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## **CHAPTER 64 MOTIONS AND HEARINGS**

A brief overview on the legal and ethical considerations for Chapter 64 Motions

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Sarah Moore currently serves as an Assistant District Attorney for the Williamson County District Attorney's Office. After a career in executive management in the hotel industry, she graduated *cum laude* from St. Mary's University School of Law in December 2008. From 2006 to present, Sarah has practiced in Travis, Williamson, El Paso, Ector, Dawson, Gaines, Lynn and Garza counties either as a prosecutor or as a solo practitioner (or both). She was the 2020 recipient of the TDCAA Lone Star Prosecutor award for her work in protecting the rights of victims, was inducted into the Texas Prosecutor Society in 2022, is a member of the Texas Bar College, and continues to be a regular speaker at statewide conferences and trainings for law enforcement and attorneys in both Texas and Arizona. She enjoys spending time with her four children, running for charities that resonate with her passions, and one day hopes to add "traveled the world" to her resume.

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# CHAPTER 64 MOTIONS AND HEARINGS

## I. INTRODUCTION

1989, the first DNA exoneration took place.<sup>1</sup> In 2020, across thirty-seven states, there were 375 documented DNA exonerees.<sup>2</sup> Twenty-one of those served time on death row.<sup>3</sup> Forty-four pled guilty to crimes they did not commit.<sup>4</sup> Twenty-three of the 104 people whose cases involved false confessions had exculpatory DNA evidence available at the time of trial but were still wrongfully convicted (as of July 29, 2020).<sup>5</sup> The average number of years served by these exonerees was fourteen.<sup>6</sup> These numbers are sobering.

Because there is no free-standing due process right to DNA testing,<sup>7</sup> a convicted person in Texas has two distinct avenues to obtain post-conviction DNA testing of biological material—to attempt to reach an agreement with the district attorney,<sup>8</sup> who has broad discretion to order or allow DNA testing, or to file a motion under Chapter 64, which requires the convicting court to order testing if the movant establishes certain requirements.<sup>9</sup> However, even if the State agrees to

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<sup>1</sup> See Innocence Project, *DNA Exonerations in the United States (1989-2020)*, [www.innocenceproject.org/dna-exonerations-in-the-united-states](http://www.innocenceproject.org/dna-exonerations-in-the-united-states).

<sup>2</sup> *Id.*

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

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; See *Blacklock v. State*, 235 S.W.3d 231, 232-33 (Tex.Crim.App. 2007)(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 [14<sup>th</sup> Dist.] 2018, no pet.); *Birdwell v. State*, 276 S.W.3d 642-645-46 (Tex.App.—Waco 2008, pet. ref’d).

<sup>6</sup> *Id.*

<sup>7</sup> *Webb v. State*, 2021 WL 4900926 at \*3 (Tex.App.—Austin 2021, no pet.)(quoting *Ex parte Gutierrez*, 337 S.W.3d 883, 889 (Tex.Crim.App. 2011)(citing *District Attorney’s Office v. Osborne*, 557 U.S. 52, 61-63, 129 S.Ct. 2308 (2009))).

<sup>8</sup> *Skinner v. State*, 484 S.W.3d 434 (Tex.Crim.App. 2016)(holding that while not titled like a Chapter 64 motion, an agreed joint order of the parties for DNA testing, signed by the trial court, constitutes an order for DNA testing pursuant to Chapter 64)

<sup>9</sup> *Reed v. Goertz*, 598 U.S. \_\_\_\_ (2023)(citing *Ex parte Gutierrez*, 337 S.W.3d at 889-90.

testing,<sup>10</sup> or the trial court thinks testing is required in the interest of justice,<sup>11</sup> if Chapter 64 does not allow for testing, the defendant is not entitled to it under Chapter 64.<sup>12</sup>

Texas Code of Criminal Procedure Chapter 64 was introduced before the legislature in 2001, a time when existing statutes regulating the use of biological evidence, particularly DNA, had been surpassed by scientific advancements and technologies, unnecessarily inhibiting the use of that evidence.<sup>13</sup> At the same time, there was a unique criminal justice landscape across America that was marked by a sudden, somewhat dramatic decrease in violent crimes, while sentences remained particularly punitive.<sup>14</sup> One of the major issues in the Legislature was the idea of a moratorium on executions to evaluate practices and “ensure innocent people were not being put to death.”<sup>15</sup> Other states had already enacted statutes related to post-conviction DNA testing.<sup>16</sup> In its original form, a trial court was to be given the discretion to order DNA testing “in the interest of justice,” if it first found that results of testing may be material to a claim of innocence.<sup>17</sup> However, this was amended in the Senate to remove the discretionary review component and instead provide a clear mechanism for appeal from the court’s favorability finding in Article 64.04.<sup>18</sup>

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<sup>10</sup> Consider the reality: if the State agrees, who will object or appeal the decision if the defendant is “improperly” granted testing?

<sup>11</sup> *State v. Patrick*, 86 S.W.3d 592, 595 (Tex.Crim.App. 2002)

<sup>12</sup> *Skinner v. State*, 484 S.W.3d at 438 (the State’s participation in a joint motion for testing will waive non-jurisdictional defects in the defendant’s pleading, e.g., the absence of a sworn affidavit.)

<sup>13</sup> See Texas Bill Analysis, S.B. 3, 2001.

<sup>14</sup> See generally, US Department of Justice, Office of Justice Programs. July 2000. The Nature of Crime Continuity and Change. Vol. 1 of *Criminal Justice 2000*. Retrieved 23 April 2023 from the World Wide Web: <https://nij.ojp.gov/library/publications/criminal-justice-2000-volume-1-nature-crime-continuity-and-change>.

<sup>15</sup> House Research Organization. July 2, 2001. Placing a moratorium on the death penalty. No. 77-11 of *Focus Report: Major Issues of the 77<sup>th</sup> Legislature Regular Session*. H.J.R 56.

<sup>16</sup> *In re Morton*, 326 S.W.3d 634, 645-46, n.6 (Tex.App.—Austin 2010, reh’g overruled)(citing Eric A. Fisher, “DNA Evidence: Legislative Initiatives in the 106<sup>th</sup> Congress,”) at 11-13 (Jan. 26, 2001).

<sup>17</sup> See Texas Bill Analysis, S.B. 3, 2001.

<sup>18</sup> *Id.*; TEX. CODE CRIM. PROC. art. 64.04.

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