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## *DNA Evidence and Texas' Criminal Justice System*

DNA, the microscopic genetic material in body cells, is playing an ever larger role in the criminal justice system. Interest in using DNA evidence in criminal cases is growing, fueled by scientific advances in DNA analysis, public awareness of the capability of DNA to identify individuals accurately, and the highly publicized release of inmates from prison after DNA testing.

In Texas, post-conviction testing of DNA evidence has resulted in gubernatorial pardons and the release from prison of two men this year. In another case, the state postponed an execution to allow DNA testing, then carried out the execution after the test failed to clear the inmate. Many similar cases have occurred in other states. DNA evidence also is used increasingly in Texas during investigation and trial of criminal cases.

Unresolved issues about how DNA should be used in the criminal justice system are spurring debate at the federal, state, and local levels. The issues include whether and how prison inmates should be afforded post-conviction DNA testing, how DNA evidence should be handled, and, in Texas, whether the state should expand its DNA database. Lawmakers, prosecutors, defense attorneys, and others have called for revising Texas statutes to address DNA testing, and at least one Texas county has begun reviewing cases voluntarily to determine if DNA evidence from past cases should be reevaluated.

*Texas lawmakers may be called on to resolve issues of how the state should use DNA evidence in criminal cases to convict the guilty and exonerate the innocent.*

The Innocence Protection Act of 2000, introduced in the 106th U.S. Congress by a bipartisan group of lawmakers, would address many of these issues by establishing DNA testing requirements for states that accepted certain federal grants.

The requirements would include allowing prisoners to request DNA testing, requiring courts to grant such requests under certain conditions,

and requiring an offender's DNA profile to be preserved as long as the offender is incarcerated, unless the government first notifies the offender and the offender's attorney that the evidence will be destroyed and they do not object.

## DNA databases

Deoxyribonucleic acid or DNA can be used to identify an individual from samples of blood, semen, saliva, skin, or hair. Except in the case of identical twins, each person's DNA is unique. In the early 1990s, states began regularly gathering DNA from crime scenes and felons, developing DNA databases, and using the data to investigate and prosecute crimes.

DNA found as crime-scene evidence can be compared with DNA from crime suspects. The type of test conducted can depend on the capabilities of a laboratory and the quality of a DNA sample. Some tests can identify the source of DNA with a high degree of certainty, while other methods may be less precise. Sometimes tests results are inconclusive, and testing may not be feasible if insufficient DNA evidence exists or if the evidence has been degraded, contaminated, or stored improperly.

DNA test results often are reported as an "inclusion" or "exclusion." In a criminal case, an inclusion, also called a match, generally means that DNA evidence from a crime scene matches that of a suspect or a known person. An exclusion means that the suspect's DNA does not match the DNA obtained from the crime scene.

In most cases, developing a DNA profile — a description of the content of part of a person's DNA — can cost anywhere from \$1,000 to \$5,000, depending on the type of sample, whether it is taken from a crime scene or from an individual for a database, and the type of report to be produced.

All states allow DNA to be collected from some convicted criminals, according to the National Conference of State Legislatures (NCSL). In general, states use their DNA databases to compare DNA evidence from unsolved crimes to DNA profiles of convicted offenders. Thirty-six states require collection of DNA samples from people convicted of sex crimes and certain other serious crimes, with five of these states requiring samples from people convicted of all felonies. Fourteen states require samples from people convicted only of specific sex offenses. In 1997, Louisiana enacted a law requiring DNA samples from

people *arrested* for certain sex offenses, but the law, which was supposed to take effect September 1, 1999, has yet to be implemented because of a lack of funding and the slow development of rules. Databases in 24 states, including Texas, are linked to the federal system that contains DNA profiles from state crime laboratories.

In 1995, the Texas Legislature directed the Department of Public Safety (DPS) to establish and maintain a computerized DNA database to help federal, state, and local law enforcement agencies investigate and prosecute offenses in which biological evidence is recovered. Prison inmates must provide DNA samples if ordered to do so by a court or if they have been convicted of crimes specified in Government Code, sec. 411.148. These crimes include murder, aggravated assault, burglary of a habitation involving a felony other than theft, and a sex offense that requires the offender to register as a sex offender. Similar requirements apply to juveniles committed to the Texas Youth Commission.

DPS maintains the database of prison inmates' DNA profiles in Austin. Forensic labs throughout the state, including eight labs run by DPS, send profiles from DNA found at crime scenes to Austin to see if they match any of the database samples.

DPS has received about 62,000 DNA samples for its database as of late October. About 9,400 samples had been analyzed by both an older method and the most up-to-date method available, while another 2,600 samples had been analyzed only by the older method and will have to be reanalyzed. The remaining 50,000-plus samples have not been tested. The lab receives an average of 3,000 samples per month; about 90 percent are sent by the Texas Department of Criminal Justice and the rest are ordered by courts for persons on probation or parole.

The DPS lab can analyze about 300 to 400 samples per month. Since October 2000, DPS has used a federal grant to contract with a private lab to analyze samples. The lab analyzed 500 samples in October and is projected to analyze more each month through January 2001, when it will have analyzed 10,000 samples. DPS estimates that it will have a backlog of about 15,000 samples when the \$1.75 million grant runs out on July 31, 2001. DPS also plans to use the grant money to build a new DNA lab that can handle more work than the current lab.

Not counting personnel costs, it costs DPS about \$14 to analyze each DNA sample for the database. DPS

is paying the private lab about \$29 to analyze each DNA sample. Developing DNA profiles from samples taken from offenders generally is less expensive than analyzing crime-scene evidence, because samples from offenders are pristine, whereas crime-scene samples can be more difficult to extract and must be preserved and handled in specific ways.

The DNA database has been instrumental in solving 12 crimes as of late October, according to DPS. In these cases, DPS matched DNA from crime-scene evidence with profiles in the database or with material from another crime scene in which the offender was known.

## DNA in the news

The most discussed issue regarding DNA in the criminal justice system is post-conviction testing, the use of DNA evidence to prove a prison inmate's guilt or innocence after the inmate has been convicted and sentenced by a court.

Debate was fueled initially by a 1996 report of the National Institute of Justice (NIJ), *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*. In response to this report, U.S. Attorney General Janet Reno in 1998 asked the NIJ to create the National Commission on the Future of DNA Evidence. The NIJ charged the commission with recommending ways to ensure more effective use of DNA evidence in fighting crime and to foster its use throughout the criminal justice system. Commission members included representatives of prosecutors, defense attorneys, law enforcement, scientific and medical examiners, academia, and victims' rights organizations. The original NIJ report and the commission's reports appear on the Internet at <http://www.ojp.usdoj.gov/nij/dna>.

According to the Innocence Project, a law-school program that provides legal assistance to inmates who challenge their convictions, more than 70 people in the United States have been exonerated and released from prison because of DNA testing. In Texas, post-conviction DNA testing has led to at least four pardons during Gov.

George W. Bush's administration. In 1997, the governor pardoned Kevin Byrd and Ben Salazar, both of whom had served time for rape. In June 2000, Gov. Bush pardoned A.B. Butler, who had served time for kidnapping and rape, and in August 2000, he pardoned Roy Criner.

Those who advocate changes in current law often cite Criner's case as an example of the importance of DNA testing. Criner, who served 10 years of a 99-year sentence for aggravated sexual assault, received his pardon following DNA tests of crime-scene evidence and a spate of publicity surrounding the case, including a feature aired on the Public Broadcasting System's *Frontline* program. DNA evidence was tested twice by agreement with Criner's attorney and the prosecutor's office. The Board of Pardons and Paroles voted 18-0 to recommend a pardon, and Gov. Bush agreed, saying that credible new evidence had raised substantial doubt about Criner's guilt. The district judge, district attorney, and sheriff in the case also recommended the pardon.

Lower courts had overturned Criner's conviction twice before, once during the appeals launched soon after his original conviction and again in 1998, after the first DNA test reported that Criner's DNA did not match that of the semen found in the 16-year-old girl he was convicted of raping. Both times, the Texas Court of Criminal Appeals overruled the lower court and upheld Criner's conviction. The second test reported that Criner's DNA did not match that on a cigarette butt found at the crime scene. The 16-year-old also was murdered, but Criner was not prosecuted for the murder, reportedly because of a lack of evidence.

The case of Ricky Nolen McGinn also has received much publicity. In June 2000, death-row inmate McGinn's execution was postponed so that more sophisticated testing than that available during his 1995 trial could be conducted on DNA evidence from the crime scene. After pursuing other avenues to request the testing, McGinn's lawyers filed a clemency petition. Senate President *pro tem* Rodney Ellis, in his capacity as acting governor while Gov. Bush and Lt. Gov. Rick Perry were out of the state, issued a reprieve, postponing McGinn's execution. The trial court then ordered DNA testing as requested by McGinn's lawyers. The tests failed to exonerate McGinn in the rape and killing of his 12-year-old stepdaughter,

and he was executed September 27. Gov. Bush said in a written statement that he had recommended the reprieve because it was important that the biological evidence be tested to help determine McGinn's guilt or innocence of the rape charge and that the court's action demonstrated the safeguards in Texas' system.

In September 2000, the Travis County District Attorney's Office announced that it will review certain past cases in which DNA testing might have had an impact on the outcome of the trial. The office said that it had been involved in three cases of post-conviction DNA testing in sexual assault cases. In one case, post-conviction testing confirmed the man's guilt, and in two cases, DNA testing eliminated the defendants as perpetrators and brought the convictions into question. The office's review board, including members of the Austin Police Department, will examine cases that were tried before 1996, that involve convictions of capital murder, murder, sexual assault, and burglary with intent to commit sexual assault, that involve a claim of innocence, and in which the suspect's identity was at issue. After board review, the office will test available DNA evidence if such testing might have led to a different verdict. The office says that its goal is justice for those who have committed crimes and for those who have not.

This policy is unusual because the district attorney's office says it will examine cases proactively instead of waiting for courts to order tests or inmates to request them. In July 2000, the San Diego County district attorney's office announced that it will offer free DNA testing for certain inmates who say they are innocent and could be cleared by testing. To qualify for testing, convicts must be in prison and must have maintained their innocence consistently, and the DNA evidence must still exist.

Polls show strong public support for DNA testing. In a June 2000 Scripps-Howard Texas Poll, 87 percent of Texans surveyed supported giving inmates the right to free DNA testing to try to prove their innocence if the genetic evidence exists, and 76 percent supported a moratorium on death sentences for inmates whose cases might be affected by DNA testing. Ninety-two percent of Americans surveyed for a March 2000 Gallup Poll said that prisoners convicted before DNA tests became available should be allowed to obtain DNA tests now if the tests might show they were innocent.

Calls for post-execution testing of DNA evidence also occur. The first such case may be that of Ellis Wayne

Felker, executed in Georgia in 1996 for a rape and murder that occurred in 1981. At the request of news organizations, a state judge agreed in July 2000 to allow testing of DNA evidence from the case. The findings have not yet been reported.

## Post-conviction testing issues

Much of the current debate centers on post-conviction testing in older cases in which DNA evidence never was tested or was tested before recent advances in testing methods. Specific questions include:

- how prison inmates can get the legal help they need to obtain tests of DNA evidence and to be released from prison;
- whether a process should be created specifically to allow post-conviction testing;
- who should pay for such tests and the costs associated with preserving evidence; and
- how much compensation should be available for people imprisoned wrongfully.

While some criminal justice officials, including some judges, prosecutors, and defense attorneys, support post-conviction DNA testing for the certainty it provides, others are reluctant to embrace it, citing the need for finality in the criminal justice system, a reluctance to question jury verdicts, a potentially harmful effect on witnesses and evidence, and preservation of judicial resources. Some inmates request DNA testing in an effort to prove their innocence, but others avoid having their DNA profiles developed because the profiles could link them to crimes for which they have not been convicted.

Illinois, New York, and Minnesota were the first states to authorize post-conviction DNA testing. The Illinois and Minnesota laws are similar in that they limit post-conviction testing to cases in which the technology for testing was not available during the trial, identity was an issue in the trial, and the DNA evidence has been subject to a chain of custody sufficient to establish that it has not been tampered with. These laws require courts to order DNA testing if the results could produce new evidence relevant to a claim of actual innocence and if the test will employ a generally accepted scientific method. During 2000, six other states — Arizona, California, Delaware, Oklahoma, Tennessee, and Washington — have enacted laws dealing with post-conviction DNA testing, according to NCSL. (See box, page 5.)

## DNA Testing Laws in Other States

The following states have enacted laws this year authorizing post-conviction DNA testing, according to the National Conference of State Legislatures.

**Arizona:** SB 1353 allows a person convicted of and sentenced for a felony offense to request forensic DNA testing of any evidence in the possession or control of the court or the state that is related to the investigation or prosecution that resulted in the conviction and that may contain biological evidence.

**California:** SB 1342 authorizes a motion for post-conviction DNA testing upon demonstrated reasonable probability that the technology, had it been available at the time of trial resulting in conviction, would have had an impact on the verdict.

**Delaware:** SB 329 allows overturning convictions if forensic DNA testing that was not available at the time of trial establishes the innocence of the convicted person. It also extends the statute of limitations on crimes when the prosecution is based on forensic DNA testing.

**Oklahoma:** SB 1381 creates a system to investigate and refer to prosecution cases of indigent incarcerated persons for whom post-conviction factual innocence may be demonstrated by scientific evidence. Convicted offenders serving lengthy sentences or under sentence of death receive priority.

**Tennessee:** HB 2490 permits a defendant convicted of first-degree murder and sentenced to death to petition the court of conviction for fingerprint or forensic DNA analysis of evidence not tested at the time of trial because technology was not available or results were not admissible.

**Washington:** HB 1757 provides a procedure to conduct DNA testing of evidence for persons sentenced to death or to life imprisonment.

The following states have enacted laws during 2000 concerning storage and preservation of evidence subject to DNA testing.

**Arizona:** SB 1353 requires the prosecution to preserve evidence that could be subject to DNA testing for the period of the proceeding. The public safety department must maintain blood samples for at least 35 years.

**California:** SB 1342 requires the preservation of evidence that may be subject to testing for the period of the defendant's incarceration.

**Illinois:** HB 4593 requires the preservation of physical evidence during the prosecution of certain offenses and requires the retention of evidence after a trial for a period that depends on the offense.

Some argue that post-conviction DNA testing should be accompanied by analysis of how exonerated persons were convicted of crimes. This could help identify how to prevent wrongful convictions in all cases, not just those with DNA evidence, they argue.

### Routes to testing

Texas law establishes no single route for an inmate to request post-conviction DNA testing nor any guidelines for what should happen if test results exonerate an inmate.

Inmates who want such testing usually petition a court through various means to order the analysis. Another scenario is for those involved in a case — such as the prosecutor, law enforcement officers, and the court — to agree on testing.

Inmates often use a writ of *habeas corpus* to ask courts for DNA testing and to overturn convictions. This form of review, which typically challenges a conviction's constitutionality, can bring newly discovered evidence and claims of innocence to courts' attention. *Habeas* writs can be filed in both state and federal courts.

Texas' Code of Criminal Procedure (CCP) outlines the procedure for filing *habeas corpus* petitions in both capital and noncapital cases. The code places limits on such appeals, yet courts, prosecutors, and defense attorneys sometimes interpret the law as being broad enough to allow post-conviction testing of DNA evidence.

In noncapital cases, no time limit exists for filing *habeas* writs, but CCP, art. 11.07(4) limits the filing of subsequent writs after an initial writ. A person may file a subsequent writ only if the claim could not have been included in the previous writ because the factual or legal basis for the claim was unavailable when the previous writ was filed.

CCP, art. 11.071 outlines the procedures for filing a *habeas* writ in death-penalty cases. It establishes deadlines for the inmate to file the *habeas* writ and for the state to respond to it, and, in most cases, it limits inmates to filing one *habeas* writ. The statute allows writs to be filed after the deadlines only in specific circumstances. One exception allows writs after the initial one if the claims could not have been presented previously because the factual or legal basis for the claim was unavailable.

An inmate trying to persuade courts to order DNA testing might use a writ to detail his claim of innocence, and a court might order the testing so that it could evaluate the claim. If the test results are favorable to the inmate, the court can reverse the conviction and send the case back to the trial court, where the prosecutor has the option of retrying the case. If DNA testing has exonerated an inmate, the case most likely would not be retried.

Inmates also may pursue relief from their prison sentences through executive clemency, the power of the governor to grant pardons or temporary reprieves of execution dates or to commute court sentences to lesser penalties. The governor may grant a capital murderer one 30-day reprieve of execution without the recommendation of the 18-member Board of Pardons and Paroles. Other grants of clemency require the board's recommendation.

An inmate could ask the board for a reprieve so that testing could be done, could detail claims of innocence in a clemency request, or could file an application for a pardon based on innocence after a test has been conducted. Board rules require that applications for full pardons include the written, unanimous recommendation of the trial officials from the court in which the inmate was convicted, among other items.

**Legal help for inmates.** Many inmates who seek post-conviction DNA testing do not have lawyers to ask courts for the testing because such requests usually come after an inmate's trial and appeals are finished. Inmates with money can hire lawyers to do the legal work, but indigent inmates must rely on lawyers to volunteer to take their cases or on the media to bring attention to them.

Some have proposed that the courts appoint lawyers or other entities to help inmates obtain post-conviction testing. They suggest that indigent inmates who want the testing could be identified by establishing a process for inmates, their families, or their lawyers to ask the court to appoint legal counsel or by requiring prosecutors and others to review case files and identify cases in which testing should be done. Under another proposal, the State Council for Offenders, a group of lawyers who represent offenders in state prisons, would help handle inmates' requests for DNA tests.

Some argue that the state should pay lawyers to perform the legal work needed to obtain post-conviction DNA testing because prison inmates are in state custody. Others say that counties or prosecutors' offices should pay because they are responsible for inmates' convictions. Still others say that the costs of post-conviction DNA tests, like those of other post-conviction legal proceedings, should be the responsibility of convicted inmates, since the burden of proof has shifted from the state to them.

**Avenues in current law.** Some analysts argue that current law provides adequate opportunities for post-conviction testing in appropriate cases. Supporters of the current system say it is best to leave judges with the maximum flexibility to decide when to order post-conviction DNA tests and new trials. They say that any statutory guidelines about when to order a test would exclude some cases that might not meet the standards but still might deserve testing. Also, they note, inmates seeking exoneration may request executive clemency.

Others argue that the avenues now available to request post-conviction DNA testing are inadequate because they do not provide a specific, clear, and fair procedure for inmates to bring claims of innocence. Appellate court decisions about whether to order post-conviction testing provide no uniform guidance, they say, and often testing is ordered only in the rare cases in which a prosecutor agrees with an inmate's request.

Using a *habeas corpus* writ to bring new evidence to a court's attention is not always a realistic option, say critics of the current system, because in general, courts look favorably only on writs that allege a constitutional violation, which is not present in every case. In other cases, they note, a first writ may not have asked for testing even though the DNA evidence existed, and this could make a court reluctant to order a test requested by a subsequent writ. Critics also say that the statutory deadlines for appeals through *habeas corpus* writs in death-penalty cases seriously restrict the ability of inmates to obtain post-conviction testing.

Current law allowing new trials under certain circumstances is too restrictive to allow DNA testing and a new trial, critics argue. The rules of appellate procedure allow only 30 days for defendants to request a new trial, and DNA evidence often is discovered or testing becomes feasible only after that deadline has expired, they say.

Pursuing testing through the clemency process also is infeasible, say critics of the current system. They note that the Board of Pardons and Paroles is set up to examine evidence, not to play the role of a trial court, so an inmate is unlikely to turn to the board to request testing. In addition, critics say, the board unfairly requires the unanimous recommendation of the trial officials for requests for pardons based on innocence, the type of pardon requested most often by people who claim that DNA evidence will exonerate them. Board critics say inmates should be allowed to present their evidence and the board should make its decision without requiring such recommendations, especially since the prosecutor and law enforcement officials involved in a case may be reluctant to support an inmate's claim of innocence. Board supporters counter that trial officials often are the most familiar with a case, and it is important that the board know that these officials support an innocence pardon. In addition, say board supporters, inmates who do not have the support of trial officials for an innocence pardon can pursue other clemency avenues, such as a commutation of a sentence or a pardon not based on innocence.

**Guideline proposals.** Critics of current law say that the state should establish a specific process for inmates to request post-conviction DNA testing so that

inmates, their lawyers, and prosecutors know how to proceed. They say that establishing clear guidelines on the types of cases in which courts should grant an inmate's request for post-conviction DNA testing would make court decisions on testing more uniform and fair and would prevent a flood of inappropriate petitions asking courts for DNA testing. Such petitions could be inappropriate if DNA evidence does not exist or has been stored improperly, they say. The guidelines would apply to government-funded tests ordered by the criminal justice system. Inmates with access to DNA evidence could continue to have testing done at their own expense.

Some have suggested that court guidelines for ordering DNA testing should limit such tests to cases in which the defendant pled not guilty, identity was an issue, test results would exonerate the defendant if the results were as the defendant claimed they would be, and the biological evidence was subject to a certain chain of custody. This would ensure that testing was done only for cases in which inmates had a chance to prove their innocence, say supporters of this proposal. Allowing tests when the DNA evidence would exonerate the inmate — not just when DNA evidence was material to the case — would ensure that a favorable test would show that an inmate was innocent, not just muddy the waters in the case, they argue.

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*Critics call for the creation of a specific process for inmates to request post-conviction DNA testing so that all parties in the system know how to proceed.*

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Others criticize those guidelines as too restrictive. For example, they say, some defendants who are innocent plead guilty because they believe that a plea bargain is the best deal they can get. In addition, the phrase "would exonerate" does not have a clear legal definition and because of court decisions could be almost unattainable for inmates, critics say. For example, they say, in the Criner case, the Court of Criminal Appeals upheld the conviction even after testing found that DNA in semen found in the victim did not match Criner's DNA. In other cases, they say, requiring proof before a test is conducted that the results would exonerate the defendant could be unfair. These critics also cite the Criner case, in which a DNA test was conducted on a cigarette butt found at the crime scene. The cigarette contained DNA from the victim and another person, but not from Criner. Before the test, it would have been difficult to prove that the test would exonerate Criner.



Another proposed standard for deciding when courts could order post-conviction testing is to allow testing if DNA evidence were material to the case. Some argue that materiality is a well-defined legal concept and would be broad enough to allow DNA testing if an inmate has a compelling claim. Others say that a standard based on materiality is too broad and would require the state to fund many more tests that would not demonstrate innocence significantly.

Guidelines also are necessary, some argue, to guide court action after a test is ordered. Some propose requiring courts to order new trials for inmates if identity was an issue in the case and if a post-conviction DNA test excluded the inmate and a judge found the inmate “probably innocent.” This mandate is necessary, some argue, because courts have ignored such evidence in the past. For example, they say, the Court of Criminal Appeals concocted an unrealistic crime-scene scenario to deny one of Criner’s appeals even after DNA tests showed that semen found in victim was not his. Others argue that this proposal unwisely would change the well-established standards for ordering the release of an inmate through *habeas corpus* appeals. An inmate who has been exonerated by a DNA test and does not wish to pursue release through this process can always turn to executive clemency, they say.

The number of inmates affected by a law establishing standards for DNA testing would depend on the standards. Some say that establishing a special class of inmates who could receive access to post-conviction testing would be a burden on the criminal justice system. Supporters of this approach, however, argue that it would not be burdensome because it would not apply to the vast majority of inmates. They say that a new law most likely would be limited to cases prosecuted before the early 1990s (when DNA testing became routine) that included biological evidence that could be tested and that did not have other strong evidence linking the inmate to the crime. Also, they note, some inmates do not want their DNA tested and placed in a data bank, where it could be used to link them to other crimes.

**Who pays?** Another issue is who should pay for post-conviction DNA testing ordered by the criminal justice system. Such tests can cost from around \$1,000 to several thousand dollars, depending on the quality of the sample, the type of test, and where the test is conducted. Proposals include:

## Compensating the Wrongfully Imprisoned

People imprisoned wrongfully in Texas are entitled to compensation from the state under the Civil Practice and Remedies Code, chapter 103. They are eligible for up to \$50,000 if they have served at least part of their prison sentence, pled not guilty, and received a full pardon for the crime. In most cases, a person must bring a claim for compensation within two years after having finished serving the prison sentence, being released from custody, or having discovered the evidence substantiating innocence.

Damages assessed for physical and mental pain and suffering may not exceed \$25,000, with total damages capped at \$50,000. In September 1999, the state paid a claim of \$25,000 to Ben Salazar, who received a pardon in 1997 after serving time for rape.

Critics argue that the cap on compensation is too low and that a uniform cap for all cases, no matter how much time a person has spent in prison or the circumstances of the case, is unfair. The \$50,000 cap has not been changed since being established in 1965 and is due for revision, they say. Some suggest that the Legislature could eliminate or raise the cap and let the court hearing the claim decide how much compensation a wrongfully imprisoned person deserves. Others propose an amount for each day a person is imprisoned wrongfully. Still others argue that a cap of some kind is necessary to ensure a reasonable limit on the state’s liability.

- requiring the court that orders the testing to pay for it, just as courts pay for experts’ fees during a trial;
- requiring the state pay for the testing, possibly through funding of the DPS labs, since an inmate is in custody of the state; or
- requiring the county, through the prosecutor’s office, to pay for the test if it exonerates the inmate and charging the inmate for the test if it does not.



## Handling DNA evidence

No statewide protocols exist for handling evidence, including DNA evidence, after a criminal trial. Procedures vary from county to county and can depend on what happened to the evidence during the trial. For example, if a DNA sample or test is entered as evidence, a court clerk is responsible for it, but the law sets no requirements for where or how it should be stored. According to one district attorney, a court clerk stored evidence in a garage at home. Police departments might store DNA evidence collected from a crime scene but not tested, or a lab might store DNA evidence that it had tested and deemed not relevant to the case.

Critics of the current system say the Legislature needs to address the lack of uniformity in handling practices because evidence that could exonerate defendants could be mishandled or lost. Some argue that prosecutors or counties should be required to preserve DNA evidence for at least as long as an inmate is in prison because scientific advances might allow more sophisticated testing in the future. Some have suggested setting a specific period, such as 10 years, for keeping evidence.

However, criminal justice officials cite practical constraints on how much evidence a prosecutor or county can store and for how long. Some argue that there may be no need to preserve evidence in cases where there is a confession, where other evidence also points to an inmate's guilt, or where the DNA test has identified an inmate positively. Similarly, DNA evidence may not need to be preserved if more than one person contributed to DNA found at a crime scene and it is unlikely that testing would help with the case.

Others suggest requiring that juries be instructed that if prosecutors fail to preserve DNA evidence that is a part of the trial, the jury should assume that the evidence would have been favorable to the defendant. Another suggestion is to require defense attorneys to be notified if DNA evidence is going to be destroyed, similar to the way they are told now if evidence that was admitted as an exhibit in the trial is going to be destroyed.

During 2000, three states — Arizona, California, and Illinois — have enacted laws affecting the storage and preservation of evidence subject to DNA testing, according to NCSL. (See box, page 5.)

## Privacy issues

Even though Texas already has a DNA database comprising samples taken from people convicted of specific crimes, some argue that current law goes too far in allowing the government to store information that should be private. They say that law enforcement officials investigating a crime should take DNA samples only if — as current law requires — the suspect consents or the police have probable cause and a search warrant.

Additional debate centers on whether DNA samples should be taken from people *arrested* but not yet tried or convicted and whether the resulting DNA profiles should be placed in the state's database. Some argue that this practice would help solve and deter crimes and that the state could require the destruction of samples if a case is dismissed.

Expanding the state's DNA database with profiles from arrestees is not a cause for concern, some argue, because a DNA database is similar to existing fingerprint databases. Like DNA, fingerprints are used for identification only and raise no concerns about arrestees' privacy, they argue. In addition, they say, state law tightly controls access to the DNA database. Chapter 411 of the Government Code makes DNA records in the database confidential and not subject to the open-records law, 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. The state can take fingerprints and photos of arrestees without running afoul of constitutional provisions prohibiting certain searches and seizures, and collecting DNA would be no different, say supporters of expanding the database.

Concerns that DNA samples taken by the criminal justice system may be used for medical or insurance purposes are overblown, these observers say. The labs developing DNA profiles are specialized and develop profiles only for identification, they say. Time limits on keeping DNA samples or profiles would defeat the purpose of the database, which is to help solve crimes.

Critics of taking DNA samples from arrestees say this would violate arrestees' privacy rights and be burdensome, time-consuming, and expensive for law enforcement agencies. 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, they say. Dropping these requirements and taking samples from all arrestees and comparing them to evidence from unsolved crimes could amount to an unconstitutional search and seizure, some argue.

Critics of expanding the DNA database, including the American Civil Liberties Union, argue that it 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, they argue, but DNA databases could be subject to misuse and abuse. For example, they say, insurance companies or employers could use DNA

information to discriminate, or computer hackers or unscrupulous government employees could gain access to DNA profiles and sell the information. Others worry that researchers eventually could use DNA databases to search for a genetic basis for criminal behavior, which could lead to unfair and discriminatory profiling. Privacy advocates also suggest a need for time limits on how long the state or other labs can keep DNA samples and profiles.

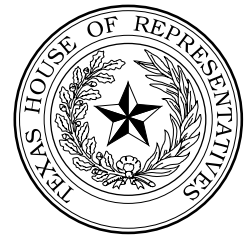
Others argue that until Texas eliminates the large backlog of DNA samples that still need to be analyzed, the state should not even consider expanding the pool of persons from whom samples are drawn.

— *by Kellie Dworaczyk*

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## HOUSE RESEARCH ORGANIZATION



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