

- SUBJECT:** Loss of good-conduct time for filing frivolous motions for DNA testing
- COMMITTEE:** Criminal Jurisprudence — favorable, without amendment
- VOTE:** 6 ayes — Gallego, Christian, Kent, Miklos, Vaught, Vo
0 nays
1 present not voting — Moody
4 absent — Fletcher, Hodge, Pierson, Riddle
- WITNESSES:** For — Michael Ware, Dallas County District Attorney’s Office

Against — Samuel England, ACLU of Texas; Scott Henson, Innocence Project of Texas; (*Registered, but did not testify:* Amanda Marzullo, Texas Fair Defense Project; Andrew Rivas, Texas Catholic Conference)
- BACKGROUND:** Under Government Code, ch. 498, an offender may be awarded good conduct time for the quality of their conduct, prison employment, and participation in educational or treatment programs. Depending on certain formulas, a well-behaved inmate working a prison job or satisfactorily participating in an educational or treatment program may earn around 45 days of good conduct time for each 30 days actually served. Good conduct time can be used to move up the date at which an offender is eligible for parole or mandatory supervision.
- DIGEST:** HB 2371 would amend Government Code, ch. 498, to remove certain amounts of good conduct time if it was determined that an offender had filed a frivolous post-conviction DNA motion. If the Texas Department of Criminal Justice (TDCJ) heard from a court that had the results of a post-conviction DNA test been available during trial, that it was reasonably probable that an inmate still would have been convicted, then TDCJ shall remove:
- 180 days of the inmate’s accrued good conduct time, if the inmate was serving a sentence for a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000);

- 365 days of the inmate's accrued good conduct time, if the inmate was serving a sentence for a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000);
- all of the inmate's accrued good conduct time, if the inmate was serving a sentence for a first-degree felony (life in prison or a sentence of five to 99 years and an optional fine of up to \$10,000) or a capital felony (death or life in prison).

HB 2371 would amend Code of Criminal Procedure, art. 64.01(a), to require an offender to include a sworn statement with a motion for post-conviction DNA testing that the requested DNA testing, if conducted, would not further inculcate the convicted person in relation to the offense that is the basis of the challenged conviction.

The bill also would amend Code of Criminal Procedure, art. 64.04, to direct a court, if it found that, had the DNA testing results been available during the trial of the offense, it would have been reasonably probable that the person would still have been convicted, to forward a certified copy of that finding to TDCJ and to the victim of the offense.

The bill would take effect September 1, 2009 and would only apply to motions filed or related findings on or after that date.

**SUPPORTERS
SAY:**

HB 2371 would reduce the amount of frivolous motions for post-conviction DNA testing and would reduce the undue strain that these motions place on the criminal justice system. HB 2371 would punish the filing of frivolous post-conviction DNA testing motions by stripping filers of certain amounts of good conduct time. HB 2371 would define a frivolous post-conviction DNA test as one in which the results of the testing reinforced the guilt of the offender who requested it. Offenders greatly value their good conduct time because it can be used to move up the date at which they can be considered for parole or mandatory supervision, so the bill would provide a strong deterrent to frivolous motions.

HB 2371 also would require that filers include a statement that the DNA test would not further inculcate them. This also would help to deter frivolous motions, because a false statement could be used as the basis of a perjury charge.

HB 2371 would establish a progressive sanction ladder in order to punish more severely the most dangerous offenders. Public safety requires that more serious felons be kept from parole. Since only the motions for DNA testing that resulted in further establishing the guilt of the offender would be considered frivolous, HB 2371 would be removing good conduct time from offenders that are known to be guilty. Those offenders that society is now certain are guilty of the most dangerous crimes should have their parole eligibility date delayed through the loss of good conduct time.

Arguments that HB 2371 would have a chilling effect on innocent offenders making motions for post-conviction DNA testing are unfounded. HB 2371 only would punish those offenders whose test results reinforced their guilt. Offenders know if they committed the crime at issue. HB 2371 would penalize those who knew they were guilty and still wasted the state's time and resources. These frivolous requests not only waste public resources, they also distract from the important work of using cutting-edge DNA testing to identify and release those who are actually innocent. Frivolous requests should be deterred.

HB 2371 is necessary because current laws dealing with frivolous litigation by offenders are not deterring people from filing these motions. Further, HB 2371 would make the penalty for filing a frivolous motion a loss of good conduct time, rather than requiring payment of court costs and fees as current law prescribes.

Under current law, TDCJ cannot restore good conduct time. Even if the Legislature allowed TDCJ to restore good conduct time, the filing of frivolous motions deserves to be punished with a permanent loss of good conduct time, because such motions are a drain on public resources and they ultimately undermine efforts to secure testing for the truly innocent.

**OPPONENTS
SAY:**

HB 2371 is not needed. Under Civil Practices and Remedies Code, ch. 14, a court may dismiss frivolous claims and litigation filed by an offender and also order the offender to pay court costs and fees and, in certain circumstances, reimburse the state for other costs related to frivolous claims.

HB 2371 would have a chilling effect on efforts to apply the latest refinements in the science of DNA testing to help free the innocent from incarceration. It is important to test as many cases as possible where biological material is present, because the science and techniques now

available are far superior to what was available even four or five years ago. In light of recent exonerations, including of offenders who confessed to the crimes with which they were charged, society has grounds to question many cases where forensic science and testing was done sloppily or not did not take place. Punishing offenders with the loss of good conduct time could chill efforts to utilize modern testing techniques, because even innocent offenders might be reluctant to risk their good conduct time by making an application for DNA testing.

HB 2371 would establish an arbitrary penalty ladder where the penalty for filing a frivolous request was based not on the waste of time and resources caused by the request, but on the crime for which the offender was convicted. The penalty for filing a frivolous post-conviction DNA motion should be the same no matter who filed it, because the drain of state resources is the same.

Good conduct time is a management tool. It allows TDCJ to maintain more effectively order and discipline throughout the prison system. An element of this management technique is the perception that an inmate's good conduct time and other privileges are determined by their behavior while in the prison system, not by the crimes they committed before they were incarcerated. HB 2371 would lessen that perception, because the punishment for the same frivolous motion would vary based on the crime committed before incarceration. HB 2371 might lessen the effectiveness of good conduct time as a management tool.

Filing a frivolous motion for post-conviction DNA does not deserve to be singled out as an especially egregious action that warrants a permanent loss of good conduct time. Should the Legislature allow TDCJ to reinstate good conduct time, HB 2371 would establish an unwarranted precedent for targeting certain behavior for permanent loss of time. These exemptions might multiply throughout the code and eventually make meaningless any future ability of TDCJ to restore good conduct time.