SUBJECT: Pre-trial DNA testing of biological evidence in death penalty cases

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 9 ayes — Herrero, Carter, Burnam, Canales, Hughes, Leach, Moody, Schaefer, Toth

0 nays

SENATE VOTE: On final passage, April 17 — 31-0

WITNESSES: (*On original bill:*)
For — (*Registered, but did not testify:* David Gonzalez, Texas Criminal Defense Lawyers Association; Ana Yanez Correa, Texas Criminal Justice Coalition)

Against — None

On — (*Registered, but did not testify:* Skylor Hearn, Texas Department of Public Safety; Beth Klusmann, Office of the Attorney General)

DIGEST: **(*The digest below reflects the bill as it would be constructed under the amendment that the author intends to offer*)**
SB 1292 would institute a process of pre-trial DNA testing of evidence in death penalty cases. Before a death penalty trial, the state would have to require either the Department of Public Safety or another accredited lab to perform DNA testing on biological evidence collected during a crime investigation and in possession of the state.

The bill would establish a process to determine what evidence fell under this requirement. As soon as practicable after a defendant was charged with a capital offense, or on motion of a defendant or the prosecutor, if the state had not waived the death penalty, courts would have to order defendants and prosecutors to meet and confer about which biological materials would be tested.

If there was agreement, the testing would proceed. If there was disagreement, the defendant or the prosecutor could request a court

hearing to decide the issue. Following the request, a court would hold a hearing at which there would be a rebuttable presumption that evidence a defendant wanted tested would have to be tested. The state would not be prohibited from testing evidence in its possession.

The labs would pay for the testing. If a lab destroyed or lost biological evidence required to be tested under the bill, it would have to provide the defendant with bench notes created as a result of the testing.

A defendant could have another accredited lab perform additional testing of evidence required to be tested under the bill. For good cause, a defendant could have accredited labs test material not required to be tested under the bill. Defendants would pay for these tests.

A defendant's exclusive remedy for testing not done as required by the bill would be to ask for a writ of mandamus from the Court of Criminal Appeals to order testing. This writ would have to be submitted on or before the due date in current law for the filing of a writ of habeas corpus. Applications for writs of mandamus would not affect any limits for state or federal writs of habeas corpus. A defendant would be entitled to one application for a writ of mandamus. A defendant would be allowed to file one additional application for forensic testing under Code of Criminal Procedure, ch. 64 provisions allowing for post-conviction testing.

The bill would take effect September 1, 2013, and would apply only to trials that began on or after that date, regardless of when the offense occurred.

SUPPORTERS SAY:

SB 1292, as it would be amended, would increase certainty in convictions in death penalty cases and reduce post-conviction, late-stage appeals. While the level of testing described by SB 1292 may be occurring now in some cases, the state should establish a uniform testing policy so that it happened in all cases to help ensure that only the guilty faced execution.

Currently, many challenges to death penalty cases center on the DNA testing of evidence, sometimes because all evidence may not have been tested. While both defendants and prosecutors are interested in DNA testing to ensure the accuracy of a conviction, in some cases requests for testing occur years after a conviction and are used as delaying tactics. In one case, the legal battles over DNA testing are continuing almost two decades after a conviction.

SB 1292 would address this issue by requiring pre-trial DNA testing of crime scene evidence. Having crime scene evidence tested early in the process would help convict the guilty and protect the innocent. If the testing identified the alleged offender or proved helpful in some other way regarding the case, the trial could proceed with more certainty. If testing proved otherwise, a person could be cleared and law enforcement authorities could refocus their efforts toward finding the guilty party.

While the bill could result in more overall testing of evidence than occurs under current law, any short delay in the start of a trial because of more testing would be offset by reducing requests and appeals later in the process.

SB 1292 would be narrowly drawn. It would apply only to death penalty trials. In the past three years, these trials have resulted in about 25 death sentences. Testing would be limited to evidence collected as part of an investigation and in possession of the state.

SB 1292 would ensure that its provisions were not used only as an unreasonable delaying tactic. As soon as practicable, courts would have to order the defense and prosecution to meet to confer about what should be tested. If there was disagreement over what should be tested, either party could request a hearing. The judge holding the hearing would act as a gatekeeper to consider a defendant's request. The presumption that a request for testing would be done would be rebuttable by the prosecution.

SB 1292 would balance and protect the needs and rights of defendants and the state in death penalty cases. Under the writ of mandamus authorized by the bill, defendants could ask a higher court to order testing that was not done as required by the bill. In addition, the current procedures in the Code of Criminal Procedure, ch. 64 to ask for post-conviction testing would remain. The state would retain the right to test all evidence in its possession.

Decisions about collecting evidence or pursuing the death penalty should not be affected by the bill. Law enforcement officers collecting evidence follow protocols and procedures that focus on solving the crime, not on later testing decisions. Decisions about pursuing the death penalty similarly would remain within the full discretion of prosecutors and should not be influenced by SB 1292.

While the Code of Criminal Procedure, ch. 64 allows convicted persons to ask for post-conviction DNA testing, SB 1292 would approach the issue from another direction by implementing pre-trial testing to reduce requests later in the process and to prevent wrongful convictions.

Any costs associated with SB 1292 could be offset by other costs that would be reduced or eliminated. The most important cost that could be eliminated with the bill is the human cost of a wrongful conviction. In addition, the bill could reduce the costs of litigating appeals, housing offenders during the appeals, and testing ordered as part of an appeal.

The Legislative Budget Board estimates no significant fiscal impact to the state as a result of the bill, and that costs could be absorbed with existing resources. DPS and other labs could handle any increase in testing, and DPS and could shift the testing or resources as needed among its multiple labs. Testing under SB 1292 could be offset by reduced testing later in the process.

OPPONENTS SAY:

SB 1292, as it would be amended, could result in unnecessary DNA testing being used as a delaying tactic in death penalty trials. The bill would be a response to problems that center mainly on older cases tried when DNA testing was not prevalent as it is now. In current cases, evidence is routinely tested and there are procedures for requesting additional testing.

With SB 1292 testing could be requested of numerous — in some cases hundreds — of items or samples. These items, while gathered from the crime scene, may have nothing to do with the identity of the criminal and the results of the testing might not yield any relevant results. This could delay trials and increase costs, without adding information about the crime.

The potential for this unlimited testing could have other consequences. It could lead to reductions in what evidence is collected from crime scenes and could have a chilling effect on the use of the death penalty.

Texas has a post-conviction testing law in Code of Criminal Procedure, art. 64 that works well to ensure fair testing of evidence not tested during a trial. Under that chapter, a person can submit to the court a motion for DNA testing of evidence that was not previously tested or that was tested

with outdated techniques if it meets appropriate requirements. These include that identity be an issue in a case and that the request for testing not be done to delay a sentence or justice.

OTHER OPPONENTS SAY:

It could be difficult for crime labs to absorb the additional testing required by SB 1292 within existing resources.

NOTES:

Rep. Turner plans to offer a floor amendment, which is included in the digest above, that would make numerous changes to the committee-approved version, including:

- adding the procedure for the writ of mandamus;
- adding a rebuttable presumption that evidence a defendant's requested for testing would be required to be tested; and
- adding the provision that the state would not be prohibited from testing evidence in its possession.