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EVIDENCE Proof Generally: Authorize Noninvasive Procedures in Addition to Blood Tests to Collect DNA Samples and Determine Characteristics; Allow Collection of DNA Samples of Convicted Felon in Addition to Sec Offenders; Provide for Sharing DNA Information for Law Enforcement Purposes; Allow Criminal Defendants Access to the DNA Data Bank in Certain Circumstances

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EVIDENCE

Proof Generally: Authorize Noninvasive Procedures in Addition to Blood Tests To Collect DNA Samples and Determine Characteristics; Allow Collection of DNA Samples of Convicted Felons in Addition to Sex Offenders; Provide for Sharing DNA Information for Law Enforcement Purposes; Allow Criminal Defendants Access to the DNA Data Bank in Certain Circumstances

CODE SECTIONS: O.C.G.A. §§ 24-4-60 to -63, -65 (amended)
BILL NUMBER: SB 318
ACT NUMBER: 738
GEORGIA LAWS: 2000 Ga. Laws 1075
SUMMARY: The Act changes and updates several sections of the Georgia Code pertaining to the establishment of a DNA data bank for law enforcement purposes. Prior to the Act, the Code provided that DNA would be collected through blood samples from prisoners convicted of certain sex offenses. The Act subjects all convicted felons incarcerated in Georgia to DNA collection. In addition, the Act expands the acceptable methods of DNA collection beyond taking blood to include other less invasive procedures, including oral swabs. Further, the Act clarifies the procedures and timing for collecting the samples. It also allows law enforcement agencies to share information in the data bank for law enforcement purposes. Finally, the Act expressly allows criminal defendants a means of access, in certain circumstances, to the information in the DNA data bank for comparison purposes.

EFFECTIVE DATE: July 1, 2000

History

Deoxyribonucleic acid (DNA) is the chemical that makes up human genes and, when analyzed from a sample of body fluids or tissues, can assist law enforcement in identifying the perpetrator of a crime, by comparing DNA at the scene to a suspect's DNA.¹ Since 1992, the Georgia Bureau of Investigation (GBI) has been collecting DNA from convicted sex offenders through blood tests and building a DNA data bank.² Originally, the statute applied only to sex offenders because perpetrators' body fluids are not likely to be found at the scene of other types of crimes.³ The director of the GBI crime lab, George Herrin, recently confirmed that "rape is the crime most likely to yield useful DNA evidence" and that many other violent crimes are not likely to produce DNA evidence.⁴ However, Lieutenant Governor Mark Taylor cited four reasons to extend DNA collection to all felons.⁵ First, the DNA data bank may provide the necessary proof to solve hundreds of unsolved crimes.⁶ Second, it will deter future crimes.⁷ Third, the law will protect innocent individuals who may have been wrongfully convicted and imprisoned.⁸ Finally, Lieutenant Governor Taylor hopes that the DNA data bank will encourage victims of sex offenses to come forward because DNA evidence will corroborate their stories.⁹

All fifty states collect DNA from sex offenders, and Alabama, New Mexico, Tennessee, Virginia, and Wyoming collect DNA from all felons.¹⁰ Also, thirty-six states collect DNA from people

1. See *Review of Selected 1992 Georgia Legislation*, 9 GA. ST. U. L. REV. 260, 260-62 (1992) [hereinafter *Selected 1992 Legislation*].

2. See 1992 Ga. Laws 2034, § 1, at 2034 (codified at O.C.G.A. § 24-4-60 (1995)); see also *Selected 1992 Legislation*, supra note 1, at 261.

3. See *Selected 1992 Legislation*, supra note 1, at 260-62.

4. Peter Mantius, *More Data on DNA May Be OK: If the Legislature Approves, State Will Move to Forefront of Identifying Criminals Through Science*, ATLANTA J. & CONST., Mar. 17, 2000, at D1.

5. See *id.*

6. See *id.*

7. See *id.*

8. See *id.*; see also Peter Mantius, *Governor Vetoes Water Rules Bill; Lethal Injections, DNA Registry OK'd*, ATLANTA J. & CONST., Apr. 29, 2000, at E3.

9. See Barnes Hails DNA Sample Bill as Powerful New Crime-fighting Tool, AP NEWSWIRE, Apr. 28, 2000, available in Westlaw, GANEWS.

10. See Kathy Pruitt, *House OKs Prisoner DNA File*, ATLANTA J. & CONST., Mar. 10, 2000, at E1.

convicted of murder, while Louisiana collects DNA from everyone arrested.¹¹

The Lieutenant Governor wanted to introduce this bill in 1999, along with the special drug prosecutor law, but funding concerns postponed introduction until 2000.¹²

SB 318

Senators Greg Hecht, Terrell Starr, George Hooks, Charles Walker, and Vincent Fort, of the 34th, 44th, 14th, 22nd, and 39th Districts, respectively, sponsored SB 318.¹³ The bill was introduced to the Senate on January 13, 2000.¹⁴ Upon introduction, the Senate assigned the bill to its Judiciary Committee, which favorably reported the bill, as substituted, on February 3, 2000.¹⁵

Consideration by the Senate Judiciary Committee

The Judiciary Committee substitute both removed and added provisions to the original version of the bill.¹⁶ The Committee removed language in Code section 24-4-60 that would have made DNA collection from felons dependent on whether funds had actually been appropriated or made available.¹⁷ In addition, the Committee removed language that would have extended DNA collection to people currently on probation for a covered felony.¹⁸ Further, the substitute removed a provision that would have subjected prisoners convicted of covered felonies in other states who are incarcerated in Georgia to DNA collection.¹⁹

11. *See id.*; Mantius, *supra* note 8.

12. *See* Telephone Interview with Sen. Greg Hecht, Senate District No. 34 (May 17, 2000) [hereinafter Hecht Interview].

13. *See* SB 318, as introduced, 2000 Ga. Gen. Assem.

14. *See* State of Georgia Final Composite Status Sheet, Mar. 22, 2000.

15. *See id.*

16. *Compare* SB 318, as introduced, 2000 Ga. Gen. Assem., *with* SB 318 (SCS), 2000 Ga. Gen. Assem.

17. *Compare* SB 318, as introduced, 2000 Ga. Gen. Assem., *with* SB 318 (SCS), 2000 Ga. Gen. Assem.

18. *Compare* SB 318, as introduced, 2000 Ga. Gen. Assem., *with* SB 318 (SCS), 2000 Ga. Gen. Assem.

19. *Compare* SB 318, as introduced, 2000 Ga. Gen. Assem., *with* SB 318 (SCS), 2000 Ga. Gen. Assem.

The substitute clarified that the bill would only apply to people presently incarcerated in a state correctional facility, rather than all people who had been convicted of a felony.²⁰ Furthermore, the substitute specified that a felony prisoner's DNA must be collected at the time that he or she enters the prison system, and for inmates presently incarcerated, DNA will be collected when that person is set to be released.²¹ The substitute also added language to cover private correctional facilities that are under contract with the Georgia Department of Corrections.²² Finally, the substitute added a definition of 'state correctional facility' which includes "penal institutions under the jurisdiction of the Department of Corrections" and inmate work and boot camps and excludes probation detention and diversion centers and probation boot camps.²³

Critics had expressed concern that the original bill did not explicitly allow defendants access to the data bank.²⁴ The Senate Judiciary Committee substitute added subsection (b)(3) to Code section 24-4-63, which would allow a criminal defendant to have access to information in a DNA data bank set up by the GBI if the superior court judge with jurisdiction over the matter ordered it because access would be "material to the investigation, preparation and presentation of a defense at a trial or motion for a new trial."²⁵

Floor Amendments to the Committee Substitute

After the Senate adopted the Committee substitute and several floor amendments, the Senate unanimously passed the bill on February 8, 2000.²⁶ Senator Hecht offered an amendment to clarify language in Code section 24-4-60 so that both private

20. Compare SB 318, as introduced, 2000 Ga. Gen. Assem., with SB 318 (SCS), 2000 Ga. Gen. Assem.

21. Compare SB 318, as introduced, 2000 Ga. Gen. Assem., with SB 318 (SCS), 2000 Ga. Gen. Assem.

22. Compare SB 318, as introduced, 2000 Ga. Gen. Assem., with SB 318 (SCS), 2000 Ga. Gen. Assem.

23. Compare SB 318, as introduced, 2000 Ga. Gen. Assem., with SB 318 (SCS), 2000 Ga. Gen. Assem.

24. See Pruitt, *supra* note 10.

25. Compare SB 318, as introduced, 2000 Ga. Gen. Assem., with SB 318 (SCS), 2000 Ga. Gen. Assem.

26. See Georgia Senate Voting Record, SB 318 (Feb. 8, 2000); State of Georgia Final Composite Status Sheet, Mar. 22, 2000.

and public correctional institutions use the same timing for collecting DNA samples from people incarcerated after July 1, 2000 (upon entry) and people incarcerated before July 1, 2000 (upon release).²⁷ In addition, several Senators introduced a second floor amendment applying to Code section 24-4-60 that would have required the inmates to pay for the cost of collecting the DNA out of their inmate accounts.²³ Other floor amendments corrected some grammatical mistakes and added gender neutral terms to portions of the bill.²⁰

From the Senate Floor to the House Judiciary Committee

The House Judiciary Committee favorably reported the bill, as substituted, on February 29, 2000.³⁰ The Committee substitute deleted the Senate floor amendment language pertaining to payment for collecting the samples in Code section 24-4-60.³¹ According to Senator Hecht, who sponsored the bill in the Senate, the House Committee had administrative concerns about whether the entire collection process would be stopped if an inmate could not pay or would not authorize payment.³²

Furthermore, Representative Jim Martin, Chairman of the House Judiciary Committee, explained that the Committee was unsure whether, as a matter of law, the State could take property from someone to pay for a test that is performed for the State's benefit.³³ The Committee was concerned that the amendment would amount to bad public policy for several reasons.³⁴ First, it would have involved taking private property for a public purpose.³⁵ Second, the amendment raised due process questions about how an inmate would have been

27. Compare SB 318 (SCS), 2000 Ga. Gen. Assem., with SB 318 (SCSFA), 2000 Ga. Gen. Assem.

28. Compare SB 318 (SCS), 2000 Ga. Gen. Assem., with SB 318 (SCSFA), 2000 Ga. Gen. Assem.

29. Compare SB 318 (SCS), 2000 Ga. Gen. Assem., with SB 318 (SCSFA), 2000 Ga. Gen. Assem.

30. See State of Georgia Final Composite Status Sheet, Mar. 22, 2000.

31. Compare SB 318 (SCSFA), 2000 Ga. Gen. Assem., with SB 318 (HCS), 2000 Ga. Gen. Assem.

32. See Hecht Interview, *supra* note 12.

33. See Telephone Interview with Rep. Jim Martin, House District No. 47 (June 12, 2000) [hereinafter Martin Interview].

34. See *id.*

35. See *id.*

notified of the cost or any redress the inmate might have.³⁶ Finally, it could have opened the door to legal challenges by inmates, resulting in lengthy hearings that could cost the State more than just testing fees.³⁷

In addition, the substitute changed proposed Code section 24-4-63(b)(3) from the Senate version, which gave a superior court judge discretion to allow a criminal defendant access to the DNA data bank, to a mandatory provision, requiring that a court with proper jurisdiction "shall" order such access.³⁸ The amendment allowing defendants limited access to the DNA data bank was jointly drafted by members of the criminal defense and law enforcement communities.³⁹ Originally, the bill included the mandatory language, and this change reflects the original draft.⁴⁰

Finally, the Committee substitute added a new Section 6 to the text of bill, giving guidance on how it should be interpreted.⁴¹ Section 6 provided that, should the bill pass, it should not be construed as requiring action by the Department of Corrections unless funds are available or appropriated.⁴² Absent such funding, Section 6 further provided that the Director of the GBI would be allowed to designate the felonies for which DNA would be collected because the GBI is in the best position and has the expertise to make these decisions.⁴³

36. *See id.*

37. *See id.*

38. Compare SB 318 (SCSFA), 2000 Ga. Gen. Assem., with SB 318 (HCS), 2000 Ga. Gen. Assem.

39. *See* Telephone Interview with Sandra Michaels, Georgia Association of Criminal Defense Lawyers (June 7, 2000) [hereinafter Michaels Interview]. As this amendment went through the legislative process, lobbyists convinced members of the General Assembly to pass the original draft of the bill. *See id.* The final version of the Act is the same as the version drafted by the lobbyists. *See id.*

40. *See id.*

41. Compare SB 318 (SCSFA), 2000 Ga. Gen. Assem., with SB 318 (HCS), 2000 Ga. Gen. Assem.

42. *See* SB 318 (HCS), 2000 Ga. Gen. Assem. The Committee made this change because, as a general rule, the General Assembly cannot require a department to act without funding. *See* Martin Interview, *supra* note 33.

43. *See* SB 318 (HCS), 2000 Ga. Gen. Assem.; *see also* Martin Interview, *supra* note 33.

From the House Judiciary Committee to the House Floor

The House passed SB 318 on March 9, 2000, with one floor amendment.⁴⁴ The floor amendment overhauled proposed section 24-4-63(b)(3), pertaining to criminal defendants' access to the DNA data bank.⁴⁵ First, the amendment moved the language requiring the defendant to show that access to the data bank would be material to a defense or motion for a new trial to the beginning of the subsection.⁴⁶ Second, it specified that the court must have jurisdiction over the criminal case.⁴⁷ Finally, instead of allowing direct access to the data bank, the amendment would require a defendant to have an independent DNA profile made in accordance with federal standards for forensic DNA analysis.⁴⁸ Then, the GBI would compare the DNA in the data bank to a DNA profile generated by the defendant.⁴⁹ The language in this amendment reflected the language in the original draft of the bill and passed because it was presented to the House as a joint effort between criminal defense and law enforcement interests.⁵⁰

From the House Floor Back to the Senate

The bill returned to the Senate from the House, and on March 20, 2000, the Senate agreed to the House version of the bill, as amended by the Senate.⁵¹ Senator Crotts and other Senators reintroduced the amendment to Code section 24-4-60,

44. See Georgia House of Representatives Voting Record, SB 318 (Mar. 9, 2000); State of Georgia Final Composite Status Sheet, Mar. 22, 2000.

45. Compare SB 318 (HCS), 2000 Ga. Gen. Assem., with SB 318 (HCSFA), 2000 Ga. Gen. Assem.

46. Compare SB 318 (HCS), 2000 Ga. Gen. Assem., with SB 318 (HCSFA), 2000 Ga. Gen. Assem.

47. Compare SB 318 (HCS), 2000 Ga. Gen. Assem., with SB 318 (HCSFA), 2000 Ga. Gen. Assem.

48. Compare SB 318 (HCS), 2000 Ga. Gen. Assem., with SB 318 (HCSFA), 2000 Ga. Gen. Assem.

49. Compare SB 318 (HCS), 2000 Ga. Gen. Assem., with SB 318 (HCSFA), 2000 Ga. Gen. Assem.

50. See Michaels Interview, *supra* note 39. Although the amendment represented compromise language between the two sides, one issue that particularly concerned law enforcement was ensuring that the defendant's DNA test was conducted in some kind of standardized manner. See *id.*

51. See Georgia Senate Voting Record, SB 318 (Mar. 20, 2000); State of Georgia Final Composite Status Sheet, Mar. 22, 2000.

which would have required that inmates reimburse the state for their DNA tests out of their inmate accounts.⁵² The Senate adopted this amendment on March 20, 2000.⁵³

From the Senate Floor Amendment to the Version as Passed

On March 22, 2000, the House refused to accept the Senate amendment pertaining to reimbursing the costs of DNA collection.⁵⁴ On that same day, the Senate unanimously voted to recede from its amendment.⁵⁵ Citing due process concerns in the House and worry over whether the amendment's language would have required cessation of DNA collection if the inmate's funds were insufficient, Senator Hecht urged the Senate to recede from the amendment.⁵⁶ The final version of the bill is the same as the version that the House passed on March 9, 2000.⁵⁷

The Act

Code Section 24-4-60

The Act amends Code section 24-4-60 by briefly describing each of the sex offenses covered, rather than referring to them only by Code section as in the original law.⁵⁸ The Act also extends the law's reach by providing that DNA samples shall be collected from anyone convicted of any felony and incarcerated in Georgia.⁵⁹ It establishes that felons incarcerated after July 1, 2000, will be tested within thirty days of entering the prison

52. Compare SB 318 (HCSFA), 2000 Ga. Gen. Assem., with SB 318 (SFA), 2000 Ga. Gen. Assem. See also Audio Recording of Senate Proceedings, Mar. 20, 2000 (vote on amendments) <<http://www.ganet.org/services/leg/audio/2000archive.html>>.

53. See Georgia Senate Voting Record, SB 318 (Mar. 20, 2000); State of Georgia Final Composite Status Sheet, Mar. 22, 2000.

54. See Georgia House of Representatives Voting Record, SB 318 (Mar. 22, 2000); State of Georgia Final Composite Status Sheet, Mar. 22, 2000.

55. See Georgia Senate Voting Record, SB 318 (Mar. 22, 2000); State of Georgia Final Composite Status Sheet, Mar. 22, 2000.

56. See Hecht Interview, *supra* note 12.

57. Compare SB 318 (HCSFA), 2000 Ga. Gen. Assem., with SB 318, as passed, 2000 Ga. Gen. Assem.

58. Compare 1992 Ga. Laws 2034, § 1, at 2035 (formerly found at O.C.G.A. § 24-4-60 (1995)), with O.C.G.A. § 24-4-60 (Supp. 2000).

59. Compare 1992 Ga. Laws 2034, § 1, at 2035 (formerly found at O.C.G.A. § 24-4-60 (1995)), with O.C.G.A. § 24-4-60 (Supp. 2000).

system, and felons convicted prior to July 1, 2000, but incarcerated after that date, will be tested upon their release.⁶⁰ Similarly, the Act confirms that it applies to both public and private correctional facilities.⁶¹ The Act also provides methods other than drawing blood for obtaining DNA samples.⁶² Finally, the Act amends this section by adding a definition of ‘state correctional facility,’ which does not include probation systems.⁶³

Code Section 24-4-61

The Act amends Code section 24-4-61, regarding DNA sample collection times and procedures, by specifying that DNA from currently incarcerated felons will be collected within the twelve months prior to the scheduled release, with the place to be determined by the Department of Corrections, rather than the sentencing court.⁶⁴ Furthermore, the Act provides that the Division of Forensic Sciences of the GBI shall establish the procedures for collecting and transferring the samples.⁶⁵ In addition, the Department of Corrections is to implement the new procedures as part of the “regular processing of offenders.”⁶⁶

The Act also creates a new subsection (b) to the Code section.⁶⁷ Subsection (b) deals with who may collect the samples.⁶⁸ For samples taken by oral swab or other noninvasive procedures under the Act, anyone trained in the procedure may take the

60. Compare 1992 Ga. Laws 2034, § 1, at 2035 (formerly found at O.C.G.A. § 24-4-60 (1995)), with O.C.G.A. § 24-4-60 (Supp. 2000).

61. Compare 1992 Ga. Laws 2034, § 1, at 2035 (formerly found at O.C.G.A. § 24-4-60 (1995)), with O.C.G.A. § 24-4-60 (Supp. 2000).

62. Compare 1992 Ga. Laws 2034, § 1, at 2035 (formerly found at O.C.G.A. § 24-4-60 (1995)), with O.C.G.A. § 24-4-60 (Supp. 2000).

63. Compare 1992 Ga. Laws 2034, § 1, at 2035 (formerly found at O.C.G.A. § 24-4-60 (1995)), with O.C.G.A. § 24-4-60 (Supp. 2000).

64. Compare 1992 Ga. Laws 2034, § 1, at 2035-36 (formerly found at O.C.G.A. § 24-4-61(a) (1995)), with O.C.G.A. § 24-4-61(a) (Supp. 2000).

65. Compare 1992 Ga. Laws 2034, § 1, at 2035-36 (formerly found at O.C.G.A. § 24-4-61(a) (1995)), with O.C.G.A. § 24-4-61(a) (Supp. 2000).

66. Compare 1992 Ga. Laws 2034, § 1, at 2035-36 (formerly found at O.C.G.A. § 24-4-61(a) (1995)), with O.C.G.A. § 24-4-61(a) (Supp. 2000).

67. Compare 1992 Ga. Laws 2034, § 1, at 2035-36 (formerly found at O.C.G.A. § 24-4-61 (1995)), with O.C.G.A. § 24-4-61(b) (Supp. 2000).

68. See O.C.G.A. § 24-4-61(b) (Supp. 2000).

sample.⁶⁹ However, the Act retains language pertaining to who may take blood samples.⁷⁰

The Act “renumbers” the Code section’s former subsection (b) as section (c), which refers to procedures for collecting, transporting, and safeguarding samples.⁷¹ The Act also changes language in this Code section, which only referred to collecting blood, to more universal language referring to taking DNA samples generally.⁷²

Code Section 24-4-62

The Act amends Code section 24-4-62 to add gender neutrality and to correct for the addition of new methods of collecting DNA samples other than blood tests.⁷³

Code Section 24-4-63

Code section 24-4-63 generally refers to dissemination of the information maintained in the data bank.⁷⁴ The Act amends Code section 24-4-63(b), which pertains to requests for DNA comparisons, by creating three subparts.⁷⁵ Subpart (b)(1) is the language that was formerly (b).⁷⁶ Subparts (b)(2) and (b)(3) are completely new.⁷⁷ Subpart (b)(2) provides that information in the data bank may be shared with other law enforcement data bases for only law enforcement purposes.⁷⁸ Subpart (b)(3) explains how a criminal defendant can have his or her independently-generated DNA profile compared to data in the

69. *See id.*

70. *Compare* 1992 Ga. Laws 2034, § 1, at 2035-36 (formerly found at O.C.G.A. § 24-4-61(a) (1995)), *with* O.C.G.A. § 24-4-61(b) (Supp. 2000).

71. *Compare* 1992 Ga. Laws 2034, § 1, at 2035-36 (formerly found at O.C.G.A. § 24-4-61(b) (1995)), *with* O.C.G.A. § 24-4-61(c) (Supp. 2000).

72. *Compare* 1992 Ga. Laws 2034, § 1, at 2035-36 (formerly found at O.C.G.A. § 24-4-61 (1995)), *with* O.C.G.A. § 24-4-61 (Supp. 2000).

73. *Compare* 1992 Ga. Laws 2034, § 1, at 2036-37 (formerly found at O.C.G.A. § 24-4-62 (1995)), *with* O.C.G.A. § 24-4-62 (Supp. 2000).

74. *See* O.C.G.A. § 24-4-63 (Supp. 2000).

75. *Compare* 1992 Ga. Laws 2034, § 1, at 2037-38 (formerly found at O.C.G.A. § 24-4-63(b) (1995)), *with* O.C.G.A. § 24-4-63(b) (Supp. 2000).

76. *Compare* 1992 Ga. Laws 2034, § 1, at 2037-38 (formerly found at O.C.G.A. § 24-4-63(b) (1995)), *with* O.C.G.A. § 24-4-63(b)(1) (Supp. 2000).

77. *Compare* 1992 Ga. Laws 2034, § 1, at 2037-38 (formerly found at O.C.G.A. § 24-4-63(b) (1995)), *with* O.C.G.A. § 24-4-63(b)(1)-(2) (Supp. 2000).

78. *See* O.C.G.A. § 24-4-63(b)(2) (Supp. 2000).

state's DNA data bank.⁷⁹ Critics, including the American Civil Liberties Union, expressed concerns, however, that the data bank would be too large and that the Act has insufficient safeguards to prevent information from being released to insurance companies or other third parties.⁸⁰

Code Section 24-4-65

The Act does not significantly amend this Code section, which relates to expunging the data bank when a conviction is reversed and dismissed, although it is stricken and replaced with substantially the same, but now gender neutral language.⁸¹

Section 6 of the Act

The Act includes a final section that will not be codified, but provides instruction on how to interpret the changes to the Code.⁸² Specifically, Section 6 of the Act provides that neither the Department of Corrections nor the Georgia Bureau of Investigation is required to implement the Act unless funding is available or has been appropriated.⁸³ It further provides that if funding is not available, the Georgia Bureau of Investigation may decide to which felonies the Act will apply.⁸⁴

Jill Wasserman

79. *See id.* § 24-4-63(b)(3).

80. *See* Pruitt, *supra* note 10; Mantius, *supra* note 4.

81. *Compare* 1992 Ga. Laws 2034, § 1, at 2038 (formerly found at O.C.G.A. § 24-4-65 (1995)), *with* O.C.G.A. § 24-4-65 (Supp. 2000).

82. *See* 2000 Ga. Laws 1075, § 6, at 1080.

83. *See id.*

84. *See id.*