

**SUBJECT:** Deadlines for post-conviction testing of forensic evidence

**COMMITTEE:** Criminal Jurisprudence — committee substitute recommended

**VOTE:** 5 ayes — Peña, Vaught, Escobar, Hodge, Pierson  
0 nays  
4 absent — Riddle, Mallory Caraway, Moreno, Talton

**SENATE VOTE:** On final passage, April 12 — 31-0, on Local and Uncontested Calendar

**WITNESSES:** For — (*Registered, but did not testify:* Edwin Colfax, The Justice Project; Will Harrell, ACLU, NAACP, LULAC; Celeste Villarreal, Texas Criminal Defense Lawyers Association)  
  
Against — None  
  
On — (*Registered, but did not testify:* Pat Johnson, Texas Department of Public Safety Crime Laboratory)

**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. 64.01 provides the procedure for a convicted person to file a motion for forensic testing of DNA material that had not been previously tested because it had not been available or because it was not technological feasible to test it at the time of the trial. The convicted person is entitled to counsel, and the state must compensate that counsel if the judge accepts the motion for further DNA testing and determines that the person is indigent.

Code of Criminal Procedure, art. 64.02 requires a court receiving a motion for forensic testing of DNA to provide a copy to the prosecuting attorney. In turn, the prosecuting attorney must deliver the evidence to the court along with a description of the condition of the evidence or explain in writing why the evidence cannot be delivered.

Code of Criminal Procedure, art. 64.03(b) allows a convicted person to file the motion for additional forensic testing even if the person had pleaded guilty or nolo contendere and prohibits the court from finding that identity is not an issue based solely upon that plea. 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:**

CSSB 499 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.

The bill 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.

CSSB 499 would amend Code of Criminal Procedure, art. 64.01(c) to require that counsel be appointed for the convicted person making the request for further forensic DNA testing within 45 days of the date the court found reasonable grounds for the additional testing or determined that the person was indigent, whichever was later.

The bill would amend Code of Criminal Procedure, art. 64.02 to set a 60-day deadline for the prosecuting attorney to respond to the motion for further DNA forensic testing by delivering the evidence or explaining in

writing why the evidence could not be delivered. At the expiration of the 60-day period, the court could order testing under Code of Criminal Procedure, art. 64.03, whether or not the prosecuting attorney had responded to the motion for the additional examination of the DNA.

The bill also would amend Code of Criminal Procedure, art. 64.03 to:

- allow a person who had made a confession or similar admission before or after conviction to file a motion for forensic DNA testing;
- provide that the state would not be liable for the cost of forensic DNA testing conducted by an independent laboratory, unless good cause has been shown;
- provide that a political subdivision would not be liable for those independent laboratory costs, regardless of whether good cause was shown; and
- testing would be done in a timely and efficient manner.

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:**

CSSB 499 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.

CSSB 499 sets reasonable deadlines for appointing counsel for indigent persons filing motions for forensic DNA testing and for the state to respond to the motions. Establishing deadlines and clarifying the court's authority to order the testing, even in absence of a response from prosecutors, should provide for a more timely response to these requests. According to the Governor's Criminal Justice Advisory Council's January 2006 report, 16,949 writs were filed with the Court of Criminal Appeals between November 2003 and October 2005. Enactment of legislation such as CSSB 499 and the proposed continuing education and technical assistance for prosecutors and criminal defense attorneys should help ease this backlog.

CSSB 499 also would clarify the "identity in issue" provisions by allowing persons who made confessions or other admissions also to be eligible to seek additional DNA testing. Current law allows those who pleaded guilty or nolo contendere to make such requests, and it is only reasonable for those who made confessions or other admissions to be included in provisions of the bill. Oral admissions of guilt have been granted great credence from medieval times to modern television court dramas, but the fact is that confessions could be false. An innocent person can make a confession because of coercion, threats, or promises of a reduced sentence, particularly in a capital case, and the bill allows for these persons to use forensic DNA testing to prove their innocence.

The bill 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.

CSSB 499 also properly would exclude political subdivisions from bearing the cost of the additional testing. This expense could be particularly onerous on smaller counties. Crime laboratories operated by cities and counties are subject to review and accreditation by DPS and must meet state standards.

Although CSSB 499 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 CSSB 499, 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.

CSSB 499 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. CSSB 499 would allow a court to authorize the use of an independent lab when a defendant requested it, which would allow for independent testing over the potential objection of the state.

Excluding political subdivisions from paying the costs of independent DNA testing, regardless of the merit of the claim, would unfairly absolve these jurisdictions of their responsibility for sloppy or incompetent forensic laboratory procedures or unfair prosecutions. These subdivisions should have some liability to pay for their mistakes.

NOTES:

On April 18, the House passed by 143-0 HB 481 by Hochberg, which would amend Code of Criminal Procedure, art. 11.07 to allow a court to order additional testing and would amend Code of Criminal Procedure, art. 64.03 (c)-(d) to allow the court to order that forensic testing be done by a laboratory independent of DPS when good cause has been shown. That bill was reported favorably by the Senate Criminal Justice Committee on May 11 and recommended for the Senate Local and Uncontested Calendar.

The House committee substitute differs from the Senate version of the bill by adding the provisions of HB 481.