

WESTLAW

NOTES OF DECISIONS (10)

In general
 Jurisdiction
 Due process
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 Review

Vernon's Texas Statutes and Codes Annotated
Code of Criminal Procedure (Refs & Annos)
 Title 1. **Code of Criminal Procedure** of 1965

Art. 38.43. Evidence Containing Biological Material

Vernon's Texas Statutes and Codes Annotated Code of Criminal Procedure Effective: September 1, 2015 (Approx. 4 pages)
 Chapter Thirty-Eight. EVIDENCE IN CRIMINAL ACTIONS (REFS & ANNOS)

Effective: September 1, 2015

Vernon's Ann. Texas C.C.P. **Art. 38.43**

Art. 38.43. Evidence Containing Biological Material

Currentness

(a) In this article, "biological evidence" means:

(1) the contents of a sexual assault examination kit; or

(2) any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or any other identifiable biological material that was collected as part of an investigation of an alleged felony offense or conduct constituting a felony offense that might reasonably be used to:

(A) establish the identity of the person committing the offense or engaging in the conduct constituting the offense; or

(B) exclude a person from the group of persons who could have committed the offense or engaged in the conduct constituting the offense.

(b) This article applies to a governmental or public entity or an individual, including a law enforcement agency, prosecutor's office, court, public hospital, or crime laboratory, that is charged with the collection, storage, preservation, analysis, or retrieval of biological evidence.

(c) An entity or individual described by Subsection (b) shall ensure that biological evidence collected pursuant to an investigation or prosecution of a felony offense or conduct constituting a felony offense is retained and preserved:

(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 the defendant is convicted of a capital felony;

(B) until the defendant dies, completes the defendant's sentence, or is released on parole or mandatory supervision, if the defendant is sentenced to a term of confinement or imprisonment in the Texas Department of Criminal Justice;

(C) until the defendant completes the defendant's term of community supervision, including deferred adjudication community supervision, if the defendant is placed on community supervision;

(D) until the defendant dies, completes the defendant's sentence, or is released on parole, mandatory supervision, or juvenile probation, if the defendant is committed to the Texas Juvenile Justice Department ; or

(E) until the defendant completes the defendant's term of juvenile probation, including a term of community supervision upon transfer of supervision to a **criminal** court, if the defendant is placed on juvenile probation.

(d) The attorney representing the state, clerk, or other officer in possession of biological evidence described by Subsection (a) may destroy the evidence, but only if the attorney, clerk, or officer by mail notifies the defendant, the last attorney of record for the defendant, and the convicting court of the decision to destroy the evidence and a written objection is not received by the attorney, clerk, or officer from the defendant, attorney of record, or court before the 91st day after the later of the following dates:

(1) the date on which the attorney representing the state, clerk, or other officer receives proof that the defendant received notice of the planned destruction of evidence; or

(2) the date on which notice of the planned destruction of evidence is mailed to the last attorney of record for the defendant.

(e) To the extent of any conflict, this article controls over Article 2.21.

(f) The Department of Public Safety shall adopt standards and rules authorizing a county with a population less than 100,000 to ensure the preservation of biological evidence by promptly delivering the evidence to the Department of Public Safety for storage in accordance with Section 411.053, Government **Code**, and department rules.

(g) The Department of Public Safety shall adopt standards and rules, consistent with best practices, relating to a person described by Subsection (b), that specify the manner of collection, storage, preservation, and retrieval of biological evidence.

(h) A person described by Subsection (b) may solicit and accept gifts, grants, donations, and contributions to support the collection, storage, preservation, retrieval, and destruction of biological evidence.

(i) Before a defendant is tried for a capital offense in which the state is seeking the death penalty, subject to Subsection (j), the state shall require either the Department of Public Safety through one of its laboratories or a laboratory accredited under Article 38 01 to perform DNA testing, in accordance with the laboratory's capabilities at the time the testing is performed, on any biological evidence that was collected as part of an investigation of the offense and is in the possession of the state. The laboratory that performs the DNA testing shall pay for all DNA testing performed in accordance with this subsection.

(j) As soon as practicable after the defendant is charged with a capital offense, or on a motion by the state or the defendant in a capital case, unless the state has affirmatively waived the death penalty in writing, the court shall order the state and the defendant to meet and confer about which biological materials collected as part of an investigation of the offense qualify as biological evidence that is required to be tested under Subsection (i). If the state and the defendant agree on which biological materials constitute biological evidence, the biological evidence shall be tested in accordance with Subsection (i). If the state and the defendant do not agree on which biological materials qualify as biological evidence, the state or the defendant may request the court to hold a hearing to determine the issue. On receipt of a request for a hearing under this subsection, the court shall set a date for the hearing and provide written notice of the hearing date to the state and the defendant. At the hearing, there is a rebuttable presumption that the biological material that the defendant requests to be tested constitutes biological evidence that is required to be tested under Subsection (i). This subsection does not in any way prohibit the state from

testing biological evidence in the state's possession.

(k) If an item of biological evidence is destroyed or lost as a result of DNA testing performed under Subsection (i), the laboratory that tested the evidence must provide to the defendant any bench notes prepared by the laboratory that are related to the testing of the evidence and the results of that testing.

(l) The defendant's exclusive remedy for testing that was not performed as required under Subsection (i) or (j) is to seek a writ of mandamus from the court of criminal appeals at any time on or before the date an application for a writ of habeas corpus is due to be filed in the defendant's case under Section 4(a), Article 11.071. An application for a writ of mandamus under this subsection does not toll any period of limitations applicable to a habeas petition under state or federal law. The defendant is entitled to only one application for a writ of mandamus under this subsection. At any time after the date an application for a writ of habeas corpus is filed in the defendant's case under Section 4(a), Article 11.071, the defendant may file one additional motion for forensic testing under Chapter 64.

(m) A defendant may have another laboratory accredited under Article 38.01 perform additional testing of any biological evidence required to be tested under Subsection (i). On an ex parte showing of good cause to the court, a defendant may have a laboratory accredited under Article 38.01 perform testing of any biological material that is not required to be tested under Subsection (i). The defendant is responsible for the cost of any testing performed under this subsection.

Credits

Added by Acts 2001, 77th Leg., ch. 2, § 1, eff. April 5, 2001. Renumbered from Vernon's Ann.C.C.P. art. 38.39 by Acts 2005, 79th Leg., ch. 728, § 23.001(8), eff. Sept. 1, 2005. Amended by Acts 2009, 81st Leg., ch. 1179, § 1, eff. Sept. 1, 2009; Acts 2011, 82nd Leg., ch. 91 (S.B. 1303), § 27.002(1), eff. Sept. 1, 2011; Acts 2011, 82nd Leg., ch. 1248 (S.B. 1616), § 1, eff. June 17, 2011; Acts 2013, 83rd Leg., ch. 1349 (S.B. 1292), § 1, eff. Sept. 1, 2013; Acts 2015, 84th Leg., ch. 734 (H.B. 1549), § 4, eff. Sept. 1, 2015; Acts 2015, 84th Leg., ch. 1276 (S.B. 1287), § 10, eff. Sept. 1, 2015.

Editors' Notes

LIBRARY REFERENCES

2005 Main Volume

2005 Main Volume

Criminal Law ¶700(9).

2005 Main Volume

C.J.S. Criminal Law §§ 486, 510, 541 to 546, 1233, 1236.

RESEARCH REFERENCES

2015 Electronic Update

Treatises and Practice Aids

Dix and Schmolesky, 43 Tex. Prac. Series § 36:35, **Procedure**.

Dix and Schmolesky, 43B Tex. Prac. Series § 61:7.50, **Court of Criminal Appeals--Pretrial DNA Testing in Capital Cases**.

Relevant Notes of Decisions (8)

[View all 10](#)

Notes of Decisions listed below contain your search terms.

In general

Trial court improperly concluded that provision of **Code of Criminal Procedure** requiring