# Harnessing DNA's Power: A Comprehensive Discussion of Chapter 64 Motions and Hearings

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UNDERSTANDING FORENSIC DNA ANALYSIS:
A PROGRAM FOR LAWYERS AND JUDGES
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# HARNESSING DNA'S POWER:
# A COMPREHISIVE DISCUSSION OF
# CHAPTER 64 MOTIONS AND HEARINGS

An 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

This paper was originally written for and presented at the 2020 Robert O. Dawson Conference on Criminal Appeals. While there have been some definite shifts in the landscape of post-conviction DNA testing since that point in time, much of the original information within that version of this paper remains applicable today. In 2023, motions for post-conviction forensic testing under Chapter 64 are more prevalent – and perhaps more relevant – than ever.

"There is no free-standing due-process right to DNA testing, and the task of fashioning rules to 'harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice' belongs 'primarily to the legislature.'"[1] The Texas Legislature created a process for such testing in Chapter 64.[2] 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.[3] 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.[4] The Legislature did not intend to introduce procedures and burdens which mirror the traditional post-trial procedure of writs of habeas corpus, and instead created an additional building block for post-conviction relief.[5] 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."[6]

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

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[1] *Ex parte Gutierrez*, 337 S.W.3d 883, 889 (Tex. Crim. App. 2011) (quoting *District Attorney's Office v. Osborne*, 557 U.S. 52, 62, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009)).
[2] *Ramirez v. State*, 621 S.W.3d 711, 717 (Tex. Crim. App. 2021).
[3] *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).
[4] Texas Bill Analysis, H.B. 1011, 2003.
[5] *Id.*
[6] *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.

either a principal or a party?[7] 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.[8] For that reason, analysis of the two goes hand-in-hand.

# 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.[9] 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.[10] 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.[11] In recent years qualifiers for retesting have expanded to include evidence tested at laboratories engaged in faulty testing practices.[12]

The original form of Chapter 64 was passed by the Legislature in 2001.[13] 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.[14] 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 not available, or available, but not technologically capable of providing probative results.[15] In the alternative, the movant could also argue that the interest of justice required DNA testing to be done.[16] 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."[17]

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[7] *Gutierrez*, 337 S.W.3d at 900; *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).
[8] *Ex Parte White*, 506 S.W.3d 39, 44 (Tex. Crim. App. 2016).
[9] Tex.Code Crim. Proc. Art. 64.01.
[10] *Id.*.; *Bell*, 90 S.W.3d at 306; *See also State v. Patrick*, 86 S.W.3d 592, 597 (Tex. Crim. App. 2002).
[11] *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).
[12] *See* Acts 2017, 85th Leg., ch. 903 (H.B. 3872), § 2, eff. June 15, 2017.
[13] *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);
[14] *Id*.
[15] *Id*.
[16] *Id.*
[17] *See Swearingen*, 424 S.W.3d at 37; *Reed v. State*, 541 S.W.3d 759, 768 (Tex. Crim. App. 2017).

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.[18] The convicting court could not refuse to appoint counsel based on deficiencies in the filing or otherwise.[19] 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.[20] The Legislature also amended Article 43.141(d) to allow the convicting court to modify or withdraw an order setting an execution date in a death penalty case, if it had determined that additional proceedings were necessary under Chapter 64.[21] In 2007, the sections on appointment of counsel were amended again to explicitly state that appointment of counsel mandatory if the court finds the convicted person is indigent and has reasonable grounds for the motion to be filed, and that counsel must be appointed no later than the 45th day after the date the court finds indigency and reasonable grounds.[22]

In 2011 the legislature amended Article 64.01 to provide a definition of "biological material."[23] This is discussed in greater detail below. Article 64.01 also saw a fairly substantial change in the burden carried by convicted persons seeking to test evidence that was not previously subjected to DNA testing. The 2011 amendment removed all of the qualifiers to Article 64.01(b)(1), including the "no fault" and "interest of justice" provisions, and only required that the item not be previously subjected to DNA testing.[24] The remainder of Article 64.01(b), dealing with evidence that had previously been tested, remained the same. 2015 saw Article 64.01(a) amended to read that "[a] convicted person may submit to the convicting court a motion for forensic DNA testing of evidence that has a reasonable likelihood of containing biological material."[25] While the previous version of the statute required that all evidence to be tested must be *proven* to contain biological material, the amended language is significantly easier for an applicant to carry.[26]

In 2017, the legislature made many changes to address "junk science" and faulty testing practices.[27] Article 64.01(b)(2)(B) was added, allowing for the retesting of evidence that, although previously subjected to DNA testing, was tested at a laboratory that ceased conducting DNA testing after an audit by the Texas Forensic Science Commission revealed the laboratory engaged

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[18] *See* Acts 2001, 77th Leg., ch. 2, § 2.
[19] *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).
[20] 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 person is indigent and there is reasonable grounds for a motion to be filed, a convicting court has no merely ministerial duty to appoint counsel.); *James v. State*, 196 S.W.3d 847, 850 (Tex. App.—Texarkana 2006) (where an application for testing and the supporting affidavit did not allege or even suggest that any biological evidence remained that would permit DNA testing, the convicting court did not err in refusing to appoint counsel to represent convicted person.).
[21] POSTCONVICTION DNA TESTING, 2003 Tex. Sess. Law Serv. Ch. 13 (H.B. 1011) (VERNON'S).
[22] POSTCONVICTION FORENSIC TESTING, 2007 Tex. Sess. Law Serv. Ch. 1006 (H.B. 681) (VERNON'S).
[23] POSTCONVICTION FORENSIC DNA ANALYSIS, 2011 Tex. Sess. Law Serv. Ch. 366 (S.B. 122) (VERNON'S).
[24] CERTAIN PRETRIAL AND POST–TRIAL PROCEDURES AND TESTING IN A CRIMINAL CASE, 2011 Tex. Sess. Law Serv. Ch. 278 (H.B. 1573) (VERNON'S).
[25] POSTCONVICTION FORENSIC DNA ANALYSIS, 2015 Tex. Sess. Law Serv. Ch. 70 (S.B. 487) (VERNON'S).
[26] *See Reed*, 541 S.W.3d at 772.
[27] A MOTION FOR FORENSIC DNA TESTING OF CERTAIN EVIDENCE PREVIOUSLY SUBJECTED TO FAULTY TESTING, 2017 Tex. Sess. Law Serv. Ch. 903 (H.B. 3872) (VERNON'S).

in faulty testing practices; and during the period identified in the audit as involving faulty testing practices.[28] Article 11.0731, which details procedures related to certain previously tested evidence, was also added.[29] That section applies to evidence described by Article 64.01 that was subjected to testing at a facility engaged in faulty testing practices, and it created a new gateway to habeas relief under those same circumstances.[30] If the convicted person had previously raised a Chapter 64 claim that had been denied, and it had come to light that the laboratory had engaged in faulty testing practices, then the Applicant can seek relief on habeas.[31]

There are basic requirements of Chapter 64 that have remained constant since 2001. For instance, because Chapter 64 specifically provides that a convicted person may seek post-conviction DNA testing, it follows that a person who has not been convicted is not entitled to seek relief under Chapter 64.[32] In *State v. Young*, 242 S.W.3d 926 (Tex. App.—Dallas 2008, no pet.), the convicted person argued that, despite being placed on deferred adjudication, he should be treated as a "convicted person" because he is treated as such under Chapter 62 for sex offender registration requirements.[33] The Court of Appeals rejected this argument, and ultimately vacated the convicting court's order granting forensic DNA testing under Chapter 64.[34]

The convicting court can deny a motion under Chapter 64 for failing to provide specific detail.[35] In *Ex parte Gutierrez*, 337 S.W.3d 883 (Tex. Crim. App. 2011), the Court of Criminal Appeals summarily laid out what must be met for a judge of a convicting court to order DNA testing.[36] What is listed below is an update to this list, to include amendments after *Gutierrez.* The judge of the convicting court is required to order DNA testing when requested by a convicted person if it finds all of the following:

(1) evidence exists that by its nature permits DNA testing;
(2) the evidence has a reasonable likelihood of containing biological material;
(3) the evidence was either:
    (a) justifiably not previously subjected to DNA testing [because DNA testing i) was not available, or ii) was incapable of providing probative results, or iii) did not occur "through no fault of the convicted person, for reasons that are of such a nature that the interests of justice require DNA testing"]; or
    (b) subjected to previous DNA testing by techniques now superseded by more accurate techniques;
    (c) tested at a laboratory that ceased conducting DNA testing after an audit by the Texas Forensic Science Commission revealed the laboratory engaged in faulty testing practices; and during the period identified in the audit as involving faulty testing practices.
(4) that evidence is in a condition making DNA testing possible;

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[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *State v. Young*, 242 S.W.3d 926, 929 (Tex. App.—Dallas 2008, no pet.)
[33] *Id.* at 926.
[34] *Id.*
[35] *Dinkins v. State,* 84 S.W.3d 639 (Tex.Crim.App.2002).
[36] *Gutierrez, 337 S.W.3d at 883.*

(5) the chain of custody of the evidence is sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;
(6) identity was or is an issue in the underlying criminal case;
(7) the convicted person has established by a preponderance of the evidence that the person would not have been convicted if exculpatory results had been obtained through DNA testing; and
(8) the convicted person has established by a preponderance of the evidence that the request for DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.[37]

**A. Affidavit**

A Chapter 64 motion for DNA testing should include an affidavit from the convicted person, alleging facts "showing that the test results will be so exonerating that he would not have been convicted at trial had the results been available."[38] These facts should be clearly articulated to avoid any sort of conclusion that DNA testing would merely "muddy the waters."[39] To meet the requirements of Article 64.01, the convicted person's motion and affidavit must clearly state, at a minimum, what evidence he wants tested.[40]

A motion can be considered fatally defective for failing to suggest the existence of evidence to be tested.[41] In *James v. State*, 196 S.W.3d 847 (Tex. App.—Texarkana 2006, no pet.), the convicted person's motion failed to state, allege, or even suggest that any biological evidence remained that could be subjected to DNA testing.[42] The affidavit stated, "The accuser was infact [sic] examined by a Medical doctor at the time this accusation was made."[43] The Court of Appeals held that such a statement amounts to no suggestion that any biological evidence was obtained during, or retained from, any such examination.[44]

The affidavit should name the evidence specifically. The convicting court is not obligated to order testing beyond that requested by the convicted person.[45] In *Jones v. State*, 161 S.W.3d 685 (Tex. App.—Fort Worth 2005, pet. ref'd), the convicted person's motion and affidavit limited his claim to two specific pieces of evidence - a shirt and a knife.[46] The convicted person argued that, while his motion and affidavit was limited to those two items, his request was not limited to only the shirt and the knife.[47] Because the convicted person did not specify other items of

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[37] *See* Acts 2017, 85th Leg., ch. 903 (H.B. 3872), § 2, eff. June 15, 2017; *Gutierrez,* 337 S.W.3d at 889 (citing 43B George E. Dix & Robert O. Dawson, 43B Texas Practice: Criminal Practice and Procedure § 45.188 (2d ed. 2001 & 2008–09 Supp.) (setting out a summary of Articles 64.01(a)-(b) & 64.03(a)-(b)).
[38] Tex. Code Crim. Pro. Art. 64.01; *Dunning v. State*, 572 S.W.3d 685, 697 (Tex. Crim. App. 2019), reh'g denied (May 22, 2019).
[39] *See Reed*, 541 S.W.3d at 774; *See also Gutierrez,* 337 S.W.3d at 901.
[40] *Dinkins,* 84 S.W.3d at 642.
[41] *James*, 196 S.W.3d at 850.
[42] *Id.*
[43] *Id*.
[44] *Id.*
[45] *Jones v. State*, 161 S.W.3d 685, 688 (Tex. App.—Fort Worth 2005, pet. ref'd).
[46] *Id.*
[47] *Id*.

evidence that he wanted tested for DNA and did not provide statements of fact in support of these claims, the convicting court need not move beyond the filing itself.[48]

While Article 64.01(a–1) seems to indicate that the affidavit is a requirement to the motion ("[t]he motion *must* be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion[]"), the lack of an accompanying affidavit is a pleading deficiency, not a jurisdictional requirement.[49] The Court of Criminal Appeals has analogized the affidavit requirement to other, similar requirements, where the Court had treated the failure to comply with a verification requirement as a pleading deficiency, not a jurisdictional issue.[50] While the State should not be taxed for the failure of a convicted person to comply with a particular statute (i.e. failing to provide an affidavit in support of a motion under Chapter 64), the proceedings should not summarily conclude when the State does not object to the deficiency.[51] That said, this pleading deficiency may still be fatal to a filing if there was no hearing at which the State had an opportunity to respond to the filing, the State did not address the substance of the motion, or the State objected to the lack of verification. [52]

**B. Biological Material**

The requirement of Article 64.01(a), that the evidence has a reasonable likelihood of containing biological material, has seen a great deal of changes in the convicted person's favor. Under previous versions of Article 64.01, a convicted person carried the burden to *prove* that biological material existed, and "not that it is merely probable."[53] If a defense expert testified as to the "*high probability*" or possibility that biological material existed that was not sufficient.[54] Even more daunting was the fact that there was no guidance as to a method of determining the existence of biological material.[55]

The convicted person is not entitled to preliminary testing to prove the existence of biological material.[56] In *Routier v. State*, 273 S.W.3d 241 (Tex. Crim. App. 2008), the convicted person sought to have nine of items of evidence recovered from the scene tested.[57] Within those items was a tube sock, and the convicted person speculated that the tube sock might have been used as a gag and might, therefore, contain additional biological material in the form of saliva. [58] The convicted person's expert provided an affidavit saying that the sock could have been subjected to testing to determine the *possible* presence of saliva which, if found, could have been subjected to DNA analysis.[59] Under those circumstances, the convicted person "failed even to establish that

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[48] *Id*.
[49] *See Skinner v. State*, 484 S.W.3d 434, 438 (Tex. Crim. App. 2016).
[50] *Id*. (citing *Rouse v. State,* 300 S.W.3d 754, 758–59, 761–62 (Tex.Crim.App.2009); *See also Druery v. State*, 412 S.W.3d 523-33 (Tex. Crim. App. 2013) (execution competency); *Ex parte Golden,* 991 S.W.2d at 861 (postconviction writs of habeas corpus); *Connor v. State*, 877 S.W.2d 325, 326 (Tex. Crim. App. 1994)(motions for new trial).
[51] *See Skinner*, 484 S.W.3d at 438.
[52] *Id.*; *Druery,* 412 S.W.3d at 533 (citing *Rouse,* 300 S.W.3d at 761–62).
[53] *Holberg*, 425 S.W.3d at 285; *Swearingen,* 424 S.W.3d at 38 (citing, *inter alia, Routier,* 273 S.W.3d at 250).
[54] *See Holberg*, 425 S.W.3d at 286.
[55] *See Swearingen*, 424 S.W.3d at 37.
[56] *Routier*, 273 S.W.3d at 251.
[57] *Id.* at 241.
[58] *Id*.
[59] *Id*.

there is any biological evidence on the sock in the form of saliva."[60] The Court of Criminal Appeals found that "Nothing in Chapter 64 entitles her to have it performed now as a predicate to seeking post-conviction DNA testing."[61]

The Court of Criminal Appeals ultimately found that, while Routier was not entitled to preliminary testing for saliva, or to the testing of the limb hairs, the convicted person was entitled under Article 64(b)(2) to retesting of the blood stain that yielded a result before trial.[62] While *Routier* was decided under a previous version of Article 64.01, much of the language relied on for the Court's determinations remains in Article 64.01.[63]

Article 64.01 was amended in 2011 to include a definition of "biological material," meaning an item that is in possession of the state and that contains 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.[64] This includes the contents of a sexual assault evidence collection kit.[65] Because items within this definition are now defined as biological material *per se,* convicted persons no longer need to show that they contain biological material.[66] However, this amendment does not relieve convicted persons of the burden to prove the existence of biological material in the case of other items not specifically listed, like clothing.[67] Additionally, even with the "reasonable likelihood" language, controlling authority still holds that Chapter 64 cannot be used to conduct a preliminary test to determine if further testing would yield exculpatory results.[68]

### C. Possession of the State

The duties of the State in responding and producing evidence are covered in greater detail below. For the purposes of Article 64.01, the convicted person's motion must allege that the evidence is currently in the possession of the State and was in possession of the State during the time of the prosecution or the plea.[69]

The scope of testing under Chapter 64 is expressly limited to evidence collected in relation to the charged offense and in the State's possession at the time of trial.[70] In *Yarbrough v. State*, 258 S.W.3d 205 (Tex. App.—Waco 2008, no pet.), the convicted person argued (among other issues) that the court should order the State to: (1) obtain a specimen of the co-defendants' DNA and compare it with evidence in the State's possession such as the victim's clothing; and (2)

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[60] *Id*. at 249-250.
[61] *Id*. at 250.
[62] *Id*. at 251.
[63] *Id*. at 250; Tex. Code Crim. Pro. Art. 64.01.
[64] POSTCONVICTION FORENSIC DNA ANALYSIS, 2011 Tex. Sess. Law Serv. Ch. 366 (S.B. 122) (VERNON'S)
[65] *Id*.
[66] *Swearingen*, 424 S.W.3d at 37.
[67] *Id*.
[68] *See Routier,* 273 S.W.3d at 250; *Holberg*, 425 S.W.3d at 285 ("Chapter 64.01 does not allow for the appellant to conduct a test that is merely a predicate to a subsequent DNA test").
[69] *See* Tex.Code Crim. Proc. Art. 64.01(b); *See also Swearingen,* 424 S.W.3d at 37 (explaining the requisites of Chapter 64 motions); *Holberg*, 425 S.W.3d at 284.
[70] *Yarbrough v. State*, 258 S.W.3d 205, 209 (Tex. App.—Waco 2008, no pet.) (citing Tex.Code Crim. Proc. Art. 64.01(b)).

exhume the victim's body to check for fingernail scrapings containing DNA and compare any results with the co-defendant's DNA and convicted person's DNA.[71] Both of these requests fall firmly outside the boundaries of Chapter 64. The Court of Appeals found that the State cannot be compelled to exhume a victim's body to gather additional evidence for DNA testing under Chapter 64.[72] Likewise, the State cannot be compelled to draw a blood specimen from a person who is or may be criminally responsible for the offense, nor can the State be required to produce a blood specimen in the possession of a state agency such as TDCJ which was not drawn "in relation to the offense that is the basis of the challenged conviction" and in the State's possession at the time of trial.[73]

The impetus is placed on the convicted person to make requests regarding evidence. In *Shannon v. State*, 116 S.W.3d 52 (Tex. Crim. App. 2003), the convicted person argued that the convicting court should have inquired of the State as to the existence of biological material suitable for testing, and demanded an accounting of all evidence in possession of or with within the knowledge of the State. However, this issue was raised for the first time on appeal.[74] The Court of Criminal Appeals held that the convicted person's failure to make such an inquiry of the convicting court then waived any right to raise the issue on appeal.[75]

**D. Not Previously Tested or Newer Testing Techniques**

Among the other qualifiers in Article 64.01, the evidence must not have been previously subjected to DNA testing, or, although previously subjected to DNA testing, the evidence 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 the previous test.[76] The latest version of the statute (addressed in greater detail below) also attempts to address testing that was conducted at labs engaged in faulty testing practices.[77] In 2011, the Legislature changed the analysis required for previously untested evidence.[78] The end result was the elimination of the "no fault" analysis under the former Article 64.01, and only requiring the convicted person to prove that item had not previously been subjected to DNA testing – not that testing was unavailable, or if available would not have been probative.[79]

A convicted person cannot be denied testing under Chapter 64 simply because the testing was available at the time of trial and the evidence was either previously tested or could have been tested.[80] For items that were tested and did yield a result, the convicted person must show that new testing techniques will provide a reasonable likelihood of results that are more accurate and

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[71] *Id.*
[72] *Id.*
[73] *Id*.
[74] *Shannon v. State*, 116 S.W.3d 52 (Tex. Crim. App. 2003).
[75] *Id*. at 55.
[76] Tex. Code Crim. Pro. Art. 64.01.
[77] *Id*.
[78] POSTCONVICTION FORENSIC DNA ANALYSIS, 2011 Tex. Sess. Law Serv. Ch. 366 (S.B. 122) (VERNON'S).
[79] CERTAIN PRETRIAL AND POST–TRIAL PROCEDURES AND TESTING IN A CRIMINAL CASE, 2011 Tex. Sess. Law Serv. Ch. 278 (H.B. 1573) (VERNON'S).
[80] *Routier*, 273 S.W.3d at 241.

probative than the results of the previous tests.[81] In *LaRue v. State*, 518 S.W.3d 439 (Tex. Crim. App. 2017), the convicted person's oral swab was originally mis-typed as blood Type A, when it was really Type O.[82] Among other issues, the convicted person challenged the "integrity of his blood sample" that was used for the DNA comparison on the swabs and stains, because one crime lab determined his blood was Type A and another crime lab determined his blood was Type O.[83] The oral swabs had been tested at different times, and by different labs with varying results, and those results were all consistent with the fact that the convicted person could not be excluded as a donor.[84] The convicted person also admitted to having oral sex with the complainant shortly before her death, and he did not dispute that fact that his DNA was found in her fingernail scrapings.[85] The Court of Criminal Appeals found that, while it may be that new testing techniques would yield more accurate and probative results, on the facts of this case, the convicted person had not shown that any favorable or exculpatory test result would change the probability that he would have been convicted.[86]

Even if newer testing techniques exist, the convicted person must still carry their burden to show that newer, more discriminating DNA testing would exonerate the convicted person.[87] In *Wilson v. State*, 185 S.W.3d 481, 485 (Tex. Crim. App. 2006), the convicted person had been convicted of capital murder committed in the course of a kidnapping.[88] The convicted person had never challenged the issue of identity.[89] On motion for testing under Chapter 64, the convicted person argued that he was entitled to new testing or retesting of evidence because there may have been an *additional* man involved in the abduction, rape, and murder of the victim.[90] The Court of Criminal Appeals found that if newer, more discriminating DNA testing showed that another perpetrator was involved, that finding would not exonerate appellant because it would show nothing more than there was another party to the crime, at best.[91] Under the circumstances, the convicted person could not meet his burden under Chapter 64.[92]

### E. Faulty Testing Practices

One of the newest additions to Article 64.01 addresses faulty testing practices. Under Article 64.01(b)(2)(b), as amended in 2017, a motion under Chapter 64 may request forensic DNA testing of evidence that was previously subjected to DNA testing at a laboratory that ceased conducting DNA testing after an audit by the Texas Forensic Science Commission revealed the laboratory engaged in faulty testing practices, and during the period identified in the audit as involving faulty testing practices.[93] This amendment was passed as part of a legislative package

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[81] Tex. Code Crim. Pro. Art. 64.01; *See also Routier*, 273 S.W.3d at 250; *LaRue v. State*, 518 S.W.3d 439, 448 (Tex. Crim. App. 2017); Tex. Crim. Proc. Code Art. 64.01(b)(2).
[82] *LaRue*, 518 S.W.3d at 439.
[83] *Id*. at 446.
[84] *Id.* at 448.
[85] *Id*.
[86] *Id*.
[87] *Wilson v. State*, 185 S.W.3d 481, 485 (Tex. Crim. App. 2006).
[88] *Id.*
[89] *Id*. .
[90] *Id*.
[91] *Id*.
[92] *Id*. at 486.
[93] Tex. Code Crim. Pro. Art. 64.01.

that included the addition of Article 64.03(b-1), which requires a convicting court to order DNA testing be done with respect to evidence previously tested at such labs, as long as the convicted person has met the burden listed in Article 64.01(a)(1).[94] The end result is that convicted persons with cases that fall within (b)(2)(b) are relieved of the burden of proving that retesting will give results providing a reasonable likelihood of results that are more accurate and probative than the results of the previous test.[95]

As faulty testing practices were being addressed in Chapter 64, Article 11.073 was added to allow courts to grant a writ of habeas corpus to a convicted person whose DNA evidence was subject to testing at a lab engaged in faulty test practices.[96] In addition to explicitly stating that relief could be granted if the convicted person establishes the elements of Chapter 64 (including proof by a preponderance of the evidence that, had the evidence not been presented at the applicant's trial, the applicant would not have been convicted), 11.073 also provides a gateway around the various procedural bars to subsequent writ applications.[97] Article 11.073 is covered in greater detail in Part VI below.

### F. Art. 64.011. Guardians and Other Representatives

While in a separate section from Art. 64.01, Art. 64.011 is worth mentioning in the discussion of motions. Article 64.011 allows for the "guardian of a convicted person," the person who is the legal guardian either because of the age of the convicted person or because of the physical or mental incompetency of the convicted person, to submit motions for post-conviction DNA testing on behalf of the convicted person.[98] The guardian is entitled to counsel that would otherwise be provided to the convicted person under Chapter 64.[99] This portion of the code has not seen much discussion, though is notable because no such protection is afforded to a guardian before conviction.[100]

## II. Tex. Code Crim. Pro. Art. 64.02. Notice to State; Response

Article 64.02 requires that the convicting court shall, on receipt of the motion, provide a copy to the attorney representing the State.[101] The attorney for the State must then take one of the following actions in response no later than the 60th day after the date the motion is served: 1) deliver the evidence to the court, along with a description of the condition of the evidence; or 2) explain in writing to the court why the State cannot deliver the evidence to the court.[102] However, and despite the use of the word "require" in the statute, there is no presumption in favor of the applicant when the State fails to file a response to the motion.[103] The wording of Article 64.02

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[94] Tex. Code Crim. Pro. Art. 64.03.
[95] Tex. Code Crim. Pro. Art. 64.01.
[96] Texas Bill Analysis, H.B. 3872, 6/29/2017; Tex. Code Crim. Proc. Art. 11.0731.
[97] Tex. Code Crim. Proc. Art. 11.073.
[98] Tex. Code Crim. Proc. Ann. art. 64.011.
[99] *Id*.
[100] Hon. Claudia Laird & Darlene Payne Smith, Elder Abuse: The Criminal Aspects of Estates & Guardianships, and Mental Commitments, 10 Est. Plan. & Community Prop. L.J. 225, 269 (2018).
[101] Tex. Code Crim. Pro. Art. 64.02.
[102] Tex. Code Crim. Proc. Art. 64.02.
[103] *Whitaker v. State,* 160 S.W.3d 5 (Tex.Crim.App.2004).

seems to indicate that the convicting court cannot rule on a motion under Chapter 64 without notice to the State.

Like Article 64.01, Article 64.02 came into being in 2001.[104] Unlike Article 64.01, Article 64.02 has seen very few significant changes since that time. In 2007, Article 64.02 was restructured to put in place the 60 day deadline for the State to either deliver the evidence to the court or explain in writing to the court why the state cannot deliver the evidence to the court, and Article 64.03 was amended to clarify that the convicting court may proceed under Article 64.03 after the 60 day response period has expired, regardless of whether the attorney representing the State submitted a response.[105] Outside of that change, the State's obligations have remained relatively unchanged since Chapter 64 came into being.

**A. Inventory**

The State may either deliver the evidence to the court or explain in writing why the evidence cannot be delivered.[106] A State's response can cite to affidavits from members of county district clerk's office, police department property division, and police department crime labs to explain whether those agencies are in possession of the evidence.[107] If no such evidence is in the possession of the State, those representations alone are sufficient to enable the convicting court to determine that no evidence exists for DNA testing. *Id*. If the trial judge "finds that the State has not exercised due diligence in attempting to locate the evidence, the court has implied authority to order those responsible for the safekeeping and custody of the evidence to conduct a further search."[108] But, if the trial judge finds, as a factual matter, that the evidence no longer exists and its disappearance is not caused by the bad faith of the State, the requested item simply is not available for DNA testing.[109]

Looking at the plain language of Chapter 64.02, some courts have found that affidavits are not needed at all. The Fourth Court, for instance, has found that the convicting court's decision about whether evidence still exists can turn on the sufficiency of the State's written explanation.[110] The convicting court was not required to conduct an evidentiary hearing if the State's response provided sufficient detail as to why the evidence could not be delivered.[111]

The convicting court does not have the power to permit the convicted person or convicted person's representatives to personally search records and the property room of police department for lost evidence.[112] The convicted person is also not entitled to production of every bit of

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[104] 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).
[105] POSTCONVICTION FORENSIC TESTING, 2007 Tex. Sess. Law Serv. Ch. 1006 (H.B. 681) (VERNON'S)
[106] Tex.Code Crim. Proc. Art. 64.02.
[107] *See Thompson v. State*, 123 S.W.3d 781, 783 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).
[108] *Gutierrez,* 337 S.W.3d at 898 (citing *In re State,* 116 S.W.3d 376, 384–85 (Tex.App.-El Paso 2003, no pet.) (orig. proceeding)).
[109] *Gutierrez,* 337 S.W.3d at 898.
[110] *Mearis v. State*, 120 S.W.3d 20, 23 (Tex. App.—San Antonio 2003, pet. ref'd).
[111] *Id*.
[112] *In re State*, 116 S.W.3d at 384.

documentation from the testing laboratory.[113] In *Skinner v. State*, 122 S.W.3d 808 (Tex. Crim. App. 2003), the convicted person argued (among other issues) that the convicting court erred in not compelling the production of benchnotes from a private forensics laboratory that had conducted the testing on behalf of the State.[114] The convicted person did not know if the benchnotes actually existed, and he was not able to provide any legal authority to compel their production.[115] The Court of Criminal Appeals, noting that the report was unambiguous, found that there was not enough to compel the lab to turn over its notes.[116]

While Article 64.02 requires action on the part of the State, the failure to produce a response with an inventory may be considered harmless if the convicted person's pleadings are deficient under Article 64.01.[117] In *In re McBride*, 82 S.W.3d 395, 396 (Tex. App.—Austin 2002, no pet.), the convicting court complied with its obligation under Article 64.02 to notify the State of the receipt of the motion for DNA testing.[118] The State failed to comply, and did not file a formal response.[119] In response to convicted person's ground on appeal, the State conceded that that it was notified of the convicted person's motion and affirmed that numerous exhibits possibly containing biological evidence were in its possession.[120] The convicted person' affidavit accompanying his motion failed to assert any facts supporting his assertion that identity was or is an issue, nor did it contain any statement of fact tending to show that he would not have been convicted if DNA test results favorable to him had been obtained prior to his trial.[121] Under the circumstances, the Court of Appeals found no harm to the convicted person in the State's failure to formally respond to his motion under Chapter 64.[122]

**B. Joint Filing**

Joint filings to expedite the post-conviction testing process were not new at the time of the original drafting of this paper, and have only become more common in 2023. However, practitioners (and lower court judges) should be mindful when filing agreed orders to somehow circumvent a portion of the Chapter 64 process. If the motion, from its substance, appears to be the type of filing that should be made under Chapter 64, the Court of Criminal Appeals will treat it as such.[123]

The requirements of Article 64.01 are sometimes impossible for some convicted persons to meet. Prior to the removal of the requirements for untested evidence, and the amendment to "reasonable likelihood of containing biological material," the burden on the convicted person was much greater. An alternative to a filing under Article 64.01 could be a joint filing of both parties, agreeing to DNA testing. This may serve to circumvent issues on the way to a test result.

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[113] *See Skinner v. State*, 122 S.W.3d 808, 812 (Tex. Crim. App. 2003).
[114] *Id. at* 808.
[115] *Id.* at 812.
[116] *Id.*
[117] *See In re McBride*, 82 S.W.3d 395, 396 (Tex. App.—Austin 2002, no pet.).
[118] *Id.*
[119] *Id*.
[120] *Id.*
[121] *Id.* at 397.
[122] *Id*. at 396.
[123] *Skinner*, 484 S.W.3d at 437-438.

However, the Court of Criminal Appeals will still look to the substance of the filing to determine its character.[124]

An "Agreed Joint Order of the Parties for DNA Testing," seemingly filed outside the bounds of the statute, will still be analyzed under Chapter 64 if the substance of the motion tracks retesting under Chapter 64.[125] In *Skinner v. State*, 484 S.W.3d 434 (Tex. Crim. App. 2016), the convicting court denied the convicted person's motion for postconviction DNA testing under Chapter 64.[126] The convicted person appealed, but before the Court of Criminal Appeals could reach a decision the State and the convicted person agreed to DNA testing and filed a "Joint Motion to Vacate and Remand for Submission of an Agreed Proposed Order for Forensic DNA Testing" with the convicting court.[127] The Court of Criminal Appeals dismissed the convicted person's appeal based on the understanding that the parties intended to move forward with an agreed Chapter 64 to engage in forensic testing.[128]

The State and defense then filed an "Agreed Joint Order of the Parties for DNA Testing," which was adopted by the convicting court.[129] DNA testing was then conducted pursuant to Chapter 64, and the convicting court made its findings under Article 64.04 finding that results were not favorable to the convicted person.[130] The convicted person then sought to appeal that finding. The parties agreed the order was a joint motion and argued that the convicting court treated the order as an order pursuant to Chapter 64, such that analysis under Chapter 64 would apply.[131] The Court of Criminal Appeals looked to the substance of the joint filing, and intent of the parties, considering the fact that both had consistently argued that the joint finding was intended to be a Chapter 64 motion.[132] The Court then proceeded to analyze the claims made under Chapter 64.[133]

You may have an extraordinary situation, and that situation may call for an agreement to an extraordinary result. However, if you are inclined to make a joint filing, whether it is an agreement to testing or an agreement to the favorable result, please make sure to show your work and explain the individual elements of Chapter 64. It's not only good practice, but it may save yourself and those you represent time and resources in the long run.

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[124] *See Ex parte Thomas,* 953 S.W.2d 286, 289 (Tex.Crim.App.1997); *State v. Moreno,* 807 S.W.2d 327, 333 (Tex.Crim.App.1991) ("An appellate court, in order to determine its jurisdiction, must look to the effect of any orders concerning an indictment or information, not what the convicting court or the parties at trial have labeled such orders."); *Young,* 810 S.W.2d at 223 (explaining that the "mere label attached either to the convicted person's motion or to the convicting court's order ruling on [the] same cannot determine its appealability").
[125] *Skinner*, 484 S.W.3d at 436, 438.
[126] *Id.* at 434.
[127] *Id.* at 436.
[128] *Skinner v. State,* No. AP–76,675, 2012 WL 2343616 (Tex.Crim.App. June 20, 2012) (per curiam) (not designated for publication) (ordering the appeal dismissed as moot).
[129] *Skinner*, 484 S.W.3d at 436.
[130] *Id.*
[131] *Id*. at 436-437.
[132] *Id*. at 438.
[133] *Id*.

# III. Tex. Code Crim. Pro. Art. 64.03. Requirements; Testing

Article 64.03 was also enacted in 2001, and has seen amendments to track changes in Article 64.01 and Article 64.02 in the meantime.[134] The first significant change to Article 64.03 took place in 2003.[135] In *Kutzner v. State,* 75 S.W.3d 427 (Tex.Crim.App.2002), the Court of Criminal Appeals looked to the legislative intent of Article 64.03(a)(2)(a) and determined that the statute requires convicted persons to "show a reasonable probability exists that exculpatory DNA tests would prove their innocence."[136] In response to *Kutzner*, the Legislature amended and clarified Article 64.03 with the intent of clarifying that the standard of proof with regard to getting a DNA test is "preponderance of the evidence."[137] The amendment removed the 'reasonable probability' language, clarifying that the convicted person does not have to meet two burdens, and struck the "prosecuted or" language.[138]

The Texas Forensic Science Commission was created in 2005.[139] The duties of the commission include development and implementation of a reporting system through which a crime laboratory may report professional negligence or professional misconduct; requiring a crime laboratory that conducts forensic analyses to report professional negligence or professional misconduct to the commission; and investigation, in a timely manner, of any allegation of professional negligence or professional misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by a crime laboratory.[140] Under the modern version of Article 64.03, a convicted person may request to have testing conducted at a lab that is accredited by the commission.[141]

More amendments to Article 64.03 came in 2007, along with the changes to Article 64.02.[142] Article 64.02 was restructured to put in place the 60 day deadline for the State to either deliver the evidence to the court or explain in writing to the court why the state cannot deliver the evidence to the court, and Article 64.03 was amended to clarify that the convicting court may proceed under Article 64.03 after the 60 day response period has expired, regardless of whether

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[134] 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).
[135] POSTCONVICTION DNA TESTING, 2003 Tex. Sess. Law Serv. Ch. 13 (H.B. 1011) (VERNON'S).
[136] *Smith v. State*, 165 S.W.3d 361, 363–64 (Tex. Crim. App. 2005) (citing *Kutzner v. State*, 75 S.W.3d 427, 439 (Tex.Crim.App.2002)).
[137] *Id*.
[138] *Id*. (citing to House Criminal Jurisprudence Committee, Bill Analysis, Tex. H.B. 1011 78th Leg., R.S. (2003) ("Despite the reasoning in *Kutzner*, the Legislature did not intend for the convicted person to have to prove 'actual innocence' (a principle under habeas law) in order to meet his burden to have the test done. The convicted person must prove that, had the results of the DNA test been available at trial, there is a 51% chance that the convicted person would not have been convicted… The bill further clarifies that the convicted person does not have to meet a two-prong test of not having been prosecuted or convicted. Rather, the intent was that the person would have to prove by a preponderance of the evidence that he would not have been convicted. Accordingly, the bill strikes the 'prosecuted or' language.").
[139] COLLECTION AND ANALYSIS OF EVIDENCE AND TESTIMONY BASED ON FORENSIC ANALYSIS, CRIME LABORATORY ACCREDITATION, DNA TESTING, AND THE CREATION AND MAINTENANCE OF DNA RECORDS; PROVIDING A PENALTY, 2005 Tex. Sess. Law Serv. Ch. 1224 (H.B. 1068) (VERNON'S).
[140] Tex. Code Crim. Pro. Art. 38.01.
[141] Tex. Code Crim. Pro. Art. 64.03.
[142] POSTCONVICTION FORENSIC TESTING, 2007 Tex. Sess. Law Serv. Ch. 1006 (H.B. 681) (VERNON'S).

the attorney representing the state submitted a response.[143] Article 64.03 was also amended so the court may allow the convicted person to request testing by another accredited lab (as long as a political subdivision of the State is not liable for the cost of testing), and the requirement that the testing be conducted in a timely and efficient manner was codified.[144]

While 2011 saw no changes to Article 64.03, the legislature implemented Article 64.035, dealing with unidentified DNA profiles.[145] If an analyzed sample meets the applicable requirements of state or federal submission policies, on completion of the testing under Article 64.03, the convicting court shall order any unidentified DNA profile to be compared with the DNA profiles in: (1) the DNA database established by the Federal Bureau of Investigation; and (2) the DNA database maintained by the Department of Public Safety under Subchapter G, Chapter 411, Government Code. References to 64.035 were implemented into other portions of the code as well.[146] In 2015, Article 64.03 was amended to include a new requirement in line with changes to Article 64.01: the convicting court may order forensic DNA testing under Chapter 64 only if there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing.[147]

In 2017, Article 64.03 was amended in consideration of the addition of Article 11.0731 and the changes to Article 64.01.[148] Section (b-1) was added to allow for retesting of evidence that was tested at a laboratory engaged in faulty testing practices, regardless of whether the person would not have been convicted if exculpatory results had been obtained through DNA testing, assuming the other elements of Article 64.03 were met. This is a substantial shift that greatly lessened the burden of the convicted person under these circumstances. The court may order the test to be conducted by any laboratory that the court may order to conduct a test under Subsection (c) of Article 64.03: the Department of Public Safety, a laboratory operating under a contract with the Department, or, on the request of the convicted person, another laboratory if that laboratory is accredited by the Texas Forensic Science Commission.[149]

Since this paper was originally prepared in 2020, the Southern District of Texas has held that granting a movant a right to a subsequent habeas proceeding under Art. 11.071, for innocence of the death penalty, but then denying DNA testing for a movant to avail himself of that right creates a system which is fundamentally inadequate to vindicate the substantive rights the State of Texas provides.[150] The State subsequently argued that the Federal Court's ruling should be interpreted to mean that there was no longer any legitimate statutory authority for DNA testing *at all*, and so there was no legal basis for Appellant to claim entitlement to such testing.[151] The Court of Criminal Appeals went on to find that the Southern District's opinion did not divest state district

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[143] *Id*.
[144] *Id*.
[145] CERTAIN PRETRIAL AND POST–TRIAL PROCEDURES AND TESTING IN A CRIMINAL CASE, 2011 Tex. Sess. Law Serv. Ch. 278 (H.B. 1573) (VERNON'S).
[146] Tex. Code Crim. Pro. Art. 64.035.
[147] POSTCONVICTION FORENSIC DNA ANALYSIS, **2015** Tex. Sess. Law Serv. Ch. 70 (S.B. 487) (VERNON'S).
[148] A MOTION FOR FORENSIC DNA TESTING OF CERTAIN EVIDENCE PREVIOUSLY SUBJECTED TO FAULTY TESTING, 2017 Tex. Sess. Law Serv. Ch. 903 (H.B. 3872) (VERNON'S).
[149] Tex. Code Crim. Pro. Art. 64.03.
[150] *Gutierrez v. Saenz*, 565 F. Supp. 3d 892, 911 (S.D. Tex. 2021).
[151] *Gutierrez v. State*, 663 S.W.3d 128, 130 (Tex. Crim. App. 2022).

court of jurisdiction to determine whether an inmate was entitled to DNA testing.[152] More on this development is included below.

Under Article 64.03, a convicting court may order testing only if (1) the evidence "still exists and is in a condition making DNA testing possible;" (2) the evidence "has been subjected to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material respect;" and (3) "identity was or is an issue in the case."[153] The convicted person has the burden of showing by a preponderance of the evidence that she "would not have been convicted if exculpatory results had been obtained through DNA testing," and that "the request for the proposed DNA testing is not made to unreasonably delay the execution of [the convicted person's] sentence[.]"[154]

**A. Evidence Exists and Testing is Possible**

The threshold requirement of Article 64.03 is that the convicting court determine whether the evidence exists.[155] In *Lopez v. State,* 114 S.W.3d 711 (Tex. App.—Corpus Christi 2003, no pet.), the convicted person conceded that the State did not have the evidence that he sought.[156] The convicted person argued that the evidence was, at one point, in the possession of the State, and that the absence of evidence was sufficient to prove his innocence.[157] After acknowledging the requirements of Chapter 64, the Court of Appeals found that the record does not establish that evidence containing biological material capable of exculpatory DNA testing existed, and affirmed the denial of the convicted person's motion.[158]

As noted above (in Part II), the State's written explanation as to why evidence does not exist can be sufficient for the purposes of Article 64.02, and for the convicting court to make a finding under Article 64.03.[159] In *Cravin v. State*, 95 S.W.3d 506 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd), the convicted person had filed a motion under Chapter 64.[160] In support, he attached an affidavit which stated that various pieces of evidence, including his own clothing, the victim's clothing, and medical evidence existed at the time of his trial.[161] The State filed a written response, stating that there was no evidence to test.[162] In support, the State attached affidavits from the District Clerk's office, stating that there was no evidence in its custody, and the arresting agency, stating that, because there was no case number, no evidence could be located.[163] The convicting court denied the convicted person's motion.[164] The Court of Appeals affirmed this

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[152] *Id.* at 131.
[153] *Holberg*, 425 S.W.3d at 284 (citing Tex. Code Crim. Proc. Art. 64.03(a)(1)).
[154] *Id*.
[155] *Lopez v. State*, 114 S.W.3d 711, 717 (Tex. App.—Corpus Christi 2003, no pet.) (citing Tex.Code Crim. Proc. Art. 64.03).
[156] *Id.*
[157] *Id*.
[158] *Id*.
[159] *Cravin v. State*, 95 S.W.3d 506, 509 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd).
[160] *Id.* at 506.
[161] *Id.* at 507.
[162] *Id*.
[163] *Id*. at 507-508.
[164] *Id*. at 507.

ruling, finding that the convicting court may reach that decision based on the sufficiency of the State's written explanation, without requiring affidavits or an evidentiary hearing.[165]

Similarly, in *Mearis v. State*, 120 S.W.3d 20 (Tex. App.—San Antonio 2003, pet. ref'd),, the State opposed the convicted person's Chapter 64 motion due to the non-existence of biological material to test.[166] The State attached a number of affidavits to support the fact that no property and evidence related to the case were in the State's possession.[167] The exhibits clerk for the district clerk's office, the property and evidence custodian for the crime lab, and the property and evidence records for the police department all provided affidavits indicating that the evidence was not in their possession.[168] The convicting court found that the convicted person had failed to show that the evidence still exists and is in a condition making DNA testing possible and, consequently, the convicted person failed to show by a preponderance of the evidence that a reasonable probability exists that he would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.[169] The convicted person appealed, arguing (among other issues) that the State failed in its obligations under Article 64.02(2) when it failed to either deliver the evidence to the court, along with a description of the evidence or explain in writing why the State cannot deliver the evidence to the court, and that the issues cannot be decided on affidavits alone.[170] The Court of Appeals found that, in determining whether to order forensic DNA testing under Article 64.03, the convicting court was not required to hold an evidentiary hearing and may rely on the motion and the State's written response.[171] Further, the court found that Chapter 64 does not require the convicting court to hold a hearing, and the State is not required to attach affidavits in support of its response.[172]

### B. Reasonable Likelihood of Biological Material

As discussed above, the 2011 amendments and providing a definition of "biological material" shifted the landscape for both the purposes of the convicted person's motion and the analysis of the convicting court. The 2015 amendment to Chapter 64.03 softened another formerly significant hurdle to DNA testing under Chapter 64. Where the previous version of the statute required that all evidence to be tested must be *proven* to contain biological material, the amended language of Article 64.01(a–1) and Article 64.03(a)1)(B), requiring merely a "reasonable likelihood that the evidence contains biological material" is significantly easier for an applicant to carry.[173] In *Reed v. State*, 541 S.W.3d 759 (Tex. Crim. App. 2017), the convicted person sought post-conviction DNA testing of over forty items.[174] Among the many litigated issues on appeal was a question over whether the items contained biological material suitable for testing.[175] The

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[165] *Id*. at 509
[166] *Mearis*, 120 S.W.3d at 20.
[167] *Id.* at 22.
[168] *Id*.
[169] *Id.* at 23.
[170] *Id*.
[171] *Id.* (citing *Cravin,* 95 S.W.3d at 509; *Mimms v. State,* No. 14–02–01196–CR, 2003 WL 21543499, at *2 (Tex.App.-Houston [14th Dist.] July 10, 2003, no pet. h.) (not designated for publication); *See also Rivera v. State,* 89 S.W.3d 55, 58 (Tex.Crim.App.2002)).
[172] *Id*.
[173] *See Reed*, 541 S.W.3d at 772.
[174] *Id.* at 759.
[175] *Id*. at 770.

convicting court found that defense experts could not provide certainty that any of the requested items contained biological material suitable for testing.[176]

In examining the finding of the convicting court, the Court of Criminal Appeals noted that the "reasonable likelihood" statutory standard became effective after the convicted person filed his Chapter 64 motion.[177] The previous standard required convicted persons to bear the burden to "*prove* biological material exists and not that it is merely probable."[178] The court noted that "Current Articles 64.01(a–1)'s and 64.03(a-1)(B)'s new language requiring merely a reasonable likelihood that the evidence contains biological material is decidedly less onerous."[179] After reviewing the defense witness testimony, and applying the new standard of "reasonable likelihood," the Court of Criminal Appeals found that the convicted person had met his burden to prove that either biological material exists or there is a reasonable likelihood that it exists on some of the evidence in question.[180]

### C. Identity as an Issue

Under Article 64.03(a)(l)(C), the court must find that identity was or is an issue in the convicted person's case to order post-conviction DNA testing.[181] This phrasing (the use of past tense "*was*" and present tense "*is*") might suggest that, while a plea could be seen as eliminating the issue of identity at the time of the conviction, evidence may be introduced on Chapter 64 to put identity into issue now.

The identity requirement in Chapter 64 relates to the issue of identity as it pertains to the DNA evidence.[182] The fact that the convicted person plead not guilty and proceeded forward to trial, by itself, is not sufficient to raise identity as an issue.[183] On the other hand, Article 64.03 prohibits a court from finding that identity was not an issue in the case solely on the basis a convicted person pleaded guilty or nolo contendere or, whether before or after conviction, made a confession or similar admission in the case."[184] The convicted person can make identity an issue by showing that exculpatory DNA tests would prove his innocence, even though he may have conceded identity as an issue at trial.[185] Further, even the fact that the victim knew and identified the convicted person, is irrelevant to a determination under Chapter 64.[186]

The convicting court may order DNA testing only when identity is an issue.[187] In *Green v. State*, 100 S.W.3d 344 (Tex. App.—San Antonio 2002, pet. ref'd), the convicting court expressly

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[176] *Id*. at 771.
[177] *Id*. at 772.
[178] *Id*.
[179] *Id*.
[180] *Id*. at 772.
[181] Tex. Code Crim. Proc. Art. 64.03.
[182] *Prible*, 245 S.W.3d at 470.
[183] *Id*.
[184] Tex.Code Crim. Proc. Art. 64.03(b); *See also Prible*, 245 S.W.3d at 470 (Tex. Crim. App. 2008).
[185] *See Blacklock*, 235 S.W.3d at 231.
[186] *Id.*
[187] *See* Tex.Code Crim. Proc. Art. 64.03(a)(1)(B); *cf. Green v. State,* 100 S.W.3d 344, 345 (Tex.App.-San Antonio 2002, pet. ref'd); *McBride,* 82 S.W.3d at 397 (holding identity not at issue where appellate challenge to sufficiency of the evidence was directed to an element other than identity).

found that identity was not an issue in the case.[188] During the trial, counsel for the convicted person told the jury that the convicted person as not disputing that he was present at the location where the offense allegedly occurred.[189] On direct appeal, the convicted person admitted in his briefing that he had sex with the complainant without her consent.[190] The convicted person did not raise any issues on appeal as to his identity as the assailant.[191] Further, the convicted person did not assert any facts alleging identity as an issue in his affidavit for his Chapter 64 motion.[192] The Court of Appeals found that the convicting court did not err in denying the motion, as the convicted person had failed to meet his burden under 64.03(a)(1)(B).[193]

Identity is deemed to be at issue where the convicted person maintains his innocence.[194] That said, Chapter 64 does not require a convicted person to include in his motion an express denial of guilt to make identity an issue in the case.[195] Instead, under Article 64.03, identity is an issue if DNA tests that exclude the convicted person as the source would also exclude him as the assailant, regardless of admissions of guilt.[196]

When identity is not an issue, the merits of the relief sought are beyond dispute, and there is no room for the exercise of discretion.[197] If identity is not properly raised the convicting court has a ministerial duty to deny the motion.[198] In *In re State ex rel. Villalobos*, 218 S.W.3d 837 (Tex. App.—Corpus Christi 2007, no pet.), the convicted person sought DNA testing to show that the victim was the first aggressor, to allow him to establish a self-defense claim.[199] Identity was not at issue.[200] Under the circumstances, the State was entitled to mandamus relief vacating the convicting court's order granting DNA testing, when the State's appeal on the issue was precluded.[201]

The identity of the accused as the perpetrator of the aggravating factors is an essential element of capital murder.[202] In *Leal v. State*, 303 S.W.3d 292 (Tex. Crim. App. 2009), the convicted person conceded his guilt to the offense of murder, but denied committing the predicate

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[188] *Green*, 100 S.W.3d at 344.
[189] *Id*.
[190] *Green v. State,* No. 04–94–00125–CR, slip op. at 5 (Tex.App.-San Antonio July 5, 1995, pet. ref'd) (not designated for publication).
[191] *Id*.
[192] *Green*, 100 S.W.3d at 345.
[193] *Id*.
[194] *Blacklock*, 235 S.W.3d at 233.
[195] *Pegues v. State*, 518 S.W.3d 529, 536 (Tex. App.—Houston [1st Dist.] 2017, no pet.).
[196] *Id*. (citing *Lyon v. State*, 274 S.W.3d 767, 769 (Tex. App.—San Antonio 2008, pet. ref'd)).
[197] *In re State ex rel. Villalobos*, 218 S.W.3d 837, 840 (Tex. App.—Corpus Christi 2007, no pet.)(citing *State ex rel. Hill v. Court of Appeals for Fifth Dist.*, 34 S.W.3d 924, 926–27 (Tex. Crim. App. 2001)).
[198] *Id.*
[199] *Id. at* 837.
[200] *Id*. at 840.
[201] *Id*.
[202] *Leal v. State*, 303 S.W.3d 292, 297 (Tex. Crim. App. 2009) (citing *Avery v. State,* 632 S.W.2d 610, 614 (Tex.Crim.App.1982); *Ellison v. State,* 154 Tex.Crim. 406, 410, 227 S.W.2d 545, 548 (Tex.Crim.App.1950).

aggravating factors of sexual assault or kidnapping.[203] The Court of Criminal Appeals found that convicted person satisfied the requirements of Article 64.03(a)(1)(B) under the circumstances.[204]

The court is not required to presume an item's relevance to the question of the offender's identity.[205] Whether identity is an issue can also be examined based on the totality of the evidence in front of the court. The convicting court can look to circumstantial evidence, witness statements, and inferences to make a finding that identity was or is not an issue.[206]

Finally, the issue of identity is limited to the identity of a person. In *Newby v. State*, 229 S.W.3d 412, 415 (Tex. App.—Texarkana 2007, pet. ref'd), the convicted person was convicted of possession of marijuana.[207] He sought DNA testing of the evidence (alleged marijuana plants) under Chapter 64.[208] The Court of Appeals rejected his claim, concluding "that the Legislature intended the DNA testing to be limited to determining the identity of a person, not a plant."[209]

**D. Chain of Custody**

Under Article 64.03(a)(l)(A)(i)-(ii). the evidence which the convicted person seeks to have tested must have been subjected to a sufficient chain of custody and be in a condition making testing possible. A convicting court may order DNA testing only if it finds that the evidence "has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect[.]"[210] The convicted person must provide proof to the convicting court that the chain of custody is sufficient.[211]

The convicting court should consider where and how the evidence was maintained.[212] In *Larson v. State*, 488 S.W.3d 413 (Tex. App.—Texarkana 2016, pet. ref'd), the convicted person contended that she was entitled to have a piece of sheetrock, taken from the room in which the victims were shot, tested to determine if the blood present on the sheetrock matched the DNA of the victims.[213] The sheetrock had been handled by multiple people before, during, and after the trial, at a time when there was no contemplation of DNA testing.[214] The room where the evidence was maintained was also exposed to water damage due to flooding.[215] The convicting court found that the blood specimen from the sheetrock had not been subjected to a chain of custody sufficient to establish that it has not been tampered with or altered with regard to testing for biological specimens and has become contaminated for the purposes of DNA testing.[216] The convicting court also found that "[t]he blood specimen from the sheetrock which was previously submitted to the

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[203] *Leal*, 303 S.W.3d at 292.
[204] *Id*.
[205] *Reed*, 541 S.W.3d at 775.
[206] *See Gutierrez,* 337 S.W.3d at 899.
[207] *Newby v. State*, 229 S.W.3d 412, 415 (Tex. App.—Texarkana 2007, pet. ref'd).
[208] *Id*. at 415.
[209] *Id*.
[210] Tex. Code Crim. Proc. Art. 64.03.
[211] *Id*.; *Larson v. State*, 488 S.W.3d 413 (Tex. App.—Texarkana 2016, pet. ref'd); *Reed*, 541 S.W.3d at 770.
[212] *Larson*, 488 S.W.3d at 422.
[213] *Id.* at 413.
[214] *Id.* at 421–22.
[215] *Id*.
[216] *Id.*

[testing laboratory] has not been maintained by the lab and the lab has no items available for additional DNA testing for this case."[217] The Court of Appeals agreed, and deferred to the convicting court's findings regarding the chain of custody.[218]

The examination of individual pieces of evidence in *Reed v. State*, 541 S.W.3d 759 (Tex. Crim. App. 2017), suggests that the requirements for proper chain of custody depend on the type of evidence and the type of DNA testing sought.[219] For instance, the convicted person requested retesting of some evidence by a touch DNA technique to develop a DNA profile from the epithelial cells left by those handling the item.[220] The convicting court had found that certain items of evidence were handled by "ungloved attorneys, court personnel, and possibly the jurors."[221] The evidence was also not separately packaged, but instead "commingled in a common repository."[222] Under the circumstances, Court of Criminal Appeals found the convicted person failed to show the chain of custody required by Chapter 64, as the record "demonstrates that the manner in which the evidence was handled and stored casts doubt on the evidence's integrity, especially for the specific testing [the convicted person] seeks."

**E. "Would Not Have Been Convicted"**

Article 64.03 provides that a convicting court may order forensic DNA testing only if the court finds that the convicted person has proved by a preponderance of the evidence that "the person would not have been convicted if exculpatory results had been obtained through DNA testing."[223] This means that a convicted person must show a greater than 50% chance that he or she would not have been convicted if exculpatory results from the requested DNA testing had been available at trial.[224] "Exculpatory results" means only results excluding the convicted person as the donor of the DNA.[225] The burden under Article 64.03(a)(2)(A) is met if the record shows that exculpatory DNA test results, excluding the convicted person as the donor of the material, would establish, by a preponderance of the evidence, that the convicted person would not have been convicted.[226]

In considering the likelihood of conviction, the convicting court should consider only whether exculpatory results would alter the landscape of evidence at trial, and not consider post-trial factual developments.[227] The convicted person must show that, more likely than not, she would not have been convicted had the jury been able to weigh evidence against the balance of the

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[217] *Id*. at 422.
[218] *Id.*
[219] *Reed*, 541 S.W.3d at 759.
[220] *Id.* at 769.
[221] *Id*. at 769-770.
[222] *Id*. at 770.
[223] *LaRue*, 518 S.W.3d at 445–46; (citing Tex. Crim. Proc. Code Art. 64.03).
[224] *Hall v. State*, 569 S.W.3d 646, 655 (Tex. Crim. App. 2019) (citing *Reed,* 541 S.W.3d at 774); *See also Smith,* 165 S.W.3d at 364.
[225] *Id*.; *LaRue*, 518 S.W.3d at 446; *Swearingen*, 424 S.W.3d at 38; *Blacklock*, 235 S.W.3d at 232.
[226] *Gutierrez,* 337 S.W.3d at 899.
[227] *Hall*, 569 S.W.3d at 655 (citing *Reed,* 541 S.W.3d at 774); *See also Kutzner,* 75 S.W.3d at 439 ("The language of Chapter 64.03(a)(2)(A) and its legislative history ... do not contemplate a consideration of appellant's 'new' post-trial information.").

evidence presented at trial.[228] This burden cannot be met after the fact; a convicted person has not met their burden if the motion argues that testing would need to be done first, and then, if the results were favorable, then he or she could show that they would not have been convicted if the testing had been done prior to trial.[229] Chapter 64 requires that this showing before the court will order testing.[230] In *Dinkins v. State*, 84 S.W.3d 639 (Tex. Crim. App. 2002), the Court of Criminal Appeals rejected the argument that the fairest reading of the statute would direct the convicting court to require such proof only after the results were available.[231]

While Chapter 64 does not allow the court to consider post-trial factual developments, such evidence can be presented on an application for writ of habeas corpus. In *Ex parte Kussmaul*, 548 S.W.3d 606 (Tex. Crim. App. 2018), the habeas court considered the fact that the three co-defendants who testified against Kussmaul would not have testified had they known of exculpatory DNA results.[232] While the Court of Criminal Appeals ultimately disagreed with the habeas court's recommendation as to actual innocence, the court did find that all four men were entitled to relief under Article 11.073.[233]

DNA testing should not be ordered if it would "merely muddy the waters."[234] The concept of "muddy[ing] the waters" applies to, among other situations, cases involving the law of parties and accomplices, as there is not a lone offender whose DNA must have been left at the scene.[235] In *Whitaker v. State*, 160 S.W.3d 5 (Tex. Crim. App. 2004), the convicted person and co-defendants robbed and murdered an elderly woman.[236] The trial court denied the convicted person's motion on the basis that the convicted person had not met their burden, agreeing with the State's response that there was no DNA evidence at trial as to whether the blood on the murder weapon belonged to the convicted person, the victim, or a mixture of both and, therefore, DNA testing would be meaningless.[237] The Court of Criminal Appeals agreed with the convicting court that the convicted person had not met their burden under Article 64.03(a)(2), finding that regardless of whose blood was on the rifle, other evidence at trial established the convicted person's guilt, including his own statement that he had killed the victim.[238]

A similar result was reached in *Prible v. State*, 245 S.W.3d 466 (Tex. Crim. App. 2008), where the convicted person contended that someone else committed the murders which he was convicted, and the potential for a third-party DNA profile was crucial to his case.[239] The Court of Criminal Appeals reasoned that if, regardless of the results, retesting would not show by a preponderance of the evidence that Appellant would not have been convicted, then there is no reason for the court to order the DNA testing.[240] Evidence of another person's DNA, in addition to

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[228] *Holberg*, 425 S.W.3d at 287.
[229] *Smith*, 165 S.W.3d at 363 (citing *Dinkins,* 84 S.W.3d at 639).
[230] *Id*.
[231] *Dinkins*, 84 S.W.3d at 639.
[232] *Ex parte Kussmaul*, 548 S.W.3d 606 (Tex. Crim. App. 2018).
[233] *Id.* at 641.
[234] *Gutierrez,* 337 S.W.3d at 901.
[235] *See Id*. at 900; *Whitaker,* 160 S.W.3d at 5.
[236] *Whitaker*, 160 S.W.3d at 5.
[237] *Id.* at 7.
[238] *Id*. at 7-9.
[239] *Prible*, 245 S.W.3d at 467.
[240] *Id*. at 469-470.

that of the convicted person, would not meet Applicant's burden to provide exculpatory evidence under Chapter 64.[241]

Chapter 64 deals only with testing evidence that could establish, by a preponderance of the evidence, that the person "would not have been *convicted* if exculpatory results" were obtained.[242] With that in mind, the concept of "muddying the waters" also applies to testing that might affect only the punishment or sentence that the convicted person received. In the aforementioned *Kutzner v. State,* 75 S.W.3d 427 (Tex.Crim.App.2002), the Court of Criminal Appeals concluded that Chapter 64 was intended to provide testing only for those who would not have been "prosecuted or convicted" of the offense had the exculpatory test results been previously available, not for those who might show a "different outcome unrelated to the convicted person's guilt/innocence."[243] Similarly, in *Torres v. State,* 104 S.W.3d 638, 642 (Tex.App.-Houston [1st Dist.] 2003, pet. ref'd), the Court of Appeals held that "a convicted person may not seek forensic DNA testing for the purpose of affecting the punishment assessed."[244]

If the evidence was found at a location where a number of DNA contributors can be found, then it is not considered as probative as evidence with a reasonably limited number of contributors.[245] As with the issue of identity, the issue of exculpatory results is fact specific. The convicting court is not required to make inferences that overlook the facts and circumstances of the case.[246] Where exculpatory DNA test results could, at most, show that someone other than the convicted person had also left his DNA at the crime scene, rather than exonerate the convicted person, then testing would serve only to "muddy the waters."[247]

**F. Unreasonable Delay**

Article 64.03(a)(2)(B) states that the convicting court may order forensic DNA testing only if the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.[248] The convicted person must meet this burden by a preponderance of the evidence.[249] The statute does not explicitly layout how that determination should be made, or when a convicted person has satisfied this burden. Considerations may include the promptness of the request, the temporal proximity between the request and the sentence's execution, or the ability to request the testing earlier.[250] However, individual cases in this area

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[241] *Id*. at 470.
[242] Tex.Code Crim. Proc. Art. 64.03(a)(2)(A).
[243] *Kutzner,* 75 S.W.3d at 427 (Tex.Crim.App.2002)
[244] *Torres v. State,* 104 S.W.3d 638, 642 (Tex.App.-Houston [1st Dist.] 2003, pet. ref'd).
[245] *Hall*, 569 S.W.3d at 658; *Reed*, 541 S.W.3d at 776-77.
[246] *See Swearingen*, 424 S.W.3d at 39.
[247] *See LaRue*, 518 S.W.3d at 449; *Wilson*, 185 S.W.3d at 485 ("if newer, more discriminating DNA testing showed that another perpetrator was involved, that finding would not exonerate appellant because it would show nothing more than there was another party to the crime, at best").
[248] Tex. Code Crim. Pro. Art. 64.03.
[249] *Id*.
[250] *See, e.g.*, *Swearingen v. State*, 303 S.W.3d 728, 736 (Tex. Crim. App. 2010) (noting that convicted person could have requesting testing of materials earlier); *Thacker,* 177 S.W.3d at 927 (convicted person failed to satisfy his burden when he waited over four years to file his motion less than a month before his execution); *Patrick*, 86 S.W.3d at 598 (Hervey, J., concurring).

turn on the discrete facts the cases presented and there is no definitive criteria for answering this inherently fact-specific and subjective inquiry.[251]

A pending warrant of execution can play a role in the court's determination of delay.[252] In *Kutzner v. State*, 75 S.W.3d 427 (Tex. Crim. App. 2002), convicted person made his request for testing under Chapter 64 nine days before his scheduled execution date.[253] He could provide no excuse for the delay with regard to one of the pieces of evidence, but for the remaining two he blamed the delay on a theory that the State had concealed or withheld the evidence.[254] As the convicted person had raised the same claims of misconduct on a prior application for writ of habeas corpus, the Court of Criminal Appeals affirmed the convicting court's finding that the convicted person failed to prove that his filing was not made to unreasonably delay the execution of sentence or administration of justice.[255] The court came to the same conclusion in *Swearingen v. State*, 303 S.W.3d 728 (Tex. Crim. App. 2010), where the convicted person's request was filed 21 days before his scheduled execution date.[256]

The court will analyze whether delay is reasonable even when an execution date is not pending.[257] In *Skinner v. State*, 122 S.W.3d 808 (Tex. Crim. App. 2003), the convicted person did not have a set date of execution, and he had a federal habeas appeal pending.[258] The testing could be conducted before the appellant was assigned an execution date or appeared on his federal habeas claim.[259] Under those circumstances, the Court of Criminal Appeals overruled the convicting court's determination that convicted person failed to demonstrate by a preponderance of the evidence that the DNA testing request is not made to unreasonably delay the execution of his sentence or the administration of justice.[260] Contrast this with *Thacker v. State*, 177 S.W.3d 926 (Tex. Crim. App. 2005), where the convicted person waited over four years to file his motion, and that motion was filed less than a month before his scheduled execution. Considering the fact that nothing legally prevented appellant from filing a motion for DNA testing during the pendency of his federal habeas proceedings, the Court of Criminal Appeals affirmed the convicting court's finding regarding unreasonable delay.[261]

### G. *Gutierrez v. State and the Supremacy Clause*

The Supremacy Clause states that federal constitution, laws, and treaties are the "supreme law of the land," and state courts are bound by them notwithstanding anything to the contrary that may be found in the constitution or laws of any state.[262] However, that does not mean that the

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[251] *Reed*, 541 S.W.3d at 778.
[252] *Kutzner*, 75 S.W.3d at 442; *Swearingen*, 303 S.W.3d at 728.
[253] *Kutzner*, 75 S.W.3d at 427.
[254] *Id.*
[255] *Id*. at 442.
[256] *Swearingen*, 303 S.W.3d at 728.
[257] *Skinner*, 122 S.W.3d at 808; *Thacker,* 177 S.W.3d at 927.
[258] *Skinner*, 122 S.W.3d at 808.
[259] *Id.* at 811.
[260] *Id*.
[261] *Thacker,* 177 S.W.3d at 927.
[262] U.S. CONST. ART. VI, Cl. 2.

state courts are bound by lower federal court decisions.[263] State courts are not bound by decisions of the lower federal courts.[264] The state and federal courts are "of parallel importance."[265]

At the time of writing, the Southern District of Texas has held that denying an individuals' DNA testing, under certain circumstances, offends due process.[266] In the aftermath of that holding the State argued that the lower federal court invalidated the entire statute and deprived the trial court of jurisdiction to consider movant's request for post-conviction testing.[267]

The Court of Criminal Appeals, in an unanimous decision, held that the lower federal court's decision should not be weaponized against the article or procedure itself.[268] Writing for the Court, Judge Yeary pointed out that "nothing about the federal district court's opinion in *Gutierrez v. Saenz* purported, in any way, to invalidate what the statute already legitimately authorizes."[269]

The Court also noted that the Southern District's decision is not final, and is currently pending appeal to the United States Court of Appeals for the Fifth Circuit in *Gutierrez v. Saenz*, No. 21-70009 (5th Cir. Dec. 13, 2021).[270] Even then, *that* decision may not be binding on the state courts. "[Our state courts] are not required to follow [even] Fifth Circuit federal constitutional interpretations."[271] We may have to wait for the Supreme Court of the United States to settle the issue.[272]

For the moment, the result of *Gutierrez* appears to be that courts reviewing motions for post-conviction DNA testing under Chapter 64 should continue to follow Chapter 64. This has come in an explicit statement from the Court of Criminal Appeals. Practitioners on all sides may be interested to see how the federal courts (or perhaps even the State legislature) take up this issue in the future.

## IV. Tex. Code Crim. Pro. Art. 64.04. Finding

Both Article 64.035 and Article 64.04 provide guidance for courts after testing has been conducted. Under Article 64.035 the convicting court shall order any unidentified DNA profile to be compared with the DNA profiles in the FBI database and the DPS database, if the submission requirements for those respective agencies are met.[273] If the convicting court has ordered testing under Article 64.03, then Article 64.04 requires the convicting court to hold a hearing and make a

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[263] *Gutierrez*, 663 S.W.3d at 132.
[264] *Gutierrez v. State*, 663 S.W.3d 128, 131 (Tex. Crim. App. 2022) (citing *Johnson v. Williams*, 568 U.S. 289, 305, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013) and *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) and Bryan A. Garner et al., THE LAW OF JUDICIAL PRECEDENT 691 (2016)).
[265] *Gutierrez v. State*, 663 S.W.3d 128, 132 (Tex. Crim. App. 2022) (citing *Pruett v. State*, 463 S.W.2d 191, 194 (Tex. Crim. App. 1970)).
[266] *See Gutierrez*, 565 F. Supp. 3d at 911.
[267] *Gutierrez*, 663 S.W.3d at 131.
[268] *See Gutierrez*, 565 F. Supp. 3d at 911; *Gutierrez*, 663 S.W.3d at 131.
[269] *Id*.
[270] *Id*.
[271] *Gutierrez v. State*, 663 S.W.3d 128, 132 (Tex. Crim. App. 2022) (quoting *Reynolds v. State*, 4 S.W.3d 13, 20 n.17 (Tex. Crim. App. 1999))
[272] *Id.* (citing *Pruett*, 463 S.W.2d at 194).
[273] Tex. Code Crim. Pro. Art. 64.035.

finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted.[274]

It is possible to imagine a scenario where the convicted person is entitled to testing under Chapter 64.03, but would not prevail under Chapter 64.04.[275] While the court may set aside inculpatory evidence on an Chapter 64.03 analysis, the same evidence supporting guilt can be fatal to the Chapter 64.04 analysis.[276] Further, if the results of the ordered testing were "inconclusive," then the conviction court may determine that the results were "not favorable" to the convicted person.[277]

If the convicting court finds that the results were favorable, then the most that can happen is a favorable finding under Article 64.04. The convicting court has no authority to order the convicted person's release from incarceration, nor does the Chapter 64 give the convicting court the power to grant a new trial.[278] The appropriate avenue for relief, utilizing favorable results, is via an application for writ of habeas corpus.[279] Under Article 17.48, the convicting court, on entering a finding favorable to a convicted person under Article 64.04, after a hearing at which the attorney representing the state and the counsel for the convicted person are entitled to appear, may release the convicted person on bail under this chapter pending the conclusion of court proceedings or proceedings under Section 11, Article IV, Texas Constitution, and Article 48. 01.[280]

However, an unfavorable finding under Article 64.04 could foreclose relief under a subsequent application for writ of habeas corpus, and habeas is not an opportunity to relitigate a finding under Chapter 64.[281] In *Ex Parte Pruett*, 458 S.W.3d 535 (Tex. Crim. App. 2015), the applicant had filed a Chapter 64 motion in the convicting court and, after the results of the testing were inconclusive, the trial judge found that it was not reasonably probable that applicant would have been acquitted had the new results been available at trial.[282] This finding was appealed and affirmed.[283] The applicant then filed his second subsequent application for a writ of habeas corpus, asserting that he was entitled to relief under Texas Code of Criminal Procedure Article 11.073.[284] On habeas, the Court of Criminal Appeals held that "Because both the trial court and this Court during the 2013 Chapter 64 proceedings found that the inconclusive DNA evidence did

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[274] Tex. Code Crim. Pro. Art. 64.04; *Jones*, 161 S.W.3d at 690 (convicting court erred in determining that results of DNA testing were not favorable to the convicted person without holding a hearing); *Lopez*, 114 S.W.3d at 711.
[275] *See Dunning*, 572 S.W.3d at 697.
[276] *Id*. ("Under Chapter 64.04, the judge does not consider the convicted person's claims about how exculpatory he thinks the results will be *if the testing is performed*, [] he must consider the results *after testing is performed* to determine the exculpatory value, if any, of the test results and whether the results meet the standard set out in Chapter 64.04.")
[277] *Baggett v. State*, 110 S.W.3d 704, 706–07 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).
[278] *Watson v. State*, 96 S.W.3d 497, 500 (Tex. App.—Amarillo 2002, pet. ref'd); *State v. Holloway*, 360 S.W.3d 480 (Tex. Crim. App. 2012).
[279] *Holloway*, 360 S.W.3d at 488-490; *Gutierrez,* 337 S.W.3d at 890 (citing *Thacker,* 177 S.W.3d at 927).
[280] Tex. Code Crim. Pro. Art. 17.48.
[281] *Ex Parte Pruett*, 458 S.W.3d 535 (Tex. Crim. App. 2015).
[282] *Id*. at 536-537.
[283] *Pruett v. State,* No. AP–77,037, 2014 WL 5422573 (Tex.Crim.App. Oct. 22, 2014) (not designated for publication), *cert. denied, Pruett v. Texas*, 575 U.S. 939, 135 S. Ct. 1707, 191 L. Ed. 2d 682 (2015)
[284] *Pruett*, 458 S.W. at 537.

not support a reasonable probability that applicant would have been acquitted had that evidence been available at his trial, applicant is foreclosed from obtaining relief under Article 11.073."[285]

The convicting court should examine DNA results in the context of the evidence of the case. The State can present additional evidence to this end.[286] In *Dunning v. State*, 572 S.W.3d 685 (Tex. Crim. App. 2019), the convicted person was convicted of aggravated sexual assault of a child, to which he pleaded guilty.[287] At the Chapter 64.04 hearing, the State introduced into evidence a copy of its investigative file.[288] The Court of Criminal Appeals found that, while post-conviction DNA testing results excluded the convicted person as a major contributor to items tested, and revealed the presence of third-party touch DNA in the crotch area of victim's shorts, those results would not probably have resulted in the convicted person being acquitted if presented at trial. The exculpatory results tended only to "muddy the waters," where convicted person's guilty plea, judicial confession and testimonial confession were not shown to be inaccurate or unreliable, inculpatory evidence was substantial, and there was no evidence supporting defense theory that victim had been coached to falsely accuse convicted person.[289]

While a guilty plea does not preclude a favorable finding under Article 64.04, if there is no reason to believe that a convicted person's plea was inaccurate or unreliable, that plea should be given great weight.[290] If the test results are exceedingly exculpatory, however, "it is difficult to conclude that a prior guilty plea was accurate or reliable."[291] In such a case, the convicted person's guilty plea might be outweighed.[292] The question before the convicting court at an Article 64.04 hearing is whether the inculpatory evidence—including the convicted person's guilty plea, judicial confession, his testimonial confession, and other inculpatory evidence adduced at the Chapter 64 hearing—is so undermined by the test results that it is reasonably probable that a fact finder would not have convicted Appellant had the tests been available at trial despite the inculpatory evidence.[293]

Even if exculpatory DNA results would tend to indicate that Appellant was not the perpetrator, the fact that the evidence is not strongly exonerating means that we would look to see whether inculpatory evidence in the record weighs against a conclusion that Appellant would not have been convicted.[294] As stated above, the presence of a third party's DNA alone is not enough. Evidence that merely shows that someone other than the convicted person was also involved in the

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[285] *Id*.
[286] *See Asberry v. State*, 507 S.W.3d 227, 228–29 (Tex. Crim. App. 2016).
[287] *Dunning*, 572 S.W.3d at 685
[288] *Id.*
[289] *Id*. at 698.
[290] *See Bell*, 90 S.W.3d at 307; *Dunning*, 572 S.W.3d at 694–95.
[291] *Dunning*, 572 S.W.3d at 695.
[292] *Id*.
[293] *Id.* at 694 (citing Tex. Code Crim. Proc. Art. 64.04 (the convicting court shall "make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted")).
[294] See *LaRue*, 518 S.W.3d at 449 ("We agree with Appellant that the court of appeals failed to acknowledge and consider that if re-testing of Augustine's shirt revealed the presence of Pentecost's blood it would enhance the credibility of Appellant's testimony and one of Appellant's prior versions of events. But his DNA found under Pentecost's fingernails—which he does not contest—connects Appellant to this crime with 'unparalleled accuracy.' ").

crime does not exonerate the convicted person.[295] Even when the presence of a third party's DNA may tend to be exonerating, the convicted person's burden will not be satisfied "if the record contains other substantial evidence of guilt independent of that for which the convicted person seeks DNA testing."[296]

However, under some circumstances, the presence of DNA from a third party is so strongly exonerating that the convicted person's burden will be met despite the existence of other substantial inculpatory evidence.[297] The presence of a third party's DNA is so strongly exonerating when it is clear that the biological material in question was left by a lone assailant.[298]

## V. Tex. Code Crim. Pro. Art. 64.05. Appeals

Article 64.05 addresses the right to appeal of an order under Chapter 64. An appeal under Chapter 64 is to a court of appeals in the same manner as an appeal of any other criminal matter, except that if the convicted person was convicted in a capital case and was sentenced to death, the appeal is a direct appeal to the Court of Criminal Appeals.[299] As mentioned above, Article 44.01 was amended in 2003 to explicitly state that the State is entitled to appeal an order of a court under Chapter 64.[300]

There is no free-standing due-process right to DNA testing. In *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009), the Supreme Court of the United States declined the convicted person's claim that Alaska law governing procedures for postconviction relief did not violate the prisoner's due process rights, finding that "The task of establishing rules to harness DNA's power to prove innocence without unnecessarily overthrowing the established criminal justice system belongs primarily to the legislature."[301]

The Court of Criminal Appeals has also held that there is nothing unreasonable or unjust with the way Chapter 64 deals with requests for DNA testing.[302] First, there is no constitutional

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[295] *Hall*, 569 S.W.3d at 657–58; *LaRue*, 518 S.W.3d at 449.
[296] *Hall*, 569 S.W.3d at 657; *Swearingen*, 303 S.W.3d at 736. *See also Whitaker,* 160 S.W.3d at 9; *Rivera*, 89 S.W.3d at 60 ( [A]t best, a negative result from the rape kit could have a bearing on whether appellant and Zavala had sexual intercourse, but it would not indicate innocence of the capital murder of the child. Even if one concluded that negative test results supplied a very weak exculpatory inference, such an inference would not come close to outweighing appellant's confession. Not only did appellant admit to sexually assaulting and murdering the child, but his sexual assault admissions were also corroborated by autopsy results showing injury to the victim's anus. And although appellant claims that his confession was involuntary because it was beaten out of him, the convicting court found against him on that claim at trial, and he failed to raise such a claim on direct appeal or in his application for writ of habeas corpus.").
[297] *Hall*, 569 S.W.3d at 657; *Esparza v. State*, 282 S.W.3d 913, 922 (Tex. Crim. App. 2009) ("In sexual assault cases like this, any overwhelming eye-witness identification and strong circumstantial evidence ... supporting guilt is inconsequential when assessing whether a convicted person has sufficiently alleged that exculpatory DNA evidence would prove his innocence.").
[298] *Id*.
[299] Tex. Code Crim. Proc. Art. 64.05; *Sisk v. State*, 131 S.W.3d 492, 497 (Tex. Crim. App. 2004).
[300] Tex. Code Crim. Proc. Art. 44.01(a)(6).
[301] *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 61, 129 S. Ct. 2308, 2316, 174 L. Ed. 2d 38 (2009).
[302] *Prible*, 245 S.W.3d at 470.

right to post-conviction DNA testing in order to determine the presence of a third-party's DNA.[303] Additionally, Chapter 64 does not exclude all evidence of third-party guilt.[304] To the contrary, Chapter 64 proscribes testing if additional DNA testing would result in exculpatory evidence that would have altered the outcome of the trial, whether from a third-party or otherwise.[305]

Chapter 64.05 does not explicitly state which issues are appealable and which are not. In *Gutierrez v. State*, 307 S.W.3d 318 (Tex. Crim. App. 2010), the Court of Criminal Appeals found that an order refusing to appoint counsel is not immediately appealable.[306] The nature of Chapter 64 findings also places courts of appeals in an odd position. Chapter 64 does not provide the convicted person with any sort of remedy, as a positive finding is a precursor to a subsequent filing for habeas relief.[307] In *State v. Holloway*, 360 S.W.3d 480 (Tex. Crim. App. 2012), the Court of Criminal Appeals wrote that the court of appeals opinion with respect to the sufficiency of the evidence to support the convicting court's favorable finding under Chapter 64.04 was "advisory in nature," and that "[r]esolution of such a question should await such time as an applicant may seek post-conviction habeas corpus relief."[308]

It is clear that the convicted person may appeal if the convicting court refuses to order testing. That same convicted person may also appeal if, after successfully appealing and obtaining testing, the convicting court determines that the convicted person has not proven by a preponderance of the evidence that they would not have been convicted.[309] The court of appeals may also review the sufficiency of the evidence to support the convicting court's finding under Chapter 64.04.[310] However, the court of appeals has no jurisdiction over claims that the convicted person is entitled to relief from conviction.[311]

Article 44.01 provides the State the right to appeal all orders issued under Chapter 64, so long as the appeal is actually brought on an order under Chapter 64.[312] In *State v. Patrick*, 86 S.W.3d 592 (Tex. Crim. App. 2002), the convicted person filed for testing under Chapter 64.[313] Although there was overwhelming evidence that convicted person murdered the victim, he requested testing because he could not remember the murder.[314] The convicting court denied the request under the statute but, separately, entered an order *granting* DNA testing that explicitly stated that the convicted person failed to meet the requirements of Chapter 64.[315] The State appealed the convicting court's order, and filed an application for writ of mandamus.[316] While the Court of Criminal Appeals found that nothing in Article 44.01 or Article 64.05 would authorize an

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[303] *Id*. at 469.
[304] *Id*. at 469.
[305] *Id*.
[306] *Gutierrez v. State*, 307 S.W.3d 318 (Tex. Crim. App. 2010)
[307] *Holloway*, 360 S.W.3d at 490.
[308] *Id*.
[309] *Fuentes v. State*, 128 S.W.3d 786 (Tex. App.—Amarillo 2004, pet. ref'd); *Whitfield v. State*, 430 S.W.3d 405 (Tex. Crim. App. 2014).
[310] *Whitfield*, 430 S.W.3d at 409.
[311] *Lopez,* 114 S.W.3d at 714–15.
[312] *Patrick*, 86 S.W.3d at 594 (Tex. Crim. App. 2002).
[313] *Id*. at 593
[314] *Id*. at 593-594.
[315] *Id.*
[316] *Id. at 594.*

appeal under these circumstances, as the State was not complaining about the findings under Chapter 64, and the convicting court's order was implicitly outside of Chapter 64.[317] On further analysis the court found that the appropriate remedy was mandamus action, ordering the convicting court to vacate its order.[318]

As an appeal under Chapter 64 is treated in the same manner as an appeal of any other criminal matter, the ordinary rules of appellate procedure apply.[319] Notice of appeal from an order denying a motion under Chapter 64 must be filed within 30 days of entry of that order, regardless of other motions in the case pending before the convicting court.[320] Under Tex. R. App. P. 4.6 (No Notice of Convicting court's Appealable Order on a Motion for Forensic DNA Testing), the convicting court may grant a motion for additional time to appeal by a convicted person adversely affected by an appealable order under Chapter 64.[321] The motion must be in writing, sworn, and filed in the convicting court within 120 days of the signing of the order, and it must state that the convicted person desires to appeal and specify the earliest day when the convicted person received notice or acquired actual knowledge that the trial judge signed the order.[322] If the convicting court finds that the earliest notice or actual knowledge date was more than 20 days after the signing of the order, the judge may enter an order granting additional time to file notice of appeal.[323] The motion itself may serve as the convicted person's notice of appeal.[324] The time for filing notice of appeal then runs from the date the order specifies is the earlier date the convicted person or the convicted person's attorney received notice or acquired actual knowledge. Under Rule 4.6, this time may not begin to run from a date more than 120 days after the date the trial judge signed the Chapter 64 order.[325]

When appeal is authorized, courts of appeal apply a bifurcated standard of review to Article 64.04 favorability findings.[326] In *Rivera v. State*, 89 S.W.3d 55 (Tex. Crim. App. 2002), the Court of Criminal Appeals wrote that the court will "afford almost total deference to a convicting court's determination of issues of historical fact and application-of-law-to-fact issues that turn on credibility and demeanor," whiling reviewing "*de novo* other application-of-law-to-fact issues."[327] In the event that the convicting court does not enter separate findings on a Chapter 64.04 hearing, then the appellate court implies findings necessary to support the ruling so long as they are reasonably supported by the record.[328]

For appointed appellate counsel, filing an *Anders* brief may be appropriate. In *Murphy v. State*, 111 S.W.3d 846 (Tex. App.—Dallas 2003, no pet.), the convicting court's order, denying testing under Chapter 64, was based on findings that there was no biological evidence in the State's

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[317] *Id.*
[318] *Id*. at 597.
[319] *Swearingen v. State*, 189 S.W.3d 779, 781 (Tex. Crim. App. 2006).
[320] *Id*.
[321] Tex. R. App. P. 4.6.
[322] Tex. R. App. P. 4.6(b)(1).
[323] Tex. R. App. P. 4.6(c).
[324] Tex. R. App. P. 4.6(b)(3).
[325] Tex. R. App. P. 4.6(a).
[326] *Dunning*, 572 S.W.3d at 692; *Holberg*, 425 S.W.3d at 284–85; *Reed*, 541 S.W.3d at 769.
[327] *Rivera*, 89 S.W.3d at 55.
[328] *Id*. (citing *Guzman v. State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997)); *LaRue*, 518 S.W.3d at 446.

possession at the time of trial that was collected in relation to the offense for which appellant was convicted.[329] Appellant's attorney filed an *Anders* brief, in which she concluded the appeal was wholly frivolous and without merit.[330] The Court of Appeals reasoned that appointed counsel could find themselves in situation where the appeal is frivolous, but counsel still has a professional duty to protect the appellant's right to appeal.[331] Therefore, the court concluded, *Anders* should be extended to proceedings under Chapter 64.[332]

After the appeal of the finding on the motion, the convicted person may file a subsequent motion under Chapter 64. There is no apparent procedural bar to multiple subsequent motions for DNA testing under Chapter 64. However, Chapter 64 proceeds are subject to "law of the case," where the court must respect determinations made in prior proceedings under Chapter 64.[333]

# VI. Tex. Code Crim. Pro. Art. 11.073. Procedure related to certain scientific evidence

Since this paper was originally drafted in 2020, claims under Article 11.073 have only become more common. Judge Hervey's concurrence in *Ex parte Hightower*, 622 S.W.3d 371 (Tex. Crim. App. 2021), pointed out that many applicants who raise an Article 11.073 "junk science claim" will also raise a false-evidence claim.[334] Judge Hervey noted that the jurisprudence of the Court of Criminal Appeals suggest that the definitiveness of the scientific testimony is of paramount importance, and the scientific trial testimony was definitive, and the new evidence wholly refutes that testimony, that testimony was false.[335]

The Court's per curium opinion in *Ex parte Broxton*, 664 S.W.3d 256 (Tex. Crim. App. 2022) notes that Article 11.073 to applying to relevant scientific evidence that was not available to be offered by the defendant at trial, or that contradicts scientific evidence relied on by the State at trial. Art. 11.073(a).[336] Prior to the enactment of article 11.073, newly available scientific evidence per se generally was not recognized as a basis for habeas corpus relief and could not have been reasonably formulated from a final decision of this Court or the United States Supreme Court, unless it supported a claim of "actual innocence" or "false testimony."[337] Passed in 2013, Article 11.073 provides a new legal basis for habeas relief in the small number of cases where the applicant can show by the preponderance of the evidence that he or she would not have been convicted if the newly available scientific evidence had been presented at trial.[338] Article 11.073 integrates many aspects of Chapter 64 into post-conviction habeas.[339] Both Chapter 64 and Article 11.073 are remedial statutes that concern scientific evidence, and the presence of identical

[329] *Murphy v. State*, 111 S.W.3d 846, 847 (Tex. App.—Dallas 2003, no pet.).
[330] *Id*.
[331] *Id.*
[332] *Id.* at 847-848.
[333] *State v. Swearingen*, 478 S.W.3d 716, 721 (Tex. Crim. App. 2015).
[334] *Ex parte Hightower*, 622 S.W.3d 371, 372 (Tex. Crim. App. 2021).
[335] *Id.* at 375.
[336] *Ex parte Broxton*, 664 S.W.3d 256, 257 (Tex. Crim. App. 2022).
[337] *Ex Parte Robbins*, 478 S.W.3d 678, 689 (Tex. Crim. App. 2014).
[338] *Id*. at 690.
[339] PROCEDURE FOR AN APPLICATION FOR A WRIT OF HABEAS CORPUS BASED ON RELEVANT SCIENTIFIC EVIDENCE, 2013 Tex. Sess. Law Serv. Ch. 410 (S.B. 344) (VERNON'S).

standards of proof in both statutes suggests that the legislature contemplated that these statutes would sometimes work together.[340] The Court of Criminal Appeals has held that Article 11.073 provides a new legal basis for habeas relief in the small number of cases where an applicant can show by a preponderance of the evidence that he would not have been convicted if the newly available scientific evidence had been presented at trial.[341]

Additionally, and importantly, an applicant also must establish that the facts he alleges are at least minimally sufficient to bring him within the ambit of Article 11.073.[342] In 2014, *Ex Parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014), raised the issue of whether Article 11.073 could be invoked by evidence that a State expert witness from the original trial had gained experience and information, such that the expert now believed that the testimony given at trial was incorrect.[343] The Court of Criminal Appeals found that "scientific knowledge," as used in Article 11.073(d) applies to the knowledge of an individual witness as well as the scientific community generally.[344]

Consistent with this holding, the Legislature amended Article 11.073(d) in 2015, to read that: "[i]n making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed[.]"[345] While such a specific testifying expert's own personal scientific knowledge seems unlikely in the context of Chapter 64, this amendment serves as an indication of the evolving nature of this statute and the legislative approach to forensic evidence. Given the nature of the statute, it logically follows that Article 11.073 can be a new legal basis under Article 11.07, § 4(a)(1) for a subsequent application.[346] For purposes of Section 4(a)(1), Article 11.07, Section 5(a)(1), Article 11.071, and Section 9(a), Article 11.072, a claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application, as applicable, was filed.[347]

There are many similarities between Chapter 64 and Article 11.073. As with motions under Chapter 64, claims made under Article 11.073 do not apply to the punishment phase of trial.[348] The analysis on this point is much the same. An applicant must show that, had the evidence been available, the applicant would not have been convicted.[349] Article 11.073 does not

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[340] *White*, 506 S.W.3d at 44.
[341] *Broxton*, 664 S.W.3d at 257 (citing *Robbins*, 478 S.W.3d at 690).
[342] *Robbins*, 478 S.W.3d at 690.
[343] *Id*.
[344] *Id.* at 691–92.
[345] CONSIDERATION OF CERTAIN SCIENTIFIC EVIDENCE CONSTITUTING THE BASIS FOR AN APPLICATION FOR A WRIT OF HABEAS CORPUS, 2015 Tex. Sess. Law Serv. Ch. 1263 (H.B. 3724) (VERNON'S).
[346] *Robbins*, 478 S.W.3d at 689; *Kussmaul*, 548 S.W.3d at 633 (Tex. Crim. App. 2018).
[347] Tex. Code Crim. Pro. Art. 11.073.
[348] *See White,* 506 S.W.3d at 39.
[349] *Id*.

apply if the applicant establishes only that he or she would have received a less severe penalty.[350] The burden of proof on Chapter 64 lies solely on the convicted person, just as it does on habeas. An applicant must plead and prove facts which entitle him to relief and he must prove his claim by a preponderance of the evidence.[351] An applicant must show, or at least allege, the detailed facts which give rise to and compel each legal conclusion that entitles him to relief.[352]

While an actual innocence claim requires proof by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence, the standard for relief under Article 11.073 is showing by a mere preponderance of the evidence that an applicant would not have been convicted if exculpatory DNA results are obtained.[353] The fact that Article 11.073 affords an avenue for relief under the preponderance standard is significant, and the practical result of the coinciding standards is that a favorable Chapter 64 finding can result in habeas corpus relief.[354]

The results of the convicted person's Chapter 64 may not be enough to satisfy the burden of clear and convincing evidence of actual innocence on habeas.[355] In *Ex Parte Holloway*, 413 S.W.3d 95 (Tex. Crim. App. 2013), a knife, recovered from the convicted person's car, had been tested and the victim was excluded as a possible source of, or contributor to, the DNA profile obtained from the knife.[356] An Article 64.04 hearing had been conducted, and the convicting court recommended granting actual innocence relief.[357] On habeas, the Court of Criminal appeals noted the burden placed on an applicant in a claim of actual innocence, to "show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."[358] The Court of Criminal Appeals found that there was ample "intangible" evidence that the convicted person committed the offenses, considering that he stabbed multiple people with *a* knife on the night of the offense, and the jury heard testimony of people who saw the convicted person stab people, and testimony from people who were themselves stabbed.[359] For those reasons, the results of the convicted person's Chapter 64 did not show by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence.[360]

The Court of Criminal Appeals provided a guide to analysis of Article 11.073 in *Ex parte Kussmaul*, 548 S.W.3d 606 (Tex. Crim. App. 2018).[361] Post-conviction DNA testing had excluded

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[350] *Id*. at 43-44; *Kussmaul,* 548 S.W.3d at 606.
[351] *Ex parte Rains*, 555 S.W.2d 478 (Tex. Crim. App. 1976).
[352] *Ex parte Hogan*, 556 S.W.2d 352 (Tex. Crim. App. 1977)
[353] *See Ex parte Harleston*, 431 S.W.3d 67, 70 (Tex. Crim. App. 2014) ("To prevail in a freestanding claim of actual innocence, an applicant must prove by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence.") (internal quotation marks omitted). *See also Robbins*, 478 S.W.3d at 690 ("Prior to the enactment of article 11.073, newly available scientific evidence per se generally was not recognized as a basis for habeas corpus relief and could not have been reasonably formulated from a final decision of this Court or the United States Supreme Court, unless it supported a claim of 'actual innocence' or 'false testimony.' ").
[354] *White*, 506 S.W.3d at 44; *Kussmaul*, 548 S.W.3d at 634 (citing Tex. Crim. Proc. Code § 11.073).
[355] *Ex Parte Holloway*, 413 S.W.3d 95, 98 (Tex. Crim. App. 2013).
[356] *Id*.
[357] *Id*. at 96-97
[358] *Id*. at 97 (citing *Ex parte Elizondo*, 947 S.W.2d 202, 206 (Tex.Crim.App.1996)).
[359] *Id*. at 98.
[360] *Id*. at 98.
[361] *Kussmaul*, 548 S.W.3d at 634 (Tex. Crim. App. 2018),

Kussmaul and his three co-defendants as the contributors to semen collected at the crime scene, and revealed the genetic profiles of two unidentified males.[362] On habeas, the three co-defendants recanted their inculpatory statements and their testimony at Kussmaul's trial, and the habeas court recommended relief on 11.073 and actual innocence grounds.[363] The court analyzed Article 11.073, and pointed out that that statute and Chapter 64 were designed to work together, with Article 11.073 affording an avenue for relief under the same standard required for a favorable Chapter 64 finding.[364] As mentioned above, the practical result of the coinciding standards is that a favorable Chapter 64 finding, so long as it is agreed with by the Court of Criminal Appeals, can result in habeas corpus relief.[365]

The three co-defendants who testified against Kussmaul also testified at the habeas hearing, and told the convicting court that they would not have pled guilty and would not have testified against Kussmaul if they had known of exculpatory DNA test results.[366] The court also noted a gap in time between when the co-defendants testified about what happened in trial, and the physical evidence in the case.[367] These issues called into question the reliability of the result at trial.[368] The court ultimately agreed that the Kussmaul and the three co-defendants were entitled to relief under Article 11.073, but disagreed with the convicting court's recommendation as to actual innocence.[369] The court also noted that "actual innocence," only applies in circumstances in which the accused did not, in fact, commit the charged offense or any of the lesser-included offenses, and the court expanded that definition to include any greater offenses as well.[370] The four had proved by a preponderance of the evidence that the outcome of the trial would be different, but they had not proved by clear and convincing evidence that they did not perpetrate the charged, lesser-included, or greater offenses.[371]

In analyzing the Article 11.073 claim in *Kussmaul*, the Court of Criminal Appeals noted that the statute applies to relevant scientific evidence that: (1) was not available to be offered by a convicted person at the convicted person's trial; or (2) contradicts scientific evidence relied on by the state at trial.[372]

> Relief can be granted under Article 11.073 upon a threefold showing that:
> 1. relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and
> 2. the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and

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[362] *Id.* at 609–10.
[363] *Id*. at 610.
[364] *Id.*
[365] *Id*.
[366] *Id*. at 636.
[367] *Id*.
[368] *Id*.
[369] *Id*. at 641.
[370] *Id*.
[371] *Id*.
[372] *Id*. at 634; Tex. Code Crim. Pro. Art. 11.073(a)(1).

3. had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.[373]

These guidelines serve as a checklist for analysis for habeas claims of changed or newly discovered scientific evidence. If the successful Chapter 64 proceedings provide the convicted person with evidence that was not available to be offered at the convicted person's trial, or contradicts the evidence relied on by the State at trial, then a claim under Article 11.073 can provide the appropriate avenue for relief.[374] If you preparing to litigate an Article 11.073 claim, please consider the array of options available under both Articles 11.07, 11.073, and Art. 11.071 if applicable. Additionally, and importantly: please avail yourself of Judge Hervey's concurring opinion in *Ex parte Hightower*, discussing junk science, false and problematic testimony, and the interplay between the two.

## Conclusion

This is an excellent time for post-conviction practice in Texas. More than two decades after its enactment, Chapter 64 continues to evolve to meet the needs of the criminal justice community. Additionally, and importantly, the enactment and amendments to Article 11.073 illustrate a willingness to accept that science and expert opinions can change with time.

It is my sincere hope that you have found this summation of Chapter 64 and its history useful. If you have any questions regarding motions for forensic testing under Chapter 64, or applications for writs of habeas corpus under 11.073 or otherwise, please do not hesitate to contact me.

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[373] *Id.*
[374] *Id*. at 634; Tex. Code Crim. Pro. Art. 11.073(a)(1).