SUBJECT: DNA samples from people arrested and indicted for certain sex crimes

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 8 ayes — Hinojosa, Dunnam, Keel, Talton, Garcia, Kitchen, Martinez Fischer, Shields

0 nays

1 absent — Green

SENATE VOTE: On final passage, April 30 — voice vote

WITNESSES: *(On House companion bill, HB 1726:)*
For — Claude Jones, Texas Police Chiefs Association; Rudy Landeros, Austin Police Department; Myrtle L. Captain; *Registered but did not testify:* Shanna Igo, Texas Municipal League; Charles C. Holt, Common Cause of Texas; Lyn Williams, Texas Association Against Sexual Assault; Mike Sheffield, Austin Police Association; Chris W. Jones, CLEAT; Verna Lee Carr, People Against Violent Crime; Ruth-Ellen Gura; Ronald Earle

Against — William Harrell, American Civil Liberties Union

On —Donald Lee, Texas Conference of Urban Counties; Arthur J. Eisenberg, University of North Texas Health Science Center; Chris Kirk, Brazos County Sheriff's Office; Mindy Montford McCracken, Texas District and County Attorneys Association

BACKGROUND: Prison inmates must give blood samples or other specimens to create DNA records at the request of the institutional (prison) division of the Texas Department of Criminal Justice (TDCJ) if ordered by a court to do so or if the inmate is serving a sentence for specified violent offenses. Those offenses are murder, aggravated assault, first-degree burglary, second-degree burglary if committed in a habitation, an offense that requires registration under the state's sex-offender registration law, or any offense if the inmate has been convicted previously of one of the above offenses or a similar offense under federal law or the laws of another state.

Juvenile offenders committed to the Texas Youth Commission (TYC) must provide blood samples or other specimens to create a DNA record if ordered to do so by a juvenile court or if the juvenile was committed for one of the offenses that trigger the requirement for adult offenders to give samples.

The Department of Public Safety (DPS) maintains the state's DNA database.

DIGEST:

SB 638 would require defendants indicted for specified sex crimes, repeat offenders arrested for the specified sex crimes, and those convicted of public lewdness or indecent exposure to give specimens for the creation of a DNA record. The specimen or the DNA record could be sent to DPS.

SB 638 would take effect September 1, 2001. Requirements relating to people charged with or convicted of certain felonies and those released by magistrates for certain offenses would apply to defendants arrested on or after February 1, 2002. The bill would apply to people placed on deferred adjudication or community supervision on or after February 1, 2002.

Requiring DNA samples from certain defendants. SB 638 would require specimens to create DNA records from a defendant who was:

- indicted or waived indictment for one of the following felonies:
  - aggravated kidnaping involving bodily injury or sexual abuse;
  - indecency with a child;
  - sexual assault;
  - aggravated sexual assault;
  - prohibited sexual conduct;
  - burglary involving a habitation and intent to commit another felony other than theft;
  - compelling prostitution;
  - sexual performance by a child; or
  - possession or promotion of child pornography; or

- arrested for one of the felonies listed above and previously had been convicted of or placed on deferred adjudication for one of the felonies listed above; or
- convicted of public lewdness or indecent exposure.

A court would have to require a defendant who met the above requirements and who was indicted or waived indictment and those convicted of public lewdness or indecent exposure to provide a law enforcement agency with a specimen for creating a DNA record. Law enforcement agencies would have to require defendants who met the requirements above and who were arrested to provide a specimen to create a DNA record. Magistrates would have to require as a condition of release that defendants described above provide law enforcement agencies with a specimen for a DNA record.

The DPS director would have to require law enforcement agencies taking specimens to preserve them and to maintain a record of the specimen collection. The specimens could be sent to DPS or to a DPS-approved laboratory. The DPS director would have to prohibit law enforcement agencies from taking blood samples to create the DNA record. By January 1, 2002, the DPS director would have to adopt rules relating to local law enforcement agencies taking specimens under SB 638.

If a defendant were acquitted after arrest or indictment or a case was dismissed, the court would have to order the law enforcement agency to destroy the record of the collection and order DPS to destroy the specimen and the record of its receipt.

A defendant described above who provided a specimen would not have to provide one at other points in the criminal justice system unless a prosecutor established to the satisfaction of the DPS director that the interests of justice or public safety required an additional sample.

Requiring DNA specimens from certain probationers. Courts would have to require certain defendants placed on community supervision (probation), including deferred adjudication community supervision, to report to a law enforcement agency to provide a specimen to create a DNA record. This would apply to defendants placed on community supervision for:

- aggravated kidnaping involving bodily injury or sexual abuse;
- indecency with a child;
- sexual assault;
- aggravated sexual assault;
- prohibited sexual conduct (incest);

- burglary involving a habitation and intent to commit another felony other than theft;
- compelling prostitution;
- sexual performance by a child; or
- possession or promotion of child pornography.

The DPS director would have to require law enforcement agencies to preserve the specimens and to maintain records of their collection. The director would have to prohibit law enforcement agencies from taking blood samples to create a DNA record. Probationers would not have to provide samples at other points in the criminal justice system unless a prosecutor established to the satisfaction of the DPS director that the interests of justice or public safety required an additional sample.

Segregation of records. DNA records created under SB 638 would have to be segregated from other DNA records. However, if a record otherwise would be required under current law because a person was sent to a penal institution or a court ordered that a record be made, a record created under SB 638 would not have to be segregated from the main database.

Confidentiality. Records created under SB 638 would be confidential and not subject to disclosure under the open records law. It would be a third-degree felony (punishable by two to 10 years in prison and an optional fine of up to $10,000) knowingly to disclose information in DNA record required by SB 638 or information related to an associated DNA analysis. A violation also would constitute official misconduct.

The bill's confidentiality requirements would apply only to offenses committed on or after the bill's effective date.

Court cost upon conviction. A person convicted of public lewdness or indecent exposure would have to pay a court cost of $50, and a person convicted of another offense listed in SB 638 would have to pay a court cost of $250. Officers collecting the court costs would have to keep separate records of the funds collected and deposit them in the county treasury. The county treasurer would have to send to the funds collected to the comptroller quarterly. If the treasurer met this requirement, the county could retain 10 percent of the funds.

The comptroller would have to deposit 35 percent of the funds in the treasury to the credit of the state highway fund and 65 percent to the credit of the criminal justice planning account in the general revenue fund.

The Legislature would have to appropriate the necessary amount from the criminal justice planning account to the criminal justice division of the Governor's Office for grants to local law enforcement agencies taking specimens as required by SB 638.

These court costs would apply only to offenses committed on or after the bill's effective date.

SUPPORTERS SAY:

SB 638 would help prevent sexual assault and other serious sex crimes and would help identify perpetrators of crimes by broadening the category of people who must submit DNA samples to authorities. These actions are warranted because of the seriousness of sex crimes and the risk represented by repeat offenders. The U.S. Department of Justice estimates that the average number of sexual assaults per offender is eight to 12.

DNA taken from someone suspected of a crime could be compared with that from crime scenes, helping to solve cases. SB 638 also would help the wrongfully accused if DNA from someone accused of a crime was compared with that from a crime scene and the person was excluded as a suspect.

SB 638 would be limited to circumstances that warrant the taking of DNA. It would apply only to people who were arrested if the person had a previous conviction for a sex crime. Many of these offenders should have had DNA samples taken, as required by current law, when they were released from prison, but for some, this never has occurred, and for others, a sample was taken but deteriorated before it could be analyzed. If a case against a defendant moves a step further to indictment, it would be appropriate to take a DNA sample. SB 638 also would require samples from people convicted of public lewdness and indecent exposure, because often these offenses are precursors to more serious sex crimes, but the bill would require these samples only upon conviction.

SB 638 contains safeguards to protect the privacy of defendants who would have to give samples. It would require that upon acquittal or dismissal, law

enforcement agencies destroy the record of the specimen's collection and that DPS destroy the specimen and the record of its receipt. This would ensure that DPS would not keep DNA profiles on innocent people. Also, profiles developed under SB 638 would have to be kept segregated from other DNA records. SB 638 specifically would make DNA records created under the bill confidential and would make it a third-degree felony to disclose information in a DNA record or analysis taken under the bill.

Current state law tightly controls access to the DNA database. Government Code, chapter 411 makes DNA records in the database confidential and not subject to the open records law. It restricts uses of the records and restricts database access to criminal justice agencies for judicial proceedings, criminal defense purposes, or statistical analysis if personally identifiable information has been removed. DNA profiles for the database are developed for identification purposes only, not for medical or other reasons.

SB 638 would not expand the state's DNA database significantly. If a person was acquitted or charges were dropped, there would be no profile, and if the person was convicted, the sample eventually would be taken under current law. The only expansion would be for profiles of those convicted of public lewdness or indecent exposure.

The state can take fingerprints and photos of arrestees without running afoul of constitutional protections, and collecting DNA under SB 1818 would be no different. Concerns that DNA samples taken by the criminal justice system may be used for medical or insurance purposes are overblown, because the profiles are specialized and developed only for identification.

SB 638 would fund these DNA collection efforts by instituting a new court cost for people convicted of an offense so that offenders, not the general public, would foot the bill. A portion of the fees collected would go to help local law enforcement agencies pay their costs, and the rest would be used to defray state costs. These costs would be waived for indigent defendants, as are other court costs.

OPPONENTS SAY:

Expanding the state's DNA database to include certain defendants who only are arrested or indicted — but not convicted — would go too far in the state's DNA collection efforts and could lead to violations of privacy. If an

arrestee is suspected in a particular crime, a DNA sample can be taken now if there is probable cause and a search warrant for a specific crime. Dropping these requirements and taking samples from arrestees and comparing them to evidence from unsolved crimes could amount to an unconstitutional search and seizure.

The number of people in the DNA database, even if they are criminal suspects, should be kept to a minimum to ensure people's privacy. The DNA database is not comparable to a fingerprint database, because DNA samples contain much more personal information. Fingerprints have no application outside of the criminal justice system, but DNA samples contain much more personal information that could be subject to misuse and abuse by insurance companies, employers, or others. As the database expands, the risk increases that the information could be used for purposes other than law enforcement.

Samples should not be taken from people convicted of public lewdness and indecent exposure. These offenses might not rise to the seriousness of other crimes included in the database.

NOTES:

The bill's fiscal note estimates that it would generate revenue of $2 million in fiscal 2002 and $2.6 million annually after that. Sixty-five percent would be deposited in the state's criminal justice planning account and 35 percent in the state highway fund, and counties would retain 10 percent. The cost to the state highway fund of taking and analyzing DNA specimens would be about $285,000 per year.