

- SUBJECT:** Recording DNA tests for prior felonies in criminal history files
- COMMITTEE:** Public Safety — committee substitute recommended
- VOTE:** 8 ayes — Merritt, Frost, Burnam, Driver, P. King, Lewis, Rodriguez, Vo
0 nays
1 absent — Mallory Caraway
- WITNESSES:** For — Carol Bart, Pat Keaton, Bertha “Lavinia” Masters, Sexual Assault Cold Case Program (SEACAP); Debbie Shaw; Michael Ware, Dallas County District Attorney’s Office; Patrick Welsh, Dallas Police Department; Angela Whitlow, SEACAP and Dallas Police Department; (*Registered, but did not testify*: Myrtie Alexander; Torie Camp, Texas Association Against Sexual Assault; James Jones, Houston Police Department; Gary Tittle, Texas Police Chiefs Association

Against — Debbie Russell, ACLU of Texas

On — Shannon Edmonds, Texas District and County Attorneys Association; David Gavin, Department of Public Safety; Pat Johnson, DPS Crime Laboratory Services
- BACKGROUND:** Both Code of Criminal Procedure, art. 60.051 (g) and Government Code, sec. 411.082 (2) provide for the collection of criminal history record information. Government Code, sec. 411.082 (g) also provides that criminal history information does not include fingerprint records submitted for other purposes, such as proving identification or in conjunction with a background check for employment.

The Department of Public Safety (DPS) is responsible for collecting and maintaining the computerized criminal history information data system, and the Texas Department of Criminal Justice oversees a similar database tracking system for those who are or have been in prison. Law enforcement agencies and prosecutors can access the criminal history database for information on individuals who have been arrested or are being prosecuted.

DIGEST:

CSHB 2932 would amend Code of Criminal Procedure, art. 60.051(g) to require that criminal history records include a summary of any forensic DNA test results that indicated a high likelihood that a person arrested for or charged with any felony or misdemeanor offense, other than one punishable by a fine, committed another offense. The notation would be included in the file, irrespective of whether the person would have been or ever would be arrested or charged with the offense identified through the forensic DNA test. The information also would include the offense code assigned for the alleged crime in the criminal history information database system.

The bill also would amend Government Code, sec. 411.082(2) to require that information about DNA testing results be a part of a person's criminal history record. However, other provisions would exclude any DNA submitted with no connection to a criminal offense, including the one described by Code of Criminal Procedure, art. 60.051 (g).

The bill would apply only to DNA summaries included in the criminal history information database system on or after September 1, 2009, when the bill would take effect. However, the information in the DNA summaries could be based on test results obtained before, on, or after the bill took effect.

**SUPPORTERS
SAY:**

CSHB 2932 would provide a narrowly crafted, but necessary, response to the consequences of reexamining old sexual assault cases either for post-conviction exonerations or investigations of cold cases. In many cases, the person who committed these attacks can be identified. However, these perpetrators cannot be prosecuted because the statute of limitations now has expired for sexual assaults that occurred before 1995. Legislators agreed in 2001 to remove the time limit on other sexual assault cases where biological evidence was available. CSHB 2932 would allow for some degree of justice in closing the final chapters of these earlier offenses and holding accountable those responsible.

CSHB 2932 would not create any additional categories for inclusion into state DNA databases and would apply to a very limited number of cases. All evidence would come from biological material collected at the time of the offense and stored in the evidence collection kits. The bill would apply only to those criminal information histories already allowed by state law. Unfortunately, these who commit violent sexual assaults are likely to be repeat offenders or commit other crimes. The bill would allow for

identification of these offenders who again may end up in the criminal justice system.

Nothing in CSHB 2932 would impinge on constitutional protections or other rights afforded those accused of crimes. Information on matches through the current system of analyzing DNA samples would have only limited applications. The information from the database match could be introduced as additional evidence in the punishment phase of trial when the person is convicted of another offense. The purpose would be to demonstrate that the defendant had a prior history of bad conduct and deserved a more severe sentence. The report also could be considered in application for paroles for those already incarcerated for other offenses.

CSHB 2932 would not change the rules of evidence or relieve the prosecution of its evidentiary at the punishment phase of a trial. Counsel for the defendant would be aware of the accusations and be able to offer rebuttal to its relevancy to the new charges. Any use of the information in the parole process would be subject to the due process provisions of that system.

CSHB 2932 would provide some sense of closure to victims of sexual assault. The bill could, paradoxically, contribute to the victims' healing process even if their assailants cannot be brought to justice. Police and prosecutors invariably must turn their attention to other crimes. Sexual assault victims never forget. The bill would demonstrate that victims of sexual assaults, and their attempts to cope with these painful experiences, are not forgotten.

CSHB 2932 also would acknowledge the integrity of Dallas County prosecutors and police in recognizing and remedying mistakes made in past handling of sexual assault cases. So far, 38 men falsely convicted and imprisoned for sexual assault cases in Texas have been exonerated by reexamination of DNA; 19 are from Dallas County. For many years, the Dallas Police Department has been one of the few law enforcement agencies to preserve biological evidence from every case when it was available. Thousands of evidence collection kits — some dating from the 1980s — were maintained by the Southwestern Institute of Forensic Science lab in Dallas. Availability of this evidence has enabled further investigations through the Dallas Police Department Sexual Assault Cold Case Program and the Conviction Integrity Unit of the Dallas District Attorney's Office. Allowing use of information from "cold case" sexual

assaults in ongoing investigations and prosecutions would provide an incentive to preserve and examine older evidence collection kits.

Current standards for protecting the privacy of individuals would not be changed by CSHB 2932, and the bill would add additional safeguards to ensure that DNA information submitted for other purposes would not be included in a criminal history record file. The bill would not allow DNA information to be collected, analyzed, or stored in a way that included descriptions of the individual's human physical traits or any propensity for disease or medical conditions. Currently, DNA information is recorded as a series of bar codes and would not include information that would compromise the privacy of persons or close relatives named in the records.

Making those identified through DNA matches from cold cases register as sex offenders could violate the constitutional rights provided those accused of crimes. CSHB 2932 would provide a standard that would protect constitutional rights and more likely would survive legal challenge.

Problems with backlogs in testing evidence collection kits in Los Angeles reflect particular problems with police proceedings and budget shortfalls in California and cannot be extrapolated to Texas. The Legislature has already addressed the problems that could be caused by delaying in processing evidence collection kits by removing the statute of limitation for cases where biological evidence was collected.

Both the Senate and House versions of SB 1 by Ogden, the general appropriations bill, would provide funding for the DPS's exceptional request for updates to its information technology system. Any changes required by CSHB 2932 could be incorporated in this update.

**OPPONENTS
SAY:**

Inclusion of potentially incriminating evidence in a person's criminal history record information file without the person's knowledge or consent would present serious risks to all Texans' constitutional rights. HB 2932 would turn the due process assumption of "innocent until proven guilty" on its head. Americans are justifiably wary of past and present attempts by other governments to collect dossiers of information about their citizens. CSHB 2932 would not allow knowledge of what would be included in the criminal history record, nor a process to remove the information once the record had been "flagged."

DNA examination has proven to be a useful tool for law enforcement, but it is no panacea. The state of forensic science has not reached the level portrayed in television crime programs and other media. Many news reports have exposed problems at forensic laboratories operated by DPS and other local jurisdictions other than that operated in Dallas County. There remain some doubts about the professionalism or expertise of these facilities. Older evidence collection kits may not have been preserved properly, and testing them may yield incomplete or incorrect results.

Collection and use of DNA information for any purposes raises privacy concerns. DNA information is much more personal than a fingerprint. Close family members share similar DNA, and improper use or disclosure could result in false accusations against innocent people.

OTHER
OPPONENTS
SAY:

Suspects identified through matches with cold cases should be required to register as sex offenders.

CSHB 2932 would change statutes without making corresponding appropriations to implement the programs. Changes to forms and other records eventually could add up to large expenditures for data collection and reporting systems.

CSHB 2932 could provide false hope to sexual assault victims that information from their evidence collection kits was being processed in a timely and proper manner, no matter how old the case. A March 2009 Human Rights Watch report, "Testing Justice: The Rape Kit Backlog in Los Angeles City and County," found that Los Angeles County has the largest known sexual assault kit backlog in the United States, with more than 12,000 untested sexual assault kits. It is uncertain how large the backlog would be in Texas.

NOTES:

The committee substitute differs from the original bill by adding the provision that would allow DNA summaries to be included in the criminal history information database whether the test was conducted before, on, or after the bill took effect.

The fiscal note estimates that CSHB 2932 would require an expenditure of \$1.2 million in fiscal 2010 to modify the DPS's computerized criminal history system to store and allow retrieval of information from systems that currently compile summary forensic DNA test results.

The companion bill, SB 1558 by Carona, the companion, has been referred to the Senate Criminal Justice Committee.