

## *Should Texas Do More to Regulate Crime Labs?*

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Legislators, law enforcement officers, and others involved in the criminal justice system continue to discuss the structure and oversight of the state's crime labs and whether a 2003 law enacted by the 78th Legislature went far enough to correct problems discovered at several labs in Texas. The law required, with some exceptions, that physical evidence be subject to forensic analysis and testimony about that evidence be admissible in Texas courts only if the crime lab conducting the analysis was accredited under a process established by the Department of Public Safety (DPS). Despite the new law, the debate continues over whether crime labs are adequately regulated and the evidentiary analyses they produce are reliable. Ongoing problems with evidence testing at the Houston Police Department's crime lab have prompted some observers to call for a moratorium on executions of inmates from Harris County.

While much of the attention about problems with crime labs has focused on the situation in Houston, other crime labs in the state also have experienced problems. In 2004, it was revealed that DPS had closed the DNA section of its McAllen crime lab for three months in 2003, and there have been questions about the ability of other DPS crime labs to handle their workloads. Also in 2003, the Fort Worth Police Department closed its DNA crime lab following questions about whether a forensic analyst followed proper procedures in handling evidence.

*This report examines the ongoing debate over whether current law is sufficient to ensure that crime labs are adequately regulated and the evidentiary analyses they produce are reliable.*

New proposals have emerged for restructuring the state's crime lab system, and committees of the House and Senate are studying the issue. The House General Investigating Committee was charged with continuing the investigation into the Houston crime lab and examining other labs as necessary, and the Senate

Criminal Justice Committee reports that it plans to hold a hearing on the issue in January 2005.

## The crime lab system

Evidence from crime scenes in Texas generally is analyzed by one of DPS' 13 laboratories or by a crime lab operated by a city police department, a county, a medical examiner's office, or other governmental entity. In some cases, law enforcement agencies send evidence to private labs for analysis. Forensic analysis can include DNA testing, testing body fluids for drugs or alcohol, testing substances for the presence of illegal drugs, testing firearms, analyzing fingerprints, and analyzing trace evidence such as shoe prints and fibers.

DPS labs perform about one-half of the forensic analyses in Texas. Any Texas law enforcement agency can send evidence in a criminal case to a DPS lab, each of which has different capabilities (see Figure 1, page 3). Some perform numerous types of forensic tests while others specialize in certain areas, such as testing for the presence of illegal drugs. Eight DPS labs perform forensic DNA analysis.

The 78th Legislature appropriated \$9.7 million annually for fiscal 2004-05 to DPS for its crime labs, which employ some 186 full time workers, about 45 of whom perform DNA analysis. DPS labs are accredited by a national organization, the American Society of Crime Laboratory Directors – Laboratory Accreditation Board (ASCLAD – LAB).

The state does not charge law enforcement entities for its forensic work. DPS labs generally analyze evidence on a first-come, first-served basis, and each lab currently has a backlog. While DPS performs about 4,600 drug analysis tests each month, the statewide backlog for drug tests was approximately 9,000 in October 2004. The agency has seen a 16 percent increase in requested drug tests in the last year.

Most major metropolitan areas operate their own crime labs at either the city or county level. For example, police departments in Houston, Austin, Fort Worth, Corpus Christi, Plano, and Pasadena operate labs. County labs include those run by Tarrant, Bexar, Harris, Jefferson, and Brazoria counties, and Dallas County operates a lab called the Southwest Institute of Forensic Sciences. Capabilities at these non-DPS labs also vary, with some performing only one type of analysis and others operating as full service forensic labs. Law enforcement agencies in areas that do not run their own labs, or whose labs may lack certain capabilities,

may use DPS labs or have agreements to use other area labs. Prior to 2003, non-DPS crime labs did not have to meet any accreditation or other standards.

## Recent legislation

**Problems at HPD lab.** A December 2002 audit of the lab run by the Houston Police Department (HPD) fueled debate by the 78th Legislature about the competence of the state's crime labs. The audit, which spurred immediate closure of the HPD lab's DNA division, found widespread problems, including that:

- lab personnel lacked necessary training and experience;
- the lab was not designed to provide adequate security and minimize contamination;
- a leaking roof might have contaminated evidence;
- that the lab failed to properly calibrate equipment and instruments used in DNA testing;
- analysts might have exaggerated statistics in some instances; and
- trial testimony over several years had been based on questionable lab results.

**HB 2703.** The 78th Legislature enacted HB 2703 by Bailey that made inadmissible in court physical evidence and testimony regarding the evidence if, at the time the analysis or evidence was submitted to the court, the crime laboratory was not accredited by DPS. Until September 1, 2005, physical evidence is admissible regardless of the accreditation status of the crime laboratory if the lab agrees to preserve and maintain one or more separate samples of the evidence until all appeals in the case are final.

The law required DPS to establish an accreditation process for the crime labs and other entities, including DNA labs, and to regulate DNA testing. DPS issued initial rules in August 2003 that included naming specific accreditation bodies under which individual labs could seek accreditation, including the ASCLAD – LAB, the National Forensic Science Technology Center for DNA accreditation, and the American Board of Forensic Toxicology for toxicology. DPS reports that, as of mid-December 2004, the Southwest Institute of Forensic Sciences and crime labs in Bexar County, Harris County, and Tarrant County currently are accredited, and other labs are working toward their accreditation.

The law allows DPS to exempt certain laboratories from the accreditation process if independent accreditation is unavailable or inappropriate, the type of forensic examination is admissible under a well established rule of evidence, or the type of test performed is conducted routinely outside of a crime laboratory. It does not apply to latent fingerprint examinations, breath tests, or examinations exempted by rule by the DPS director.

Supporters of the law said the Legislature needed to act ensure the integrity of the state's crime labs and to help ensure that situations like the one at HPD's lab did not occur again. The problems in Houston were not isolated incidents, and the episode tarnished the whole criminal justice system by leading to the incarceration of some innocent persons. Prosecutors, courts, and juries give great weight to forensic evidence, supporters said, which makes it essential that forensic testing be reliable.

Critics said that it was unnecessary to impose changes upon the majority of properly managed crime labs in the state that had not experienced the problems seen in Houston. In addition, they argued that the cost of implementing the bill was too high given the fiscal situation confronting state and local governments in 2003.

## Continuing problems and investigations

After closing the DNA division of the HPD crime lab in 2002, the Harris County District Attorney's office reviewed about 1,350 cases that involved DNA evidence analyzed by HPD's crime lab. Almost 400 of those cases were earmarked for retesting of the DNA evidence, by private labs in most instances. As of December 2004, retesting in 294 of the cases confirmed the original test. In the remaining cases, with one exception, either retesting did not confirm the original test,

**Figure 1: DPS laboratory services**

City	Drugs	Blood alcohol	Serology/DNA	Firearms/Toolmarks	Gun muzzle distance	Serial number restoration	Shoe/Tire impressions	Bulb filament	Hair	Fibers	Paint	Glass	Gunshot residue	Toxicology	Questioned documents	Computer evidence	Latent prints	Photography
Abilene	X	X																
Amarillo	X																	
Austin	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Corpus Christi	X	X	X															
El Paso	X		X	X	X	X												
Garland	X	X	X			X	X	X	X	X	X							
Houston	X	X	X				X	X	X	X	X							
Laredo	X																	
Lubbock	X	X	X	X	X	X	X	X	X	X	X							
McAllen	X	X	X	X	X	X	X	X	X	X	X							
Midland	X	X																
Tyler	X	X		X	X	X	X											
Waco	X	X	X															

Source: Texas Department of Public Safety

## Should Texas impose a moratorium on capital punishment?

Prompted in part by well publicized problems in the crime lab system, some legislators and other observers are calling for Texas to impose a moratorium on executing inmates convicted of capital murders. Most proposals call for temporarily suspending executions while the state reviews its system for imposing capital punishment.

Currently, the state has no mechanism to impose a statewide moratorium on executions. Individual trial courts set execution dates, and the Texas Department of Criminal Justice (TDCJ) carries out death sentences after the appeals process has been exhausted in the courts.

However, the governor could issue a clemency decision to delay an execution or change a death sentence to a penalty that did not include execution. In death penalty cases, clemency can come in the form of a reprieve that postpones an execution date for a specified amount of time, a commutation of a sentence to a lesser penalty, or a pardon. The governor independently can grant a one-time 30-day reprieve from execution, but all other clemency decisions by the governor can be made only upon recommendation of the Board of Pardons and Paroles.

While no mechanism currently exists for a statewide moratorium, supporters say that the governor could take action immediately to halt or slow executions, thus giving the Legislature time to debate a moratorium during the 79th legislative session in 2005. For example, the governor could use his power to enact a 30-day delay on any execution that is imminent and could use his bully pulpit to urge trial courts to stop setting execution dates, they say.

### Legislative actions

For the 79th Legislature, Rep. Elliott Naishtat has introduced legislation, HJR 14, that would amend the

Texas Constitution to authorize the governor to issue an order prohibiting TDCJ from performing executions after a specified date and until the order was revoked.

During the 2003 regular session, several proposals that would have authorized the governor to impose a moratorium and to create a commission to study Texas' capital punishment system died in committee in both chambers. One related proposal, which would have allowed the governor independently to grant unlimited 30-day reprieves in capital cases, was approved by the Senate Criminal Justice Committee but never considered by the full Senate.

*Most proposals for enacting a death penalty moratorium call for temporarily suspending executions while the state reviews its procedures for imposing capital punishment.*

### The debate

**Supporters of a moratorium say:** Controversies and problems with numerous Texas death sentences are compelling reasons for the state to halt executions while the Texas justice system is examined. These cases – including those of eight men who have been exonerated and released from death row – point to systemic problems. The only fair and just way to handle this situation where human lives are at stake is to halt executions so that problems, including irregularities in evidence testing, can be identified and fixed. That way, Texans can be satisfied that only the guilty are being put to death. At a minimum, the state should impose a limited moratorium on those convictions and sentences that have been based on evidence coming from the troubled Houston Police Department Crime Lab.

In addition to the cases of men who have been exonerated, at least two more death sentences are being reviewed for actual innocence, and there have been serious, unresolved questions about other cases. For example, many persons accused or convicted of capital murder have received inadequate legal representation, at present or in

the past, and many inmates have not received access to the system for post-conviction DNA testing enacted by the 77th Legislature in 2001. In other cases, the state may have executed persons with mental retardation in violation of a U.S. Supreme Court ruling.

It is false to assume problems with the system of capital punishment are properly addressed on a case-by-case basis through the appeals and clemency system. The merits of all death row cases are not necessarily fairly and adequately reviewed by courts, especially given restrictions on parts of the appeals process. Other cases may have been reviewed by courts years ago before problems with the work of crime labs had been discovered and before the availability of DNA analysis. The clemency process in Texas also is inadequate to provide an emergency safeguard for miscarriages of justice, especially given the traditional role the Board of Pardons and Paroles has taken in limiting the governor's discretion and the narrow view Texas governors traditionally have taken in granting clemency.

The public and numerous public officials and entities – both supporters and opponents of the death penalty – support a moratorium. In a Scripps Howard Texas Poll released in November 2004, 70 percent of those surveyed said they believed Texas has executed innocent people. Former district attorneys, former state district judges, numerous newspapers, religious groups, and the League of Women voters have called for a moratorium. In addition, the American Bar Association adopted a resolution in 1997 asking states to declare a temporary moratorium until they can ensure the fair and impartial administration of the death penalty. In the face of growing support for an execution moratorium, the Legislature should let voters decide whether the governor should be granted the power to impose one.

**Opponents of a moratorium say:** A moratorium is unnecessary because each death sentence in Texas is thoroughly reviewed, appealed, and vetted by the criminal justice system to ensure that only the guilty are put to

death and that the system is fair and just. After a death sentence has been imposed, each case undergoes a series of mandatory reviews, in addition to the optional appeals filed by virtually all inmates. This means that almost every death sentence in Texas is reviewed about 10 times by state and federal courts. During this process, inmates have ample opportunities to raise issues such as the adequacy of their legal representation. In addition, inmates have the option of requesting post-conviction DNA testing and can ask for clemency through the Board of Pardons and Parole and the governor.

The state applies the death penalty in a fair manner. Many of the cases used as examples of problems in Texas occurred decades ago and do not reflect current state law or procedures. In the vast majority of Texas capital cases, defendants confess to murder and guilt is not an issue. Texas juries hear all the facts and information about cases before convicting defendants, and sentences should not be second guessed by persons unfamiliar with these cases. Those who have received death sentences through the process required by the Texas legal system should not have their sentences suspended.

In some cases, opponents of the death penalty are calling for a moratorium not because they believe there are problems in the administration of law in Texas but because they wish to abolish capital punishment. The Legislature convenes every two years, during which time it can review the administration of the death penalty and make any changes to Texas law if it deems such action necessary. A blanket moratorium, even if permitted under the Constitution, should not be inserted into this process and would serve only to advance an anti-death penalty agenda that most Texans oppose.

The vast majority of criminal justice officials and members of the public support the death penalty in Texas and oppose an execution moratorium. The 2004 Scripps Howard Texas Poll found that 75 percent of those surveyed supported the use of the death penalty in Texas and 52 percent opposed an execution moratorium.



additional testing is being performed, there are problems with the original statistical analysis, or the retesting is pending.

So far, one person has been released from prison after retesting excluded him as the source of DNA evidence used in the case. Josiah Sutton, who was convicted of a 1998 rape, was released in March 2003 after serving four years of a 25-year sentence. In May 2004, Gov. Rick Perry pardoned Sutton. Another man, George Rodriguez, whose 1987 rape trial included evidence tested by the HPD lab, has been released on bond while the Texas Court of Criminal Appeals considers his appeal. Prosecutors, defense attorneys, and the judge were involved in asking for his release pending the appeal, saying that his trial was not fair because testing relied upon by witnesses was inaccurate.

While most of the discussion about the work of the HPD crime lab has centered on DNA evidence, problems have occurred in other areas at the lab and with other sorts of evidence. In October 2003, HPD closed its toxicology lab, which tests blood and urine for drugs and alcohol after problems were identified when HPD lab personnel were given competency tests. The toxicology lab since has partially reopened.

In August 2004, the Houston police chief said that investigators had found 280 boxes of evidence, which had been improperly tagged and stored, that may be linked to 8,000 cases dating from the late 1970s to the early 1990s. The department is sorting through the contents of the boxes and has examined evidence in about 62 percent of the cases as of mid-December 2004.

Also in December, Gov. Perry, upon recommendation of the Texas Board of Pardons and Paroles, granted a 120-day reprieve from execution to Frances Newton, who was convicted of a 1987 capital murder in Harris County. Gov. Perry said that he granted the reprieve to allow the courts to order a retest of evidence from the case – a skirt that contained gunpowder residue according to the HPD crime lab's original analysis. In a letter to the governor, Houston Mayor Bill White said that he supported the reprieve because of concerns about the quality of some of work performed by the HPD crime lab.

Several public officials, advocacy groups, members of the legal community, and others have called for delaying executions of death row inmates whose convictions were based on evidence analyzed by the HPD crime lab until all the evidence from the boxes discovered in August 2004

has been examined. They argue that temporary delays are justified to allow for the possible discovery of evidence that might cast doubt upon a murder conviction.

The Harris County district attorney's office has responded that it does not believe a blanket execution moratorium is necessary because it is making sure that the evidence from capital cases is accounted for if an execution date has been set. Also, all the evidence from capital murder cases currently undergoing appeals located so far in the 280 boxes is evidence that was known at the time of trial. The Governor's Office has stated that the existing procedures for reviewing individual cases are adequate and no blanket moratorium is necessary (see *Should Texas impose a moratorium on capital punishment?*, pages 4-5).

Aside from the HPD audit, several grand juries in Harris County and a court of inquiry have examined the situation at the Houston crime lab but taken no action. In mid-December 2004, the Houston Police Department announced that it was accepting proposals for a person to conduct an investigation into the issues involving the crime lab and property room. Applications are due January 7, 2005.

**Recent problems at other labs.** The HPD crime lab is not the only one to experience problems. DPS closed the DNA division of its crime lab in McAllen for about three months in 2003 while it changed procedures for working with DNA samples. Some law enforcement officials have complained that the DPS lab in Corpus Christi is not handling its workload properly, leading to delays in the prosecution of cases. DPS responds that all its labs have backlogs and that it can work with law enforcement officials when it is necessary to expedite testing to properly handle certain cases.

In 2003, Fort Worth closed the DNA lab run by its police department after questions emerged about work done by lab personnel. While the Tarrant County district attorney continues to investigate the situation, the lab has been outsourcing analysis of DNA evidence, and the city has begun the process of building a new lab.

Private labs have not been immune to criticism of their work. In November 2004, the press reported allegations that DNA tests done in labs run by Orchid Cellmark, a private company that performs tests for police departments and criminal justice agencies, may have been falsified. Some of the tests in question reportedly were done for the Los Angeles Police Department.

## Should the Legislature change crime lab laws?

Critics of the current system say that more changes are needed to the state's crime lab system. Jurors place a lot of importance on scientific evidence, and the state needs to ensure that it is as accurate as possible. The accreditation system established by the 78th Legislature does not do enough to ensure the integrity of criminal evidence, they say. Accreditation processes by private groups can be less than rigorous or thorough, and accreditation does not solve what some see as a problem with the labs being too closely associated with police and prosecutors.

Others say that changes to current law are unnecessary because the legislation enacted by the 78th Legislature is working to ensure that all labs in Texas meet industry standards through certification by an accrediting agency designated by DPS. Supporters of the current law advocate allowing this process to reach fruition before considering whether to change the law again.

**Creating regional crime labs.** One proposal would establish regional crime labs across the state and require that evidence admitted in Texas courts come from these labs. DPS, a new state oversight body, or another entity, such as a pharmaceutical school, could run these labs. Debate over regional crime labs usually focuses on issues of independence, management, and cost.

**Independence.** Supporters of regional crime labs say the labs should be divorced from individual law enforcement agencies and open to scrutiny by outside observers to ensure that lab work is not biased toward results desired by police and prosecutors. Opponents of regional labs say that crime labs are a law enforcement function that should not be separated from local law enforcement agencies any more than should other fact-gathering entities, such as crime scene investigators and police detectives.

Others oppose the idea of regional crime labs because they do not believe a regional crime lab system is necessary to ensure that labs are independent and unbiased. Locally run labs could be placed under the authority of commissioners courts, health departments, or other local governmental entities not affiliated with law enforcement agencies, they say. Such labs would be flexible enough to meet local needs without the requirements that could be placed on one-size-fits-all regional crime labs.

**Management.** Supporters of regional crime labs say that the ongoing problems in crime labs throughout the state demand systemic change to protect the integrity of forensic analysis and the state's criminal justice system. They say that problems at the Houston crime lab are not isolated and could be prevented in the future through the establishment of a regional crime lab system.

Those who oppose creating regional crime labs say that problems at the Houston lab and other places can be attributed to bad management and lax oversight at individual sites, not to a flaw in the crime lab system as a whole. These issues could be addressed by proper quality controls, appropriate oversight, and better management of labs, including holding the labs to specific standards, regularly auditing the labs, independently monitoring their compliance with standards, publicizing audit and monitoring data, and holding officials accountable for their duties, they say.

**Cost.** Supporters of regional crime labs say that the labs could be funded through fees charged to users, as is the current practice at several locally run labs, and that local law enforcement agencies could pay the fees with funds they are using now to run their own facilities. The state would not have to build facilities because existing local facilities could be leased from local law enforcement agencies and turned into regional crime labs with the critical difference that they would be overseen by the regional crime lab entity, not local law enforcement. It might be cheaper in the long run for local entities to pay for services at a regional crime lab in which testing is done properly than to have to pay the costs of running a lab and, as Harris County and HPD are doing now, pay for the consequences of shoddy work.

Others caution that it would cost the state too much to create and run regional crime labs. These labs would require adequate funding and competent staffing, the lack of which could lead to unacceptable testing backlogs and questions about the accuracy of test results. Each DPS lab has a backlog now, and the agency would be unable to handle the workload of regional crime labs without a tremendous addition to its resources, critics say. A fee-for-service approach might result in higher costs for local law enforcement agencies, many of which offset some of the costs of their labs by charging other entities – including some from out of state – for tests in which they specialize. Others argue that if the option of free analysis by DPS labs were eliminated, some counties, especially smaller ones, might not be able to afford fees that would be charged by regional crime labs.

**Other proposals.** Other proposals that would affect crime labs and their work include:

- dedicating more public money for defendants, many of whom are indigent, to pay for scientific investigations and to investigate and refute the work of crime labs;
- allowing defendants to obtain through discovery the error rate for the laboratory where evidence was tested and making this information admissible at trial so that juries could consider the lab's record when weighing the physical evidence;
- expanding discovery laws so that defense attorneys have fuller access to crime lab information; and
- requiring some type of accreditation or certification of the experience and training of crime scene investigators and crime lab personnel, similar to what is required for peace officers and some other law enforcement officials.

– **by Kellie Dworaczyk**

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### **Staff:**

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