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**Chapter 64 Motions and Hearings**

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## **CHAPTER 64 MOTIONS AND HEARINGS**

A brief overview of motions for forensic testing, collaborative and contested, and common missteps on the road to 11.073.

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# CHAPTER 64 MOTIONS AND HEARINGS

## Introduction

A Chapter 64 motion seeks to provide a means by which a convicted person may establish their innocence by excluding themselves as the perpetrator of the offense of which they were convicted.<sup>1</sup> Article 64.01 sets out the requirements of the convicted person's motion, and provides guidance on what can and cannot be tested. Article 64.02 directs the convicting court to provide notice to the State, and gives the State a sixty day timetable for a response. Article 64.03 lays out the questions that must be answered by the convicting court *before* testing can be ordered, and Article 64.04 directs the court to make a finding *after* testing has been ordered. Article 64.05 deals with appeal of the convicting court's order under Chapter 64.

The Legislature intended for Chapter 64 to be used as a motions procedure which, but for the fact that it appears after conviction, works like a pretrial motion.<sup>2</sup> The Legislature did not intend to introduce procedures and burdens which mirror the traditional post-trial procedure of writs of habeas corpus, instead creating a stepping stone to post-conviction relief.<sup>3</sup> A motion for Chapter 64 forensic DNA testing should be crafted with this goal in mind: as a procedural vehicle for obtaining evidence "which might then be used in a state or federal habeas proceeding."<sup>4</sup>

The most basic analysis in a Chapter 64 motion for DNA testing comes down to a single question: Will this testing, if it shows that the biological material does not belong to the convicted person, establish, by a preponderance of the evidence, that he or she did not commit the crime as either a principal or a party?<sup>5</sup> This burden of proof placed on the convicted person, to establish by a preponderance of the evidence that the person would not have been convicted if exculpatory results had been obtained through DNA testing, is identical to the burden placed on an applicant under an Article 11.073 application for writ of habeas corpus.<sup>6</sup> For that reason, analysis of the two goes hand-in-hand.

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<sup>1</sup> See *Blacklock v. State*, 235 S.W.3d 231, 232-233 (Tex. Crim. App. 2007)(stating that exoneration by exclusion of a convicted person as the DNA donor "is precisely the situation in which the Legislature intended to provide post-conviction DNA testing."); *Weems v. State*, 550 S.W.3d 776, 779-80 (Tex. App.—Houston [14th Dist.] 2018, no pet.); *Birdwell v. State*, 276 S.W.3d 642, 645-46 (Tex. App.—Waco 2008, pet. ref'd).

<sup>2</sup> Texas Bill Analysis, H.B. 1011, 2003.

<sup>3</sup> *Id.*

<sup>4</sup> See *Thacker v. State*, 177 S.W.3d 926, 927 (Tex. Crim. App. 2005); *In re Garcia*, 363 S.W.3d 819, 822 (Tex. App.—Austin 2012, no pet.); *Weems*, 550 S.W.3d at 781.

<sup>5</sup> *Ex parte Gutierrez*, 337 S.W.3d 883, 900 (Tex. Crim. App. 2011); *Prible v. State*, 245 S.W.3d 466, 470 (Tex. Crim. App. 2008); *Bell v. State*, 90 S.W.3d 301, 306 (Tex. Crim. App. 2002).

<sup>6</sup> *Ex Parte White*, 506 S.W.3d 39, 44 (Tex. Crim. App. 2016).

## I. Tex. Code Crim. Pro. Art. 64.01. Motion

Chapter 64 of the Code of Criminal Procedure allows a convicted person to submit to the convicting court a motion for forensic DNA testing of evidence that has a reasonable likelihood of containing biological material.<sup>7</sup> The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion, and the convicting court may order testing only if the statutory preconditions are met.<sup>8</sup> Such a motion requests testing of evidence 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” but either was not previously tested or, although previously tested, can be tested with newer techniques that would provide more “accurate and probative” results.<sup>9</sup> In recent years qualifiers for retesting have expanded to include evidence tested at laboratories engaged in faulty testing practices.<sup>10</sup>

The original form of Chapter 64 was passed by the Legislature in 2001.<sup>11</sup> Many of the present requirements existed at that point, including that the motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion.<sup>12</sup> However, the original form did not provide a definition of biological material provided, and the burden placed on the convicted person was significantly higher: if the convicted person was seeking testing of evidence that was previously not subjected to DNA testing, the convicted person had to show that the testing was (i) not available; or (ii) available, but not technologically capable of providing probative results; 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. The major turning points in litigation over Article 64.01 have come with changes to these sections, including the elimination of the “no fault” requirement, a definition of items that are biological material *per se*, and the addition of the phrase “reasonable likelihood” ahead of “containing biological material.”<sup>13</sup>

Under the original language of Chapter 64, the convicting court was required to appoint counsel whenever an indigent convicted person informed the court that they wanted to file a motion under Chapter 64.<sup>14</sup> The convicting court could not refuse to appoint counsel based on deficiencies in the filing or otherwise.<sup>15</sup> With the 2003 amendments, Article 64.01(c) was amended to also require the court to find reasonable grounds for a motion to be filed for counsel to be appointed.<sup>16</sup> The Legislature also amended Article 43.141(d) to allow the convicting court to

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<sup>7</sup> Tex.Code Crim. Proc. Art. 64.01.

<sup>8</sup> *Id.*; *Bell*, 90 S.W.3d at 306; *See also State v. Patrick*, 86 S.W.3d 592, 597 (Tex. Crim. App. 2002).

<sup>9</sup> *See* Tex.Code Crim. Proc. Art. 64.01(b); *See also State v. Swearingen*, 424 S.W.3d 32, 37 (Tex.Crim.App.2014) (explaining the requisites of Chapter 64 motions); *Holberg v. State*, 425 S.W.3d 282, 284 (Tex. Crim. App. 2014).

<sup>10</sup> *See* Acts 2017, 85th Leg., ch. 903 (H.B. 3872), § 2, eff. June 15, 2017.

<sup>11</sup> *See* Acts 2001, 77th Leg., ch. 2, § 2; ESTABLISHING PROCEDURES FOR THE PRESERVATION OF EVIDENCE CONTAINING DNA AND POSTCONVICTION DNA TESTING, 2001 Tex. Sess. Law Serv. Ch. 2 (S.B. 3) (VERNON'S);

<sup>12</sup> *Id.*

<sup>13</sup> *See Swearingen*, 424 S.W.3d at 37; *Reed v. State*, 541 S.W.3d 759, 768 (Tex. Crim. App. 2017).

<sup>14</sup> *See* Acts 2001, 77th Leg., ch. 2, § 2.

<sup>15</sup> *Winters v. Presiding Judge of Criminal Dist. Court Number Three of Tarrant County*, 118 S.W.3d 773, 775 (Tex. Crim. App. 2003); *Neveu v. Culver*, 105 S.W.3d 641, 642–43 (Tex. Crim. App. 2003).

<sup>16</sup> POSTCONVICTION DNA TESTING, 2003 Tex. Sess. Law Serv. Ch. 13 (H.B. 1011) (VERNON'S); *In re Ludwig*, 162 S.W.3d 454 (Tex. App.—Waco 2005) (Because appointment of counsel requires determinations that the convicted

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