

**ITEM 14**  
**FINAL STAFF ANALYSIS**  
**PROPOSED PARAMETERS AND GUIDELINES**

Penal Code Sections 1405 and 1417.9

Statutes 2000, Chapter 821; Statutes 2001, Chapter 943

*Post Conviction: DNA Court Proceedings*  
00-TC-21, 01-TC-08

County of Los Angeles, Claimant

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**EXECUTIVE SUMMARY**

On July 28, 2006, the Commission on State Mandates (Commission) adopted a Statement of Decision finding that the test claim legislation imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to perform the following activities:

- **Representation and investigation by indigent defense counsel:** Effective January 1, 2001, for indigent defense counsel investigation of the DNA-testing and representation of the convicted person (except for drafting and filing the DNA-testing motion) (Pen. Code, § 1405, subd. (c), as added by Stats. 2000, ch. 821).
- **Prepare and file motion for DNA testing & representation by indigent defense counsel:** Effective January 1, 2002, if the person is indigent and has met the statutory requirements, and if counsel was not previously appointed by the court, prepare and file a motion for DNA testing, if appropriate (Pen. Code, § 1405, subds. (a) & (b)(3)(A)). Also, provide notice of the motion to “the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested”(Pen. Code, § 1405, subd. (c)(2)).
- **Prepare and file response to the motion:** Effective January 1, 2001, prepare and file a response to the motion for testing, if any, by the district attorney “within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause” (Pen. Code, § 1405, subd. (c)(2)).
- **Provide prior test lab reports and data:** Effective January 1, 2001, when the evidence was subjected to DNA or other forensic testing previously, for either the prosecution or defense, whichever previously ordered the testing, to provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the indigent defense counsel and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).

- **Writ review:** Effective January 1, 2001, prepare and file petition, or response to petition, for writ review by indigent defense counsel and the district attorney of the trial court's decision on the DNA-testing motion (Pen. Code, § 1405, subd. (j)).
- **Retain biological material:** Effective January 1, 2001, retain all biological material that is secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)).

The Commission found that all other statutes in the test claim, including holding a hearing on the DNA-testing motion pursuant to Penal Code section 1405, subdivision (e), as well as appointment of counsel when counsel was previously appointed and disposal of the biological material before the convicted person's release from prison (Pen. Code, § 1417.9, subd. (b)), are not a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514.

## **Discussion**

Staff reviewed the proposed parameters and guidelines and the comments received. Non-substantive, technical changes were made for purposes of clarification, consistency with language in recently adopted parameters and guidelines, and conformity to the Statement of Decision and statutory language.

Substantive changes were made to the following sections of the proposed parameters and guidelines. Commission staff issued a draft staff analysis on March 16, 2007. The claimant submitted comments on April 11, 2007, and DOF submitted comments on April 17, 2007. All comments are addressed in the analysis.

### *IV. Reimbursable Activities*

On August 24, 2006, the claimant submitted its proposed parameters and guidelines, in which the reimbursable activities were grouped into the following categories: Indigent Defense Counsel and District Attorney, Retention of Biological Material, and Inmate Custody and Transportation.

#### Indigent Defense Counsel and District Attorney

Under this category, there are six primary activities: 1) representation of indigent convicted person and investigation, 2) prepare and file motion for DNA-testing, 3) prepare and file response to the motion, 4) provide prior test lab reports and data, 5) agree on a DNA lab, and 6) writ review. Under each primary activity, the claimant proposed a number of additional activities that it asserts are reasonably necessary to carry out the mandate. For the reasons stated in the analysis, staff only included those activities that are consistent with the Statement of Decision and those that were justified in the record to be the most reasonable methods of complying with the six primary activities.

#### Retention of Biological Material

The Statement of Decision included the activity of retaining biological material that is secured in connection with a felony case, and the claimant proposed a number of additional one-time and ongoing activities that it believes are reasonably necessary to implement this activity. For the reasons stated in the analysis, staff limited the reimbursable activities to those that were justified in the record to be the most reasonable methods of complying with the mandate to retain biological material in a condition suitable for DNA testing.

Moreover, staff clarified that retention of biological material that is secured in connection with a felony case, and is introduced into court as an exhibit in the criminal action or proceeding, is reimbursable only after the criminal action or proceeding becomes final pursuant to Penal Code section 1417.1, and for the period of time that any person remains incarcerated in connection with that case.

Even if the biological material secured in connection with a felony case is not introduced in court as an exhibit in the criminal action or proceeding, reimbursement is not required for the retention of biological material *until after* the criminal action or proceeding becomes final. The purpose of the test claim statute is to provide for “post-conviction discovery” of material in connection with a criminal case to assist a convicted felon who “is currently serving a term of imprisonment” in filing a motion for DNA testing, following the conviction, pursuant to Penal Code section 1405 (Pen. Code, §§ 1405, subd. (a), and 1417.9).

#### Inmate Custody and Transportation

The claimant proposed reimbursement for “the costs of transporting and housing state prisoners during the course of their DNA post-conviction proceedings, based on a local jurisdiction’s approved California Department of Corrections and Rehabilitation daily jail rates and mileage rates.” The Commission specifically found that a hearing on the DNA motion is a court mandate on the district attorney and indigent defense counsel, and therefore, is not subject to article XIII B, section 6. Accordingly, staff did not include inmate custody and transportation as a reimbursable activity.

#### Documentation

Claimants may use time studies to support reimbursement claims in lieu of certain documentation. Since many of the proposed activities here are repetitive in nature, staff finds that using time studies to support costs may be appropriate for this program. Thus, staff included the following language under section IV:

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Time study usage is subject to the review and audit conducted by the State Controller’s Office.

#### *V. Claim Preparation and Submission*

The claimant submitted a proposed reimbursement methodology for this program. Staff reviewed the claimant’s proposed methodology and concluded that it is not a reasonable reimbursement methodology as defined in Government Code section 17518.5, subdivision (a). Therefore, staff recommends that actual costs be claimed for this program.

#### *VII. Offsetting Revenues and Reimbursements*

Staff added under this section that any Office of Criminal Justice Planning grants or other grant funding from a successor agency shall be identified and deducted from reimbursement claims.

**Staff Recommendation**

Staff recommends that the Commission adopt the proposed parameters and guidelines, beginning on page 21.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

## Claimant

County of Los Angeles

## Chronology

07/28/06	Commission on State Mandates (Commission) adopted Statement of Decision
08/07/06	Commission staff issued draft parameters and guidelines
08/24/06	Claimant submitted its proposed parameters and guidelines
10/25/06	The Department of Finance (DOF) submitted comments
03/16/07	Commission staff issued the draft staff analysis
04/11/07	Claimant submitted comments on the draft staff analysis
04/17/07	DOF submitted comments on the draft staff analysis
05/17/07	Commission staff issued the final staff analysis

## Summary of the Mandate

On July 28, 2006, the Commission adopted a Statement of Decision finding that the test claim legislation imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to perform the following activities:

- **Representation and investigation by indigent defense counsel:** Effective January 1, 2001, for indigent defense counsel investigation of the DNA-testing and representation of the convicted person (except for drafting and filing the DNA-testing motion) (Pen. Code, § 1405, subd. (c), as added by Stats. 2000, ch. 821).
- **Prepare and file motion for DNA testing & representation by indigent defense counsel:** Effective January 1, 2002, if the person is indigent and has met the statutory requirements, and if counsel was not previously appointed by the court, prepare and file a motion for DNA testing, if appropriate (Pen. Code, § 1405, subs. (a) & (b)(3)(A)). Also, provide notice of the motion to “the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested” (Pen. Code, § 1405, subd. (c)(2)).
- **Prepare and file response to the motion:** Effective January 1, 2001, prepare and file a response to the motion for testing, if any, by the district attorney “within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause” (Pen. Code, § 1405, subd. (c)(2)).
- **Provide prior test lab reports and data:** Effective January 1, 2001, when the evidence was subjected to DNA or other forensic testing previously, for either the prosecution or defense, whichever previously ordered the testing, to provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the indigent defense counsel and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).

- **Writ review:** Effective January 1, 2001, prepare and file petition, or response to petition, for writ review by indigent defense counsel and the district attorney of the trial court's decision on the DNA-testing motion (Pen. Code, § 1405, subd. (j)).
- **Retain biological material:** Effective January 1, 2001, retain all biological material that is secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)).

The Commission found that all other statutes in the test claim, including holding a hearing on the DNA-testing motion pursuant to Penal Code section 1405, subdivision (e), as well as appointment of counsel when counsel was previously appointed and disposal of the biological material before the convicted person's release from prison (Pen. Code, § 1417.9, subd. (b)), are not a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514.

## **Discussion**

Staff reviewed the proposed parameters and guidelines and the comments received. Non-substantive, technical changes were made for purposes of clarification, consistency with language in recently adopted parameters and guidelines, and conformity to the Statement of Decision and statutory language.

Substantive changes were made to the following sections of the proposed parameters and guidelines. Commission staff issued a draft staff analysis on March 16, 2007. The claimant submitted comments on April 11, 2007, and DOF submitted comments on April 17, 2007. All comments are addressed below.

### *IV. Reimbursable Activities*

On August 7, 2006, Commission staff issued draft parameters and guidelines based on the specific activities approved in the Statement of Decision. The claimant was asked to file modifications and/or comments on the proposal. On August 24, 2006, the claimant submitted its proposal, in which the reimbursable activities were grouped into the following categories: Indigent Defense Counsel and District Attorney, Retention of Biological Material, and Inmate Custody and Transportation.

#### Indigent Defense Counsel and District Attorney

Under this category, there are six primary activities: 1) representation of indigent convicted person and investigation, 2) prepare and file motion for DNA-testing, 3) prepare and file response to the motion, 4) provide prior test lab reports and data, 5) agree on a DNA lab, and 6) writ review. Each will be discussed below.

1. *Representation of indigent convicted person and investigation.* Under the primary activity of investigating the DNA-testing and representing the indigent convicted person, the claimant proposed the following additional activities as reasonably necessary to carry out the activity:<sup>1</sup>

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<sup>1</sup> Section 1183.1, subdivision (a)(4), of the Commission's regulations authorizes the Commission to include the "most reasonable methods of complying with the mandate" in the parameters and guidelines. The "most reasonable methods of complying with the mandate" are "those methods not specified in statute or executive order that are necessary to carry out the mandated program."

- “Development and Procedure – preparing protocols, administrative forms, meeting with SB 90 advisor and one-time activities associated with setting up this unit.”

Staff finds that preparing protocols and administrative forms, meeting with the SB 90 advisor, and other “one-time” activities associated with setting up the unit are too broad to be included as activities that are reasonable methods of complying with the mandate to represent and investigate. Also, staff notes that other “one-time activities” should be specifically identified. Therefore, staff did not include any of the claimant’s proposed development and procedure activities.

- “Initial Contact – writing or responding to initial correspondence from inmates, attorneys, or others seeking information regarding Penal Code section 1405 and 1417.9.”

Staff finds that this proposed activity is worded too broadly because it is unclear who the “others seeking information” might include. Therefore, staff limited this activity to writing to or responding to initial correspondence from convicted persons and their attorneys seeking information regarding Penal Code section 1405. This activity was also limited to Penal Code section 1405 because the primary activity is pursuant to Penal Code section 1405. A similar activity is included under activity B. Retention of biological material, which is pursuant to Penal Code section 1417.9.

- “Investigating Claims – reading letters from inmates or those writing on behalf of inmates; retrieving court files, public defender files, and appellate counsel files; reviewing files; researching legal, technical and scientific issues; interviewing witnesses; subpoenaing records; and preparing to write a motion pursuant to Penal Code section 1405. Meeting with clients (inmates) in person or on the telephone as well as written consultation.”

In its comments dated October 23, 2006, DOF agreed that this proposed activity is consistent with the Statement of Decision.

Staff finds that these activities are reasonable methods of complying with the mandate to represent and investigate, but notes that “preparing to write a motion pursuant to Penal Code section 1405” falls under the second primary activity, which is reimbursable as of January 1, 2002. Therefore, staff did not include this activity under “Representation of indigent convicted person and investigation.”

In response to the draft staff analysis, the claimant requested that additional indigent defense counsel activities be included as part of the primary activities of investigating the DNA-testing and representing the indigent convicted person, as follows:

- “viii) To prepare and file a declaration of innocence within 180 days of the judgment of conviction as required by Penal Code section 1417.9.
- ix) To search for DNA evidence which cannot be readily retrieved, including the costs of going to the agency’s storage facility, and with the help of a storage agency representative, either locating the lost evidence or locating documentation which demonstrates that the evidence has been destroyed.”

The claimant contends that the additional activities are reasonably necessary to carry out the legislation. To support its contention, the claimant submitted another declaration by

Jennifer Friedman, lawyer and forensic science coordinator with the Los Angeles County Public Defender's Office.<sup>2</sup>

Staff finds that filing a declaration of innocence within 180 days of the judgment of conviction pursuant to Penal Code section 1417.9, subdivision (b)(2)(C), is not a reimbursable activity. Penal Code section 1417.9 lists the notice provisions which, if accompanied by a lack of a timely response as specified, would authorize the local entity to dispose of the biological material collected. The Commission specifically found that "this statute authorizes but does not require the local entity to dispose of the biological material before the convicted person's release from prison, [and thus,] the Commission finds that doing so is not subject to article XIII B, section 6."<sup>3</sup> Therefore, staff did not include the proposed activity of filing a declaration of innocence pursuant to Penal Code section 1417.9, subdivision (b)(2)(C).

Regarding the proposed activity to search for DNA evidence, staff finds that it is a reasonable method of complying with the mandate to represent and investigate and added it as a reimbursable activity. However, staff moved this activity under "Retention of Biological Material; Responding to Request for Biological Evidence..." to align like activities.

2. *Prepare and file motion for DNA-testing.* Under the primary activity of preparing and filing a motion for DNA-testing and representation, the claimant proposed the following additional activities as reasonably necessary to carry out the primary activity:

- "Preparing Motions – includes preparing motions pursuant to Penal Code section 1405 and responding to notices sent pursuant to Penal Code section 1417.9."

DOF agreed that preparing motions pursuant to Penal Code section 1405 is consistent with the Statement of Decision.

However, staff notes that preparing motions is the primary activity and does not need to be restated as an additional activity. Also, staff finds that indigent defense counsel responding to notices sent pursuant to Penal Code section 1417.9 conflicts with the Commission's finding that notifying persons convicted of felonies about the disposal of biological evidence pursuant to Penal Code section 1417.9, subdivision (b), does not constitute a reimbursable state-mandated activity.<sup>4</sup> Therefore, staff did not include it as a reimbursable activity.

- "Travel – travel related expenses associated with meeting with inmate in connection with preparation of 1405 motion. Travel to and from local court houses for purposes of litigating 1405 motions."

DOF also agreed that travel related expenses associated with preparing and filing motions are consistent with the Statement of Decision.

However, staff finds that travel costs are a direct cost that may be incurred as a result of preparing motions pursuant to Penal Code section 1405. Therefore, such costs may be claimed accordingly (see section V.A.5 of the parameters and guidelines). Staff did not include travel as a separate reimbursable activity.

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<sup>2</sup> Exhibit E, pages 278-279.

<sup>3</sup> Exhibit A, page 125.

<sup>4</sup> Exhibit A, page 125.

3. *Prepare and file response to the motion.* Under the primary activity of preparing and filing a response to the motion, the claimant proposed the following additional activity as reasonably necessary to comply with the activity:

- “Meet and Confer – consultation and meetings with the trial attorneys, appellate counsel, members of the Alternate Public Defender’s Innocence Unit, the Post Conviction Center, the DA’s Office, the Attorney General, and individuals from other Innocence Projects.”

Staff finds that this activity is a reasonable method of complying with the mandate to prepare and file a response to the motion; however, staff limited this activity to meetings and consultation about DNA-testing for the convicted person, and clarified that consultations and meetings may be with trial attorneys, appellate counsel, members of the Alternate Public Defender’s Innocence Unit, the Post Conviction Center, the district attorney’s office, the Attorney General, *or* individuals from other Innocence Projects.

In its comments to the draft staff analysis, the claimant also proposed additional activities associated with filing a response to the motion, as follows:

...reviewing the file and the trial transcript; interviewing the trial attorney, investigating officer, criminalist; and performing other investigative activities necessary in order to respond to the inmate’s motion.

Staff finds that these activities are reasonable methods of complying with the mandate to prepare and file a response to the motion. Therefore, staff added the following activities under activity IV.A.3:

- ii) Reviewing the file and trial transcript.
- iii) Interviewing persons who worked on the criminal conviction, such as the trial attorney, investigating officer, or criminalist.
- iv) Performing other investigative activities necessary to respond to the inmate’s motion.

4. *Provide prior test lab reports and data.* Under the primary activity of providing prior test lab reports and data, the claimant proposed the following additional activity as reasonably necessary to comply with the activity:

- “DNA Source Identification and Tracking – meeting with judges, clerks, law enforcement personnel regarding preservation of evidence and locating evidence, touring law enforcement labs and storage facilities.”

DOF commented that this additional activity exceeds the scope of the activity contained in the Statement of Decision.

Staff finds that this proposed activity needs further justification because it is unclear how meetings and the touring of facilities are the most reasonable methods of complying with the mandate to provide prior test lab reports and data. Therefore, staff did not include it as a reimbursable activity.

Following the activity to provide prior test lab reports and data, staff specifically noted that reimbursement is not required for the time spent by the indigent defense counsel and district attorney at a hearing on the motion for DNA-testing pursuant to Penal Code section 1405, subdivision (e).

In its comments to the draft staff analysis, the claimant argues that “the basis for excluding time spent on an evidentiary hearing as a reimbursable activity appears erroneous. In an analogous context, [habeas corpus], prosecutors are reimbursed for time spent in evidentiary hearings.”<sup>5</sup> Staff notes that the Commission is bound by the Statement of Decision, in which the Commission found that a hearing on the DNA motion is a court mandate (not a state mandate) on the indigent defense counsel and the district attorney, and are therefore not subject to article XIII B, section 6.<sup>6</sup> The Commission does not have jurisdiction to change the final Statement of Decision, absent a court order (Gov. Code, § 17559).

5. *Agree on a DNA lab.* Under the primary activity of agreeing on a DNA lab, staff noted that reimbursement is only required for the district attorney’s time in non-capital punishment cases because Penal Code section 1405, subdivision (g)(2), specifically states: “[t]he testing shall be conducted by a laboratory mutually agreed upon by the district attorney *in a noncapital case*, or the Attorney General in a capital case, and the person filing the motion.” [Emphasis added.]

The claimant proposed the following additional activity as reasonably necessary to comply with the activity to agree on a DNA lab, if the court grants the motion for DNA-testing:

- “DNA Testing Modality Selection – travel, lodging, and related expenses associated with research and becoming conversant in newly developed technological advances in the field of DNA analysis.”

DOF asserted that travel and lodging costs should not be reimbursable.

Staff finds that this proposed activity is overly broad and needs further justification. Therefore, staff did not include it as a reimbursable activity.

6. *Writ review.* The claimant proposed the following additional activity as reasonably necessary to comply with the primary activity to prepare and file the petition for writ of mandate or prohibition to appeal the trial court’s order on motion for DNA-testing, or to respond to the petition for writ of mandate or prohibition:

- “Court – time spent in court, including but not limited to, appointment of counsel, filing of motions, and litigation associated with motions pursuant to Penal Code section 1405 and 1417.9.”

DOF commented that motions filed pursuant to Penal Code section 1417.9 should not be included.

Staff finds that appointing counsel, filing motions, litigating motions pursuant to Penal Code section 1405, subdivision (j), and time spent in court on appeal are reasonable methods of complying with the mandate to prepare and file the petition for writ of mandate or prohibition to appeal the trial court’s order on motion for DNA-testing, or to respond to the petition for writ of mandate or prohibition. However, litigation associated with Penal Code section 1417.9 is outside the scope of this mandate. Therefore, staff did not include it as a reimbursable activity.

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<sup>5</sup> Exhibit E, page 276.

<sup>6</sup> Exhibit A, page 124.

DOF also stated in its comments that:

To the extent possible, local governments should refer the [Indigent Defense Counsel] activities to organizations such as the Northern California Innocence Project and the California and Hawaii Innocence Project. [...] The Innocence Projects utilize law students to accomplish some of the duties listed..., including investigating claims submitted by inmates and preparing motions for DNA testing pursuant to Penal Code Section 1405. [...] Utilizing the Innocence Projects represents a low-cost option for complying with the mandate and provides inmates with very high quality legal representation.<sup>7</sup>

Staff notes that while this may be a cost-effective option, it is inconsistent with the Statement of Decision.

#### Retention of Biological Material

The Statement of Decision included the activity of retaining biological material that is secured in connection with a felony case, and the claimant proposed a number of additional one-time and ongoing activities that it believes are reasonably necessary to implement this activity.

The Statement of Decision specifically states:

[B]efore the test claim statute, there was no duty to retain biological evidence past the date of conviction or when the time for appeal had expired. [¶]  
Therefore, the Commission finds that effective January 1, 2001, it is a new program or higher level of service to retain DNA or other biological evidence secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case.<sup>8</sup>

There is no reimbursement for retention of biological material secured in connection with a criminal case during the pendency of the proceeding. For ‘exhibits’ introduced into court, preexisting Penal Code section 1417.1 prohibited destroying them (including biological material), “prior to the final determination of the action or proceeding.” The section provides the following exhibit retention schedule in defining when the date the criminal action or proceeding becomes final:

- (a) When no notice of appeal is filed, 30 days after the last day for filing that notice.
- (b) When a notice of appeal is filed, 30 days after the date the clerk of the court receives the remittitur affirming the judgment.
- (c) When an order for a rehearing, a new trial, or other proceeding is granted and the ordered proceedings have not been commenced within one year thereafter, one year after the date of that order.
- (d) In cases where the death penalty is imposed, 30 days after the date of execution of sentence.

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<sup>7</sup> Exhibit C, pages 213-214.

<sup>8</sup> Exhibit A, page 130.

Therefore, because preexisting law required retaining the exhibits according to this schedule, the biological exhibits at issue are only reimbursable to the extent they are required to be retained longer than this schedule, which is normally 30 days after the last day for filing a notice of appeal (or other time periods corresponding to (b) when the notice of appeal is filed, or (c) when an order for rehearing, new trial, or other proceeding is granted but not commenced).

There is no reimbursement for biological exhibits introduced in court in cases where the death penalty is imposed unless someone remains incarcerated after the execution of sentence who does not have the death penalty imposed. Subdivision (d) of section 1417.1 requires retaining exhibits until “30 days after the date of execution of sentence.” “Execution” means “completion, fulfillment, or perfecting of anything, or carrying it into operation and effect.”<sup>9</sup> Thus, subdivision (d) means the biological evidence is retained 30 days after the death penalty is carried into effect, at which time the convicted person would no longer be incarcerated (the Statement of Decision requires that biological evidence only be kept for the period of time *any person remains incarcerated* in connection with that case, Pen. Code, § 1417.9, subd. (a)).

Accordingly, staff clarified that retention of biological material that is secured in connection with a felony case, and is introduced into court as an exhibit in the criminal action or proceeding, is reimbursable only after the criminal action or proceeding becomes final pursuant to Penal Code section 1417.1, and for the period of time that any person remains incarcerated in connection with that case.

Even if the biological material secured in connection with a felony case is not introduced in court as an exhibit in the criminal action or proceeding, reimbursement is not required for the retention of biological material *until after* the criminal action or proceeding becomes final. The purpose of the test claim statute is to provide for “post-conviction discovery”<sup>10</sup> of material in connection with a criminal case to assist a convicted felon who “is currently serving a term of imprisonment” in filing a motion for DNA testing, following the conviction, pursuant to Penal Code section 1405 (Pen. Code, §§ 1405, subd. (a), and 1417.9).

#### A. *One-Time Activities*

The claimant proposed the following one-time activities associated with retention of biological material:

- Development of departmental policies and procedures necessary to comply with the post conviction forensic testing requirements of the subject law, which include making the necessary upgrades to the computer programming and hardware to the Crime Lab’s electronic chain of custody module.
- Meet and confer with trial attorneys and other counsel regarding the coordination of efforts in implementing the subject law.

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<sup>9</sup> Black’s Law Dictionary (6th ed. 1990) page 568, column 1.

<sup>10</sup> The bill analysis said: “In California, there is no right to post-conviction discovery in criminal cases nor is there a set procedure for letting the courts evaluate whether a defendant should have access to post-conviction testing of DNA.” Assembly Committee on Public Safety, Analysis of Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as amended June 13, 2000, page 5.

- Distribute State Attorney General’s Office recommendations for compliance with the subject law, and in particular the evidence retention conditions to ensure suitability for future DNA testing.

Staff notes that the first two activities go beyond the scope of the mandate, and therefore, were not included as reimbursable activities. Staff also did not include the third activity as a reimbursable activity because distribution of the Attorney General’s recommendations by the claimant is not necessary as the report is available on the world wide web at <http://www.ag.ca.gov/publications/finalproof.pdf>.

In its comments to the draft staff analysis, the claimant questioned how long the Attorney General’s report and recommendations would be available on the world wide web, asserting that claimants should be reimbursed to distribute the Attorney General’s report and recommendations. As an alternative, the claimant recommended that the parameters and guidelines be modified to include a new section XI to state the following:

The Attorney General’s *Post Conviction DNA Testing Recommendations for the Retention, Storage and Disposal of Biological Evidence* report, attached as an integral part of these [parameters and guidelines], may be used in determining allowable costs.

Staff has already included the Attorney General’s report as Attachment A to the parameters and guidelines when the draft staff analysis was issued for comment. Therefore, section XI, as suggested by the claimant, was not added to the parameters and guidelines.

The claimant also proposed the following activities:

- a. Development of departmental policies and procedures necessary to provide notification, retention, and storage services in order to retain and preserve evidence with biological material in felony convictions pursuant to the subject law.
- b. Train evidence and property custodians on storage and notification methods necessary to comply with the subject law.
- c. Training investigative personnel, to whom crime lab services are provided, in the methods and procedures necessary to comply with the subject law.
- d. Design, development, and testing of computer software and equipment necessary to identify and retrieve all biological materials associated with a particular case to comply with the following requirements:
  - a) category store evidence items by grade of crime – felony or misdemeanor
  - b) type of evidence – biological
  - c) distribution of disposal notification as required by Penal Code section 1417.9.”

Staff limited these activities to be consistent with the Statement of Decision and the primary activity to retain biological material. Thus:

- Departmental policies and procedures are limited to those in order to retain and preserve biological material in felony cases.
- Staff limited training investigative personnel, to whom crime lab services are provided, in the methods and procedures necessary to comply with the subject law to a one-time activity because there is currently no justification in the record

to support this training on an ongoing basis, and limited the training to methods and procedures necessary to retain biological material.

- For designing, developing, and testing computer software and equipment – staff notes that the primary activity is limited to retention of biological material that is secured in connection with a felony case, and that notices pursuant to Penal Code section 1417.9 were specifically denied in the Statement of Decision.<sup>11</sup> Therefore, staff modified this activity as follows: “Design, develop, and test computer software and equipment necessary to identify and retrieve all biological materials associated with a particular case in order to categorize and store evidence items by type of biological material.”

DOF commented that none of the proposed one-time activities should be reimbursable because “sufficient documentation has not been provided by the claimant to demonstrate that they are necessary to implement the test claim legislation.”<sup>12</sup>

Staff notes that two declarations signed under penalty of perjury were submitted with the test claim declaring that these one-time activities, among others, are new duties as a result of the test claim legislation, and have resulted in costs for the Los Angeles County Sheriff’s Department.<sup>13</sup> Accordingly, staff finds that the proposed one-time activities, as modified by staff, are the most reasonable methods of complying with the mandate to retain biological material in a condition suitable for DNA testing.

DOF also argues that the one-time activities are not reimbursable because retention of biological material is not a new activity. DOF argued that:

preexisting Penal Code Section 1417.1 requires all exhibits introduced into court, including biological material, to be retained until the criminal action or proceeding becomes final. Therefore, local agencies were required to conduct the one-time activities related to implementing systems for retention of biological material under Penal Code Section 1417.1 prior to enactment of the test claim legislation.<sup>14</sup>

Preexisting Penal Code section 1417.1 requires retention of “exhibits” introduced in court. However, the test claim statute (Pen. Code, § 1417.9) is broader in requiring retention of “all biological material that is secured in connection with a criminal case,” and requires it to be kept “for the period of time that any person remains incarcerated in connection with that case.”

Accordingly, staff modified activities a and d to allow claimants to *update* any existing policies and procedures to retain and preserve biological material in felony cases and any computer software and equipment necessary to identify and retrieve all biological materials associated with a particular case in order to categorize and store evidence items by type of biological material.

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<sup>11</sup> Exhibit A, page 125.

<sup>12</sup> Exhibit C, page 213.

<sup>13</sup> Declarations by L. Peter Zavala, Administrative Services Manager III, Central Property and Evidence Unit with the County of Los Angeles Sheriff’s Department; and Dean M. Gialamas, Crime Laboratory Assistant Director, Scientific Services Bureau with the County of Los Angeles Sheriff’s Department.

<sup>14</sup> Exhibit F, page 285.

Additionally, staff clarified that any training for evidence and property custodians and investigative personnel is reimbursable only once for each employee.

#### B. *Ongoing Activities*

The claimant proposed the following ongoing activities associated with retention of biological material:

- Initiating contacts to specified parties to seek permission to dispose of biological evidence.
- Provide court testimony on chain of custody and disposition of biological evidence. This may include the basis and reasons for the disposition of evidence collected prior to this subject law.
- Reimbursement of local agency costs of DNA testing for indigent inmate cases, which is not reimbursed by the State or Superior Court under other funding provisions due to insufficient funding.

Staff did not include the above three activities because they were denied in the Statement of Decision.

Claimant also proposed:

- a. Writing or responding to initial correspondence from inmates, attorneys, or others seeking information regarding Penal Code sections 1405 and 1417.9.

In its comments on the draft staff analysis, DOF continued to disagree that this activity is not directly related to the retention or storage of biological material and should not be reimbursable.

As stated previously, staff limited this activity to writing to or responding to initial correspondence from convicted persons and their attorneys seeking information regarding Penal Code section 1417.9. Staff included similar language regarding Penal Code section 1405 under the reimbursable activities for Indigent Defense Counsel and District Attorneys.

Claimant proposed:

- b. Identification and tracking of evidence that meets the requirements of the subject law to ensure its proper retention and storage.

DOF commented that this activity is consistent with the Statement of Decision. This activity was proposed twice by the claimant. Therefore, staff eliminated the duplicate activity.

Claimant also proposed:

- c. Responding to request for biological evidence held at local agency crime labs which have not been previously examined. This involves a computer and record search for the location or disposition of the evidence sought, manual retrieval of the evidence, and forwarding it to the appropriate party.
- d. Responding to requests for the analysis of evidence held at the local agency crime labs in order to determine if biological evidence is present and suitable for DNA testing. This involves laboratory testing and analysis and the issuance of the final report.

- e. Meet and confer with parties (attorneys, investigators, etc.) to determine the suitability of DNA testing on the retained evidence in a particular case.
- f. Preparation and tracking of biological evidence that is sent to agreed upon private vendor DNA laboratories for testing.

DOF contends that proposed ongoing activities c through g above “are not directly related to the retention or storage of biological material and should not be reimbursable.”

Staff finds that these activities are reasonable methods of complying with the mandate to retain biological material in a condition suitable for DNA testing because legislative bill analyses of the test claim legislation “requires the court to allow testing if certain conditions are met, such as the evidence is available and in a condition suitable for testing.”

The claimant proposed:

- g. Responding to request for biological evidence held at local agency Property and Evidence Units, including computer and record searches for the location or disposition of the evidence sought, manual retrieval of the evidence, and forwarding it to the appropriate party.

Again, DOF contends that this activity should not be reimbursable for the reasons stated above.

Staff finds that this activity is a reasonable method of complying with the mandate. According to the author of the test claim legislation, this section “provides safeguards to ensure that the evidence is available and reliable.”<sup>15</sup> However, as stated previously, in order to align like activities, staff revised this activity to include the costs of going to the agency’s storage facility, and with the help of a storage agency representative, either locating lost evidence or locating certain documentation.

Finally, the claimant proposed:

- h. Maintaining biological evidence in refrigerated facilities to preserve its suitability for DNA testing pursuant to the subject law. This activity requires refrigerated facilities as well as maintaining such facilities (e.g. utilities) in accordance with standards and protocols published in the Attorney General’s Task Force Report on implementing the subject Post-Conviction DNA Testing Program, incorporated herein by reference and attached hereto.”

DOF commented that this activity is consistent with the Statement of Decision.

Staff notes that as proposed, this activity implies that refrigerated facilities are mandated by the Attorney General’s Task Force Report. Penal Code section 1417.9, subdivision (a), states that the governmental entity has discretion to determine how the evidence is retained, provided that it is retained in a condition suitable for DNA testing. Staff also notes that retention of biological material is the primary activity and does not need to be restated as an additional activity. Thus, staff deleted this proposed activity and revised the primary activity to state: “Retention of biological material in a condition suitable for future DNA testing.”

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<sup>15</sup> Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as amended August 30, 2000, pages 5-6.

As discussed previously, staff finds that legislative analyses of the test claim legislation, together with Penal Code section 1417.9, subdivision (a), provides evidence that these activities are reasonable methods of complying with the mandate to retain biological material in a condition suitable for DNA testing. Therefore, staff did not make any modifications to the ongoing activities in this section.

#### Inmate Custody and Transportation

The claimant proposed reimbursement for “the costs of transporting and housing state prisoners during the course of their DNA post-conviction proceedings, based on a local jurisdiction’s approved California Department of Corrections and Rehabilitation daily jail rates and mileage rates.”

The Commission found that a hearing on the DNA motion is a court mandate on the district attorney and indigent defense counsel, and therefore, is not subject to article XIII B, section 6. This finding included “denial of the activity claimant alleged for the sheriff to transport convicted persons and provide oral testimony at hearings.”<sup>16</sup> Moreover, there is no justification why the costs of transporting and housing state prisoners during the course of their DNA post-conviction proceedings are reasonable methods of complying with Penal Code section 1405, considering that the court can decide the motion without a hearing. Accordingly, staff did not include inmate custody and transportation as a reimbursable activity.

#### Time Study Language

Staff finds that using time studies to support documentation may be appropriate for this program. Thus, staff included the following language under section IV:

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Time study usage is subject to the review and audit conducted by the State Controller’s Office.

#### *V. Claim Preparation and Submission*

The claimant proposed timekeeping and reimbursement methodologies to claim specified labor and storage costs, as follows:

##### 1. Labor Costs

The “reasonable reimbursement methodology” to recover the labor costs of the “Indigent Defense Counsel and District Attorney” component is based on one or more monthly time surveys for each staff working on activity categories A through F for one particular Post Conviction: DNA Court Proceedings case. Each employee enters time on a survey form upon beginning working on a case and continues doing so throughout the duration of the case. Additional monthly survey forms may be used as necessary to record all the time spent on a case. A sample monthly time survey is attached hereto.

The time recorded on each time survey form would then be totaled and multiplied by that employee’s productive hourly rate, as that term is defined in the State Controller’s Office annual claiming instruction manual, found on [www.sco.ca.gov](http://www.sco.ca.gov). The total labor cost for the case is the sum of each employee’s labor costs. The

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<sup>16</sup> Exhibit A, page 124, footnote 62.

resulting cost per case is then multiplied by the number of cases. If 4 through 9 cases occur during the year, 2 cases should be time surveyed. If 10 or more cases occur during the year, a 20% sample, rounded to the nearest whole number of cases, should be taken.

## 2. Storage Costs

The “reasonable reimbursement methodology” formula to recover the continuing facility, utility, equipment, service and supply “Retention of Biological Evidence” component would be based on the ratio of the number of biological evidence specimens retained in felony cases to the number of all biological evidence specimens. So, for example, if 10,000 out of 40,000 such specimens were for felony cases, then 25% of the total biological evidence specimen retention costs would be reimbursable. One-time costs associated with retention activities, as well as personnel costs, would be claimed as actual costs.

DOF commented that the Attorney General’s Post Conviction DNA Testing Task Force should be consulted regarding the methodology for storage costs because of the members’ extensive expertise in the field. Staff contacted the Attorney General’s Office in January and was informed that the task force disbanded following release of their report regarding recommendations for retention, storage, and disposal of biological evidence in 2002. Staff recently included several members of the former task force on the mailing list for this program and encouraged their feedback on the draft staff analysis and proposed parameters and guidelines. No comments were received from any of these persons.

Staff reviewed the claimant’s proposed reimbursement methodology and concluded that it does not meet the statutory definition of a reasonable reimbursement methodology as specified in Government Code section 17518.5, subdivision (a).

Therefore, based on the evidence in the record, staff recommends this program be reimbursed using actual costs.

Finally, staff added the training component as a direct cost under this section because training was included as a reimbursable activity under section IV.B, Retention of biological material in a condition suitable for DNA-testing.

## *VII. Offsetting Revenues and Reimbursements*

In the Statement of Decision, it was noted that “the claimant indicated receipt of a \$160,000 grant from the Office of Criminal Justice Planning ... for providing representation to former public defender clients who request counsel for DNA-testing motions.”<sup>17</sup> The Commission found that this grant would be considered an offset of increased costs incurred under the statutes.

Therefore, staff added under this section that any Office of Criminal Justice Planning grants or other grant funding from a successor agency shall be identified and deducted from reimbursement claims.

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<sup>17</sup> Exhibit A, page 131.

**Staff Recommendation**

Staff recommends that the Commission adopt the proposed parameters and guidelines, beginning on page 19.

Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

## PROPOSED PARAMETERS AND GUIDELINES

Penal Code Sections 1405 and 1417.9

Statutes 2000, Chapter 821; Statutes 2001, Chapter 943

*Post Conviction: DNA Court Proceedings*  
00-TC-21, 01-TC-08

County of Los Angeles, Claimant

### I. SUMMARY OF THE MANDATE

On July 28, 2006, the Commission on State Mandates (Commission) adopted a Statement of Decision finding that the test claim legislation imposes a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 to perform the following activities:

- **Representation and investigation by indigent defense counsel:** Effective January 1, 2001, ~~F~~for indigent defense counsel investigation of the DNA-testing and representation of the convicted person (except for drafting and filing the DNA-testing motion) effective January 1, 2001 (Pen. Code, § 1405, subd. (c), as added by Stats. 2000, ch. 821).
- **Prepare and file motion for DNA testing & representation by indigent defense counsel:** Effective January 1, 2002, ~~I~~f the person is indigent and has met the statutory requirements, and if counsel was not previously appointed by the court, ~~for counsel to~~ prepare and file a motion for DNA testing, if appropriate, effective January 1, 2002 (Pen. Code, § 1405, subds. (a) & (b)(3)(A)). Also, ~~providing~~ notice of the motion to “the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested” ~~is mandated as of January 1, 2002~~ (Pen. Code, § 1405, subd. (c)(2)).
- **Prepare and file response to the motion:** Effective January 1, 2001, ~~to~~ prepare and file a response to the motion for testing, if any, by the district attorney “within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause” (Pen. Code, § 1405, subd. (c)(2)).
- **Provide prior test lab reports and data:** Effective January 1, 2001, ~~W~~hen the evidence was subjected to DNA or other forensic testing previously, ~~by~~ for either the prosecution or defense, ~~the prosecution or defense,~~ whichever previously ordered the testing, to provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the ~~public defender~~ indigent defense counsel and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).

- **Writ review:** Effective January 1, 2001, prepare and file petition, or response to petition, for writ review by indigent defense counsel and the district attorney of the trial\_court's decision on the DNA-testing motion (Pen. Code, § 1405, subd. (j)).
- **Retain biological material:** Effective January 1, 2001, retain all biological material that is secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)).

The Commission found that all other statutes in the test claim, including holding a hearing on the DNA-testing motion pursuant to Penal Code section 1405, subdivision (e), as well as appointment of counsel when counsel was previously appointed and disposal of the biological material before the convicted person's release from prison (Pen. Code, § 1417.9, subd. (b)), are not a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514.

## II. ELIGIBLE CLAIMANTS

Any city, county, and city and county that incurs increased costs as a result of this reimbursable state-mandated program is eligible to claim reimbursement of those costs.

## III. PERIOD OF REIMBURSEMENT

Government Code section 17557, subdivision (ee), ~~as amended by Statutes 1998, chapter 681,~~ states that a test claim shall be submitted on or before June 30 following a given fiscal year to establish eligibility for that fiscal year. The County of Los Angeles filed the test claim on June 29, 2001, establishing eligibility for fiscal year 1999-2000. However, the operative date of the test claim statutes, as enacted by Statutes 2000, chapter 821, is January 1, 2001. Additionally, Penal Code section 1405, as amended by Statutes 2001, chapter 943, is operative January 1, 2002. Therefore, costs incurred pursuant to Statutes 2000, chapter 821, are reimbursable on or after January 1, 2001, and costs incurred pursuant to Statutes 2001, chapter 943, are reimbursable on or after January 1, 2002.

Actual costs for one fiscal year shall be included in each claim. Estimated costs of the subsequent year may be included on the same claim, if applicable. Pursuant to Government Code section 17561, subdivision (d)(1)(A), all claims for reimbursement of initial fiscal year costs shall be submitted to the State Controller within 120 days of the issuance date for the claiming instructions.

If the total costs for a given fiscal year do not exceed \$1,000, no reimbursement shall be allowed except as otherwise allowed by Government Code section 17564.

## IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Time study usage is subject to the review and audit conducted by the State Controller's Office.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are reimbursable:

A. Indigent Defense Counsel<sup>1</sup> and/or District Attorney Activities

A-1. Representation of indigent convicted person and investigation. Reimbursement period begins January 1, 2001.

1a. For indigent defense counsel to investigation of the DNA-testing and representation of the convicted person, (except for drafting and filing the DNA-testing motion) (Pen. Code, § 1405, subd. (c) as added by Stats. 2000, ch. 821). The following activities are reimbursable:

- i) Reading letters from convicted persons or those writing on behalf of convicted persons.
- ii) Writing to or responding to initial correspondence from convicted persons and their attorneys seeking information regarding Penal Code section 1405.
- iii) Retrieving and reviewing court files, public defender files, and appellate counsel files.
- iv) Researching legal, technical, and scientific issues.
- v) Interviewing witnesses.
- vi) Subpoenaing records.
- vii) Meeting with clients (convicted persons) in person or on the telephone, as well as written consultation.

A-2. Prepare and file motion for DNA-testing & representation. Reimbursement period begins January 1, 2002.

1a. For counsel to prepare and file a motion for DNA testing, if the person is indigent and has met the statutory requirements, and if counsel was not previously appointed

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<sup>1</sup> This category includes the Public Defender, Alternate Public Defender, and court-appointed indigent defense counsel.

by the court pursuant to Penal Code section 1405 before January 1, 2002., ~~for counsel to prepare and file a motion for DNA testing, if appropriate~~ (Pen. Code, § 1405, subs. (a) & (b)(3)(A)).

~~2.b.~~ Provide ~~ing~~ notice of the motion to “the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested” ~~is mandated~~ (Pen. Code, § 1405, subd. (c)(2)).

~~E.3.~~ Prepare and file response to the motion. *Reimbursement period begins January 1, 2001.*

~~4.a.~~ Prepare and file a response to the motion for testing, if any, by the district attorney “within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause” (Pen. Code, § 1405, subd. (c)(2)). The following activities are also reimbursable:

i) Consulting and meeting about DNA-testing for the convicted person with the trial attorneys, appellate counsel, members of the Alternate Public Defender’s Innocence Unit, the Post Conviction Center, the district attorney’s office, the Attorney General, or individuals from other Innocence Projects.

ii) Reviewing the file and trial transcript.

iii) Interviewing persons who worked on the criminal conviction, such as the trial attorney, investigating officer, or criminalist.

iv) Performing other investigative activities necessary to respond to the inmate’s motion.

~~D.4.~~ Provide prior test lab reports and data. *Reimbursement period begins January 1, 2001.*

~~4.a.~~ Provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing ~~When the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the prosecution or defense, whichever previously ordered the testing, provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing~~ (Pen. Code, § 1405, subd. (d)).

**Time spent by the indigent defense counsel and district attorney at a hearing on the motion for DNA-testing pursuant to Penal Code section 1405, subdivision (e), is not reimbursable.**

~~E.5.~~ Agree on a DNA lab. *Reimbursement period begins January 1, 2001.*

a. If the court grants the motion for DNA-testing, ~~for the public defender~~ indigent defense counsel and the district attorney, in non-capital cases, to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).

~~F.6.~~ Writ review. *Reimbursement period begins January 1, 2001.*

~~4.a.~~ Prepare and file petition for writ of mandate or prohibition to appeal trial court’s order on motion for DNA-testing, or response respond to petition for writ of mandate

~~or prohibition, for writ review by indigent defense counsel and the district attorney of the trial court's decision on the DNA testing motion (Pen. Code, § 1405, subd. (j)).~~  
The following activities are also reimbursable:

- i) Appointing counsel,
- ii) Filing motions,
- iii) Litigating motions pursuant to Penal Code section 1405, subdivision (j), and
- iv) Time spent in court.

~~G. Retain biological material. Reimbursement period begins January 1, 2001.~~

~~1. Retain all biological material that is secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)).~~

B. Retention of biological material in a condition suitable for DNA-testing<sup>2</sup>  
(Pen. Code, § 1417.9, subd. (a)). Reimbursement period begins January 1, 2001.

Retention of biological material that is secured in connection with a felony case, and is introduced into court as an exhibit in the criminal action or proceeding, is reimbursable only after the criminal action or proceeding becomes final pursuant to Penal Code section 1417.1, and for the period of time that any person remains incarcerated in connection with that case.

Retention of biological material that is secured in connection with a felony case, and is not introduced into court as an exhibit in the criminal action or proceeding, is reimbursable only after the criminal action or proceeding becomes final, and for the period of time that any person remains incarcerated in connection with that case.

1. One-Time Activities

- a. Update departmental policies and procedures to retain and preserve biological material in felony cases.
- b. Train evidence and property custodians on storage methods necessary to comply with the requirement to retain biological material secured in connection with a felony case (one-time per employee).
- c. Train investigative personnel, to whom crime lab services are provided, in the methods and procedures necessary to retain biological material (one-time per employee).
- d. Update and test computer software and equipment necessary to identify and retrieve all biological materials associated with a particular case in order to categorize and store evidence items by type of biological material.

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<sup>2</sup> The recommendations published in the Attorney General's SB 1342 Task Force Report on implementing the subject Post Conviction: DNA Court Proceedings program may be used (see Attachment A).

## 2. Ongoing Activities

- a. Write or respond to initial correspondence from convicted persons and their attorneys seeking information regarding Penal Code section 1417.9.
- b. Identify and track biological material that meets the requirements of the subject law to ensure its proper storage and retention.
- c. Respond to requests for biological material held at local agency crime labs which have not been previously examined. This involves a computer and record search for the location or disposition of the biological material sought, manual retrieval of the biological material, and forwarding it to the appropriate party.
- d. Respond to requests for the analysis of evidence held at the local agency crime labs in order to determine if biological material is present and suitable for DNA testing. This involves laboratory testing and analysis and the issuance of a final report.
- e. Meet and confer with parties (attorneys, investigators, etc.) to determine the suitability of DNA testing on the retained biological material in a particular case.
- f. Prepare and track biological material that is sent to agreed upon private vendor DNA laboratories for testing.
- g. Respond to requests for biological material held at local agency Property and Evidence Units, including computer and record searches for the location or disposition of the biological material sought, manual retrieval of the biological material, and forwarding it to the appropriate party. This activity includes the costs of going to the agency's storage facility, and with the help of a storage agency representative, either locating lost evidence or locating documentation which demonstrates that the evidence has been destroyed.

## **V. CLAIM PREPARATION AND SUBMISSION**

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

### **A. Direct Cost Reporting**

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

#### **1. Salaries and Benefits**

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

#### **2. Materials and Supplies**

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies

that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

### 3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

### 4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

### 5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

### 6. Training

Report the cost of training an employee, as specified in Section IV. of this document, under B. “**Retention of biological material in a condition suitable for DNA-testing,**” activities 1.b. and 1.c. Report the name and job classification of each evidence and property custodian and investigative personnel preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and purpose (related to the mandate of the training session), dates attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element A.1, Salaries and Benefits, and A.2, Materials and Supplies. Report the cost of consultants who conduct the training according to the rules of cost element A.3, Contracted Services.

## B. Indirect Cost Rates

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or
2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

## VI. **RECORD RETENTION**

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter<sup>3</sup> is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the

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<sup>3</sup> This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

#### **VII. ~~OFFSETTING SAVINGS~~ REVENUES AND REIMBURSEMENTS**

Any ~~offsetting savings~~ the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate from any source, including but not limited to, any Office of Criminal Justice Planning grants or other grant funding from a successor agency, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

#### **VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS**

Pursuant to Government Code section 17558, subdivision (b), the Controller shall issue claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the adopted parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The claiming instructions shall be derived from the test claim decision and the parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(1), issuance of the claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon parameters and guidelines adopted by the Commission.

#### **IX. REMEDIES BEFORE THE COMMISSION**

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.

In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

#### **X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES**

The Statement of Decision is legally binding on all parties and provides the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision, is on file with the Commission.