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Actual Innocence: Establishing Innocence or Guilt  
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**ACTUAL INNOCENCE – TEXAS LEGISLATIVE UPDATE**

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## TEXAS LEGISLATIVE UPDATE

During Texas's 82<sup>nd</sup> Legislative Session, the Legislature considered and passed a number of bills designed to help prevent future wrongful convictions and remedy those already on the books. The following paper provides an overview of several significant pieces of that legislation. Some became law effective immediately, while others will go into effect on September 1, 2011.

### 1. Legislation Effective Immediately

#### ***a. SB 1616: Requiring Retention of Biological Evidence and Creating Rules Governing Evidence Storage***

SB 1616 amends Article 38.43 of the Code of Criminal Procedure (relating to the preservation of biological evidence) in several ways. Perhaps most importantly, it defines the term "biological evidence" in order to clarify what types of evidence must be preserved in accordance with the statute. Specifically, section 38.43(a) explains that biological evidence includes the contents of a sexual assault kit or any items containing blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or any other identifiable biological material collected as part of the investigation of an alleged felony or conduct constituting a felony. Tex. Code Crim. Proc. Ann. 38.43(a), <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB01616F.pdf#navpanes=0>. The article goes on to explain that only biological evidence that could establish the identity of the perpetrator or exclude an individual as a perpetrator must be retained. *Id.*

The amendments to Article 38.43 also include a provision explaining which entities and individuals are responsible for evidence retention. The legislation explains in section 38.43(b) that the statute applies to governmental and public entities and individuals charged with the collection, storage, preservation, analysis or retrieval of biological evidence. Tex. Code Crim. Proc. Ann. 38.43(b), <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB01616F.pdf#navpanes=0>. Unless proper destruction notice is given, the statute further requires these entities and individuals to ensure the retention of relevant biological evidence...

- 1) for not less than 40 years, or until the applicable statute of limitations has expired, if there is an unapprehended actor associated with the offense; or

- 2) in a case in which a defendant has been convicted, placed on deferred adjudication community supervision, or adjudicated as having engaged in delinquent conduct and there are no additional unapprehended actors associated with the offense:
  - a. until the inmate is executed, dies, or is released on parole if a defendant is convicted of a capital felony;
  - b. until the defendant dies, completes his sentence, or is released on parole or mandatory supervision, if the defendant is sentenced to a term of confinement...;
  - c. until the defendant completes his term of community supervision, including deferred adjudication supervision, if the defendant is placed on community supervision;...

*Id.*

Finally, this legislation requires the Department of Public Safety to “adopt standards and rules, consistent with best practices...that specify the manner of collection, storage, preservation and retrieval of biological evidence.” *Id.* In doing so, DPS must consult with law enforcement agencies, associations, and organizations in addition to the Texas District and County Attorneys Association and the Texas Criminal Defense Lawyers Association. *Id.*

***b. HB 417: Providing Healthcare to Exonerees and Expanding Compensation for the Wrongly Convicted***

One of the primary effects of HB 417 is to expand access to wrongful conviction compensation to a larger class of defendants who have been proven innocent. Under the amendments to Chapter 103 of the Civil Practice and Remedies Code, compensation is now available to those who have received relief based on actual innocence via a writ of habeas corpus or pardon. Tex. Code Crim. Proc. § 103.001(a)(2) (2011), <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB00417F.pdf#navpanes=0>. In addition, compensation is made available to those who have been granted relief on a writ of habeas corpus and who have dismissal orders from the trial court in conjunction with an official statement from the prosecuting attorney

(either in the dismissal motion or an affidavit) asserting that the state's attorney believes the defendant to be innocent. *Id.* In effect, this provision opens the door to compensation to innocent defendants, like Anthony Graves, whose cases were dismissed by prosecutors and courts prior to the defendant obtaining a pardon or the granting of a writ of habeas corpus based on actual innocence.

Another amendment to Chapter 103 deals with healthcare for exonerees. It entitles exonerees who are eligible for compensation under the statute to healthcare from the Texas Department of Criminal Justice as if the person were an employee of the department. Tex. Code Crim. Proc. § 103.001(d) (2011), <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB00417F.pdf#navpanes=0>. However, the coverage does not extend beyond the exoneree. Spouses, dependants and other family members are not eligible for coverage under the statute. *Id.*

Finally, this legislation added Subchapter C to Chapter 103. That Subchapter deals specifically with attorneys fees charged in preparation of an exoneree's application for wrongful conviction compensation. Tex. Code Crim. Proc. § 103.101 (2011), <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB00417F.pdf#navpanes=0>. While it allows attorneys to enter into fee arrangements for these types of claims, it requires the attorney to file a fee report in conjunction with the compensation application and limits the fees charged to a reasonable hourly rate. *Id.*

## **2. Legislation Effective September 1, 2011**

### ***a. HB 215: Improving Eyewitness Identification Procedures***

HB 215 created Article 38.20 of the Code of Criminal Procedure relating to photographic and live lineup identification procedures. It requires law enforcement agencies to "adopt, implement, and as necessary amend a detailed written policy regarding the administration of photograph and live lineup identification procedures..." Tex. Code Crim. Proc. Ann. 38.20(3)(a) (2011), <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB00215F.pdf#navpanes=0>. The departments may either adopt a model policy to be developed in accordance with the statute by the Bill Blackwood Law Enforcement Management Institute of Texas, or they may develop their own policies so long as those policies are based on credible research and conform with best practices as outlined in detail in the statute. *Id.*

In terms of how evidence obtained in violation of the policies is to be dealt with in court, the statute makes it clear that evidence of compliance with the statute is not a condition precedent to the admissibility of eyewitness identification. Tex. Code Crim. Proc. Ann. 38.20(5)(a) (2011), <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB00215F.pdf#navpanes=0>. Eyewitness identification testimony not obtained in substantial compliance with the departments' policies is not barred from admission in court. *Id.*

***b. SB 122: Expanding Access to Post-Conviction DNA Testing***

SB 122, like SB 1616 (dealing with evidence preservation), begins by defining the term “biological evidence” as it relates to defendants seeking access to post-conviction DNA testing. It sets forth that biological evidence includes the contents of a sexual assault kit in addition to items in possession of the state “containing blood, semen, hair, saliva, skin tissue or cells, fingernail scrapings, bone, bodily fluids or other identifiable biological evidence that may be suitable for forensic DNA testing.” Tex. Code Crim. Proc. 64.01(a)(1) (2011), <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00122F.pdf#navpanes=0>.

The legislation further simplifies the requirements for defendants wishing to obtain post-conviction DNA testing of biological evidence in order to prove their innocence. Rather than requiring defendants to explain why the evidence in their case was not previously subjected to DNA testing, as was required under the previous version of the statute, the amended version of Chapter 64 of the Code of Criminal Procedure allows defendants to request DNA testing of biological evidence in the possession of the state at the time of trial if that evidence was either 1) not previously subjected to DNA testing, or 2) “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 [previous testing].” *Id.*

Finally, the newly amended Chapter 64 will require that unidentified DNA profiles obtained as a result of granted post-conviction DNA testing be entered into relevant state and national DNA databases, when possible, in an attempt to identify the contributor of the DNA on the tested samples. Tex. Code Crim. Proc. 64.035 (2011), <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00122F.pdf#navpanes=0>. After examining the results of the DNA testing conducted under the statute and the results of any required database uploads, the

convicting court must hold a hearing and enter findings establishing whether it is reasonably probable that that the person would not have been convicted in light of the DNA evidence. *Id.*

# Texas Legislative Update

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## New Legislation – Effective Immediately

### SB 1616 (Retention & Storage of Biological Evidence)

- Amends article 38.43, Texas Code of Criminal Procedure
  - Provides definition of term "biological evidence": includes the contents of a sexual assault kit or any items containing blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or any other identifiable biological material collected as part of the investigation of an alleged felony or conduct constituting a felony.
  - Specifies that only biological evidence that could establish the identity of a perpetrator or exclude an individual as a perpetrator must be retained.
  - Requires DPS to "adopt standards and rules, consistent with best practices...that specify the manner of collection, storage, preservation and retrieval of biological evidence."
  - DPS must consult with law enforcement agencies, organizations, and associations when developing these standards and rules.
  - DPS must also consult with TCDLA and TDCAA.

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## New Legislation – Effective Immediately

### SB 1616 (continued)

- Sets required retention times for biological evidence. Unless proper notice of destruction is given, biological evidence must be retained for:
  - No less than 40 years, or end of applicable statute of limitations, if there is an unapprehended actor in the crime;
  - in a case in which a defendant has been convicted, placed on deferred adjudication community supervision, or adjudicated as having engaged in delinquent conduct and there are no additional unapprehended actors associated with the offense:
    - until the inmate is executed, dies, or is released on parole if a defendant is convicted of a capital felony;
    - until the defendant dies, completes his sentence, or is released on parole or mandatory supervision, if the defendant is sentenced to a term of confinement...
    - until the defendant completes his term of community supervision, including deferred adjudication supervision, if the defendant is placed on community supervision;...

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### New Legislation – Effective Immediately

#### HB 417 (Exoneree Healthcare & Expansion of Compensation Statute)

- Amends Chapter 103, Civil Practice & Remedies Code
  - Expands access to compensation to a larger class of exonerees
    - Entitled to compensation if granted a writ or pardon based on "actual innocence"
    - Entitled to compensation if granted a writ and have charges dismissed on the basis of innocence. To collect under this provision, a defendant needs an official statement of innocence from the prosecutor:
      - Affidavit, or
      - Language in the dismissal motion itself
  - Allows exonerees to apply for healthcare
    - Entitled to healthcare from TDCJ as if the person were an employee of the department
    - Coverage not available for an exoneree's spouse, dependants, or other family members.

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### New Legislation – Effective September 1

#### HB 215 (Improving Eyewitness ID Procedures)

- Requires law enforcement to adopt, implement or amend a detailed written policy regarding the administration of photo and live lineups
  - Agencies can adopt a model policy to be developed by the Bill Blackwood Law Enforcement Management Institute, or
  - Develop their own policies that are based on credible research and conform with best practices (as outlined in statute)
- Evidence of statute compliance is NOT a condition precedent to the admissibility of an eyewitness ID
- Eyewitness IDs not obtained in substantial compliance with the implemented policies are not barred from admission in court.

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### New Legislation – Effective September 1

#### SB 122 (Expanding Access to Post-Conviction DNA Testing of Biological Evidence)

- Amends Chapter 64, Code of Criminal Procedure
  - Defines biological evidence: contents of a sexual assault kit in addition to items in possession of the state "containing blood, semen, hair, saliva, skin tissue or cells, fingernail scrapings, bone, bodily fluids or other identifiable biological evidence that may be suitable for forensic DNA testing"
  - Simplifies requirements for obtaining testing:
    - Under previous version of statute, defendants had to explain (when applicable) why the evidence in their case wasn't previously subjected to DNA testing.
    - Now, defendants only have to show:
      - The evidence was not previously tested, or
      - The evidence can be tested with newer techniques that provide a reasonable likelihood of more accurate and probative results.

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### New Legislation – Effective September 1

#### SB 122 (continued)

- Requires unidentified DNA profiles to be uploaded to into state and federal DNA databases.  
e.g. CODIS
- After examining the results of the testing and database uploads, the statute requires the trial court to hold a hearing and enter findings.  
Findings must establish whether it is reasonably probable that the defendant would not have been convicted in light of the new DNA evidence.

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### Additional Resources

- To easily access the complete text of each of the bills discussed, visit the “82<sup>nd</sup> Legislature – Public Policy” page at [www.jpofexas.org](http://www.jpofexas.org)

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