SUBJECT: Amending standards for post-conviction DNA testing

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 7 ayes — Keel, Riddle, Ellis, Denny, Hodge, P. Moreno, Pena

0 nays

2 absent — Dunnam, Talton

WITNESSES: For — Keith Hampton, Texas Criminal Defense Lawyers Association; Roe Wilson, Harris County District Attorney's Office

Against — None

On — John Rolater, Dallas County District Attorney's Office

BACKGROUND: SB 3 by Duncan, enacted by the 77th Legislature and codified as Chapter 64 of the Code of Criminal Procedure, allows a person convicted of a crime to ask the convicting court for DNA testing of biological evidence. Testing can be requested only if the biological evidence meets specific criteria, including not having been tested previously, either because DNA testing was not available or because testing was available but technologically could not have provided results that proved something in the case. Testing also can be requested if testing previously was not done through no fault of the offender and if the interests of justice require the testing. The convicted person can request testing of evidence that previously was tested if the evidence could be subjected to newer testing techniques with a likelihood of results that are more accurate and more capable of proving something in the case than the previous test.

Code of Criminal Procedure, Art. 64.01©) requires the convicting court to appoint counsel for a convicted person who wishes to submit a motion for DNA testing and who the court determines is indigent.

Art. 64.03 requires the convicting court to order DNA testing if certain conditions are met, including if the convicted person establishes by a

preponderance of the evidence that a reasonable probability exists that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.

Art. 64.05 specifies that a party may appeal a "finding" under Art. 64.03 or 64.04 to a court of appeals, and that in a capital case, the appeal of the finding is a direct appeal to the Court of Criminal Appeals. Art. 44.01(a), specifying when the state may appeal a court order in a criminal case, does not include an order issued under Chapter 64.

The Court of Criminal Appeals, in *Kutzner v. State*, 75 S.W.3d 427 (2002), interpreted Chapter 64 and found that the Legislature intended to require a convicted person to show that a reasonable probability exists that exculpatory DNA tests would prove that person's innocence before obtaining a court order for DNA testing. The court also held that the phrase "appeal of a finding" under Art. 64.03 was ambiguous as to what could be appealed.

Code of Criminal Procedure, Art. 11 outlines procedures for habeas corpus and specifies that a writ of habeas corpus is the remedy to be used when a person's liberty is restrained.

DIGEST:

HB 1011 would amend the Code of Criminal Procedure to require a court to appoint counsel for an indigent defendant only if the court finds "reasonable grounds" for a motion for DNA testing to be filed.

The bill would change the standard that a person must meet to obtain court-ordered DNA testing to whether the convicted person establishes by a preponderance of the evidence that the person would not have been convicted if exculpatory results had been obtained through DNA testing.

HB 1011 would eliminate the language limiting to "findings" what can be appealed under Chapter 64. The bill would specify that only a person convicted in a capital case and sentenced to death could appeal directly to the Court of Criminal Appeals. It would specify that the state is entitled to appeal an order issued under Chapter 64.

The bill would take effect September 1, 2003.

SUPPORTERS SAY:

By requiring reasonable grounds before appointing an attorney for an indigent person seeking post-conviction DNA testing, HB 1011 would weed out frivolous claims while still ensuring a person with a valid claim access to testing. After SB 3 took effect on April 5, 2001, courts were flooded with letters from inmates asking for DNA testing. Trial courts had no choice but to appoint counsel for indigent convicted people, even if a request was frivolous on its face, at a great cost to the state. Counties also faced higher costs because prosecutors were forced to investigate and respond to frivolous motions. HB 1011 would provide a necessary gatekeeping function and ensure that state and local resources are directed toward viable claims.

Judges would not find it difficult to decide if reasonable grounds existed for motions to be filed. Even if the convicted person sends the court a postcard with little information, the judge can make an appropriate decision based on the type and age of the case, among other factors. For example, certain types of cases, such as possession of a controlled substance or theft, would not lend themselves to DNA testing, and some cases are so old that no biological material exists to be tested. These factors would facilitate easy decisions by judges. When in doubt, a judge would err on the side of caution and appoint a lawyer in case the convicted person had a valid claim.

HB 1011 would clarify the Legislature's intent with regard to the convicted person's burden of proof and would undo the Court of Criminal Appeals' imposition of a higher burden in the *Kutzner* case. The Legislature did not intend to require the convicted person to prove actual innocence, a principle under habeas corpus law, to meet the burden to have a DNA test done. HB 1011 would reinforce the intent of the 77th Legislature by specifying that the convicted person only need prove by a preponderance of the evidence that the person would not have been convicted if exculpatory results had been obtained. Furthermore, the bill would articulate the standard in a simpler, more concise manner than current law.

HB 1011 would clarify when an appeal could be taken, which is necessary in light of the *Kutzner* decision that found the appeals section of Chapter 64 ambiguous. One reason for the confusion is the legal distinction between findings and conclusions of law. HB 1011 clearly would allow an appeal both of the request for a test (based on legal or factual determinations) and the finding of the trial court as to whether the DNA results are favorable, which

was the 77th Legislature's intent. It would not open the floodgates for more appeals because convicted people already are appealing these issues.

HB 1011 also would clarify that a prosecutor can appeal an order under Chapter 64, which current law does not address. It makes sense to allow prosecutors to appeal orders under Chapter 64, given that prosecutors already can appeal similar orders such as dismissal orders, new trial orders, or orders granting motions to suppress evidence.

OPPONENTS SAY:

By requiring reasonable grounds before the appointment of an attorney, HB 1011 could limit a convicted person's right to pursue a motion for DNA testing. Even under the current system, many judges do not appoint attorneys for indigent people, and this change would give them more license not to do so. An appointed counsel investigates the propriety of pursuing a motion in the first place, and indigent offenders should not be expected to state reasonable grounds without the assistance of an attorney.

The *Kutzner* court correctly articulated the standard for obtaining post-conviction DNA testing. If offenders want to obtain DNA testing, they should have to show that favorable results would help prove their innocence. Otherwise, obtaining the tests is pointless. After all, offenders who obtain favorable DNA test results and who apply for writs of habeas corpus must establish their actual innocence. By setting the standard higher for an offender to obtain DNA tests, the *Kutzner* decision helps eliminate frivolous claims.

Broadening the opportunities for appeal would be a step in the wrong direction. Just as there was a flood of DNA testing requests after SB 3 took effect, there has been a flood of appeals. Under current law, Texas courts can dismiss appeals when the parties are not appealing a "finding" under Chapter 64. By removing limits on appeals, HB 1011 would drain counties' resources, because prosecutors must litigate appeals. It would be better to list specifically the orders that are appealable.

OTHER OPPONENTS SAY:

HB 1011 would not go far enough in requiring a convicted person to show grounds for appointment of an attorney. A convicted person should have to provide the court with detailed information about the case before obtaining a court-appointed attorney, rather than sending the court letters that do not even contain the cause number of the case, as they do now. An offender who

applies for a writ of habeas corpus must file a form with the court that includes the cause number in the trial court, the sentence imposed, the offenses of conviction, details about the trial, and much more. An offender who wishes to submit a motion for DNA testing likewise should have to provide the court with more specific information on which to base its "reasonable grounds" determination. Also, reasonable grounds is a vague standard, and judges will tend to err on the side of caution and appoint lawyers even in frivolous cases.

NOTES:

The companion bill, SB 543 by Duncan, is pending in the Senate Criminal Justice Committee.