

- SUBJECT:** Post-conviction testing of forensic evidence
- COMMITTEE:** Criminal Jurisprudence — committee substitute recommended
- VOTE:** 8 ayes — Peña, Vaught, Riddle, Escobar, Hodge, Mallory Caraway, Pierson, Talton
- 0 nays
- 1 absent — Moreno
- WITNESSES:** For — Edwin Colfax, The Justice Project; (*Registered, but did not testify:* David Gonzalez; Texas Criminal Defense Lawyers Association; Will Harrell, ACLU of Texas and NAACP; Ana Yanez-Correa, Texas Criminal Justice Coalition)
- Against — None
- On — (*Registered, but did not testify:* Brady Mills, Texas Dept. of Public Safety Crime Lab Service)
- BACKGROUND:** Code of Criminal Procedure, ch. 11 specifies that a writ of habeas corpus is the remedy to be used when a person's liberty is restrained.
- Code of Criminal Procedure, art. 11.07, allows a judge to resolve material issues of fact important to an application for a writ of habeas corpus in which a defendant seeks relief for a felony judgment imposing a penalty other than death. To resolve these issues, a judge is authorized by this statute to order affidavits, depositions, interrogatories, hearings, and examination of personal recollection.
- Code of Criminal Procedure, art. 64.03 allows a court to order additional forensic testing of DNA under certain conditions. The testing may be done at a Department of Public Safety (DPS) lab, a lab under contract with DPS, or an independent lab. An independent lab may be used only if the state and the defendant agree to do so.

DIGEST: CSHB 681 would amend Code of Criminal Procedure, art. 11.07, sec. 3 to allow a court to order additional forensic testing to resolve issues of material fact regarding the legality of a defendant's confinement resulting from a felony judgment imposing a penalty other than death. The state would pay the cost of the testing, except that the defendant would pay the cost if the defendant retained counsel to file an application for a writ of habeas corpus. The additional forensic testing would not include forensic DNA testing as provided in Code of Criminal Procedure, ch. 64.

CSHB 681 also would amend Code of Criminal Procedure, Art. 64.03(c)-(d) to allow a court to order that forensic DNA testing be done by a laboratory independent of DPS when good cause had been shown. If the court ordered that the forensic DNA testing be done by a non-DPS laboratory, the state would not be liable for the cost of testing unless good cause for payment of that testing had been shown.

The bill would take effect on September 1, 2007, and would apply only to writs and motions filed on or after that date.

SUPPORTERS SAY: CSHB 681 would address a recommendation from the Governor's Criminal Justice Advisory Council and would provide sensible rules for allowing and funding post-conviction forensic testing of evidence. Under current law, defendants sometimes are accused of making frivolous requests for new tests. Current law also sometimes is blamed for preventing judges from ordering new tests except in specific situations.

The bill would remedy this by expressly allowing a court to order additional forensic testing of evidence to resolve a material fact in an application for a writ of habeas corpus. Judges have shown reluctance to order testing without a specific provision in the Code of Criminal Procedure to govern testing and costs. The bill would provide for judicial discretion with a showing of good cause and free judges to order new testing if they thought it was necessary in the interests of justice.

Also, a judge could grant a request by a defendant for additional forensic testing that would be paid for by the defendant if the defendant hired a lawyer to file an application for a writ of habeas corpus and if the additional testing was to clear up a material fact critical to the application. Defendants thus would be deterred from making frivolous requests.

While some prosecutors objected to the bill as filed because it would have allowed additional forensic testing of DNA evidence believed to be addressed adequately under Code of Criminal Procedure, ch. 64, the committee substitute would address this concern by excluding DNA testing from “additional forensic testing” in the bill. Forensic DNA testing would continue to be regulated by Code of Criminal Procedure, ch. 64.

The bill also would allow forensic testing in an independent lab. DPS faces evidence-processing backlogs in its labs and is facing problems implementing the latest scientific procedures and acquiring the most current technology. Also, recent problems in some crime labs has meant that defendants and courts have not always felt they could trust the reliability of existing state and locally run labs. A defendant should be able to have testing done by an independent lab even when the state and the defendant cannot agree to the necessity of doing so. CSHB 681 would allow a judge to hear from both sides and order independent testing when good cause was shown to do so. This would prevent abuse and advance justice.

Although CSHB 681 could result in more forensic testing, it would not have a significant fiscal impact on the state, according to the fiscal note.

**OPPONENTS
SAY:**

Under CSHB 681, the breadth of the phrase “additional forensic testing” would expand a defendant’s right to apply for additional testing of everything but DNA. More applications would mean more use of court resources to hear and evaluate these motions.

CSHB 681 also could disturb the carefully crafted statutory scheme regulating the use of independent labs for forensic testing. Under current law, a lab independent of DPS may be used only if both sides agree. CSHB 681 would allow a court to authorize the use of an independent lab when good cause had been shown, which would allow for independent testing over the potential objection of one of the parties.

NOTES:

HB 681 as filed did not exclude forensic DNA testing from the definition of “additional forensic testing” in the bill. The committee substitute would exclude forensic DNA testing as provided in Code of Criminal Procedure, ch. 24.