sanction, or (c) the felony was a "sexually oriented offense" or "child-victim oriented offense," and the offender has a duty to comply with the requirements of*

the Sex Offender Registration and Notification Law (the SORN Law, contained in R.C. Chapter 2950.) *relative to that felony* (see "**Additional DNA definitions**," below for terms in quotes).

(3) The *offender* did not plead guilty or no contest to the offense for which the inmate is incarcerated and is requesting the testing.

(4) *The offender has not died prior to submitting the application for the DNA testing*.

The bill eliminates the existing criterion that, on the date on which the application for DNA testing 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 (R.C. 2953.72(C)).

The bill replaces all existing references in the DNA testing provisions, and in the related postconviction relief provisions, to "eligible inmate" and "inmate" with references to "eligible offender" and "offender" (R.C. 2953.21(A), 2953.23(A), 2953.71(A), (C), (G), (H), (I), (L), (M), and (O), 2953.72(A) and (B), 2953.73, 2953.74, 2953.75, 2953.76, 2953.77, 2953.78, 2953.79, 2953.81, and 2953.84).

Obtaining of a sample of biological material from the felon

Existing law

Under existing law, if an eligible inmate submits an application for DNA testing under the mechanism described above for offenders convicted of a felony and if the application is accepted and DNA testing is to be performed, a sample of biological material must be obtained from the inmate in accordance with the procedure described below, 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 biological material from the inmate in accordance with medically accepted procedures. If DNA testing is to be performed for an inmate, the court must require the state to coordinate with the Department of Rehabilitation and Correction (DRC) as to the time and place at which the sample of biological material will be obtained from the inmate. The sample must be obtained from the inmate at the facility in which the inmate is housed, and DRC must make the inmate available at the specified time. The court must require the state to 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 require the state to coordinate with the testing authority regarding the obtaining of the sample from the inmate.

If DNA testing is to be performed for an inmate as described in the preceding paragraph, and 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 court is required to rescind its prior acceptance of the application for DNA testing for the inmate and deny the application. For purposes of the provision described in this paragraph, 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.

Existing law requires the extracting personnel to make the determination as to whether an eligible inmate for whom DNA testing is to be performed is refusing to submit to the collection of a sample of biological material from the inmate or is hindering the state from obtaining a sample of biological material from the inmate at the time and date of the scheduled collection of the sample. If the extracting personnel determine that 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, maintain the documentation, and notify the court of the inmate's refusal or hindrance. (R.C. 2953.79.)

Operation of the bill

The bill modifies the provisions regarding the obtaining of a biological sample from the felon in the following ways:

(1) It replaces all existing references in the provisions to "eligible inmate" and "inmate" with references to "eligible offender" and "offender" (R.C. 2953.79(A), (B), (C), and (D)).

(2) It recognizes that, in the future, not all eligible offenders for whom DNA testing will be performed will be inmates in a DRC prison and, as a result, provides for the taking of the sample in other places. Specifically, it provides that if DNA testing is to be performed for an offender (language added by the bill is in italics), the court must require the state to coordinate with DRC *or the other state agency or entity of local government with custody of the offender, whichever is applicable,* as to the time and place at which the sample of biological material will be obtained from the offender. *If the offender is in prison or is in custody in another facility at the time the DNA testing is to be performed,* the sample of biological material must be obtained from the offender at the facility in which the offender is housed, and DRC *or the other state agency or entity of local*

government with custody of the offender, whichever is applicable, must make the offender available at the specified time. As under existing law, the court must require the state to provide notice to the offender and to the offender's counsel of the date on which, and the time and place at which, the sample will be so obtained. (R.C. 2953.79(B).)

State maintenance of results of DNA testing

Existing law

Under existing law, if an eligible inmate submits an application for DNA testing under the mechanism described above for offenders convicted of a felony and if DNA testing is performed based on that application, upon completion of the testing: (1) the results of the testing are a public record, (2) the court or the testing authority must provide a copy of the results of the testing to the prosecuting attorney, the Attorney General (the AG), and the subject inmate, (3) if the postconviction proceeding in question is pending at that time in an Ohio court, the court of common pleas that decided the DNA application or the testing authority must provide a copy of the results of the testing to any Ohio court, and, if it is pending in a federal court, the court of common pleas or testing authority must provide a copy of the results of the testing to that federal court, (4) the testing authority must provide a copy of the results of the testing to the court of common pleas that decided the DNA application, and (5) the inmate or the state may enter the results of the testing into any proceeding.

In addition to the requirements described in the preceding paragraph, the court or a designee of the court must require the state to maintain the results of the DNA testing and to 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. (R.C. 2953.81.)

Operation of the bill

The bill modifies the provisions that specify the requirements that must be satisfied upon completion of DNA testing in the following ways:

(1) It replaces all existing references in the provisions to "eligible inmate" and "inmate" with references to "eligible offender" and "offender" (R.C. 2953.81(A), (C), and (F)).

(2) It modifies the provisions requiring the state to maintain the results of DNA testing to recognize that, in the future, not all eligible offenders for whom DNA testing will be performed will be serving a prison term. Specifically, it provides that (language added by the bill is in italics) the samples must be preserved during the entire period of time for which the offender is imprisoned *or confined* relative to the sentence in question, *is on parole or probation relative to that sentence, is under post-release control or a community control sanction relative to that sentence, or has a duty to comply with the requirements of the SORN Law relative to that sentence. Additionally, if the prison term or confinement under the sentence in question expires, if the sentence in question is a sentence of death and the offender is executed, or if the parole or probation period, the period of post-release control, the community control sanction, or the duty to comply with the SORN Law requirements under the sentence in question ends, the samples must be preserved* for a reasonable period of time of not less than 24 months after the term *or confinement* expires, the offender is executed, *or the parole or probation period, the period of post-release control, the community control sanction, or the duty to comply with the SORN Law requirements ends, whichever is applicable*. 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 *or confinement* expires, the offender is executed, *or the parole or probation period, the period of post-release control, the community control sanction, or the duty to comply with the SORN Law requirements ends, whichever is applicable*. The bill retains without change the related provisions of existing law that are discussed above in the first paragraph under "**Existing law**." (R.C. 2953.81(A).)

Additional DNA definitions

As used in the provisions described above in "**Operation of the bill**" under "**Eligibility to apply**" (R.C. 2953.71(N), (S), and (T), by reference to existing R.C. 2929.01, 2967.01, and 2950.01, and R.C. 2953.71(U)):

(1) "Community control sanction" means a sanction that is not a prison term and that is described in R.C. 2929.15, 2929.16, 2929.17, or 2929.18 or a sanction that is not a jail term and is described in R.C. 2929.26, 2929.27, or 2929.28 (including probation if the sentence involved was imposed for a felony committed prior to July 1, 1996, or for a misdemeanor committed prior to January 1, 2004).

(2) "Parole" means, regarding a prisoner who is serving a prison term for aggravated murder or murder, who is serving a prison term of life imprisonment for rape or for felonious sexual penetration as it existed under R.C. 2967.12 prior to

September 3, 1996, or who was sentenced prior to July 1, 1996, a release of the prisoner from confinement in any state correctional institution by the Adult Parole Authority that is subject to the eligibility criteria specified in R.C. Chapter 2967. and that is under the terms and conditions, and for the period of time, prescribed by the Authority in its published rules and official minutes or required by R.C. 2967.131(A) or another provision of R.C. Chapter 2967.

(3) "Post-release control" means a period of supervision by the Adult Parole Authority after a prisoner's release from imprisonment that includes one or more "post-release control sanctions" imposed under R.C. 2967.28 ("post-release control sanction" means a sanction that is authorized under R.C. 2929.16 to 2929.18 and that is imposed upon a prisoner upon the prisoner's release from a prison term).

(4) "Sexually oriented offense" and "child-victim oriented offense" mean any offense that is within the definition of either of those terms that is set forth in the existing SORN Law.

(5) "Definitive DNA test" means a DNA test that clearly establishes that biological material from the perpetrator of the crime was recovered from the crime scene and also clearly establishes whether or not the biological material is that of the eligible offender. A prior DNA test is not definitive if the eligible offender proves by a preponderance of the evidence that because of advances in DNA technology there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may have failed to discover. Prior testing may have been a prior "definitive DNA test" as to some of the biological evidence but may not have been a prior "definitive DNA test" as to other biological evidence.

DNA testing--offender who pleads guilty or no contest to a felony

Existing law

The existing post-conviction DNA testing law also allows certain 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 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 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 inmate who pleaded guilty or no contest to a felony offense, who satisfies the criteria set forth in the preceding paragraph, and who wishes to request DNA testing must submit, in accordance with existing statutory procedures an application for the testing to the court of common pleas. The inmate must specify on the application the

offense or offenses for which the inmate is requesting the DNA testing. The application and the acknowledgement that must accompany it are the same application and acknowledgement as are used by eligible inmates who were convicted of a felony and request DNA testing under the mechanism described above. Upon filing the application the inmate must serve a copy on the prosecuting attorney.

Within 45 days after the filing of the application for DNA testing, 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 the DNA testing. If the prosecuting attorney agrees that the inmate should be permitted to obtain the DNA testing, the application, written statement, and procedures are the same as if the inmate was an inmate who had been convicted of a felony and for whom an application for DNA testing had been accepted. (R.C. 2953.82(A) to (C).)

If the prosecuting attorney disagrees that the inmate should be permitted to obtain DNA testing, the prosecuting attorney's disagreement is final, and no court may order the requested DNA testing (R.C. 2953.82(D); but see **COMMENT** 2). If the prosecuting attorney fails to file a written statement of agreement or disagreement, the court may order the prosecuting attorney to file a statement of that nature within 15 days of the date of the order (R.C. 2953.82(E)).

If an inmate files an application under the provisions described in the preceding paragraph and the application is accepted, the DNA test is conducted in accordance with specified procedures that are the same as those that apply regarding an eligible inmate convicted of a felony who files an application for DNA testing and whose application is accepted under the provisions described above in "**DNA testing--offender who is convicted of a felony**" (R.C. 2953.77 to 2953.81; see **COMMENT** 1). If the DNA test provided results that establish by clear and convincing evidence the actual innocence of the inmate of that felony offense or establish by clear and convincing evidence actual innocence of the aggravating circumstance that is the basis of the sentence of death, 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. A court may entertain a petition for postconviction relief filed by an inmate in these circumstances even if the period that generally is prescribed for the filing of such a petition has expired or the inmate has filed a previous petition requesting similar relief. (R.C. 2953.21 and 2953.23.)

Operation of the bill

The bill repeals the mechanism that allows certain 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 (repeal of R.C. 2953.82). The bill repeals all existing references to the mechanism in the DNA testing provisions (R.C. 2953.71(A), (G), (I), (L), (M), (O), and (R), 2953.72(B) and repealed (A)(11), and 2953.83) and repeals an existing reference to the mechanism in the law regarding the State DNA Laboratory and laboratories under contract with the Bureau of Criminal Identification and Investigation (R.C. 109.573(I)). The bill modifies the language of the postconviction relief provisions that refers to the mechanism so that the language instead refers to the mechanism as it exists under current law, prior to the bill's effective date--as a result, for inmates who use the mechanism prior to its repeal by the bill, the postconviction relief provisions still will be available to the inmates to the same extent as if the bill did not repeal the mechanism (R.C. 2953.21(A)(1) and 2953.23(A)(2)).

Custodial interrogations

In general

The bill defines a "custodial interrogation" 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, as specified by the United States Supreme Court in *Miranda v. Arizona* (1966), 384 U.S. 436, and subsequent decisions, and ending when the questioning has completely finished.

The bill provides that all "statements" (see "**Custodial interrogation definitions**," below for definitions of terms in quotes) made by a person who is the suspect of a violation of or possible violation of R.C. 2903.01 (aggravated murder), 2903.02 (murder), or 2903.03 (voluntary manslaughter), a violation of R.C. 2903.04 (involuntary manslaughter) or 2903.06 (aggravated vehicular homicide, vehicular homicide, and vehicular manslaughter) that is a felony of the first or second degree, a violation of R.C. 2907.02 (rape) or 2907.03 (sexual battery), or an attempt to commit a violation of R.C. 2907.02 during a custodial interrogation in a place of detention are presumed to be voluntary if the statements made by the person are electronically recorded. The person making the statements during the electronic recording of a custodial interrogation has the burden of proving that the statements made during the custodial interrogation were not voluntary. There is no penalty against the law enforcement agency that employs a law enforcement officer if the law enforcement officer fails to electronically record as required under the bill a custodial interrogation. A law enforcement officer's failure to electronically record a custodial interrogation does not create a private cause of action against that law enforcement officer. (R.C. 2933.81(A)(1) and (B).)

Admission of statement, in certain circumstances, if not recorded

Under the bill, a failure to electronically record a statement as required under the bill does not provide the basis to exclude or suppress the statement in any criminal proceeding, delinquent child proceeding, or other legal proceeding (R.C. 2933.81(C)).

Cataloguing and preservation of recordings

Under the bill, law enforcement personnel are required to clearly identify and catalogue every electronic recording of a custodial interrogation that is recorded pursuant to the bill.

If a criminal or delinquent child proceeding is brought against a person who was the subject of a custodial interrogation that was electronically recorded, law enforcement personnel 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.

Upon motion by the defendant in a criminal proceeding or the alleged delinquent child in a delinquent child proceeding, the court may order that a copy of an electronic recording of a custodial interrogation of the person be preserved for any period beyond the expiration of all appeals, post-conviction relief proceedings, and *habeas corpus* proceedings.

If no criminal or delinquent child proceeding is brought against a person who was the subject of a custodial interrogation that was electronically recorded pursuant to the bill, law enforcement personnel are not required to preserve the related recording. (R.C. 2933.81(D).)

Custodial interrogation definitions

The bill provides the following definitions for its provisions regarding the recording of custodial interrogations (R.C. 2933.81(A)):

"***Electronic recording***" or "***electronically recorded***" means an audio and visual recording that is an authentic, accurate, unaltered record of a custodial interrogation.

"***Law enforcement vehicle***" means a vehicle primarily used by a law enforcement agency or by an employee of a law enforcement agency for official law enforcement purposes.

"***Place of detention***" means a jail, police or sheriff's station, holding cell, "state correctional institution," "local correctional facility," "detention facility," or Department

of Youth Services (DYS) facility. As used in this definition: (1) "***state correctional institution***" includes any institution or facility that is operated by DRC and that is used for the custody, care, or treatment of criminal, delinquent, or psychologically or psychiatrically disturbed offenders (by reference to existing R.C. 2967.01, which is not in the bill), (2) "***local correctional facility***" means a county, multicounty, municipal, municipal-county, or multicounty-municipal jail or workhouse, a minimum security jail established under R.C. 341.23 or 753.21, or another county, multicounty, municipal, municipal-county, or multicounty-municipal facility used for the custody of persons arrested for any crime or delinquent act, persons charged with or convicted of any crime, or persons alleged to be or adjudicated a delinquent child (by reference to existing R.C. 2903.13, which is not in the bill), and (3) "***detention facility***" means any public or private place used for the confinement of a person charged with or convicted of any crime in Ohio or another state or under the laws of the United States or alleged or found to be a delinquent child or unruly child in Ohio or another state or under the laws of the United States (by reference to existing R.C. 2921.01, which is not in the bill). "Place of detention" does not include a law enforcement vehicle.

"***Statement***" means an oral, written, sign language, or nonverbal communication.

Preservation of biological evidence

In general

The bill enacts provisions that generally require the preservation of "biological evidence" for specified periods of time by "governmental evidence-retention entities." It defines "biological evidence" 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" (see "**Biological evidence-preservation definitions**," below) 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 specifies that this definition applies whether the material in question is catalogued separately, such as on a slide or swab or in a test tube, or is present on other evidence, including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups or containers, or cigarettes). It defines "governmental evidence-retention entity" to mean all of the following: (1) 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, and (2) any official or employee of any entity or individual described in clause (1) of this sentence.

The bill requires each governmental evidence-retention entity that secures any biological evidence in relation to an investigation or prosecution of a criminal offense or delinquent act that is a violation of R.C. 2903.01 (aggravated murder), 2903.02 (murder), or 2903.03 (voluntary manslaughter), a violation of R.C. 2903.04 (involuntary manslaughter or 2903.06 (aggravated vehicular homicide, vehicular homicide, and vehicular manslaughter) that is a felony of the first or second degree, a violation of R.C. 2907.02 (rape) or 2907.03 (sexual battery) or 2907.05(A)(4) or (B) (gross sexual imposition when the victim is a certain specified minor), or an attempt to commit a violation of R.C. 2907.02 (attempted rape) to secure the biological evidence for whichever of the following periods of time is applicable: (1) for a violation of R.C. 2903.01 (aggravated murder) or 2903.02 (murder), for the period of time that the offense or act remains unsolved, (2) for a violation of R.C. 2903.03 (voluntary manslaughter), a violation of R.C. 2903.04 (involuntary manslaughter) or 2903.06 (aggravated vehicular homicide, vehicular homicide, and vehicular manslaughter) that is a felony of the first or second degree, a violation of R.C. 2907.02 (rape), 2907.03 (sexual battery), or 2907.05(A)(4) or (B) (gross sexual imposition when the victim is a certain specified minor), or an attempt to commit a violation of R.C. 2907.02 (attempted rape), for a period of 30 years if the offense or act remains unsolved, or (3) if any person is convicted of or pleads guilty to the offense, or is adjudicated a delinquent child for committing the delinquent act, for the earlier of the following: (i) the expiration of the latest of the following periods of time that apply to the person: the period of time that the person is incarcerated, is in a DYS institution or other juvenile facility, is under a community control sanction for that offense, is under any order of disposition for that act, is on probation or parole for that offense, is under judicial release or supervised release for that act, is under post-release control for that offense, is involved in civil litigation in connection with that offense or act, or is subject to registration and other duties imposed for that offense or act under the SORN Law or (ii) 30 years. If after the period of 30 years the person remains incarcerated, then the governmental evidence-retention entity must secure the biological evidence until the person is released from incarceration or dies.

The bill states that its biological evidence-preservation provisions apply to evidence likely to contain biological material that was in the possession of any governmental evidence-retention entity during the investigation and prosecution of a criminal case or delinquent child case involving a violation of R.C. 2903.01 (aggravated murder), 2903.02 (murder), or 2903.03 (voluntary manslaughter), a violation of R.C. 2903.04 (involuntary manslaughter) or 2903.06 (aggravated vehicular homicide, vehicular homicide, and vehicular manslaughter) that is a felony of the first or second degree, a violation of R.C. 2907.02 (rape), or 2907.03 (sexual battery), or R.C. 2907.05(A)(4) or (B) (gross sexual imposition when the victim is a certain specified minor) or an attempt to commit a violation of R.C. 2907.02 (attempted rape).

A governmental evidence-retention entity that possesses biological evidence must retain the biological evidence in the amount and manner sufficient to develop a "DNA" "profile" (see "**Biological evidence-preservation definitions**," below) from the biological material contained in or included on the evidence. (R.C. 2933.82(A)(1), (A)(6), (B)(1), (B)(2), and(B)(3).)

Preparation of inventory

Under the bill, upon written request by the defendant in any criminal case or the alleged delinquent child in any delinquent child case involving a violation of R.C. 2903.01 (aggravated murder), 2903.02 (murder), or 2903.03 (voluntary manslaughter), a violation of R.C. 2903.04 (involuntary manslaughter) or 2903.06 (aggravated vehicular homicide, vehicular homicide, and vehicular manslaughter) that is a felony of the first or second degree, a violation of R.C. 2907.02 (rape), 2907.03 (sexual battery), or R.C. 2907.05(A)(4) or (B) (gross sexual imposition when the victim is a certain specified minor), or an attempt to commit a violation of R.C. 2907.02 (attempted rape), a governmental evidence-retention entity that possesses biological evidence must prepare an inventory of the biological evidence that has been preserved in connection with the defendant's criminal case or the alleged delinquent child's delinquent child case (R.C. 2933.82(B)(4)).

Exception authorizing early destruction of biological evidence, after giving notice

When the exception applies

The bill generally permits a governmental evidence-retention entity that possesses biological evidence that includes biological material to destroy the evidence before the expiration of the applicable period of time described above in the second paragraph under "**In general**" if all of the following apply (R.C. 2933.82(B)(5)):

(1) No other provision of federal or state law requires the state to preserve the evidence.

(2) The governmental evidence-retention entity, by certified mail, return receipt requested, provides notice of intent to destroy the evidence to all of the following: (a) all persons who remain in custody, incarcerated, in a DYS institution or other juvenile facility, under a community control sanction, under any order of disposition, on probation or parole, under judicial release or supervised release, under post-release control, involved in civil litigation, or subject to registration and other duties imposed for that offense or act under the SORN Law as a result of a criminal conviction, delinquency adjudication, or commitment related to the evidence in question, (b) the attorney of record for each person who is in custody in any circumstance described in

clause (a) of this paragraph if the attorney of record can be located, (c) the State Public Defender, (d) the office of the prosecutor of record in the case that resulted in the custody of the person in custody in any circumstance described in clause (a) of this paragraph, and (e) the AG.

(3) No person who is notified under the provision described in the preceding paragraph does either of the following within one year after the date on which the person receives the notice: (a) files a motion for testing of evidence under the state's law governing DNA testing of persons who are convicted of or plead guilty or no contest to a felony, as described above in "**DNA testing--offender who is convicted of a felony offense**" or "**DNA testing--offender who pleads guilty or no contest to a felony offense**," or (b) submits a written request for retention of evidence to the governmental evidence-retention entity that provided notice of its intent to destroy evidence under the provision described in the preceding paragraph.

Retention after provision of notice, upon request

The bill specifies that except as provided in the next paragraph if, after providing notice under the provision described above in paragraph (2) under "**When the exception applies**" of its intent to destroy evidence, a governmental evidence-retention entity receives a written request for retention of the evidence from any person to whom the notice is provided, the governmental evidence-retention entity must retain the evidence while the person referred to in clause (a) of that paragraph remains in custody, incarcerated, in a DYS or other juvenile facility, under a community control sanction, under any order of disposition, on probation or parole, under judicial release or supervised release, under post-release control, involved in civil litigation, or subject to registration and other duties imposed for that offense or act under the SORN Law as a result of a criminal conviction, delinquency adjudication, or commitment related to the evidence in question (R.C. 2933.82(B)(6)).

Exception authorizing early destruction of biological evidence when pleads guilty or no contest

The bill allows a governmental evidence-retention entity that possesses biological evidence that includes biological material to destroy the evidence five years after a person pleads guilty or no contest to a violation of R.C. 2903.01 (aggravated murder), 2903.02 (murder), or 2903.03 (involuntary manslaughter), a violation of R.C. 2903.04 (involuntary manslaughter) or 2903.06 (aggravated vehicular homicide, vehicular homicide, vehicular manslaughter) that is a felony of the first or second degree, a violation of R.C. 2907.02 (rape), 2907.03 (sexual battery), or 2907.05(A)(4) or (B) (gross sexual imposition when the victim is a certain specified minor), or an attempt to commit a violation of R.C. 2907.02 (rape) and all appeals have been exhausted unless,

upon a motion to the court by the person who pleaded guilty or no contest or the person's attorney and notice to those persons described in "**Exception authorizing early destruction of biological evidence, after giving notice**," above, requesting that the evidence not be destroyed, the court finds good cause as to why that evidence must be retained (R.C. 2933.82(B)(7)).

Exception authorizing early destruction of biological evidence, when retention physically impracticable

The bill specifies that a governmental evidence-retention entity is not required to preserve physical evidence pursuant to the bill's provisions that is of such a size, bulk, or physical character as to render retention impracticable. When retention of physical evidence that otherwise would be required to be retained pursuant to the bill's provisions is impracticable as described in this provision, the governmental evidence-retention entity that otherwise would be required to retain the physical evidence must remove and preserve portions of the material evidence likely to contain biological evidence related to the offense, in a quantity sufficient to permit future DNA testing before returning or disposing of that physical evidence. (R.C. 2933.82(B)(8).)

Preservation of Biological Evidence Task Force

The bill establishes within the Bureau of Criminal Identification and Investigation of the AG's Office a Preservation of Biological Evidence Task Force. The Task Force must consist of officers and employees of the Bureau; a representative from the Ohio Prosecutors Association; a representative from the Ohio State Coroners Association; a representative from the Ohio Association of Chiefs of Police; a representative from the Ohio Public Defenders Office, in consultation with the Ohio Innocence Project; and a representative from the Buckeye State Sheriffs Association. The bill requires the Task Force to establish a system regarding the proper preservation of biological evidence in Ohio and specifies that, in establishing the system, the Task Force must do all of the following: (1) devise standards regarding the proper collection, retention, and cataloguing of biological evidence for ongoing investigations and prosecutions, and (2) recommend 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 provides that, in consultation with the Task Force, the Division of Criminal Justice Services of the Department of Public Safety must administer and conduct training programs for law enforcement officers and other relevant employees who are charged with preserving and cataloguing biological evidence regarding the methods and procedures referenced in the bill's provisions described above that require or relate to the preservation of biological evidence. (R.C. 109.561 and 2933.82(C).)

Biological evidence-preservation definitions

The bill provides the following definitions for its provisions regarding the preservation of biological evidence (R.C. 2933.82(A)):

"***Biological material***" means any product of a human body containing DNA (by reference to existing R.C. 2953.71).

"***DNA***" means human Deoxyribonucleic Acid (by reference to R.C. 109.573).

"***Profile***" means a unique identifier of an individual, derived from DNA.

"***Prosecutor***" includes the county prosecuting attorney and any assistant prosecutor designated to assist the county prosecuting attorney, and, in the case of courts inferior to courts of common pleas, includes the village solicitor, city director of law, or similar chief legal officer of a municipal corporation, any such officer's assistants, or any attorney designated by the prosecuting attorney of the county to appear for the prosecution of a given case (by reference to existing R.C. 2935.01, which is not in the bill).

Eyewitness identification procedures in lineups

In general

The bill enacts provisions that govern the conduct of lineups for purposes of the identification by an "eyewitness" (see "**Lineup definitions**," below, for definitions of terms in quotes) of persons suspected of committing an offense. It specifies that, prior to conducting any "live lineup" or "photo lineup" on or after the bill's effective date, 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 procedures, at a minimum, must impose the following requirements (R.C. 2933.83(B)):

(1) Unless impracticable, a "blind" or "blinded" "administrator" must conduct the live lineup or photo lineup.

(2) When it is impracticable for a blind administrator to conduct the live lineup or photo lineup, the administrator must state in writing the reason for that impracticability.

(3) When it is impracticable for either a blind or blinded administrator to conduct the live lineup or photo lineup, the administrator must state in writing the reason for that impracticability.

(4) The administrator conducting the lineup must make a written record that includes: (a) all identification and nonidentification results obtained during the lineup, signed by the eyewitnesses, including the eyewitnesses' confidence statements made immediately at the time of the identification, (b) the names of all persons present at the lineup, (c) the date and time of the lineup, (d) any eyewitness identification of one or more "fillers" in the lineup, and (e) the names of the lineup members and other relevant identifying information, and the sources of all photographs or persons used in the lineup.

(5) If a blind administrator is conducting the live lineup or the photo lineup, the administrator must inform the eyewitness that the suspect may or may not be in the lineup and that the administrator does not know who the suspect is.

Evidence of failure to comply with lineup provisions and procedures--significance

The bill specifies that, for any photo lineup or live lineup that is administered on or after the bill's effective date, all of the following apply (R.C. 2983.33(C)):

(1) Evidence of a failure to comply with any of the bill's lineup provisions or with any procedure for conducting lineups that has been adopted by a law enforcement agency or criminal justice agency pursuant to the requirement described above in "**In general**" and that conforms to any provision described in paragraphs (1) to (5) of that part of this analysis must be considered by trial courts in adjudicating motions to suppress eyewitness identification resulting from or related to the lineup and is admissible in support of any claim of eyewitness misidentification resulting from or related to the lineup as long as that evidence otherwise is admissible.

(2) When such evidence is presented at trial, the jury must be instructed that it may consider credible evidence of noncompliance in determining the reliability of any eyewitness identification resulting from or related to the lineup.

Other scientifically accepted procedures

The bill states that the requirements of the bill regarding the procedures for live lineups or photo lineups conducted by a law enforcement agency or criminal justice entity do not prohibit a law enforcement agency or criminal justice entity from adopting other scientifically accepted procedures for conducting live lineups or photo lineups the scientific community considers more effective (R.C. 2933.83(D)).

Supreme Court rules--adoption and compliance

The bill provides that the General Assembly requests that the Attorney General adopt rules pursuant to R.C. Ch. 119. prescribing specific procedures to be followed for the administration by law enforcement agencies and criminal justice entities in this state of photo lineups, live lineups, and "showups." The General Assembly also requests that any rules of that nature adopted by the Attorney General be consistent with the requirements of the bill. If the Attorney General adopts rules of the type described in this paragraph, on and after the date on which the rules take effect, law enforcement agencies and criminal justice entities in Ohio must comply with the rules in conducting live lineups, photo lineups, and showups. (Section 3(A).)

The bill also provides that the General Assembly requests that the Ohio Judicial Conference review existing jury instructions regarding eyewitness identification for compliance with the bill. (Section 3(B).)

Lineup definitions

The bill provides the following definitions for its provisions regarding the conduct of lineups (R.C. 2933.83(A) and (D)(1)):

"***Administrator***" means the person conducting a photo lineup or live lineup.

"***Blind administrator***" means the administrator does not know the identity of the suspect. "Blind administrator" includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system.

"***Blinded administrator***" means the administrator may know who the suspect is, but does not know which lineup member is being viewed by the eyewitness. "Blinded administrator" includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system.

"***Eyewitness***" means a person who observes another person at or near the scene of an offense.

"***Filler***" means either a person or a photograph of a person who is not "suspected" of an offense and is included in an identification procedure.

"***Folder system***" means a system for conducting a photo lineup that satisfies all of the following:

(1) The investigating officer uses one "suspect photograph" that resembles the description of the suspected perpetrator of the offense provided by the witness, five "filler photographs" of persons not suspected of the offense that match the description

of the suspected perpetrator but do not cause the suspect photograph to unduly stand out, four "blank photographs" that contain no images of any person, and ten empty folders.

(2) The investigating officer places one "filler photograph" into one of the empty folders and numbers it as folder 1.

(3) The administrator places the "suspect photograph" and the other four "filler photographs" into five other empty folders, shuffles the five folders so that the administrator is unaware of which folder contains the "suspect photograph," and numbers the five shuffled folders as folders 2 through 6.

(4) The administrator places the four "blank photographs" in the four remaining empty folders and numbers these folders as folders 7 through 10, and these folders serve as "dummy folders."

(5) The administrator provides instructions to the eyewitness as to the lineup procedure and informs the eyewitness that a photograph of the alleged perpetrator of the offense may or may not be included in the photographs the eyewitness is about to see and that the administrator does not know which, if any, of the folders contains the photograph of the alleged perpetrator. The administrator also must instruct the eyewitness that the administrator does not want to view any of the photographs and will not view any of the photographs and that the eyewitness may not show the administrator any of the photographs. The administrator must inform the eyewitness that if the eyewitness identifies a photograph as being the person the eyewitness saw the eyewitness must identify the photograph only by the number of the photograph's corresponding folder.

(6) The administrator hands each of the ten folders to the eyewitness individually without looking at the photograph in the folder. Each time the eyewitness has viewed a folder, the eyewitness indicates whether the photograph is of the person the eyewitness saw, indicates the degree of the eyewitness's confidence in this identification, and returns the folder and the photograph it contains to the administrator.

(7) The administrator follows the procedures specified for a second viewing if the eyewitness requests to view each of the folders a second time, handing them to the eyewitness in the same order as during the first viewing. The eyewitness is not permitted to have more than two viewings of the folders. The administrator preserves the order of the folders and the photographs they contain in a facedown position in order to document the steps specified in (8) below.

(8) The administrator documents and records the results of the procedure described in paragraphs (1) to (7) above. The documentation and record includes the date, time, and location of the lineup procedure; the name of the administrator; the names of all of the individuals present during the lineup; the number of photographs shown to the eyewitness; copies of each photograph shown to the eyewitness; the order in which the folders were presented to the eyewitness; the source of each photograph that was used in the procedure; a statement of the eyewitness's confidence in the eyewitness's own words as to the certainty of the eyewitness's identification of the photographs as being of the person the eyewitness saw that is taken immediately upon the reaction of the eyewitness to viewing the photograph; and any additional information the administrator considers pertinent to the lineup procedure. If the eyewitness views each of the folders a second time, the administrator must document and record the statement of the eyewitness's confidence in the eyewitness's own words as to the certainty of the eyewitness's identification of a photograph as being of the person the eyewitness saw and document that the identification was made during a second viewing of each of the folders by the eyewitness.

(9) The administrator may not say anything to the eyewitness or give any oral or nonverbal cues as to whether or not the eyewitness identified the "suspect photograph" until the administrator documents and records the results of the procedures described in paragraphs (1) to (6) above and the photo lineup has concluded.

"***Live lineup***" means an identification procedure in which a group of persons, including the "suspected perpetrator" of an offense and other persons not "suspected" of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the "suspect" as the "perpetrator" of the offense.

"***Photo lineup***" means an identification procedure in which an array of photographs, including a photograph of the "suspected perpetrator" of an offense and additional photographs of other persons not "suspected" of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the "suspect" as the "perpetrator" of the offense.

"***Perpetrator***" means the person who committed the offense.

"***Suspect***" means the person believed by law enforcement to be the possible perpetrator of the offense.

"***Showup***" means an identification procedure in which an eyewitness is presented with a single "suspect" for the purpose of determining whether the eyewitness identifies that individual as the "perpetrator" of the offense.

Sealing of records

DNA records and fingerprints

Existing law generally allows a first offender to apply to the sentencing court if convicted in this state, or to a court of common pleas if convicted in another state or in a federal court, for the sealing of the conviction record (R.C. 2953.32(A)(1)). Existing law also allows any person who has been arrested for any misdemeanor offense and who has effected a bail forfeiture to apply to the court in which the misdemeanor criminal case was pending when bail was forfeited for the sealing of the record in the case (R.C. 2953.32(A)(2)). If the court determines, after complying with certain requirements of the sealing law, that the applicant is a first offender or the subject of a bail forfeiture, that no criminal proceeding is pending against the applicant, and that the interests of the applicant in having the records pertaining to the applicant's conviction or bail forfeiture sealed are not outweighed by any legitimate governmental needs to maintain those records, and that the rehabilitation of an applicant who is a first offender has been attained to the satisfaction of the court, the court, generally, must order all official records pertaining to the case sealed (R.C. 2953.32(C)(2)).

Under the bill, DNA records collected in the DNA database and fingerprints filed for record by the Superintendent of the Bureau of Criminal Identification and Investigation cannot be sealed unless the Superintendent receives a certified copy of a final court order establishing that the offender's conviction has been overturned. A court order is not "final" if time remains for an appeal or application for discretionary review with respect to the order. (R.C. 2953.32(H).)

Existing law generally prohibits a law enforcement officer or other person employed by a law enforcement agency from knowingly releasing, disseminating, or otherwise making the investigatory work product available to, or discuss any information contained in it with, any person not employed by the employing law enforcement agency. A law enforcement agency, or person employed by a law enforcement agency, that receives investigatory work product is prohibited from using that work product for any purpose other than the investigation of the offense for which it was obtained from the other law enforcement agency, or from disclosing the name of the person who is the subject of the work product except when necessary for the conduct of the investigation of the offense, or the prosecution of the person for committing the offense, for which it was obtained from the other law enforcement agency. (R.C. 2953.321(C)(1) and (2).) Existing law also generally prohibits any officer or employee of the state, or a political subdivision of the state, from releasing or otherwise disseminating or making available for any purpose involving employment, bonding, or licensing in connection with any business, trade, or profession to any person, or to any department, agency, or other instrumentality of the state, or any

political subdivision of the state, any information or other data concerning any arrest, complaint, indictment, trial, hearing, adjudication, conviction, or correctional supervision the records with respect to which the officer or employee had knowledge of were sealed by an existing order, or were expunged. A person who violates this prohibition is guilty of divulging confidential information, a misdemeanor of the fourth degree. (R.C. 2953.35(A).)

Existing law provides that every law enforcement officer possessing records or reports pertaining to the case that are the officer's specific investigatory work product and that are excepted from the definition of "official records" must immediately deliver the records and reports to the officer's employing law enforcement authority. Generally speaking that officer is prohibited from knowingly releasing, disseminating, or otherwise making the records and reports or any information contained in them available to, or discuss any information contained in this with, any person not employed by the officer's employing law enforcement agency. (R.C. 2953.54(A)(1).) Every law enforcement agency that possesses records or reports pertaining to the case that are its specific investigatory work product and that are excepted from the definition of "official records" or that are the specific investigatory work product of a law enforcement officer it employs and that were delivered to it must generally close the records and reports to all persons who are not directly employed by the law enforcement agency and generally must treat the records and reports, in relation to all persons other than those who are directly employed by the law enforcement agency, as if they did not exist and had never existed. Generally, a person who is employed by the law enforcement agency is prohibited from knowingly releasing, disseminating, or otherwise making the records and reports in the possession of the employing law enforcement agency or any information contained in them available to, or discuss any information contained in them with, any person not employed by the employing law enforcement agency. (R.C. 2953.54(A)(2).) Whoever violates these prohibitions is guilty of divulging confidential information, a misdemeanor of the fourth degree (R.C. 2953.54(B)).

Finally, existing law prohibits an officer or employee of the state or any of its political subdivisions from knowingly releasing, disseminating, or making available for any purpose involving employment, bonding, licensing, or education to any person or to any department, agency, or other instrumentality of the state, or any of its political subdivisions, any information or other data concerning any arrest, complaint, indictment, information, trial, adjudication, or correctional supervision, the records of which have been sealed pursuant to R.C. 2953.52 (sealing of records after not guilty finding, dismissal of proceedings, or no bill by grand jury). A person who violates this prohibition is guilty of divulging confidential information, a misdemeanor of the fourth degree. (R.C. 2953.55(B).)

The bill provides that it is not a violation of the provisions in the three preceding paragraphs for the Bureau of Criminal Identification and Investigation or any authorized employee of the Bureau participating in the investigation of criminal activity to release, disseminate, or otherwise make available to, or discuss with, a person directly employed by a law enforcement agency DNA records collected in the DNA database or fingerprints filed for record by the Superintendent of the Bureau (R.C. 2953.321(C)(3), 2953.35(C), 2953.54(C), and 2953.55(C)).

Under the bill, violations of the sealing law do not provide the basis to exclude or suppress any of the following evidence that is otherwise admissible in a criminal proceeding, delinquent child proceeding, or other legal proceeding (R.C. 2953.56):

(1) DNA records collected in the DNA database;

(2) Fingerprints filed for record by the Superintendent of the Bureau of Criminal Identification and Investigation;

(3) Other evidence that was obtained or discovered as the direct or indirect result of divulging or otherwise using the records described in (1) and (2) above.

For the purposes of the sealing law, the bill defines "fingerprints filed for record" as any fingerprints obtained by the Superintendent of the Bureau of Criminal Identification and Investigation pursuant to R.C. 109.57 (duties of the Superintendent regarding fingerprints, among other things) and 109.571 (National Crime Prevention and Privacy Compact) (R.C. 2953.31(I)).

Sealing of records when court enters judgment that vacates and sets aside the conviction of a person because of DNA testing

A court that enters a judgment that vacates and sets aside the conviction of a person because of DNA testing that was performed under R.C. 2953.71 to 2953.81 or under R.C. 2953.82 must issue 90 days after the court vacates and sets aside the conviction an order directing that all official records pertaining to the case involving the vacated conviction be sealed and that the proceedings in the case are deemed not to have occurred (R.C. 2953.57).

The court must send notice of an order to seal official records issued pursuant to the procedure described in the prior paragraph to any public office or agency that the court knows or has reason to believe may have any record of the case, whether or not it is an official record, that is the subject of the order. The notice must be sent by certified mail, return receipt requested. A person whose official records have been sealed pursuant to an order issued pursuant to the procedure described in the prior paragraph may present a copy of that order and a written request to comply with it, to a public

office or agency that has a record of the case that is the subject of the order. (R.C. 2953.58(A) and (B).)

An order to seal official records issued pursuant to the procedure described in the second prior paragraph applies to every public office or agency that has a record of the case that is the subject of the order, regardless of whether it receives a copy of the order to seal the official records. Upon receiving a copy of an order to seal official records or upon otherwise becoming aware of an applicable order to seal official records issued pursuant to the procedure described in the second prior paragraph, a public office or agency must comply with the order and, if applicable, with the provisions of the bill described below, except that it may maintain a record of the case that is the subject of the order if the record is maintained for the purpose of compiling statistical data only and does not contain any reference to the person who is the subject of the case and the order. (R.C. 2953.58(C) and (D).)

A public office or agency also may maintain an index of sealed official records, in a form similar to that for sealed records of conviction, access to which may not be afforded to any person other than the person who has custody of the sealed official records. The sealed official records to which such an index pertains are not available to any person, except that the official records of a case that have been sealed may be made available to the following persons for the following purposes:

(1) To the person who is the subject of the records upon written application, and to any other person named in the application, for any purpose;

(2) To a law enforcement officer who was involved in the case, for use in the officer's defense of a civil action arising out of the officer's involvement in that case. (R.C. 2953.58(C) and (D).)

Except as otherwise provided in Chapter 2950. of the Revised Code, upon the issuance of an order by a court under the bill directing that all official records pertaining to a case be sealed and that the proceedings in the case be deemed not to have occurred (R.C. 2953.59(A)):

(1) Every law enforcement officer possessing records or reports pertaining to the case that are the officer's specific investigatory work product and that are excepted from the definition of "official records" must immediately deliver the records and reports to the officer's employing law enforcement agency. Except as provided in (3) below, no such officer may knowingly release, disseminate, or otherwise make the records and reports or any information contained in them available to, or discuss any information contained in them with, any person not employed by the officer's employing law enforcement agency.

(2) Every law enforcement agency that possesses records or reports pertaining to the case that are its specific investigatory work product and that are excepted from the definition of "official records," or that are the specific investigatory work product of a law enforcement officer it employs and that were delivered to it under (1) above must, except as provided in (3) below, close the records and reports to all persons who are not directly employed by the law enforcement agency and must, except as provided in (3) below, treat the records and reports, in relation to all persons other than those who are directly employed by the law enforcement agency, as if they did not exist and had never existed. Except as provided in (3) below, no person who is employed by the law enforcement agency may knowingly release, disseminate, or otherwise make the records and reports in the possession of the employing law enforcement agency or any information contained in them available to, or discuss any information contained in them with, any person not employed by the employing law enforcement agency.

(3) A law enforcement agency that possesses records or reports pertaining to the case that are its specific investigatory work product and that are excepted from the definition of "official records," or that are the specific investigatory work product of a law enforcement officer it employs and that were delivered to it under (1) above may permit another law enforcement agency to use the records or reports in the investigation of another offense, if the facts incident to the offense being investigated by the other law enforcement agency and the facts incident to an offense that is the subject of the case are reasonably similar and if all references to the name or identifying information of the person whose records were sealed are redacted from the records or reports. The agency that provides the records and reports may not provide the other agency with the name of the person who is the subject of the case the records of which were sealed.

Whoever violates (1), (2), or (3) above is guilty of divulging confidential information, a misdemeanor of the fourth degree. (R.C. 2953.59(B).)

In any application for employment, license, or any other right or privilege, any appearance as a witness, or any other inquiry, a person may not be questioned with respect to any record that has been sealed pursuant to the bill. If an inquiry is made in violation of this provision, the person whose official record was sealed may respond as if the arrest underlying the case to which the sealed official records pertain and all other proceedings in that case did not occur, and the person whose official record was sealed shall not be subject to any adverse action because of the arrest, the proceedings, or the person's response.

An officer or employee of the state or any of its political subdivisions who knowingly releases, disseminates, or makes available for any purpose involving employment, bonding, licensing, or education to any person or to any department,

agency, or other instrumentality of the state, or of any of its political subdivisions, any information or other data concerning any arrest, complaint, indictment, information, trial, adjudication, or correctional supervision, the records of which have been sealed pursuant to the bill, is guilty of divulging confidential information, a misdemeanor of the fourth degree. (R.C. 2953.60(A) and (B).)

As used in R.C. 2953.57 to 2953.60, "official records" means all records that are possessed by any public office or agency that relate to a criminal case, including, but not limited to: the notation to the case in the criminal docket; all subpoenas issued in the case; all papers and documents filed by the defendant or the prosecutor in the case; all records of all testimony and evidence presented in all proceedings in the case; all court files, papers, documents, folders, entries, affidavits, or writs that pertain to the case; all computer, microfilm, microfiche, or microdot records, indices, or references to the case; all index references to the case; all fingerprints and photographs; all records and investigative reports pertaining to the case that are possessed by any law enforcement officer or agency, except that any records or reports that are the specific investigatory work product of a law enforcement officer or agency are not and shall not be considered to be official records when they are in the possession of that officer or agency; and all investigative records and reports other than those possessed by a law enforcement officer or agency pertaining to the case. "Official records" does not include records or reports maintained pursuant to R.C. 2151.421 by a public children services agency or the department of job and family services. (R.C. 2953.57(B) by cross reference to R.C. 2953.51.)

Procedures for entering DNA records into the National DNA Index System

Current law specifies the various authorizations and requirements of the Attorney General's office and the Bureau of Criminal Identification and Investigation with regards to DNA. The bill authorizes the Attorney General to develop procedures for entering into the National DNA Index System the DNA records submitted pursuant to R.C. 2901.07(B)(1) (described under "**Submission of DNA specimen**," above). (R.C. 109.573(J).)

COMMENT

1. Under existing law, any convicted felon who is an "eligible inmate" under the definition of that term and who wishes to request DNA testing must submit an application for the testing to the court of common pleas that sentenced the inmate, on a form prescribed by the Attorney General (the AG) for this purpose. 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 that contains specified information

and statements by the inmate, is on a form prescribed by the AG for this purpose, and is signed by the inmate. Both the form and the acknowledgement prescribed by the AG also are used by inmates who pleaded guilty or no contest to a felony and who make an application for DNA testing under the provisions described under "**DNA testing--offender who pleads guilty or no contest to a felony**" in the **CONTENT AND OPERATION** portion of this analysis.

If an eligible offender submits an application for DNA testing under these provisions, upon the submission of the application, the eligible inmate must serve a copy of the application on the prosecuting attorney and the AG. The application is assigned to the judge of the court of common pleas who heard the case in which the inmate was convicted of the offense for which the inmate is requesting DNA testing, or, if that judge no longer is a judge of that court, it is assigned according to court rules. The judge to whom the application is assigned decides the application. If an eligible inmate submits an application for DNA testing, regardless of whether 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 testing, any response to the application by the prosecuting attorney or the AG must be filed not later than 45 days after the date of the submission. The prosecuting attorney or the AG, or both, may, but are not required to, file a response to the application. If either files a response, he or she must serve a copy of the response on the eligible inmate.

If an eligible inmate submits an application for DNA testing under these provisions, the court must expedite its review of the application and make a determination as to whether the application should be accepted or rejected in accordance with specified procedures, summarized below. In making the determination, the court must consider the application, supporting affidavits, and documentary evidence, and all the files and records pertaining to the proceedings against the applicant, 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 and all responses to the application filed by a prosecuting attorney or the AG (provided that, if the application and the files and records show the applicant is not entitled to DNA testing, the application may be denied). The court is not required to conduct an evidentiary hearing in conducting its review of, and in making its determination as to whether to accept or reject, the application. Upon making its determination, the court must enter a judgment and order that either accepts or rejects the application and that includes its reasons. The court must send a copy of the judgment and order to the eligible inmate who filed it, the prosecuting attorney, and the AG.

A judgment and order of a court entered as described in the preceding paragraph is appealable only as described in this paragraph. If a court of common pleas rejects an application of an eligible inmate, one of the following applies: (a) if the inmate was sentenced to death for the offense for which the inmate is requesting DNA testing, the inmate may seek leave of the Supreme Court to appeal the rejection to that Court (courts of appeals do not have jurisdiction to review a rejection in these circumstances), or (b) if the inmate was not sentenced to death for the offense for which the inmate is requesting DNA testing, the rejection is a final appealable order and the inmate may appeal it to the court of appeals of the district in which is located that court of common pleas. If a court rejects an eligible inmate's application for DNA testing as described in the preceding paragraph, unless the rejection is overturned on appeal, no court may require the state to administer a DNA test under these provisions on the eligible inmate. (R.C. 2953.72 and 2953.73.)

If an eligible inmate submits an application for DNA testing under these provisions and a prior definitive DNA test has been conducted regarding the same biological evidence that the inmate seeks to have tested, the court is required to reject the application. If an eligible inmate files an application for DNA testing and 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.

If an eligible inmate submits an application for DNA testing under these provisions, the court may accept the application only if one of the following applies: (a) the inmate did not have a DNA test taken at the trial stage in the case in which the inmate is requesting the testing regarding the same biological evidence the inmate seeks to have tested, the inmate shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the case would have been "outcome determinative" (a term defined in R.C. 2953.71) at the 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 (b) 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 requesting the testing regarding the same biological evidence the inmate seeks to have tested, the test was not a prior definitive DNA test, and the inmate shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case would have been "outcome determinative" at the trial stage in that case. In determining whether the "outcome determinative" criterion described in this paragraph has been satisfied, the court must consider all available admissible evidence related to the inmate's case.

Additionally, if an eligible inmate submits an application for DNA testing under these provisions, the court may accept the application only if all of the following apply: (a) the court determines pursuant to procedures set forth in R.C. 2953.75 (see the next paragraph) that biological material was collected from the crime scene or the victim of the offense for which the inmate is requesting the 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" (a term defined in R.C. 2953.71), pursuant to procedures set forth in R.C. 2953.76 (see the next paragraph), determines that the parent sample of the biological material described in clause (a) contains scientifically sufficient material to extract a test sample, that the parent sample is not so minute or fragile as to risk destruction of the parent sample by that extraction (but 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 that the parent sample has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing and that it 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 requesting the 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 or in a retrial of that case in an Ohio court was of such a nature that, if testing is conducted and an "exclusion result" (a term defined in R.C. 2953.71) is obtained, the exclusion result will be outcome determinative, (e) the court determines that, if testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding that inmate, and (f) the court determines pursuant to procedures set forth in R.C. 2953.76 (see the next paragraph) from the "chain of custody" (a term defined in R.C. 2953.71) 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. (R.C. 2953.74.)

R.C. 2953.75 sets forth procedures the court uses to determine whether biological material was collected from the crime scene or victim of the offense for which an eligible inmate who submitted an application is requesting the DNA testing 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. R.C. 2953.76 sets forth procedures the testing authority and court use to determine 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 and reliability regarding that parent sample.

R.C. 2953.77 to 2953.81 govern the treatment of an application for DNA testing under the provisions after the application has been accepted and DNA testing is to be performed. Briefly, R.C. 2953.77 sets forth precautions concerning the chain of custody of the DNA samples from the crime scene or the victim and against contamination of the samples and provisions regarding documentation of that chain of custody, R.C. 2953.78 provides for the selection of the testing authority to be used for the testing, R.C. 2953.79 provides for the obtaining of biological material from the inmate and specifies ramifications if the inmate refuses to submit to the collection of the material or hinders the state from obtaining the material, R.C. 2953.80 provides criteria that the AG must use in approving testing authorities that may be used to conduct the testing, and R.C. 2983.81 provides for the state's maintaining of the results of the testing and its preservation of the samples used, and provided for access to, the distribution of, and the use of, the results of the testing.

2. The Ohio Supreme Court has considered a case involving R.C. 2953.82 and an application for DNA testing made by a person who pleaded guilty to a felony. The Court held that, because R.C. 2953.82(D) provides that a prosecuting attorney's decision to disagree with an inmate's request for DNA testing is final and not appealable by any person and further directs that no court has authority, without agreement of the prosecuting attorney, to order DNA testing, the provision interferes with the exercise of judicial authority, violates the doctrine of separation of powers, and is unconstitutional. The Court specified in its decision that R.C. 2953.82(D) is capable of being severed from the rest of R.C. 2953.82. *State v. Sterling* (2007), 113 Ohio St.3d 255.

HISTORY

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