POSTCONVICTION DNA TESTING — 2001

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Introduction:

On April 5, 2001, Governor Perry signed into the law of this state some of the most sweeping post-conviction DNA testing legislation in the country. This paper sorts through some of the science behind DNA in a very simplified manner and then gets into the legislation and some of its implications. When dealing with post-conviction DNA testing, it is helpful to know the scientific basics of DNA and the history behind it to know what it can and cannot do. At the end of Part I. I give examples of evidence collected prior to much of the newest DNA technology being available to show what could possibly be done with that evidence now. In Part II. I go through the new rule and statutory provisions with some predictions on how they might work and point out some of the implications in their wording. Needless to say, to a great extent this is a wide open frontier and it will take a few years to see how these rules and statutes will be treated in the trial courts and courts of appeals, but it is a great start.

A note on resources ─ much of the science and background came from the internet and, in particular, the National Institute of Justice website. This website has a great selection of free publications and statistics. All of the NIJ publications cited herein may be found at www.ojp.usdoj.gov/nij/.

Part I.: The Fundamentals of Forensic DNA

(A) DNA Analysis Fundamentals

Deoxyribonucleic acid (DNA) is the chemical structure of chromosomes.[1] Also called "Nuclear DNA," it is made up of four different enzymes: adenine, thymine, guanine and cytosine. This form of DNA is found in any cell that contains a nucleus. DNA forms a double helix with the two strands connected to each other through the binding of the above enzymes (also called bases or nucleotides) running down the strand in a particular order. Only certain bases will bind to one another between strands. Adenine will only bind to thymine and vice versa. Guanine will only bind to cytosine and vice versa. Therefore, a double helix of DNA may look like this:

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GGATGTACTGTCGATATCGG
CCTACATGACAGCTATAGCC
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Notice the repeating "G" sequence and "C" sequences at the end of the string. The genetic information between these double letters is called a "variable number tandem repeat" (VNTR). Each combination of letters between the two strands set out above is called a "base pair." For instance, in the combination set out above:

[1]See "DNA 101 — What is it?" found at www.biology.washington.edu/fingerprint/elementa/html.

GGATGTACTGTCGATATCGG G
CCTACATGACAGCTATAGCC, the combination C is a base pair.

Each person's VNTRs will have a different number of base pairs. This fact forms the fundamental basis for DNA analysis and what has come to be called "DNA Fingerprinting."

The vast majority of all human DNA is essentially the same. The researchers have been able, however, to map out several sections of the human genome (called, collectively, "alleles" or "loci") where each person's DNA is different.[2] Once a sample is prepared, a chemical or radioactive "probe" is used, essentially, to determine differences in size between the VNTRs in the two specimens being examined at a particular locus. The chances of two people (who are not identical twins) having the same "size" of VNTRs at several different loci are infinitesimally small — often calculated as a chance in several millions or even billions. Therefore, if several probes are used, it can be determined whether or not the two samples are, for all practical purposes, from the same source.

In the language of DNA analysis, however, when two specimens appear to be from the same source, it is said that the person *cannot be excluded* from the

[2]*See* NATIONAL INSTITUTE OF JUSTICE, AUTOMATED DNA TYPING: METHOD OF THE FUTURE? 2 (1997).

population of people who have this particular DNA profile. Technically this is not the same as saying that this is *that* person's DNA. However, when the statistical population to which the suspected donor belongs becomes approximately ten or so people on the face of the entire planet, the practical effect is basically the same.

One implication inherent in this manner of stating results is that if there is error, it can *only apply to inclusion*, not exclusion. If a person is excluded on any locus, he is excluded, period. If he cannot be excluded after testing at several loci, there is always a possibility (although perhaps not a statistically significant one) that if one more locus was found and tested, that he could be excluded. It is the ability of the particular type of DNA analysis to exclude (differentiate between different donors' DNA) that determines the "accuracy" of that type of DNA analysis.

The oldest type of DNA analysis is Restriction Fragment Length Polymorphism (RFLP).[3] RFLP DNA analysis uses what is called the "Southern Blot" method for preparing the final, readable result, an "autoradiograph" or "autorad."[4] This resembles a small piece of x-ray film that can be read with the

[3] *See generally* NATIONAL INSTITUTE OF JUSTICE, THE UNREALIZED POTENTIAL OF DNA TESTING 7 (1998), (section entitled, "A Primer of DNA Testing Technology" gives a concise history of the sequence of DNA analysis developments from RFLP through the discovery and use of STRs).

[4] *See* "DNA 101 — What is it?" at 4 (description of the "Southern Blot").

unaided eye. The advantages of RFLP as compared with other forms of DNA analysis is that it is probably (or at this point, possibly) the most accurate.[5] The disadvantages are that it is slow — sometimes taking up to six weeks. It also requires a "good" sample, meaning that it cannot have degraded through, for instance, excessive drying, heating, or improper storage.[6] It also requires a fairly large sample (relatively speaking) to be successful — although in the world of DNA, a drop of wet blood is a large sample, clearly enough for RFLP analysis.

The next form of DNA analysis to appear, Polymerase Chain Reaction (PCR), is distinct as much as a method for chemically replicating DNA material as it is a stand-alone method of analysis. Because it can replicate DNA material, analysis may be done on samples that would be far too small for RFLP. There is no Southern Blot — the analysis is done through machines, tiny tubes and lasers and plotted with dots on paper, graphs or charts. Otherwise, the concept is the same. Certain known loci are examined (probed) and differentiated by the relative size of VNTRs.[7] The advantages of PCR are not only that it can be done on

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[5]*See* NATIONAL INSTITUTE OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 26-27 (1999).

[6]*See* NATIONAL INSTITUTE OF JUSTICE, AUTOMATED DNA TYPING: METHOD OF THE FUTURE? (1997).

[7]Another type of DNA analysis which was born of the PCR technology maps "Short Tandem Repeats" (STRs) rather than VNTRs. STRs are much shorter sequences (containing a

samples that are much smaller than that required for RFLP, but it can also be done on samples that are too degraded for successful RFLP analysis.[8] Another advantage is that it is much faster than RFLP because the Southern Blot is not used, and it can be automated through the use of a computer.[9] The major disadvantage has been that it is not as accurate as RFLP (meaning that it can fail to exclude somebody where they would be excluded using a sufficient RFLP analysis). The technology of PCR, however, has improved to the point where the accuracy of PCR can approach or equal that of RFLP when a lab does additional testing of different loci after an initial test fails to exclude.[10]

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significantly smaller number of base pairs) that come from different loci on the chromosomes. *See* NATIONAL INSTITUTE OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 27 (1999); NATIONAL INSTITUTE OF JUSTICE, AUTOMATED DNA TYPING: METHOD OF THE FUTURE? (1997).

[8]*See id.*

[9]*See* NATIONAL INSTITUTE OF JUSTICE, AUTOMATED DNA TYPING: METHOD OF THE FUTURE? (1997).

[10]*See id.*

The newest form of DNA analysis explores the individual sequences in the mitochondria of cells. Mitochondrial DNA analysis (mtDNA) was also made possible by the technology of PCR. Unlike the other forms of DNA analysis, mtDNA does not depend upon the presence of cells that possess a nucleus. While not all cells possess a nucleus, all cells possess mitochondria, which serve as the energy centers for the cell.[11] In addition, each cell possesses multiple mitochondria, each of which contains mitochondrial DNA.[12] Mitochondrial DNA is not the same as nuclear DNA. Nonetheless, certain loci have been mapped and are used for mtDNA analysis under essentially the same basic theory as described above.[13]

The advantages of mtDNA are numerous. Through its use, a DNA analysis may be conducted on bones or teeth that are even hundreds of years old. MtDNA analysis can also be conducted on material such as hair, which itself does not contain nuclear DNA (only the root of a strand of hair may be tested for nuclear DNA).[14] MtDNA analysis can also be used to test the skin cells left in

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[11]*See* "Mitochondrial DNA: State of Tennessee v. Paul Ware" at 2, found at www.promega.com/profiles/103/103_06/default.htm.

[12]*See id*. at 2-3.

[13]*See id.*

[14]*See id.*

fingerprints, on clothing or in cars.[15] The possible applications are nearly endless. One disadvantage of mtDNA analysis is that, because it is PCR, it can suffer some of the same inaccuracies inherent in that technology (false "failure to exclude" results). Like nuclear PCR DNA analysis, however, as the number of discovered loci increases, these problems will decrease (at this time, only two loci are used in mtDNA analysis, with two others being isolated at present).[16] Also, unlike nuclear DNA, which comes from both sides of one's parentage, mitochondrial DNA all comes from one's maternal parentage. Therefore, the suspect's mother may have the same mtDNA "match" as her son. Additionally, a portion of the population appears to carry more than one type of mtDNA in their cells (called "heteroplasmy"). The problem of heteroplasmy will also diminish in the very near future as more loci are isolated and the testing technology improves.[17]

(B) The Forensic DNA Timeline

British Professor Sir Alec Jeffreys first reported the possibility of using "DNA Fingerprinting" in the forensic context in 1985.[18] The first time DNA

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[15]*See* NATIONAL INSTITUTE OF JUSTICE, THE FIFTH ANNUAL CONFERENCE OF THE FUTURE OF DNA: IMPLICATIONS FOR THE CRIMINAL JUSTICE SYSTEM 529-30 (2000)(Testimony of Dr. Terry Melton).

[16]*See id*. at 528.

[17]*See id.* at 533-34.

[18]*See* NATIONAL INSTITUTE OF JUSTICE, POSTCONVICTION DNA TESTING:

testing was used in a criminal investigation was in Britain in 1986-87 to solve two seemingly connected rape-murders.[19] DNA was first introduced in the courts of the United States within several months of its first use in the U.K.[20] PCR analysis was first used in a United States court in 1986.[21] By 1996, DNA was admitted into criminal proceedings without question in 43 states.[22] Mitochondrial DNA was first used in a criminal trial in the United States in 1996.[23]

The first reported case in Texas where RFLP DNA was used was *Glover v. State*.[24] The *Glover* court did not address squarely the scientific basis of DNA, but merely observed that at that time it was "generally accepted" in the scientific community and in other states.[25] *Trimboli v. State*[26] marked the first time that PCR

RECOMMENDATIONS FOR HANDLING REQUESTS 26 (1999).

[19]NATIONAL INSTITUTE OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 4 (1996).

[20]*See id.* at 4-6.

[21]*See* NATIONAL INSTITUTE OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 27 (1999).

[22]*See id.* at 6.

[23]*See* "Mitochondrial DNA: State of Tennessee v. Paul Ware."

[24]787 S.W.2d 544 (Tex. App. ─ Dallas 1990), *aff'd*, 825 S.W.2d 127 (Tex. Crim. App. 1992).

[25]*See id.* at 547-48 (citing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)).

[26]817 S.W.2d 785 (Tex. App. ─ Waco 1991), *aff'd*, 826 S.W.2d 953 (Tex. Crim. App. 1992).

was mentioned in a published Texas case. In *Trimboli*, both RFLP and PCR were used in the trial.[27] *Trimboli* presented a fairly exhaustive discussion of the science of DNA within the framework of the rules of evidence addressing the admission of scientific evidence.[28]

The Court of Criminal Appeals expressly adopted such an analysis in *Kelly v. State*[29] (the test for admissibility of scientific evidence that the United States Supreme Court would adopt a year later in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[30]). In the process, the court gave its official stamp of approval to the RFLP method of DNA analysis.[31] Two months after it handed down *Kelly*, the Court of Criminal Appeals affirmed *Trimboli*, however it did so without getting into the science of the PCR method of DNA analysis.[32] Nonetheless, *Trimboli* does implicitly for PCR what *Kelly* did explicitly for RFLP — there is not a question that if either is done correctly and properly supported by expert testimony that it will be admissible in trial. Both methods, in fact, are now

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[27]*See id.* at 786-94.

[28]*See id.*

[29]824 S.W.2d 568 (Tex. Crim. App. 1992).

[30]113 S.Ct. 2786 (1993).

[31]*See Kelly*, 824 S.W.2d at 574.

[32]*See Trimboli v. State*, 826 S.W.2d 953, 954 (Tex. Crim. App. 1992), attached hereto at

used routinely in the courts of Texas.

The newest method of DNA analysis, mtDNA, has only been mentioned in one published opinion, *Ex Parte McGinn*.[33] Ricky McGinn sought a successive writ of habeas corpus for the purpose of conducting testing on certain biological samples through the use of mtDNA analysis.[34] The court did not examine the science of mtDNA at all, except to observe that it has been in existence since 1996, which was used as the basis for denying McGinn's subsequent writ (he had filed his first writ in September of 1997).[35] Then-Governor Bush subsequently granted McGinn a temporary reprieve and mtDNA testing was conducted, which again confirmed that McGinn was the killer.[36]

(C) How Much of a Sample Is Required For Testing?

How large a sample is necessary for DNA testing depends upon the type of testing that is desired.

Tab 11.

[33] ___ S.W.3d ___, 2000 WL 763245, at *2 (Tex. Crim. App. June 14, 2000), attached hereto at Tab 12.

[34] *See id.*

[35] *See id.* at *2 & n.2. Under TEX. CODE CRIM. PRO. art. 11.071 § 5(a)(1), a subsequent writ may only be filed if it presents a factual or legal basis that could not have been raised at the time the initial writ is filed. Mitochondrial DNA was first used in a court in the United States in September 1996 in *Tennessee v. Paul Ware*.

[36] *See* "DNA Cuts Both Ways: Genetic Tests Clear One Man, Bring Death Date for

RFLP Analysis:

RFLP is the most demanding DNA test sample-wise. To successfully conduct an RFLP analysis, a sample must generally be at least large enough to contain 100,000 cells or more (a saturated blood stain the size of a dime or larger or a drop of liquid blood) and cannot be degraded (must be fairly fresh or preserved).[37]

PCR:

Because PCR involves chemical amplification of the sample, the required sample size for testing is dramatically smaller than that required for RFLP.[38] A successful PCR test may be conducted on a sample containing 50 to 100 cells.[39] PCR testing may also be performed on samples that have degraded, such as old samples or those that have been improperly stored.[40] A PCR nuclear DNA test may be performed on a visible dot of blood or a single hair root.[41]

MtDNA Analysis:

Another," found at www.abcnews.go.com/sections/us/DailyNews/dnacases000815.html.

[37]*See* NATIONAL INSTITUTE OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 26 (1999).

[38]*See id.* at 27.

[39]*See id.*

[40]*See id.*

As stated above, while not all cells have a nucleus, all cells do have multiple mitochondria.[42] Theoretically, therefore, it would be possible to conduct several DNA tests on a single cell. In fact, mitochondrial DNA (and sometimes even nuclear DNA) are being found in fingerprints, sweat stains, and clothing.[43] Speaking at a conference last year, one expert who conducts mtDNA analysis stated, "Occasionally, we'll do a degraded stain, but what we're finding with stains is that we have such a sensitive assay, mitochondrial is about ten to a hundred times more sensitive than nuclear DNA typing, so with degraded stains, we will recover not only the type of stain itself, but the type of anyone who has handled the fabric prior to the stain being there."[44]

Two recent cases in Texas illustrate how small a sample can be for multiple DNA tests to be possible using mtDNA analysis. In the case of Ricky McGinn, a single pubic hair was tested by three separate labs ─ DPS, FBI and a defense

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[41]*See id.*

[42]*See* "Mitochondrial DNA: State of Tennessee v. Paul Ware" at 2.

[43]*See* NATIONAL INSTITUTE OF JUSTICE, WHAT EVERY LAW ENFORCEMENT OFFICER SHOULD KNOW ABOUT DNA 2.

[44]NATIONAL INSTITUTE OF JUSTICE, THE FIFTH ANNUAL CONFERENCE OF THE FUTURE OF DNA: IMPLICATIONS FOR THE CRIMINAL JUSTICE SYSTEM 529-30 (2000)(Testimony of Dr. Terry Melton).

chosen lab.[45] In the case of Roy Criner, a single cigarette butt was tested by two separate labs.[46]

(D) Examples of Proposed Testing

An evidence list that was prepared by the Fort Worth Police Department on March 19, 1986 is attached to the end of this article. DNA analysis was just being introduced in 1986, so none of these items was DNA tested. This was a death penalty case and the defendant, Richard Wayne Jones, was executed without the evidence ever being tested. We will go down the list in turn describing, hypothetically, what testing could be done and how much of the sample would be left for re-testing.

LIST OF EVIDENCE:

Received at Crime Scene 4600 Randol Mill Road from R. Corder by Shumway 2-20-86:

1-3. Sealed envelopes containing blood samples.

Blood samples may be tested using any of the above-referenced methods of

[45]*See* "DNA Cuts Both Ways: Genetic Tests Clear One Man, Bring Death Date for Another," found at www.pbs.org/wgbh/pages/frontline/shows/case/cases/.

[46]*See* "Frontline: The Case For Innocence, Four Cases" at 4-5.

DNA analysis. Assuming that the blood is in vials and properly stored, even RFLP testing could be conducted. If not, PCR and/or mtDNA could be done, leaving enough to be tested many more times.

4-5. Sealed envelopes containing leaves with blood.

These blood stains would probably be degraded, thus not permitting RFLP analysis. However, PCR and mtDNA analysis would be easily accomplished. Again, from the description on the evidence sheet, there would be enough substance to test many times.

6. Sealed sack containing white bra.

Through mtDNA analysis, the bra could be tested for DNA left by anyone who touched the bra. Mitochondrial DNA analysis requires such a small specimen that the bra would no doubt have enough genetic material on it to test many times.

Collected at 4600 Randol Mill Road by Shumway 2-20-86:

7. Envelope containing glass fragments with blood.
8-9. Metal containers with plant material with blood.
10. Sack with pieces of blood stained wood.
11. Sack with plaint material with possible body fluids.
12. Metal container with bloodstained grass.

These blood and possible body fluid stains would probably be degraded, thus not permitting RFLP analysis. However, PCR and mtDNA analysis would be easily accomplished. Again, from the description on the evidence sheet, there

would be enough substance to test many times.

Received from D. McMillan, Medical Examiner's office 2-20-86, 2:05 p.m. by Shumway:

13. Sealed sexual assault death kit containing:

A.	Blood sample.
B.	Scalp hair sample.
C, D, E.	Vaginal, anal and oral smears.
F, G, H.	Vaginal, anal and oral swabs (perianal).

There would obviously be enough material in these samples to test many, many times. In addition, the technology did not exist in 1986 to test these specimens the way they could be tested today. The technology of the day could only test for the presence or absence of semen.[47] Today, through mtDNA analysis, the swabs could be tested to see if an attacker left epithelial cells that had been sloughed off from his skin.

Received in lab 2-24-86, 10:40 a.m. from G. Penry by Shumway:

14. Plastic envelope with a check number 467 on Gill Savings.

This check was examined for identifiable fingerprints. Today, it could be tested by mtDNA for epithelial cells deposited by a person handling it whether the actual fingerprints are identifiable or not. Presumably, there would be enough

[47]*See* "RESULTS OF EXAMINATION" section on last page of list.

genetic material, if it exists at all, to be tested multiple times through the use of mtDNA analysis.

Received in Property Room 2-24-86, 10:40 a.m. from G. Penry by Shumway:

15. Sealed sack containing a pair of boots (submitted by L. Steffler).
16. Sealed sack (submitted by W.D. Bundy) containing:
    A. Pair of jeans.
    B. Sealed sack with a brown plaid shirt.

These clothes had blood stains on them. The lab did ABO and antigen testing and in two cases found that the quantity of blood was "insufficient for further analysis."[48] Through PCR and mtDNA analysis, further more conclusive testing could be done on these items and multiple testing would easily be possible.

18. Sealed sack containing:

    A. Plastic petri dish with fabric from complainant's wrist.
    B-C. Plastic petri dishes with fabric fragments.
    D. Envelope with possible shoe fragments.
    E. Envelope with a hair sample.
    F-H. Sacks with shoe fragments.

[48] *See id.*

There was no analysis whatsoever conducted on these items.[49] The hair sample could be tested using mtDNA with multiple testing capability. As described above, in Ricky McGinn's case a single pubic hair was mtDNA tested by three separate labs.

21. Sealed package containing two blankets.

Again, there was no analysis done on these items at the time.[50] Blankets can be a depository for anything from hair and skin cells to microscopic quantities of blood, any of which lends itself to multiple mtDNA analyses.

22. Sealed sack containing:

A. Eight cigarette butts.
B. Plastic bag with assorted trash.
C. Plastic envelope with unknown stain.
D. Plastic bag with vacuumings.
E. Paper funnels.

Again, there was no analysis done on these items.[51] It goes without saying that cigarette butts, no doubt completely irrelevant for scientific testing purposes in 1986, could be of vital importance today. As mentioned above, in Roy Crimer's case a single cigarette butt was tested by two separate labs using mtDNA. Thus,

[49] *See id.*

[50] *See id.*

[51] *See id.*

there would be plenty of sample for multiple testing of these items.

23-29. Various items. The value of these items *vis-a-vis* DNA analysis is not immediately apparent. However, upon seeing the chain of custody documentation, this opinion could change. If so, mtDNA analysis and possibly PCR nuclear DNA analysis could be performed on material taken from any of these items in the manner described above with enough sample left for anyone who wanted to do additional testing.

30. Sealed sack containing:

A. Sealed envelope with two hairs.
B-D. Sealed envelopes with possible bloodstains.

There was no analysis done on 30A.[52] On 30B through 30D, the only analysis that was conducted was to check for the presence of blood (usually done with the chemical "luminol"). Obviously, mtDNA and perhaps even nuclear PCR DNA analysis could be conducted on the bloodstains (assuming they are bloodstains). If they are, a bloodstain that is actually visible to the human eye can support many separate mtDNA analyses. Likewise, the hairs could support many mtDNA analyses.

31-36. Various items. The value of these items *vis-a-vis* DNA analysis

[52]*See id.*

is not immediately apparent. However, upon seeing the chain of custody documentation, this opinion could change. If so, mtDNA analysis and possibly PCR nuclear DNA analysis could be performed on material taken from any of these items in the manner described above with enough sample left for anyone who wanted to do additional testing.

Received in lab 2-26-86, 10:22 a.m. from L. Steffler by Shumway:

37. Gold covered (sic?) lock-blade knife.

Possible murder weapon. The analysis on this item was to test for the presence of blood. The result was, "Blood which could not be further characterized, was detected."[53] Those dried bloodstains could now not only be characterized, but typed through PCR or mtDNA analysis to essentially be linked to a specific person. In addition, any skin cells left by a person holding the knife could be typed through mtDNA analysis. Again, the knife could probably be subjected to several mtDNA analyses before all genetic material was "used up."

Collected in the laboratory 2-27-86, 1:30 p.m. by Taylor:

38. Blood sample from Richard Wayne Jones.
39. Saliva sample from Richard Wayne Jones.

These samples were ABO and antigen tested.[54] Presumably, the samples are

[53]*Id.*

[54]*See id.*

still in existence and would provide plenty of material for any type of DNA analysis available and to be tested many times. Such testing would be necessary for purposes of elimination or inclusion in connection with the testing of the other items described above.

Part II. The New Statutory & Rule Provisions

TEX. CODE CRIM. PRO. Art. 38.39

PRESERVATION OF EVIDENCE CONTAINING BIOLOGICAL MATERIAL

(a) In a criminal case in which a defendant is convicted, the attorney representing the state, a clerk, or any other officer in possession of evidence described by Subsection (b) shall ensure the preservation of the evidence.

(b) This article applies to evidence that:

(1) was in the possession of the state during the prosecution of the case; and

(2) at the time of conviction[55] was known to contain biological material that if subjected to scientific testing would more likely than not:

[55]Note that with the advent of more and more sensitive testing methods (e.g., mtDNA), there may be a lot of evidence that contains biological material but, at the time of conviction, was not "known to contain biological material that if subjected to scientific testing ... ." In 1985 could it have been foreseen by mere mortals that in less than 15 years we would be identifying people from the epithelial cells they left on a cigarette butt? It will be interesting to see how this is interpreted in the courts. It would also be a great idea to get the tapes of the debates in the legislature to see if they shed any light on what was meant by this phrase. *See* TEX. CODE CRIM. PRO. art. 64.01(b)(1)(A)(ii), below.

(A) establish the identity[56] of the person committing the offense; or

(B) exclude a person from the group of persons who could have committed the offense.

(c) Except as provided by Subsection (d), material required to be preserved under this article must be preserved:

[56]From the standpoint of mere terminology, remember that DNA does not "establish identity," but can only exclude someone from the pool of potential donors of the DNA material. Thus, (A) sets up an impossible condition.

(1) until the inmate is executed, dies, or is released on parole,[57] if the defendant was convicted of a capital felony; or

(2) until the defendant dies, completes the defendant's sentence, or is released on parole or mandatory supervision, if the defendant is sentenced to a term of confinement or imprisonment.

(d) The attorney representing the state, clerk, or other officer in possession of the evidence described by Subsection (b) may destroy the evidence, but only if the attorney, clerk, or officer by mail notifies the defendant, the last attorney of record for the defendant, and the convicting court of the decision to destroy the evidence and a written objection is not received by the attorney, clerk, or officer from the defendant, attorney of record, or court before the 91st day after the later of the following dates:

(1) the date on which the attorney representing the state, clerk, or other officer receives proof that the defendant received notice of the planned destruction of evidence; or

(2) the date on which notice of the planned destruction of evidence is mailed to the last attorney of record for the defendant.[58]

[57]I guess this statute cannot be used to "clear someone's name" once they have been released from prison ― at least to the extent that the samples need not be preserved. Samples also need not be preserved after someone dies or is executed, short-circuiting possible attempts to show that Texas executed an innocent person.

[58]Be on the lookout for one of these notices.

(e) To the extent of any conflict, this article controls over Article 2.21 (Duty of Clerks).

TEX. CODE CRIM. PRO. Chapter 64:

MOTION FOR FORENSIC DNA TESTING

Art. 64.01. MOTION.

(a) A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing biological material. The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion.

(b) The motion may request forensic DNA testing only of evidence described by Subsection (a) that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but:

(1) was not previously subjected to DNA testing:

(A) because DNA testing was:

(i) not available; or

(ii) available, but not technologically capable of providing probative results;[59] or

(B) through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing; or

[59]E.g., where a stain was degraded and only RFLP was available, it may now be tested through the use of PCR.

(2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.[60]

(c) A convicted person is entitled to counsel during a proceeding under this chapter.[61] If a convicted person informs the convicting court that the person wishes to submit a motion under this chapter and if the court determines that the person is indigent, the court shall appoint counsel for the person. Compensation of counsel is provided in the same manner as is required by:

(1) Article 11.071 for the representation of a petitioner convicted of a capital felony; and

(2) Chapter 26[62] for the representation in a habeas corpus hearing of an indigent defendant convicted of a felony other than a capital felony.

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[60]I suppose that it is possible that a piece of evidence could be tested multiple times under this provision. For instance, a motion could be filed to test the evidence today with the present technology. Assuming that no useable results were achieved, the material could be tested again in the future when technology advances even further.

[61]Wow!!!

[62]TEX. CODE CRIM. PRO. art. 26.05.

Art. 64.02. NOTICE TO STATE; RESPONSE.

On receipt of the motion, the convicting court shall:

(1) provide the attorney representing the state with a copy of the motion; and

(2) require the attorney representing the state to:

(A) deliver the evidence to the court, along with a description of the condition of the evidence; or

(B) explain in writing to the court why the state cannot deliver the evidence to the court.

Art. 64.03. REQUIREMENTS; TESTING.

(a) A convicting court may order forensic DNA testing under this chapter only if:

(1) the court finds that:

(A) the evidence:

(i) still exists and is in a condition making DNA testing possible; and

(ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; and

(B) identity was or is an issue in the case;[63] and

[63]This will surely be one of those phrases that will require some court interpretation. At what point is, or is not, identity an issue in the case, especially in light of section (b), below, that states identity may still be an issue even where the defendant pleaded guilty? Will this phrase

(2) the convicted person establishes by a preponderance of the evidence that:

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ultimately be interpreted to mean that identity "reasonably" is an issue, or "rational jurists could believe" that identity was an issue or some other similar limitation? It remains to be seen. I like the "was or is" part. This appears to mean that identity did not have to be an issue at trial. This is another place where the tapes of the floor debates in the legislature will come in handy.

(A) a reasonable probability exists that the person would not have been prosecuted[64] or convicted if exculpatory results had been obtained through DNA testing; and

(2) the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.[65]

(2) A convicted person who pleaded guilty or nolo contendere in the case may submit a motion under this chapter, and the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of that plea.[66]

(3) If the convicting court finds in the affirmative the issues listed in Subsection (a) (1) and the convicted person meets the requirements of

[64]To date, it has been the policy of the Tarrant County District Attorney's Office to not prosecute someone in the face of DNA results excluding them.

[65]If the person is on death row, then I can see how execution of sentence could be delayed, but how do you delay a *non*-death sentence? And what exactly is meant by delaying the "administration of justice?" This appears to just be language that needs to go in the order. The real test is whether the DNA analysis would help.

[66]"Solely on the basis of that plea?" What about a plea and an eyewitness? Taken to its logical extreme, a conviction cannot be based *solely* on a plea of guilty. Exactly what, in addition to the plea, will preclude relief under this law remains to be seen. One would think, however, that some evidence that the plea was involuntary or coerced would come in very handy.

Subsection (a) (2), the court shall order that the requested forensic DNA testing be conducted. The court may order the test to be conducted by the Department of Public Safety, by a laboratory operating under a contract with the department, or, on agreement of the parties, by another laboratory.

(4) If the convicting court orders that the forensic DNA testing be conducted by a laboratory or a laboratory under contract with the department, the State of Texas is not liable for the cost of testing. If the court orders that the testing be conducted by a laboratory described by this subsection, the court shall include in the order requirements that:

(1) the DNA testing be conducted under reasonable conditions designed to protect the integrity of the evidence and the testing process;[67]

(2) the DNA testing employ a scientific method sufficiently reliable and relevant to be admissible under Rule 702, Texas Rules of Evidence; and

(3) on completion of the DNA testing, the results of the testing and all data related to the testing required for an evaluation of the test results be immediately filed with the court and copies of the results and data be served on the convicted person and the attorney representing the state.

(5) The convicting court, not later than the 30th day after the conclusion of a proceeding under this chapter, shall forward the results to the Department of Public Safety.

Art. 64.04 FINDING.

After examining the results of testing under Article 64.03, the convicting

[67]Basically disqualifies the DPS lab, doesn't it?

court shall hold a hearing and make a finding as to whether the results are favorable to the convicted person. For the purposes of this article, results are favorable if, had the results been available before or during the trial of the offense, it is reasonably probable that the person would not have been prosecuted or convicted.

Art. 64.05 APPEALS.

An appeal of a finding under Article 64.03 or 64.04 is to a court of appeals, except that if the convicted person was convicted in a capital case,[68] the appeal of the finding is a direct appeal to the court of criminal appeals.

[68]I guess they probably meant a capital case where the death penalty was imposed.

Tex. Code Crim. Pro. Chap. 17 (Bail)

Art. 17.47. POSTTRIAL ACTIONS

A convicting court on entering a finding favorable to a convicted person under Article 64.04, after a hearing at which the attorney representing the state and the counsel for the defendant are entitled to appear, may release the convicted person on bail under this chapter pending the conclusion of court proceedings or proceedings under Section 11, Article IV, Texas Constitution, and Article 48.01.

Subsection (g), Section 411.142, Government Code, is amended to read as follows:

(1) The DNA database may contain DNA records for the following:

(1) a person described by Section 411.148 or 411.150;

(1) a biological specimen of a deceased victim of a crime:

(2) a biological specimen that is legally obtained in the investigation of a crime, regardless of origin;

(3) results of testing ordered under Article 64.03, Code of Criminal Procedure;

(4) an unidentified missing person, or unidentified skeletal remains or body parts;

(5) a close biological relative of a person who has been reported missing to a law enforcement agency;

(6) a person at risk of becoming lost; such as a child or a person declared by a court to be mentally incapacitated, if the record is required by court order or a parent, conservator, or guardian of the person consents to the record; or

(7) an unidentified person, if the record does not contain personal identifying information.

PROVISIONS APPLYING TO SUBSEQUENT WRITS AND NOTICE

(a) If a person filed an application for a postconviction writ or habeas corpus that was denied or dismissed before September 1, 2001, and if the results of forensic testing conducted under Article 64.03, Code of Criminal Procedure, as added by this Act, are favorable to the person, a claim based on actual innocence that is asserted in a subsequent application is, for the purposes of Subsection (a), Section 4, Article 11.07, Code of Criminal Procedure, and Subsection (a), Section 5 Article 11.071 Code of Criminal of Criminal Procedure, a claim the legal basis for which was unavailable on the data the applicant filed the previous application.[69]

(2) An applicant whose application for a writ of habeas corpus is pending on September 1, 2001, on submitting a motion under Chapter 64, Code of Criminal Procedure, as added by this Act, is entitled to a stay of the proceeding pending a determination by the convicting court as to whether to order DNA testing and, on receiving favorable results, to amend the petition. The court of criminal appeals shall adopt rules to provide for a stay of proceedings and the filing of amendments as authorized by this subsection.

(3) The Texas Department of Criminal Justice shall provide notice of the provisions of this Act to all persons housed in facilities operated by or under contract with the department. In providing notice under this section, the Texas Department of Criminal Justice shall:

(1) include notice of the provisions of this Act in a newspaper or similar publication published for persons housed in facilities operated by or under contract with the department;

(2) post notice of the provisions of this Act in each law library

[69]Does away with the *McGinn* problem where the court decides that because the science existed somewhere at the time of the first writ, it is not an appropriate claim for a subsequent writ.

maintained by the department or under contract with the department in a facility in which persons are housed; and

(3) ensure that adequate notice is provided to persons who are not housed in the general population of inmates.