

SENATE BILL REPORT

SB 6366

As of February 4, 2016

Title: An act relating to submission of DNA markers to a database accessible only to qualified laboratory personnel.

Brief Description: Asserting that submission of DNA markers to a database be accessible only to qualified laboratory personnel.

Sponsors: Senators Darneille, Fain, Fraser, Miloscia, Cleveland, O'Ban, Mullet, Keiser, Conway and Chase.

Brief History:

Committee Activity: Law & Justice: 1/19/16, 2/01/16 [DPS-WM, DNP, w/oRec].
Ways & Means: 2/04/16.

Brief Summary of Bill

- Establishes a statewide DNA database containing DNA samples of adults lawfully arrested for the commission of a crime against persons or residential burglary.
- DNA sample is destroyed if the person is not arraigned for a qualifying offense.
- Automatic expungement by the city or local jail occurs within 60 days if the person is not charged with a a qualifying offense.
- A person may request expungement by State Patrol of the sample and records if the underlying conviction is reversed or dismissed.
- DNA database account receives \$0.50 per traffic infraction.
- Upon conviction, every adult offender for which a crime laboratory analysis is performed must pay \$100 to be used for crime laboratories.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 6366 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

Signed by Senators Padden, Chair; O'Ban, Vice Chair; Darneille and Pearson.

Minority Report: Do not pass.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Signed by Senator Pedersen, Ranking Minority Member.

Minority Report: That it be referred without recommendation.
Signed by Senator Frockt.

Staff: Aldo Melchiori (786-7439)

SENATE COMMITTEE ON WAYS & MEANS

Staff: Travis Sugarman (786-7446)

Background: The Washington State Patrol (WSP) operates and maintains a deoxyribonucleic acid (DNA) identification system. The purpose of the system is to help with criminal investigations and to identify human remains or missing persons. County and city jails, the Department of Corrections, and the Department of Social and Health Services are responsible for collecting biological samples for DNA analysis from offenders incarcerated in their respective facilities. Local police and sheriffs' departments are responsible for collecting biological samples for DNA analysis from offenders who do not serve any term of incarceration.

Offenders from whom a Biological Sample must be Collected. Biological samples are collected from persons convicted of any felony or the following gross misdemeanors: (1) assault in the 4th degree with sexual motivation; (2) communication with a minor for immoral purposes; (3) custodial sexual misconduct in the 2nd degree; (4) failure to register; (5) harassment; (6) patronizing a prostitute; (7) sexual misconduct with a minor in the 2nd degree; (8) stalking; and (9) violation of a sexual assault protection order. Additionally, a sample must be collected from any person required to register as a sex offender.

Testing Biological Samples. The Forensic Laboratory Services Bureau (forensic laboratory) of WSP tests the biological samples for inclusion in the DNA database. The director must give priority to testing samples from persons convicted of sex and violent offenses.

Funding. The sentencing court must charge every offender convicted of an offense included in the database a fee of \$100 for collection of a DNA sample unless it would result in an undue hardship on the offender. 80 percent of the fee is deposited in the DNA Database Account, expenditures from which may only be used for the creation, operation, and maintenance of the DNA database, and 20 percent is remitted to the agency responsible for collecting the sample.

Crimes Against Persons. Crimes against persons include: Aggravated Murder; 1st and 2nd Degree Murder; 1st and 2nd Degree Manslaughter; 1st and 2nd Degree Kidnapping; 1st, 2nd, and 3rd Degree Assault; 1st, 2nd, and 3rd Degree Assault of a Child; 1st, 2nd, and 3rd Degree Rape; 1st, 2nd, and 3rd Degree Rape of a Child; 1st and 2nd Degree Robbery; 1st Degree Arson; 1st Degree Burglary; 1st and 2nd Degree Identity Theft; 1st and 2nd Degree Extortion; Indecent Liberties; Incest; Vehicular Homicide; Vehicular Assault; Felony Driving a Motor Vehicle While Under the Influence of Intoxicating Liquor or Any Drug; Felony Physical Control of a Motor Vehicle While Under the Influence of Intoxicating Liquor or Any Drug; 1st, 2nd, and 3rd Degree Child Molestation; 1st Degree Promoting Prostitution;

Intimidating a Juror; Communication with a Minor; Intimidating a Witness; Intimidating a Public Servant; Bomb Threat, if against a person; Unlawful Imprisonment; Promoting a Suicide Attempt; Riot , if against person; Stalking; Custodial Assault; Domestic Violence Court Order Violations; and Counterfeiting.

Summary of Bill (Recommended Substitute): Applicable Offenses. DNA samples must be collected from all adults lawfully arrested for any crime against persons or residential burglary.

Procedure. From January 1, 2018, to June 30, 2018, it is the right, but not the duty, of the sheriff, director of public safety, or chief of police to collect the DNA samples and forward them to the forensic laboratory. After June 30, 2018, it is their duty to do so. The DNA samples are collected at the time of booking, transfer to the facility, or - if no sample has been taken at the time of the first court appearance - before a person is released from custody. The forensic laboratory of WSP provides the kits for the biological sample collection. If the forensic laboratory already has a DNA sample from the individual, a subsequent sample is not required to be submitted.

All samples are retained at the city or county jail until the person within one year arraigned for a qualifying offense. If the person is not arraigned for a qualifying offense, the samples are immediately destroyed and notice is provided to the person and their counsel. Otherwise, the sample is then sent to the forensic laboratory in a sealed envelope where it is analyzed unless a complete DNA profile for that person has previously been entered in the DNA database.

The person's DNA record must be expunged by the city or county jail automatically if the person is not charged, is found not guilty, or has been acquitted. If the city or county jail negligently or willfully fails to destroy the sample when required, the arrested individual may seek actual damages from the city or county, as well as attorney's fees and costs.

Expungement. At the time the biological sample is taken, the person must be provided with notice of the right to expungement of their sample and record, the procedure for doing so, and their right to bring suit for damages, attorney's fees, and costs if the sample is not destroyed when required. A person may request expungement of their sample and DNA records if the person is not charged with a qualifying offense within one year, is found not guilty or acquitted, or has that conviction reversed and the case dismissed.

To request expungement, the person must submit to the forensic laboratory: (1) a written request for expungement; and (2) a certified copy of a final court order reversing the conviction that required the collection of the sample. When the complete request for expungement is received by the forensic laboratory, the forensic laboratory must expunge the person's DNA sample and DNA records unless the person has a prior conviction or pending charge for which collection is authorized.

Fees. The current fee of \$10 per infraction imposed on a person found to have committed a traffic infraction, and forwarded to the Washington Auto Theft Prevention Authority Account, is reduced to \$9.50. A new fee of \$0.50 is imposed on every person found to have committed

a traffic infraction, with revenues deposited in the state DNA Database Account. The fee cannot be waived or reduced.

The \$100 crime laboratory fee - imposed on a convicted person when a crime laboratory analysis was performed - may not be suspended or waived.

Annual Report. By January 30, 2018, and annually thereafter, the Administrative Office for the Court must report to the Legislature and the Governor on the status of the DNA database.

EFFECT OF CHANGES MADE BY LAW & JUSTICE COMMITTEE (Recommended Substitute): Assault in the 4th degree is removed as a qualifying offense. The DNA collections begin in 2018 rather than 2017. DNA at arrest is done for adults arrested and booked into jail for a qualifying offense. It is clarified that automatic expungement must occur within 60 days rather than "immediately". It is clarified who is responsible for the expungement at the different stages in the criminal process. The \$0.50 traffic infraction fee cannot be waived or reduced. Administrative Office for the Courts is responsible for the annual reports instead of the forensic lab. Various technical changes are made.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill (Law & Justice): PRO: This is not a new idea. Over the years it has become increasingly apparent that the scope of the problem is increasing and the state's response is inadequate. This is a method that will allow us to go on the offense against crime and do something to prevent it. We now know more about DNA collection and analysis. This can be used to exonerate the innocent as well as convict the guilty. If the bill passes, we may be eligible for federal grant money. DNA has become a very valuable tool to solve crimes. The bill strikes the right balance between privacy and crime prevention.

A cheek swab is a minimal intrusion and a limited number of DNA markers are used. The Washington Supreme Court has not ruled on the constitutionality of this process. The forensic laboratory is the most advanced crime fighting tool available today. This bill will save lives.

CON: DNA testing has been found constitutional under the United States Constitution, but the Washington State Constitution is more protective of privacy. You need probable cause in this state to obtain DNA. This is an invasive search for information to go into a database. The law will have a racially disparate impact.

Persons Testifying on Original Bill (Law & Justice): PRO: Senator Darneille, prime sponsor; Georgia Cuddleback, citizen; Laura Niblack, citizen; Monica Alexander, WSP; James McMahan, WASPC; John Tunheim and Tom McBride, WAPA.

CON: Bob Cooper, WACDL and WDA; Shankar Narayan, ACLU; Alex Hur, Statewide Poverty Action Network.

Persons Signed In To Testify But Not Testifying on Original Bill: No one.

Staff Summary of Public Testimony on First Substitute (Ways & Means): PRO: Washington State Patrol is supportive of the bill with some more explanation in sections 6 and 7 around the expungement process to reduce the costs. The Washington Association of Sheriffs and Police Chiefs is in strong support of this bill. Forensic evidence has proven incredibly effective in solving and preventing crimes in other states. Science is not cheap, we think it is well worth the value and encourage you to move the bill forward.

CON: You are buying yourselves a lawsuit with this bill. This appears to be unconstitutional under the Washington Constitution. A DNA sample is a search, and a search requires a warrant unless a search meets certain criteria. This bill will clearly be expensive to the state and ultimately provide no benefit. This is an expensive bill even if the fiscal note is reduced. It is not worth it for three independent reasons. First, it doesn't work. There is no evidence from other states where this exists that there is a difference in crime rates. DNA searches have been upheld under the federal constitution but lost in California and Vermont which are less privacy protected than ours. Finally, the harms of this bill will fall disproportionately on communities of color.

OTHER: Speaking only to Section 12, the section on reporting requirements. Currently, there is a lot of information required in this report that is not available to the Administrator of the Courts through the Jail Information System (JIS). It does not contain arrest data, demographics, nor does it highlight when DNA is obtained at arrest. This would need to come from someplace else. Review of protocols would be a staff heavy, site-visit process. Maybe there is a law enforcement agency that would be better to do this review.

Persons Testifying on First Substitute (Ways & Means): PRO: James McMahan, WA Assoc Sheriffs and Police Chiefs; Monica Alexander, WSP.

CON: Bob Cooper, WA Association of Criminal Defense Lawyers & WA Defender Assoc.; SHANKAR NARAYAN, ACLU of Washington.

OTHER: Mellani McAleenan, Administrative Office of the Courts.

Persons Signed In To Testify But Not Testifying on First Substitute: No one.