

SUBJECT: Making evidence tested by unaccredited crime laboratory inadmissible

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Keel, Riddle, Ellis, Hodge, Talton

0 nays

4 absent — Denny, Dunnam, P. Moreno, Pena

WITNESSES: For — Timothy Fallon

Against — None

On — Chuck Noll, Harris County District Attorney's Office; John Rolater, Dallas County District Attorneys Office; Ron Urbanovsky, Department of Public Safety, Crime Laboratory Service

BACKGROUND: Code of Criminal Procedure, art. 38.35, permits a law enforcement agency to procure a forensic analysis of physical evidence obtained in connection with the agency's investigation of a criminal offense. A law enforcement agency, other governmental agency, or private entity performing a forensic analysis may require the requesting law enforcement agency to pay a fee. Forensic analysis is defined as a medical, chemical, toxicologic, ballistic, or other expert examination performed on physical evidence to determine its connection to a crime. Physical evidence means any tangible object, thing, or substance relating to a crime.

Government Code, Chapter 411, governs the Department of Public Safety (DPS), and defines DNA laboratory as a laboratory that performs forensic DNA analysis on samples or specimens derived from a human body or crime scene.

DIGEST: CSHB 2703 would make inadmissible physical evidence and testimony regarding the evidence if, at the time of the analysis or the time the evidence was submitted to the court, the crime laboratory or other entity conducting the analysis was not accredited by DPS. However, physical evidence would be

admissible regardless of the accreditation status of the crime laboratory or entity if the laboratory or other entity preserved one or more separate samples of the physical evidence for use by the defense attorney or under order of the convicting court, and agreed to preserve those samples until all appeals in the case were final. This exception to the accreditation requirement would expire on September 1, 2005.

CSHB 2703 would add a section to Government Code, Chapter 411, to require the director of DPS to establish by rule an accreditation process for crime laboratories, including DNA laboratories, and other entities conducting forensic analyses of physical evidence for use in criminal proceedings.

CSHB 2703 would amend the definition of forensic analysis specifically to include DNA evidence.

This bill 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, 2003. The bill would apply only to evidence tested after September 1, 2003. The DPS director would be required to adopt rules for the accreditation process not later than the 61st day after the effective date of the bill.

**SUPPORTERS
SAY:**

CSHB 2703 would establish minimum standards that would help bring all laboratories in Texas up to national standards and prevent the kind of shoddy forensic analyses that threaten to taint the criminal justice system in this state.

A DPS audit in December 2002 found widespread problems in the unaccredited Houston Police Department (HPD) crime lab. The audit team found, among other things, that lab personnel lacked necessary training and experience, that the lab was not designed to provide adequate security and minimize contamination, that a leaking roof might have contaminated evidence, that the lab failed to properly calibrate equipment and instruments used in DNA testing, that lab analysts might have exaggerated statistics in some instances, and that trial testimony over several years had been based on questionable lab results. What happened in Houston is not an isolated incident, and the Legislature must act now to prevent these kinds of abuses in the future.

CSHB 2703 would help restore the public's faith in the integrity criminal justice system. Prosecutors, courts, and juries give great weight to forensic evidence, and it is essential that forensic testing be reliable. The scandal at the HPD lab tarnished the system by incarcerating at least some innocent persons, and CSHB 2703 would help restore the public's trust in the system by ensuring the reliability of physical evidence used to send offenders to prison, or even to death.

All 13 DPS laboratories are accredited by a national organization, the American Society of Crime Laboratory Directors (ASCLAD), and there is no reason that other laboratories within the state should not meet similar standards. DPS does about half the forensic work in Texas, and CSHB 2703 would ensure consistency among jurisdictions. This bill also would contain an exception granting laboratories a limited time in which to raise their standards. Evidence from unaccredited labs still would be admissible as long as they agreed to preserve samples of physical evidence for the duration of appeals in the case.

Requiring certification would ensure that laboratories received the funding, and employees received the training, necessary to function properly. This bill would prevent management from cutting corners because the consequences would be too great.

With an accreditation process in place, laboratories would go through two internal audits, and one external audit, every two years to maintain their accreditation status. This process would ensure that any problems would be detected early and that laboratories would have to keep up with any changes in technology and technique regarding DNA testing. Finally, having an outsider conduct an audit would be helpful because outsiders often notice things with fresh eyes that go overlooked by insiders.

There already is a mechanism in place to address cases that have been decided based on shoddy forensic analyses by the HPD crime lab. The Houston Police Department and the Harris County District Attorney's Office are reviewing cases dating back to 1992 that involved DNA evidence that was tested at the HPD crime lab and that inculpated the defendant, to determine if the evidence should to be re-tested. The review includes cases from other counties and even federal cases. CSHB 2703 effectively would prevent this kind of

injustice from occurring elsewhere.

Representative Bailey intends to introduce a floor amendment that should eliminate any fiscal note attached to this bill by excluding certain kinds of evidence from the definition of forensic analysis and by allowing the director of DPS to exempt from the accreditation process certain types of crime laboratories.

**OPPONENTS
SAY:**

CSHB 2703 would do nothing to address cases that have already been decided based on shoddy forensic analyses from unaccredited labs. It would help prevent future mishaps but would not get to the bottom of what went wrong at the HPD lab. CSHB 2703 would apply only to evidence tested after September 1, 2003, which would mean that in trials conducted after the effective date of the bill, evidence previously tested at unaccredited laboratories still could be presented to judges and juries.

CSHB 2703 would cost too much money to implement at a time when the state is facing a fiscal crisis. The Legislative Budget Board (LBB) has determined that the bill would cost about \$1.3 million to implement over the next biennium. While the goals of the bill are worthy, the state cannot afford it at this time.

**OTHER
OPPONENTS
SAY:**

CSHB 2703 would not go far enough. To fully protect the rights of criminal defendants, it should allow the defendant to obtain through discovery the error rate for the laboratory where the evidence was tested, and should make the error rate admissible at trial. That way, the jury could consider the laboratory's record when weighing the physical evidence tying the defendant to the crime and decide how trustworthy it was.

NOTES:

The bill as introduced differs from the committee substitute in that it would have provided for accreditation of crime laboratories by ASCLAD rather than DPS, would have applied only to laboratories owned or operated by a municipality, county, or other political subdivision, and did not contain an expiration date for the exception for unaccredited labs that preserved samples until all appeals were exhausted. It also did not specify that the bill only would apply to evidence tested after September 1, 2003, and did not exclude testimony regarding physical evidence from unaccredited laboratories.

Representative Bailey intends to offer a floor amendment that would exclude latent print examinations and the taking of a breath sample from the definition of forensic analysis, as well as an examination or test excluded by rule of the director of DPS. Furthermore, the amendment would allow the director of DPS to exempt crime laboratories from the accreditation process if the director determined that independent accreditation was unavailable or inappropriate for the laboratory or the entity or the type of examination or test performed by the laboratory; the type of examination or test was admissible under a well-established rule of evidence; and the type of examination or test was routinely conducted outside of a crime laboratory by a person other than an employee of the crime laboratory. The purpose of the amendment is to eliminate the fiscal note attached to the bill, which the LBB estimates would result from costs incurred by DPS in meeting the requirement of preserving samples of breath tests.

A similar bill, HB 353 by Dutton, which was heard in the House Law Enforcement Committee on April 7, and left pending, would create a forensic science review committee to regulate and oversee the activities of forensic laboratories in Texas and adopt accreditation standards for them as well as qualification standards and a code of ethics for examiners, analysts, and scientists employed by forensic laboratories.

Another similar bill, SB 1607 by Ellis, was reported favorably from the Senate Criminal Justice Committee on March 31. It would create a commission on forensic science to develop minimum standards and a program of accreditation for all forensic laboratories in Texas. The commission would have to establish a subcommittee on forensic DNA laboratories and forensic DNA testing that would make binding recommendations for an accreditation program for DNA laboratories.

HCR 93 by Dutton, which was left pending in the House Criminal Jurisprudence Committee on April 8, would urge Congress to request that the U.S. Department of Justice conduct a thorough investigation into the HPD crime laboratory and past criminal cases in which the outcome might have depended on evidence processed by the laboratory.