

SUBJECT: Regulating crime and DNA labs and requiring DNA samples

COMMITTEE: Law Enforcement — committee substituted recommended

VOTE: 6 ayes — Driver, Jackson, Burnam, Frost, Hegar, Veasey

0 nays

1 absent — Hupp

WITNESSES: For — Marie Munier, representing Charles Rosenthal, Jr., District Attorney, Harris County; Mark Thielman, Tarrant County District Attorney

Against — Will Harrell, ACLU, NAACP, LULAC; Michael Vasquez, Texas Conference of Urban Counties

On — Pat D. Johnson, DPS Crime Lab; Dennis Loockerman, Texas Department of Public Safety; William Allison

BACKGROUND: ***Crime labs.*** In 2003, the 78th Legislature enacted HB 2703 by Bailey, which required DPS to establish an accreditation process for crime labs and other entities, including DNA labs, and to regulate DNA testing. Under this law, physical evidence subject to forensic analysis and testimony regarding the evidence is inadmissible in criminal court if, at the time the analysis or evidence was submitted to the court, the crime laboratory was not accredited by DPS. DPS has issued rules that name specific accreditation bodies under which individual labs can seek accreditation. Until September 1, 2005, physical evidence is admissible regardless of the accreditation status of the crime laboratory if the lab agrees to preserve and maintain one or more separate samples of the evidence until all appeals in the case are final.

The law allows DPS to exempt certain laboratories from the accreditation process if independent accreditation is unavailable or inappropriate, the type of forensic examination is admissible under a well established rule of evidence, or the type of test performed is conducted routinely outside of a crime laboratory. It does not apply to latent fingerprint examinations, breath tests, or examinations exempted by rule by the DPS director.

For more information about the state's crime lab system and the surrounding debate, see House Research Organization Focus Report No. 79-2, *Should Texas Do More to Regulate Crime Labs?*, December 20, 2004.

DNA samples. Under Government Code, sec. 411.148, prison inmates admitted to TDCJ must provide a specimen for a DNA record. Juvenile offenders committed to TYC who commit certain sexual or violent offenses or are ordered by a court to give a sample also must provide a sample.

Also required to give DNA samples are:

- under Government Code, sec. 411.1472, persons placed on probation or deferred adjudication following felony convictions for certain sexual offenses;
- under Government Code, sec. 411.1471, persons indicted or who waive indictments for certain felony sexual offenses, persons arrested for any offense who have previous convictions for certain felony sexual offenses, and persons convicted of two misdemeanor sexual offenses.

DNA labs. Government Code, sec. 411.0206 requires DPS to regulate DNA testing, including DNA labs. Government Code, sec. 411.144 requires DPS to establish procedures for DNA labs and criminal justice and law enforcement agencies for collecting and analyzing a specimen for DNA analysis to permit the use of the evidence in criminal cases. DNA labs and criminal justice and law enforcement agencies are required to follow DPS procedures. DPS may enter and inspect the premises or audit the procedures of any DNA lab that provides DNA records or forensic analyses to DPS.

State DNA database. Government Code, sec. 411.142 authorizes DPS to establish and maintain a computerized database as the central depository for DNA records in Texas. The database must be compatible with the FBI's national DNA identification index system (CODIS) to the extent required by the FBI to permit exchange and storage of DNA records. The principal purpose of the data base is to assist criminal justice and law enforcement agencies in investigating and prosecuting criminal offenses.

Under sec. 411.143(e), DPS may not store a name or other personal identifying information in the CODIS database. The CODIS system may contain a reference number to identifying information in another database.

DIGEST:

CSHB 1068 would make several changes to the state's law governing crime and DNA labs and the state DNA database, including giving DPS more authority to inspect crime labs and DNA labs in Texas, expanding who would be required to give DNA samples for the database, and statutorily authorizing two state DNA databases.

CSHB 1068 would take effect September 1, 2005. The bill would apply to evidence tested on or after that date and to persons who, on or after that date, were confined, placed on probation, community supervision, deferred adjudication, ordered to give a sample, or volunteered to give a sample. TDCJ and TYC would collect samples from inmates or juveniles serving sentences who were not required to give a sample previously.

Crime labs. CSHB 1068 would authorize DPS to enter and inspect the premises of an accredited crime lab or one seeking accreditation and to audit a lab's records, reports, procedures and other quality assurance matters.

The bill would prohibit forensic analysis of evidence and testimony about the evidence from being inadmissible based solely on the accreditation status of the crime lab if the lab were eligible for accreditation at the time of the exam but had not made a proper application and obtained accreditation before testimony about an exam or test.

The bill also would add to the list of exclusions from the definition of forensic analysis that therefore were not under the rules requiring evidence to be analyzed by accredited crime labs. The bill would add: digital evidence; tests done to determine compliance with probation or parole conditions; and expert examinations or tests conducted for scientific research, medical practice, civil or administrative litigation, or other purposes unrelated to evidence from a crime. The definition of forensic analysis would include exams or tests requested by a law enforcement agency, prosecutor, criminal suspect or defendant, or court.

DPS would have new authority to exempt from the Texas accreditation process a crime lab if, at the time of an analysis, the lab was under another accreditation process that met or exceeded the Texas process and

was either outside of Texas or operated by a Texas governmental entity other than the state or a political subdivision of the state. DPS could modify or remove a crime laboratory exemption from accreditation requirements if the director determined that the reason for the exemption no longer applied.

The bill would authorize law enforcement agencies, prosecutors, and crime labs to petition courts to require as a condition of probation or parole that a person reimburse them for reasonable costs of confiscating, analyzing, storing, or disposing of evidence.

DPS could collect costs incurred for accrediting a lab and could charge \$6 for copies of audit or other reports, in addition to what can be charged under the state's public information laws. These funds could be used only to defray the cost of administering the accreditation process or laws relating to the state's DNA database.

DNA samples. CSHB 1069 would expand who had to contribute samples for the state DNA database. Samples could be required of:

- persons placed on probation or deferred adjudication following all felony convictions, not just the sex offenses as required under current law;
- juveniles who were confined in a TYC facility after an adjudication for conduct constituting all felonies or who were placed on probation or deferred adjudication after adjudication for conduct constituting any felony, instead of the specific sexual or serious offenses required under current law; and
- all persons confined in a TDCJ penal institution, regardless of when they entered.

The bill would require certain criminal justice agencies to collect the required samples and send them to DPS. Employees of criminal justice agencies could collect the samples if they complied with DPS rules on collecting and handling samples.

TDCJ and TYC would, as soon as practicable, obtain a sample from someone confined in another penal institution but likely to be released

before being admitted to one of their facilities. The administrator of the other institutions would be required to cooperate with TDCJ and TYC

CSHB 1068 would create a new offense making it a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000) to knowingly fail or refuse to provide a DNA sample if required to do so under the statute and if notified of the requirement.

Current requirements that DNA records of people under indictment for certain crimes or on probation for certain crimes generally be kept segregated from other records would be repealed.

The cost charged to certain people convicted of offenses and placed on probation who were required to submit DNA samples would be lowered from \$250 to \$140 and could be charged to anyone who was required to submit a sample. The current court cost of \$50 for those convicted of two specific offenses would be raised to the \$140 charged all defendants. All of the funds would go into the state highway fund instead of the current split of 35 percent going to the highway fund and the rest to the criminal justice planning account in the general revenue fund.

DNA labs. The bill would expand DPS' current authority to inspect the premises and audit the procedures of DNA labs that *provided* DNA records or forensic analysis to DPS. DPS could audit the records, reports, and other quality assurance matters of DNA labs that provided DNA records to DPS or that *conducted* forensic analysis. DPS regulations on DNA labs would not apply to crime scene collection of evidence, including DNA evidence.

DPS would have to expunge a DNA record if DPS determined that an individual otherwise was not required to submit a DNA sample. DPS would not have to destroy physical evidence obtained in the investigation of a criminal action.

CSHB 1068 would provide an affirmative defense to prosecution for the current offense of knowingly disclosing information in a DNA record or analysis if the person reasonably believed that the person's conduct was authorized under the law or under a rule.

CSHB 1068 would make someone who ordered, collected, handled, analyzed or otherwise was involved with a DNA sample or who administered the state's DNA collection laws immune from civil liability for acts or omission resulting in death, damage, or injury if certain

conditions were met. The person would have to be acting in the course of that person's duties, reasonably believe their actions were in substantial compliance with the statute or a rule and have collected a sample in a reasonable manner according to generally accepted medical or other professional practices.

DPS could charge \$6 for copies of audits or other reports made under the DNA database laws, in addition to charges authorized under the state's public information laws. The funds could be used only to defray the costs of administering the DNA database or the crime lab accreditation statutes.

State DNA database. CSHB 1068 would authorize DPS to maintain separate types of databases. A CODIS database could not store a name or other personally identifying information and would have to be compatible with the national DNA index system to the extent required by the FBI for the exchange and storage of records and information. A CODIS database could store a code, file, or reference numbers only if DPS determined it was necessary for specified purposes.

A non-CODIS, separate DNA database could contain a name or other identifying information cross-referenced and searchable by name, code, or other identifier. A non-CODIS database would be compatible with the national DNA index system to the extent possible to allow the useful exchange and storage of DNA records and information.

SUPPORTERS
SAY:

Crime labs. CSHB 1068 would address some problems identified since 2003 by putting more teeth into the law that required crime labs to be accredited and would clarify provisions in that law. CSHB 1069 would expand DPS' audit and inspection powers so that DPS could examine a lab if it lost its accreditation or, evaluate a situation at an accredited lab and determine if further agency or accreditation action were necessary

CSHB 1068 would give DPS more flexibility and authority in the accreditation process by allowing exemption of certain crime labs, such as those from out of state, if appropriate. By setting standards for the admissibility of evidence that allowed evidence from a non-accredited lab if the lab were eligible for accreditation and obtained it before giving testimony, the bill would give the DPS enough flexibility to allow evidence from out-of-state labs in narrow circumstances.

The bill would amend the definition of crime lab to ensure that the statutory requirements apply only those entities analyzing evidence for

criminal trials. The bill would exclude entities doing drug and alcohol tests for probationers and parolees, medical tests, and digital evidence. The definition of forensic analysis specifically would include tests requested by prosecutors and defendants to ensure that both sides of a criminal trial were treated equally.

Legislation enacted by the 78th Legislature to require accreditation of crime labs in Texas is working to ensure that all labs in Texas meet industry standards through certification by an accrediting agency designated by DPS. Current law should be able to reach fruition before considering wholesale changes to the law. There is no need to create a new state entity to oversee crime labs when DPS has the experience and expertise to continue this duty.

DNA samples. CSHB 1068 would broaden the category of offenders who had to submit DNA samples for the state database so that both the defense and the prosecution could take advantage of DNA technology. DNA testing could help identify perpetrators of crimes as well as exclude people from the list of suspects.

Under current law, all felons who are committed to TDCJ must give DNA samples. Before that law was implemented in April 2004, those being admitted to TDCJ for specific offenses were required to give samples. This means about 56,000 inmates prison have not been sampled. CSHB 1068 would remedy this by requiring all TDCJ inmates to give samples.

The bill also would simplify current requirements that certain probationers or persons under indictment give samples. Because all felonies are serious crimes, the bill would require samples of all felony probationers and juveniles adjudicated for all felonies. This change would be in line with the current policy that requires samples from all convicted felons. The bill would apply the same standards to all offenders, make administration of the law more straightforward, and could help solve and deter crimes since many offenders are repeat offenders.

CSHB 1068 would not lead to violations of privacy. Current state law tightly controls access to and use of the DNA database and makes the records in the database confidential and not subject to the state's public information laws. DNA profiles for the database are developed for identification purposes only and cannot be used for medical or other reasons.

TDCJ currently is authorized to use force to obtain a sample, but inmates cannot be held past their statutory release date for failing or refusing to give samples. This leaves the agency with only the possibility of administrative action, such as taking away good conduct time or restricting privileges, if an inmate refused to give a sample. CSHB 1068 would create a new criminal offense for refusing to give a sample.

DNA labs. CSHB 1068 would expand the state's inspection authority over DNA labs to include records, reports, and other quality assurance matters and would ensure that the DPS could enter and inspect private labs and labs that had lost their accreditation. The state currently does not have authority to enter private labs, even though it has an obligation to regulate them. CSHB 1068 also would ensure that DPS regulations for DNA labs were applied only to the proper entities by excluding crime scene collection of evidence.

State DNA database. CSHB 1068 would formalize the state's current system of having two separate, but related DNA databases. To follow the FBI's regulations, the state has a CODIS database that contains DNA information but not personal identifying information, and another database with that personal information filed by reference numbers. CSHB 1068 would place this arrangement into statute and clarify how the two databases operate together.

OPPONENTS
SAY:

Crime labs. CSHB 1068 would not go far enough in addressing the state's need for independent crime labs. The accreditation system established by the 78th Legislature does not do enough to ensure the integrity of criminal evidence in the state. Oversight of the state's crime labs should be divorced from DPS and opened to scrutiny by an outside, independent entity. DPS oversight of crime labs could lead to a situation in which there were no outside body to oversee cases in which DPS had gathered and analyzed evidence.

DNA samples. CSHB 1068 would go too far in the state's DNA collection efforts and could lead to violations of privacy. While current law requiring DNA samples from sex offenders or violent offenders may be justified, CSHB 1068 would expand the law to all felony probationers, including those who may not have committed or be accused of the types of offenses that warrant the state keeping their DNA profiles. For example, some burglary, theft, and driving while intoxicated offenses are felonies, and these cases may not warrant inclusion in the database.

The number of people in the database — even if they are offenders — should be kept to a minimum. As the database expands, the risk increases that the information could be used for purposes other than law enforcement, such as to delve into a person's genetic makeup for medical or insurance reasons. The state should be mindful of keeping a balance between public safety and liberty.

The new offense created by the bill that makes it a felony for people to refuse to give DNA samples would run counter to the state's efforts to reserve its prison resources for those who commit violent or serious crimes.

NOTES:

The author plans to offer a floor amendment to remove changes to current law concerning felons under indictment who are required or can be required to give DNA samples

The committee substitute made many changes to the original bill, including eliminating a requirement that DNA samples be taken from persons arrested for felonies; eliminating provisions about removing certain DNA records from the database; creating the new offense for refusing to give a DNA sample; and adding provisions that additional samples were not required from persons who already had a sample in the DNA database.

A related bill, SB 1263 by Whitmire, which would create the Texas Forensic Science Commission to develop and implement an accreditation process for all labs and facilities that conduct forensic analyses, passed the Senate by 28-1 (Estes) on April 19 and has been referred to the House Law Enforcement Committee.

Another related bill, HB 1788 by Bailey, which would require DPS to designate an existing Department of Public Safety DNA lab as a regional lab if an area did not have an accredited DNA lab, is pending in the Law Enforcement Committee.