SUBJECT: Procedures for post-conviction testing of DNA evidence

COMMITTEE: Criminal Jurisprudence — favorable, with amendment

VOTE: 9 ayes — Hinojosa, Dunnam, Keel, Talton, Garcia, Green, Kitchen, Martinez Fischer, Shields

0 nays

SENATE VOTE: On final passage (February 19) — 30-0-1

WITNESSES: *(On House companion bill, HB 1474 by Hinojosa, et al.:)*
For — Clay Strange, Travis County District Attorney's Office; Michael Bernard, Bexar County District Attorney's Office; William Harrell, American Civil Liberties Union of Texas; Keith S. Hampton, Texas Criminal Defense Lawyers Association; Charles C. Holt, Common Cause of Texas; Bill Allison; Mike Charlton

Against — None

On — Pat Johnson, Texas Department of Public Safety; Charlie Baird

BACKGROUND: Post-conviction DNA testing refers to testing of DNA evidence after a person has been convicted of a crime and sentenced. Deoxyribonucleic acid or DNA, the microscopic genetic material in body cells, can be used to identify an individual from samples of blood, semen, saliva, skin, or hair. Except in the case of identical twins, each person's DNA is unique.

For more information about the use of DNA in the criminal justice system, including details about DNA databases, post-conviction testing issues, DNA testing laws in other states, handling of DNA evidence, and other topics, see House Research Organization Focus Report Number 76-26, *DNA Evidence and Texas' Criminal Justice System*, November 10, 2000.

DIGEST: SB 3 as amended would authorize a convicted person to ask a court for a DNA test; require the court to order a test if certain conditions were met; require courts to appoint and compensate attorneys for indigent defendants

who want to pursue DNA testing; allow appeals of court decisions relating to DNA tests; establish rules for preserving biological evidence; and require the Texas Department of Criminal Justice (TDCJ) to notify people in its custody of the new testing provisions.

SB 3 would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2001.

**Request for DNA test**. SB 3 would allow a person convicted of a crime to ask the convicting court for DNA testing of biological evidence. A sworn affidavit with facts supporting the request would have to accompany the motion asking for the test.

Testing could be requested only if the biological evidence met specific criteria. The evidence to be tested would have to be related to the offense that was being challenged. It would have to have been in possession of the state during the trial but not tested previously, either because DNA testing was not available at the time or because testing was available but technologically could not have provided results that proved something in the case. Testing also could be requested if testing previously was not done through no fault of the offender and if the interests of justice required the testing. The convicted person could request testing of evidence that previously had been tested if the evidence could be subjected to newer testing techniques with a likelihood of results that were more accurate and more capable of proving something in the case than was the previous test.

**Court action after request and on test results.** After receiving a request for a DNA test, the convicting court would have to give a copy of the request to the prosecutor and would have to require the prosecutor to deliver the evidence to the court or explain why the state could not deliver it.

A convicting court would have to order a test in certain circumstances and could order tests only under those circumstances. The offender would have to establish by a preponderance of the evidence that a reasonable probability existed that he or she would not have been prosecuted or convicted if DNA testing had provided exculpatory results. The offender could not request a test to delay a sentence or the administration of justice unreasonably.

An offender who had pled guilty or no contest could request a DNA test, and the court would be prohibited from finding that identity was not an issue in the case solely because of a guilty or no-contest plea.

The DNA evidence would have to exist in a condition that made testing possible and would have to have been subject to a chain of custody that established that it had not been substituted, tampered with, replaced, or altered in any material respect.

Courts would have to order that testing protect the integrity of the evidence and the testing process, that the testing use a scientific method admissible under the Texas Rules of Evidence, and that the test results immediately be filed with the court, with copies going to the offender and the prosecutor.

A court could order a DNA test to be conducted by a Texas Department of Public Safety (DPS) laboratory, a lab under contract with DPS, or, if all parties agreed, by another lab. The state would not be responsible for the cost of tests done by non-DPS labs. DPS could keep in its DNA database results of tests performed under SB 3. Within 30 days of concluding a proceeding involving DNA test results, the court would have to forward its conclusions to DPS.

After examining the test results, the court would have to hold a hearing and make a finding as to whether the results favored the offender. Results would be considered favorable if, had they been available before or during the person's trial, it would be reasonably probable that the person would not have been prosecuted or convicted.

**Right to counsel.** An offender would be entitled to a lawyer during these proceedings. Convicting courts would have to appoint lawyers for offenders who informed the court that they wanted to submit a motion relating to a DNA test if the court found that the offender was indigent. Payment of the lawyers would follow procedures prescribed by the Code of Criminal Procedure for court-provided lawyers in *habeas corpus* appeals.

**Appeals.** Appeals of orders for tests or of findings about test results would be made to the courts of appeal, except in capital cases, in which case the appeal would be directly to the Court of Criminal Appeals.

Persons could be released on bail pending final decisions on their appeals. General provisions in the Code of Criminal Procedure for bail pending an appeal would apply to appeals of court decisions about DNA tests. Restrictions that prohibit bail for people convicted of certain violent offenses and for people appealing felony convictions that resulted in sentences of 10 years or more would not apply to people who appealed orders for DNA tests or findings about test results.

If a person's *habeas corpus* appeal was denied or dismissed before September 1, 2001, and if DNA test results conducted under SB 3 were favorable to the person, the court could consider a subsequent writ of *habeas corpus* challenging the conviction.

If a person with a *habeas corpus* appeal pending on September 1, 2001, asked the convicting court for a DNA test, the person would be entitled to a stay of proceedings on the appeal while the convicting court decided whether to order a DNA test. If the results proved favorable to the defendant, the appeal could be amended.

**Preserving evidence.** In a criminal case in which a defendant was convicted, the prosecutor, court clerk, or another officer would have to preserve the biological evidence that was in the state's possession during prosecution of the case and that could identify a person who committed an offense or exclude a person from the group of those who could have committed it.

For a capital felon, the biological evidence would have to be preserved until the inmate was executed, died, or was released on parole. For inmates given another type of prison sentence, evidence would have to be kept until the inmates died, completed their sentences, or were released on parole or mandatory supervision.

Prosecutors, court clerks, or other officers could destroy the evidence only if they notified by mail the defendants, their attorneys, and convicting courts of the planned destruction and received no written objection within 90 days of mailing the notice.

**Notice to offenders in state facilities.** TDCJ would have to notify all people in its custody about SB 3. The agency would have to include

information about SB 3 in an offender newspaper or other offender publication, post notice of information about SB 3 in each of its law libraries, and ensure that inmates not housed with the general TDCJ population received notice of the bill's provisions.

SUPPORTERS SAY:

SB 3 is necessary to establish a uniform, fair process for inmates to request post-conviction DNA testing so that Texas inmates, their lawyers, prosecutors, and judges know how to proceed if they want to have a test conducted. The avenues available under current law — *habeas corpus* petitions, requests for new trials, and the clemency process — are inadequate because they do not provide a specific procedure that is impartial and that ensures justice in cases in which DNA evidence could exonerate people convicted of crimes.

The importance of using DNA evidence to prove a prison inmate's guilt or innocence after the inmate has been convicted and sentenced by a court is illustrated by the more than 70 people in the United States who have been exonerated and released from prison because of DNA testing. In Texas, post-conviction DNA testing has led to at least six persons being pardoned or freed from prison since 1997.

Using a *habeas corpus* writ to bring new evidence to a court's attention is not always a realistic option because, in general, courts look favorably only on writs that allege a constitutional violation, which is not present in every case. In other cases, a first writ may not have asked for testing even though DNA evidence existed, and this could make a court reluctant to order a test requested by a subsequent writ. Also, statutory deadlines for *habeas corpus* appeals in death-penalty cases seriously restrict the ability of inmates to get a post-conviction DNA test.

Current law allowing new trials under certain circumstances is too restrictive to allow DNA testing and a new trial. The rules of appellate procedure allow only 30 days for defendants to request a new trial, and DNA evidence often is discovered or testing becomes feasible only after that deadline has expired.

Pursuing testing through the clemency process also is infeasible. The Board of Pardons and Paroles is set up to examine evidence, not to develop it, so

the board is an unlikely place to turn to request testing. Also, the board requires the unanimous recommendation of the trial officials for requests for pardons based on innocence, the type of pardon requested most often by people who claim that DNA evidence will exonerate them.

In addition, appellate court decisions about whether to order post-conviction testing provide no uniform guidance, and courts tend to order testing only in the rare case in which a prosecutor agrees with an inmate's request.

**Request for DNA test.** SB 3 would give all convicted people initial access to the DNA testing process by allowing any person to ask a convicting court for a test if biological evidence met certain criteria. Specifying that requests go to the convicting court would ensure that all parties know who is responsible for the decision to order a test.

The criteria set by SB 3 would be minimal so as not to bar inmates unfairly from receiving tests. By the same token, SB 3 would protect the criminal justice system from requests for testing in cases in which testing would be inappropriate or infeasible. For example, SB 3 would require that, generally, testing not have been done before unless testing was not previously available or new technology could result in more accurate test results. However, SB 3 would ensure that courts had discretion to order testing in all appropriate situations by allowing tests if the interests of justice required one.

**Court action after request and on test results.** By requiring courts to order tests under specific circumstances, SB 3 would ensure that judges would not refuse arbitrarily or unfairly to order a test. SB 3 would allow courts to decide to order tests without requiring the approval of prosecutors, some of whom have been reluctant to embrace post-conviction DNA testing in the past.

The bill would set a reasonable standard to require a test: a preponderance of the evidence showing that the defendant probably would not have been prosecuted or convicted. Wrongfully convicted defendants would have no problem meeting this standard. It would ensure that a favorable test would show that an inmate was innocent, not merely muddy the waters in a case.

These requirements would ensure that the bill would not be used for frivolous appeals. Also, SB 3 explicitly would prohibit requests made only to delay a sentence.

However, SB 3 specifically would allow DNA tests in cases in which a defendant had pled guilty. This would make SB 3 broad enough to cover cases that judges might reject simply because of a defendant's plea. It would allow tests for people like Christopher Ochoa, who pled guilty to a 1988 murder and served 12 years in prison but was released in January 2001 after a post-conviction DNA test.

Other requirements in SB 3 would ensure that a requested test would be scientifically possible and carried out in the proper manner. For example, the condition of evidence would have to make testing possible, and the evidence would have to have been subject to proper storage and an adequate chain of custody. A defendant's lawyer could establish those facts easily by requesting copies of reports from law enforcement officials. If necessary, courts could order that this information be turned over to defense attorneys.

SB 3 would set a reasonable standard for a court to decide that DNA test results favored an inmate. Results would have to be considered favorable if they made it reasonably probable that a person would not have been prosecuted or convicted. It would be inappropriate for SB 3 to limit judicial discretion and require a certain type of relief upon a finding that favored an inmate. Judges should be able to make whatever decision is appropriate for a case without a legislative mandate.

SB 3 would not overburden the criminal justice system with requests for tests because it would not apply to the vast majority of inmates. Most inmates requesting testing would be those convicted before the early 1990s, when DNA testing became routine, and the cases would have to include biological evidence that could be tested. Also, some inmates would not request tests because they do not want their DNA tested and placed in the state's DNA data bank, where it could link them to other crimes. As time goes on, requests for post-conviction DNA testing should be fewer and fewer, since testing is done routinely in current cases.

The cost of a test would not be a barrier to defendants because SB 3 would allow courts to order a DPS laboratory to conduct the test, nor would the tests be costly to the state. DPS estimates, based on the experiences of New York and Illinois, that it would have to perform about 50 tests per year at a cost of about $73,000 annually. SB 3's fiscal note reports that DPS could absorb this cost within its current resources. The state easily could afford this expense to ensure that justice is carried out.

**Right to counsel.** By requiring that indigent defendants be provided with attorneys if they wanted to ask for a DNA test, SB 3 would ensure that all people have access to the courts and can use the system for post-conviction DNA testing.

**Appeals.** By allowing appeals of court orders for tests and of findings about test results, SB 3 would give convicted people full access to the courts and would provide a check on individual courts' decisions.

In addition, by allowing people to be released on bail pending appeals of decisions related to DNA tests, SB 3 would help ensure that people whose tests are favorable do not have to wait in prison — as they often do under current law — for final court action to release them. The bill would not require anyone to be released on bail, so all decisions about granting bail would remain with judges.

**Preserving evidence.** SB 3 would establish statewide protocols for handling biological evidence, since none exist now. Without such standards, evidence that could exonerate defendants can be mishandled or lost, making it impossible for inmates to receive a post-conviction test.

OPPONENTS SAY:

SB 3 is unnecessary because current law provides adequate opportunities for post-conviction testing in appropriate cases. It would be better to leave judges with the maximum flexibility to decide when to order post-conviction DNA tests and to decide what to do after a test has been conducted. Statutory guidelines about when a test can be requested and when a test must be ordered would exclude some cases that might not meet the standards but still might merit testing. In addition, prison inmates seeking exoneration can use executive clemency.

**Court action after request and on test results.** SB 3 would prohibit a court from finding that identity was not an issue in a case solely on the basis of a guilty or no-contest plea. This would be an unwise restriction on judicial decision-making. Other language in SB 3 is broad enough to ensure testing in all appropriate cases. Judges should have the maximum flexibility to make decisions without a statutory prohibition against one type of decision.

**Appeals.** The provision in SB 3 allowing people to be released on bail pending final determinations of appeals based on DNA tests is too broad. The bill should specify that release on bail is allowed only for someone who appeals a conviction on the basis of DNA test results, not for someone who appeals a judge's decision not to conduct a test. Release on bail should be limited to situations in which all parties related to a case, including prosecutors, agree that a person should be released.

OTHER OPPONENTS SAY:

**Court action after request and on test results.** SB 3 would set too high a standard for courts to order DNA tests. Requiring that defendants show by a "preponderance of the evidence" that a test would demonstrate a "reasonable probability" that they would not have been prosecuted or convicted could oblige defendants almost to prove they had not committed the crime without having the benefit of the test results to make their case. The DNA test might be the only exonerating evidence, and without its results, some defendants might not meet the standard in SB 3. It would be better to allow all convicted persons access to this testing without having to meet a litmus test.

Under SB 3, before a court could order a DNA test, the defendant would have to prove that the evidence existed in a certain condition and that it had been subject to a certain type of chain of custody. This could be difficult for a defendant to prove, since the records and information about the evidence most likely would be in the hands of law enforcement officers or prosecutors, who might be reluctant to have a DNA test conducted. It would be better to shift the burden to prosecutors to prove that the evidence was not handled properly or to give defendants explicit access to offense and lab reports and other information that would detail the evidence's chain of custody.

SB 3 should specify that if test results are favorable, defendants receive relief such as a new trial or release from prison or that appellate courts must

hear the test results. This is necessary to ensure that courts do not ignore favorable test results, as they have in the past. For example, in the case of Roy Criner, lower courts had overturned his conviction after a DNA test reported that Criner's DNA did not match that of the semen found in the 16-year old girl he was convicted of raping. However, the Texas Court of Criminal Appeals overruled the lower court and upheld Criner's conviction. Criner later was pardoned after another DNA test on crime-scene evidence.

**Appeals.** The bill should authorize release on bail for anyone appealing a conviction based on innocence, not merely for those claiming innocence on the basis of DNA test results.

NOTES:

The committee amendments would change the Senate-passed bill by adding provisions that would:

- require that attorneys be provided for indigent people who wanted to ask a court for a DNA test;
- prohibit courts from finding that identity was not an issue in a case solely because a person pled guilty or no contest;
- allow appeals of court decisions about ordering DNA tests; and
- allow release on bail pending a final decision on such an appeal.

The companion bill, HB 1474 by Hinojosa, is pending in the House Criminal Jurisprudence Committee.

Four related House bills also are pending in the committee. HB 157 by Hochberg and HB 864 by Dutton would allow a convicted person to ask the convicting court for a DNA test and would require the court to order the test if the court found, among other things, that a reasonable probability existed that DNA testing would produce results that, if favorable to the person, would constitute evidence relevant and material to a claim of innocence. If the test results were favorable to the defendant, the court could consider a second or subsequent appeal filed through a writ of *habeas corpus*.

HB 312 by Allen would allow a defendant who had filed an appeal claiming innocence through a writ of *habeas corpus* to ask the convicting court for a DNA test. The court would have to order the test if certain conditions were met by a preponderance of the evidence, including that a defendant pled not

guilty and that an exclusionary result necessarily would exonerate the defendant. HB 312's companion bill, SB 119 by Wentworth, has been referred to the Senate Jurisprudence Committee.

HB 366 by Hinojosa would allow a defendant to ask a convicting court for a DNA test. The court would have to order a test if, among other conditions, a reasonable probability existed that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing. Courts would have the discretion to order tests if a reasonable probability existed that DNA testing would produce results that would have made the verdict or sentence more favorable had the results been available before the conviction.