ITEM 4

TEST CLAIM
FINAL STAFF ANALYSIS

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

County of Los Angeles, Claimant

EXECUTIVE SUMMARY

The test claim was filed in June 2001 by the County of Los Angles on statutes that provide a post-conviction remedy for convicted felons to obtain deoxyribonucleic acid (DNA) testing of biological evidence. The statutes also establish procedures and timelines for the retention of biological evidence. Claimant filed a test claim amendment in November 2001 based on Statutes 2001, chapter 943 that revised the test claim statutes, primarily regarding the court procedure to obtain the DNA test.

Comments were filed by the Department of Finance on the test claim, with rebuttal comments submitted by the claimant. Although claimant disagrees with findings of nonreimbursable activities in the draft staff analysis, no substantive changes were made to the draft staff analysis..

For reasons stated in the analysis, staff finds 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**: 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**: If 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:** 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 effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender 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)).

Staff finds that all other statutes in the test claim, including holding a hearing on the DNA-testing motion, are not a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514.

Recommendation

Staff recommends that the Commission adopt this analysis and partially approve the test claim for the activities listed above.

STAFF ANALYSIS

Claimant

County of Los Angeles

Chronology

06/29/01	Test Claim filed by County of Los Angeles, Claimant
08/08/01	Department of Finance submits comments on the test claim
09/05/01	Department of Corrections submits a letter on the test claim
10/17/01	Claimant submits rebuttal comments on the state agency comments
11/09/01	Claimant submits amendment to test claim
12/19/01	Department of Finance submits comments on the test claim amendment
02/15/02	Claimant files rebuttal comments to the Dept. of Finance comments
08/21/03	Commission staff requests additional information from claimant
09/24/03	Claimant provides additional information on the claim
10/30/03	Claimant submits additional documents
02/13/04	Commission staff requests state agency comments on claimant's submissions
03/15/04	No comments received, record is closed
05/26/06	Commission staff issues draft staff analysis on the test claim
06/16/06	Claimant submits comments on the draft staff analysis
07/7/06	Commission staff issues final staff analysis and proposed Statement of Decision

Background

Test Claim Statutes

In 2000, the Legislature enacted the test claim statutes as a post-conviction remedy for convicted felons to obtain deoxyribonucleic acid (DNA) testing of biological evidence. The DNA-testing motion is a separate civil action[1] and not part of the original criminal action.[2] The statutes also establish procedures and timelines for the retention of biological evidence.

The post-conviction remedy applies to cases where biological evidence is available and is previously untested or tested by a less reliable test, and where identity of the perpetrator was an

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[1] As defined by Code of Civil Procedure section 30, a civil action is "prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong."

[2] As defined by Penal Code section 683, a criminal action is "the proceeding by which a party charged with a public offense is accused and brought to trial and punishment..."

issue. The test claim statutes specify how a defendant files a motion to obtain DNA testing and what conditions must be met before the court grants the testing motion.

In 2001, the original test claim statute was amended (Stats. 2001, ch. 943) to clarify that the defendant's right to file a motion for post-conviction DNA testing cannot be waived, nor can the right be waived to receive notice of a governmental entity's intention to dispose of biological material before expiration of the period of imprisonment.[3]

Appointment of counsel for indigent defendants: The original statute required the court to appoint counsel for the convicted person who brings a motion under this section if that person is indigent.[4] In 2001, the Legislature added a new subdivision (b) to section 1405[5] to clarify this right to counsel. The amendment specifies how an indigent convicted person requests appointment of counsel and establishes appointment criteria for the court. The amendment also specifies that counsel investigates and, if appropriate, files a motion for DNA testing, and clarifies that representation is solely for the purpose of obtaining DNA testing and not for any post-conviction collateral proceeding.[6]

Motion for DNA testing: The original statute established a procedure for the defendant to obtain DNA testing of biological evidence. As a result of the 2001 amendment, an indigent defendant can request counsel to investigate and prepare this motion. Section 1405, former subdivision (b), now subdivision (c), establishes the following requirements for the motion:

1. A written motion shall be verified by the convicted person under penalty of perjury and shall do all of the following:
   A. Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.
   B. Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.
   C. Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.
   D. If prosecution or defense previously conducted any DNA or other biological testing, the results of that testing shall be revealed in the motion, if known.[7]
   E. State whether any motion for testing under this section previously has been filed and the results of that motion, if known.

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[3] Penal Code section 1405 was technically amended by Statutes 2004, chapter 405. Staff makes no finding on this amendment.

[4] Penal Code section 1405, subdivision (b), formerly subdivision (c).

[5] All references herein are to the Penal Code unless otherwise indicated.

[6] Penal Code section 1405, subdivision (b)(4), as added by Statutes 2001, chapter 943.

[7] Former Penal Code section 1405, subdivision (a)(3).

2. Notice of the motion shall be served on 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.[8]

Responses to DNA-testing motion: Once a motion is filed, the statute provides that responses, if any, shall be filed 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.[9]

Access to lab reports and data: If the court finds that the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, it shall order the party at whose request the testing was conducted 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.[10]

Hearing: The court, "in its discretion," may order a hearing on the motion. The statute originally stated, "the judge who conducted the trial shall hear the motion, unless the presiding judge determines that judge is unavailable. Upon request of either party, the court may order, in the interest of justice, that the convicted person be present at the hearing of the motion." The 2001 statute amends the first sentence regarding hearing the motion as follows: "The motion shall be heard by the judge who conducted the trial, *or accepted the convicted person's plea of guilty or nolo contendre*, unless ...."[11]

Criteria for granting DNA-testing motion: Subdivision (f) of section 1405, (formerly subd. (d)) states that "[t]he court shall grant the motion for DNA testing if it determines all of the following have been established:

(1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion.

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.

(3) The identity of the perpetrator of the crime was, or should have been a significant issue in the case.

(4) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence.

(5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction.

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[8] Penal Code section 1405, subdivision (c)(2), formerly subdivision (a)(2).

[9] Penal Code section 1405, subdivision (c)(2), formerly subdivision (a)(2).

[10] Penal Code section 1405 subdivision (d), formerly subdivision (a)(3).

[11] Penal Code section 1405, subdivision (e), formerly subdivision (b).

The court in its discretion may consider any evidence whether or not it was introduced at trial.

(6) The evidence sought to be tested meets either of the following conditions:

A. It was not tested previously.

B. It was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.[12]

(7) The testing requested employs a method generally accepted within the relevant scientific community.

(8) The motion is not made solely for the purpose of delay.

DNA testing & results: Subdivision (g) of section 1405 (formerly subd. (e)) states:

> (1) If the court grants the motion for DNA testing, the court order shall identify the specific evidence to be tested and the DNA technology to be used. (2) The 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. If the parties cannot agree, the court's order shall designate the laboratory to conduct the testing and shall consider designating a laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB).

Subdivision (k) of section 1405 (formerly subd. (i)) provides that the testing be done as soon as practicable, but authorizes the court to expedite testing 'in the interests of justice.'

Subdivision (h) of section 1405 (formerly subd. (f)) requires test results to "be fully disclosed to the person filing the motion, the district attorney, and the Attorney General. If requested by any party, the court shall order production of the underlying laboratory data and notes."

Cost of DNA test: Subdivision (i) of section 1405 (formerly subd. (g)) requires the cost of the DNA testing to be borne by the state or the applicant, "as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person."

Judicial Review: Subdivision (j) of section 1405 (formerly subd. (h)) provides as follows:

> An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General. Any such petition shall be filed within 20 days after the court's order granting or denying a motion for DNA testing. In a non-capital case, the petition for writ of mandate or prohibition petition shall be filed in the court of appeals. In a capital case, the petition shall be filed in the Supreme Court.

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[12] Statutes 2001, chapter 943 substituted "It" with "The evidence" and renumbered the subdivision.

Exempt from public disclosure: Subdivision (l) of section 1405 (formerly subd. (j)) provides: "DNA profile information from biological samples taken from a convicted person pursuant to a motion for post-conviction DNA testing is exempt from any law requiring disclosure of information to the public."

Severability: According to subdivision (n) (formerly subd. (k)), section 1405 is severable, and if any provision of it or its application is held invalid, "that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application."

Retain biological evidence: Penal Code section 1417.9 states that the "appropriate" governmental entity shall retain any biological evidence secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The Attorney General's Office has stated that this retention is limited to felony cases.[13]

Subdivision (a) of section 1417.9 further states that "[t]he governmental entity shall have the discretion to determine how the evidence is retained ... provided that the evidence is retained in a condition suitable for DNA testing."

Subdivision (b) authorizes the governmental entity to dispose of biological material before the expiration of the period of time if the following notification conditions are met.

(1) The governmental entity has notified all of the following persons of the provisions of this section and of their intention to dispose of the material: any person who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.

(2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

(A) A motion filed pursuant to section 1405, however, upon filing of that application, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

(B) A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to section 1405 that is followed within 180 days by a motion for DNA testing pursuant to section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this

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[13] 88 Opinions of the California Attorney General 77 (2005).

section or on an application by or on behalf of the convicted person filed pursuant to Section 1405.

(3) No other provision of law requires that biological evidence be preserved or retained.

The 2001 amendment added subdivision (c) to section 1417.9 to state, "the right to receive notice pursuant to this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre."

A sunset clause in the original version of section 1417.9 would have repealed it on January 1, 2003, but the sunset clause was removed by Statutes 2002, chapter 1105.

Preexisting Law

Preexisting state law provides procedures whereby a defendant may appeal a conviction.[14] Preexisting state law also specifies the conditions under which a new trial is granted, as follows:

> When a verdict has been rendered or a finding made against a defendant, the court may, upon his application, grant a new trial, in the case of when new evidence is discovered, material to the defendant and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable.[15]

Claimant Position

Claimant alleges that the test claim statutes impose a reimbursable mandate under section 6 of article XIII B of the California Constitution. After describing the test claim statutes, claimant enumerates new duties for various county departments as a result of the test claim statute.

For the District Attorney and Public Defender (for indigent defendants), claimant alleges activities related to the following:[16]

- **Initial Contact** – Writing or responding to initial correspondence from inmates, attorneys or others seeking information regarding Penal Code section 1405 and 1417.9.
- **Investigating Claims** - Reading letters from inmates or others writing on behalf of inmates, retrieving and reviewing court files, trial attorney files, appellate counsel 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 inmates in person or on the telephone as well as written consultation.

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[14] Penal Code section 1236 et seq..

[15] Penal Code section 1181, subdivision (8), as amended by Statutes 1973, chapter 167.

[16] The test claim includes detail for each of the bulleted activities. See Exhibit A, pages 113-118.

- **Preparing Motions** - Includes preparing motions pursuant to Penal Code section 1405 and responding to notices sent pursuant to Penal Code section 1417.9.
- **Meet and Confer** - Consultation and meetings with the trial attorney, appellate counsel, representatives of the Public Defender's Innocence Unit, the Post-Conviction Center, the District Attorney's Office, the Attorney General, and individuals from other Innocence Projects.
- **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.
- **Development and Procedure** - Preparing protocols, administrative forms, meeting with SB 90 adviser and one-time activities associated with setting up the Post-Conviction DNA unit within the District Attorney's Office [for Public Defender services, the activity claimed is "one-time activities associated with setting up the unit."]
- **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.
- **Travel** - Travel-related expenses associated with meeting with inmate in connection with preparation of 1405 motion.
- **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.

For the Sheriff's Department Crime Laboratory, claimant alleges activities related to the following:

- Develop policies and procedures (one time activity).
- Meet and confer with attorneys regarding the coordination of efforts in implementing the subject law (one time activity).
- Distribute the State Attorney General's Office recommendations for compliance with the law[17] including the evidence retention conditions (one time activity).
- Train investigative personnel and the staff of other law enforcement that use the crime lab.
- Initial contacts for permission to dispose of biological evidence.
- Identify and track evidence for proper retention and storage.
- Respond to request for biological evidence held.
- Respond to requests for the analysis of evidence held.
- Meet and confer with parties to determine the suitability of DNA testing on retained evidence.
- Prepare and track biological evidence sent to lab for DNA testing.
- Court testimony on chain of custody and disposition of biological evidence.
- DNA testing required of the Sheriff's Department not reimbursed by the Court.

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[17] This document is attached as Exhibit J.

For the Sheriff's Department Central Property and Evidence Unit, claimant alleges activities related to the following:

- Develop policies and procedures (one time activity).
- Meet and confer with attorneys regarding the coordination of efforts in implementing the subject law (one time activity).
- Distribute the State Attorney General's Office recommendations for compliance with the law[18] including the evidence retention conditions (one time activity).
- Train evidence and property custodians on storage and notification methods and procedures (one-time activity).
- Design, develop, and test computer software and equipment necessary to identify and retrieve biological materials (one-time activity).
- Initial contacts to specified parties to seek permission to dispose of biological evidence.
- Identify and track evidence for proper retention and storage.
- Respond to request for biological evidence held.
- Maintain biological evidence in refrigerated facilities and add and maintain refrigerated facilities.
- Court testimony on chain of custody and disposition of biological evidence.

The claimant stated that it is incurring costs well in excess of $200 annually, the standard at the time the test claim was filed.[19] The claimant estimated that costs for the public defender would be $521,234 for fiscal year 2001-2002.

In its October 2001 response to Department of Finance comments, claimant states that the program is a new program or higher level of service, and not merely extensions of the original duties of trial counsel or extensions of the original case. Claimant supports this contention as specified in the analysis below.

In November 2001, claimant amended the test claim to add Statutes 2001, chapter 943. This statute amended Section 1405 to establish a procedure for appointing counsel to investigate and prepare the DNA-testing motion so that counsel is appointed before a motion is filed (unlike the prior version of 1405, in which, according to claimant, counsel was appointed after filing the motion). Claimant also alleges activities from amended section 1417.9, subdivisions (c) and (m) as follows:

> Section 1417.9 is also included in this amendment as Chapter 943, Statutes of 2001, further expands the duties of local government to include those persons who may have waived certain rights. ... Therefore, as amended herein, the County is now required to provide more service – to provide notice to those with waivers as well as those without such waivers. In addition, as amended herein, the County must provide services in investigating and filing motions for post-

[18] This document is attached as Exhibit J.

[19] The current minimum amount is $1000 (Gov. Code, § 17564).

conviction DNA testing to more indigents – now including those waiving rights as set forth in new Section 1405(m) … ."[20]

In response to a request for further information from Commission staff, claimant stated in September 2003 that the Public Defender's Office received a one-time grant from the Office of Criminal Justice Planning for $160,000 to represent former clients who request counsel pursuant to Penal Code section 1405.

In comments submitted June 16, 2006 on the draft staff analysis, claimant agrees with the activities that staff finds reimbursable. Claimant disagrees, however, with staff's conclusions regarding activities found not reimbursable: holding a hearing and appointing counsel when counsel has previously been appointed.

State Agency Position

In comments submitted in August 2001 on the original test claim, the Department of Finance (Finance) states that while the test claim may have resulted in a state mandate, "the activities described in the test claim do not constitute a new program or activity or a reimbursable cost."

Finance states that the test claim activities are "a procedure extension of the original trial" and goes on to state: "The petition involved is only raising examination of original evidence using technology not available at the time of the original case, thereby raising in question a material and substantive issue to the original criminal charge and verdict." Finance concludes, therefore, that the activities are existing responsibilities of local government.

The Department of Corrections also submitted a letter in August 2001, stating, "CDC takes no position on the merits of the County's test claim."

In December 2001, Finance commented on the test claim amendment, stating that it concurs that Statutes 2001, chapter 943 create a reimbursable state-mandated local program for the following activities pled by claimant:

- Appointing counsel to investigate and file a motion, if appropriate, for post-conviction DNA testing for indigent convicted persons.
- Providing notices to indigent convicted persons, who may have waived their rights as part of a plea agreement or plea of nolo contendre, that their right to file a motion for post-conviction DNA testing cannot be waived.

No other state agencies submitted comments on the claim, nor did any comment on the draft staff analysis.

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[20] County of Los Angeles, test claim amendment (01-TC-08) submitted November 9, 2001, page 5.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[21] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[22] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[23] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[24]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[25]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[26] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim

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[21] Article XIII B, section 6, subdivision (a), (as amended in November 2004) provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[22] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[23] *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

[24] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[25] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[26] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

legislation.[27] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[28]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[29]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[30] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[31]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

A. Activities in section 1405 mandated by the state

As enacted by Statutes 2000, chapter 821, section 1405 read, in part, as follows:

> (a) A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction in his or her case, for performance of forensic ... (DNA) testing. [¶]...[¶]
>
> (c) The court shall appoint counsel for the convicted person who brings a motion under this section if that person is indigent.

Subdivisions (a)(1) and (a)(3) of section 1405 (currently subd. (c)(1)) specifies the content of the motion, stating it must:

A. Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.
B. Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.
C. Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.

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[27] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[28] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[29] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[30] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[31] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

D. If prosecution or defense previously conducted any DNA or other biological testing, the results of that testing shall be revealed in the motion, if known.
E. State whether any motion for testing under this section previously has been filed and the results of that motion, if known.

The court grants the motion if it makes eight findings, as specified above (pp. 5-6).

Claimant seeks reimbursement for the activities of writing or responding to initial correspondence from inmates, attorneys, or others seeking information; investigating claims, preparing motions and meeting and conferring with counsel. As indicated by claimant, the indigent defense counsel appointed to investigate or file the DNA-testing motion is a public defender or otherwise provided by the local government.

This issue is whether subdivisions (a) and (c) of section 1405, as originally enacted in 2000, mandate an activity on the local entity. Staff finds that subdivision (c) does, based on the plain language in subdivision (c) that "the court shall appoint counsel."[32]

As to preparing, filing, and giving notice of the motion, subdivision (a) originally stated that it is the person convicted of the felony who does this rather than the indigent defense counsel. Therefore, drafting the DNA-testing motion is not a requirement on local entity in the original version of section 1405 (this was changed by the 2001 amendment, as discussed below).

Additionally, although this original statute did not expressly articulate the requirement for counsel to 'investigate' the claim (prior to the Stats. 2001, ch. 943 amendment), the eight findings the court must make to grant the motion were stated in subdivision (d), (now in § 1405, subd. (f) -- see pp. 5-6 above). In order to represent the convicted person and advocate these findings to the court, counsel would need to investigate the case, since he or she has a duty to "present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit."[33]

Staff finds, therefore, that indigent counsel representation and investigation of the DNA-testing (except for drafting and filing the DNA-testing motion) is a mandated activity in the original test claim statute: Statutes 2000, chapter 821, effective January 1, 2001.

As amended by Statutes 2001, chapter 943, subdivision (a) of section 1405 states, "A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion … for performance of forensic … (DNA) testing." Subdivision (b)(3)(A) of section 1405 was added as follows:

> Upon a finding that the person is indigent, he or she has included the information required in paragraph (1), and counsel has not previously been appointed pursuant to this subdivision, **the court shall appoint counsel to investigate and, if appropriate, to file a motion for DNA testing** under this section and to represent

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[32] Cf. *San Diego Unified School Dist,, supra,* 33 Cal.4th at page 880 states: "Accordingly, in its mandatory aspect, [the test claim statute] … appears to constitute a state mandate, in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing."

[33] *Norton v. Hines* (1975) 49 Cal.App.3d 917, 922.

the person solely for the purpose of obtaining DNA testing under this section. [Emphasis added.]

According to the 2001 amendment in subdivision (m) of section 1405, the "right to file a motion for post-conviction DNA testing is absolute and shall not be waived ...[including] a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre." Moreover, the Second District Court of Appeal has held that a trial court does not have discretion to deny a motion for the appointment of counsel under section 1405 where the petitioner's request meets the statutory criteria.[34]

Even though the indigent defense counsel files the DNA-testing motion "if appropriate," staff finds that preparing and filing the motion is mandatory. As stated above, an attorney's duty is "to present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit."[35] Because whether or not to file the DNA testing motion is a matter of professional judgment, the indigent defense counsel's duty to file it, if appropriate, is not truly discretionary. Rather, it is an activity mandated by the state.

Therefore, if the person is indigent and has met the other statutory requirements, staff finds that preparing and filing the motion for DNA testing and representing the person solely for the purpose of obtaining DNA testing are mandated activities that are subject to article XIII B, section 6 effective January 1, 2002.

Section 1405, subdivision (c)(2) requires the person making the motion for DNA testing to 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." Although this activity is a requirement of the person filing the motion, if the person is indigent, it will fall on the indigent defense counsel. Therefore, staff finds that effective January 1, 2002, notice of the motion as specified is also a mandated activity that is subject to article XIII B, section 6.

Subdivision (c)(2) of section 1405 (former subd. (a)(2)) also states that a response to the motion "if any, shall be filed 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." Claimant alleged the following activity: "investigate whether such a [DNA-testing] motion is meritorious, and, if necessary litigate the motion ...."[36]

Here, by using the words "if any," the statute appears to merely authorize filing a response to the DNA-testing motion. Thus, the issue is whether filing a response to this motion is a state mandate on the district attorney. For the reasons below, staff finds that it is.

The district attorney's duties are specified in Government Code section 26500, et seq.. Section 26500 states: "The district attorney is the public prosecutor, except as otherwise provided by law.

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[34] *In re. Kinnamon* (2005) 133 Cal. App. 4th 316, 323.

[35] *Norton v. Hines, supra,* 49 Cal.App.3d 917, 922.

[36] See attached to the original test claim the Declaration of Lisa Kahn, June 18, 2001, page 1. Claimant also alleges the public defender and district attorney activity of responding to notices sent pursuant to Penal Code section 1417.9.

The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." The California Supreme Court has held that the prosecuting district attorney has the exclusive authority to prosecute individuals on behalf of the public.[37] The decision whether or not to prosecute, however, is left to the discretion of the prosecuting district attorney.[38] As to this discretion, in *People v. Eubanks,* the court stated that "the district attorney is expected to exercise his or her discretionary functions in the interests of the People at large ..." and this includes "the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name."[39] Furthermore, the Fourth District Court of Appeal has stated that if a district attorney elected not to appear at a serious felony trial, he or she "would be in gross dereliction of his [or her] duty to the people of the state under Government Code section 26500...."[40]

In addition to the role of public prosecutor, the district attorney's civil law duties are stated in Government Code sections 26520-26528,[41] including the duty to "defend all suits brought against the state in his or her county or against his or her county wherever brought ..."[42]

The issue of discretionary local activities in the context of state mandates was discussed in the recent California Supreme Court case of *San Diego Unified School District v. Commission on State Mandates,*[43] which involved legislation requiring a due process hearing prior to student expulsion. There, the court stated its reluctance to preclude reimbursement "whenever an entity makes an initial discretionary decision that in turn triggers mandated costs"[44] because, under such a strict application of the rule, "public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it

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[37] *People v. Eubanks* (1996) 14 Cal.4th 580, 588-590 (*Eubanks*).

[38] *Ibid.*

[39] *Ibid.*

[40] *People ex rel. Kottmeier v. Municipal Court* (1990) 220 Cal.App.3d 602, 609 (*Kottmeier*). Staff notes that the court's statements in *Eubanks* and *Kottmeier* are in the context of criminal prosecutions. However, the DNA testing procedure authorizes the prosecuting district attorney to comment on the appropriateness of DNA testing for convicted criminals, which is similar to criminal prosecutions in that the prosecuting district attorney is carrying out his or her role of protecting the public from those convicted of crimes. Therefore, the use of case law surrounding criminal prosecutions is analogous and appropriate.

[41] These duties include legal services for the county, prosecution of actions for recovery of debts, fines, penalties and forfeitures, actions to recover illegal payments, and abatement of public nuisances.

[42] Government Code section 26521.

[43] *San Diego Unified School Dist v. Commission on State Mandates., supra*, 33 Cal.4th 859, 887-888.

[44] *Ibid.*

has been established that reimbursement was in fact proper."[45] Citing *Carmel Valley Fire Protection District v. State of California,*[46] where an executive order requiring that local firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate, the court pointed out that reimbursement was not foreclosed "merely because a local agency possessed discretion concerning how many firefighters it would employ – and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected."[47] The court expressed doubt that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended such a result.[48]

In the claim at issue, the prosecuting district attorney's decision to respond to a petition for a DNA-testing motion must be driven by the serious public interest in public protection, as well as by saving the taxpayers the expense of unnecessary DNA testing (as the prosecutor may dispute any of the findings required for a successful DNA-testing motion). Any response to a DNA motion is very closely related to the district attorney's public prosecutor role, and also analogous to the duty to "defend all suits brought against ... his or her county ...."[49] In short, the district attorney has no choice to respond to the motion when the facts of the case so dictate.

For these reasons, staff finds that the district attorney's preparation and filing of a response to the DNA-testing motion is a state mandate within the meaning of article XIII B, section 6, effective January 1, 2001.

Section 1405, subdivision (d) (former subd. (a)(3)) states as follows:

> If the court finds evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, **it shall order the party** at whose request the testing was conducted 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. [Emphasis added.]

Claimant requests reimbursement for responding to requests for the analysis of evidence held.

Based on its mandatory language that the court 'shall' order access to the specified information, subdivision (d) leaves the court with no discretion in ordering the parties access to previous DNA-testing information.[50] As indicated in the analysis below, when the court is left without discretion, the provision is a state mandate rather than a mandate by the court. Therefore, staff finds that the following activity is subject to article XIII B, section 6, effective January 1, 2001: when the evidence was subjected to DNA or other forensic testing previously by either the

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[45] *Ibid.*

[46] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521.

[47] Cf. *San Diego Unified School Dist v. Commission on State Mandates, supra,* 33 Cal.4th 859, 888.

[48] *Ibid.*

[49] Government Code section 26521.

[50] Cf. *San Diego Unified School Dist., supra,* 33 Cal.4th at page 880. The Supreme Court did not resolve the discretionary mandate issue, however, as it decided the case on other grounds.

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.

Section 1405, subdivision (g)(2) (former subd. (e)) states:

> The 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. If the parties cannot agree, the court shall designate the laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB).

Claimant requests reimbursement for meeting and conferring with the trial attorney, appellate counsel, representatives of the Public Defender's Innocence Unit, etc., but it is unclear whether claimant's alleged purpose for these meetings is to agree on a DNA-testing laboratory.

The issue, nonetheless, is whether agreeing on a laboratory is a mandatory activity for the indigent defense counsel and the district attorney.

As stated above, the duty of indigent defense counsel is "to present his case vigorously in a manner as favorable to the client [or convicted person] as the rules of law and professional ethics will permit."[51] Deciding on a DNA-testing lab falls within this professional duty because of the perception that the choice of lab might affect the test's outcome. Therefore, staff finds that agreeing to a DNA-testing laboratory is a state mandate on a public defender subject to article XIII B, section 6.

As applied to the district attorney, deciding on a DNA-testing laboratory after the person has been convicted is in furtherance of enforcing criminal laws, or is closely related to it. For the same reasons stated above regarding responding to the DNA-testing motion, agreeing on a DNA-testing laboratory is within the district attorney's professional duties. Therefore, staff finds that agreeing to a DNA-testing laboratory is also a state mandate on the district attorney within the meaning of article XIII B, section 6 effective January 1, 2001.

Section 1405, subdivision (j) (former subd. (h)) states: "An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General." Claimant alleged the activity of "if necessary litigate the [DNA-testing] motion including seeking appellate relief through a writ petition if the motion is denied."[52]

Although subdivision (j) appears to merely authorize the indigent defense counsel or the district attorney to request writ review of the superior court ruling on the DNA-testing motion, the issue is whether filing or responding to writ review is a state mandate. Staff finds that it is.

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[51] *Norton v. Hines, supra,* 49 Cal.App.3d 917, 922.

[52] See attached to the original test claim the Declaration of Lisa Kahn, June 18, 2001, page 1, and the Declaration of Jennifer Friedman, June 6, 2001, page 1.

As stated above, the state mandates the program that allows convicted persons to seek DNA testing, and mandates the appointment of indigent defense counsel under specified conditions. The indigent defense counsel's duty is "to present his case vigorously in a manner as favorable to the client [or defendant] as the rules of law and professional ethics will permit."[53] Filing or responding to writ review for denial of a DNA-testing motion falls within this professional duty because, based on the public defender's professional judgment, the superior court judge may have wrongfully denied the petition. Therefore, staff finds that indigent defense counsel's filing or responding to writ review is a state mandate that is subject to article XIII B, section 6 effective January 1, 2001.

Filing writ review is also a state mandate on the district attorney. As with the discussion above regarding responding to the motion, the prosecuting district attorney's decision to file a writ review of the trial court's decision to grant the DNA-testing motion is driven by a serious interest in public protection. Filing or responding to writ review in such a case is closely related to the district attorney's public prosecutor role, and also analogous to the duty to "defend all suits brought against the state in his or her county or against his or her county ...."[54] Therefore, staff finds that filing or responding to writ review of the trial court's decision is a state-mandated activity subject to article XIII B, section 6 for the district attorney effective January 1, 2001.

B. Activities in section 1405 mandated by the court

Subdivision (b)(3)(B) of section 1405, as amended by Statutes 2001, chapter 943, states that if the court finds that the person is indigent and *that counsel has previously been appointed under this section*, "the court may, in its discretion, appoint counsel to investigate and if appropriate, to file a motion for DNA testing..."

Thus, the issue is whether, when counsel was previously appointed, it is a state mandate to appoint counsel to investigate and, if appropriate, file the DNA-testing motion.

Article XIII B, section 9, subdivision (b), of the California Constitution excludes from either the state or local spending limit any "[a]ppropriations required for purposes of complying with mandates *of the courts* or the federal government which, without discretion,[55] require an expenditure for additional services or which unavoidably make the providing of existing services

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[53] *Norton v. Hines, supra,* 49 Cal.App.3d 917, 922.

[54] Government Code section 26521.

[55] In *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51, which interpreted section XIII B, section 9, the court held that "without discretion" as used in section 9 (b) is not the same as legal compulsion. Rather it means that the alternatives are so far beyond the realm of practical reality that they leave the state without discretion to depart from the federal standards. Thus, the court held that the state enacted the test claim statute in response to a federal mandate for purposes of article XIII B, so the state statute was not reimbursable. (*Id.* at p. 74). Although the context in *City of Sacramento* was federal mandates analyzed under article XIII B, section 9, subdivision (b), the analysis is instructive in this case.

more costly." [Emphasis added.] Article XIII B places spending limits on both the state and local governments. "Costs mandated by the courts" are expressly excluded from these ceilings.[56]

The California Supreme Court has explained article XIII B as follows:

> Article XIII B - the so-called "Gann limit" - restricts the amounts state and local governments may appropriate and spend each year from the "proceeds of taxes." (§§ 1, 3, 8, subds. (a)-(c).) ... In language similar to that of earlier statutes, article XIII B also requires state reimbursement of resulting local costs whenever, after January 1, 1975, "the Legislature or any state agency mandates a new program or higher level of service on any local government, ..." (§ 6.) Such mandatory state subventions are excluded from the local agency's spending limit, but included within the state's. (§ 8, subds. (a), (b).) Finally, article XIII B excludes from either the state or local spending limit any "[a]ppropriations required for purposes of complying with mandates of *the courts* or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly." (§ 9, subd. (b) ... .) [Emphasis added.][57]

In other words, for activities undertaken to comply with a court mandate, article XIII B section 9, subdivision (b) excludes their costs from the constitutional spending cap of the affected state or local entity.[58] By contrast, expenditures for state-mandated programs under section 6 of article XIII B are exempt from a local agency's spending limit, but are not exempt from the state's constitutional spending cap.[59] Since court mandates are excluded from the constitutional spending limit, reimbursement under article XIII B, section 6 is not invoked.

As stated above, the issue is whether the appointment of counsel to investigate and if appropriate, file the DNA-testing motion, when counsel was previously appointed under section 1405, subdivision (b)(3)(B), is a mandate of the court or the state. In determining whether this provision is a court mandate, we consider whether the court has discretion in granting the request. If the court has no discretion, then the requirement is more in the nature of a state mandate rather than a court-ordered mandate. Conversely, the more discretion the court has in requiring the activity, the more likely the activity will be a court mandate.[60]

Based on the statutory language ("the court may, in its discretion, appoint counsel..."), appointment of counsel when counsel has previously been appointed is an activity wholly within the discretion of the court. Thus, staff finds this activity is a mandate of the court and not of the

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[56] *Id.* at page 57.

[57] *Id.* at pages 58-59.

[58] *Id.* at page 71.

[59] California Constitution, article XIII B, section 8, subdivision (a).

[60] Cf. *San Diego Unified School Dist,, supra,* 33 Cal.4th at page 880 states: "[I]n its mandatory aspect, [the test claim statute] ... appears to constitute a state mandate, in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing."

state. As a court mandate, it is therefore excluded from the constitutional definition of 'appropriations subject to limitation' in article XIII B, section 9 (b) of the California Constitution, making it not subject to article XIII B, section 6.

Similarly, section 1405, subdivision (e) states, "The court, in its discretion, may order a hearing on the motion [for DNA testing]." Claimant requests reimbursement for the following hearing-related activities of the district attorney and indigent defense counsel: time spent in court for appointment of counsel, filing of motions and litigation associated with motions, as well as travel-related expenses associated with meeting with inmates in connection with preparing the motion.[61] Claimant also alleges the Sheriff's activities of court testimony on the chain of custody and disposition of biological evidence.

The plain language of section 1405, subdivision (e) indicates that this activity is discretionary with the court, i.e., is triggered by a discretionary court order. Moreover, reading section 1405 in its entirety indicates that the court could grant or deny the motion for DNA testing without a hearing on the motion.

Claimant disagrees. In comments on the draft staff analysis, claimant argues "activities, such as the limited judicial discretion in appointment of counsel, 'triggers' State mandated activities in carrying out the post conviction rights of the indigent to DNA court proceedings." Claimant quotes part of the analysis above regarding the *San Diego Unified School Dist.* case and its discussion of discretionary decisions that trigger mandated costs (see pp. 16-17 above). Claimant states that the "appointment of counsel, while 'triggered' by a discretionary event, is deemed to be a state mandated event." Claimant goes on to cite the declaration of Jennifer Friedman originally submitted with the test claim, and then concludes with: "reimbursement is required for hearings, appointment of counsel and other activities reasonably necessary in implementing the test claim legislation, as claimed by the County in its Commission filings."

Claimant attempts to use the analysis above regarding discretionary activities of prosecutors and indigent defense counsel and apply it to discretionary activities of the court. Claimant does so without addressing the constitutional basis in article XIII B, section 9 (b) for finding this activity is not subject to Article XIII B, section 6. Thus, claimant ignores the constitutional difference, as explained above, between activities triggered by the discretion of local government actors, and those triggered by the court's discretion. Additionally, claimant asserts that judicial discretion in appointment of counsel when counsel has already been appointed, and in holding a hearing, is "limited." This assertion, however, is not supported by evidence or analysis of the statutes. Finally, the Friedman declaration quoted by claimant addresses post conviction DNA testing generally and characterizes section 1405, subdivision (c) as requiring "that a court appoint counsel for all convicted persons serving a term of imprisonment who file a motion under the section." Although this was true of subdivision (c) when section 1405 was originally enacted, Statutes 2001, chapter 943 amended this provision to create a difference between the required appointment of counsel in section 1403, subdivision (b)(3)(A), and the discretionary appointment of counsel in subdivision (b)(3)(B). Thus, the provisions are treated separately in this analysis.

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[61] Staff makes no finding on whether transporting inmates to or from state prison would be reimbursable under Penal Code section 4750 et seq.

As discussed above, an activity that is wholly within the discretion of the court is not a state-mandated activity, but is a court mandate within the meaning of article XIII B, section 9 (b). As to subdivision (e), the plain language indicates that whether or not a hearing is held is wholly within the discretion of the court.

Therefore, staff finds that a hearing on the DNA motion, as well as appointment of counsel when counsel was previously appointed, are court mandates on the district attorney and indigent defense counsel, and are therefore not subject to article XIII B, section 6.[62]

C. Activities in section 1417.9 mandated by the state

Subdivision (a) of section 1417.9 of the Penal Code states:

> (a) Notwithstanding any other provision of law and subject to subdivision (b), the appropriate governmental entity shall retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for deoxyribonucleic acid (DNA) testing.

Subdivision (b), as discussed below, specifies the conditions upon which the local entity may dispose of the biological evidence. Neither subdivision (a) nor (b) was substantively amended by Statutes 2001, chapter 943. Claimant requests reimbursement for identifying and tracking evidence to maintain proper retention and storage, preparing and tracking biological evidence sent to the lab for DNA testing, and maintaining biological evidence in refrigerated facilities and adding and maintaining such facilities. Claimant also alleges related activities, such as policies and procedures, training, distribution of a State Attorney General's Office publication on the test claim statute, and designing and developing computer software and equipment necessary to identify and retrieve the biological material.[63]

Because the plain language of section 1417.9, subdivision (a), requires the local entity to retain biological material secured in connection with a felony case,[64] staff finds that this activity is mandated by the state, and is therefore subject to article XIII B, section 6 effective January 1, 2001.

Subdivision (b) of section 1417.9 of the Penal Code states that "A governmental entity may dispose of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set for below are met . . . ." The statute then lists the notice provisions

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[62] This finding includes denial of the activity claimant alleged for the sheriff to transport convicted persons and provide oral testimony at hearings.

[63] These related activities are not expressly required by the statute. Should the Commission approve this analysis, these related activities may be considered during the parameters and guidelines phase to determine the "...most reasonable methods of complying with the mandate . . . ." (Cal. Code Regs, tit. 2, § 1183.12, subd. (b)(2)).

[64] The State Attorney General has opined that this retention is required only in felony cases. 88 Opinions of the California Attorney General 77 (2005).

which, if accompanied by a lack of a timely response as specified, would authorize the local entity to dispose of the biological material collected.

Claimant requests reimbursement for making initial contacts for permission to dispose of the biological evidence.

Thus, the issue is whether notifying persons convicted of felonies of the disposal of biological material in connection with their criminal case before their release from prison is a state-mandated activity. Staff finds that it is not.

In the *Kern High School Dist.* case,[65] the California Supreme Court considered whether school districts have a right to reimbursement for costs in complying with statutory notice and agenda requirements for various education-related programs that are funded by the state and federal government. The court held that in eight of the nine programs at issue, the claimants were not entitled to reimbursement for notice and agenda costs because district participation in the underlying program was voluntary. As the court stated, "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirement related to that program does not constitute a reimbursable mandate."[66]

Here, as in *Kern,* the initial decision to dispose of the biological material is voluntary or discretionary. This decision, in turn, triggers a mandatory duty to notify those incarcerated. Thus, because this statute authorizes but does not require the local entity to dispose of the biological material before the convicted person's release from prison, staff finds that doing so is not subject to article XIII B, section 6.

D. Do the test claim statutes constitute a "program" within the meaning of article XIII B, section 6?

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program," defined as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[67] Only one of these findings is necessary to trigger article XIII B, section 6.[68]

Of the activities discussed above,[69] only the following activities and statutes that are subject to article XIII B, section 6 are now under consideration. Thus, future reference to the test claim statutes or legislation is limited to the following:

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[65] *Kern High School Dist., supra,* 30 Cal.4th 727.

[66] *Id.* at page 743. Emphasis in original.

[67] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[68] *Carmel Valley Fire Protection District v. State of California, surpa,* 190 Cal.App.3d 521, 537.

[69] Claimant also requests reimbursement for preparing and tracking biological evidence sent to the lab for DNA testing, and for DNA testing required of the sheriff's department that is not reimbursed by the court. Since these activities are not expressly in statute as local government

- **Representation and investigation**: 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**: if 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 lab reports and data:** 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 effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender 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)).

Staff finds that these test claim statutes constitute a program within the meaning of article XIII B, section 6. DNA testing and retention of biological material carry out a governmental function of providing a service to the public by allowing incarcerated persons to contest their criminal convictions, thereby fostering justice for those wrongly convicted. Moreover, the activities impose unique requirements on local government that do not apply generally to all residents and entities in the state. Therefore, the test claim statutes constitute a program within the meaning of article XIII B, section 6.

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requirements, the Commission may, if it approves this test claim, consider them during the parameters and guidelines phase to determine whether they are "the most reasonable methods of complying with the mandate" (Cal.Code Regs, tit. 2, § 1183.12, subd. (b)(2)).

Issue 2: Does the test claim legislation impose a new program or higher level of service on local entities within the meaning of article XIII B, section 6?

To determine whether the "program" is new or imposes a higher level of service, the test claim legislation is compared to the legal requirements in effect immediately before enacting the test claim legislation.[70] And the test claim legislation must increase the level of governmental service provided to the public.[71] Each activity is discussed separately.

Prepare and file motion for DNA testing & representation: As discussed above, this activity requires court-appointed counsel, if not previously appointed by the court, to investigate and represent the person for the purpose of obtaining DNA testing, and as amended by Statutes 2001, chapter 943, to file a motion, if appropriate, for DNA testing and to represent the person solely for the purpose of obtaining DNA testing (Pen. Code, § 1405, subds. (a) & (b)(3)), and to provide notice of the motion as specified (§ 1405, subd. (c)(2)).[72]

Finance, in its August 2001 comments, states the following:

> [T]he activities described in the test claim do not constitute a new program or activity or a reimbursable cost. We believe that the activities ... is a procedure extension of the original trial. The petition involved is only raising examination of original evidence using technology not available at the time of the original case, thereby raising in question a material and substantive issue to the original criminal charge and verdict. ... the defense and prosecutorial activity and related investigations of this test claim are existing responsibilities of local government.

In its October 2001 response to Department of Finance comments, claimant argues that the program is not merely extensions of the original duties of trial counsel or extensions of the original case. Claimant cites a legislative analysis of SB 1342 that convicted individuals had no right to post-conviction DNA testing before the test claim statute.[73] Claimant also states that preexisting law (Pen. Code, § 1182) that authorizes a motion for a new trial is to be made prior to the imposition of judgment, unlike the test claim statute that authorizes the motion after the judgment. Claimant points out that the counsel appointed to represent the convict is often new to the case and must conduct an investigation in order to determine whether the motion is warranted, and if so, to prepare and file it. Claimant also argues that there was no prior mechanism for obtaining a DNA test to use as the basis for habeas corpus relief, and that there is no absolute right to counsel for habeas corpus relief (citing *Pennsylvania v. Finley* (1987) 481

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[70] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[71] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[72] The discussion as to whether this activity is a new program or higher level of service includes the original test claim statute (Stats. 2000, ch. 821) as well as the amendments of Statutes 2001, chapter 943.

[73] Assembly Committee on Public Safety, Analysis of Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as amended June 13, 2000, pages 4-5.

U.S. 551). Claimant concludes that the test claim statute is new and not an extension of a preexisting duty of trial or habeas counsel.

In its December 2001 comments, Finance states that appointing counsel to investigate and file a motion, if appropriate, for post-conviction DNA testing for indigent convicted persons is a reimbursable state-mandated program.

Staff finds that the activities of investigating and, if appropriate, filing a motion for DNA testing and representing the person solely for the purpose of obtaining DNA testing under Penal Code section 1405, constitute a new program or higher level of service. The DNA-testing motion is a separate civil action,[74] not part of the original criminal action, since the action is not to bring someone "to trial and punishment."[75] As such, the motion for DNA testing is not an extension of the original criminal trial.

Under preexisting law, a convicted person can file a petition for writ of habeas corpus or by coram nobis[76] based on newly discovered evidence.[77] However, a public defender is not required to do so.

Another preexisting statute, Government Code section 68662, requires the court to offer to appoint counsel to represent state prisoners subject to a capital sentence for purposes of state post-conviction proceedings, meaning state proceedings in which the prisoner seeks collateral relief from a capital sentence, i.e., relief other than by automatic appeal."[78] The Habeas Corpus Resource Center, an agency in the Judicial Branch of state government, provides for this counsel.[79]

These provisions, however, are distinct from the requirements of the test claim statute. Thus, investigating, filing the motion for DNA testing, and representing the person for the purposes of obtaining DNA testing are not preexisting duties of local entities, but are a new program and higher level of service.

Inasmuch as the test claim statute imposes new requirements, staff finds that the activities of investigating and, if appropriate, filing a motion for DNA testing and representing the person solely for the purpose of obtaining DNA testing under Penal Code section 1405, constitute a new program or higher level of service.

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[74] As defined by Code of Civil Procedure section 30, a civil action is "prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong."

[75] As defined by Penal Code section 683, a criminal action is "the proceeding by which a party charged with a public offense is accused and brought to trial and punishment..."

[76] A writ of coram nobis permits the court that rendered judgment to reconsider it and give relief from errors of fact.

[77] *In re Clark* (1993) 5 Cal. 4th 750, 766.

[78] *In re Barnett* (2003)31 Cal.4th 466, 476, fn. 6.

[79] See <http://www.hcrc.ca.gov> as of April 28, 2006.

The test claim statutes, as discussed above, also require local entities to do the following:

- **Prepare and file response to the motion:** Effective January 1, 2001, to 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 lab reports and data:** 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 effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender 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)).

Because preexisting law did not require local entities to perform the four activities listed above, staff finds that they constitute a new program or higher level of service within the meaning of article XIII B, section 6.

Retain biological material: The test claim statute requires 'the appropriate government entity' to retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)). The California Attorney General has opined that this does not require retention of biological material in connection with a misdemeanor conviction, but only applies to felony cases.[80]

Although preexisting law includes a law enforcement duty to preserve evidence that might be expected to play a significant role in the suspect's defense,[81] that duty is limited. The California Supreme Court outlined the limitation as follows:

> The state's responsibility [to preserve evidence] is further limited when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." [Citations omitted.] In such case, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." [Citations omitted.][82]

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[80] 88 Opinions of the California Attorney General 77 (2005).

[81] *People v. Farnam* (2002) 28 Cal. 4th 107, 166.

[82] *Ibid.*

Thus, the preexisting duty to retain biological evidence is limited when the material, like DNA and other biological material, 'could have been subject to tests, the results of which might have exonerated the defendant." Moreover, before 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, staff 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.

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

In order for the test claim statute to impose a reimbursable state-mandated program under the California Constitution, the test claim legislation must impose costs mandated by the state.[83] In addition, no statutory exceptions listed in Government Code section 17556 can apply. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

With the test claim, claimant files a declaration that it "is incurring costs, well in excess of $200 per annum, the minimum cost that must be incurred to file a claim in accordance with Government Code section 17564(a)."[84]

Government Code section 17556, subdivision (e), precludes reimbursement for a local agency if:

> [t]he statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or **includes additional revenue** that was specifically intended to fund the costs of the state mandate **in an amount sufficient** to fund the cost of the state mandate. [Emphasis added.]

The issue, therefore, is whether there is sufficient additional revenue to fund the program. Staff finds that there is not.

Penal Code section 1405, subdivision (i) states:

> (1) The cost of DNA testing ordered under this section shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and posses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person.
> (2) In order to pay the state's share of any testing costs, the laboratory designated in subdivision (e) shall present it bill for services to the superior court for

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[83] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[84] The current requirement is $1000 in costs (Gov. Code, § 17564, as amended by Stats. 2004, ch. 890).

approval and payment. It is the intent of the Legislature to appropriate funds for this purpose in the 2000-01 Budget Act.

As to the DNA testing, there is no local entity expenditure for this testing because the statute calls for the state or applicant to pay for it. However, there is no similar promise of funding for the other activities mandated by the test claim statute. Therefore, staff finds that subdivision (i) of section 1405 does not preclude reimbursement for the test claim.

In addition, the claimant indicated receipt of a $160,000 grant from the Office of Criminal Justice Planning (State of California) for providing representation to former public defender clients who request counsel for DNA-testing motions.[85]

There is no evidence in the record that this grant constitutes "additional revenue ... specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate." The grant was only for indigent counsel or public defender expenses, and was not intended to fund evidence retention or other activities required by the test claim statutes. Therefore, while this grant would be considered an offset of expenses incurred under the statute,[86] it does not preclude reimbursement for the state-mandated program.

Therefore, staff finds that the test claim statutes impose costs mandated by the state within the meaning of Government Code section 17514, and that the preclusions in Government Code section 17556 do not apply.

CONCLUSION

Staff finds 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**: 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**: If 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

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[85] Letter from J. Tyler McCauley, County of Los Angeles, September 19, 2003, page 5.

[86] California Code of Regulations, title 2, section 1183.1, subdivision (a)(7).

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:** 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 effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender 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)).

Staff finds that all other statutes in the test claim, including holding a hearing on the DNA-testing motion, are not a reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514.

Recommendation

Staff recommends that the Commission adopt this analysis and partially approve the test claim for the activities listed above.

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EXHIBIT A

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

June 27, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

The County of Los Angeles submits and encloses herewith a test claim to obtain timely and complete reimbursement for the State-mandated local program, in the captioned law.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

For J. Tyler McCauley
Auditor-Controller

JTM:JN:LK-HY
Enclosures

County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

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County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

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County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916)323-3562
CSM 1 (12/89)

For Official Use Only

RECEIVED
JUN 29 2001
COMMISSION ON STATE MANDATES
10:15 am

Claim No. 00-TC-21

TEST CLAIM FORM

Local Agency or School District Submitting Claim

Los Angeles County

Contact Person	**Telephone No.**
Leonard Kaye	(213) 974-8564

Address
500 West Temple Street, Room 603
Los Angeles, CA 90012

Representative Organization to be Notified

California State Association of Counties

This test claim alleges the existence of " costs mandated by the state" within the meaning of section 17514 of the Government Code and section 6, article, XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable.

See page a

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative	**Telephone No.**
J. Tyler McCauley Auditor-Controller	(213) 974-8301

Signature of Authorized Representative	**Date**
Maria Rios for J.T. McCauley	6/28/01

County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

Notice of Filing

The County of Los Angeles filed the reference test claim on June 28, 2001 with the Commission on State Mandates of the State of California at the Commission's Office, 980 Ninth Street, Suite 300, Sacramento, California 95814.

Los Angeles County does herein claim full and prompt payment from the State in implementing the State-mandated local program found in the subject law.

County of Los Angeles Test Claim
Sections 1405 and 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

Brief

Sections 1405 and 1417.9 of the Penal Code, as added by Chapter 821, Statutes of 2000, the test claim legislation, sets forth new requirements for post conviction DNA testing and court proceedings.

Section 1405 addresses the new rights of State prison inmates to appointed counsel for purposes of litigating a request for post-conviction DNA testing where "identity of the perpetrator was, or should have been, a significant issue in the case".

Section 1417.9 covers new biological evidence retention and notification requirements to ensure that biologic evidence is not destroyed, unless it is not needed in litigation pursuant to Section 1405.

Under prior law, there was no requirement that the governmental entity in possession of biological evidence suitable for DNA testing retain such evidence or notify the District Attorney, inmate, defense counsel, and specified others, in order to be able to destroy biological evidence in their possession.

Evidence Requirements

Section 1417.9 mandates new evidence duties upon the "appropriate governmental entity", or in the County's case, upon the County's Sheriff Department, requiring that:

> " [the] entity shall retain any biological material secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for DNA testing.
>
> (b) A governmental entity may dispose of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set forth below are met:

(1) The governmental entity notifies all of the following persons of the provisions of this section and of the intention of the governmental entity to dispose of the material: any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.

(2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

(A) A motion filed pursuant to Section 1405, however, upon filing of that application, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

(B) A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to Section 1405 that is followed within 180 days by a motion for DNA testing pursuant to Section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405.

(3) No other provision of law requires that biological evidence be preserved or retained."

Section 1405 Motion

Penal Code Section 1405(a) states that "a person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion before the trial court that entered the judgement of conviction in his or her case, for performance of deoxyribonucleic acid [DNA] testing".

When the prisoner makes his or her motion, requirements for the motion must be complied with in accordance Section 1405(a):

"(1) The motion shall be verified by the convicted person under penalty of perjury and shall do all of the following:

(A) Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.

(B) Explain in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.

(C) Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.

(2) Notice of the motion shall be served on 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. Responses, if any, shall be filed 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.

(3) If any DNA or other biological evidence testing was conducted previously by either the prosecution or defense,

the results of that testing shall be revealed in the motion for testing, if known."

Hearing on the Motion

If the court orders a hearing on the motion, requirements for the hearing are set forth, in pertinent part, in subdivisions (b) and (c) of Section 1405:

"(b) ..... The motion shall be heard by the judge who conducted the trial unless the presiding judge determines that judge is unavailable. Upon request of either party, the court may order, in the interest of justice, that the convicted person be present at the hearing of the motion.

(c) The court shall appoint counsel for the convicted person who brings a motion under this section if that person is indigent.

(d) The court shall grant the motion for DNA testing if it determines all of the following have been established:

(1) The evidence to be tested is available and in a condition that would permit the DNA testing that is requested in the motion.

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.

(3) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case.

(4) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence.

(5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction. The court in its discretion may consider any evidence whether or not it was introduced at trial.

(6) The evidence sought to be tested meets either of the following conditions:

(A) It was not tested previously.

(B) It was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

(7) The testing requested employs a method generally accepted within the relevant scientific community.

(8) The motion is not made solely for the purpose of delay."

DNA Testing

If the court grants the motion for DNA testing, requirements for the testing are set forth, in pertinent part, in subdivisions (e), (f), (g), (i) and (j) of Section 1405:

"(e) ... the court order shall identify the specific evidence to be tested and the DNA technology to be used. The 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. If the parties cannot agree, the court's order shall designate the laboratory to conduct the testing and shall consider designating a laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB).

(f) The result of any testing ordered under this section shall be fully disclosed to the person filing the motion, the district attorney, and the Attorney General. If requested by any party, the court shall order production of the underlying laboratory data and notes.

(g)(1) The cost of DNA testing ordered under this section shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person.

(2) In order to pay the state's share of any testing costs, the laboratory designated in subdivision (e) shall present its bill for services to the superior court for approval and payment. It is the intent of the Legislature to appropriate funds for this purpose in the 2000-01 Budget Act.

(i) DNA testing ordered by the court pursuant to this section shall be done as soon as practicable. However, if the court finds that a miscarriage of justice will otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, a DNA laboratory shall be required to give priority to the DNA testing ordered pursuant to this section over the laboratory's other pending casework."

(j) DNA profile information from biological samples taken from a convicted person pursuant to a motion for postconviction DNA testing is exempt from any law requiring disclosure of information to the public."

Review of Court Orders

Section 1405(h) governs the review of court orders on DNA testing as follows:

> "(h) An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General. Any such petition shall be filed within 20 days after the court's order granting or denying the motion for DNA testing. In a noncapital case, the petition for writ of mandate or prohibition shall be filed in the court of appeals. In a capital case, the petition shall be filed in the California Supreme Court. The court of appeals or California Supreme Court shall expedite its review of a petition for writ of

District Attorney Services

The Los Angeles County District Attorney's Office is now required to perform new duties pursuant to Sections 1405 and 1417.9 of the Penal Code, as added by Chapter 821, Statutes of 2000, the test claim legislation. These duties are explained in the declaration of Lisa Kahn, Deputy-in-Charge, Forensic Sciences Section, in Exhibit A, in pertinent part, as follows:

> "**Initial Contact-** Writing or responding to initial correspondence from inmates, attorneys or others seeking information regarding Penal Code Section 1405 and 1417.9.
>
> **Investigating Claims-** Reading letters from inmates or those writing on behalf of inmates, retrieving and reviewing court files, trial attorney files, appellate counsel 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 inmates in person or on the telephone as well as written consultation.
>
> **Preparing Motions-** Includes preparing motions pursuant to Penal Code Section 1405 and responding to notices sent pursuant to Penal Code Section 1417.9.
>
> **Meet and Confer-** Consultation and meetings with the trial attorney, appellate counsel, representatives of the Public Defender's Office, the Alternate Public Defender's Innocence Unit, the Post Conviction Center, the District Attorney's Office, the Attorney General, and individuals from other Innocence Projects.
>
> **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."

"**Development and Procedure**- Preparing protocols, administrative forms, meeting with SB90 advisor and one-time activities associated with setting up the Post-Conviction DNA unit within the District Attorney's Office.

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.

Travel- Travel related expenses associated with meeting with inmate in connection with preparation of 1405 motion. Travel to and from local courthouses for purpose of litigating 1405 motions.

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."

Indigent Defense Services

The Los Angeles County Public Defender, Alternate Public Defender, and court-appointed indigent defense counsel are now required to perform new duties pursuant to Sections 1405 and 1417.9 of the Penal Code, as added by Chapter 821, Statutes of 2000, the test claim legislation. These duties are exemplified in the declaration of Jennifer Friedman, Coordinator of the Los Angeles County Public Defender Innocence Unit, in Exhibit B, in pertinent part, as follows:

"A: **Initial Contact**- Writing or responding to initial correspondence from inmates, attorneys or others seeking information regarding Penal Code Section 1405 and 1417.9.

B: **Investigating Claims**- Reading letters from inmates or those writing on behalf of inmates, retrieving court files, public defender files, 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.

C: **Preparing Motions**- Includes preparing motions pursuant to Penal Code Section 1405 and responding to notices sent pursuant to Penal Code Section 1417.9.

D: **Meet and Confer**- Consultation and meetings with the trial attorneys, appellate counsel, members of APD's Innocence Unit, the Post Conviction Center, the DA's Office, the Attorney General, and individuals from other Innocence Projects.

E: **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.

F: **Development and Procedure-** preparing protocols, administrative forms, meeting with SB90 advisor and one time activities associated with setting up this unit.

G: **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.

H: **Travel-** Travel related expenses associated with meeting with inmate in connection with preparation of 1405 motion. Travel to and from local court houses for purpose of litigating 1405 motions.

I: **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. "

Sheriff Services

The Los Angeles County Sheriff's Department is now required to perform new duties pursuant to Sections 1405 and 1417.9 of the Penal Code, as added by Chapter 821, Statutes of 2000, the test claim legislation. In particular, the Sheriff's Department must now implement Section 1414.9, mandating biological evidence retention and notification requirements, to ensure that biologic evidence is not destroyed, unless it is not needed in litigation pursuant to Section 1405.

Some of the Sheriff's new duties under the test claim legislation are explained in the declaration of Dean Gialamas, Crime Laboratory Assistant Director, Scientific Services Bureau, in Exhibit F, in pertinent part, as follows:

"One-time Activities

Development of Departmental policies and procedures necessary to comply with the post conviction forensic testing requirements of the subject law, which may include the necessary computer programming and hardware of 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.

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. "

"Continuing Activities

Train investigative personnel with the Los Angeles County Sheriff's Department and the staff of the 46 independent law enforcement agencies (e.g., city police departments) to whom we provide crime lab services in the methods and procedures necessary to comply with the subject law.

Initial contacts to specified parties to seek permission to dispose of biological evidence.

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

Responding to requests for biological evidence held at the Scientific Services Bureau of the Los Angeles County Sheriff's Department which has 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.

Responding to requests for the analysis of evidence held at the Scientific Services Bureau of the Los Angeles County Sheriff's Department in order to determine if biological evidence is present and suitable for DNA testing. This involves laboratory testing and analysis and the issuance of a final report.

Meet and confer with parties (attorneys, investigators, etc.) to determine the suitability of DNA testing on the retained evidence in a particular case.

Preparation and tracking of biological evidence that is sent to agreed upon private vendor DNA laboratories for testing.

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.

DNA testing required of the Los Angeles County Sheriff's Department subject to the pursuant law which is not reimbursed by the Superior Court due to insufficient funding."

Some of the Sheriff's new duties under the test claim legislation are explained in the declaration of L. Peter Zavala, Administrative Services Manager III, Central Property and Evidence Unit, in Exhibit E, in pertinent part, as follows:

One-time Activities

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.

Meet and confer with trial attorneys and other counsel regarding the coordination of efforts in implementing the subject law.

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.

Train evidence and property custodians on storage and notification methods and procedures necessary to comply with the subject law.

Design, development, and testing of computer software and equipment necessary to identify and retrieve all biological materials associated with a particular case.

Continuing Activities

Initial contacts to specified parties to seek permission to dispose of biological evidence.

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

Responding to requests for biological evidence held at the Central Property and Evidence Unit of the Los Angeles County Sheriff's Department. 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.

Maintaining biological evidence in refrigerated facilities to preserve its suitability for DNA testing pursuant to the subject law. This activity includes adding refrigerated facilities to meet increasing storage requirements as well as maintaining such facilities [e.g. utilities].

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. //

Reimbursable Costs

The County Sheriff, District Attorney, and indigent defense counsel are performing new duties in implementing the test claim legislation, as described in the attached seven declarations. As a result, the County is incurring costs, well in excess of $200 per annum, the minimum cost that must be incurred to file a claim in accordance with Government Code Section 17564(a).

The magnitude and nature of reimbursable costs that will be incurred by the County's Public Defender Department in implementing the test claim legislation has been estimated for 2001-02, in the declaration of Patricia Van Bogaert, Administrative Deputy, Administrative Services Bureau. It is reproduced here, in pertinent part, as follows:

PUBLIC DEFENDER

ESTIMATED PROGRAM COSTS FOR POST CONVICTION DNA TESTING FOR FY2001/2002

Position	Title	FY2001/2002 Salary	Emp Ben 37.13%	O.H. 23.91%	Total Annual	Other S & S	S & S Seminars	Total Program
2.00	Deputy Public Defender IV	245,376.00	91,108.11	58,669.40	395,153.51	5,000.00	5,000.00	405,153.51
0.25	Investigator III	20,020.92	7,433.77	4,787.00	32,241.69			32,241.69
1.00	Legal Office Support Asst II	39,184.32	14,549.14	9,368.97	63,102.43			63,102.43
1.00	Senior Paralegal	12,876.27	4,780.96	3,078.72	20,735.95			20,735.95
4.25		**$317,457.51**	**$117,871.97**	**$75,904.09**	**$511,233.57**	**$5,000.00**	**$5,000.00**	**$521,233.57**

Notes: Annual Salary uses weighted average from FY2001/02 spread sheets
Employee Benefit and Overhead Rates from approved FY2000/01 ICP
Services and Supplies for Travel and Mileage associated with visits to inmates and court appearances
Services and Supplies for Seminars associated with technological advances in the field of DNA analysis

Similar Reimbursable Duties

The Commission has found duties and costs, similar to the ones claimed herein, to be reimbursable. A similar example is the Mentally Disordered Offenders' Extended Commitment Proceedings [MDO] program.

The MDO program, established by Penal Code Sections 2970, 2972, and 2972.1, as Added and Amended by Statutes of 1985, Chapter 1418; Statutes of 1986, Chapter 858; Statutes of 1987, Chapter 687; Statutes of 1988, Chapter 657; Statutes of 1988, Chapter 658; Statutes of 1989, Chapter 228; Statutes of 1991, Chapter 435; and Statutes of 2000, Chapter 324, addresses the Mentally Disordered Offender legislation, and establishes civil commitment procedures for the continued involuntary treatment of persons with severe mental disorders for one year following their parole termination date. These procedures, according to Commission's Statement of Decision, generally require the following:

> "A civil hearing on the petition for continued involuntary treatment; [t]he right to a jury trial, with a unanimous verdict by the jury before the offender can be committed; [t]he appointment of defense counsel for indigent offenders; and [s]ubsequent petitions and hearings regarding the recommitment of the offender for another year of involuntary treatment."

The Commission found that Penal Code sections 2970, 2972, and 2972.1 impose 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 for the following activities:

> " Review the state's written evaluation and supporting affidavits indicating that the offender's severe mental disorder is not in remission or cannot be kept in remission without continued treatment (Pen. Code, § 2970);
>
> Prepare and file petitions with the superior court for the continued involuntary treatment of the offender (Pen. Code, § 2970);
>
> Represent the state and the indigent offender in civil hearings on the petition and any subsequent petitions or hearings regarding recommitment (Pen. Code, §§ 2972, 2972.1);

Retain necessary experts, investigators, and professionals to prepare for the civil trial and any subsequent petitions for recommitment;

Travel to and from state hospitals where detailed medical records and case files are maintained; and

Provide transportation and custody of each potential mentally disordered offender before, during, and after the civil proceedings by the County's Sheriff Department."

It should also be noted that transportation and custody of the subject [DNA Court Proceedings test claim] inmates, can be required in specific cases, and, if so required, would also be reimbursable as it is for potential MDO inmates.

Redirected Effort is Prohibited

When Sections 1405 and 1417.9 of the Penal Code were added by Chapter 821, Statutes of 2000, the test claim legislation, and set forth new requirements for post conviction DNA testing and court proceedings, the County's and local governments' funds were redirected to pay for the State's program.

The State has not been allowed to circumvent restrictions on shifting its burden to localities by directing them to shift their efforts to comply with State mandates however noble they may be.

This prohibition of substituting the work agenda of the state for that of local government, without compensation, has been found by many in the California Constitution. On December 13, 1988, Elizabeth G. Hill, Legislative Analyst, Joint Legislative (California) Budget Committee wrote to Jesse Huff, Commission on State Mandates (Exhibit I) and indicated on page 6 that the State may not redirect local governments' effort to avoid reimbursement of local costs mandated by the State:

"Article XIII B, Section 6 of the State Constitution requires the state to reimburse local entities for new programs and higher levels of service.

It does not require counties to reduce services in one area to pay for a higher level of service in another."

Therefore, reimbursement for the subject program is required as claimed herein.

State Funding Disclaimers Are Not Applicable

There are seven disclaimers specified in GC Section 17556 which could serve to bar recovery of "costs mandated by the State", as defined in GC Section 17514. These seven disclaimers do not apply to the instant claim, as shown, in seriatim, for pertinent sections of GC Section 17556.

(a) "The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the Program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency to implement a given program shall constitute a request within the meaning of this paragraph."

(a) is not applicable as the subject law was not requested by the County claimant or any local agency or school district.

(b) "The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts."

(b) is not applicable because the subject law did not affirm what had been declared existing law or regulation by action of the courts.

(c) "The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation."

(c) is not applicable as no federal law or regulation is implemented in the subject law.

(d) "The local agency or school district has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service."

(d) is not applicable because the subject law did not provide or include any authority to levy any service charges, fees, or assessments.

(e) "The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the State mandate in an amount sufficient to fund the cost of the State mandate."

(e) is not applicable as no offsetting savings are provided in the subject law and no revenue to fund the subject law was provided by the legislature.

(f) "The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a Statewide election."

(f) is not applicable as the duties imposed in the subject law were not included in a ballot measure.

(g) "The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction."

(g) is not applicable as the subject law did not create or eliminate a crime or infraction and did not change that portion of the statute not relating directly to the penalty enforcement of the crime or infraction.

Therefore, the above seven disclaimers will not bar local governments' reimbursement of its costs in implementing the requirements set forth in the captioned test claim legislation as these disclaimers are all not applicable to the subject claim.

Costs Mandated by the State

The County has incurred costs in complying with Sections 1405 and 1417.9 of the Penal Code, as added by Chapter 821, Statutes of 2000, the test claim legislation. The County's costs in performing new duties under the test claim legislation, as illustrated in the attached seven declarations, are reimbursable "costs mandated by the State" under Section 6 of Article XIII B of the California Constitution and Section 17500 et seq of the Government Code.

The County was required to provide a new State-mandated program and thus incur reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

Accordingly, for the County's costs to be reimbursable "costs mandated by the State", three requirements must be met:

1. There are "increased costs which a local agency is required to incur after July 1, 1980"; and

2. The costs are incurred "as a result of any statute enacted on or after January 1, 1975"; and

3. The costs are the result of "a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution".

All three of above requirements for finding cost mandated by the State are met herein.

First, local government is incurring costs in implementing the test claim legislation added by Chapter 821, Statutes of 2000, well after July 1, 1980.

Second, the test claim statute, Chapter 821, Statutes of 2000, was enacted well after January 1, 1975.

Third, the post-conviction: DNA court proceedings required under the test claim legislation, as detailed above, are new, not required under prior law. Therefore, "a new program or higher level of service..." has been enacted in the test claim legislation.

Therefore, reimbursement of the County's "costs mandated by the State", incurred in implementing the test claim legislation, as claimed herein, is required.

LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
BUREAU OF FRAUD AND CORRUPTION PROSECUTIONS •
FORENSIC SCIENCES SECTION

STEVE COOLEY • District Attorney
LAWRENCE E. MASON • Chief Deputy District Attorney
PETER BOZANICH • Assistant District Attorney

DAVID H. GUTHMAN • Director

County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

Declaration of Lisa Kahn

Lisa Kahn makes the following declaration and statement under oath:

I, Lisa Kahn, Deputy-in-Charge, Forensic Sciences Section of the District Attorney's Office of the County of Los Angeles, am responsible for implementing the subject law.

I declare that the District Attorney's Office has incurred new duties as a result of the Post-Conviction DNA Testing statute (Pen. Code § 1405), and the Disposal of Evidence Notification law (Pen. Code § 1417.9). These new duties have resulted in increased costs for the Office.

I declare that before the enactment of Penal Code Section 1405, convicted persons had no right to appointed counsel for purposes of litigating a request for post-conviction DNA testing.

I declare that before the enactment of Penal Code Section 1417.9, there was no requirement that the governmental entity in possession of biological evidence notify the District Attorney and the inmate in order to be able to destroy biological evidence in their possession.

I declare that as a result of the Post-Conviction DNA testing statute, when a convicted person either files a motion or requests appointment of counsel for purposes of investigating a claim pursuant to Penal Code Section 1405, the District Attorney or the Attorney General's Office is required to investigate whether such a motion is meritorious, and, if necessary litigate the motion including seeking appellate relief through a writ petition if the motion is denied.

I declare that new duties created by the Disposal of Evidence Notification law arise because the law requires that the District Attorney's Office be notified whenever a governmental entity in possession of biological material intends to destroy the material. (Penal Code Section 1417.9, subdivision (b)(1).)

I declare that duties performed by the District Attorney's Office pursuant to the subject law are reasonably necessary in complying with the subject law, and cost the County of Los Angeles in excess of $200 per annum, the minimum cost that must be incurred to file a claim in accordance with Government Code Section 17564(a).

780 Hall of Records
320 West Temple Street
Los Angeles, CA 90012
(213) 974-7346

I declare that new duties imposed on the District Attorney's Office due to Section 1417.9 include reviewing the convicted prisoner's or Public Defender's or other counsel's representations regarding the convicted prisoner's case in which the biological material was retained in order to determine how to respond to the government's notification of disposal.

I declare that possible responses could include reviewing the convicted prisoner's or Public Defender's or other counsel's representations and drafting and litigating a motion pursuant to Penal Code Section 1405.

I declare that duties of deputy district attorneys, support personnel, investigators, experts, and associated services and supplies, mandated under the subject law, as detailed on the attached list of reimbursable activities are reasonably necessary in complying with the subject law.

Specifically, I declare that I am informed and believe that the County's State mandated duties and resulting costs in implementing the subject law require the County to provide new State-mandated services and thus incur costs which are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

6/18/01
Date

Los Angeles, CA
Place

Signature

LAW OFFICES
LOS ANGELES COUNTY PUBLIC DEFENDER
210 West Temple
Los Angeles, CA. 90012
213-974-2811

May 21, 2001

MICHAEL P. JUDGE
PUBLIC DEFENDER

County of Los Angeles Test Claim
Section 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post-Conviction: DNA Court Proceedings

Declaration of Jennifer Friedman

I, Jennifer Friedman, makes the following declaration and statement under oath:

I, Jennifer Friedman, coordinator of the Los Angeles County Public Defender Office's Innocence Unit, am responsible for implementing the subject law.

I declare that the Public Defender's Office has incurred new duties as a result of Post-Conviction DNA Testing Statute (Penal Code Section 1405), and the Disposal of Evidence Notification law (Penal Code Section 1417.9). These new duties have resulted in increased costs for the Office.

I declare that before the enactment of Penal Code Section 1405, convicted persons had no right to appointed counsel for purposes of litigating a request for post-conviction DNA testing.

I declare that before the enactment of Penal Code Section 1417.9, there was no requirement that the government notify the public defender and the inmate in order to be able to destroy biological evidence in their possession.

I declare that as a result of the Post-Conviction DNA testing statute, when a convicted person either files a motion or requests appointment of counsel for purposes of investigating a claim pursuant to Penal Code Section 1405 by contacting the Public Defender, the court, the District Attorney or Attorney General, the Office is required to investigate whether such a motion is potentially meritorious, and if so, must draft, file and litigate the motion, including seeking appellate review through a writ petition if the motion is denied.

I declare that new duties created by the Disposal of Evidence Notification Law arise because the law requires that the Public Defender's Office be notified whenever a governmental agency in possession of biological evidence intends to destroy the material. (Penal Code Section 1417.9ubd.(b)(1)).

I declare that new duties imposed on the Public Defender due to Section 1417.9 include determining whether the Public Defender represented the person who was charged with the crime in which the biological material was retained; contacting the person's lawyer if the Public Defender did not represent him or her, and reviewing the individual's case to determine how to respond to the government's notification.

I declare that possible responses could include drafting and litigating a motion pursuant to Penal Code Section 1405, drafting a declaration stating that a motion will be filed within 180 days or drafting a declaration of innocence as provided by Penal Code Section 1417.9 (b)(2)(C).

I declare that duties of attorneys, support personnel, investigators, and associated services and supplies, mandated under the subject law, as detailed on the attached list of reimbursable activities are reasonably necessary in complying with the subject law.

Specifically, I declare that I am informed and believe that the County's State mandated duties and resulting costs in implementing the subject law require the County to provide new State-mandated services and thus incur costs which are, im my opinion are reimbursable "costs mandated by the State," as defined in Government Code Section 17514:

> "'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of any existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

6/6/01 Los Angeles, CA.
Date and Place

Jennifer Friedman

Description of Reimbursable Activities

A: **Initial Contact-** Writing or responding to initial correspondence from inmates, attorneys or others seeking information regarding Penal Code Section 1405 and 1417.9.

B: **Investigating Claims-** Reading letters from inmates or those writing on behalf of inmates, retrieving court files, public defender files, 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.

C: **Preparing Motions-** Includes preparing motions pursuant to Penal Code Section 1405 and responding to notices sent pursuant to Penal Code Section 1417.9.

D: **Meet and Confer-** Consultation and meetings with the trial attorneys, appellate counsel, members of APD's Innocence Unit, the Post Conviction Center, the DA's Office, the Attorney General, and individuals from other Innocence Projects.

E: **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.

F: **Development and Procedure-** preparing protocols, administrative forms, meeting with SB90 advisor and one time activities associated with setting up this unit.

G: **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.

H: **Travel-** Travel related expenses associated with meeting with inmate in connection with preparation of 1405 motion. Travel to and from local court houses for purpose of litigating 1405 motions.

I: **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.

LAW OFFICES
LOS ANGELES COUNTY PUBLIC DEFENDER
19-513 CRIMINAL COURTS BUILDING
210 WEST TEMPLE STREET
LOS ANGELES, CALIFORNIA 90012
(213) 974-2811

MICHAEL P. JUDGE
PUBLIC DEFENDER

June 6, 2001

County of Los Angeles Test Claim
Section 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post-Conviction: DNA Court Proceedings

Declaration of Patricia Van Bogaert

I, Patricia Van Bogaert, makes the following declaration and statement under oath:

I, Patricia Van Bogaert, Administrative Deputy, Administrative Services Bureau of the Los Angeles County Public Defender Office, am responsible for fiscal management and administration, including recovering County costs incurred in performing State-mandated programs, and for determining State-mandated County costs unavoidably resulting from the subject law.

I believe that the Public Defender's Office has incurred new duties as a result of Post-Conviction DNA Testing Statute (Penal Code Section 1405), and the Disposal of Evidence Notification law (Penal Code Section 1417.9). These new duties have resulted in increased costs for the Office.

I believe that before the enactment of Penal Code Section 1405, convicted persons had no right to appointed counsel for purposes of litigating a request for post-conviction DNA testing.

I believe that before the enactment of Penal Code Section 1417.9, there was no requirement that the government notify the public defender and the inmate in order to be able to destroy biological evidence in their possession.

I believe that as a result of the Post-Conviction DNA testing statute, when a convicted person either files a motion or requests appointment of counsel for purposes of investigating a claim pursuant to Penal Code Section 1405 by contacting the Public Defender, the court, the District Attorney or Attorney General, the Office is required to investigate whether such a motion is potentially meritorious, and if so, must draft,

file and litigate the motion, including seeking appellate review through a writ petition if the motion is denied.

I believe that new duties created by the Disposal of Evidence Notification Law arise because the law requires that the Public Defender's Office be notified whenever a governmental agency in possession of biological evidence intends to destroy the material. (Penal Code Section 1417.9ubd.(b)(1)).

I believe that new duties imposed on the Public Defender due to Section 1417.9 include determining whether the Public Defender represented the person who was charged with the crime in which the biological material was retained; contacting the person's lawyer if the Public Defender did not represent him or her, and reviewing the individual's case to determine how to respond to the government's notification.

I believe that possible responses could include drafting and litigating a motion pursuant to Penal Code Section 1405, drafting a declaration stating that a motion will be filed within 180 days or drafting a declaration of innocence as provided by Penal Code Section 1417.9 (b)(2)(C).

I believe that duties of attorneys, support personnel, investigators, and associated services and supplies, mandated under the subject law, as detailed on the attached list of reimbursable costs are reasonably necessary in complying with the subject law.

Specifically, I declare that I am informed and believe that the County's State mandated duties and resulting costs in implementing the subject law require the County to provide new State-mandated services and thus incur costs which are, in my opinion are reimbursable "costs mandated by the State," as defined in Government Code Section 17514:

> "'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of any existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

6/6/01 Los Angeles, Ca.
Date and Place

Patricia Van Bogaert
Patricia Van Bogaert

PUBLIC DEFENDER

ESTIMATED PROGRAM COSTS FOR POST CONVICTION DNA TESTING FOR FY2000/2001

Position	Title	FY2000/2001 Salary	Emp Ben 37.13%	O.H. 23.91%	Total Annual	Other S & S	S & S Seminars	Total Program
0.25	Deputy Public Defender IV	29,485.35	10,947.91	7,049.95	47,483.21	500.00		47,983.21
								0.00
								0.00
								0.00
0.25		**$29,485.35**	**$10,947.91**	**$7,049.95**	**$47,483.21**	**$500.00**	**$0.00**	**$47,983.21**

Notes: Annual Salary uses weighted average from FY2000/01 spread sheets
Employee Benefit and Overhead Rates from approved FY2000/01 ICP
Services and Supplies for Travel and Mileage associated with visits to inmates and court appearances

.\SB90DNA.123

05/23/2001

PUBLIC DEFENDER

ESTIMATED PROGRAM COSTS FOR POST CONVICTION DNA TESTING FOR FY2001/2002

Position	Title	FY2001/2002 Salary	Emp Ben 37.13%	O.H. 23.91%	Total Annual	Other S & S	S & S Seminars	Total Program
2.00	Deputy Public Defender IV	245,376.00	91,108.11	58,669.40	395,153.51	5,000.00	5,000.00	405,153.51
0.25	Investigator III	20,020.92	7,433.77	4,787.00	32,241.69			32,241.69
1.00	Legal Office Support Asst II	39,184.32	14,549.14	9,368.97	63,102.43			63,102.43
1.00	Senior Paralegal	12,876.27	4,780.96	3,078.72	20,735.95			20,735.95
4.25		**$317,457.51**	**$117,871.97**	**$75,904.09**	**$511,233.57**	**$5,000.00**	**$5,000.00**	**$521,233.57**

Notes: Annual Salary uses weighted average from FY2001/02 spread sheets
Employee Benefit and Overhead Rates from approved FY2000/01 ICP
Services and Supplies for Travel and Mileage associated with visits to inmates and court appearances
Services and Supplies for Seminars associated with technological advances in the field of DNA analysis

Post-Conviction : DNA Court Proceedings
Penal Code Section 1405 And 1417.9

MONTH _____ YEAR _____

:LIENT NAME : _____ PUBLIC DEFENDER CASE # : _____
Last Name First Name

,TTORNEY : _____ GRADE _____ CDC # : _____

NVESTIGATOR/
ARALEGAL/
ECRETARY : _____ INSTITUTION : _____

DATE	DESCRIPTION	REIMB. ACTIVITY	HOURS	PART HOURS *

FISCAL USE ONLY

Hourly Rate : Total Hours :

Total Activity A : Total Activity B : Total Activity C : Total Activity D : Total Activity E :

Total Activity F : Total Activity G : Total Activity H : Total Activity I :

Reimbursable Activities :

(A) Initial Contact
(B) Investigating Claims
(C) Preparing Motions
(D) Meet and Confer
(E) DNA Source Identification and Tracking
(F) Development & Procedure
(G) Court
(H) Travel
(I) DNA Testing Modality Selection

* Part Hours :
1/4 hour = .25
1/2 hour = .50
3/4 hour = .75

Law Offices of the Los Angeles County
Alternate Public Defender
35 Hall of Records, 320 W. Temple Street, Los Angeles, CA 90012
Telephone No. (213) 974-6626
Fax No. (213) 626-3171

Bruce A. Hoffman
Alternate Public Defender

Janice Y. Fukai
Chief Deputy

County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

Declaration of Jordan Yerian

Jordan Yerian makes the following declaration and statement under oath:

I, Jordan Yerian, Head Deputy Alternate Public Defender, Special Innocence Projects, for the Alternate Public Defender of the County of Los Angeles, am responsible for implementing the subject law.

I declare that the Alternate Public Defender's Office has incurred new duties as a result of the Post-Conviction DNA Testing statute (Pen. Code § 1405), and the Disposal of Evidence Notification law (Pen. Code § 1417.9). These new duties have resulted in increased costs for the Office.

I declare that before the enactment of Penal Code Section 1405, convicted persons had no right to appointed counsel for purposes of litigating a request for post-conviction DNA testing.

I declare that before the enactment of Penal Code Section 1417.9, there was no requirement that the government notify counsel of record and the inmate in order to be able to destroy biological evidence in their possession.

I declare that as a result of the Post-Conviction DNA testing statute, when a convicted person either files a motion or requests appointment of counsel for purposes of investigating a claim pursuant to Penal Code Section 1405 by contacting the Alternate Public Defender, the court, the District Attorney or the Attorney General, the Office is required to investigate whether such a motion is potentially meritorious, and, if so, must

draft, file and litigate the motion, including seeking appellate relief through a writ petition if the motion is denied.

I declare that new duties created by the Disposal of Evidence Notification law arise because the law requires that counsel of record be notified whenever a governmental entity in possession of biological material intends to destroy the material. (Penal Code Section 1417.9, subdivision (b)(1).)

I declare that new duties imposed on the Alternate Public Defender due to Section 1417.9 include determining whether the Alternate Public Defender represented the person who was charged with the crime in which the biological material was retained; contacting the person's lawyer if the Alternate Public Defender did not represent him or her; and reviewing the person's case to determine how to respond to the government's notification.

I declare that possible responses could include drafting and litigating a motion pursuant to Penal Code Section 1405, drafting a declaration stating that a motion will be filed within 180 days or drafting a declaration of innocence as provided by Penal Section 1417.9, subdivision (b)(2)(C).

I declare that duties of attorneys, support personnel, investigators, experts, and associated services and supplies, mandated under the subject law, as detailed on the attached list of reimbursable activities are reasonably necessary in complying with the subject law.

Specifically, I declare that I am informed and believe that the County's State mandated duties and resulting costs in implementing the subject law require the County to provide new State-mandated services and thus incur costs which are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

June 14, 2001, at Los Angeles, California
Date and Place

Signature

LEROY D. BACA, SHERIFF

County of Los Angeles
Sheriff's Department Headquarters
4700 Ramona Boulevard
Monterey Park, California 91754-2169

County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

Declaration of L. Peter Zavala

L. Peter Zavala makes the following declaration and statement under oath:

I, L. Peter Zavala, Administrative Services Manager III, Central Property and Evidence Unit, Sheriff's Department of the County of Los Angeles, am responsible for implementing the subject law.

I declare that the Los Angeles County Sheriff's Department has new duties as a result of the Post-Conviction DNA Testing statute (Penal Code § 1405) and the Disposal of Evidence Notification law (Penal Code § 1417.9) and that these new duties have resulted in increased costs for the Los Angeles County Sheriff's Department.

I declare that before the enactment of Penal Code § 1417.9, there were no legislative requirements that the Los Angeles County Sheriff's Department notify the imprisoned felon, any counsel of record and/or their respective agencies, and the State Attorney General in order to dispose of biological evidence in possession of the Los Angeles County Sheriff's Department.

I declare that these new duties imposed on the Los Angeles County Sheriff's Department due to Section 1417.9 which reads:

> "... retaining any biological material secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with the case and disposing of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set forth below are met:
>
> (1) The government entity notifies all of the following persons of the provisions of this section and of the intention of the governmental entity to dispose of the material: any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.
>
> (2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

(A) A motion pursuant to Section 1405, however, upon filing of that application, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

(B) A request under penalty of perjury that the material not to be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to Section 1405 that is followed within 180 days by motion for DNA testing pursuant to Section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgement of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of the identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405."

I declare that pursuant to Section 1405, the Central Property and Evidence Unit of the Los Angeles County Sheriff's Department, is mandated to provide notification, retention and storage services in order to retain and preserve evidence with biological material in felony convictions.

I declare that pursuant to Section 1405, when the request for biological evidence held in connection with a post-conviction DNA case is made, Central Property and Evidence Unit of the Los Angeles County Sheriff's Department is required to search for and retrieve the evidence held and/or the documentation related to the case.

I declare that, in my opinion, proper storage of biological evidence pursuant to Section 1405 requires refrigerated facilities.

I declare that the above duties performed by the Central Property and Evidence Unit of the Los Angeles County Sheriff's Department pursuant to the subject law are reasonably necessary in complying with the subject law, and cost the County of Los Angeles in excess of $200 per annum, the minimum cost that must be incurred to file a claim in accordance with Government Code Section 17564(a).

I declare that I have prepared the attached description of reimbursable activities reasonably necessary to comply with the subject law.

Specifically, I declare that I am informed and believe that the County's State mandated duties and resulting costs in implementing the subject law require the County to provide new State-mandated services and thus incur costs which are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

" "Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

6-13-01 14205 Telegraph Rd, Whittier CA 90604
Date and Place

Signature

Description of Reimbursable Activities
Declaration of L. Peter Zavala

One-time Activities

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.

Meet and confer with trial attorneys and other counsel regarding the coordination of efforts in implementing the subject law.

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.

Train evidence and property custodians on storage and notification methods and procedures necessary to comply with the subject law.

Design, development, and testing of computer software and equipment necessary to identify and retrieve all biological materials associated with a particular case.

Continuing Activities

Initial contacts to specified parties to seek permission to dispose of biological evidence.

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

Responding to requests for biological evidence held at the Central Property and Evidence Unit of the Los Angeles County Sheriff's Department. 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.

Maintaining biological evidence in refrigerated facilities to preserve its suitability for DNA testing pursuant to the subject law. This activity includes adding refrigerated facilities to meet increasing storage requirements as well as maintaining such facilities [e.g. utilities].

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.

County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

Declaration of Dean M. Gialamas

Dean M. Gialamas makes the following declaration and statement under oath:

I, Dean M. Gialamas, Crime Laboratory Assistant Director, Scientific Services Bureau, Sheriff's Department of the County of Los Angeles, am responsible for implementing the subject law.

I declare that the Los Angeles County Sheriff's Department has new duties as a result of the Post-Conviction DNA Testing statute (Penal Code § 1405) and the Disposal of Evidence Notification law (Penal Code § 1417.9) and that these new duties have resulted in increased costs for the Los Angeles County Sheriff's Department.

I declare that before the enactment of Penal Code § 1417.9, there were no legislative requirements that the Los Angeles County Sheriff's Department notify the imprisoned felon, any counsel of record and/or their respective agencies, and the State Attorney General in order to dispose of biological evidence in possession of the Los Angeles County Sheriff's Department.

I declare that these new duties imposed on the Los Angeles County Sheriff's Department due to Section 1417.9 which reads:

> "... retaining any biological material secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with the case and disposing of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set forth below are met:
>
> (1) The government entity notifies all of the following persons of the provisions of this section and of the intention of the governmental entity to dispose of the material: any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.
>
> (2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:
>
> (A) A motion pursuant to Section 1405; however, upon filing of that application, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.
>
> (B) A request under penalty of perjury that the material not to be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to Section 1405 that is followed within 180 days by motion for DNA testing pursuant to Section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.
>
> (C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgement of conviction or July 1,

2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of the identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405."

I declare that pursuant to Section 1405, the Scientific Services Bureau of the Los Angeles County Sheriff's Department is required to maintain proper storage procedures in order to retain and preserve evidence with biological material in felony convictions.

I declare that pursuant to Section 1405, the notification, retention and storage of extracted DNA material from felony cases examined by the Scientific Services Bureau of the Los Angeles County Sheriff's Department is required.

I also declare that pursuant to Section 1405, when the request for biological evidence held in connection with a post-conviction DNA case is made, the Scientific Services Bureau of the Los Angeles County Sheriff's Department is required to search for and retrieve the evidence held and/or the documentation related to the case.

I declare that in my scientific opinion, some cases will require performing tests on the evidence sample to confirm the presence of biological material suitable for DNA testing and provide the results to requesting party.

I declare that the above duties performed by the Scientific Services Bureau of the Los Angeles County Sheriff's Department pursuant to the subject law are reasonably necessary in complying with the subject law, and cost the County of Los Angeles in excess of $200 per annum, the minimum cost that must be incurred to file a claim in accordance with Government Code Section 17564(a).

I declare that under Penal Code Section 1402(g) that if the Scientific Services Bureau of the Los Angeles County Sheriff's Department is ordered to conduct the post-conviction DNA testing under this Section, any and all testing costs for DNA services will be billed to the Superior Court and that receipts for providing such services will be deducted from reimbursement claims under 17500 et seq. of the Government Code.

Specifically, I declare that I am informed and believe that the County's State mandated duties and resulting costs in implementing the subject law require the County to provide new State-mandated services and thus incur costs which are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " 'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

25 June 2001
Los Angeles, California
Date and Place

Signature

One-time Activities

Development of Departmental policies and procedures necessary to comply with the post conviction forensic testing requirements of the subject law, which may include the necessary computer programming and hardware of 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.

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.

Continuing Activities

Train investigative personnel with the Los Angeles County Sheriff's Department and the staff of the 46 independent law enforcement agencies (e.g., city police departments) to whom we provide crime lab services in the methods and procedures necessary to comply with the subject law.

Initial contacts to specified parties to seek permission to dispose of biological evidence.

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

Responding to requests for biological evidence held at the Scientific Services Bureau of the Los Angeles County Sheriff's Department which has 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.

Responding to requests for the analysis of evidence held at the Scientific Services Bureau of the Los Angeles County Sheriff's Department in order to determine if biological evidence is present and suitable for DNA testing. This involves laboratory testing and analysis and the issuance of a final report.

Meet and confer with parties (attorneys, investigators, etc.) to determine the suitability of DNA testing on the retained evidence in a particular case.

Preparation and tracking of biological evidence that is sent to agreed upon private vendor DNA laboratories for testing.

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.

DNA testing required of the Los Angeles County Sheriff's Department subject to the pursuant law which is not reimbursed by the Superior Court due to insufficient funding.

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

Declaration of Leonard Kaye

Leonard Kaye makes the following declaration and statement under oath:

I Leonard Kaye, SB 90 Coordinator, in and for the County of Los Angeles, am responsible for filing test claims, reviews of State agency comments, Commission staff analysis, and for proposing parameters and guidelines (P's& G's) and amendments thereto, all for the complete and timely recovery of costs mandated by the State. Specifically, I have prepared the subject test claim.

Specifically, I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs as set forth in the subject test claim, are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

" ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true."

6/27/01, Los Angeles, CA
Date and Place

Leonard Kaye
Signature

CHAPTER 821

(Senate Bill No. 1342)

An act to add Section 1405 to, and to add and repeal Section 1417 of, the Penal Code, relating to forensic testing.

[Approved by Governor September 28, 2000. Filed with Secretary of State September 28, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1342, Burton. Forensic testing: post conviction.

Existing law authorizes the defendant in a criminal case to file a motion for a new trial upon specified grounds including, but not limited to, the discovery of new evidence that is material to the defendant, and which could not, with reasonable diligence, have been discovered and produced at the trial.

This bill would grant to a defendant who was convicted of a felony and currently serving a term of imprisonment, the right to make a written motion under specified conditions for the performance of forensic DNA testing. The bill would require that the motion include an explanation of why the applicant's identity was or should have been a significant issue in the case; how the requested DNA testing would raise a reasonable probability that the verdict or sentence would have been more favorable if the DNA testing had been available at the trial resulting in the judgment of conviction, and a reasonable attempt to identify the evidence to be tested and the type of DNA testing sought. The motion would also have to include the results of any previous DNA tests and the court would be required to order the party in possession of those results to provide access to the reports, data and notes prepared in connection with the DNA tests to all parties. The bill would also provide that the cost of DNA testing ordered under this act would be borne by either the state or by the applicant if, in the interests of justice the applicant is not indigent and possesses the ability to pay.

The bill would also require, except as otherwise specified, the appropriate governmental entity to preserve any biological material secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. These provisions would remain in effect until January 1, 2003. By increasing the duties of local officials this bill would impose a state-mandated local program.

The people of the State of California do enact as follows:

SECTION 1. Section 1405 is added to the Penal Code, to read:

§ 1405. (a) A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction in his or her case, for performance of forensic deoxyribonucleic acid (DNA) testing.

(1) The motion shall be verified by the convicted person under penalty of perjury and shall do all of the following:

(A) Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.

(B) Explain in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.

(C) Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.

(2) Notice of the motion shall be served on 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. Responses, if any, shall be filed 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.

(3) If any DNA or other biological evidence testing was conducted previously by either the prosecution or defense, the results of that testing shall be revealed in the motion for testing, if known. If evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the court shall order the prosecution or defense to provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA testing.

(b) The court, in its discretion, may order a hearing on the motion. The motion shall be heard by the judge who conducted the trial unless the presiding judge determines that judge is unavailable. Upon request of either party, the court may order, in the interest of justice, that the convicted person be present at the hearing of the motion.

(c) The court shall appoint counsel for the convicted person who brings a motion under this section if that person is indigent.

(d) The court shall grant the motion for DNA testing if it determines all of the following have been established:

(1) The evidence to be tested is available and in a condition that would permit the DNA testing that is requested in the motion.

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.

(3) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case.

(4) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence.

(5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction. The court in its discretion may consider any evidence whether or not it was introduced at trial.

(6) The evidence sought to be tested meets either of the following conditions:

(A) It was not tested previously.

(B) It was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

(7) The testing requested employs a method generally accepted within the relevant scientific community.

(8) The motion is not made solely for the purpose of delay.

(e) If the court grants the motion for DNA testing, the court order shall identify the specific evidence to be tested and the DNA technology to be used. The 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. If the

parties cannot agree, the court's order shall designate the laboratory to conduct the testing and shall consider designating a laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB).

(f) The result of any testing ordered under this section shall be fully disclosed to the person filing the motion, the district attorney, and the Attorney General. If requested by any party, the court shall order production of the underlying laboratory data and notes.

(g)(1) The cost of DNA testing ordered under this section shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person.

(2) In order to pay the state's share of any testing costs, the laboratory designated in subdivision (e) shall present its bill for services to the superior court for approval and payment. It is the intent of the Legislature to appropriate funds for this purpose in the 2000–01 Budget Act.

(h) An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General. Any such petition shall be filed within 20 days after the court's order granting or denying the motion for DNA testing. In a noncapital case, the petition for writ of mandate or prohibition shall be filed in the court of appeals. In a capital case, the petition shall be filed in the California Supreme Court. The court of appeals or California Supreme Court shall expedite its review of a petition for writ of mandate or prohibition filed under this subdivision.

(i) DNA testing ordered by the court pursuant to this section shall be done as soon as practicable. However, if the court finds that a miscarriage of justice will otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, a DNA laboratory shall be required to give priority to the DNA testing ordered pursuant to this section over the laboratory's other pending casework.

(j) DNA profile information from biological samples taken from a convicted person pursuant to a motion for postconviction DNA testing is exempt from any law requiring disclosure of information to the public.

(k) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 2. Section 1417.9 is added to the Penal Code, to read:

§ 1417.9. (a) Notwithstanding any other provision of law and subject to subdivision (b), the appropriate governmental entity shall retain any biological material secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for DNA testing.

(b) A governmental entity may dispose of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set forth below are met:

(1) The governmental entity notifies all of the following persons of the provisions of this section and of the intention of the governmental entity to dispose of the material: any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.

Italics indicate changes or additions. * * * indicate omissions.

(2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

(A) A motion filed pursuant to Section 1405, however, upon filing of that application, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

(B) A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to Section 1405 that is followed within 180 days by a motion for DNA testing pursuant to Section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405.

(3) No other provision of law requires that biological evidence be preserved or retained.

(c) This section shall remain in effect only until January 1, 2003, and on that date is repealed unless a later enacted statute that is enacted before January 1, 2003, deletes or extends that date.

Italics indicate changes or additions. * * * indicate omissions.

Joint Legislative Budget Committee

GOVERNMENT CODE SECTIONS 9140-9143

CALIFORNIA LEGISLATURE

LEGISLATIVE ANALYST
ELIZABETH G. HILL

925 L STREET, SUITE 650
SACRAMENTO, CALIFORNIA 95814
(916) 445-4656

December 13, 1988

Mr. Jesse Huff, Chairman
Commission on State Mandates
1130 K Street, Suite LL50
Sacramento, CA 95814

Dear Mr. Huff:

This letter responds to your request for a recommendation on Claim No. CSM-4313, related to the reporting of cases involving the abuse of elderly persons. In this claim, Fresno County requests reimbursement for the increased costs it has allegedly incurred in providing protective services in reported cases of elder abuse. The county claims that Chapter 769, Statutes of 1987, requires the county Department of Social Services to investigate a reported incident of elder abuse, assess the needs of the victim, provide various social or medical services, and follow-up to ensure a satisfactory outcome.

Our examination of the current law reveals, however, that most of the existing requirements with regard to county response to reported elder abuse preceded the enactment of Chapter 769. The statute which initially allowed reporting of dependent adult abuse was enacted in 1982. This reporting requirement was extended by legislation enacted in 1983 and 1985. Our analysis indicates, however, that Chapter 769 does impose increased workload on counties in the following manner:

- Chapter 769 repealed the 1990 sunset date on the existing law regarding reporting of dependent adult abuse. This imposes a mandate in 1990 and subsequent years by increasing county costs associated with reporting known or suspected dependent adult abuse cases. In addition, to the extent that the dependent adult abuse reporting program results in increased reports of abuse, it will increase county workload associated with investigation and resolution of these cases.

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- Chapter 769 requires county Adult Protective Services (APS) or law enforcement agencies receiving a report of abuse occurring within a long-term care facility to report the incident to the appropriate facility licensing agency.

Our analysis further indicates that the increased costs associated with Chapter 769 appear to be state-reimbursable to the extent that counties have augmented their County Services Block Grant (CSBG) with county funding to pay for these costs. A detailed analysis of the claim follows below.

Background

Adult Protective Services. Welfare and Institutions (W&I) Code Chapter 5.1 generally requires county governments to provide an APS program. The purpose of this program is to ensure the safety and well-being of adults unable to care for themselves. The program attempts to accomplish these objectives by providing social services and/or referrals to adults in need.

The state provides funding for APS through the County Services Block Grant (CSBG), which counties also use to fund a variety of other social service programs, including administration of In-Home Supportive Services. Under current law, each county generally has discretion as to the types of adult protective services to provide, the number of adults who receive such services, and the amount of CSBG funding allocated to these services. However, the state does require the county APS program to record and investigate reports of suspected elder or dependent adult abuse.

Reporting. Welfare and Institutions Code Chapter 11 (Section 15600 et seq.) requires dependent care custodians, health care providers, and specified public employees to report known or suspected physical abuse of an elderly or dependent adult. An elderly adult is defined as anyone aged 65 years or older. A dependent adult is any person between the ages of 18 and 64 years who is unable to care for himself or herself due to physical or mental limitations, or who is admitted as an inpatient to a specified 24-hour health facility. Care providers are permitted but not required to make such reports if the suspected abuse is not physical in nature.

Upon receiving a report, counties are required to file appropriate reports with the local law enforcement agency, the state long-term care ombudsman, and long-term care facility licensing agencies. In addition, the county is required to report monthly to the state Department of Social Services (DSS) regarding the number of abuse reports it has received.

Analysis

Fresno County claims that Chapter 769 requires the county Department of Social Services to investigate a reported incident of elder abuse, assess the needs of the victim, provide various social or medical services, and follow-up to ensure a satisfactory outcome. In our view, the central question before the commission is what Chapter 769 actually requires a county to do upon receiving a report of elder abuse. We examine

requirements with regard to three areas of county response: reporting, investigation, and case resolution.

Reporting. Our review of the APS program's statutory history reveals that most of the current reporting requirements were in existence prior to the enactment of Chapter 769. Chapter 1184, Statutes of 1982, established W&I Code Chapter 11, which allowed any person witnessing or suspecting that a dependent adult was subject to abuse to report the suspected case to the county adult protective services agency. At that time, "dependent adult" included individuals over age 65 years. Chapter 11 initially was scheduled to sunset on January 1, 1986. Subsequent legislation expanded the reporting requirements. Specifically:

- Ch 1273/83 enacted W&I Code Chapter 4.5, which established a separate reporting system for suspected abuse of individuals aged 65 or older. This statute required elder care custodians, medical and nonmedical practitioners and employees of elder protective agencies to report suspected or known cases of physical abuse to the local APS agency. It also required county APS agencies to report the number of reports received to the state DSS.

- Ch 1164/85 amended W&I Code Chapter 11 to require similar mandatory reporting of physical abuse of a dependent adult. This statute also required law enforcement agencies and APS agencies to report to each other any known or suspected incident of dependent adult abuse. In addition, Chapter 1164 extended the program's sunset date to January 1, 1990.

Chapter 769, Statutes of 1987, consolidated the reporting requirements for elderly and dependent adult abuse within the same statute, and repealed the January 1, 1990 sunset date for dependent adult abuse reporting. The statute also made minor changes in the reporting requirements, including the following:

- The statute required abuse occurring within a long-term care facility to be reported to a law enforcement agency or the state long-term care ombudsman.

- The statute required county APS or law enforcement agencies receiving a report of abuse occurring within a long-term care facility to report the incident to the appropriate facility licensing agency.

In sum, various provisions of existing law impose increased reporting workload on local governments by requiring them to receive reports of suspected abuse made by other care providers, and to report specific information to other state and local agencies. However, our analysis indicates that the bulk of these requirements were imposed prior to Chapter 769. Therefore, only the marginal increase in workload imposed by Chapter 769 would appear to be subject to the current claim. These requirements include the following:

- Reporting workload associated with reports of dependent adult abuse occurring after January 1, 1990. By repealing the January 1, 1990 sunset date for the dependent adult abuse reporting program, Chapter 769 imposes increased reporting workload on counties in 1990 and subsequent years.

- The workload required to report abuse incidents to the appropriate long-term care facility licensing agency.

We note that Chapter 769 also could reduce county workload to the extent that reports of abuse in a 24-hour health facility are made to the state long-term care ombudsman rather than to the local APS agency. We are unable to determine the potential magnitude of this reduction in costs. However, it appears unlikely that the reduction in costs in this area will fully offset the cost increases identified above, and particularly the costs associated with dependent adult abuse reporting in 1990 and beyond.

In addition to increasing reporting costs, Chapter 769 will increase county costs associated with investigating and resolving dependent adult abuse cases, to the extent that the mandatory reporting requirement results in identification of increased cases of abuse.

Investigation. Chapter 30-810.2 of the state Department of Social Services' (DSS) regulations, requires counties to investigate promptly most reports or referrals of adult abuse or neglect. Welfare and Institutions Code Section 15610.(m) defines "investigation" as the activities required to determine the validity of a report of elder or dependent adult abuse, neglect or abandonment. Thus, it appears that state law requires county APS agencies to act promptly to determine the validity of a reported incident of abuse.

Resolution. Welfare and Institutions Code Section 15635 (b) requires the county to maintain an inventory of public and private service agencies available to assist victims of abuse, and to use this inventory to refer victims in the event that the county cannot resolve the immediate or long-term needs of the victim. This referral requires assessment of the needs of the client, and identification of the appropriate agency to serve these needs. Depending on the needs of the client and the resources available, a county may refer the client to a county, state or federally funded program, or to a private organization. When serving an indigent client, the county is required to be the service provider of last resort if the client does not qualify for state or federal programs (W&I Section 17000).

To the extent that mandatory reporting of dependent adult abuse increases the number of cases reported to the county, it increases the county's APS workload. Presumably, the sunset of the reporting requirements would have led to a reduction in this workload. Thus, by repealing the January 1, 1990 sunset date on the dependent adult abuse reporting program, Chapter 769 probably results in increased county APS workload, in terms of both investigation and resolution, in 1990 and subsequent years. Again, the

requirements with regard to elder abuse cases, and with regard to dependent adult cases reported prior to January 1, 1990, are imposed by earlier statutes. Consequently, any increased workload associated with these cases does not appear to be subject to the current claim.

Are costs reimbursable? The second question before the commission is whether the increased county costs associated with this mandate are state-reimbursable. Specifically, you must determine whether the costs associated with dependent adult and elder abuse reporting are reimbursable, given that the Legislature currently provides funding for the APS program in the form of the CSBG.

In order to determine whether the CSBG fully funds the increased workload imposed by Chapter 769, it is useful to understand the history of funding for APS. Prior to 1981, the state DSS' social services regulations contained detailed requirements identifying the minimum level of APS service that counties had to provide to clients. In 1981, however, the federal government reduced its support for social service programs (Title XX of the Social Security Act) by approximately 20 percent. To help the counties accommodate this reduction, DSS eliminated the specific requirements from its APS regulations and from the regulations governing various other social services programs, thereby giving the counties substantial discretion in the level of service they provide and in the amount of federal Title XX funds they allocate to APS.

In recognition of this increased county discretion, the Legislature, in the Budget Act of 1985, created the CSBG, which provides funds for the various social services programs, including APS, over which counties have substantial discretion. (In contrast, the counties have limited discretion over two major social services programs -- Child Welfare Services and In-Home Supportive Services. These programs are budgeted and their funds are allocated based on county caseloads and costs.) The level of funding provided through the CSBG was not tied to any measurement of the workload in any of the CSBG programs. Rather, it was based on county expenditures for all of the programs in 1982-83, with the expectation that counties would allocate CSBG funds to the various programs based on local priorities.

In sum, counties have considerable flexibility as to the types and level of services provided under APS, and as to the level of CSBG funding each county devotes to the APS program. Moreover, the amount of CSBG funds provided to each county does not necessarily reflect workload in that county. Thus, in response to the increased workload requirements imposed by Chapter 769, counties with insufficient CSBG funding to pay for the workload increase generally face two choices:

- The county can fund the increased APS workload by reducing expenditures in other areas of the APS program, or in other programs funded through CSBG. This, in effect, requires the county to realign its existing program priorities in order to redirect CSBG money to pay for the recording, investigation, and referral of reported [illegible]se cases.

494

- The county can use its own funds to augment CSBG funding in order to provide an increased level of service within the existing program, while maintaining existing program priorities.

Article XIII B, Section 6 of the State Constitution requires the state to reimburse local entities for new programs and higher levels of service. It does not require counties to reduce service in one area to pay for a higher level of service in another. Moreover, in enacting Chapter 11, the Legislature did not require that counties realign their social service priorities in order to accommodate the increased workload. Therefore, we conclude that the costs associated with Chapter 769, are state-reimbursable to the extent that a county uses its own funding to pay for these costs. If, however, a county exercises its discretion to redirect CSBG funds to pay for the costs of elder and dependent adult abuse reporting, investigation, and resolution, these costs are not state-reimbursable.

Sincerely,

Elizabeth G. Hill

Elizabeth G. Hill
Legislative Analyst

EXHIBIT B

DEPARTMENT OF FINANCE
GRAY DAVIS, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

August 8, 2001

RECEIVED
AUG 0 8 2001
COMMISSION ON STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of July 9, 2001, the Department of Finance has reviewed the test claim submitted by the Los Angeles County (claimant) asking the Commission to determine whether specified costs incurred under Chapter No. 821, Statutes of 2000, (SB 1342, J. Burton), are reimbursable state mandated costs (Claim No. CSM-00-TC-21 "Post Conviction: DNA Court Proceedings"). Commencing with Page 1 of the test claim, claimant has identified the following new duties, which it asserts are reimbursable state mandates:

- Biological material retention, treatment, and disposal and notification related to those activities
- Motion requirements and related activities based on Penal Code section 1405(a) providing for review of DNA testing
- Hearing costs associated with providing an inmate a court review of his or her DNA testing motion
- DNA testing based on court order, related notification of results
- Workload to review and prepare petitions of court orders regarding DNA testing, and
- District attorney, public defender, and local sheriff workload associated with processing DNA testing motions and related activities.

As the result of our review, we have concluded that while this test claim may have resulted in a state mandate, the activities described in the test claim do not constitute a new program or activity or a reimbursable cost. We believe that the activities initiated by an inmate's desire to have a hearing on DNA testing for his or her case is a procedure extension of the original trial. The petition involved is only raising examination of original evidence using technology not available at the time of the original case, thereby raising in question a material and substantive issue to the original criminal charge and verdict. That being the case, the defense and prosecutorial activity and related investigations of this test claim are existing responsibilities of local government.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your July 9, 2001 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Todd Jerue, Principal Program Budget Analyst at (916) 445-8913 or Jim Lombard, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Calvin Smith

S. Calvin Smith
Program Budget Manager

Attachments

Attachment A

DECLARATION OF TODD JERUE
DEPARTMENT OF FINANCE
CLAIM NO. CSM-00-TC-21

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter No. 821, Statutes of 2000, (SB 1342, J. Burton) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

AUG 8 2001

at Sacramento, CA

PROOF OF SERVICE

Test Claim Name: "Post Conviction: DNA Court Proceedings"
Test Claim Number: CSM-00-TC-21

I, the undersigned, declare as follows:

I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915L Street, 8th Floor, Sacramento, CA 95814.

On August 8, 2001, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: William Ashby
3301 C Street, Room 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

B-8
Mr. Jim Spano
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
P.O. Box 942850
Sacramento, CA 95814

Wellhouse and Associates
Attention: David Wellhouse
9175 Kiefer Boulevard, Suite 121
Sacramento, CA 95826

Mr. Leroy Baca
Los Angeles County Sheriffs Department
4700 Ramona Boulevard
Monterey Park, CA 91754

Harmeet Barkschat
Mandate Resource Services
8254 Heath Peak Place
Antelope, CA 95843

Executive Director
California State Sheriffs' Association
P.O. Box 890790
West Sacramento, CA 95898

Mr. Ken Hughes
Department of Corrections
P.O. Box 942883
Sacramento, CA 94283-0001

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941

Mr. Paul Minney
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

Ms. Sandy Reynolds, President
Reynolds Consulting Group, Inc.
P.O. Box 987
Sun City, CA 92586

D-8
Mr. Manuel Medeiros, Asst. Attorney General
Department of Justice
Government Law Section
1300 I Street, 17th Floor
Sacramento, CA 95814

Mr. Keith B. Petersen, President
Sixten & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Mr. Steve Smith, CEO
Mandated Cost Systems, Inc.
2275 Watt Avenue, Suite C
Sacramento, CA 95825

Ms. Pam Stone
Legal Counsel
DMG-MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 8, 2001 atSacramento, California.

Mary Latrace

STATE OF CALIFORNIA—YOUTH AND ADULT CORRECTIONAL AGENCY
DEPARTMENT OF CORRECTIONS
P.O. Box 942883
Sacramento, CA 94283-0001

EXHIBIT C

August 31, 2001

Ms. Shirley Opie
Assistant Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: *Post Conviction: DNA Court Proceedings* – 00-TC-21
County of Los Angeles, Claimant
Penal Code Sections 1405 and 1417.9 as added by Statutes of 2000, Chapter 821
Our Legal Log # 01-0851

Dear Ms. Opie:

The Commission on State Mandates (the Commission) has sent the Department of Corrections (CDC or the Department) a copy of the test claim filed by the County of Los Angeles (the County) requesting reimbursement for the County's costs of implementing S.B. 1342, a new state law. The Commission identified CDC as a state agency which might have an interest in the Commission's determination of whether the new law imposes a reimbursable state-mandated program on local agencies.

S.B. 1342

S.B. 1342, enacted last year, added section 1405 to and repealed and reenacted section 1417.9 of the Penal Code. Section 1405 grants to a defendant who has been convicted of a felony and is currently serving a prison term the right, under specified conditions, to file a written motion requesting the performance of forensic DNA testing. The cost of this DNA testing is to be borne by the state or by the applicant, as ordered by the court. If the costs are to be borne by the state, the laboratory is to submit its bill "to the superior court for approval and payment" and the Legislature was "to appropriate funds for this purpose in the 2000-01 Budget Act." Section 1417.9 as reenacted requires "the appropriate governmental entity" to retain any biological material obtained in connection with a criminal case during the period any person is incarcerated in connection with that case. These provisions are to remain in effect until January 1, 2003.

County Test Claim

The County contends that S.B. 1342 imposes a new state-mandated local program for which it must be compensated. The County argues that section 1417.9 imposes new evidence retention obligations on its Sheriff Department and additional legal costs to petition a court for authority to dispose of biological material otherwise required to be retained. According to the County, the procedure for post-conviction DNA-related court proceedings imposes additional work on the Sheriff, District Attorney, and indigent defense counsel. The County has submitted declarations prepared by personnel in these departments to support its contentions.

Commission on State Mandates Proceeding

The Commission conducts proceedings to determine whether local agencies may recover from the state the costs of implementing new state-imposed mandates. By filing the test claim with the Commission, the County initiated the process of determining whether S.B. 1342, in fact, imposed a reimbursable state-mandated program on local agencies. You have identified the key issues to be resolved as:

1. Within the meaning of applicable California Constitution and Government Code provisions, does S.B. 1342 impose (a) a new program or a higher level of service within an existing program on local agencies and (b) costs mandated by the state?

2. Is the Commission legally precluded from finding that any of the provisions cited in the test claim impose state-mandated costs?

CDC Position

Under the Commission's regulations, state agencies and interested parties that may have an interest in the Commission's determinations may file comments on the test claim. The Commission has provided a copy of the test claim and its supporting documents to CDC and has asked that we analyze the test claim and file written comments on the key issues identified above, as appropriate. We may also submit a written statement of nonresponse to the Commission.

Please be advised that, at this time, CDC takes no position on the merits of the County's test claim.

We appreciate this opportunity to participate in the Commission's proceedings on this matter. Please contact me at 323-3434 if you have any questions about this letter.

Sincerely,

Sharon K. Joyce

Sharon K. Joyce
Staff Attorney
Legal Affairs Division

PROOF OF SERVICE
(Code of Civ. Proc. Section 1013)

CASE NAME: POST CONVICTION: DNA COURT PROCEEDINGS

CASE NUMBER: 00-TC-21

I, JACQUELINE M. SUMNER, declare:

I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within. My business address is 1515 S Street, Room 125-S, Sacramento, California 95814. I am readily familiar with my employer's business practice for collection and processing of correspondence for UPS, U.S. Mail, Fax transmission and/or Personal Service.

On September 4, 2001, I caused the following documents to be served on the parties listed as follows:

- ✓ By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail.
- ___ Via personal service.
- ___ Via faxing a true copy followed by regular mail.
- ___ Via overnight mail by UPS.
- ___ Via certified mail No._____.

Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
Kenneth Hahn Hall of Administration
500 West Temple Street, Room 525
Los Angeles, CA 90012-2766

Ms. Shirley Opie
Assistant Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Please see attached list for additional parties served.

I declare under penalty of perjury under the law of the State of California that the above is true and correct. Executed September 4, 2001 at Sacramento, California.

JACQUELINE M. SUMNER

EXHIBIT D

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

October 12, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

Review of State Department of Finance Comments
County of Los Angeles Test Claim
Post-Conviction: DNA Court Proceedings

The County of Los Angeles submits and encloses herewith the subject review.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

for J. Tyler McCauley
Auditor-Controller

JTM:JN:LK
Enclosures

C. Robert Kalunian, Assistant Public Defender, Los Angeles County

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Hasmik Yaghobyan states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 603 Kenneth Hahn Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 12th day of October 2001, I served the attached:

Documents: Review of State Department of Finance Comments, County of Los Angeles Test Claim, Post-Conviction , including *a 1 page letter of J. Tyler McCauley dated 10/12/01 , a five page narrative, and a 2 page narrative, all pursuant to 00-TC-21, now* pending before the Commission on State Mandates.

upon all Interested Parties listed on the attachment hereto and by

[X] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date. Commission on State Mandates - FAX as well as mail of originals.

[ ] by placing [ ] true copies [ ] original thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) as set forth below at the indicated address.

PLEASE SEE ATTACHED MAILING LIST

That I am readily familiar with the business practice of the Los Angeles County for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United States mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of October, 2001, at Los Angeles, California.

Hasmik Yaghobyan

Review of State Department of Finance Comments [1.]
County of Los Angeles Test Claim
Post-Conviction: DNA Court Proceedings

The Department of Finance on August 8, 2001, submitted a letter to the Commission on State Mandates concerning Los Angeles County's Test Claim requesting reimbursement for increased costs due to SB 1342 (Burton) dealing with "Post-Conviction: DNA Court Proceedings." The County of Los Angeles hereby responds to this letter.

The Department of Finance in its letter apparently concedes that SB 1342 has resulted in increased costs, but argues that they are not reimbursable because they "do not constitute a new program or activity." The Department of Finance argues that expenses incurred by Los Angeles County as a result of SB1342 are not reimbursable state mandated costs because the costs associated with the new duties imposed are an extension of the original duties of trial counsel. The Department of Finance argues that the "activities initiated by an inmate's desire to have a hearing on DNA testing for his or her case is (sic) a procedural extension of the original case."

The Department of Finance is incorrect. The increased costs resulting from SB 1342 are due to "a new program or higher level of service" within the meaning of Government Code section 17514. The legislature itself acknowledged in enacting SB 1342 that convicted individuals serving a state prison sentence had no right to post conviction DNA testing. (See [attached] Assembly Committee on Public Safety Analysis of SB 1342, 6-21-2000, p.5.["California has no statute or case law that authorizes such testing."]

While existing law authorized an individual convicted of a crime to file a motion for a new trial based on the discovery of new evidence under certain specified circumstances, such a motion was to be made prior to the imposition of judgment. (Pen. Code § 1182). The evidence submitted as the basis for the motion was evidence that was discovered during the pendency of the case prior to judgment. On the other hand, SB 1342 (current Pen. Code § 1405) grants an individual serving a term of imprisonment the right to post conviction DNA testing when certain specified conditions are met.

1. This review was prepared by Jennifer Friedman, Coordinator of the Los Angeles County Public Defender Office's Innocence Unit, in consultation with Alex Riciardulii, an appellate attorney with the Los Angeles County Public Defender Office and a frequent legal columnist.

Penal Code section1405, subdivision (c), requires that a court appoint counsel for all convicted persons serving a term of imprisonment who file a motion under the section. In many cases the lawyer appointed to represent the convicted person is not the lawyer who represented the individual at trial. This is an entirely new appointment made by the court. As a result of the appointment, counsel is required to conduct an investigation in order to determine whether or not a motion for post conviction DNA testing is warranted and if such a motion is warranted, then counsel must prepare to litigate the motion. (See original test claim for explanation of duties imposed.)

In addition, while current law provides for habeas corpus relief under certain specified circumstances, there is no mechanism by which such an individual incarcerated in state prison may obtain a post conviction DNA test to use as the basis for the petition for habeas corpus relief. This statute provides a new mechanism for this purpose. Moreover, individuals do not have an absolute right to counsel appointed for the purpose of litigating a habeas corpus motion. (See [attached] Pennsylvania v. Finley (1987) 481 U.S. 551, 107 S.Ct. 1990, 1993 ["Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further"].)

In sum, the duties imposed under Penal Code section 1405 are not an extension of any existing duties of trial counsel or habeas corpus counsel (if one has been appointed). The right to post conviction DNA testing did not exist prior to the enactment of this statute. The Legislature recognized the need to have counsel appointed in order to assure that this new right be fully realized.

Date of Hearing: June 20, 2000
Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Carl Washington, Chair

SB 1342 (Burton) - As Amended: June 13, 2000

SUMMARY : Requires the court to order DNA testing on evidence relevant to conviction of a criminal defendant upon specified conditions, and requires the appropriate governmental entity to preserve any biological material secured in a criminal case as specified. Specifically, this bill :

1) Provides that a defendant in a criminal case may make a motion in the trial court for performance of DNA testing on evidence relevant to the charges that resulted in the conviction or sentence which was not tested because either the evidence or the technology for forensic testing was not available at the time of trial.

2) Requires that the motion for DNA testing be verified by the defendant under penalty of perjury that the information contained in the motion be true and correct to the best of his or her knowledge.

3) Requires that a notice of the hearing be served on the Attorney General and the district attorney in the county of conviction 30 days prior to the hearing, and that the hearing be heard by the judge who conducted the trial unless the presiding judge determines that judge is unavailable.

4) The court shall grant the hearing on the motion if the defendant presents a prima facie case that identity was a significant issue in the case, and the court finds all of the following:

   a) The result of the testing has the scientific potential to produce new, non-cumulative evidence that is material and relevant to the defendant's assertion of innocence.

   b) The testing requested employs a method generally accepted within the scientific community.

   c) The evidence to be tested is available and in a condition that would permit DNA testing requested in the motion.

d) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect.

5) Requires, if known, that the motion identify the evidence subject to the testing and the specific type of testing being requested by the defendant.

6) States that if the prosecuting attorney objects to the specific items sought to be tested, to the specific type of test requested, or if there is an issue as to the condition of a questionable sample, the court shall conduct a hearing to resolve the issues.

7) Provides that if a motion for DNA testing has been granted, the testing shall be conducted by a laboratory mutually agreed upon by the defendant and the district attorney in a non-capital case or the Attorney General in a capital case. If the parties cannot agree, the court shall designate the laboratory to conduct the test.

8) Requires that the results of any testing ordered be fully disclosed to each of the parties. If requested by either party, the court shall order production of the underlying data and notes.

9) Provides that the cost of DNA testing shall be borne by the State or by the applicant if the court finds that the applicant is not indigent and has the ability to pay. Requires that the designated laboratory present any bill for the State's share of costs to the court for approval; and upon approval, the laboratory shall submit the bill to the state treasurer for payment. If, after 30 days the superior court has taken no action on the bill, it shall be deemed approved.

10) Provides that the court may at any time appoint counsel and upon request of the defendant, in the interests of justice, the court may order the defendant present at the hearing on the motion.

11) Requires the appropriate governmental entity to preserve any biological material secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with the case, but a governmental entity may destroy biological materials before the expiration date of the following conditions are met:

a) The governmental entity notifies the person who remains incarcerated in connection with the case, any counsel of record, the public defender and the district attorney in the county of conviction and the Attorney General.

b) No person makes an application for an order requiring DNA testing on the evidence sought to be destroyed within 180 days of receiving the above notice.

c) No other provision of law requires that the biological evidence be preserved.

EXISTING LAW :

GENERAL PROVISIONS

1) Establishes the DNA and Forensic Identification Data Base and Data Bank Act of 1998. (Penal Code Section 295(a).)

2) States that it is the Legislature's intent to use the DNA and Forensic Identification Data Bank to detect and prosecute individuals responsible for sex offenses and other violent crimes, exclude suspects who are being investigated for such crimes, and to identify missing and unidentified persons. (Penal Code Section 295(b)(3).)

3) Requires the Department of Justice's (DOJ) DNA laboratory, the California Department of Corrections (CDC), and the California Youth Authority (CYA) to adopt policies and enact regulations as necessary to give effect to the Act. (Penal Code Section 295(e)(1).)

4) Authorizes DOJ laboratories approved by ASCLD/LAB, or any approved certifying body, and any crime laboratory designated by DOJ and accredited by ASCLD/LAB to analyze crime scene samples. (Penal Code Section 297(a).)

5) States that the DOJ shall perform DNA analysis and other

forensic identification analysis only for identification purposes. Provides that all DNA profiles retained by the DOJ are confidential except as provided by statute. (Penal Code Section 295.1(a), 299.5(a).)

CONVICTED PERSONS REQUIRED TO SUBMIT SAMPLES

6) Requires any person convicted of any of the following crimes to provide two specimens of blood, a saliva sample, right thumbprints and a full palm print of each hand: any registerable sex offense, murder or attempted murder, voluntary manslaughter, felony spousal abuse, aggravated sexual assault of a child, felonious assault or battery, kidnapping, mayhem, and torture. (Penal Code Section 296(a)(1)(A - I).)

7) Provides that any person who is required to register as a sex offender who is committed to any CYA institution where the person was confined, granted probation, or released from a state hospital as a mentally disordered sex offender shall be required to give the specified biological samples. (Penal Code Section 296(a)(2).)

SAMPLES FROM SUSPECTS

8) Provides that samples obtained from a suspect shall only be

compared to samples taken from the criminal investigation for which he or she is a suspect and for which the sample was originally taken either by court order or voluntarily. (Penal Code Section 297(b).)

9) Provides that a person whose DNA profile has been included in the data bank shall have his or her information and materials expunged if the conviction was reversed and the case dismissed, the person was found to be factually innocent, or the person has been acquitted of the underlying offense. (Penal Code Section 299(a).)

10) Requires the DOJ to review its data bank to determine whether it contains DNA profiles from persons who are no longer suspects in a criminal case. Evidence accumulated from any crime scene with respect to a particular person shall be stricken when it is determined that the person is no longer a

suspect. (Penal Code Section 299(d).)

FISCAL EFFECT : Unknown

COMMENTS :

1) Author's Statement . According to the author, "This bill would allow a convicted defendant to make a motion before the trial court for DNA testing that was not available at trial because the evidence or the testing technology was not available to the defendant. California has no statute or case law that authorizes such testing. This bill balances the need for discovering the truth with procedural fairness and practicality. It does not allow DNA testing in every case - only where the identity of the accused was a significant issue at trial, and the court finds, among other things, that the result of the testing will produce new evidence that is material and relevant to the defendant's assertion of innocence. The bill also provides safeguards to ensure that the evidence is available and reliable.

"Innocent people should not serve time or be executed for crimes they did not commit. As long as an innocent person is incarcerated for a crime he or she did not commit, the guilty party remains at-large, a danger to society and unpunished."

2) Background . At the Innocence Project run by attorneys Peter Neufeld and Barry Scheck at the Cardoza Law School in Michigan, second- and third-year law students evaluate cases from all over the country to determine which cases they will seek post-conviction DNA testing. As of January 2000, the Innocence Project has "played a role in 39 exonerations." (Boyer, Peter J. "Annals of Justice: DNA on Trail", New Yorker . January 17, 2000, Page 42.) In order to qualify for help by the Innocence Project, the case had to have available biological material and "the defense had to have been that the accused had been wrongly identified by the victim." (Id. At 45.)

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. As a result, in California in cases where DNA has been tested and an inmate has been released, the inmate has had to convince the prosecutor in the

original case to allow DNA testing. Of the 70 cases in the United States that have been vacated on the basis of DNA testing, four were in California.

When discussing the case of Herman Atkins, originally prosecuted in Riverside County and recently released from prison, Neufeld of the Innocence Project stated, "California currently lacks a statute giving inmates the right to post-conviction DNA testing. . . . As a result, an inmates is at the mercy of the good-will of the prosecutor." (Los Angeles Times , February 9, 2000, Section A, Page 10.) According to the article, a motion by the Innocence Project stated, "The original prosecutor in the case resisted testing for several years." (Id.) Upon Atkins' release, he had been in prison for 12 years and it has taken Atkins "three years to get a judge to agree to DNA testing of the biological evidence recovered from the victim, who had fingered Atkins as her attacker." (USA Today , February 29, 2000.)

At this time, only New York and Illinois have statutes providing for post-conviction testing in certain cases. Currently, in addition to this legislation, there is federal legislation proposed, as well as legislation proposed in other states.

3) Federal Legislation . SB 2073 (Leahy) provides, in part, for DNA testing of biological materials related to the investigation or prosecution that resulted in the judgment for which the person is in custody. If passed, SB 2073 would require that states make similar DNA testing available to convicted persons.

SB 2073 would require that the court order DNA testing upon a determination that the testing may produce non-cumulative, exculpatory evidence relevant to the claim of wrongful conviction or sentence. In other words, the defendant would be required to show that the testing might produce evidence favorable to the defendant. This bill only requires that defendant show that the testing has the scientific potential to produce new non-cumulative evidence, which would be the case any time previously untested materials are examined. SB 2073 requires that the person requesting the order for testing be in custody and that the material to be tested relate to the judgment for which the person is in custody. This bill does not require that the defendant be in custody, and testing can be requested on any charge that resulted in a conviction or

sentence. Therefore, a defendant may request testing on a prior conviction which served as a basis for an increased sentence. In addition, this bill would apply in all criminal cases, is not limited to felony cases, and would include misdemeanors as well. This bill requires that identity be a significant issue resulting in the conviction and, in that respect, is narrower than SB 2073.

According to the Associated Press, Senator Orrin Hatch, Chairman of the Senate Judiciary, intends to introduce legislation that would provide for DNA testing in order to establish innocence. The Hatch legislation would only be operative for two years after the date of enactment. It requires that the defendant assert actual innocence under penalty of perjury, and identity had to have been an issue at the trial. Under the Hatch proposal, an in-custody defendant would be required to show that testing of the specified evidence would, assuming exculpatory results, establish the actual innocence of the applicant. This bill only requires that the specified evidence be relevant to the charge. Is this bill overly broad in that it does not require that the defendant show some degree of likelihood that the testing of the specified material would produce favorable evidence or establish actual innocence?

4) Attorney General's Office . The Attorney General's Office has no position on the bill at this time, but believes that the proposed standard for ordering DNA testing is too low. The Attorney General's Office states, "We share your goal providing a means by which innocent persons who have been wrongly convicted may use new scientific techniques to prove their innocence. However, as you are aware, we have significant concerns about the bill as currently drafted. Our primary concern is the standard employed. SB 1342 mandates DNA testing if identity was a significant issue at the trial, and the court finds that results of the testing 'has the scientific potential to produce new non-cumulative evidence that is material and relevant to the defendant's assertion of innocence.' We believe testing should be granted if the evidence to be tested would be dispositive, not merely relevant, on the question of innocence. Additionally, we believe it is essential to include language on a number of points of procedure so as to ensure this provision is not used to delay the execution of sentence or the administration of justice and will not unjustly divert scarce and costly

resources."

5) Technical Amendments . This bill allows a defendant who was convicted in a criminal case to make application for an order requiring that DNA testing be conducted on evidence relevant to the conviction or sentence. This bill should be amended to clarify that these provisions only apply to defendants convicted after a court or jury trial in order to prevent

defendants who have pled guilty from bringing a motion. Additionally, this bill should be amended to clarify that identity had to have been a significant issue that resulted in the conviction or sentence. This bill should also be amended in order that results of any testing be disclosed to both the person filing the motion and the district attorney or Attorney General.

6) Arguments in Support .

a) According to the American Civil Liberties Union, "DNA testing has exonerated more than 60 inmates in the United States and Canada. (See DNA Bill of Rights, American Bar Association Journal, March 2000). The advent of DNA testing raises serious concerns about the prevalence of wrongful convictions, especially wrongful convictions arising out of mistaken eyewitness identification testimony. According to a 1996 Department of Justice study entitled 'Convicted by Juries, Exonerated by Science: Case Studies of Post-Conviction DNA Exonerations', in approximately 20-30% of the cases referred for DNA testing, the results excluded the primary suspect. Without DNA testing, many of these individuals might have wrongfully continued to serve sentences for crimes they did not commit.

"As long as an innocent person is incarcerated for a crime he or she did not commit, the guilty party remains at-large, a danger to society and unpunished. The safety of society requires that the guilty party be apprehended and brought to justice."

b) The California Attorneys for Criminal Justice states, "The importance of this bill is clear. As much as we strive for a perfect justice system, we know that sometimes it does not work properly and innocent people get convicted of and are sentenced for crimes they did not commit. SB 1342

would implement a safeguard against wrongful convictions and provide a mechanism for wrongly convicted people to prove their innocence and secure their release from prison. It contains appropriate guidelines to ensure all people and entities involved have an ample opportunity to test the evidence and review the findings."

REGISTERED SUPPORT / OPPOSITION :

Support

American Civil Liberties Union
California Attorneys for Criminal Justice
Committee on Moral Concerns
_ Crime Victims United of California

Opposition

None on File

Analysis Prepared by : Gregory Pagan / PUB. S. / (916) 319-3744

481 U.S. 551, 95 L.Ed.2d 539

[551] PENNSYLVANIA, Petitioner

v.

Dorothy FINLEY.

No. 85-2099.

Argued March 2, 1987.

Decided May 18, 1987.

Indigent prisoner petitioned for postconviction relief. The Pennsylvania Court of Common Pleas, Edward J. Blake, J., denied petition. Prisoner appealed. The Pennsylvania Supreme Court, 497 Pa. 882, 440 A.2d 1188, reversed, holding that prisoner was entitled, under state law, to appointed counsel in postconviction proceedings. On remand, the Court of Common Pleas appointed counsel, permitted appointed counsel to withdraw, and dismissed petition for postconviction relief. Prisoner appealed. The Pennsylvania Superior Court, 330 Pa.Super 813, 479 A.2d 568, concluded that conduct of counsel in postconviction proceedings violated prisoner's constitutional rights. Certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that: (1) prisoner had no equal protection or due process right to appointed counsel in postconviction proceeding, and (2) prisoner, who had no constitutional right to appointed counsel, had no constitutional right to insist on *Anders* procedures for withdrawal of appointed counsel when that attorney found case frivolous on direct appeal.

Reversed and remanded.

Justice Blackmun filed opinion concurring in the judgment.

Justice Brennan filed dissenting opinion joined by Justice Marshall.

Justice Stevens filed dissenting opinion.

1. Criminal Law ⇐998(20), 1077.3

Prisoners have no constitutional right to counsel in mounting collateral attacks on convictions; right to appointed counsel extends to first appeal of right and no further. U.S.C.A. Const.Amends. 5, 14.

2. Criminal Law ⇐998(20)

Defendant has no federal constitutional right to counsel when pursuing discretionary appeal on direct review of conviction and, therefore, does not have this right when attacking conviction that has long since become final upon exhaustion of appellate process. U.S.C.A. Const.Amends. 5, 14.

3. Constitutional Law ⇐270.5

Indigent prisoner had no due process right to appointed counsel in postconviction proceeding after exhaustion of appellate process. U.S.C.A. Const.Amends. 5, 14.

4. Constitutional Law ⇐250.2(2)

Indigent prisoner had no equal protection right to appointed counsel in postconviction proceeding after exhaustion of appellate process; prisoner's access to trial record and appellate briefs and opinions provided sufficient tools for meaningful access to courts. U.S.C.A. Const.Amend. 14.

5. Criminal Law ⇐998(20)

State-created right to counsel on postconviction review did not require application of *Anders* procedures for withdrawal of appointed counsel when that attorney found case wholly frivolous on direct appeal; constitutional right to appointed counsel was prerequisite to application of *Anders* procedures. U.S.C.A. Const. Amends. 5, 14.

6. Constitutional Law ⇐268.1(3), 270.5

States have no obligation to provide postconviction relief for collateral attack upon judgment, and when they do, fundamental fairness mandated by due process does not require them to supply a lawyer. U.S.C.A. Const.Amends. 5, 14.

7. Criminal Law ⇐998(20)

Indigent prisoner, who had no constitutional right to appointed counsel in state postconviction proceedings, had no constitutional right to insist on application of

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Anders procedures for withdrawal of appointed counsel when that attorney found case wholly frivolous on direct appeal; thus, appointed counsel in postconviction proceeding could withdraw after he reviewed trial record, consulted with prisoner, and wrote to trial court to inform court that there was no arguable basis for collateral relief and to request permission to withdraw. U.S.C.A. Const.Amends. 5, 14.

8. Criminal Law ⇐998(20)

Constitution did not require Pennsylvania to make difficult choice between providing no counsel whatsoever or following strict procedural guidelines enunciated in *Anders* for withdrawal of appointed counsel when that attorney found case on direct appeal wholly frivolous, where Pennsylvania made valid choice to give prisoners assistance of counsel without requiring full panoply of procedural protections required by Constitution for defendants who were at trial and on first appeal as of right. U.S.C.A. Const.Amends. 5, 14.

Syllabus *

Respondent was convicted of second-degree murder and sentenced to life imprisonment in a Pennsylvania trial court, and the Pennsylvania Supreme Court affirmed on direct appeal. In respondent's subsequent postconviction proceedings, the trial court, as required by state law, appointed counsel to assist her. Counsel reviewed the trial record, consulted with respondent, concluded that there were no arguable bases for collateral review, advised the trial court in writing of his conclusion, and requested permission to withdraw. After reviewing the record, the court agreed that there were no arguably meritorious issues and dismissed the proceedings. Respondent acquired new appointed counsel and appealed to the Pennsylvania Superior Court, which concluded that counsel's conduct in the trial court violated respondent's constitutional rights, and remanded the case for further proceedings. The Superior Court relied on *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, which held that (1) when an attorney appointed to represent an indigent defendant on *direct appeal* finds the case to be wholly frivolous he must request the court's permission to withdraw and submit a brief referring to anything in the record arguably supporting the appeal, (2) a copy of the brief must be furnished the indigent and time must be allowed for him to raise any points that he chooses, and (3) the court itself must then decide whether the case is wholly frivolous.

Held: The court below improperly relied on the Federal Constitution to extend the *Anders* procedures to these collateral postconviction proceedings. Denial of counsel to indigents on first appeal as of right amounts to discrimination against the poor in violation of the Fourteenth Amendment, and *Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel. The right to appointed counsel extends to only the first appeal of right, and since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341, *a fortiori*, he has no such right when attacking, in postconviction proceedings, a conviction that has become final upon exhaustion of the appellate process. The *Anders* procedures do not apply to a state-created right to counsel on postconviction review just because they are applied to the right to counsel on first appeal as of right. Respondent's access to a lawyer was the 1552 result of the State's decision, not the command of the Federal Constitution. The procedures followed by her trial counsel in the postconviction proceedings fully comported with the fundamental fairness mandated by the

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Due Process Clause. States have no obligation to provide postconviction relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well. Nor was the equal protection guarantee of meaningful access violated in this case. Moreover, there is no merit to respondent's contention that once the State has granted a prisoner access to counsel on postconviction review, the Due Process Clause of the Fourteenth Amendment requires that counsel's actions comport with the *Anders* procedures. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821, distinguished. Pennsylvania made a valid choice to give prisoners the assistance of counsel in postconviction proceedings without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right. Pp. 1992–1996.

330 Pa.Super. 313, 479 A.2d 568 (1984), reversed and remanded.

REHNQUIST, C.J., delivered the opinion of the Court, in which WHITE, POWELL, O'CONNOR, and SCALIA, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 1995. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 1995. STEVENS, J., filed a dissenting opinion, *post*, p. 2001.

Gaele M. Barthold, Philadelphia, Pa., for petitioner.

Catherine M. Harper, Philadelphia, Pa., for respondent.

[553] Chief Justice REHNQUIST delivered the opinion of the Court.

In 1975 respondent was convicted of second-degree murder by the Court of Common Pleas of Philadelphia County. She was sentenced to life imprisonment. Her appointed trial attorney appealed the conviction to the Supreme Court of Pennsylvania. That court unanimously affirmed the conviction. 477 Pa. 211, 383 A.2d 898 (1978). Having failed on direct appeal, respondent, proceeding *pro se*, sought relief from the trial court under the Pennsylvania Post Conviction Hearing Act. See 42 Pa. Cons.Stat. § 9541 *et seq.* (1982). She raised the same issues that the Supreme Court of Pennsylvania had rejected on the merits. The trial court denied relief, but the State Supreme Court reversed, holding that respondent was entitled, under state law, to appointed counsel in her postconviction proceedings. 497 Pa. 332, 440 A.2d 1183 (1981). On remand, the trial court appointed counsel. Counsel reviewed the trial record and consulted with respondent. He concluded that there were no arguable bases for collateral relief. Accordingly, he advised the trial court in writing of his conclusion and requested permission to withdraw. The trial court conducted an independent review of the record and agreed that there were no issues even arguably meritorious. The court thus dismissed the petition for postconviction relief.

Respondent acquired new appointed counsel and pursued an appeal to the Superior Court. Over a dissent, that court concluded that the conduct of the counsel in the trial court's postconviction proceedings violated respondent's constitutional rights. 330 Pa.Super. 313, 479 A.2d 568 (1984). The court held that "Pennsylvania law concerning procedures to be followed when a court-appointed attorney sees no basis for an appeal is derived from the seminal case of" *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). 330 Pa.Super., at 318, 479 A.2d, at 570. In *Anders*, this Court held that when an attorney appointed to represent an indigent defendant on direct appeal finds a case wholly frivolous:

> "[H]e should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should

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be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." 386 U.S., at 744, 87 S.Ct., at 1400.

The Superior Court held that respondent's postconviction counsel had failed to follow these procedures, and it therefore remanded the case to the Court of Common Pleas for further proceedings. We granted certiorari, 479 U.S. 812, 107 S.Ct. 61, 93 L.Ed.2d 20 (1986), and we now reverse.

We think that the court below improperly relied on the United States Constitution to extend the *Anders* procedures to postconviction proceedings. The holding in *Anders* was based on the underlying constitutional right to appointed counsel established in *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Relying on "that equality demanded by the Fourteenth Amendment," *id.*, at 358, 83 S.Ct., at 817, the *Douglas* Court held that denial of counsel to indigents on first appeal as of right amounted to unconstitutional discrimination against the poor. In *Anders*, the Court held that in order to protect the "constitutional requirement of substantial equality and fair process" set out in *Douglas*, appointed appellate counsel must follow the procedures described above when a case appears to be frivolous. 386 U.S., at 744, 87 S.Ct., at 1400. Of course, *Anders* did [555] not set down an independent constitutional command that all lawyers, in all proceedings, must follow these particular procedures. Rather, *Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel.

[1-4] We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, see *Johnson v. Avery*, 393 U.S. 483, 488, 89 S.Ct. 747, 750, 21 L.Ed.2d 718 (1969), and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. *Wainwright v. Torna*, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982); *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process. See *Boyd v. Dutton*, 405 U.S. 1, 7, n. 2, 92 S.Ct. 759, 762, n. 2, 30 L.Ed.2d 755 (1972) (POWELL, J., dissenting).

In *Ross v. Moffitt*, *supra*, we analyzed the defendant's claim to appointed counsel on discretionary review under two theories. We concluded that the fundamental fairness exacted by the Due Process Clause did not require appointment of counsel:

"[I]t is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal [556] defendant's consent, it is clear that the State need not provide any appeal at all. *McKane v. Durston*, 153 U.S. 684 [14 S.Ct. 913, 38 L.Ed. 867] (1894). The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way." 417 U.S., at 610-611, 94 S.Ct., at 2444.

We also concluded that the equal protection guarantee of the Fourteenth Amendment does not require the appointment of an attorney for an indigent appellant just because an affluent defendant may retain one. "The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Id.*, at 616, 94 S.Ct., at 2447.

[5] These considerations apply with even more force to postconviction review. First, we reject respondent's argument that the *Anders* procedures should be applied to a state-created right to counsel on postconviction review just because they are applied to the right to counsel on first appeal that this Court established in *Douglas*. Respondent apparently believes that a "right to counsel" can have only one meaning, no matter what the source of that right. But the fact that the defendant has been afforded assistance of counsel in some form does not end the inquiry for federal constitutional purposes. Rather, it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question. In this case, respondent's access to a lawyer is the result of the State's decision, not the command of the United States Constitution.

[6] We think that the analysis that we followed in *Ross* forecloses respondent's constitutional claim. The procedures followed by respondent's habeas counsel fully comported with fundamental fairness. Postconviction relief is even further removed from the criminal trial than is discretionary direct [557] review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. See *Fay v. Noia*, 372 U.S. 391, 423–424, 83 S.Ct. 822, 841, 9 L.Ed.2d 837 (1963). It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief, cf. *United States v. MacCollom*, 426 U.S. 317, 323, 96 S.Ct. 2086, 2090–2091, 48 L.Ed.2d 666 (1976) (plurality opinion), and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.

[7] Nor was the equal protection guarantee of "meaningful access" violated in this case. By the time respondent presented her application for postconviction relief, she had been represented at trial and in the Supreme Court of Pennsylvania. In *Ross*, we concluded that the defendant's access to the trial record and the appellate briefs and opinions provided sufficient tools for the *pro se* litigant to gain meaningful access to courts that possess a discretionary power of review. 417 U.S., at 614–615, 94 S.Ct., at 2446. We think that the same conclusion necessarily obtains with respect to postconviction review. Since respondent has no underlying constitutional right to appointed counsel in state postconviction proceedings, she has no constitutional right to insist on the *Anders* procedures which were designed solely to protect that underlying constitutional right.

Respondent relies on *Evitts v. Lucey*, 469 U.S. 387, 401, 105 S.Ct. 830, 838–839, 83 L.Ed.2d 821 (1985), for the proposition that even though the State need not grant a prisoner access to counsel on postconviction review, once it has done so, the Due Process Clause of the Fourteenth Amendment requires that counsel's actions comport with the procedures enumerated in *Anders*. In *Evitts*, the Court held that a State cannot penalize a criminal defendant by dismissing his first appeal as of right when his appointed counsel has failed to follow mandatory appellate rules. In so ruling, the Court rejected the State's argument that since it need not provide an appeal in the first place, see [558] *McKane v. Durston*, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894), it could cut off a defen-

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dant's appeal without running afoul of the Due Process Clause. Noting that "[t]he right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms," 469 U.S., at 400–401, 105 S.Ct., at 838, the Court reasoned that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause," *id.*, at 401, 105 S.Ct., at 839. Respondent argues that by allowing counsel to represent her without complying with *Anders*, the Court of Common Pleas improperly deprived her of her state-law right to "effective" assistance.

We think that *Evitts* provides respondent no comfort. Initially, the substantive holding of *Evitts*—that the State may not cut off a right to appeal because of a lawyer's ineffectiveness—depends on a constitutional right to appointed counsel that does not exist in state habeas proceedings. More important, however, is the fact that unlike the prisoner in *Evitts*, who was actually deprived of a state-created right to appeal, respondent here has suffered no deprivation, assuming for the moment that the Due Process Clause is relevant. Cf. *Wainwright v. Torna*, 455 U.S., at 588, n. 4, 102 S.Ct., at 1301, n. 4 (*per curiam*); *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). The Court of Common Pleas found that respondent's right to counsel under Pennsylvania law was satisfied by the conduct of her appointed counsel, combined with the court's independent review of the record. The Superior Court did not disagree with this state-law holding. Rather, it ruled that *Anders* required even more assistance, as a matter of federal constitutional law. We have rejected that conclusion, and therefore the State's obligations, as a matter of both federal and state law, have been fulfilled. Since respondent has received exactly that which she is entitled to receive under state law—an independent review of the record by competent counsel—she cannot claim any deprivation without due process.

[8] At bottom, the decision below rests on a premise that we are unwilling to accept—that when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume. On the contrary, in this area States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review. In Pennsylvania, the State has made a valid choice to give prisoners the assistance of counsel without requiring the full panoply of procedural protections that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right. In this context, the Constitution does not put the State to the difficult choice between affording no counsel whatsoever or following the strict procedural guidelines ennunciated in *Anders*. The judgment of the Superior Court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice BLACKMUN, concurring in the judgment.

I agree with the Court's conclusion that the Superior Court erred in its belief that the United States Constitution required the application of the procedures mandated by *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), to this case. In my view, however, on remand the Superior Court should be able to consider whether appointed counsel's review of respondent's case was adequate under Pennsylvania law or the Pennsylvania Supreme Court's remand order.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

On respondent's appeal from denial of state collateral relief, the Pennsylvania Supreme Court held that state law required

Dorothy Finley's counsel to review the record carefully, to amend her petition for relief, and to file a brief on her behalf. On remand, however, her counsel advised the [560] trial court (Court of Common Pleas) summarily to dismiss her petition. Today the Court reverses the subsequent determination of the appellate court (Superior Court) that the performance of Dorothy Finley's trial counsel was deficient for failure to comply with three different sets of requirements: those established by *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), by *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981), and by the remand order issued originally by the Pennsylvania Supreme Court.

In Pennsylvania, courts may comply with either the *Anders* or the *McClendon* procedures when appointed counsel wishes to withdraw from representation of a petitioner's collateral attack upon a judgment. 330 Pa.Super. 318, 320–321, 479 A.2d 568, 571 (1984). The *Anders* procedures require counsel to perform a conscientious evaluation of the record, to write a brief referring to "arguable" support in the record, and to give notice to the client. The trial court may grant counsel's request to withdraw after a full examination of the record. *Anders v. California*, *supra*, 386 U.S., at 744, 87 S.Ct., at 1400. The *McClendon* procedures require "an exhaustive examination of the record" by counsel and an "independent determination" by the court that the petition is wholly frivolous. No *Anders* brief or notice to client is required. 330 Pa.Super., at 320–321, 479 A.2d, at 571.

In addition to finding that trial counsel complied with neither of these two sets of requirements, the state appellate court found that the lower court failed to comply with the specific requirements of the remand order of the State Supreme Court. In that circumstance, the appellate court decision rested on this independent state ground, and the petition for certiorari should be dismissed as improvidently granted. Moreover, the controversy involving the application of the *Anders* procedures is not ripe for review. Finally, I believe that counsel's deficient performance violated Finley's federal rights to due process and equal protection. I therefore dissent.

[561]

The failure of the trial court to ensure compliance with the State Supreme Court's instructions on remand is an independent state ground for the appellate court's decision. After exhausting direct appeals of her criminal convictions, Finley filed a *pro se* application for collateral relief pursuant to the Pennsylvania Post Conviction Hearing Act, 42 Pa.Cons.Stat. § 9541 *et seq.* (1982) (PCHA). The trial court summarily denied the petition. The Pennsylvania Supreme Court reversed and held that Finley was entitled to appointed counsel if indigent, since the PCHA required the appointment of counsel to assist her in a meaningful manner. 497 Pa. 382, 384, 440 A.2d 1183, 1184 (1981). The State Supreme Court did not rely on or refer to federal statutory or constitutional law. It stated that the right to counsel guaranteed by the PCHA could be denied "*only* where a previous *PCHA petition* involving the same issues has been determined adversely to the petitioner in a *proceeding on the PCHA petition* . . ." *Ibid.* (emphasis added). Finley had not previously filed a PCHA petition and therefore had a right to counsel. The State Supreme Court instructed that appointed counsel was not to limit his or her efforts to the claims raised by Finley, but should "explore legal grounds for complaint, investigate underlying facts" and "articulate claims for relief." The trial court was further instructed to allow counsel to amend the petition. 497 Pa., at 384–385, 440 A.2d, at 1184–1185.

On remand, Finley's counsel failed to meet these requirements. Appointed counsel read only the "Notes of Testimony" of the original trial and failed to indicate to the trial court how he had conducted an exhaustive research of the record. 330 Pa.

Super., at 322–323, 479 A.2d, at 572–573. Instead of filing a brief and amending the complaint, as the remand order required, he simply submitted a "no-merit" letter[563] describing his limited review, listing the identical issues that were previously presented to the Pennsylvania Supreme Court on both direct appeal and on collateral attack, and stating why he regarded those claims as meritless.[1] Finley did not receive advance notice from either the court or her counsel that the latter was filing a letter maintaining that all her claims were without merit. Tr. of Oral Arg. 17. Indeed, there is no evidence that Finley ever received a copy of the letter. The attorney also failed to inform Finley of her right to seek new counsel or to proceed *pro se* before the trial court. 330 Pa.Super., at 320–321, 323, 479 A.2d, at 571, 573. After receiving the no-merit letter, the trial court dismissed Finley's petition without a hearing. New counsel was appointed to represent Finley in the appeal of the dismissal.

The Superior Court reversed, noting that the trial court had failed to follow the required instructions of the State Supreme Court's remand, which were based on its interpretation of the PCHA. "The [Pennsylvania] Supreme Court remanded, not because it saw any particular merit to the [contentions raised at that time], which were identical to those disposed of earlier in appellant's direct appeal.... The Supreme Court wished to afford appellant the opportunity to amass other issues with arguable merit...." 330 Pa.Super., at 321, 479 A.2d, at 571–572.

The Superior Court cited to Rule 1504 of the Pennsylvania Rules of Criminal Procedure as a basis for the earlier remand order. That Rule requires counsel to "act as an advocate in fulfilling his role." 330 Pa.Super., at 321, 479 A.2d, at 572. The Superior Court stated that Finley's appellant counsel was able to list several issues "which may have arguable merit" simply by reviewing the " 'bare record available in the [563] Superior Court.' " *Id.*, at 323, 479 A.2d, at 572–573 (citing Brief for Appellant).[2] Thus, the trial court's failure to require a submitted brief and an amended complaint did not satisfy the mandate of the State Supreme Court that effective counsel be provided for Finley's first PCHA petition. Since trial counsel had failed to amend the petition or submit a brief, "the proceeding was in fact uncounselled" under Pennsylvania law. *Id.*, at 321, 479 A.2d, at 572 (citation omitted).

This reliance on state grounds independently and adequately justified the Superior Court's remand. There is no need for a plain statement indicating the independence of the state grounds since there was no federal law interwoven with this determination. See *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476–3477, 77 L.Ed.2d 1201 (1983). Indeed, the Superior Court referred to state law with the very purpose of basing the reversal of the trial court's decision on grounds independent of both *Anders* and *McClendon*. 330 Pa.Super., at 321–322, 479 A.2d, at 571–572. As a result, the Court has no need to address the issue of what general requirements govern representation in collateral proceedings in Pennsylvania, much less whether *Anders* is applicable.

II

The *Anders* issue is not ripe for review for yet another reason. The Superior Court's decision leaves the trial court discretion on remand to impose the requirements of either *Anders* or *McClendon*, so long as it also complies with the requirements imposed by the original remand order by the Pennsylvania Supreme Court.

1. The Superior Court noted that counsel gave an incorrect explanation of one of these two issues in his evaluation of why these issues were meritless. 330 Pa.Super., at 323, n. 4, 479 A.2d, at 573, n. 4.

2. Finley's appellate counsel raised a number of issues of arguable merit that establish Sixth Amendment violations of ineffective assistance of counsel. See Brief for Respondent 15, n. 7.

See 330 Pa.Super., at 322, |564 479 A.2d, at 571.[3] Because the trial court had satisfied neither the requirements of *Anders* nor *McClendon*,[4] the Superior Court remanded the case and did not specify which set of procedures the trial court was to follow.[5]

It is more than conjecture that the *Anders* requirements may never be imposed in this case, given the alternative availability of *McClendon* as a source of duties in Pennsylvania. After the present case was decided, the Superior Court held that the *McClendon* procedures—*not* the *Anders* requirements—are required on collateral review. *Commonwealth v. McGeth*, 347 Pa.Super. 333, 344–345, 500 A.2d 860, 866 (1985). The Pennsylvania Supreme Court has never held that *Anders* procedures are required on collateral review. In *Commonwealth v. Lowenberg*, 498 Pa. 232, 235, 425 A.2d 1100, 1101–1102 (1981), the State Supreme Court was equally divided on this issue and therefore affirmed the lower court ruling that the *Anders* procedures are required |565 *only* on direct appeal from a criminal conviction, and *not* on collateral review. Because Pennsylvania does not require that *Anders* be followed on collateral review, there is no occasion for today's decision.

It is also unnecessary to decide in this case the adequacy of the *McClendon* procedures. The Commonwealth does not oppose the imposition of the *McClendon* requirements. Indeed, the Commonwealth approves of the *McClendon* requirements as a "flexible and enlightened approach." Brief for Petitioner 18, n. 11. Since it is not clear that the parties in this case have adversarial legal interests, there is no case or controversy regarding the adequacy of *McClendon*. See *Steffel v. Thompson*, 415 U.S. 452, 460, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505 (1974).[6]

In order to avoid issuing an advisory opinion, we should await a final judgment by a Pennsylvania court that requires the imposition of the *Anders* procedures.[7]

3. The Superior Court acknowledged that Pennsylvania appellate courts do not always require that trial courts follow the *Anders* procedure, but may allow the appointed counsel to withdraw if the lower court complies with the alternative requirements enunciated by the Pennsylvania Supreme Court in *Commonwealth v. McClendon*, 495 Pa. 467, 434 A.2d 1185 (1981). 330 Pa.Super., at 320, 479 A.2d, at 571 ("[C]ompliance was unnecessary" if counsel conducted an exhaustive examination of the record and the lower court concludes that the petitioner's claims are completely frivolous).

4. The Superior Court found that the *McClendon* requirements were not satisfied. "Here, there is no mention of an exhaustive search nor the required finding that the case is wholly frivolous. Counsel must certify to an exhaustive reading and endeavor to uncover all possible issues for review so that the frivolity of the appeal may be determined by the lower court, or ... at the appellate level." 330 Pa.Super., at 322, 479 A.2d, at 572 (footnotes omitted).

5. The Superior Court's instructions to the trial court were as follows:

"Since the procedures utilized herein were defective, they acted to deprive appellant of her right to adequate representation. We remand for an evidentiary hearing on the claims raised in appellant's brief and any other issues discerned by counsel after an exhaustive search of the record in accordance with this opinion." *Id.*, at 323–324, 479 A.2d, at 573.

6. There are several additional reasons why the Court should not decide the validity of the *McClendon* requirements. First, any holding that determines the applicability of the *McClendon* requirements to collateral review proceedings is inappropriate because of the lack of a final judgment. Since the trial court has not yet chosen which procedure to follow, there is no final judgment or decree that we can review. Cf. *Republic Gas Co. v. Oklahoma*, 334 U.S. 62, 69–71, 68 S.Ct. 972, 977–978, 92 L.Ed. 1212 (1948). Second, the validity of the *McClendon* requirements is not at issue in this case, and is not briefed by the litigants. Third, the *McClendon* issue is not ripe for review. The trial court may decide not to impose the *McClendon* requirements, and thus any opinion on this issue is an impermissible advisory opinion.

7. Such an approach is consistent with the past practices of the Court:

"It has long been this Court's 'considered practice not to decide abstract, hypothetical or contingent questions, ... or to decide any constitutional question in advance of the necessity for its decision, ... or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, ... or

Since review of the trial court's eventual decision may be sought later in both the state appellate courts and this Court, we should [568] avoid prematurely reversing the decision of an inferior state court.[8] Thus, I would dismiss the petition as improvidently granted.

III

I also disagree with the Court's holding that trial counsel's abandonment of his client without notice and his advocacy against Finley's petition did not violate her federal rights to due process and equal protection. The Court denigrates Finley's right to effective assistance of counsel by noting that this case involves only postconviction review by a trial court. It argues that such review is similar to discretionary appellate review, for which appointment of counsel is not required by the Federal Constitution under *Ross v. Moffitt*, 417 U.S. 600, 621, 94 S.Ct. 2437, 2449, 41 L.Ed.2d 341 (1974). See *ante*, at 1993. This case, however, is readily distinguished from *Ross*. Under state law, Finley has a *mandatory* right to *effective* assistance of counsel, and the trial court is *required* to review the issues of arguable merit.

In construing the PCHA legislation, the Pennsylvania Supreme Court concluded:

"We pause to note that the mandatory appointment requirement is a salutary one and best comports with efficient judicial administration and serious consideration of a prisoner's claims. Counsel's ability to frame the issues in a legally meaningful fashion insures the trial court that all relevant considerations will be brought to its attention...." *Commonwealth v. Mitchell*, 427 Pa. 395, 397, 235 A.2d 148, 149 (1967).

[567] The Pennsylvania Legislature recognized the importance of collateral review by adopting the PCHA, which requires effective assistance of counsel. 330 Pa.Super., at 321, 479 A.2d, at 572. An appointed counsel's determination that a petitioner's claims have no merit may completely preclude consideration of meritorious claims. Pennsylvania law allows summary dismissal, without appointment of counsel, of petitions which raise claims that were the subject of previous PCHA petitions. Pa.Rule Crim.Proc. 1504.[9]

The Court justifies its holding on the ground that a State may refuse indigent prisoners any assistance of counsel and therefore has the lesser power to deliver inadequate legal services. But it has long been settled that even if a right to counsel is not required by the Federal Constitution, when a State affords this right it must ensure that it is not withdrawn in a manner inconsistent with equal protection and due process. See *Evitts v. Lucey*, 469 U.S. 387, 400, 105 S.Ct. 830, 838, 83 L.Ed.2d 821 (1985); *Ross v. Moffitt*, *supra*; *Johnson v. Avery*, 393 U.S. 483, 488, 89 S.Ct. 747, 750, 21 L.Ed.2d 718 (1969); *Smith v. Bennett*, 365 U.S. 708, 713, 81 S.Ct. 895, 898, 6 L.Ed.2d 39 (1961).

"'Due process' emphasizes fairness between the State and the individual dealing with the State." *Ross v. Moffitt*, *supra*,

to decide any constitutional question except with reference to the particular facts to which it is to be applied...." *Public Workers v. Mitchell*, 330 U.S. 75, 90, n. 22, 67 S.Ct. 556, 564, n. 22, 91 L.Ed. 754 (1947); see also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 510, 95 S.Ct. 1029, 1053–1054, 43 L.Ed.2d 328 (1975) (REHNQUIST, J., dissenting).

8. In the instant case, the Commonwealth sought discretionary review of the Superior Court's decision in the Pennsylvania Supreme Court. Review was granted, and the matter was briefed and argued. The court, however, ordered that the appeal be dismissed "as having been improvidently granted." 510 Pa. 304, 507 A.2d 822 (1986). Under Pennsylvania law, the State Supreme Court's refusal to review is not a decision on the merits. See *Commonwealth v. Britton*, 509 Pa. 620, 506 A.2d 895 (1986); *Dayton v. Dayton*, 509 Pa. 632, 506 A.2d 901 (1986).

9. This right to counsel on collateral review is of special significance to Finley because the Superior Court found several arguably meritorious issues which indicate that effective assistance of counsel was not rendered both in the trial that resulted in her conviction and in the handling of the postconviction petition. 330 Pa.Super., at 322–323, 479 A.2d, at 572–573.

417 U.S., at 609, 94 S.Ct., at 2448. "[F]undamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" *Ake v. Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985) (citation omitted). In my view, the Federal Constitution requires that the *Anders* procedures must be followed when a State provides assistance of counsel in collateral proceedings. As the Court previously explained:

> "This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant [568] is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the client nor the court any aid. The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate. Moreover, such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled." *Anders v. California*, 386 U.S., at 745, 87 S.Ct., at 1400.

Even if the *Anders* requirements were not mandated by due process, the performance of Finley's counsel clearly violated minimal standards of fundamental fairness. At a minimum, due process requires that counsel perform as an advocate. The "very premise of our adversarial system ... is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593 (1975). It is fundamentally unfair for appointed counsel to argue against his or her client's claims without providing notice or an opportunity for that client either to proceed *pro se* or to seek the advice of another attorney. "It is one thing for a prisoner to be told that appointed counsel sees no way to help him, and quite another for him to feel sandbagged when counsel appointed by one arm of the government seems to be helping another to seal his doom." *Suggs v. United States*, 129 U.S.App.D.C. 133, 136, 391 F.2d 971, 974 (1968). Indeed, even the Commonwealth concedes that "due process requires that the attorney conduct a conscientious and meaningful review of the case and the record." Tr. of Oral Arg. 14. The Superior Court's criticism of the trial counsel's review of the record as insufficient was in those terms, since Finley's appellate counsel was able to list several issues of [569] arguable merit based on the "bare record available in the Superior Court." 330 Pa.Super., at 323, 479 A.2d, at 572.

The performance of Finley's counsel also violated the Equal Protection Clause. Equal protection demands that States eliminate unfair disparities between classes of individuals. There is no rational basis for assuming that petitions submitted by indigents for collateral review will be less meritorious than those of other defendants. It is hard to believe that retained counsel would file a letter that advocates dismissal of a client's case without notice to the client and without conducting a conscientious assessment of the record. Since an impoverished prisoner must take whatever a State affords, it is imperative that the efforts of court-appointed counsel be scrutinized so that the indigent receives adequate representation. Equal protection therefore requires the imposition of the *Anders* requirements. Otherwise, "[t]he indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual," while a person who can afford it obtains meaningful review. *Douglas v. California*, 372 U.S. 353, 358, 83 S.Ct. 814, 817, 9 L.Ed.2d 811 (1963).

IV

The Court transforms Finley's right to effective counsel into a right to a meaning-

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less ritual.[10] In the face of the identification by the Superior Court of three possible means of ensuring adequate representation, the Court was without jurisdiction to render its decision. "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." *Michigan v. Long*, 463 U.S., at [570] 1040, 103 S.Ct., at 3476. I would therefore dismiss the petition as improvidently granted.

I respectfully dissent.

Justice STEVENS, dissenting.

Without bothering to identify the basis for federal jurisdiction in this case, the Court blithely assumes that the decision below does not rest on an independent and adequate state ground. I cannot agree. State procedural rules are often patterned after federal precedents, but they are, nonetheless, rules of state law. In this case, the Pennsylvania Superior Court explicitly stated that it was applying "*Pennsylvania law* concerning procedures to be followed when a court-appointed attorney sees no basis for an appeal." 330 Pa.Super. 313, 318, 479 A.2d 568, 570 (1984) (emphasis added). As for federal precedents, the court simply noted that state law in the area was "derived from" this Court's 1967 decision in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493. Thus, I believe that the "plain statement" test of *Michigan v. Long*, 463 U.S. 1032, 1037–1044, 103 S.Ct. 3469, 3474–3478, 77 L.Ed.2d 1201 (1983), is satisfied, and that the decision on review rested on independent and adequate state grounds. Moreover, it seems rather clear to me, for the reasons stated in Part I of Justice BRENNAN's dissent, that the decision below did not rest alone on that portion of the discussion which could conceivably be considered to be based on *Anders*. See *ante*, at 1996–1998. In either event, there is no basis for concluding that the Pennsylvania Superior Court's decision to remand this case stemmed from its belief that the Federal Constitution required it to do so.

But even if I believed that the court relied on some federal precedents, and that the sacrosanct "plain statement" were missing, I would still conclude that this Court lacks jurisdiction over the case. It is unrealistic—and quite unfair—to expect the judges in the Philadelphia office of the Superior Court of Pennsylvania to acquire and retain familiarity with this Court's jurisprudence concerning the intricacies of our own jurisdiction. The occasions on which the decisions of [571] the judges in that office will be subject to direct review by the Supreme Court of the United States are far too rare to make it appropriate for them to become familiar with the *Michigan v. Long* presumption. It is denigrating enough to require the justices of the 50 State Supreme Courts to include such a statement in their decisions, without demanding the same of the 716 state appellate judges or all 20,000 state-court judges who decide cases that could conceivably be reviewed by this Court.*

Before the Commonwealth of Pennsylvania petitioned this Court for a writ of certiorari, it sought review of the Superior Court's judgment in the Supreme Court of

10. I disagree with the Court's interpretation that the Commonwealth's obligations, as a matter of state law, were conclusively determined by the trial court. In my view, therefore, today's holding does not preclude a determination of this case under the Commonwealth's own laws and Constitution. See *South Dakota v. Opperman*, 428 U.S. 364, 396, 96 S.Ct. 3092, 3110, 49 L.Ed.2d 1000 (1976) (MARSHALL, J., dissenting).

* These figures are based on 1984 statistics as reported in two recent publications. See (Conference of State Court Administrators and the Court Statistics and Information Project of the National Center for State Courts, R. Roper, M. Elsner, & V. Flango, 1984 State Appellate Court Jurisdiction Guide for Statistical Reporting 5–9 (1985) (figure for appellate judges); National Center for State Courts, State Court Caseload Statistics: Annual Report 1984, pp. 195–248 (June 1986) (figure for all judges).

Pennsylvania. Had it not done so, this Court could not have accepted jurisdiction of the petition because cases originating in a state court may not be reviewed here unless the judgment was "rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. When the Pennsylvania Supreme Court dismissed the Commonwealth's appeal as improvidently granted, it did not accompany its order with any statement of reasons. We thus have no way of knowing whether its action was based on a correct interpretation of Pennsylvania law or an incorrect interpretation of federal law.

In my opinion, due respect for the courts of the States, as well as our separate interest in the "avoidance of rendering advisory opinions," *Michigan v. Long*, *supra*, 463 U.S. at 1040, 103 S.Ct., at 3476, strongly favors the former presumption. I would not take yet another step down the jurisdiction-expanding path marked by *Michigan v. Long*, see *Delaware v. Van Arsdall*, [1572]475 U.S. 673, 689, 106 S.Ct. 1431, 1440, 89 L.Ed.2d 674 (1986) (STEVENS, J., dissenting). Instead, I would dismiss the writ for want of jurisdiction.

I respectfully dissent.

481 U.S. 573, 95 L.Ed.2d 557

[1573]NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340.

No. 85-1924.

Argued Feb. 25, 1987.

Decided May 18, 1987.

National Labor Relations Board petitioned for enforcement of its order holding union in violation of National Labor Relations Act, for its disciplining members who worked as supervisors for employers that did not have collective bargaining agreement with union. The Court of Appeals, 780 F.2d 1489, denied enforcement, and appeal was taken. The Supreme Court, Justice Brennan, held that: (1) discipline of members who were not engaged in collective bargaining or grievance adjustment tasks was not unfair labor practice, and (2) absence of collective bargaining relationship between employers and union made possibility that discipline would coerce employers too attenuated to form basis of unfair labor practice charge.

Affirmed.

Justice Scalia filed opinion concurring in judgment.

Justice White filed dissenting opinion, in which Chief Justice Rehnquist and Justice O'Connor joined.

1. Labor Relations ⇐395.1

Union discipline of member, who works as supervisor for employer, is prohibited, under the NLRA provision precluding union from restraining or coercing employer in selection of his representatives, only when member is engaged in collective bargaining, grievance adjustment, or some other closely related activity; disavowing *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 98 S.Ct. 2423, 57 L.Ed.2d 313. National Labor Relations Act, §§ 2(11), 8(b)(1)(B), as amended, 29 U.S.C.A. §§ 152(11), 158(b)(1)(B).

2. Labor Relations ⇐395.1

Union discipline of member, who works as supervisor for employer, violates NLRA provision prohibiting union's restraining or coercing employer in selection of his representatives only when it may adversely affect supervisor's future conduct in performing collective bargaining, grievance adjustment, or some other closely related

Claim Number 00-TC-21 Claimant County of Los Angeles

Issue Penal Code Sections 1405 and 1417.9 as added by Statues of 2000, Chapter 821
Post Conviction: DNA Court Proceedings

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State Agency

Claim Number 00-TC-21 **Claimant** County of Los Angeles

Subject Penal Code Sections 1405 and 1417.9 as added by Statues of 2000, Chapter 821

Issue Post Conviction: DNA Court Proceedings

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Claim Number 00-TC-21 Claimant County of Los Angeles

Issue Penal Code Sections 1405 and 1417.9 as added by St 821
Post Conviction: DNA Court Proceedings

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Commission on State Mandates

List Date: 07/06/2001 Mailing Information Request for Extension

Mailing List

Claim Number 00-TC-21 Claimant County of Los Angeles

Subject Penal Code Sections 1405 and 1417.9 as added by Statues of 2000, Chapter 821

Issue Post Conviction: DNA Court Proceedings

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State Agency

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
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CSM 1 (12/88)

TEST CLAIM FORM

For Official Use Only

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NOV 09 2001
COMMISSION ON STATE MANDATES

Claim No. 01-TC-08

Local Agency or School District Submitting Claim

Los Angeles County

Contact Person	**Telephone No.**
Leonard Kaye	(213) 974-8564

Address
500 West Temple Street, Room 603
Los Angeles, CA 90012

Representative Organization to be Notified

California State Association of Counties

This test claim alleges the existence of " costs mandated by the state" within the meaning of section 17514 of the Government Code and section 6, article, XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable.

See page a

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative	**Telephone No.**
J. Tyler McCauley Auditor-Controller	(213) 974-8301

Signature of Authorized Representative	**Date**
J. Tyler McCauley	11/6/01

County of Los Angeles Test Claim Amendment [1]
Sections 1405 and 1417.9 of the Penal Code, as Added by
Chapter 821, Statutes of 2000 and Amended by Chapter 943, Statutes of 2001
Post Conviction: DNA Court Proceedings

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[1] The County of Los Angeles requests that its "Post Conviction: DNA Court Proceedings" test claim, filed on June 28, 2001 with the Commission on State Mandates, be amended to include recent changes to sections 1405 and 1417.9 of the Penal Code, the test claim legislation. Chapter 943, Statutes of 2001, enacted on October 14, 2001, amends sections 1405 and 1417.9 of the Penal Code [as added by Chapter 821, Statutes of 2000 - the original test claim legislation] and imposes duties on local government which were not included in the original test claim legislation.

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COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

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PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Hasmik Yaghobyan states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 603 Kenneth Hahn Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 1st day of November 2001, I served the attached:

Documents: County of Los Angeles, Post Conviction: DNA Court Proceedings, including *a 1 page letter of J. Tyler McCauley dated 10/31/01 , a 4 page narrative, a 1 page Leonard Kaye Declaration, and a 11 page attachment, all pursuant to 00-TC-21, now* pending before the Commission on State Mandates.

upon all Interested Parties listed on the attachment hereto and by

[X] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date. Commission on State Mandates - FAX as well as mail of originals.

[ ] by placing [ ] true copies [ ] original thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) as set forth below at the indicated address.

PLEASE SEE ATTACHED MAILING LIST

That I am readily familiar with the business practice of the Los Angeles County for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United States mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of November 2001, at Los Angeles, California.

Hasmik Yaghobyan

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

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J. TYLER McCAULEY
AUDITOR-CONTROLLER

October 31, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

County of Los Angeles Test Claim Amendment
Post Conviction: DNA Court Proceedings

We submit and enclose herein an amendment to the subject test claim.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

J. Tyler McCauley
Auditor-Controller

JTM:JN:LK
Enclosures

C. Robert Kalunian, Assistant Public Defender, Los Angeles County

County of Los Angeles Test Claim Amendment
Sections 1405 and 1417.9 of the Penal Code, as Added by
Chapter 821, Statutes of 2000 and Amended by Chapter 943, Statutes of 2001
Post Conviction: DNA Court Proceedings

The County of Los Angeles [County] requests that its "Post Conviction: DNA Court Proceedings" test claim, filed on June 28, 2001 with the Commission on State Mandates [Commission], be amended to include recent changes to sections 1405 and 1417.9 of the Penal Code, the test claim legislation.

Chapter 943, Statutes of 2001 [attached], enacted on October 14, 2001, amends sections 1405 and 1417.9 of the Penal Code [as added by Chapter 821, Statutes of 2000 - the original test claim legislation] and imposes duties on local government which were not included in the original test claim legislation.

Amendment Provision

As noted by Commission's Executive Director, "[p]ursuant to Government Code section 17557, subdivision (c), the claimant may amend the test claim at any time prior to a commission hearing on the claim without affecting the original filing date as long as the amendment substantially relates to the original test claim"[1].

Penal Code section 1405, as amended by Chapter 943, Statutes of 2001, now "establishes a procedure for counsel to be appointed to investigate and prepare the motion [for post-conviction DNA testing] to ensure that valid claims are not dismissed"[2]. These new duties for counsel substantially relate to the services of counsel called for in Penal Code section 1405 (c)[3], under the original test claim legislation [Chapter 821, Statutes of 2000] after a motion is filed. Now, services of counsel can be provided before a motion is filed.

---

[1] From page 1 of the October 5, 2000 letter of Paula Higashi, Commission's Executive Director to Leonard Kaye, County of Los Angeles, regarding "Claimant's Amendment to Test Claim...", attached.

[2] As noted in the July 11, 2001 Assembly Committee on Appropriations Hearing Report on Senate Bill 83 [Chapter 943, Statutes of 2001], attached.

[3] Penal Code section 1405 (c), as added by Chapter 821, Statutes of 2000, required that "[t]he court shall appoint counsel for the convicted person who brings a motion under this section if that person is indigent".

Section 1417.9 is also included in this amendment as Chapter 943, Statutes of 2001, further expands the duties of local government to include those persons who may have waived certain rights. Specifically, a new section 1417.9 (c) was added by Chapter 943, Statutes of 2001:

> "Notwithstanding any other provision of law, the right to receive notice pursuant to this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre."

Therefore, as amended herein, the County is now required to provide more service - to provide notice to those with waivers as well as those without such waivers.

In addition, as amended herein, the County must provide services in investigating and filing motions for post conviction DNA testing to more indigents - now including those waiving rights as set forth in a new Section 1405 (m), as added by by Chapter 943, Statutes of 2001:

> "Notwithstanding any other provision of law, the right to file a motion for postconviction DNA testing provided by this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre."

Therefore, as amended herein, the test claim legislation requires the County to provide more services than originally claimed under both sections 1417.9 and 1405 of the Penal Code.

Section 1405

Section 1405, in the original test claim legislation, provides new rights to State prison inmates for DNA testing where "identity of the perpetrator was, or should have been, a significant issue in the case". Chapter 943, Statutes of 2001 expands those rights to include provisions set forth under a revised section 1405 (b):

> "(b) (1) An indigent convicted person may request appointment of counsel to prepare a motion under this section by sending a written request to the court. The request shall include the person's statement that he or she was not the perpetrator of the crime and that DNA

testing is relevant to his or her assertion of innocence. The request also shall include the person's statement as to whether he or she previously has had counsel appointed under this section.

(2) If any of the information required in paragraph (1) is missing from the request, the court shall return the request to the convicted person and advise him or her that the matter cannot be considered without the missing information.

(3) (A) Upon a finding that the person is indigent, he or she has included the information required in paragraph (1), and counsel has not previously been appointed pursuant to this subdivision, the court shall appoint counsel to investigate and, if appropriate, to file a motion for DNA testing under this section and to represent the person solely for the purpose of obtaining DNA testing under this section.

(B) Upon a finding that the person is indigent, and counsel previously has been appointed pursuant to this subdivision, the court may, in its discretion, appoint counsel to investigate and, if appropriate, to file a motion for DNA testing under this section and to represent the person solely for the purpose of obtaining DNA testing under this section.

(4) Nothing in this section shall be construed to provide for a right to the appointment of counsel in a post conviction collateral proceeding, or to set a precedent for any such right, in any context other than the representation being provided an indigent convicted person for the limited purpose of filing and litigating a motion for DNA testing pursuant to this section."

Now, under Penal Code section 1405 (b) as amended by Chapter 943, Statutes of 2001, counsel is available early in the process "... to investigate and, if appropriate, to file a motion for DNA testing under this section and to represent the person solely for the purpose of obtaining DNA testing...".

Under the prior test claim legislation, counsel was available much later in the process, only after a motion was filed. Formerly, Penal Code section 1405 (c), as added by Chapter 821, Statutes of 2000, provided merely that "[t]he court shall appoint counsel for the convicted person who brings a motion under this section if that person is indigent".

Now, indigents must be provided services in investigating and filing motions as well as services after a motion is filed.

Additional Services are Reimbursable

The Legislative Counsel reports in their "Digest" to Chapter 943, Statutes of 2001 that:

> "By requiring that counsel be appointed to perform additional duties, this bill would impose a state-mandated local program."

In addition, the Legislature invites the Commission's consideration of reimbursements due local government in Section 3 of Chapter 943, Statutes of 2001 as follows:

> "Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000),reimbursement shall be made from the State Mandates Claims Fund."

We agree with the [above] findings of the Legislative Counsel and the Legislature. The test claim legislation, as amended by Chapter 943, Statutes of 2001, clearly imposes a reimbursable state-mandated program upon local government.

We also agree with the finding of the Assembly Committee on Appropriations Hearing Report on Senate Bill 83 [Chapter 943, Statutes of 2001], attached, that the "Post Conviction: DNA Court Proceedings" program is a reimbursable state-mandated program.

Therefore, the [Chapter 943, Statutes of 2001] revisions of Penal Code sections 1405 and 1417.9 substantially relate to duties set forth in County's original test claim on Chapter 821, Statutes of 2000. Accordingly, pursuant to Government Code section 17557, subdivision (c), amendment, as claimed herein, is authorized.

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AUDITOR-CONTROLLER

County of Los Angeles Test Claim Amendment
Sections 1405 and 1417.9 of the Penal Code, as Added by
Chapter 821, Statutes of 2000 and Amended by Chapter 943, Statutes of 2001
Post Conviction: DNA Court Proceedings

Declaration of Leonard Kaye

Leonard Kaye makes the following declaration and statement under oath:

I, Leonard Kaye, SB 90 Coordinator, in and for the County of Los Angeles, am responsible for filing test claims and amendments thereto, reviews of State agency comments, Commission staff analysis, and for proposing parameters and guidelines (P's& G's) and amendments thereto, all for the complete and timely recovery of costs mandated by the State. Specifically, I have prepared the subject test claim amendment.

Specifically, I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs as set forth in the subject amended test claim, are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " 'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

10/31/01; Los Angeles, CA
Date and Place

Leonard Kaye
Signature

SB 83 Senate Bill - CHAPTEREDBILL NUMBER: SB 83 CHAPTERED
BILL TEXT

CHAPTER 943
FILED WITH SECRETARY OF STATE OCTOBER 14, 2001
APPROVED BY GOVERNOR OCTOBER 14, 2001
PASSED THE SENATE SEPTEMBER 14, 2001
PASSED THE ASSEMBLY SEPTEMBER 13, 2001
AMENDED IN ASSEMBLY SEPTEMBER 12, 2001
AMENDED IN ASSEMBLY SEPTEMBER 5, 2001
AMENDED IN ASSEMBLY JULY 3, 2001
AMENDED IN ASSEMBLY JUNE 21, 2001
AMENDED IN SENATE MAY 14, 2001
AMENDED IN SENATE MAY 1, 2001

INTRODUCED BY Senator Burton

JANUARY 11, 2001

An act to amend Sections 1405 and 1417.9 of the Penal Code, relating to forensic testing.

LEGISLATIVE COUNSEL'S DIGEST

SB 83, Burton. Forensic testing: post conviction.

Existing law grants a person who was convicted of a felony and is currently serving a term of imprisonment the right to make a written motion under specified conditions for the performance of forensic DNA testing. Under existing law, if a hearing is held on the motion, the judge who presided over the person's trial generally hears the motion. Existing law provides that if an indigent person files a motion for DNA testing, the court shall appoint counsel to represent the person.

This bill would provide that an indigent person may request appointment of counsel to file a motion for the performance of DNA testing by sending a written request to the court, as specified. This bill would also specify that if a hearing is held on a motion for DNA testing and the person was convicted by entry of a plea of guilty or nolo contendre, then the judge who accepted the plea will generally decide the motion. This bill would also require the court to appoint counsel to investigate and, if appropriate, file the person's motion for DNA testing and to represent the person solely

for the purpose of obtaining DNA testing if the person is indigent and has not previously been appointed counsel. The court may, in its discretion, appoint counsel to an indigent person who has previously been appointed counsel. By requiring that counsel be appointed to perform additional duties, this bill would impose a state-mandated local program.

This bill would also provide that the right to file a motion for postconviction DNA testing cannot be waived.

Existing law requires that DNA evidence secured in connection with a criminal case be retained by an appropriate governmental entity, as specified. That entity may dispose of the evidence if certain criteria are met, including notification of certain persons of the intent to dispose of the biological material.

This bill would specify that all DNA evidence be retained so long as any person remains incarcerated in connection with the case. This bill would also provide that the right to receive notice that a governmental entity intends to dispose of biological material cannot be waived.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1405 of the Penal Code is amended to read:

1405. (a) A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction in his or her case, for performance of forensic deoxyribonucleic acid (DNA) testing.

(b) (1) An indigent convicted person may request appointment of counsel to prepare a motion under this section by sending a written request to the court. The request shall include the person's statement that he or she was not the perpetrator of the crime and that DNA testing is relevant to his or her assertion of innocence. The request also shall include the person's statement as to whether he or she previously has had counsel appointed under this section.

(2) If any of the information required in paragraph (1) is missing from the request, the court shall return the request to the convicted person and advise him or her that the matter cannot be considered without the missing information.

(3) (A) Upon a finding that the person is indigent, he or she has included the information required in paragraph (1), and counsel has not previously been appointed pursuant to this subdivision, the court shall appoint counsel to investigate and, if appropriate, to file a motion for DNA testing under this section and to represent the person solely for the purpose of obtaining DNA testing under this section.

(B) Upon a finding that the person is indigent, and counsel previously has been appointed pursuant to this subdivision, the court may, in its discretion, appoint counsel to investigate and, if appropriate, to file a motion for DNA testing under this section and to represent the person solely for the purpose of obtaining DNA testing under this section.

(4) Nothing in this section shall be construed to provide for a right to the appointment of counsel in a postconviction collateral proceeding, or to set a precedent for any such right, in any context other than the representation being provided an indigent convicted person for the limited purpose of filing and litigating a motion for DNA testing pursuant to this section.

(c) (1)The motion shall be verified by the convicted person under penalty of perjury and shall do all of the following:

(A) Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.

(B) Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.

(C) Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.

(D) Reveal the results of any DNA or other biological testing that was conducted previously by either the prosecution or defense, if known.

(E) State whether any motion for testing under this section previously has been filed and the results of that motion, if known.

(2) Notice of the motion shall be served on 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. Responses, if any, shall be filed 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.

(d) If the court finds evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, it shall order the party at whose request the testing was conducted 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.

(e) The court, in its discretion, may order a hearing on the motion. The motion shall be heard by the judge who conducted the trial, or accepted the convicted person's plea of guilty or nolo contendre, unless the presiding judge determines that judge is unavailable. Upon request of either party, the court may order, in the interest of justice, that the convicted person be present at the hearing of the motion.

(f) The court shall grant the motion for DNA testing if it determines all of the following have been established:

(1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion.

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.

(3) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case.

(4) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence.

(5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction. The court in its discretion may consider any evidence whether or not it was introduced at trial.

(6) The evidence sought to be tested meets either of the following conditions:

(A) The evidence was not tested previously.

(B) The evidence was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

(7) The testing requested employs a method generally accepted within the relevant scientific community.

(8) The motion is not made solely for the purpose of delay.

(g) If the court grants the motion for DNA testing, the court order shall identify the specific evidence to be tested and the DNA technology to be used. The 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. If the parties cannot agree, the court shall designate the laboratory to conduct the testing and shall consider designating a laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB).

(h) The result of any testing ordered under this section shall be fully disclosed to the person filing the motion, the district attorney, and the Attorney General. If requested by any party, the court shall order production of the underlying laboratory data and notes.

(i) (1) The cost of DNA testing ordered under this section shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person.

(2) In order to pay the state's share of any testing costs, the laboratory designated in subdivision (e) shall present its bill for services to the superior court for approval and payment. It is the intent of the Legislature to appropriate funds for this purpose in the 2000-01 Budget Act.

(j) An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General. The petition shall be filed within 20 days after the court's order granting or denying the motion for DNA testing. In a noncapital case, the petition for writ of mandate or prohibition shall be filed in the court of appeal. In a capital case, the petition shall be filed in the California Supreme Court. The court of appeal or California Supreme Court shall expedite its review of a petition for writ of mandate or prohibition filed under this subdivision.

(k) DNA testing ordered by the court pursuant to this section shall be done as soon as practicable. However, if the court finds that a miscarriage of justice will otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, a DNA laboratory shall be required to give priority to the DNA testing ordered pursuant to this section over the laboratory's other pending casework.

(l) DNA profile information from biological samples taken from a convicted person pursuant to a motion for postconviction DNA testing is exempt from any law requiring disclosure of information to the public.

(m) Notwithstanding any other provision of law, the right to file a motion for postconviction DNA testing provided by this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre.

(n) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 2. Section 1417.9 of the Penal Code is amended to read:

1417.9. (a) Notwithstanding any other provision of law and subject to subdivision (b), the appropriate governmental entity shall retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for deoxyribonucleic acid (DNA) testing.

(b) A governmental entity may dispose of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set forth below are met:

(1) The governmental entity notifies all of the following persons of the provisions of this section and of the intention of the governmental entity to dispose of the material: any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.

(2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

(A) A motion filed pursuant to Section 1405. However, upon filing of that motion, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

(B) A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to Section 1405 that is followed within 180 days by a motion for DNA testing pursuant to Section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of

conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405.

(3) No other provision of law requires that biological evidence be preserved or retained.

(c) Notwithstanding any other provision of law, the right to receive notice pursuant to this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre.

(d) This section shall remain in effect only until January 1, 2003, and on that date is repealed unless a later enacted statute that is enacted before January 1, 2003, deletes or extends that date.

SEC. 3. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Date of Hearing: July 11, 2001

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Carole Migden, Chairwoman

SB 83 (Burton) - As Amended: July 3, 2001

Policy Committee: Pubic Safety Vote:6-1
Urgency: Yes State Mandated Local Program: Yes
Reimbursable: Yes

SUMMARY

This bill establishes and clarifies procedures for the appointment of counsel for indigent persons to investigate and file motions for post-conviction DNA testing, and clarifies other provisions of law related to post-conviction DNA testing. Specifically, this bill:

1) Allows indigent convicted persons to request appointment of counsel in writing, as specified, and requires the court to appoint counsel to investigate and file motions for DNA testing and to represent convicted persons at future DNA proceedings.

2) Clarifies that a hearing on a motion for post-conviction DNA testing shall be heard by the judge who accepted the plea of guilty or no contest if the person was convicted by entry of a plea of guilty or no contest.

FISCAL EFFECT

Moderate reimbursable local court costs - potentially in the range of $200,000 - to the extent additional counsel is appointed for indigent appellants resulting in additional hearings.

To date there is only anecdotal information regarding the number of post-conviction DNA requests. The enabling legislation has only been in place for seven months.

COMMENTS

1) Rationale . SB 1342 (Burton Statutes of 2000), requires appointment of counsel for indigent persons who bring a motion for post-conviction DNA testing. There is, however, some ambiguity as to whether the court can appoint counsel prior to the filing of the motion. This bill establishes a procedure for counsel to be appointed to investigate and prepare the motion to ensure that valid claims are not dismissed.

2) Current law provides that a person convicted of a felony may make a written motion before the court for DNA testing. The motion for DNA testing must explain why identity was an issue in the case, explain how DNA testing would raise a reasonable possibility of a more favorable verdict, and make reasonable attempts to identify the evidence that should be tested and the type of DNA testing sought.

Analysis Prepared by : Geoff Long / APPR. / (916)319-2081

STATE OF CALIFORNIA
GRAY DAVIS, Governor

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

October 5, 2000

Mr. Leonard Kaye
County of Los Angeles
Auditor-Controller's Office
500 West Temple Street, Room 603
Los Angeles, CA 90012

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

RE: Claimant's Amendment to Test Claim/Draft Staff Analysis
Mentally Disordered Offenders' Extended Commitment Proceedings
CSM 98-TC-09
Penal Code Sections 2970, 2972, and 2972.1
Added and Amended by Statutes of 1985, Chapter 1418; Statutes of 1986, Chapter 858; Statutes of 1988, Chapters 657 and 658; Statutes of 1989, Chapter 228; Statutes of 1991, Chapter 435; and Statutes of 2000, Chapter 324
County of Los Angeles, Claimant

Test Claim Amendment

On September 19, 2000 the claimant filed an amendment to this test claim with the Commission. The amendment added Penal Code sections 2972 and 2972.1 (as added or amended by Statutes of 1986, Chapter 858; Statutes of 1987, Chapter 687; Statutes of 1989, Chapter 228; and Statutes of 2000, Chapter 324) to the test claim. These code sections establish the procedures for the court hearing on the petition to extend the commitment of mentally disordered offenders beyond their parole termination date, and establish the rights of the offender, including the right to a trial by jury and the appointment of a public defender for indigent offenders.

Pursuant to Government Code section 17557, subdivision (c), the claimant may amend the test claim at any time prior to a commission hearing on the claim without affecting the original filing date as long as the amendment substantially relates to the original test claim.

Staff finds that the amendment, which adds Penal Code sections 2972 and 2972.1, substantially relates to the original test claim filing. Accordingly, staff has analyzed these code sections in the draft staff analysis, a copy of which is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the test claim amendment and the draft staff analysis by **November 6, 2000**. You are advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties (on the mailing list), and to be accompanied by a proof of service on those parties.

If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c), of the Commission's regulations.

Hearing

This test claim is set for hearing on **November 30, 2000** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will also appear. If you would like to request postponement of the hearing, please refer to section 1183.01 (c) of the Commission's regulations.

Please contact Camille Shelton, Staff Counsel, with questions regarding the above.

Sincerely,

Paula Higashi
Executive Director

c. Test Claim Amendment, and Draft Staff Analysis and Supporting Documents

EXHIBIT F

DEPARTMENT OF FINANCE
GRAY DAVIS, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

December 18, 2001

RECEIVED
DEC 19 2001
COMMISSION ON STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of November 13, 2001, the Department of Finance has reviewed the test claim submitted by the Los Angeles County (claimant) asking the Commission to determine whether specified costs incurred under Chapter No. 943, Statutes of 2001, (SB 83, Burton), are reimbursable state mandated costs (Claim No. CSM-01-TC-08 "Post Conviction DNA Court Proceedings Test Claim Amendment"). Claimant has identified the following new duties, which it asserts are reimbursable state mandates:

- Appointing counsel to investigate and file a motion, if appropriate, for post-conviction DNA testing for indigent convicted persons.
- Providing notices to indigent convicted persons, who may have waived their rights as part of a plea agreement or plea of nolo contendre, that their right to file a motion for post-conviction DNA testing cannot be waived.

The Department of Finance concurs that the requirements of Chapter 943, Statutes of 2001, create a reimbursable state-mandated local program.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your December 10, 2001 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Todd Jerue, Principal Program Budget Analyst, at (916) 445-8913 or Tom Lutzenberger, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Calvin Smith

S. Calvin Smith
Program Budget Manager

Attachments

Attachment A

DECLARATION OF TODD JERUE
DEPARTMENT OF FINANCE
CLAIM NO. CSM-01-TC-08

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter No. 943, Statutes of 2001, (SB 83, Burton) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

3. Attachment B is a true copy of Finance's analysis of SB 83 prior to its enactment as Chapter No. 943, Statutes of 2001, (SB 83, Burton). Finance notes that although there may be some local costs are a result of Chapter 943, Statutes of 2001, it is unknown how many indigent, convicted people would request post-conviction DNA testing.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

December 18, 2001
at Sacramento, CA

Todd Jerue
Todd Jerue

PROOF OF SERVICE

Test Claim Name: "Post Conviction DNA Court Proceedings Test Claim Amendment"
Test Claim Number: CSM-01-TC-08

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 8th Floor, Sacramento, CA 95814.

On December 18, 2001, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 8th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Glenn Haas
3301 C Street, Room 500
Sacramento, CA 95816

Department of Corrections
Attention: Sharon Joyce
P.O. Box 942883
Sacramento, CA 94283

D-8
Office of the Attorney General
Attention: Manuel Medeiros
1300 I Street
Sacramento, CA 95814

County of Los Angeles
Department of Auditor-Controller
Attention: Leonard Kaye
500 West Temple Street, Suite 603
Los Angeles, CA 90012

Los Angeles County Sheriff's Department
Attention: Leroy Baca
4700 Ramona Boulevard
Monterey Park, CA 91754

Riverside County Sheriff's Accounting
and Finance Bureau
Attention: Robert Brooks
4095 Lemon Street
Riverside, CA 92502

Mandate Resource Services
Attention: Harmeet Barkschat
8254 Heath Peak Place
Antelope, CA 95843

Department of Justice
Attention: Gary Cooper
4949 Broadway, Room G114
Sacramento, CA 95820

MAXIMUS
Attention: Allan Burdick
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Department of Finance
Attention: Tom Lutzenberger
915 L Street, 8th Floor
Sacramento, CA 95814

California State Association of Counties
Attention: Steve Keil
1100 K Street, Suite 101
Sacramento, CA 95814

Spector, Middleton, Young, & Minney, LLP
Attention: Paul Minney
7 Park Center Drive
Sacramento, CA 95825

Yolo County District Attorney's Office
Attention: Frank McGuire
P.O. Box 1446
Woodland, CA 95776

Reynolds Consulting Group, Inc.
Attention: Sandy Reynolds
P.O. Box 987
Sun City, CA 92586

California State Sheriff's Association
Attention: Joan Phillips
P.O. Box 890790
West Sacramento, CA 95898

State Controller's Office
Division of Audits
Attention: Jim Spano
300 Capitol Mall, Suite 518
Sacramento, CA 95814

SB 90 Coordinator
Auditor-Controller's Office
Riverside County Sheriff's Department
Attention: Mark Sigman
4080 Lemon Street, 3rd Floor
Riverside, CA 92502

Shields Consulting Group, Inc.
Attention: Mark Shields
1536 36th Street
Sacramento, CA 95816

Mandated Cost Systems, Inc.
Attention: Steve Smith
2275 Watt Avenue
Sacramento, CA 95825

Wellhouse and Associates
Attention: David Wellhouse
9175 Kiefer Boulevard, Suite 121
Sacramento, CA 95826

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 18, 2001 at Sacramento, California.

Mary Latorre

Mary Latorre

ATTACHMENT B

DEPARTMENT OF FINANCE BILL ANALYSIS

AMENDMENT DATE: July 3, 2001
POSITION: Oppose

BILL NUMBER: SB 83
AUTHOR: J. Burton

BILL SUMMARY: Forensic Testing: Post Conviction

This bill would allow an indigent, convicted person to request a court-appointed counsel for a post-conviction DNA investigation and, if appropriate, to file a motion for DNA testing.

FISCAL SUMMARY

Judicial Council staff indicate that any costs to the courts resulting from this bill would be minor and could be met within existing resources.

By requiring that counsel be appointed to investigate and, if appropriate, file a motion for DNA testing, this bill would result in a reimbursable state-mandated local program. Since it is unknown how many indigent, convicted people would request post-conviction DNA testing, we are unable to estimate the costs of this mandate.

COMMENTS

The Department of Finance is opposed to this measure since it would create a reimbursable state-mandated local program.

In addition, we note that the 2001-02 Budget Bill, as amended by the Budget Conference Committee, includes $800,000 for the Innocence Protection Program, which would establish a two-year pilot program to assist convicted persons in preparing the motion to request post-conviction DNA testing. As such, it is unclear whether there is a need to provide court appointed counsel to investigate and file a motion for DNA testing at this time.

Existing law:

- Allows a person convicted of a felony, who is currently imprisoned, to file a motion requesting DNA testing.
- Provides that the court may order a hearing on the motion and requires the trial court to appoint counsel for an indigent person bringing such a motion.
- Requires the court to grant the motion for DNA testing if specified conditions are met.

This bill would clarify existing law regarding the process for requesting and appointing counsel for an indigent convicted person who requests DNA testing by requiring such an individual to make a written request for DNA testing to the court. This request must contain specific information regarding the relevance of DNA testing and whether or not he or she has previously had court-appointed counsel for this purpose.

Analyst/Principal (0211) T. Jerue	Date 7/10/01	Program Budget Manager S. Calvin Smith	Date 7/11/01
Department Deputy Director: Original signed by Robert D. Miyashiro			Date JUL 13 2001
Governor's Office: By: NE		Date: 7/17/01	Position Noted Position Approved X Position Disapproved

BILL ANALYSIS — Form DF-43 (Rev 03/95 Buff)

BILL ANALYSIS/ENROLLED BILL REPORT--(CONTINUED) Form DF-43

AUTHOR	AMENDMENT DATE	BILL NUMBER
J. Burton	July 3, 2001	SB 83

If the court determines that the individual is indigent, and counsel has not previously been appointed for this purpose, the court would be required to appoint counsel to investigate, if appropriate file a motion for DNA testing, and represent the convicted person for purposes of obtaining DNA testing. If the court determines that the individual is indigent, and counsel has been appointed for this purpose in the past, the court could, at its discretion, appoint counsel for the purpose of obtaining DNA testing.

This bill would also specify that if the court finds that evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the court would be required to order the party at whose request the testing was conducted to provide all parties with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the testing that was previously conducted.

Code/Department Agency or Revenue Type	SO LA CO RV	PROP 98	FC	(Fiscal Impact by Fiscal Year) (Dollars in Thousands) 2001-2002	FC	2002-2003	FC	2003-2004	Fund Code
0250/Judiciary	SO	No		No/Minor Fiscal Impact					0001
0450/Trial Court	LA	No		No/Minor Fiscal Impact					0001
0820/Justice	LA	No		See Fiscal Summary					0001

EXHIBIT G

Mailing List for County of Los Angeles Test Claim
Commission on State Mandates Claim Number CSM-01-TC-08
Post Conviction: DNA Court Proceedings

Ms. Harmeet Barkschat,
Mandate Resource Services
8254 Heath Peak Place
Antelope, California 95843

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Mr. Leroy Baca, Sheriff
Los Angeles County Sheriff's Department
4700 Ramona Blvd.
Monterey Park, California 91754

Mr. Steve Keil,
California State Association of Counties
1100 K Street, Suite 101
Sacramento, California 95814

Mr. Jim Spano,
State Controller's Office
Division of Audits (B-8)
300 Capitol Mall, Suite 518
Sacramento, California 95814

Mr. Keith B. Petersen, President
Sixten & Associates
5252 Balboa Ave., Suite 807
San Diego, California 92117

Mr. Allan Burdick
MAXIMUS
) Auburn Blvd., Suite 2000
Sacramento, California 95841

Ms. Sharon Joyce, Staff Counsel
Department of Corrections
P. O. Box 942883
Sacramento, CA 94283-0001

Mr. Glenn Haas, Bureau Chief
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, California 95816

Mr. Steve Smith, CEO
Mandated Cost Systems
2275 Watt Avenue, Suite C
Sacramento, California 95825

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd., Suite101
Sacramento, CA 95826

Mr. Robert Brooks, Staff Analyst II
Riverside County Sheriff's Acct. & Fin.
4095 Lemon Street, P. O. Box 512
Riverside CA 92502

Mr. Frank McGuire
Yolo County District Attorney's Office
P. O. Box 1446
Woodland , CA 95776

Ms. Sandy Reynolds, President
Reynolds Consulting, Inc.
P. O. Box 987
Sun City, California 92586

Mr. Paul Minney,
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento, California 95825

(Gary Cooper, Bureau Chief
Department of Justice
4949 Broadway, Room G114
Sacramento, CA 95814

Ms. Joan L. Phillipe, Executive Director
California State Sheriff's Association
P. O. Box 890790
West Sacramento, CA 95898

Mr. Mark Bigman, SB90 Coordinator
Auditor-Controller
Riverside County
4080 Lemon Street, 3rd Floor
Riverside, CA 92501

Mr. Steve Shields,
Shields Consulting Group, Inc.
1536 36th Street
Sacramento, CA 95816

Ms. Tom Lutzenberger, Principal Analyst
Department of Finance
915 L Street, 6th Floor
Sacramento, CA 95814

Ms. Susan Geanacou, Senior Staff Attorney
Department of Finance
915 L Street, Suite 1190
Sacramento, CA 95814

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To Paula Higashi	From Leonard Kaye
Co.	Co.
Dept. CSM	Phone # 213-974-8564
Fax # 916-445-0278	Fax #

FEB-15-2002 12:05 0 98% P.01

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Hasmik Yaghobyan states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 603 Kenneth Hahn Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 15th day of February 2002, I served the attached:

Documents: Review of State Agency Comments: Los Angeles County Test Claim, Post Conviction: DNA Court Proceedings [CSM 01-TC-08], including *a 1 page letter of J. Tyler McCauley dated 2/14/02, and a 4 page attachment, all pursuant to CSM 01-TC-08, now* pending before the Commission on State Mandates.

upon all Interested Parties listed on the attachment hereto and by

[X] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date. Commission on State Mandates - FAX as well as mail of originals.

[ ] by placing [ ] true copies [ ] original thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) as set forth below at the indicated address.

PLEASE SEE ATTACHED MAILING LIST

That I am readily familiar with the business practice of the Los Angeles County for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United States mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of February 2002, at Los Angeles, California.

Hasmik Yaghobyan

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

February 14, 2002

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

Review of State Agency Comments: Los Angeles County Test Claim
Post Conviction: DNA Court Proceedings [CSM 01-TC-08]

We concur with the State Department of Finance comments [attached], the only comments received in this matter.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

J. Tyler McCauley
Auditor-Controller

JTM:JN:LK
Enclosures

DEPARTMENT OF FINANCE
915 L STREET ◻ SACRAMENTO CA ◻ 95814-3706 ◻ WWW.DOF.CA.GOV
GRAY DAVIS, GOVERNOR

December 18, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of November 13, 2001, the Department of Finance has reviewed the test claim submitted by the Los Angeles County (claimant) asking the Commission to determine whether specified costs incurred under Chapter No. 943, Statutes of 2001, (SB 83, Burton), are reimbursable state mandated costs (Claim No. CSM-01-TC-08 "Post Conviction DNA Court Proceedings Test Claim Amendment"). Claimant has identified the following new duties, which it asserts are reimbursable state mandates:

- Appointing counsel to investigate and file a motion, if appropriate, for post-conviction DNA testing for indigent convicted persons.
- Providing notices to indigent convicted persons, who may have waived their rights as part of a plea agreement or plea of nolo contendre, that their right to file a motion for post-conviction DNA testing cannot be waived.

The Department of Finance concurs that the requirements of Chapter 943, Statutes of 2001, create a reimbursable state-mandated local program.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your December 10, 2001 letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Todd Jerue, Principal Program Budget Analyst, at (916) 445-8913 or Tom Lutzenberger, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Calvin Smith

S. Calvin Smith
Program Budget Manager

Attachments

Attachment A

DECLARATION OF TODD JERUE
DEPARTMENT OF FINANCE
CLAIM NO. CSM-01-TC-08

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter No. 943, Statutes of 2001, (SB 83, Burton) sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

3. Attachment B is a true copy of Finance's analysis of SB 83 prior to its enactment as Chapter No. 943, Statutes of 2001, (SB 83, Burton). Finance notes that although there may be some local costs are a result of Chapter 943, Statutes of 2001, it is unknown how many indigent, convicted people would request post-conviction DNA testing.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

December 18 2001
at Sacramento, CA

Todd Jerue

DEPARTMENT OF FINANCE BILL ANALYSIS

AMENDMENT DATE: July 3, 2001
POSITION: Oppose

BILL NUMBER: SB 83
AUTHOR: J. Burton

BILL SUMMARY: Forensic Testing: Post Conviction

This bill would allow an indigent, convicted person to request a court-appointed counsel for a post-conviction DNA investigation and, if appropriate, to file a motion for DNA testing.

FISCAL SUMMARY

Judicial Council staff indicate that any costs to the courts resulting from this bill would be minor and could be met within existing resources.

By requiring that counsel be appointed to investigate and, if appropriate, file a motion for DNA testing, this bill would result in a reimbursable state-mandated local program. Since it is unknown how many indigent, convicted people would request post-conviction DNA testing, we are unable to estimate the costs of this mandate.

COMMENTS

The Department of Finance is opposed to this measure since it would create a reimbursable state-mandated local program.

In addition, we note that the 2001-02 Budget Bill, as amended by the Budget Conference Committee, includes $800,000 for the Innocence Protection Program, which would establish a two-year pilot program to assist convicted persons in preparing the motion to request post-conviction DNA testing. As such, it is unclear whether there is a need to provide court appointed counsel to investigate and file a motion for DNA testing at this time.

Existing law:

- Allows a person convicted of a felony, who is currently imprisoned, to file a motion requesting DNA testing.
- Provides that the court may order a hearing on the motion and requires the trial court to appoint counsel for an indigent person bringing such a motion.
- Requires the court to grant the motion for DNA testing if specified conditions are met.

This bill would clarify existing law regarding the process for requesting and appointing counsel for an indigent convicted person who requests DNA testing by requiring such an individual to make a written request for DNA testing to the court. This request must contain specific information regarding the relevance of DNA testing and whether or not he or she has previously had court-appointed counsel for this purpose.

Analyst/Principal (0211) T. Jerue	Date 7/10/01	Program Budget Manager S. Calvin Smith	Date 7/11/01
Department Deputy Director Original signed by: Robert D. Miyashiro		Date JUL 13 2001	
Governor's Office: By: NE	Date: 7/17/01	Position Noted Position Approved X Position Disapproved	

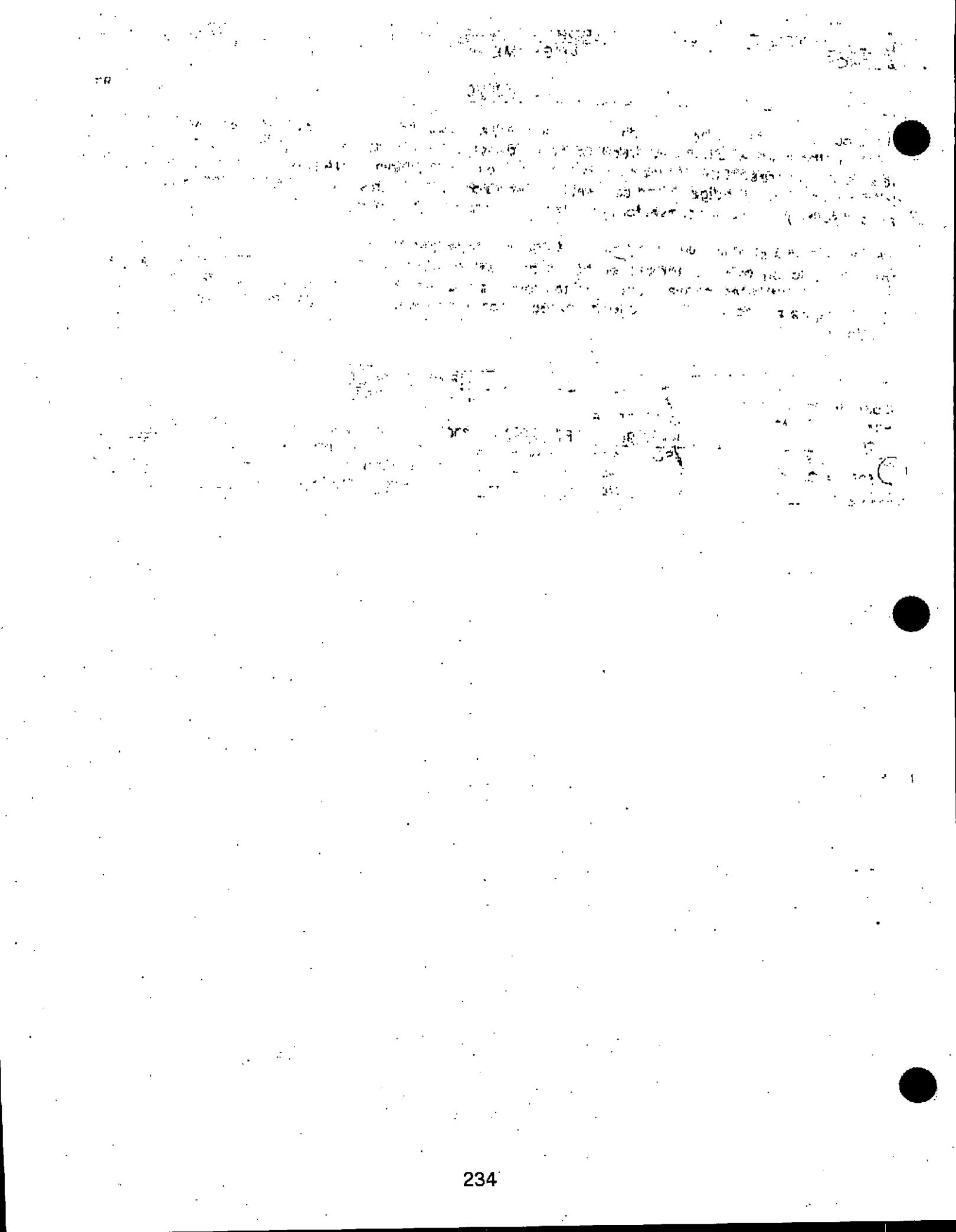
BILL ANALYSIS Form DF-43 (Rev 03/95 Buff)

:SB83-1838 docCG 7/10/01 1:26 PM

If the court determines that the individual is indigent, and counsel has not previously been appointed for this purpose, the court would be required to appoint counsel to investigate, if appropriate file a motion for DNA testing, and represent the convicted person for purposes of obtaining DNA testing. If the court determines that the individual is indigent, and counsel has been appointed for this purpose in the past, the court could, at its discretion, appoint counsel for the purpose of obtaining DNA testing.

This bill would also specify that if the court finds that evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the court would be required to order the party at whose request the testing was conducted to provide all parties with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the testing that was previously conducted.

Code/Department Agency or Revenue Type	SO LA CO RV	PROP 98	(Fiscal Impact by Fiscal Year) (Dollars in Thousands) FC 2001-2002	FC 2002-2003	FC 2003-2004	Fund Code
0250/Judiciary	SO	No	No/Minor Fiscal Impact			0001
0450/Trial Court	LA	No	No/Minor Fiscal Impact			0001
0820/Justice	LA	No	See Fiscal Summary			0001



STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
(916) 445-0278
E-mail: csminfo@csm.ca.gov

August 21, 2003

Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
Kenneth Hahn Hall of Administration
500 West Temple Street, Room 525
Los Angeles, Ca 90012-2766

And Affected State Agencies and Interested Parties (See Enclosed Mailing List)

Re: *Post Conviction: DNA Court Proceedings* – 00-TC-21 and 01-TC-08
Amendment. County of Los Angeles, Claimant
Penal Code Sections 1405 and 1417.9 as added by Statutes 2000, Chapter 821
and amended by Statutes 2001, Chapter 943

Dear Mr. Kaye:

For its analysis of this test claim, staff requests additional information regarding the following issues:

1. Sheriff's Services

   - *Crime Lab's Electronic Chain of Custody Module.* Specify and provide documentation of what is being claimed. Describe the module and how it is used.
   - 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. Specify and provide documentation of what activities are required and are being claimed.
   - Required to maintain proper storage procedures in order to retain and preserve evidence with biological material in felony convictions. Specify and provide documentation of what activities are required and are being claimed.

2. Funding

   - Have funds been appropriated for this program (e.g., budget act) or are there any other sources of funding available (e.g., grants, demonstration projects, reimbursements)? If so, identify sources and describe level of support.

If you plan to amend this test claim, please provide the requested information on these activities in the amendment. If you do not plan to amend this test claim, please provide the requested information within 30 days of the date of this letter. Please direct your response to me and provide a copy of your response to the current mailing list. (Cal. Code Regs., tit.2, § 1181.2, subd. (b).) The Department of Finance and affected state agencies will be given an opportunity to comment on your response before an analysis is prepared. (Cal. Code Regs. Tit.2, § 1183.02, subd. (b).)

This matter will be set for hearing after all filings have been received.

If you have questions, please contact me at (916) 323-8210.

Sincerely,

Paula Higashi

PAULA HIGASHI
Executive Director

Cc: Mailing List (current mailing list is attached)

Original List Date: 7/6/2001
Last Updated: 3/26/2003
List Print Date: 08/21/2003
Claim Number: 00-TC-21
Issue: Post Conviction: DNA Court Proceedings

Mailing Information: Other

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

Mr. Leroy Baca
Los Angeles County Sheriffs Department
4700 Ramona Boulevard
Monterey Park, CA 91754-2169

Tel: (323) 526-5541
Fax: (323) 000-0000

Ms. Pam Stone
MAXIMUS
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

Tel: (916) 485-8102
Fax: (916) 485-0111

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Tel: (916) 727-1350
Fax: (916) 727-1734

Mr. Jim Spano
State Controller's Office (B-08)
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Tel: (916) 323-5849
Fax: (916) 327-0832

Ms. Annette Chinn
Cost Recovery Systems
705-2 East Bidwell Street, #294
Folsom, CA 95630

Tel: (916) 939-7901
Fax: (916) 939-7801

Mr. Steve Smith
Mandated Cost Systems, Inc.
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

Tel: (916) 669-0888
Fax: (916) 669-0889

Ms. Joan L. Phillipe
California State Sheriffs' Association
P O Box 890790
West Sacramento, CA 95898
Tel: (916) 375-8000
Fax: (916) 000-0000

Ms. Susan Geanacou
Department of Finance (A-15)
915 L Street, Suite 1190
Sacramento, CA 95814
Tel: (916) 445-3274
Fax: (916) 324-4888

Ms. Sharon Joyce
Department of Corrections (B-23)
Forensic Services
P.O. Box 942883
Sacramento, CA 94283-0001
Tel: (916) 323-3434
Fax: (916) 000-0000

Mr. Keith Gmeinder
Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814
Tel: (916) 445-8913
Fax: (916) 327-0225

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012
Claimant
Tel: (213) 974-8564
Fax: (213) 617-8106

Mr. Paul Minney
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825
Tel: (916) 646-1400
Fax: (916) 646-1300

Mr. Mark Sigman
Riverside County Sheriff's Office
4095 Lemon Street
P O Box 512
Riverside, CA 92502
Tel: (909) 955-2700
Fax: (909) 955-2720

Mr. Michael Havey
State Controller's Office (B-08)
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816
Tel: (916) 445-8757
Fax: (916) 323-4807

Ms. Sandy Reynolds
Reynolds Consulting Group, Inc.
P.O. Box 987
Sun City, CA 92586
Tel: (909) 672-9964
Fax: (909) 672-9963

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117
Tel: (858) 514-8605
Fax: (858) 514-8645

Mr. Frank McGuire
County of Yolo
District Attorney's Office
P.O. Box 1446
Woodland, CA 95776
Tel: (530) 666-8400
Fax: (916) 000-0000

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826
Tel: (916) 368-9244
Fax: (916) 368-5723

Mr. Steve Keil
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941
Tel: (916) 327-7523
Fax: (916) 441-5507

Mr. Bruce Norris
County of Ventura
Sheriff's Department
800 South Victoria Avenue
Ventura, CA 93009-1540
Tel: (805) 654-2303
Fax: (805) 677-8747

Ms. Cindy Monfort
County of San Bernardino
Office of the District Attorney
316 No. Mountain View Avenue
San Bernardino, CA 92415-0004
Tel: (909) 387-6631
Fax:

Mr. Ash Kozuma
Sacramento Police Department
555 Sequoia Pacific Boulevard
Sacramento, CA 95814
Tel: (916) 264-8118
Fax: (916) 264-7366

Sgt. G. Bowman
Alameda County Sheriff's Office
15001 Foothill Blvd.
San Leandro, CA 94578-0192
Tel: (510) 667-3609
Fax: (510) 667-3654

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Boulevard, Suite #106
Roseville, CA 95661
Tel: (916) 677-4233
Fax: (916) 677-2283

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

September 19, 2003

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

Response to the Commission on State Mandates' Request for Additional Information
Sections 1405, 1417.9 of the Penal Code
As Added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

The County of Los Angeles submits and encloses herewith additional information concerning the subject claim.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

J. Tyler McCauley
Auditor-Controller

JTM:JN:LK:HY
Enclosures

Response to the Commission on State Mandates'
Request for Additional Information
Sections 1405, 1417.9 of the Penal Code
As Added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

Sheriff's Property Services:

- " *Crime Lab's Electronic Chain of Custody Module*. Specify and provide documentation of what is being claimed. Describe the module and how it is used."[1]

County's Response

Under prior law, the Evidence and Property Inventory Control system (EPIC), including the Electronic Chain of Custody Module, was the primary database used to track evidence and property items as it is explained in the declaration of L. Peter Zavala, Administrative Manager Services III; Sheriff's Department, attached as Exhibit 1, in pertinent part, as follows:

> "...under prior law, EPIC was adequate to notify the case investigators of obtaining directions/authorization for evidence retention needs and that evidence items were also classified as homicide, general, and found property.
>
> ...the test claim legislation has required Sheriff's Department to modify the EPIC database system to comply with requirements of Penal Code Section 1417.9, including the following categories:
>
> 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".

[1] As stated in the letter of Paula Higashi, Executive Director of the Commission on State Mandates, dated August 21, 2003.

Sheriff's Compliance Services:

- "*Distribute State Attorney General's Office Recommendations for Compliance with the subject law* and in particular the evidence retention conditions to ensure that suitability for future DNA testing. Specify and provide documentation of what activities are required and are being claimed."[2]

County's Response

The test claim legislation requires the Los Angeles County Sheriff's Department to perform new duties. In particular, to notify and discuss the new requirements set forth in Section 1417.9 of the Penal Code as it is explained in the declaration of Dean M. Gialamas, Crime Laboratory Assistant Director, Sheriff's Department, attached as Exhibit 2, in pertinent part, as follows:

> "...from May 2002 through August 2002, I had personnel from the crime lab visit, in person, all 45 municipal police departments in our jurisdiction to discuss the new changes in the statute of limitations for the retention of biological evidence.
>
> ...the sheriff Department prepared a letter that was distributed to all 45 police agencies and all investigative units within the Sheriff's Department, informing them of the new evidence retention requirements.
>
> ...the Sheriff's Department has incurred costs for the personnel time to visit each municipal police agency and for the preparation and distribution of the letters to each agency."

Sheriff's Storage Services:

- "Required to maintain proper storage procedures in order to retain and preserve with biological material in felony convictions. Specify and provide documentation of what activities are required and are being claimed."[2]

[2] As stated in the letter of Paula Higashi, Executive Director of the Commission on State Mandates, dated August 21, 2003.

County's Response

Due to the new evidence retention requirement set forth in the test claim legislation, the Los Angeles County sheriff's Department has to purchase more refrigerators in order to preserve the biological material, as it is explained in the declaration of L. Peter Zavala, Administrative Manager Services III, Sheriff's Department, attached as Exhibit 1, in pertinent part, as follows:

> "... proper storage of biological evidence pursuant to Section 1405 requires refrigerated facilities in order to maintain existing and incoming biological evidence in a suitable condition for testing.
>
> ...the Sheriff's Department has incurred costs in complying with the test claim legislation detailed in the attached supporting documents, and that such costs are in compliance with the test claim legislation."

Sheriff's Jail Services:

Pursuant to the test claim legislation, the Los Angeles County Sheriff's Department has a new duty to house and transport a Post Conviction: DNA Court Proceedings client from the state prison to County prison who has initiated the proceedings, as it is explained in the declaration of Conrad Meredith, Administrative Services III, Sheriff's Department, attached as Exhibit 3, in pertinent part, as follows:

> "...the Sheriff's Department is responsible for transporting defendants from the State prison to County facilities (if required) and for care and custody associated with confinement during some or all of their Post Conviction: DNA Court Proceedings detailed in the attached supporting documents."

Program Funding:

- "Have funds been appropriated for this program (e. g. budget act) or are there any other sources of funding available (e.g., grants, demonstration projects, reimbursements)? If so, identify sources and describe level of support.[3]

[3] As stated in the letter of Paula Higashi, Executive Director of the Commission on State Mandates, dated August 21, 2003.

County's Response

There has been no appropriation for this program. The County received a one time grant, as explained in the declaration of Robert E. Kalunian, Chief Deputy Public Defender, attached as Exhibit 4, in pertinent part, as follows:

> "...the Public Defender's Office of the County of Los Angeles has received a one time grant, Office of Criminal Justice and Planning Grant for $160,000 from January 2002 through March 2003 (detailed in the attached supporting documents) for providing representations to former Public Defender clients who request counsel for the purpose of filling and litigating a motion pursuant to Penal Code Section 1405.
>
> ...currently there are no sources of funding available for this program."

Exhibit 1

County of Los Angeles
Sheriff's Department Headquarters
4700 Ramona Boulevard
Monterey Park, California 91754-2169

LEROY D. BACA, SHERIFF

County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

Declaration of L. Peter Zavala

L. Peter Zavala makes the following declaration and statement under oath:

I, L. Peter Zavala, Administrative Services Manager III, Central Property and Evidence Unit, Sheriff's Department of the County of Los Angeles, am responsible for implementing the subject law.

I declare that it is my information or belief that before the enactment of Penal Code § 1417.9, the Evidence and Property Inventory Control system (EPIC) was the primary database used to track evidence and property items in the Sheriff's Department.

I declare that it is my information or belief that under prior law, EPIC was adequate to notify the case investigators of obtaining directions/authorization for evidence retention needs and that evidence items were also classified as homicide, general, and found property.

I declare that it is my information or belief that the test claim legislation has required the Sheriff's Department to modify the EPIC database system to comply with the requirements of Penal Code Section 1417.9, including the following categories:

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

I declare that, it is my information or belief that proper storage of biological evidence pursuant to Section 1405 requires refrigerated facilities in order to maintain existing and incoming biological evidence in a suitable condition for testing.

I declare that it is my information or belief that the Sheriff's Department has incurred costs in complying with the test claim legislation detailed in the attached supporting documents and that such costs are in compliance with the test claim legislation.

I declare that it is my information or belief that Los Angeles County has not received federal, state, or other external funding to implement the test claim legislation.

I declare that it is my information or belief that the above duties are reasonably necessary in complying with the test claim legislation in excess of $1,000 per annum, the minimum cost that must be incurred to file a test claim in accordance with Government Code Section 17564(a).

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

8-12-03 Whittier Ca.
Date and Place

Signature

LA COUNTY AGPS
INTERNAL SERVICES DEPARTMENT
PURCHASE ORDER

P 41883

DATE PRINTED	ORDER NUMBER
06/04/03	31029741

BILL TO:

SHERIFF
SHERIFF DEPT
CENTRAL PROP & EVIDENCE
14201 TELEGRAPH RD
WHITTIER, CA 90604

ALL TERMS AND CONDITIONS IN THE SOLICITATION ARE PART OF THIS ORDER AS IF FULLY REPRODUCED HEREIN.

PURCHASING AGENCY NO.: ISS000

ADDRESS ALL INQUIRIES AND CORRESPONDENCE TO:
GLORIA RUE
(323) 267-2303-0000

VENDOR NAME, STREET, CITY, STATE, ZIP CODE:

SAN DIEGO RESTAURANT SUPPLY
1202 MARKET STREET
SAN DIEGO, CA 92101-7386

SHIP FOB DESTINATION TO: (UNLESS SPECIFIED ELSEWHERE)

SHERIFF
SHERIFF DEPT.
CENTRAL PROP & EVIDENCE
14201 TELEGRAPH RD.
WHITTIER, CA 90604

CONTACT FOR DELIVERY INSTRUCTIONS (NAME, TELEPHONE)

PETER ZAVALA, MANAGER
(562) 946-7218-0000

VENDOR NO.	AWARD CODE	SOLIC CODE	BUYER CODE	COMPL CODE	REQ NUMBER	AGENCY REQ NUMBER	SOLICIT NUMBER	CONTRACT NUMBER	REQ AGENCY: SH0768 SHERIFF
049929 -01	1	R-	057	F	11008742	957830	211705		

PROMPT PAYMENT TERMS	DELIVERY TERMS/FOB POINT	VENDOR REFERENCE NUMBER	TOTAL AMOUNT OF ORDER
NONE	60 DAYS DELIVERED AND INSTALLED		$ 106,458.44

LINE NO.	COMMODITY/SERVICE DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	EXTENDED AMOUNT
00001	COMMODITY CODE: 740-13-000000 SALES TAX AMOUNT: BRAND NAME: KOOLSTAR WALK-IN FREEZER 19' X 37'0" X9'0" HIGH PER SPECIFICATIONS INCLUDES: 4 YEAR EXTENDED WARRANTY METRO SHELVING	2.000	EA	$ 39,336.00	$ 78,672.00 $ 6,490.44
00002	COMMODITY CODE: 962-46-014215 BRAND NAME: KOOLSTAR INSTALLATION, MISC.	2.000	EA	$ 10,648.00	$ 21,296.00
00003	COMMODITY CODE: 962-86-014349 BRAND NAME: INCLUDED TRANSPORTATION OF GOODS (FREIGHT) SEE ATTACHED SPECIFICATIONS	1.000	LO	$ 0.00	$ 00

Gloria L. Rue
COUNTY OF LOS ANGELES

PEGASYS, INFORMIX 1995

P.O.# T41551 3

LA COUNTY AGPS
INTERNAL SERVICES DEPARTMENT
PURCHASE ORDER

DATE PRINTED	ORDER NUMBER
04/16/02	31012670

BILL TO:
SHERIFF
LOS ANGELES COUNTY SHERIFF DEPT.
SPECIAL FUND ACCTG.
4700 RAMONA BLVD. -RM 310
MONTEREY PARK, CA 91754

ALL TERMS AND CONDITIONS IN THE SOLICITATION ARE PART OF THIS ORDER AS IF FULLY REPRODUCED HEREIN.

PURCHASING AGENCY NO.: 159000

ADDRESS ALL INQUIRIES AND CORRESPONDENCE TO:
GLORIA RUE
(323) 267-2303-0000

VENDOR NAME, STREET, CITY, STATE, ZIP CODE:
ARROW RESTAURANT EQUIPMENT
5061 ARROW HWY
MONTCLAIR, CA 91763-1304

SHIP FOB DESTINATION TO: (UNLESS SPECIFIED ELSEWHERE)
SHERIFF
LOS ANGELES SHERIFF'S DEPT
14201 TELEGRAPH ROAD
WHITTIER, CA 90604

CONTACT FOR DELIVERY INSTRUCTIONS (NAME, TELEPHONE)
PETER ZAVALA
(562) 946-7092-0000

VENDOR NO.	AWARD CODE	SOLIC CODE	BUYER CODE	COMPL CODE	REQ NUMBER	AGENCY REQ NUMBER	SOLICIT NUMBER	CONTRACT NUMBER	REQ AGENCY: SH0770 SHERIFF
056710 -01	1	R	057	F	11003430		207867		

PROMPT PAYMENT TERMS	DELIVERY TERMS/FOB POINT	VENDOR REFERENCE NUMBER	TOTAL AMOUNT OF ORDER
NONE	6 - 8 DAYS ARO DESTINATION		$ 85,168.94

LINE NO.	COMMODITY/SERVICE DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	EXTENDED AMOUNT
00001	COMMODITY CODE: 465-40-000000 SALES TAX AMOUNT: FURNISH AND INSTALL OUTDOOR FREEZER INCLUDING RACKS REQ#657600 N6A0770 FUND 15760 ACCT 6031 PRICE INCLUDES FREEZER INSTALLATION, INSULATED CEMENT PAD, ALARM, 6" WALLS, 48" DOOR AND 9 FT HEIGHT FOR CEILINGS.	1.000	EA	$ 78,678.00	$ 78,678.00 $ 6,490.94

FISCAL ... '02 APR 22 AM 10:54

Gloria S. Rue Theresa W. Goo 4/29/02

COUNTY OF LOS ANGELES

CAPS 4/23/02 [signature] cape 4/23/02

ISD PR, INFORMS 1995

APR 17 2002

PAID 250

4

P42055

LA COUNTY AGPS
INTERNAL SERVICES DEPARTMENT
PURCHASE ORDER

DATE PRINTED	ORDER NUMBER
06/19/03	31030548

BILL TO:

SHERIFF
SHERIFF DEPT
CENTRAL PROP & EVIDENCE
14201 TELEGRAPH RD
WHITTIER, CA 90604

ALL TERMS AND CONDITIONS IN THE SOLICITATION ARE PART OF THIS ORDER AS IF FULLY REPRODUCED HEREIN.

PURCHASING AGENCY NO.: IS9000

ADDRESS ALL INQUIRIES AND CORRESPONDENCE TO:
GLORIA RUE
(323) 267-2303-0000

VENDOR NAME, STREET, CITY, STATE, ZIP CODE:

ROGUE INDUSTRIAL SYSTEMS
560 N. MOORPARK RD. #121
THOUSND OAKS, CA 91360

SHIP FOB DESTINATION TO: (UNLESS SPECIFIED ELSEWHERE)
SHERIFF
SHERIFF DEPT.
CENTRAL PROP & EVIDENCE
14201 TELEGRAPH RD.
WHITTIER, CA 90604

CONTACT FOR DELIVERY INSTRUCTIONS (NAME, TELEPHONE)
PETER ZAVALA, MANAGER
(562) 946-7218-0000

VENDOR NO.	AWARD CODE	SOLIC CODE	BUYER CODE	COMPL CODE	REQ NUMBER	AGENCY REQ NUMBER	SOLICIT NUMBER	CONTRACT NUMBER	REQ AGENCY: SH0768 SHERIFF
100136 -01	1	R	057	F	11008746	957831	211710		

PROMPT PAYMENT TERMS	DELIVERY TERMS/FOB POINT	VENDOR REFERENCE NUMBER	TOTAL AMOUNT OF ORDER
NONE	60 DAYS DELIVERED		$ 33,954.99

LINE NO.	COMMODITY/SERVICE DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	EXTENDED AMOUNT
00001	COMMODITY CODE: 740-13-000000 SALES TAX AMOUNT: BRAND NAME: COGAN FREE-STANDING WILDECK MEZZANINE 48' X 45' X 13'8" HIGH INSTRUCTIONS TO VENDOR: FINAL DRAWINGS TO BE SUBMITTED TO JOHN CARILLO FOR REVIEW BEFORE WORK BEGINS. ALSO FINAL JOBWALK WITH JOHN CARILLO BEFORE WORK BEGINS.	1.000	EA	$ 23,515.00	$ 23,515.00 $ 1,939.99
00002	COMMODITY CODE: 962-46-014235 INSTALLATION, MISC.	1.000	LO	$ 4,500.00	$ 4,500.00
00003	COMMODITY CODE: 962-86-014349 TRANSPORTATION OF GOODS (FREIGHT) (SEE ATTACHED SPECIFICATIONS) REQUISITION #957831 NLA 0768	1.000	LO	$ 4,000.00	$ 4,000.00

DOCUMENT TRAVEL TRAIL

3 JUN 23 P4:00

Gloria Rue Thomas W. Go 6/23/03

COUNTY OF LOS ANGELES

CAPS FMS 6/23/03

PSORDR, INFORMS 1998

JUN 23 2003

Order No. 10250859 | Release 1 | Order Date 18-JUN-03

VARIOUS AGREEMENT VENDOR APPROVAL FORM

FUNDING INFORMATION

Fiscal Year: 3
Fund: A01 General Fund
Unit: 15720 Administrative Headquarters
Account: 2742 Supplies, Services & Parts
Program: 848 Central Property and Evidence

Bill to Address
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000

Requested By: TOM THURMAN | Phone: 562.946-7289 | Fax:

Approved By: L. PETER ZAVALA | Phone: 562.946-7218

PROCUREMENT INFOR

Ship to Address
Dept: L.A. County SHERIFF's DEPT
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604--000
Attn: TOM THURMAN
Phone: 562-946-7289

Agreement Info
Agrmt No.: 61947
Vendor Code: 37282
Agrmt Title: AA66031-TL-STEEL SHEET-SS

Vendor Information
Company: BOSCO METALS
Address: 2000 S. ALAMEDA STREET
City: LOS ANGELES
State: CA Zip Code: 90058-,000
Contact: CUSTOMER SERVICE
Phone: 213-748-5171
Fax: 213-748-7889

DETAIL

Stock No:	Description	Qty	Unit	Unit Price	Line Total	Tax Y/N
NA	8 12 X 31.8 X 20' I-BEAM	4	EA	$ 240.00	$ 960.00	Y
NA	C4 X 7.25 X 20' C-CHANNEL	15	EA	$ 50.00	$ 750.00	Y
NA	C3 X 4.1 X 20' C-CHANNEL	24	EA	$ 19.00	$ 456.00	Y
NA	1/2" X 20' ROUND STOCK	8	EA	$ 3.50	$ 28.00	Y
NA	1/2" X 48" X 96" STEEL PLATE	1	EA	$ 185.00	$ 185.00	Y
NA	36" X 20' - 20 GAGE G	80	EA	$ 80.00	$ 6,400.00	Y

SUB PURCHASE ORDER NUMBER
P1071G1442

Shipping Instruction: 14201 TELEGRAPH ROAD, WHITTIER, CA

Status: Approved by Fiscal Manager

Sub-Total: $	8,788.00
Taxes: $	725.00
Shipping Charges: $	.00
Order Total: $	9,514.00

The Unit Commander assumes full responsibility for the legal use of the materials ordered.
Approval was successfully processed!
Please acknowledge message. (Ok)

COPY
SENT TO HQ
FOR PAYMENT
06/30/03

AUTHORIZED TO PAY —
L. PETER ZAVALA #097753
06/26/03

Order No.	Release		Order Date
10250978	1	VARIOUS AGREEMENT VENDOR APPROVAL FORM	19-JUN-03

FUNDING INFORMATION

Fiscal Year: 3
Fund: A01 General Fund
Unit: 15720 Administrative Headquarters
Account: 2742 Supplies, Services & Parts
Program: 848 Central Property and Evidence

Bill to Address
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-6099

Requested By	Phone	Fax	Approved By	Phone
TOM THURMAN	562-946-7299		L. PETER ZAVALA	562-946-7210

PROCUREMENT INFOR

Ship to Address
Dept: L.A. County SHERIFF's DEPT
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604--000
Attn: TOM THURMAN
Phone: 562-946-7299

Agreement Info
Agmt No.: 41947
Vendor Code: 37262
Agmt Title: A#86631-TL.STEEL SHEET-SS

Vendor Information
Company: BOSCO METALS
Address: 2000 S. ALAMEDA STREET
City: LOS ANGELES
State: CA Zip Code: 90058--000
Contact: CUSTOMER SERVICE
Phone: 213-748-5171
Fax: 213-748-7869

DETAIL

Stock No.	Description	Qty	Unit	Unit Price	Line Total	Tax Y/N
NA	HRPL.1884X8 3/16 X 4' X 8' ST PLATE	7	EA	$ 72.00	$ 504.00	Y
NA	HRCH6X8.2 CS X 0.2P (.200) X 20'HR C	6	EA	$ 48.00	$ 288.00	Y
NA	CRFB.376X2.500 3/8" X 2-1/2" X 12' CLD.DRWN	14	EA	$ 24.00	$ 336.00	Y
NA	HRAN2.5X2.5-6 2-1/2" X 2-1/2" X 5/8" X 20'	4	EA	$ 28.00	$ 112.00	Y
NA	HRPP1.25-40 1-1/4" 1.660 OD SCH 40 BL	10	EA	$ 16.00	$ 160.00	Y
NA	HRAD.750 3/4" X 20' H		EA	$ 0.50	$ 47.50	Y

SUB PURCHASE ORDER NUMBER

_P187181469

Shipping Instruction: 14201 TELEGRAPH ROAD, WHITTIER, CA

Status: Approved by Fiscal Manager

Sub-Total: $	1,447.50
Taxes: $	119.42
Shipping Charges: $	.00
Order Total: $	1,566.92

The Unit Commander assumes full responsibility for the legal use of the materials ordered.
Press [ENTER] to complete transaction or [F4] to exit without committing
Count: *0
<Replace>

COPY

SENT TO HQ FOR PAYMENT 06/30/03

AUTHORIZED TO PAY — L. PETER ZAVALA #097753 06/26/03

Order No. 10259921 | Release 1 | Order Date 18-JUN-03

VARIOUS AGREEMENT VENDOR APPROVAL FORM

FUNDING INFORMATION

Fiscal Year: 3
Fund: A01 General Fund
Unit: 15720 Administrative Headquarters
Account: 4220 Rental - Equipment, Films, vehicles, other
Program: 848 Central Property and Evidence

Bill to Address
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000

Requested By: TOM THURMAN | Phone: 562-946-7299 | Fax:

Approved By: L. PETER ZAVALA | Phone: 562-946-7218

PROCUREMENT INFOR

Ship to Address
Dept: L.A. County SHERIFF's DEPT
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604--000
Attn: TOM THURMAN
Phone: 562-946-7299

Agreement Info
Agrmt No.: 41120
Vendor Code: 19093
Agrmt Title: RENTAL OF CONSTRUCTION EQ

Vendor Information
Company: BOB HILL HYDRAULIC
Address: 1390 E BURNETT ST., SUITE B
City: SIGNAL HILL
State: CA Zip Code: 90806--355
Contact: ROBERT POTTS
Phone: 562-426-6445
Fax:

DETAIL

Stock No.	Description	Qty	Unit	Unit Price	Line Total	Tax Y/N
NA	CRANE SERVICES FOR FREEZER CONSTRUCTION	1	EA	$ 800.00	$ 800.00	N

SUB PURCHASE ORDER NUMBER
P187181450

COPY
SENT TO HQ FOR PAYMENT 06/30/03

AUTHORIZED TO PAY —
L. PETER ZAVALA #097753
06/26/03

Sub-Total: $ 800.00
Taxes: $ .00
Shipping Charges: $ .00
Order Total: $ 800.00

Shipping Instruction: NONE

Status: Approved by Fiscal Manager

The Unit Commander assumes full responsibility for the legal use of the materials ordered.

Press [ENTER] to complete transaction or [F4] to exit without commiting <Replace>
Count: *0

Order No. 10259942 | Release 1 | Order Date 18-JUN-03

VARIOUS AGREEMENT VENDOR APPROVAL FORM

FUNDING INFORMATION

Fiscal Year: 8
Fund: A01 General Fund.
Unit: 15720 Administrative Headquarters
Account: 2742 Supplies, Services & Parts
Program: 848 Central Property and Evidence

Bill to Address
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000

Requested By: TOM THURMAN | Phone: 562-946-7239 | Fax:

Approved By: L. PETER ZAVALA | Phone: 562-946-7218

PROCUREMENT INFOR

Ship to Address
Dept: L.A. County SHERIFF'S DEPT
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000
Attn: TOM THURMAN
Phone: 562-946-7218

Agreement Info
Agrmt No.: 41918
Vendor Code: 29134
Agrmt Title: CHAIN LINK FENCING AND PA

Vendor Information
Company: CROWN FENCE & SUPPLY
Address: 12116 BLOOMFIELD AVENUE
City: SANTA FE SPRING
State: CA Zip Code: 90670-0000
Contact: RICK HULL
Phone: 562-864-5177
Fax: 562-864-2529

DETAIL

Stock No.	Description	Qty	Unit	Unit Price	Line Total	Tax Y/N
NA	6 5/8 STD PIPE (9 X 21')	69	EA	$ 14.79	$ 831.77	Y
NA	4 STD PIPE	840	EA	$ 8.84	$ 2,721.60	Y
NA	1 5/8 STD PIPE	420	EA	$ .81	$ 340.20	Y
NA	1 7/8 STD PIPE	84	EA	$ .97	$ 81.48	Y
NA	2 3/8 STD PIPE	120	EA	$ 1.30	$ 165.60	Y
NA	12' 2/8 FABRIC		EA	$ 9.20	$ 976.00	Y
NA	12' 3/16 X 3/4 TENSIO		EA	$ 2.83	$ 84.90	Y
NA	9 GA TENSION WIRE LBS		EA	$ .57	$ 57.00	Y
NA	1 5/8 RAILENDS PS		EA	$ .69	$ 27.60	Y
NA	4' REG BRACE BANDS		EA	$ .46	$ 16.40	Y
NA	4" PS CAPS		EA	$ 1.65	$ 19.80	Y
NA	1 5/8 X 6" SLEEVES		EA	$ .56	$ 9.00	Y
NA	4" REG TENSION BANDS		EA	$ .37	$ 44.40	Y
NA	5/10 X 1 1/4 CARRIAGE		EA	$ .09	$ 15.00	Y
NA	1 7/8 GATE ELLS		EA	$ 3.00	$ 24.00	Y
NA	1 7/8 REG TENSION BANDS	20	EA	$ .12	$ 2.40	Y
NA	1 7/8 X 4" MALL FORKLATCH	2	EA	$ 5.33	$ 10.66	Y
NA	4' X 1 7/8 INDUS HINGES	4	EA	$ 4.99	$ 19.96	Y
NA	4" X 1 5/8 CAST IRON EYETOPS	85	EA	$ 3.15	$ 266.80	Y
NA	9 GA HOG RINGS	50	EA	$ .77	$ 38.50	Y
NA	3/8 X 4" CARRIAGE BOLT & NUTS	100	EA	$ .15	$ 15.00	Y

SUB PURCHASE ORDER NUMBER
P187181481

Shipping Instruction: 14201 TELEGRAPH ROAD, WHITTIER, CA

Status: Approved by Fiscal Manager

Sub-Total:	$ 5,892.97
Taxes:	$ 486.17
Shipping Charges:	$ .00
Order Total:	$ 6,379.14

The Unit Commander assumes full responsibility for the legal use of the materials ordered.

Press (ENTER) to complete transaction or (F4) to exit without commiting
Count: *0
<Replace>

AUTHORIZED TO PAY
L. PETER ZAVALA #097753
06/27/03

COPY

SENT TO HQ FOR PAYMENT 06/30/03

Order No. 10250878 | Release 1 | Order Date 19-JUN-03

V A R I O U S A G R E E M E N T V E N D O R A P P R O V A L F O R M

F U N D I N G I N F O R M A T I O N

Fiscal Year: 8
Fund: A01 General Fund
Unit: 15720 Administrative Headquarters
Account: 2742 Supplies, Services & Parts
Program: 848 Central Property and Evidence

Bill to Address
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000

Requested By: TOM THURMAN | Phone: 562-946-7299 | Fax:
Approved By: L. PETER ZAVALA | Phone: 562-946-7219

P R O C U R E M E N T I N F O R

Ship to Address
Dept: L.A. County SHERIFF'S DEPT
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000
Attn: TOM THURMAN
Phone: 562-946-7299

Agreement Info
Agmt No.: 41858
Vendor Code: 2970
Agmt Title: PLYWOOD-DOUGLAS FIR-EXTER

Vendor Information
Company: JONES LUMBER COMPANY, INC
Address: P.O. BOX 40 / 10711 S. ALAMEDA
City: LYNWOOD,
State: CA Zip Code: 90262-0040
Contact: NELSON FLORES
Phone: 323-564-6656
Fax: 626-564-5942

D E T A I L

Stock No.	Description	Qty	Unit	Unit Price	Line Total	Tax Y/N
NA	4X8 23/32" COX XYP RATED SHEATHING, 48/24	8	EA	$ 15.36	$ 92.16	Y
NA	2X10 8' #2&BTR DF 848	20	EA	$ 6.76	$ 135.20	Y
NA	16D VINYL COATED SINKERS 50LBS/CTN APP 61PC/LB	1	CTN	$ 16.67	$ 16.67	Y
NA	8D BRIGHT COMMON NAILS 50LBS/CTN APP 106PC/LB	1	CTN	$ 23.50	$ 23.50	Y
NA	4X4 10' CON HRT ROW 848	8	EA	$ 20.63	$ 165.04	Y

SUB PURCHASE ORDER NUMBER
_P187161488

Shipping Instruction: 14201 TELEGRAPH ROAD, WHITTIER, CA

Status: Approved by Fiscal Manager

Sub-Total: $	432.57
Taxes: $	35.69
Shipping Charges: $	.00
Order Total: $	468.26

The Unit Commander assumes full responsibility for the legal use of the materials ordered.

Press (ENTER) to complete transaction or (F4) to exit without commiting
Count: *0 <Replace>

COPY

SENT TO HQ FOR PAYMENT 06/30/03

AUTHORIZED TO PAY — L. PETER ZAVALA #C97753 06/26/03

Order No. 10269897 Release

VARIOUS AGREEMENT VENDOR APPROVAL FORM

Order Date 17-JUN-03

FUNDING INFORMATION

Fiscal Year: 3
Fund: A01 General Fund
Unit: 15720 Administrative Headquarters
Account: 4476 Small Tool, Instruments and Equipment
Program: 848 Central Property and Evidence.

Bill to Address
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000

Requested By: TOM THURMAN
Phone: 562-946-7299
Fax:

Approved By: L. PETER ZAVALA
Phone: 562-946-7216

PROCUREMENT INFOR

Ship to Address
Dept: L.A. County SHERIFF's DEPT
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000
Attn: TOM THURMAN
Phone: 562-946-7299

Agreement Info
Agrmt No.: 41803
Vendor Code: 10141
Agrmt Title: ELECTRICAL PRODUCTS

Vendor Information
Company: NORTON ELECTRIC WHOLESALE
Address: 1078 N. BROADWAY
City: LOS ANGELES
State: CA Zip Code: 90012-0000
Contact: CUSTOMER SERVICE
Phone: 323-222-7181
Fax:

DETAIL

Stock No.	Description	Qty	Unit	Unit Price	Line Total	Tax Y/N
NA	CONDUIT 4-IN-UA/LA-GRAY LIQ-TI ALT400 STFLEX	50	EA	$ 9.25	$ 462.50	Y
NA	ARL LT400 4-IN STR L/T FLEX CO	10	EA	$ 70.00	$ 700.00	Y
NA	500THHNCUT CUT 500MCM THHN WIRE BLK 4X400' PR REEL	1600	EA	$ 2.10	$ 3,360.00	Y
NA	CONDUIT 1 EMT	300	EA	$ .48	$ 144.00	Y
NA	R803 REGAL-803-1-IN-DC-COMP-EMT-CON	60	EA	$ .00	$ 27.00	Y
NA	R813 REGAL-813-1-IN-D		EA	$ 1.00	$ 30.00	Y
NA	CONDUIT 112EMT 1-1/2		EA	$ .80	$ 240.00	Y
NA	R806 REGAL-806-11/2-D		EA	$ 2.00	$ 60.00	Y
NA	R616 REGAL 616-11/2-D		EA	$ 2.70	$ 81.00	Y
NA	#THHNSTRBLK WIRE THHN		EA	$ .10	$ 400.00	Y
NA	PPS2D0H100RN P-STRUT		EA	$ 1.70	$ 340.00	Y
NA	PPS10001 PWR-STRUT PS		EA	$ .70	$ 70.00	Y
NA	PPS1000112 PWR-STRUT		EA	$ .00	$ 46.00	Y
NA	H249612 HG 249012E 6C		EA	$ 145.00	$ 290.00	Y
NA	SUPPLEMENTAL PRICING		EA	$ 20.00	$ 20.00	Y

SUB PURCHASE ORDER NUMBER
_P187161429

Shipping Instruction: 14201 TELEGRAPH ROAD, WHITTIER, CA
Status: Approved by Fiscal Manager

Sub-Total:	$	6,269.00
Taxes:	$	517.23
Shipping Charges:	$	.00
Order Total:	$	6,786.73

The Unit Commander assumes full responsibility for the legal use of the materials ordered.
Press [ENTER] to complete transaction or [F4] to exit without commiting.
Count: "0 <Replace>

AUTHORIZED TO PAY -
L. PETER ZAVALA #097753
06/24/03

COPY

SENT TO HQ
FOR PAYMENT
06/30/03

Order No. 10259899 | Release 1 | Order Date 17-JUN-03

VARIOUS AGREEMENT VENDOR APPROVAL FORM

FUNDING INFORMATION

Fiscal Year: 3
Fund: A01 General Fund
Unit: 15720 Administrative Headquarters
Account: 4476 Small Tool, Instruments and Equipment
Program: 848 Central Property and Evidence

Bill to Address
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-6000

Requested By: TOM THURMAN | Phone: 562-946-7299 | Fax:

Approved By: L. PETER ZAVALA | Phone: 562-946-7216

PROCUREMENT INFOR

Ship to Address
Dept: L.A. County SHERIFF's DEPT
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604--000
Attn: TOM THURMAN
Phone: 562-946-7299

Agreement Info
Agrmt No.: 41903
Vendor Code: 10141
Agrmt Title: ELECTRICAL PRODUCTS

Vendor Information
Company: NORTON ELECTRIC WHOLESALE
Address: 1376 N. BROADWAY
City: LOS ANGELES
State: CA Zip Code: 90012--000
Contact: CUSTOMER SERVICE
Phone: 323-222-7181
Fax:

DETAIL

Stock No.	Description	Qty	Unit	Unit Price	Line Total	Tax Y/N
NA	SHCN32742N 600 HCN3274-2N PANELBOARD INT	1	EA	$ 525.00	$ 525.00	Y
NA	SHCN74T6D 600 HCN74T6D SURF TRIM W/DOOR	1	EA	$ 275.00	$ 275.00	Y
NA	SHC20748 600 HC20748 BOX NEMA1	1	EA	$ 60.00	$ 60.00	Y
NA	SFA34040 SP 480V 40A C/B	8	EA	$ 205.00	$ 1,640.00	Y
NA	SPK27GTA 600 PK27GTA GROUNDING BAR KIT	1	EA	$ 0.00	$ 0.00	Y
NA	318256 GE TLB-34250 3		EA	$ 2,700.00	$ 2,700.00	Y
NA	318286 GE HARDWARE KI		EA	$ 850.00	$ 850.00	Y

SUB PURCHASE ORDER NUMBER

P107191430

Shipping Instruction: 14201 TELEGRAPH ROAD, WHITTIER, CA

Status: Approved by Fiscal Manager

Sub-Total: $	5,550.00
Taxes: $	458.62
Shipping Charges: $	.00
Order Total: $	6,017.62

The Unit Commander assumes full responsibility for the legal use of the materials ordered.

Press [ENTER] to complete transaction or [F4] to exit without commiting
Count: *0 <Replace>

COPY
SENT TO HQ FOR PAYMENT
06/30/03

AUTHORIZED TO PAY — L. PETER ZAVALA #097753
06/24/03

Order No. 10258890 | Release 1 | Order Date 19-JUN-03

VARIOUS AGREEMENT VENDOR APPROVAL FORM

FUNDING INFORMATION

Fiscal Year: 3
Fund: A01 General Fund
Unit: 18720 Administrative Headquarters
Account: 2742 Supplies, Services & Parts
Program: 048 Central Property and Evidence

Bill to Address
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000

Requested By: TOM THURMAN | Phone: 562-946-7299 | Fax:

Approved By: L. PETER ZAVALA | Phone: 562-946-7218

PROCUREMENT INFOR

Ship to Address
Dept: L.A. County SHERIFF's DEPT
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000
Attn: TOM THURMAN
Phone: 562-946-7299

Agreement Info
Agrmt No.: 41926
Vendor Code: 41662
Agrmt Title: HVAC-MISC PRODUCTS & SUPP

Vendor Information
Company: REFRIGERATION SUPP. DISTR. LAK
Address: 25021 ATLANTIC OCEAN DR.
City: LAKE FOREST
State: CA Zip Code: 92630-0000
Contact: CUSTOMER SERVICE
Phone: 310-324-0600
Fax: 310-324-4100

DETAIL

Stock No.	Description	Qty	Unit	Unit Price	Line Total	Tax Y/N
NA	COP 1 3/8 ACR COPPER TUBE	180	EA	$ 1.91	$ 343.80	Y
NA	COP 1 1/16 ACR COPPER TUBE	340	EA	$ 1.42	$ 482.80	Y
NA	COP 5/8 ACR COPPER TUBE	280	EA	$ .63	$ 163.80	Y
NA	COP 1/2 ACR COPPER TUBE	180	EA	$ .81	$ 81.60	Y
NA	COP 1/2 SOFT COPPER TUBE	1	EA	$ 19.84	$ 19.84	Y
NA	COP 3/8 SOFT SOFT COP		EA	$ 15.48	$ 15.48	Y
NA	INSU 1 3/8 ID X 1 WAL		EA	$ 2.02	$ 208.04	Y
NA	INSU 1 1/8 ID X 1 WAL		EA	$ 1.74	$ 630.84	Y
NA	INSU 1/2 FT ADH W/BRU		EA	$ 8.18	$ 12.60	Y
NA	WES W-20058 GRN 12 GA		EA	$ 10.15	$ 161.50	Y
NA	WES 100157 1 3/8 OD H		EA	$ 2.84	$ 20.48	Y
NA	WES 100112-1 1/8 OD H		EA	$ 2.47	$ 24.70	Y
NA	WES 100062 5/8 OD HYZ		EA	$ 1.62	$ 16.20	Y
NA	WES 100050 1/2 OD HYZ		EA	$ 1.57	$ 15.70	Y
NA	MUE W 61002 1 3/8 OD		EA	$ 20.06	$ 146.72	Y
NA	MUE W 61001 1 1/8 OD SUC LINE P-TRAP	12	EA	$ 19.46	$ 181.52	Y
NA	BRAS N34 08 1/2 FROST NUT (143X-8)	10	EA	$ .64	$ 6.40	Y
NA	QUOTE FROM 4807796-00	1	EA	$ .00	$ .00	N

SUB PURCHASE ORDER NUMBER
P1871B1471

Shipping Instruction: 14201 TELEGRAPH ROAD, WHITTIER, CA

Status: Approved By:Fiscal Manager

Sub-Total:	$ 2,523.94
Taxes:	$ 208.23
Shipping Charges:	$ .00
Order Total:	$ 2,732.17

- The Unit Commander assumes full responsibility for the legal use of the materials ordered.

Press [ENTER] to complete transaction or [F4] to exit without commiting
Count: 0

<Replace>

AUTHORIZED TO PAY
L. PETER ZAVALA #097753
06/27/03

COPY

Order No. 10268882 | Release 1 | Order Date 19-JUN-03

VARIOUS AGREEMENT VENDOR APPROVAL FORM

FUNDING INFORMATION

Fiscal Year: 8
Fund: A01 General Fund
Unit: 18720 Administrative Headquarters
Account: 2742 Supplies, Services & Parts
Program: 848 Central Property and Evidence

Bill to Address
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000

Requested By: TOM THURMAN | Phone: 562-946-7299 | Fax:
Approved By: L. PETER ZAVALA | Phone: 562-946-7218

PROCUREMENT INFOR

Ship to Address
Dept: L.A. County SHERIFF's DEPT
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604--000
Attn: TOM THURMAN
Phone: 562-946-7299

Agreement Info
Agmt No.: 41926
Vendor Code: 41852
Agmt Title: HVAC-MISC PRODUCTS & SUPP

Vendor Information
Company: REFRIGERATION SUPP. DISTR. LAK
Address: 26021 ATLANTIC OCEAN DR.
City: LAKE FOREST
State: CA Zip Code: 92630--000
Contact: CUSTOMER SERVICE
Phone: 310-324-9800
Fax: 310-324-4100

DETAIL

Stock No.	Description	Qty	Unit	Unit Price	Line Total	Tax Y/N
NA	BRAS NB4 06 3/8 FROST NUT (14FBX-6)	10	EA	$ .46	$ 4.60	Y
NA	BRAS NB4 04 1/4 FROST NUT (14FBX-4)	10	EA	$ .38	$ 3.80	Y
NA	MUE H 02055 1 0/8 OD LR 90 ELL	25	EA	$ 4.20	$ 105.00	Y
NA	MUE H 02747 1 1/8 OD LR 90 ELL	25	EA	$ 2.64	$ 66.00	Y
NA	MUE H 02722 5/8 OD LR 90 ELL	25	EA	$ 1.35	$ 33.75	Y
NA	MUE H 02717 1/2 OD LR		EA	$ 1.49	$ 37.25	Y
NA	MUE H 02050 1 3/8 LR		EA	$ 5.57	$ 139.25	Y
NA	MUE H 02647 1 1/8 LR		EA	$ 3.77	$ 94.25	Y
NA	MUE H 02622 5/8 LR ST		EA	$ 1.95	$ 48.75	Y
NA	MUE H 02617 1/2 LR ST		EA	$ 2.72	$ 68.00	Y
NA	MUE H 01066 1 3/8 OD		EA	$ 1.86	$ 18.60	Y
NA	MUE H 01023 5/8 OD X		EA	$ .41	$ 4.10	Y
NA	MUE H 01055 1 1/8 OD		EA	$ 1.43	$ 14.30	Y
NA	MUE H 01047 1 1/8 OD		EA	$ .82	$ 8.20	Y
NA	MUE H 01022 5/8 OD RL		EA	$ .20	$ 2.00	Y
NA	MUE H 01017 1/2 OD RL STOP CPL	10	EA	$ .28	$ 2.80	Y
NA	SIL 81035 15N FLAT X 20 PER TUBE (KM 85150)	10	EA	$ 28.02	$ 280.20	Y
NA	QUOTE FROM 4807799-00	1	EA	$ .00	$ .00	N

SUB PURCHASE ORDER NUMBER
_P107181472

Shipping Instruction: 14201 TELEGRAPH ROAD, WHITTIER, CA

Status: Approved by Fiscal Manager

Sub-Total: $	930.85
Taxes: $	75.78
Shipping Charges: $	.00
Order Total: $	1,007.43

The Unit Commander assumes full responsibility for the legal use of the materials ordered.

Press [ENTER] to complete transaction or [F4] to exit without commiting
Count: *0 <Replace>

AUTHORIZED TO PAY
L. PETER ZAVALA #097753
06/27/03

COPY

Order No. 10258094 | Release 1

VARIOUS AGREEMENT VENDOR APPROVAL FORM

Order Date 10-JUN-03

FUNDING INFORMATION

Fiscal Year: 3
Fund: A01 General Fund
Unit: 15720 Administrative Headquarters
Account: 2742 Supplies, Services & Parts
Program: 848 Central Property and Evidence

Bill to Address
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000

Requested By: TOM THURMAN | Phone: 562-946-7299 | Fax:

Approved By: L. PETER ZAVALA | Phone: 562-946-7218

PROCUREMENT INFOR

Ship to Address
Dept: L.A. County SHERIFF'S DEPT.
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000
Attn: TOM THURMAN
Phone: 562-946-7299

Agreement Info
Agrmt No.: 41926
Vendor Code: 41852
Agrmt Title: HVAC-MISC PRODUCTS & SUPP

Vendor Information
Company: REFRIGERATION SUPP. DISTR. LAK
Address: 26021 ATLANTIC OCEAN DR.
City: LAKE FOREST
State: CA Zip Code: 92630-000
Contact: CUSTOMER SERVICE
Phone: 810-324-0800
Fax: 810-324-4100

DETAIL

Stock No.	Description	Qty	Unit	Unit Price	Line Total	Tax Y/N
NA	WAG SC-10 10 YRD SAND CLOTH	4	EA	$ 4.43	$ 17.72	Y
NA	GAS R OXYGEN CONT GAS R.OXYGEN CONT WELDING GAS	10	EA	$ 8.50	$ 85.00	Y
NA	GAS MC ACETYLENE CONT GAS MC ACETYLENE WELD GAS	10	EA	$ 13.50	$ 135.00	Y
NA	HGNM 268042 1 GAL WET ROOF CMNT 208	4	EA	$ 12.10	$ 48.60	Y
NA	RAY H511 6 WATT 115V HEAT CABLE 250'	30	EA	$ 2.78	$ 83.40	Y
NA	RAY H900 PWR CONN KIT	3	EA	$ 19.10	$ 57.30	Y
NA	MUE H 01148 7/8 OD X	10	EA	$ .80	$ 8.80	Y
NA	MUE H 01248 7/8 OD X	10	EA	$ 1.15	$ 11.50	Y
NA	MUE H 03034 7/8 OD X	10	EA	$ .81	$ 16.20	Y
NA	MUE H 02084 7/8 OD SR	20	EA	$ 1.60	$ 32.00	Y
NA	MUE H 02334 7/8 OD SR	20	EA	$ 1.87	$ 37.40	Y
NA	MUE H 08084 7/8 OD UN	10	EA	$ 9.91	$ 99.10	Y
NA	NES 100087 7/8 OD HYI	10	EA	$ 1.91	$ 19.10	Y
NA	NES 10011B 1 1/8 OD H	25	EA	$ 2.47	$ 61.75	Y
NA	COP 7/8 ACR COPPER TU	50	EA	$ .98	$ 58.80	Y
NA	COP 1 1/8 ACR COPPER TUBE	240	EA	$ 1.42	$ 340.80	Y
NA	MUE H 04048 1 1/8 OD TEE	10	EA	$ 3.10	$ 31.00	Y
NA	QUOTE FROM 4807799-00	1	EA	$ .00	$ .00	N

SUB PURCHASE ORDER NUMBER
_P187161473

Shipping Instruction: 14201 TELEGRAPH ROAD, WHITTIER, CA

Status: Approved by Fiscal Manager

Sub-Total:	$ 1,076.97
Taxes:	$ 90.37
Shipping Charges:	$ .00
Order Total:	$ 1,167.34

The Unit Commander assumes full responsibility for the legal use of the materials ordered.
Press (ENTER) to complete transaction or (F4) to exit without commiting
Count: *1
<Replace>

AUTHORIZED TO PAY #099753
L. PETER ZAVALA
06/27/03

COPY

Order No. 10260008 | Release 1 | **VARIOUS AGREEMENT VENDOR APPROVAL FORM** | Order Date 19-JUN-03

FUNDING INFORMATION

Fiscal Year: 3
Fund: A01 General Fund
Unit: 15720 Administrative Headquarters
Account: 2742 Supplies, Services & Parts
Program: 848 Central Property and Evidence

Bill to Address
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000

Requested By: TOM THURMAN | Phone: 562-946-7289 | Fax:
Approved By: L. PETER ZAVALA | Phone: 562-946-7216

PROCUREMENT INFOR

Ship to Address
Dept: L.A. County SHERIFF'S DEPT
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604--000
Attn: TOM THURMAN
Phone: 562-946-7289

Agreement Info
Agmt No.: 41828
Vendor Code: 41662
Agmt Title: HVAC-MISC PRODUCTS & SUPP

Vendor Information
Company: REFRIGERATION SUPP. DISTR. LAK
Address: 26021 ATLANTIC OCEAN DR.
City: LAKE FOREST
State: CA Zip Code: 92630--000
Contact: CUSTOMER SERVICE
Phone: 310-324-0600
Fax: 310-324-4100

DETAIL

Stock No.	Description	Qty	Unit	Unit Price	Line Total	Tax Y/N
NA	MUE M 0193T 1 1/8 CTG X 1/8 OD BUSHING	10	EA	$ 1.11	$ 11.10	Y
NA	REP R404A 24# R404A MP82 24# CYLINDER	15	EA	$ 289.99	$ 3,750.87	Y
NA	MARS 00288 FOAM SEALANT 12 OZ	10	EA	$ 5.58	$ 55.80	Y
NA	JC A2BAA-280 2 STG TEMP CTRL 2-SPDT 30/110F	3	EA	$ 116.82	$ 350.46	Y
NA	WES W-7126 3/8 X 10' ALL THREAD	4	EA	$ 9.27	$ 18.08	Y
NA	WES W-7441 FLAT WASHE		EA	$ .08	$ 8.00	Y
NA	WES W-7482 HEX NUT 3/		EA	$ .10	$ 10.00	Y
NA	CAL 4217-W3 CORK INSU		EA	$ 8.76	$ 61.32	Y
NA	SEA CR57B TEMP RECORD		EA	$ 302.76	$ 605.52	Y
NA	SEA TA2 TEMP ALARM 11		EA	$ 70.24	$ 140.48	Y
NA	HEN 934204 1/2 BV ODS		EA	$ 27.70	$ 277.00	Y
NA	HEN 934409 1 1/8 BV O		EA	$ 55.85	$ 335.50	Y
NA	MUE M 04068 1-3/8 OD		EA	$ 5.52	$ 22.08	Y
NA	QUOTE FROM 4607799-00		EA	$ .00	$ .00	N

SUB PURCHASE ORDER NUMBER
P187181474

Shipping Instruction: 14201 TELEGRAPH ROAD, WHITTIER, CA

Status: Approved by Fiscal Manager

Sub-Total: $	6,873.21
Taxes: $	484.54
Shipping Charges: $	.00
Order Total: $	8,357.75

The Unit Commander assumes full responsibility for the legal use of the materials ordered.
Press [ENTER] to complete transaction or [F4] to exit without commiting
Count: "0 <Replace>

AUTHORIZED TO PAY
L. PETER ZAVALA #097753
06/27/03

COPY

Order No.	Release		Order Date
10260009	1	VARIOUS AGREEMENT VENDOR APPROVAL FORM	10-JUN-03

FUNDING INFORMATION

Fiscal Year: 3
Fund: A01 General Fund
Unit: 15720 Administrative Headquarters
Account: 2742 Supplies, Services & Parts
Program: 648 Central Property and Evidence

Bill to Address
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000

Requested By	Phone	Fax	Approved By	Phone
TOM THURMAN	562-946-7298		L. PETER ZAVALA	562-946-7218

PROCUREMENT INFOR

Ship to Address
Dept: L.A. County SHERIFF's DEPT
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604--000
Attn: TOM THURMAN
Phone: 562-946-7298

Agreement Info
Agrmt No.: 41920
Vendor Code: 41852
Agrmt Title: HVAC-MISC PRODUCTS & SUPP

Vendor Information
Company: REFRIGERATION SUPP. DISTR. LAK
Address: 26021 ATLANTIC OCEAN DR.
City: LAKE FOREST
State: CA Zip Code: 92630--000
Contact: CUSTOMER SERVICE
Phone: 310-324-0600
Fax: 310-324-4100

DETAIL

Stock No.	Description	Qty	Unit	Unit Price	Line Total	Tax Y/N
NA	HUE W 01048 1 3/8 FTG X 1 1/8 OD BUSH	8	EA	$ 2.18	$ 17.44	Y
NA	HUE W 04006 5/8 OD TEE INTERCHG PROD: 5/8 TEE	4	EA	$ .47	$ 1.88	Y
NA	HUE W 01315 5/8 FTG X 1/2 OD BUSHING	8	EA	$ .52	$ 4.16	Y
NA	HAL R308 DEBURRING	2	EA	$ 5.18	$ 10.36	Y
NA	UNI 17 #30 ROSEBUD MT WELDING TIP	1	EA	$ 48.72	$ 48.72	Y
NA	QUOTE FROM 4807799-00		EA	$ .00	$ .00	N

SUB PURCHASE ORDER NUMBER

_P187181476

Shipping Instruction: 14201 TELEGRAPH ROAD, WHITTIER, CA

Status: Approved by Fiscal Manager

Sub-Total: $	80.56
Taxes: $	6.65
Shipping Charges: $	.00
Order Total: $	87.21

The Unit Commander assumes full responsibility for the legal use of the materials ordered.

Press (ENTER) to complete transaction or (F4) to exit without committing
Count: *0 <Replace>

AUTHORIZED TO PAY
L. PETER ZAVALA #097753
06/27/03

COPY

Order No. 10268509 | Release 1 | VARIOUS AGREEMENT VENDOR APPROVAL FORM | Order Date 17-JUN-03

FUNDING INFORMATION

Fiscal Year: 3
Fund: A01 General Fund
Unit: 15720 Administrative Headquarters
Account: 4470 Small Tool, Instruments and Equipment
Program: 848 Central Property and Evidence

Bill to Address
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604-0000

Requested By: TOM THURMAN | Phone: 562-946-7299 | Fax:
Approved By: L. PETER ZAVALA | Phone: 562-946-7218

PROCUREMENT INFOR

Ship to Address
Dept: L.A. County SHERIFF's DEPT
Unit: Financial Programs/Central Property and
Address: 14201 E. Telegraph Rd.
City: Whittier
State: CA Zip Code: 90604--000
Attn: TOM THURMAN
Phone: 562-946-7299

Agreement Info
Agrmt No.: 41903
Vendor Code: 10141
Agrmt Title: ELECTRICAL PRODUCTS

Vendor Information
Company: NORTON ELECTRIC WHOLESALE
Address: 1875 N. BROADWAY
City: LOS ANGELES
State: CA Zip Code: 90012--000
Contact: CUSTOMER SERVICE
Phone: 323-222-7181
Fax:

DETAIL

Stock No.	Description	Qty	Unit	Unit Price	Line Total	Tax Y/N
NA	SH362RB SQDH362RB 60A 600V 3P RT-SW	8	EA	$ 278.38	$ 2,227.12	Y

SUB PURCHASE ORDER NUMBER
_P187181451

Shipping Instruction: 14201 TELEGRAPH ROAD, WHITTIER

Status: Approved by Fiscal Manager

Sub-Total: $	2,227.12
Taxes: $	189.74
Shipping Charges: $	.00
Order Total: $	2,416.86

The Unit Commander assumes full responsibility for the legal use of the materials ordered.
Press [ENTER] to complete transaction or [F4] to exit without committing
Count: *0 <Replace>

COPY

SENT TO HQ FOR PAYMENT 06/30/03

AUTHORIZED TO PAY — L. PETER ZAVALA #097753 06/27/03

Exhibit 2

County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

Declaration of Dean M. Gialamas

Dean M. Gialamas makes the following declaration and statement under oath:

I, Dean Gialamas, Crime Laboratory Assistant Director, Scientific Services Bureau, Sheriff's Department of the County of Los Angeles, am partially responsible for implementing the subject law.

I declare that it is my information or belief that from May 2002 through August 2002, I had personnel from the crime lab visit, in person, all 45 municipal police departments in our jurisdiction to discuss the new changes in the statute of limitations for the retention of biological evidence.

I declare that it is my information or belief that the Sheriff's Department prepared a letter that was distributed to all 45 police agencies and all investigative units within the Sheriff's Department, informing them of the new evidence retention requirements.

I declare that it is my information or belief that the Sheriff's Department has incurred costs for the personnel time to visit each municipal police agency and for the preparation and distribution of the letters to each agency.

I declare that it is my information or belief that Los Angeles County has not received federal, state, or other external funding to implement the test claim legislation.

I declare that it is my information or belief that the above duties are reasonably necessary in complying with the test claim legislation in excess of $1,000 per annum, the minimum cost that must be incurred to file a test claim in accordance with Government Code Section 17564(a).

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters that are stated as information and belief, and as to those matters I believe them to be true.

Signed this 15th day of September 2003
in Los Angeles, California

Dean M. Gialamas

Exhibit 3

LEROY D. BACA, SHERIFF

County of Los Angeles
Sheriff's Department Headquarters
4700 Ramona Boulevard
Monterey Park, California 91754-2169

County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

Declaration of Conrad Meredith

Conrad Meredith makes the following declaration and statement under oath:

I, Conrad Meredith, Administrative Services Manager III, Sheriff's Department of the County of Los Angeles, am responsible for recovering County costs under the subject law.

I declare that it is my information or belief that Sheriff's Department has incurred new duties as a result of the Post-Conviction DNA Testing statute (Pen. Code § 1405), and the Disposal of Evidence Notification law (Pen. Code § 1417.9). These new duties have resulted in increased costs for the Department.

I declare that it is my information or belief that new duties imposed on the Sheriff's Department due to Section 1417.9 include compliance with the:

> "retaining any biological material secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with the case and disposing of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set forth below are met:
>
> > (1) The government entity notifies all of the following persons of the provisions of this section and of the intention of the governmental entity to dispose of the material: any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of

conviction, the district attorney in the county of conviction, and the Attorney General.

(2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

(A) A motion pursuant to Section 1405, however, upon filing of that application, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

(B) A request under penalty of perjury that the material not to be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to Section 1405 that is followed within 180 days by motion for DNA testing pursuant to Section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgement of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of the identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405."

I declare that it is my information or belief that the Sheriff's Department is responsible for transporting defendants from the State Prison to County facilities (if required) and for care and custody associated with confinement during some or all of their Post Conviction: DNA Court Proceedings detailed in the attached supporting documents.

I declare that it is my information or belief that the above duties are reasonably necessary in complying with the test claim legislation in excess of $1,000, the minimum cost that must be incurred to file a test claim in accordance with Government Code Section 17564(a):

" Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

09/15/02 Los Angeles, CA
Date and Place

Signature

MI01 - MICROFILM INDEX BOOKING NUMBER INQUIRY/UPDATE - JDS

BKG# 7026541 OP CODE I
LSTNAME REYES FIRST MIGUEL MN SUF
ARREST CHARGE CO RET BKG DATE 092501
SEX M RACE H HAIR BLK EYE BRO HGT 506 WGT 140 DOB 092964 AGE 36
ARREST AGENCY 8000 CASE # BA10346501 RELEASE DATE 100901 RELEASE REASON CUST

& REEL	MICROFILM ADDRESS L+.BATCH PER IMAGE	L+E	RECORD TYPE

14 days @ $42.5 = $595.70

BIH ZRC

JD2001 END OF MICROFILM ADDRESSES.

NEXT TRAN MI01 7026541 I

LOS ANGELES COUNTY JAIL
BOOKING AND PROPERTY RECORD

BOOKING NO.	LOC. REG.	DR. LIC. NO.	STATE
7026541	STWD		

JAIL CUSTODY RECORD

ARRESTEE NAME (LAST, FIRST, MIDDLE)
REYES MIGUEL

ADDRESS CITY SEX
TRANSIENT TRANSIENT HOLLYWOOD M

DESCENT	HAIR	EYES	HEIGHT	WEIGHT	BIRTHDATE	AGE
H	BLK	BRO	506	140	09-29-64	36

VEH. LIC. NO.	STATE	REPT. DIST.	ARREST/BKG NAME
		8000	

BIRTHPLACE	FILE NO.	CRIM. HIST.
XGT		6

ARST. OR DET. AGENCY	DATE & TIME ARRESTED	TYPE BKG.
8000	09-25-01 1859	2011

LOCATION OF ARREST	TOTAL BAIL
CENTINELA	0.00

CHARGE	WARR./COMM. NO.
CO RET O COURT ORDERED RE BA101465	

JAIL LOC.	BOOKING DATE	TIME	COURT
TRC1	09-26-01	0830	S100

SIGNATURE REMAINS WHEN BOOKED: X

SOC. SEC. NO.	OBSERVABLE PHYSICAL DISORDER	OCCUPATION
000-00-0000		LABORER

EMPLOYER (FIRM OR PERSON'S NAME, CITY, & PHONE NO.)		SPECIAL MEDICAL PROBLEM
UNEMPLOYED	0000000000	FEET/

CLOTHING WORN	LOCATION OF/DESCRIPTION OF VEHICLE
STATE CLOTHING	

IN CASE OF EMERGENCY NOTIFY (NAME, RELATIONSHIP, ADDRESS, CITY & PHONE NO.)

ARRESTING OFFICER	BOOKING EMPLOYEE	RECEIVING OFFICER	TRANSPORTING OFFICER
GURAN 000000 BRADY 000136 DU 000000			000000

CASH RETAINED	PROPERTY
0.00	

RECEIPT NO. FOR SEIZ. OF FORFEITABLE CASH & PROPERTY: X

CASH DEPOSITED	PROPERTY
0.00	NONE TAKEN SEE ORIG BK SLIP

RECEIPT'S VAULT NO. OF REMAINING CASH & PROPERTY: X

TELEPHONE CALLS / INTERVIEWS CODE: A - ATTY B - BONDSMAN D - DR E - EMPLOYER R - RELATIVE W - WAIVED O - OTHER

NAME	CODE	PHONE # OR INTERVIEWER	DATE & TIME MADE	✓	OFFICER SERIAL NO.	PRISONER'S INITIALS

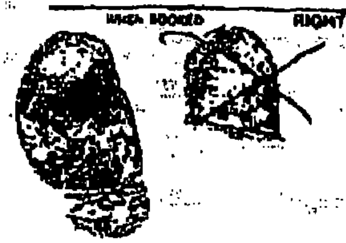
REMARKS:

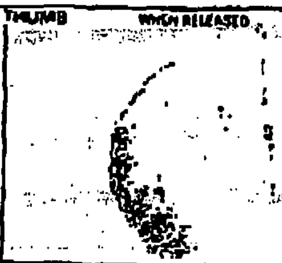
X COMPLETED CALL

RIGHT FINGERPRINTS

WHEN BOOKED | WHEN RELEASED

WHEN BOOKED — RIGHT THUMB — WHEN RELEASED





REASON FOR RELEASE: ☐ SEPARATION ☒ TIME ☐ CITATION ☐ BAIL ☐ OTHER

RECEIPT

DATE AND TIME: 10/9/01

RELEASED BY: [signature]

DOCUMENT ANALYST: Barron

RELEASED TO (NAME, AGENCY, & DETAILS): CMA Centinela

LOS ANGELES COUNTY JAIL

BOOKING AND PROPERTY RECORD

7026541

JAIL CUSTODY RECORD

REYES, MIGUEL

CENTINELA

C/O

BA103465-01

9-26-01 $100

TELEPHONE CALLS INTERVIEWS CODE: A - ATTY. B - BONDSMAN D - DR. E - EMPLOYER R - RELATIVE W - WAIVED O - OTHER				OFFICER HANDLING	PRISONER'S INITIALS
NAME	CODE	PHONE # OR INTERVIEWER	DATE & TIME MADE	SERIAL #	
REMARKS:				X COMPLETED CALL	

RIGHT FINGERPRINTS

WHEN BOOKED | WHEN RELEASED

WHEN BOOKED — RIGHT THUMB — WHEN RELEASED

REASON FOR RELEASE: ☐ EXPIRATION ☐ FINE ☐ CITATION ☐ BAIL ☐ OTHER

RECEIPT #

DATE AND TIME

RELEASED BY:

DOCUMENT ANALYST:

RELEASED TO: NAME, AGENCY, & DETAIL

QUALITY CONTROL CHECK 9/21

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT
REMOVAL ORDER FOR IN-CUSTODY DEFENDANT

The above-named defendant is to appear in

CASE NO. BA102465 DEPT. S-100 ON 9-27-01 (Date) AT 0800 (Time)

FOR: F/P (Reason)

REYES, MIGUEL (Name Booked As) 7026541 (Booking Number)

AKA

COMPUTER UPDATED-IRC
P. HOCKING 037362

R055-220256 (Bailiff & Employee #)

SEP-04-2003 10:16

STATE OF CALIFORNIA
CDC 1691 (Rev. 3/91)

DEPARTMENT OF CORRECTIONS

NOTICE OF DETAINER

To: LOS ANGELES COUNTY
SHERIFF'S DEPARTMENT
702654/

From: CENTINELA STATE PRISON
2302 BROWN ROAD / P.O. BOX 731
IMPERIAL, CA 92251-0731

RE: J99043 REYES, MIGUEL ANGEL
AKAS:

Date: SEPTEMBER 25, 2001

Please accept this detainer against the above named subject who is presently in your custody and who is wanted by the California Department of Corrections (CDC) for the reason checked below:

- ☐ Escapee from _____
- ☐ CDC's prisoner released to you under the interstate agreement on detainers.
- ☐ CDC's prisoner released to you under an executive agreement between governors.
- ☐ CDC's prisoner released to you under the Uniform Act to secure the attendance of witnesses from without the State in criminal acts.
- ☐ CDC's prisoner released to you for the service of concurrent sentences between California and your agency/department.
- ☒ CDC's prisoner released to you for trial or witness in a criminal case or civil proceeding in a parental or marital case. DEFENDANT CASE #BA103465-01

☐ Attached is a certified copy of the commitment on which the detainer is based.

Subject has a scheduled California release date of 09/14/2012

DO NOT RELEASE BEFORE CALLING: CENTINELA STATE PRISON (760) 337-7900 EXT. 5304

If subject is transferred from your custody to another detention facility, we request that you forward our detainer to said facility at the time of transfer and advise this office.

If subject escapes or dies, please contact the undersigned immediately.

☒ PC Section 3058.6 required. ☒ PC Section 290 required ☐ Escape risk / Life R
☐ REGISTRATION REQUIRED PER H11590 ☒ NOTIFICATION REQUIRED PER PC290 ☐ HIGH CONTROL CASE

☒ WANTED BY OTHER AGENCIES USINS HOLD #A28964429

Please acknowledge receipt of this detainer on the copy attached upon receipt of inmate or by returning enclosed self-addressed envelope.

Receipt: _____
Signature
_____
Title
09-25-01
Date

DIRECTOR OF CORRECTIONS
By: _____

Title: SPRING GARRETT, CASE RECORDS MANAGER

Phone Number: (760) 337-7900 EXT. 5350

REYES, M.
J-99043

NOTICE OF DETAINER

COURT CASE STATUS

DATE 9-25-01

I/M REYES, MIGUEL BKG # 7026541

HAS BEEN BROUGHT BEFORE COURT (DEPT./DIV.) 5100

THE SHERIFF IS DIRECTED TO RETURN THE ABOVE INMATE TO CENTINELLA
WHEN NO LONGER NEEDED.

INSTRUCTIONS FOR HANDLING COURT ORDERS 9-27-01

At the end of each court appearance, the Bailiff shall either stamp on the back of the order "CONTINUED" or "EXECUTED" and complete the information required by the stamp. The COURT ORDER is returned to TST headquarters, and deposited either in the "Day File" if Continued or in the Statewide tray if Executed.

IF YOU HAVE ANY QUESTIONS CONTACT THE STATEWIDE DETAIL.

BK 2026591

NAME, ADDRESS AND TELEPHONE NUMBER OF ATTORNEY(S)

FILED
LOS ANGELES SUPERIOR COURT
SEP 04 2001
JOHN A. CLARKE, CLERK
BY M. REINOSO, DEPUTY

ATTORNEY(S) FOR

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA — Plaintiff

vs.

Case Number: BA103465-01

Manuel Reyes — Defendant

AFFIDAVIT AND ORDER FOR REMOVAL OF PRISONER

AFFIDAVIT FOR ATTENDANCE

Affiant, being first duly sworn, deposes and says:

That she is a Judicial Assistant, and that Manuel Reyes D O B 09-[illegible]-65 CDC#99043 is now confined in Centinela State Prison.

That his presence is required in Department 100 of the SUPERIOR COURT of the County of Los Angeles on

September 26, 2001 for the purposes of further proceedings re DNA

Subscribed and sworn to before me on September 4, 2001

County Clerk

By J. Pulido

M. Reinoso
(Affiant)

ORDER

Good cause appearing therefor, it is ordered that the Warden or Superintendent of the aforenamed institution deliver said person into the custody of the Sheriff for the purposes set forth.

IT IS FURTHER ORDERED that the Sheriff of Los Angeles County execute this order by returning the prisoner from said institution to the Superior Court at the time and place indicated. The Sheriff is further directed to return the prisoner to the institution when his presence is no longer required by this Court.

Dated: September 4, 2001

Lance A. Wesler, Judge of the Superior Court

AFFIDAVIT AND ORDER FOR REMOVAL OF PRISONER

ABSTRACT OF JUDGMENT – PRISON COMMITMENT

FORM DSL 290

☒ SUPERIOR
☐ MUNICIPAL
☐ JUSTICE

COURT OF CALIFORNIA, COUNTY OF ~~LOS ANGELES~~

COURT (I.D.) 1 9 0 0 0 1

BRANCH OR JUDICIAL DISTRICT ~~CENTRAL CRIMINAL~~

ORIGINAL FILED
MAY 29 1997
LOS ANGELES
SUPERIOR COURT

PEOPLE OF THE STATE OF CALIFORNIA versus ☒ PRESENT BA103465 -A
DEFENDANT: REYES, MIGUEL ANGEL -B
AKA: HERNANDEZ, MIGUEL ☐ NOT PRESENT -C

COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT
AMENDED ABSTRACT ☒ -D -E

DATE OF HEARING	DEPT NO	JUDGE	CLERK
3-6-96	56	GEORGE SCHIAVELLI	U A SMITH

REPORTER	COUNSEL FOR PEOPLE	COUNSEL FOR DEFENDANT	PROBATION NO OR PROBATION OFFICER
L STALEY	C VASQUEZ	J GRAVES	X1457212

1. DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES [illegible]

☐ ADDITIONAL COUNTS ARE LISTED ON ATTACHMENT ______ (NUMBER OF PAGES)

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION MO	DAY	YEAR	CONVICTED BY JURY	COURT	PLEA	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	PRINCIPAL OR CONSECUTIVE TIME IMPOSED YEARS	MONTHS
1	PC	243.4(C)	SEXUAL BATTERY	94	11	03	95	X			U	X						(4)	
2	PC	261(A)(2)	FORCIBLE RAPE	94	11	03	95	X			U							8.	
3	PC	261(A)(2)	FORCIBLE RAPE	94	11	03	95	X			U							8	
5	PC	245(A)(1)	ASSAULT W/G.B.I.	94	11	03	95	X			U	X						(4)	

2. ENHANCEMENTS [illegible]

Count	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Enhancement	Yrs or "S"	Total
2	12022.8	5									5
3	12022.8	S									
5	2022.7	S									

ORDER CONTINUED
NEXT APPEARANCE 9-27-01 0830 TIME
COURT $100
DEPUTY [illegible]

ORDER EXECUTED
9-27-01
DATE
ALEXANDER
DEPUTY

THE WITHIN INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE
ATTEST: 9-24-01
CALIFORNIA DEPARTMENT OF CORRECTIONS
BY [signature]
CORRECTIONAL OFFICER

TEMPORARY ORDER FOR DETENTION

PER INFORMATION FROM CALIFORNIA DEPARTMENT OF CORRECTIONS OR COUNTY JAIL LISTED, INMATE TO BE RETURNED TO: CENTINELA

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT
CUSTODY DIVISION
PLEASE DETAIN

7826541
BOOKING NUMBER

REYES, MIGUEL
NAME LAST FIRST

REASON FOR HOLD

ST. PRIS.
J 990693

REQUEST BY ID NO.

DEPARTMENT/UNIT

PHONE NUMBER.

RECEIVED BY EMP. NO.

DATE RECEIVED

TIME AM/PM

NOTE: I.R.C. AND JAILER - CONTACT RECORDS OFFICE AT ABOVE LISTED INSTITUTION PRIOR TO RELEASE OF THIS INMATE.

HOLD CANCELLED

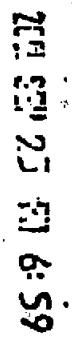
NAME/ID NO.

DEPARTMENT/UNIT

DATE

RLSD 9-14-2012

SEP-04-2003 10:16



BKM

706541

NAME, ADDRESS AND TELEPHONE NUMBER OF ATTORNEY(S)

FILED
LOS ANGELES SUPERIOR COURT
SEP 04 2001
JOHN A. CLARKE, CLERK
BY M. REINOSO, DEPUTY

ATTORNEY(S) FOR

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA — Case Number

HA103465-01

Plaintiff

vs

Manuel Reyes

AFFIDAVIT AND ORDER FOR REMOVAL OF PRISONER

Defendant

AFFIDAVIT FOR ATTENDANCE

Affiant, being first duly sworn, deposes and says:

That she is a Judicial Assistant, and that [redacted] Reyes; D.O.B. 09-[redacted]65; CDC#99043 is now confined in Centinela State Prison

That his presence is required in Department 100 of the SUPERIOR COURT of the County of Los Angeles on

September 26, 2001 for the purposes of further proceedings re: DNA.

Subscribed and sworn to before me on September 4, 2001

County Clerk

By C. Pulido

M. Reinoso

(Affiant)

ORDER

Good cause appearing therefor, it is ordered that the Warden or Superintendent of the aforenamed institution deliver said person into the custody of the Sheriff for the purposes set forth.

IT IS FURTHER ORDERED that the Sheriff of Los Angeles County execute this order by returning the prisoner from said institution to the Superior Court at the [redacted] indicated. The Sheriff is further directed to return the prisoner to the institution when his presence is [redacted] by this Court.

Dated: September 4, 2001

[redacted] Wesley, Judge of the Superior Court

AFFIDAVIT AND ORDER FOR REMOVAL OF PRISONER

SEP-04-2003 10:16

MI01 - MICROFILM INDEX BOOKING NUMBER INQUIRY/UPDATE - JDS

BKG# 7127028 OP CODE I
LASTNAME MCSHERRY FIRST LEONARD MN SUF
ARREST CHARGE CO RET BKG DATE 122701
EX M RACE W HAIR BRO EYE HAZ HGT 509 WGT 160 DOB 012251 AGE 50
ARREST AGENCY 8000 CASE # A04026401 RELEASE DATE 122801 RELEASE REASON DISM
MICROFILM ADDRESS RECORD
& REEL L+ BATCH PER IMAGE L+E TYPE.

JD2001 END OF MICROFILM ADDRESSES

NEXT TRAN MI01 7127028 I

Exhibit 4

LAW OFFICES
LOS ANGELES COUNTY PUBLIC DEFENDER
CLARA SHORTRIDGE FOLTZ
CRIMINAL JUSTICE CENTER
210 WEST TEMPLE STREET, 19TH FLOOR
LOS ANGELES, CALIFORNIA 90012
(213) 974-2811
TDD # (800) 801-5551

MICHAEL P. JUDGE
PUBLIC DEFENDER

County of Los Angeles Test Claim
Sections 1405, 1417.9 of the Penal Code
As added by Chapter 821, Statutes of 2000
Post Conviction: DNA Court Proceedings

Declaration of Robert E. Kalunian

Robert E. Kalunian makes the following declaration and statement under oath:

I, Robert Kalunian, Chief Deputy Public Defender, of the County of Los Angeles, am responsible for implementing the subject law.

I declare that it is my information or belief that the Public Defender's Office has incurred new duties as a result of the Post-Conviction DNA Testing statute (Pen. Code § 1405), and the Disposal of Evidence Notification law (Pen. Code § 1417.9). These new duties have resulted in increased costs for the Office.

I declare that it is my information or belief that before the enactment of Penal Code Section 1405, convicted persons had no right to appointed counsel for purposes of litigating a request for post-conviction DNA testing.

I declare that it is my information or belief that before the enactment of Penal Code Section 1417.9, there was no requirement that the government notify the public defender and the inmate in order to be able to destroy biological evidence in their possession.

I declare that it is my information or belief that as a result of the Post-Conviction DNA testing statute, when a convicted person either files a motion or requests appointment of counsel for purposes of investigating a claim pursuant to Penal Code Section 1405 by contacting the Public Defender, the court, the District Attorney or the Attorney General, our Office is required to investigate whether such a motion is potentially meritorious, and, if so, must draft, file and litigate the motion. If the motion is granted, we must continue to represent the defendant in the resulting proceedings and if the motion is denied, seek appellate relief through a writ petition when appropriate.

I declare that it is my information or belief that new duties created by the Disposal of Evidence Notification law arise because the law requires that the Public Defender's Office be notified whenever a governmental entity in possession of biological material intends to destroy the material. (Penal Code Section 1417.9, subdivision (b)(1).)

I declare that it is my information or belief that new duties imposed on the Public Defender due to Section 1417.9 include determining whether the Public Defender represented the person who was charged with the crime in which the biological material was retained; contacting the person's lawyer if the Public Defender did not represent him or her; and reviewing a former client's case to determine how to respond to the government's notification.

I declare that it is my information or belief that possible responses could include drafting and litigating a motion pursuant to Penal Code Section 1405, drafting a declaration stating that a motion will be filed within 180 days or drafting a declaration of innocence as provided by Penal Section 1417.9, subdivision (b)(2)(C).

I declare that it is my information or belief that duties of attorneys, support personnel, investigators, experts, and associated services and supplies, mandated under the subject law, as detailed on the attached list of reimbursable activities are reasonably necessary in complying with the subject law.

Specifically, I declare that I am informed and believe that the County's State mandated duties and resulting costs in implementing the subject law require the County to provide new State-mandated services and thus incur costs which are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> Costs mandated by the State means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I declare that it is my information or belief that the Public Defender's Office of the County of Los Angeles has received a one time grant, Office of Criminal Justice and Planning Grant, for $160,000 from January 2002 through March 2003 (detailed in the attached supporting documents) for providing representations to former Public Defender clients who request counsel for the purpose of filing and litigating a motion pursuant to Penal Code Section 1405 .

I declare that it is my information or belief that currently there are no sources of funding available for this program.

I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

9/17/03 @ LA, Ca
Date and Place

Signature

GOVERNOR'S OFFICE OF CRIMINAL JUSTICE PLANNING (OCJP A301)
GRANT AWARD FACE SHEET

The Office of Criminal Justice Planning, hereafter designated OCJP, hereby makes a grant award of funds to the following Administrative Agency (1) Los Angeles County hereafter designated Grantee, in the amount and for the purpose and duration set forth in this grant award.

(2) Implementing Agency Name Los Angeles County Public Defender

Contact Joanne Rotstein

Address 210 W. Temple Street, 19th Fl. Los Angeles, CA 90012 Telephone (213) 974-3036

(3) Project Title (60 characters maximum) CALIFORNIA INNOCENCE PROTECTION PROGRAM	(6) Award No. CK01010190
(4) Project Director (Name, Title, Address, Telephone) (four lines maximum) Robert E. Kalunian, Chief Deputy Public Defender Los Angeles County Public Defender 210 West Temple Street, Room 19-513 Los Angeles, CA 90012 (213) 974-7060	(7) Grant Period January 1, 2002 through December 31, 2002
	(8) Federal Amount
	(9) State Amount $160,000
(5) Financial Officer (Name, Title, Address, Telephone) (four lines maximum) Patricia Van Bogaert, Administrative Deputy Los Angeles County Public Defender 210 West Temple Street, Room 19-513 Los Angeles, Ca 90012 (213) 974-2807	(10) Cash Match
	(11) In-Kind Match
	(12) Total Project Cost $160,000

This grant award consists of this title page, the proposal for the grant which is attached and made a part hereof, and the Assurance of Compliance forms which are being submitted. I hereby certify that: (1) I am vested with authority to, and have the approval of the City/County Financial Officer, City Manager, or Governing Board Chair, enter into this grant award agreement; and (2) all funds received pursuant to this agreement will be spent exclusively on the purposes specified. The grant recipient signifies acceptance of this grant award and agrees to administer the grant project in accordance with the statute(s), the Program Guidelines, the OCJP Grantee Handbook, and the OCJP audit requirements, as stated in this Request for Proposal (RFP) and Request for Application (RFA). The grant recipient further agrees to all legal conditions and terms incorporated by reference in this RFP/RFA.

FOR OCJP USE ONLY

Item: 6100-101-0001
Chapter: 1000/2001
PCA No.: 00531
Components No.: 50.30.533.000
Project No.: GENF1201
Amount: 160,000
Split Fund: —
Split Encumber: —
Year: 2001/02
Fed. Cat. #: —
Match Requirement: —
Fund: General
Program: Calif. Innocence Protection

I hereby certify that all conditions for exemptions have been complied with, and this contract is exempt from Department of General Services approval.

(13) Official Authorized to Sign for Applicant/Grant Recipient

Name: MICHAEL P. JUDGE

Title: Public Defender, Los Angeles County

Address: 210 West Temple Street, Room 19-513
Los Angeles, CA 90012

Telephone: (213) 974-2801

Date: 1-8-02

I hereby certify upon my own personal knowledge that budgeted funds are available for the period and purposes of this expenditure stated above.

Fiscal Officer, OCJP Date 3/14/02

State of California Date 3/18/02

APPROVED
290

Office of Criminal Justice Planning
1130 "K" Street, Suite 300
Sacramento, California 95814

CERTIFICATION OF ASSURANCE OF COMPLIANCE

Note: There are different requirements for state and federal funds. (Those affecting only federally funded projects are identified.)

I, MICHAEL P. JUDGE, hereby certify that:
(official authorized to sign grant award; same person as line 13 on Grant Award Face Sheet)

GRANTEE: **Los Angeles County Public Defender**

IMPLEMENTING AGENCY: **Los Angeles County Public Defender**

PROJECT TITLE: **California Innocence Protection Program**

will adhere to all of the Grant Award Agreement requirements (state and/or federal) as directed by the Office of Criminal Justice Planning including, but not limited to, the following areas:

I. Equal Employment Opportunity
II. Drug-Free Workplace Act of 1990
III. California Environmental Quality Act (CEQA)
IV. Lobbying
V. Debarment, Suspension, and Other Responsibility Matters
VI. Proof of Authority from City Council/Governing Board

I. EQUAL EMPLOYMENT OPPORTUNITY (EEO)

A. General EEO Rules and Regulations (state and federal)

The applicant selected for funding acknowledges awareness of, and the responsibility to comply with, the following Equal Employment Opportunity requirements by signing the Grant Award Face Sheet (OCJP A301), including this Certification of Assurance of Compliance, and submitting the application to the Office of Criminal Justice Planning (OCJP).

1. California Fair Employment and Housing Act (FEHA) and Implementing Regulations, California Administrative Code, Title 2, Division 4, Fair Employment and Housing Commission.

2. California Government Code Article 9.5, Sections 11135-11139.5 and Implementing Regulations, California Administrative Code, Title 22, Sections 98000-98413.

3. Title VI of the Civil Rights Act of 1964.

4. Title V, Section 504 of the Rehabilitation Act of 1973 (29 USCS Section 974) and Federal Department Regulations on its implementation; Government Code Section 4450, et seq.

5. Subtitle A, Title II of the Americans with Disabilities Act (ADA), 42 USC Sections 12131-12134 and U.S. Department of Justice implementing regulations, 28 CFR, Part 35.

6. U.S. Department of Justice Regulations, 28 CFR, Part 42, Equal Employment Opportunity, Policies and Procedures – **applies to federally funded grants only.**

Federal and state agencies have the legal right to seek enforcement of the above items of this assurance of compliance.

All appropriate documentation must be maintained on file by the project and available for OCJP or public scrutiny upon request. Violation of these provisions may result in withholding of grant funds by OCJP.

B. The following apply to federally funded grants only:

Note: **Effective Fiscal Year 1992/93, the Federal criteria and requirements apply to the "implementing agency" responsible for the day-to-day operation of the project (e.g., Probation Department, District Attorney, Sheriff).**

1. Criteria for Federal EEO Program Requirements for Grants in the Amount of $25,000-$499,999. (Does not apply to community-based organizations).

   Federal regulations require qualified recipient agencies of federal financial assistance to prepare an Equal Employment Opportunity Program (EEOP) upon meeting all of the following criteria:

   a. Grantee has 50 or more employees.

   b. Grantee has received a total of $25,000 or more in grants or subgrants since 1968.

   c. Grantee has a service population of 3% minority representation (If less than 3% minority population, the EEOP must be prepared to focus on women).

The EEOP must be developed for the implementing agency responsible for the day-to-day operations of the program.

2. Assurance of EEOP for Federal Grants of $25,000-$499,999

This implementing agency has formulated, or will formulate, implement, and maintain an EEOP within 60 calendar days of the date the Grant Award Face Sheet (OCJP A301) is signed by the Executive Director of OCJP. I also certify that the EEOP is/will be on file in the following Affirmative Action (A.A.) Office:

A.A. Officer: **Ron White**

Title: **Personnel Officer**

Address: **210 West Temple Street, Room 19-513, Los Angeles, CA 90012**

Phone: **(213) 974-2800**

The EEOP is available for review or audit by officials of OCJP or the Federal Government, as required by relevant laws and regulations.

Additionally, I agree to submit a copy of said EEOP to OCJP (Attention: EEO Compliance Officer) within 60 calendar days of the Executive Director's signature on the OCJP A301.

3. Federal Grants of $500,000 and Above

All applicants for federal grant funds of $500,000 or more will submit a copy of their EEOP (developed for the implementing agency), or federal letter of compliance, to OCJP with the second stage application forms.

4. EEOP Updates for Continuing Federal Grants

Projects that have previously received a total of $25,000 or more in federal grants, or a single award in the amount of $500,000 or more, and have an approved EEOP on file with OCJP, are required to submit an annual update of their EEOP if funds are continued. The timeframe for EEOP updates are the same as identified in Section B, 2 and 3 above.

C. The following apply to all OCJP grantees:

1. In addition to this Certification, all OCJP grantees must have a current EEO Policy Statement, established by their agency, posted in a prominent place accessible to employees and applicants; and

2. The poster entitled "**Harassment or Discrimination in Employment is Prohibited by Law**" also must be posted in a conspicuous location accessible to employees and applicants. This poster may be obtained from the local office of the Department of Fair Employment and Housing.

II. CALIFORNIA DRUG-FREE WORKPLACE ACT OF 1990 AND FEDERAL DRUG-FREE WORKPLACE ACT OF 1988 REQUIREMENTS

The above-named organization(s) will comply with the California Drug-Free Workplace Act of 1990 of California Government Code Section 8355, et seq., and the Federal Drug-Free Workplace Act of 1988, and implemented as 28 CFR, Part 67, Subpart F, for grantees, as defined in 28 CFR, Part 67, Sections 67.615 and 67.620 by:

A. Publishing a statement notifying employees that unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited and specifying actions to be taken against employees for violations, as required in Government Code Section 8355(a).

B. Establishing a Drug-Free Awareness Program as required by Government Code Section 8355(b), to inform employees about all of the following:

1. The dangers of drug abuse in the workplace;
2. The organization's policy of maintaining a drug-free workplace;
3. Any available counseling, rehabilitation and employee assistance programs;
4. Penalties that may be imposed upon employees for drug abuse violations.

C. Providing as required by Government Code Section 8355(c) that every employee who works on the proposed grant:

1. Will receive a copy of the company's drug-free policy statement;
2. Will agree to abide by the terms of the company's statement as a condition of employment on the contract or grant.

D. Notifying the employee in the statement required that, as a condition of employment under the grant, the employee will:

1. Abide by the terms of the statement;
2. Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five (5) calendar days after such conviction.

E. Notifying the agency, in writing, within ten (10) calendar days after receiving notice as required above from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position, and title to: Department of Justice, Office of Justice Programs, ATTN: Control Desk, 633 Indiana Avenue, N.W., Washington, DC 20531. Notice shall include the identification number(s) of each affected grant.

F. Taking one of the following actions, within 30 calendar days of receiving notice, with respect to any employee who is so convicted:

1. Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended;
2. Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a federal, state, or local health, law enforcement, or other appropriate agency.

G. Making a good faith effort to continue to maintain a drug-free workplace through implementation of the above requirements.

III. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The above-named organization(s)/individual(s) will comply with the California Environmental Quality Act (CEQA) requirements as stated in the Public Resources Code, Division 13, Section 21000 et seq. and all other applicable rules and regulations.

All appropriate documentation will be maintained on file by the project and available for OCJP or public review upon request.

IV. LOBBYING

As required by Section 1352, Title 31 of the U.S. Code, and implemented as 28 CFR, Part 69, for persons entering into a grant or cooperative agreement over $100,000, as defined at 28 CFR, Part 69, the applicant certifies that:

A. No federally appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making of any federal grant, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal grant or cooperative agreement.

B. If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this federal grant or cooperative agreement, the undersigned shall complete and submit Standard Form - LLL, "Disclosure of Lobbying Activities," in accordance with its instructions.

C. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers [including subgrants, contracts under grants and cooperative agreements and subcontract(s)] and that all subrecipients shall certify and disclose accordingly.

V. DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS (applies to federally funded grants only)

As required by Executive Order 12549, Debarment and Suspension, and implemented at 28 CFR, Part 67, for prospective participants in primary covered transactions, as defined at 28 CFR, Part 67, Section 67.510, the applicant certifies that it and its principals:

A. Are not presently debarred, suspended, proposed for debarment, declared ineligible, sentenced to a denial of federal benefits by a state or federal court, or voluntarily excluded from covered transactions by any federal department or agency.

B. Have not, within a three-year period preceding this application, been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) transaction or contract under a public transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.

C. Are not presently indicted for, or otherwise criminally or civilly charged by a governmental entity (federal, state, or local) with, commission of any of the offenses enumerated above.

D. Have not, within a three-year period preceding this application, had one or more public transactions (federal, state, or local) terminated for cause or default.

Where the applicant is unable to certify to any of the statements in this certification, he or she shall attach an explanation to this application.

VI. PROOF OF AUTHORITY FROM CITY COUNCIL/GOVERNING BOARD

The above named organization accepts responsibility for and will comply with the requirement to obtain written authorization from the city council/governing board in support of this program. The Applicant agrees to provide all matching funds required for said project (including any amendment thereof) under the Program and the funding terms and conditions of OCJP, and that any cash match will be appropriated as required. It is agreed that any liability arising out of the performance of this Grant Award Agreement, including civil court actions for damages, shall be the responsibility of the grant recipient and the authorizing agency. The State of California and OCJP disclaim responsibility of any such liability. Be it further resolved that grant funds received hereunder shall not be used to supplant expenditures controlled by this body.

The Applicant is required to obtain written authorization from the city council/governing board that the official executing this agreement is, in fact, authorized to do so. The Applicant is also required to maintain said written authorization on file and readily available upon demand.

All appropriate documentation must be maintained on file by the project and available for OCJP or public scrutiny upon request. Failure to comply with these requirements may result in suspension of payments under the grant or termination of the grant or both and the grantee may be ineligible for award of any future grants if the Office of Criminal Justice Planning (OCJP) determines that any of the following has occurred: (1) the grantee has made false certification, or (2) violates the certification by failing to carry out the requirements as noted above.

CERTIFICATION

I, the official named below, am the same individual authorized to sign the Grant Award Agreement [line 13 on Grant Award Face Sheet], and hereby swear that I am duly authorized legally to bind the contractor or grant recipient to the above described certification. I am fully aware that this certification, executed on the date and in the county below, is made under penalty of perjury under the laws of the State of California.

Authorized Official's Signature: Michael P. Judge

Authorized Official's Typed Name: MICHAEL P. JUDGE

Authorized Official's Title: LOS ANGELES COUNTY PUBLIC DEFENDER

Date Executed: 2/5/02

Federal ID Number: 956000927

Executed in the City/County of: LOS ANGELES COUNTY

AUTHORIZED BY:

- ☒ City/County Financial Officer
- ☐ City Manager
- ☐ Governing Board Chair

Signature: Patricia Van Bogaert

Typed Name: Patricia Van Bogaert

Title: Administrative Deputy, Los Angeles County Public Defender

PROJECT CONTACT INFORMATION

Applicant: LOS ANGELES COUNTY

Implementing Agency (if applicable): LOS ANGELES COUNTY PUBLIC DEFENDER

Project Title: CALIFORNIA INNOCENCE PROTECTION PROGRAM

Grant Number (to be added by OCJP): _____

Provide the name, title, address, telephone number, and e-mail address for the project contact persons named below. **If a section does not apply to your project, enter "N/A."**

1. The person having day-to-day responsibility for the project:

   Name: Sean McDonald
   Title: Deputy Public Defender IV
   Address: 210 West Temple Street, 19th Floor, Los Angeles, CA 90012
   Telephone Number: (213) 974-2911 Fax Number: (213) 625-5031
   E-Mail Address: smcdonal@co.la.ca.us

2. The person to whom the person listed in #1 is accountable.

   Name: Carole Telfer
   Title: Head Deputy Public Defender
   Address: 207 S. Broadway, Suite 400, Los Angeles, CA 90012
   Telephone Number: (213) 893-2570 Fax Number: (213) 621-0991
   E-Mail Address: ctelfer@co.la.ca.us

3. The executive director of a nonprofit organization or the chief executive officer (e.g., chief of police, superintendent of schools) of the implementing agency:

   Name: Michael P. Judge
   Title: Public Defender, Los Angeles County
   Address: 210 West Temple Street, 19th Floor, Los Angeles, CA 90012
   Telephone Number: (213) 974-2801 Fax Number: (213) 625-5031
   E-Mail Address:

4. The chair of the governing body of the implementing agency: (Provide address and telephone number other than that of the implementing agency.)

   Name: Zev Yaroslavsky
   Title: Chairman, Los Angeles County Board of Supervisors
   Address: 383 Kenneth Hall of Administration, Los Angeles, CA 90012
   Telephone Number: (213) 974-3333 Fax Number: (213) 625-7360
   E-Mail Address:

5. The person responsible for the project from the applicant agency, if different than #1:

   Name: Robert E. Kalunian
   Title: Chief Deputy Public Defender, Los Angeles County
   Address: 210 West Temple Street, 19th Floor, Los Angeles, CA 90012
   Telephone Number: (213) 974-7060 Fax Number: (213) 974-7060
   E-Mail Address: rkalunia@co.la.ca.us

PROJECT SUMMARY

1. PROJECT YEAR	2. PROJECT TITLE	3. GRANT PERIOD
X New _ Year 2 _ Year 3 _ Other _____	**California Innocence Protection Program**	January 1, 2002 To December 31, 2002

4. APPLICANT
Name: Los Angeles County Public Defender Phone: (213) 974-2801

Address: 210 West Temple St., 19th Floor Fax #: (213) 625-5031
Los Angeles, CA 90012

5. FUNDS REQUESTED

$ 209,034

6. IMPLEMENTING AGENCY
Name: Los Angeles County Public Defender Phone: (213) 974-2801 Fax #: (213) 625-5031

Address: 210 West Temple Street, 19th Floor
Los Angeles, CA 90012

7. PROGRAM DESCRIPTION

The Los Angeles County Public Defender proposes to create a California Innocence Protection Program (CIPP) Unit within its Office in the Central Court. The Project will provide representation to all former Public Defender clients, currently in state prison (on a case in which the Office represented the inmate) who request counsel for the purpose of filing and litigating a motion pursuant to Penal Code section 1405. The Project will also respond to notification pursuant to Penal Code section 1417.9 regarding the disposal of biological material, which would clearly impact a Penal Code section 1405 motion. The Project will consist of an experienced Deputy Public Defender and Instigator and will utilize a team approach to achieve all grant program objectives.

8. PROBLEM STATEMENT

The primary problem affecting the implementation of Penal Code section 1405 is that many of the requests received by the Public Defender to date have been handled by individual attorneys with regular felony case assignments. Based on the increasing number of these requests, a single project unit of an attorney(s) and an investigator(s) could more effectively and efficiently process these cases. The complexity of the issues involved in these cases and the need for extensive investigation to locate evidence demands a team of attorney(s) and investigator(s) working together to review and handle these cases.

9. OBJECTIVES

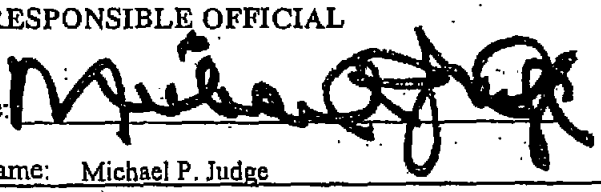
Objective #1- 50 Eligible requests for motions under P.C. 1405 will be accepted.
Objective #2- 50 Cases will involve a preliminary investigation.
Objective #3- 8 Cases will involve a full investigation and a motion under P.C. 1405 for a state habeas corpus petition based solely on a claim of actual innocence that is supported by other evidence.
Objective #4- 4 Cases will involve the appellant/client being represented in the trial court in an attempt to vacate the conviction.
Objective #5- 2 Cases where the appellant/client's judgment will be vacated or the conviction overturned as a direct Result of the project's intervention.

10. ACTIVITIES	11. CATEGORY
Attorney will perform review of case, contact California Western Innocence Project to determine if that Project has also received a request from client, seek appointment on the case from the Court, contact client and discuss motion procedure, open project data base, conduct preliminary and full investigations, review case documents, prepare motions, litigate motions, arrange for testing of evidence, prepare motion for writ of habeas corpus or new trial, input all activities in Project data base.	– – – –
	12. PROGRAM AREA – – – –
13. EVALUATION Qualitative evaluation will be conducted to determine whether Project Unit attorney has responded to all of the requests made by eligible clients in an efficient and effective manner. Quantitative evaluation will be conducted to determine whether the number of cases projected for each of the five objectives have been met.	14. NUMBER OF CLIENTS TO BE SERVED **50**

15. PROJECTED BUDGET

	Personnel Services	Operating Expenses	Equipment	TOTAL
Funds Requested	**$203,764**	**$5,270**	**-0-**	**$209,034**
Other Grant Funds	**-0-**	**-0-**	**-0-**	**-0-**
Other Sources (list in-kind, fees, etc.)	**-0-**	**-0-**	**-0-**	**-0-**
_____				
_____				
_____				
_____				

16. NAME OF RESPONSIBLE OFFICIAL

Signature: 

Date: 1-8-02

Typed Name: Michael P. Judge

Title: Public Defender, Los Angeles County

OCJP-227 (Rev. 7/97)

BUDGET CATEGORY AND LINE ITEM DETAIL

A. Personal Services - Salaries/Employee Benefits	COST
1.0 Deputy Public Defender IV 12 months @ $ 9, 717.27/month @100%	$151, 048
Subtotal Net Salary $116,607 Plus Employee Benefits (@29.53596%) $ 34,441 Total S&EB $151,048	
The Deputy Public Defender IV will be the attorney who works the Project by reviewing inmate requests, accepting eligible requests, preparing and conducting all preliminary investigations and full investigations, and representing clients in the trial courts. This attorney will also keep and maintain all program and statistic source documents.	
1.0 Investigator II – P.D. (part-time) 12 months @ $6,640.82/month @ 6.847%	$ 6, 693
Subtotal Net Salary $ 79,689 Plus Employee Benefits (at 32.03%) $25,525 Total Net S&EB $105,214 (Less Salary Savings @ 7.09%) ($7,459) Total S&EB $ 97, 755 6.847% $6,693	
The Investigator II will work part-time on the grant and assist the Deputy Public Defender IV in conducting preliminary and full investigations.	
*Employee Benefits include: vacation, holidays, sick leave, bereavement leave, military leave, jury duty, witness leave, injury leave and civil service exam leave. For other benefits, Los Angeles County offers various cafeteria plans. The following include the most common benefits: retirement, medical, dental, life insurance, short and long term disability and Worker's Compensation.	
TOTAL	$157,741

OCJP-A303a (Rev. 7/97)

BUDGET CATEGORY AND LINE ITEM DETAIL B. Operating Expenses	COST
Audit Costs - ($1500 maximum or 1% of grant total if over $150,000)	$ 900
OCJP Training/Conferences - To send two Project staff to a minimum of one OCJP sponsored training/conferences during the grant year. The Project will use County travel rates. Airfare (for 2 @ $394/roundtrip) $788 Lodging (for 2 @ $150 per night – 2@ $150X1) $300 Transportation/Shuttle (for 2 at $30) $60 Subsistence @ $52.75 daily (2 for 2 seminar days) $211 Total $1,359	$ 1,359
TOTAL	$ 2,259

BUDGET CATEGORY AND LINE ITEM DETAIL	
C. Equipment	COST
CATEGORY TOTAL	-0-
PROJECT TOTAL	$160, 000

FUND DISTRIBUTION	FEDERAL	STATE	CASH MATCH	IN-KIND MATCH
1. Amount of Funds	-0-	$160,000	-0-	-0-
2. Percentage of Funds	-0-	100%	-0-	-0-

OCJP-A303c (Rev. 7/97)

CALIFORNIA INNOCENCE PROTECTION PROGRAM
BUDGET NARRATIVE

The Los Angeles County Public Defender's Office intends to use funds under the California Innocence Protection Program to assist indigent inmates convicted of a crime(s) in California State Courts establish their actual innocence through the use of post-conviction DNA testing. The grant will fully fund an experienced Deputy Public Defender and partially fund a Deputy Investigator to investigate, prepare and litigate motions for DNA testing pursuant to Penal Code § 1405.

A significant portion of the of **$209,034** proposed budget is allocated to **Personal Services** (Salaries and Employee Benefits) and the funding of a Deputy Public Defender Grade IV attorney and a Deputy Investigator II (half-time) to staff the Project at a cost of $203,764. **Operating Expenses** totaling $5,270 consist of Audit Costs, Training/Conference expenses for Office of Criminal Justice Planning (OCJP) sponsored training and Administrative Expenses (mailing, photocopying and interstate travel).

Personal Services

A considerable portion of the grant award is being allocated to support direct services of the attorney and investigator. The attorney will provide full, competent representation to eligible inmates who request assistance with motions pursuant to Penal Code §1405. The grant will fund 100 % of the attorney's salary ($128,268) and employee benefits ($56,548) less salary savings at 3.7% ($4,746) for a total of $ 160,070.

The Attorney is responsible for reviewing all inmate requests, accepting eligible requests, preparing and conducting all preliminary and full investigations and representing clients in the trail court on the motion pursuant to Penal Code §1405. The attorney will also

keep and maintain all program and statistic source documents.

The Attorney assigned to the Project will be an attorney licensed to practice law in the State of California and a Deputy Public Defender (Grade IV) with felony trial experience.

The remainder of the Personal Services budget will fund a Deputy Investigator II who will work half-time on the grant. The grant will fund a salary of $39,845, employee benefits of $5,423, less salary savings at 3.7% ($1,475) for a total of $ 43,694.

The Deputy Investigator II will assist the Deputy Public Defender IV in conducting all preliminary and full investigations as well as assisting in court when required.

Operating Expenses

Operating Expenses include Audit Costs, OCJP Training/Conference and Administrative Expenses. The first line item in this budget category is $900 for the cost of the OCJP required independent audit. Pursuant to OCJP Handbook § 8151, a maximum of $1,500 or up to 1% of the total grant allocation may be budgeted for the audit for grants over $150,000. Our experience with the size of our proposed program suggests the $900 figure. The audit is required by OCJP to safeguard OCJP assets and to ensure all funds are accounted for. Conferences, seminars, and workshops benefit the project in that they educate staff regarding current techniques and resources to accomplish project activities and achieve project objectives.

The second line item is for OCJP Training/Conference costs. Projects are required to budget for OCJP training and conferences during the grant year. Per the RFP, the Los Angeles County Public Defender's CIPP Project has budgeted for two Project staff persons

to attend one OCJP Training/Conference at a total cost of $1,271. This cost includes: Registration at $400 (one training for two at $200 each), airfare at $300 ($150/round-trip for two people), lodging at $300 ($150/night per person for two), transportation/shuttle costs of $60 ($30 round trip from and to airport for two), and subsistence at $211 ($52.75 daily for two seminar days for two).

The third line item is for Administrative Expenses including mailing, photocopying and interstate travel. Mailing expenses include sending important documents to either the client at a state prison facility, to law enforcement agencies or to laboratories. It is estimated that two courier service packages will be sent per case. The Project estimates it will accept fifty (50) eligible cases. The average cost of the courier service used by the County ("Fed Ex) is $20 per package. The total estimated mailing costs is $2,000. Photocopying expenses are for copying documents from the court file as well as law enforcement agencies or the coroner's office. The estimated number of pages to be copied is 250 pages per case for fifty cases for a total of 12,500 pages . The cost per page is $.03, therefore, the total photocopying cost is $375. Interstate travel to the prisons to meet with the client is estimated for the eight cases where a hearing is scheduled. It is anticipated that four trips will be in Southern California where the attorney can drive; the other four trips will be in Northern California where the attorney must travel by air. Four trips have been estimated at 100 miles at $ .31 per mile for a total of $124. Four trips have been estimate at $150 per round trip airfare travel for a total of $600. The total interstate travel is budgeted at $724.

Subcontracts, unusual expenditures and equipment are not applicable to the CIPP Project grant.

LOS ANGELES COUNTY PUBLIC DEFENDER
CALIFORNIA INNOCENCE PROTECTION PROGRAM (CIPP)

NARRATIVE

PROBLEM STATEMENT

On January 1, 2001, Penal Code §1405 established a new procedure for indigent convicted persons to request appointment of counsel in order to investigate and file a motion for post-conviction DNA testing. By April of 2001, the Los Angeles County Public Defender's Office had developed a protocol for handling Penal Code § 1405 requests and by May, had received a handful of inmate requests. Twenty seven (27) requests have been received through December, 2001.

The primary problem affecting the implementation of Penal Code §1405 is that many of the requests received to date have been handled by individual attorneys with regular felony caseloads. Based on the increasing number of these requests, a single project unit of an attorney(s) and an investigator(s) could more effectively and efficiently process these cases. The complexity of the issues involved in these cases and the need for extensive investigation to locate evidence demands a team of an attorney(s) and an investigator(s) working together to review and handle these cases. This team would also be charged with training others as more of these cases come to the attention of the courts, especially in an office as large as this one.

The issues in these cases require an attorney who possess the expertise in understanding available DNA technologies and who is well versed in the types of DNA testing that are currently available as well as the limitations of some of previous types of tests. In the short time this Office has been handling these cases, it has become clear that locating "the evidence" pursuant to the statute is often extremely difficult. The use of an investigator to help locate the evidence would be extremely beneficial when it has been determined that the law enforcement agency no longer possesses the evidence.

The Los Angeles County Public Defender proposes to create a California Innocence Protection Program (CIPP) Unit within its office in the Central Court. The Project however, will provide representation to all former Public Defender clients, currently in state prison (on a case in which the office represented the inmate) who request counsel for the purpose of filing and litigating a motion pursuant to Penal Code § 1405. The Project will also respond to notification pursuant to Penal Code §1417.9 regarding the disposal of biological material which would clearly impact a Penal Code § 1405 motion. The Project will consist of an experienced Deputy Public Defender Grade IV and a Deputy Investigator II and utilize a team approach to achieve all grant program objectives.

When a request for DNA testing is referred to the Los Angeles County Public Defender by the Court, the District Attorney, the Attorney General, or some other agency or the client contacts the Public Defender directly, the attorney assigned to handle the case seeks appointment from the court. As requests from inmates throughout the state are often forwarded to either the Innocence Project at California Western School of Law (for cases originating in Southern California) and Santa Clara University School of Law (for those cases originating in Northern California), the attorney will also contact the California Western Innocence Project at California Western School of Law to determine if that Project has received a request from the inmate and whether any work has been done on the case so as not to duplicate program services.

To date, this Office has received 27 requests for assistance pursuant to the Penal Code § 1405. In 26 of these cases, a full investigation was conducted. Motions were prepared, presented to the trial court and granted in three cases. In one case the conviction was overturned and the client exonerated; the other two cases are currently pending. If the current rate remains constant, ıe Public Defender will receive approximately 50 program eligible requests during the grant year.

PLAN

The Los Angeles County Public Defender's Office proposes to provide representation to all former public defender clients, currently in state prison who request counsel for the purpose of investigating, filing a motion and litigating a motion pursuant to Penal Code Section 1405. The Project will also respond to notification pursuant to Penal Code § 1417.9 for the disposal of biological material.

Objectives

- **Objective #1** **50** Program eligible requests will be received.

The attorney will perform a cursory review of the case by checking Public Defender and Court records to determine if the Los Angeles County Public Defender represented the client and if any conflict exists in representing the client. The attorney will also contact the California Western Innocence Project to determine if that Project has also received a request from the client, so as not to duplicate program services. If the individual wrote to us directly and was represented by a private attorney, the letter will be forwarded to the Post Conviction Assistance Center in Los Angeles County; If represented by the Alternate Public Defender, the letter will forwarded to that office. If the client was represented by the Public Defender, a letter regarding the motion process and appointment of counsel as well as a Client Case Assessment form will be sent to the client. The Project will maintain a copy of the letter/request from the client as well as any other correspondence with the inmate.

- **Objective #2** **50** Cases will involve a preliminary investigation.

The attorney will obtain the Public Defender file and prepare an order requesting the court appoint the Public Defender. The attorney will open a client file in the Project Data Base and input all of the information obtained; this documentation is continued throughout the case. The attorney and the investigator will review the Public Defender file making copies of all of the property reports, lab reports, preliminary hearing transcript and any other documents deemed relevant. The attorney

and the investigator will also review the Client Case Assessment form. The attorney will contact the trial attorney of record to determine if they have any additional relevant information. The attorney with the assistance of the investigator will contact in writing the agency (law enforcement, coroner, court clerk) who should have possession of the physical evidence and request the location of the evidence. If the evidence is not available, the attorney will prepare an investigation request for a preliminary investigation regarding the existence and/or destruction of the evidence or additional evidence retained by an outside agency. The attorney will continue to input all project activities and information obtained into the Project Data Base. Other documentation to be maintained include the original case file, the Court Order pursuant to Penal Code §1405, the Client Case Assessment form, notes, case chronology and investigation request.

- **Objective #3** 8 Cases where a full investigation will be conducted and a motion under Section 1405 or for a state habeas corpus petition based solely on a claim of actual innocence that is supported by other evidence.

The attorney and investigator will re-review the client's request and file and conduct further investigation and obtain the trial transcript. If the client has a colorable claim, a declaration and motion will be prepared. The attorney will visit the client at the state prison facility where he/she is housed and discuss the motion procedures and have the client sign the declaration. The attorney will then file the motion on the appropriate parties. The attorney, where appropriate, will prepare a response to any prosecution opposition to the motion. The attorney will continue to maintain all documents, including the motion, opposition and response(s) in the client's file and to update the Project Data Base.

- **Objective #4** 4 Cases where the appellant(s) will be represented in trial court in an attempt to vacate a conviction.

If the motion is opposed by the prosecution the court will set the matter for a hearing in the same court where the trial was heard or plea taken, if that judge is still sitting in a criminal assignment, otherwise the matter will be assigned to a court by the supervising judge. The attorney will appear

in court and litigate the motion. If the motion is granted, the attorney will arrange for testing of the DNA by selecting a laboratory and arranging for evidence samples to be transported to the testing facility as well as having prison officials obtain a blood and saliva sample from the client and having it shipped overnight to the laboratory. The attorney will be responsible for obtaining the test results. If the motion is not granted, the attorney will determine the appropriateness of taking a writ. If a writ is appropriate, the attorney will work with the Public Defender's Appellate Division to prepare the writ. All documents will be maintained in the file including testing results, court orders and writs and all information entered into the Project Data Base.

- **Objective #5** 2 In two cases the appellant's judgment will be vacated or the appellant's conviction will be overturned as a direct result of the Project's intervention.

If the testing results are favorable, the attorney will prepare a petition for habeas corpus or motion for new trial, whichever is appropriate. The attorney will log all information into the Project Data Base and copies of all petitions and motions will become part of the case file.

By implementing the objectives, activities and documentation procedures described above, it is anticipated that the project team will handle almost twice as many eligible requests and motions as handled by individual attorneys in the year 2001. By only handling these types of cases, the attorney and investigator will enhance their own particular expertise in handling these cases and will be able to handle a greater number of these cases, thus making the handling of these cases more effective and efficient. Additionally, the Project team will begin training others to handle these cases to significantly develop the requisite expertise in handling these matters as more cases come to the attention of the Courts.

IMPLEMENTATION

Organizational Description - The Office of the Public Defender provides constitutionally mandated legal representation to indigent criminal defendants in the Superior, Municipal and Juvenile courts of Los Angeles County. Established in 1913, the Los Angeles County Public Defender is the oldest and largest governmental defender office in the United States and is universally regarded as one of the premier offices in the Country.

The workload is approximately six hundred thousand cases annually. The current office staff of approximately 900 members is composed of some 600 trial attorneys, supported by paralegals, investigators, social workers, law clerks and clerical staff. The Department has offices in 40 separate locations throughout the County.

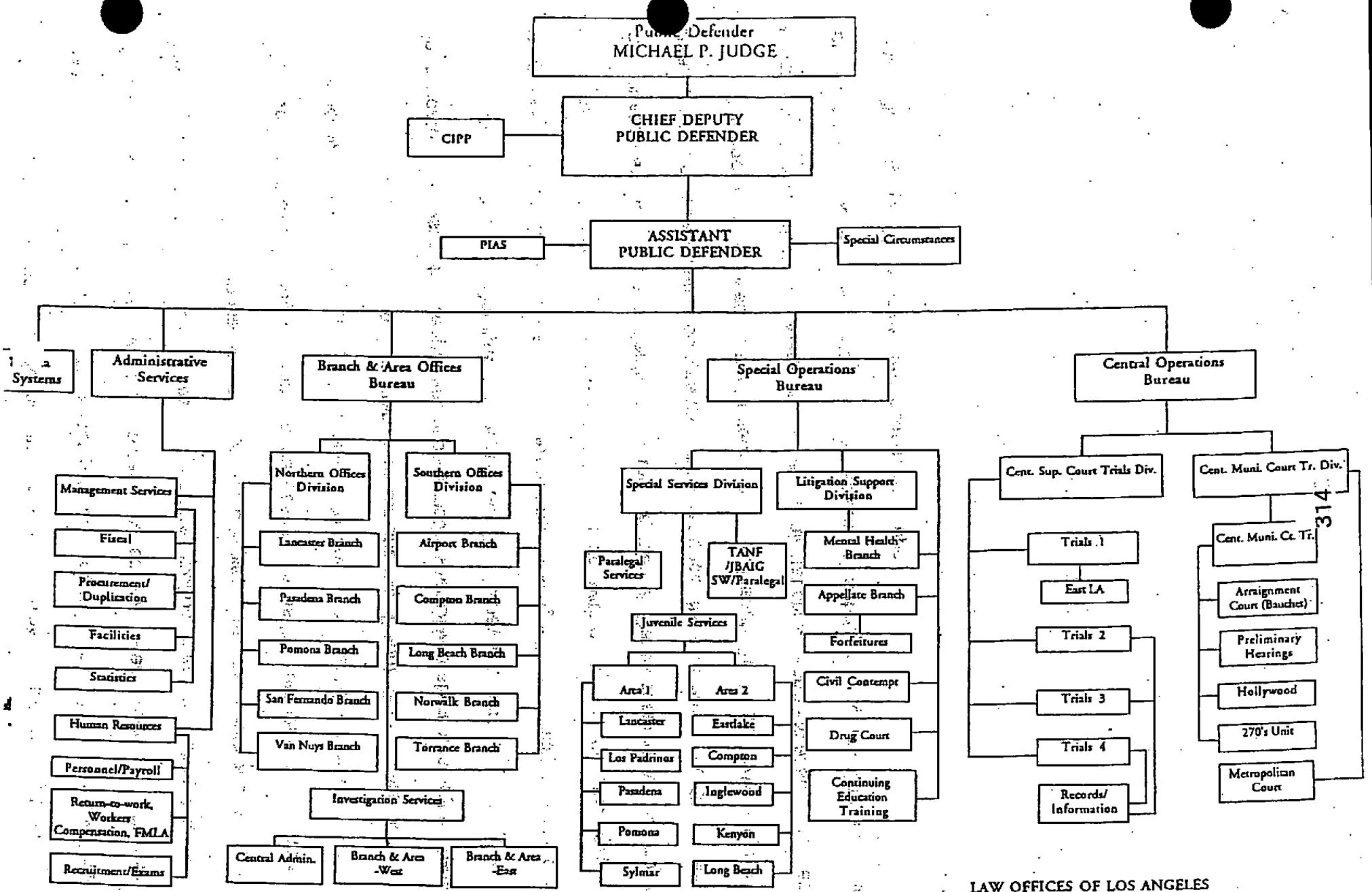
The main mission of the Department is to provide fully competent representation to indigents accused of criminal behavior. The Office strives to maintain quality representation in a most effective manner.

The structure of the Office is depicted in its Organization Chart (See Attached). The Public Defender is the Department Head. The Assistant Public Defender, Special Circumstance Coordinator and the four Bureau Chiefs (Administrative Services, Branch and Area, Special Operations and Central Operations) report directly to the Chief Deputy Public Defender who reports to the Public Defender. With the exception of Administrative Services, each Bureau has at least one Division Chief who reports to the Bureau Chief. The Public Defender's Office has forty (40) separate office locations throughout Los Angeles County. Head Deputies and Deputies-in-Charge oversee the operations of the Branch and smaller Area office locations.

The Office is governed by California Penal Code Sections 987 et seq., California Government Code Sections 27700 et seq., the Los Angeles County Ordinance, Los Angeles County Charter and Public Defender Policy and Procedures. The Board of Supervisors is the governing body for all County departments.

The Public Defender has developed considerable expertise in handling these types of cases during the very short time the statute has been on the books. The Public Defender has developed a protocol for handling these types of cases, has been appointed by the court in 27 cases, and has been successful in each of the three motions made by Public Defender attorneys in the trial court. This proposal would implement a Project team that would facilitate a more effective and efficient handling of these cases, especially as the number of cases increase and would allow for a training ground to train other attorneys and investigators to handle these cases.

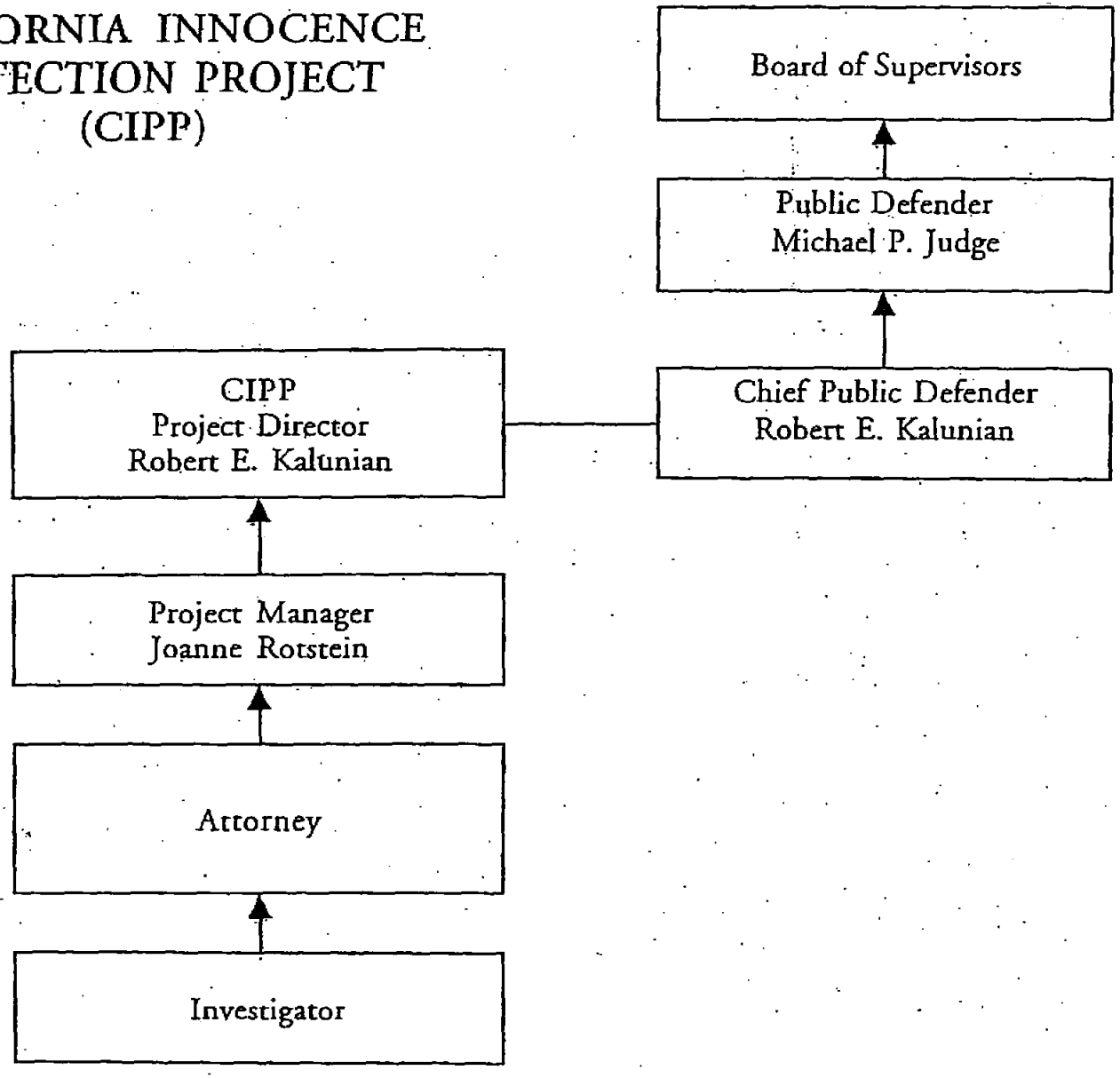
The grant will fund a project team of an experienced Deputy Public Defender and Deputy Investigator to investigate, prepare and litigate motions for DNA testing pursuant to Penal Code § 1405. The Deputy Public Defender will be a Grade IV attorney with experience in handling homicides and sexual assaults as well as experience dealing with forensics and physical evidence. The Investigator will be a Grade II investigator with experience in crime scene investigation and locating and identifying material evidence. Cases assigned to the Project will be taken out of the usual chain of command and placed under the direction of the Chief Deputy Public Defender who will oversee the Project. The Chief Deputy Public Defender with the assistance of the CIPP Project Manager will review all statistical reports to assure progress toward objectives and compliance with Grant Guidelines and will submit the required Office of Criminal Justice Planning (OCJP) progress and expenditure reports.



LAW OFFICES OF LOS ANGELES
COUNTY PUBLIC DEFENDER
ORGANIZATIONAL CHART - JANUARY 2002

Los Angeles County

CALIFORNIA INNOCENCE PROTECTION PROJECT (CIPP)



STATE OF CALIFORNIA

STANDARD AGREEMENT

STD. 2 (REV. 5-91)

APPROVED BY THE ATTORNEY GENERAL

CONTRACT NUMBER	AM. NO.
CK01010190	1

TAXPAYER'S FEDERAL EMPLOYER IDENTIFICATION NUMBER

THIS AGREEMENT, made and entered into this 31st day of December, 2001 in the State of California, by and between the State of California, through its duly elected or appointed, qualified and acting

TITLE OF OFFICER ACTING FOR STATE	AGENCY
Executive Director	Office of Criminal Justice Planning

hereinafter called the State, and

CONTRACTOR'S NAME
Los Angeles County

hereinafter called the Contractor.

WITNESSETH: That the Contractor for and in consideration of the covenants, conditions, agreements, and stipulations of the State hereinafter expressed, does hereby agree to furnish to the State services and materials as follows: *(Set forth service to be rendered by Contractor, amount to be paid Contractor, time for performance or completion, and attach plans and specifications, if any.)*

Grant Award Agreement No. CK 01010190 is hereby amended to change the end date from December 31, 2002 to March 31, 2003.

All other provisions of this agreement shall remain as previously agreed upon.

Funds: State General

Match: None

The provisions on the reverse side hereof constitute a part of this agreement.

IN WITNESS WHEREOF, this agreement has been executed by the parties hereto, upon the date first above written.

STATE OF CALIFORNIA	CONTRACTOR
AGENCY: Office of Criminal Justice Planning	CONTRACTOR (If other than an individual, state whether a corporation, partnership, etc.): Los Angeles County Public Defender
BY (AUTHORIZED SIGNATURE): RD Papa	BY (AUTHORIZED SIGNATURE): Michael P. Judge
PRINTED NAME OF PERSON SIGNING: Wayne Strumpfer DEC 10 2002	PRINTED NAME OF PERSON SIGNING: MICHAEL P. JUDGE TITLE: L.A. County Public Defender
TITLE: Executive Director	ADDRESS (City) (State) (Zip Code): 210 W. Temple St., 19th Fl., Los Angeles, CA 900

AMOUNT ENCUMBERED BY THIS DOCUMENT: $ No additional funds emcumbered.	PROGRAM / CATEGORY (CODE AND TITLE)		FUND TITLE		DEPARTMENT OF GENERAL SERVICES USE ONLY
PRIOR AMOUNT ENCUMBERED FOR THIS CONTRACT: $	(OPTIONAL USE)				
TOTAL AMOUNT ENCUMBERED TO DATE	ITEM	CHAPTER	STATUTE	FISCAL YEAR	
	OBJECT OF EXPENDITURE (CODE AND TITLE)				

No Additional Funds Requested

No Additional Funds Requested

I hereby certify upon my personal knowledge that budgeted funds are available for the period and purpose of the expenditure stated above.	T.B.A. NO.	B.R. NO.
SIGNATURE OF ACCOUNTING OFFICER: Michele D Bird	DATE: 12/9/02	

I hereby certify that all conditions for exemptions have been complied with, and this contract is exempt from Department of General Services approval.

Contractor State Agency Dept. of Gen. Ser. Controller

THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATERMARK - VIEW AT AN ANGLE

STATE OF CALIFORNIA

WARRANT NUMBER 07-330180

THE TREASURER OF THE STATE WILL PAY OUT OF THE FUND NO. 0001 FUND NAME GENERAL FUND

IDENTIFICATION NO. 8100 MO. 05 DAY 08 YR. 2002

80-1342/1211

07330180

TO:

--- TREAS/CO OF LOS ANGELES

DOLLARS	CENTS
$***11789	00

Kathleen Connell

KATHLEEN CONNELL
STATE CONTROLLER

FORM CD85 (2-97) CONTROLLERS WARRANT

:1211134231: 07330180511

REMITTANCE ADVICE

STD. 404C (REV. 4-86)

VENDOR-ID CK01010190-00

PAGE 1

STATE OF CALIFORNIA

THE ENCLOSED WARRANT IS IN PAYMENT OF THE INVOICES SHOWN BELOW

DEPARTMENT NAME	ORG. CODE	INVOICE DATE	INVOICE NUMBER	RPI	INVOICE AMOUNT
OFFICE OF CRIMINAL JUSTICE PLN	8100	/ /	#1		11789.00

DEPARTMENT ADDRESS

1130 K STREET, SUITE 300
SACRAMENTO CA 95814

CLAIM SCHED. NO. 3101413

VENDOR

TREAS/CO OF LOS ANGELES
CA INNOCENCE PROTECTION PROG
LOS ANGELES CO PUBLIC DEFENDER
210 WEST TEMPLE ST, RM 19-513
LOS ANGELES CA 90012

PAYMENT INQUIRIES:
(916)324-9170

MAY 14 20[illegible]

org # 15200
acct 8831

FEDERAL TAX ID NO. OR SSAN	RP TYPE	TAX YR	TOTAL REPORTED TO IRS	TOTAL PAYMENT
			.00	11789.00

REMITTANCE ADVICE
STD. 404C (REV. 4-95)

VENDOR-ID
CK01010190-00

PAGE 1

STATE OF CALIFORNIA

THE ENCLOSED WARRANT IS IN PAYMENT OF THE INVOICES SHOWN BELOW

DEPARTMENT NAME	ORG. CODE	INVOICE DATE	INVOICE NUMBER	INVOICE AMOUNT	RPI
OFFICE OF CRIMINAL JUSTICE PLN	8100	/ /	#2	39841.00	

DEPARTMENT ADDRESS
1130 K STREET, SUITE 300
SACRAMENTO CA. 95814

CLAIM SCHED. NO.
2200136

VENDOR
TREAS/CO OF LOS ANGELES
CA INNOCENCE PROTECTION PROG
LOS ANGELES CO PUBLIC DEFENDER
210 WEST TEMPLE ST. RM 19-513
LOS ANGELES CA 90013

C. JOANNU
ICIM

PAYMENT INQUIRIES:
(916)324-9170

FEDERAL TAX ID NO. OR SSAN	RP TYPE	TAX YR	TOTAL REPORTED TO IRS	TOTAL PAYMENT
			.00	39841.00

REMITTANCE ADVICE
STD. 404C (REV. 4-98)

VENDOR-ID
CK01010190-00

PAGE 1

STATE OF CALIFORNIA

THE ENCLOSED WARRANT IS IN PAYMENT OF THE INVOICES SHOWN BELOW

DEPARTMENT NAME	ORG. CODE	INVOICE DATE	INVOICE NUMBER	INVOICE AMOUNT	RPI
OFFICE OF CRIMINAL JUSTICE PLN	8100	/ /	#3	40916.00	

DEPARTMENT ADDRESS
1130 K STREET, SUITE 300
SACRAMENTO CA 95814

CLAIM SCHED. NO.
2200645

VENDOR
TREAS/CO OF LOS ANGELES
CA INNOCENCE PROTECTION PROG
LOS ANGELES CO PUBLIC DEFENDER
210 WEST TEMPLE ST, RM 19-513
LOS ANGELES CA 90012

PAYMENT INQUIRIES:
(916)324-9170

FEDERAL TAX ID NO. OR SSAN	RP TYPE	TAX YR	TOTAL REPORTED TO IRS	TOTAL PAYMENT
			.00	40916.00

THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATERMARK - VIEW AT AN ANGLE

STATE OF CALIFORNIA

WARRANT NUMBER 08-633298

THE TREASURER OF THE STATE WILL PAY OUT OF THE FUND NO. 0001 FUND NAME GENERAL FUND

IDENTIFICATION NO. 8100

MO. 11 DAY 18 YR. 2002

90-1342/1211

08633298

TO:

--- TREAS/CO OF LOS ANGELES

DOLLARS CENTS
$**40,916.00

Kathleen Connell

KATHLEEN CONNELL
STATE CONTROLLER

FORM CD85 (2-97) CONTROLLER'S WARRANT

⑆121134231⑆ 08633298⑈

Dick
FYI
Wendy

TO: JOANNE

FROM: LISA

J-2403

THIS IS FOR YOUR FILE. LS

THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATERMARK - VIEW AT AN ANGLE

STATE OF CALIFORNIA

WARRANT NUMBER 08-993302

THE TREASURER OF THE STATE WILL PAY OUT OF THE FUND NO. 0001 FUND NAME GENERAL FUND

IDENTIFICATION NO. 8100

MO. 02 DAY 11 YR. 2003

80-1342/1211

08993302

TO:

--- TREAS/CO OF LOS ANGELES

DOLLARS	CENTS
$***4240.7	00

#8831

STEVE WESTLY
CALIFORNIA STATE CONTROLLER

FORM CO26 (2-87) CONTROLLERS WARRANT

⑆121134231⑆ 08993302⑈

DMA OCT 02 - DEC 02

BSP 30700 J-2403

THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATERMARK - VIEW AT AN ANGLE

WARRANT NUMBER

STATE OF CALIFORNIA 04-358787

FUND NO. 0001 FUND NAME GENERAL FUND

H THE TREASURER OF THE STATE WILL PAY OUT OF THE

IDENTIFICATION NO. 8100

MO. 05 DAY 15 YR. 2003

90-1342/1211

04358787

DOLLARS	CENTS
$***25047	00

TO:

--- TREAS/CO OF LOS ANGELES

Steve Westly

STEVE WESTLY
CALIFORNIA STATE CONTROLLER

FORM 04-08 12-97 CONTROLLERS WARRANT

C1211134231: 04358787311" 8831

REMITTANCE ADVICE
STD. 404C (REV. 4-95)

VENDOR-ID
CK01010190-00

PAGE 1

STATE OF CALIFORNIA

THE ENCLOSED WARRANT IS IN PAYMENT OF THE INVOICES SHOWN BELOW

DEPARTMENT NAME	ORG. CODE
OFFICE OF CRIMINAL JUSTICE PLN	8100

DEPARTMENT ADDRESS	CLAIM SCHED. NO.
1130 K STREET, SUITE 300 SACRAMENTO CA 95814	2201458

VENDOR
TREAS/CO OF LOS ANGELES
CA INNOCENCE PROTECTION PROG
LOS ANGELES CO PUBLIC DEFENDER
210 WEST TEMPLE ST, RM 19-513
LOS ANGELES CA 90012

PAYMENT INQUIRIES:
(916)324-9170

INVOICE DATE	INVOICE NUMBER	INVOICE AMOUNT	RPI
/ /	3/03 F 5	25047.00	

#8831

DNA TAN - FEB. 2003
5th QTR.

FEDERAL TAX ID NO. OR SSAN	RP TYPE	TAX YR	TOTAL REPORTED TO IRS	TOTAL PAYMENT
			.00	25047.00

Deposited 5-23-03

cc. Wendy
John

Exhibit 5

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

Response to the Commission on State Mandates' Request for Additional Information Sections 1405, 1417.9 of the Penal Code As Added by Chapter 821, Statutes of 2000 Post Conviction: DNA Court Proceedings

Declaration of Hasmik Yaghobyan

Hasmik Yaghobyan makes the following declaration and statement under oath:

I, Hasmik Yaghobyan, Assistant SB 90 Coordinator, in and for the County of Los Angeles, I am responsible for assisting in filing for test claims, reviews of State agency comments, Commission staff analysis, and for proposing parameters and guidelines (P's& G's) and amendments thereto, all for the complete and timely recovery of costs mandated by the State. Specifically, I have prepared the subject test claim.

Specifically, I declare that I have examined the County's State mandated duties and resulting costs, in implementing the subject law, and find that such costs as set forth in the subject test claim, are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are therein stated as information or belief, and as to those matters I believe them to be true.

9/19/03, Los Angeles, CA
Date and Place

Signature

Mailing List
Claim Number: 00-TC-21
Post Conviction: DNA Court Proceedings

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Los Angeles County Sheriff's Department
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Ms. Sharon Joyce, Staff Counsel
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Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
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Claim Number: 00-TC-21
Post Conviction: DNA Court Proceedings

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San Bernardino, CA 92415-0004

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Rancho Cordova, CA 95670

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Riverside, CA 92502

Mr. Jim Spano,
State Controller's Office
Division of Audits (B-8)
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Sacramento, California 95814

Mr. David Wellhouse,
Wellhouse & Associates
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San Leandro, CA 94578-0192

Mr. Bradley Burgess
Public Resource Management Group
1380 Lead hill Blvd., Suite 106
Roseville, CA 95661

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Hasmik Yaghobyan states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 603 Kenneth Hahn Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 19th day of September 2003, I served the attached:

Documents: Response to the Commission on State Mandates', Request for Additional Information, Section 1405, 1417.9 of the Penal Code, As Added by Chapter 821, Statutes of 2000, Post Conviction: DNA Court Proceedings, including *a 1 page letter of J. Tyler McCauley dated 9/19/03, a 4 page narrative, an 18 page declaration of L. Peter Zavala (Exhibit 1), a 1 page declaration of Dean M. Gialamas (Exhibit 2), an 18 page declaration of Conrad Meredith (Exhibit 3), a 35 declaration of Robert E. Kalunian (Exhibit 4), and a 1 page declaration of Hasmik Yaghobyan (Exhibit 5), now* pending before the Commission on State Mandates.

upon all Interested Parties listed on the attachment hereto and by

[X] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date. Commission on State Mandates FAX as well as mail of originals.

[ ] by placing [ ] true copies [ ] original thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) as set forth below at the indicated address.

PLEASE SEE ATTACHED MAILING LIST

That I am readily familiar with the business practice of the Los Angeles County for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United States mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of September, 2003, at Los Angeles, California.

Hasmik Yaghobyan

EXHIBIT J

COUNTY OF LOS ANGELES
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET, ROOM 525
LOS ANGELES, CALIFORNIA 90012-2766
PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

October 30, 2003

RECEIVED
OCT 3 0 2003
COMMISSION ON
STATE MANDATES

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

Attorney General's "Postconviction DNA Testing Recommendations For Retention, Storage and Disposal of Biological Evidence" Pursuant to Implementing Penal Code Sections 1405 and 1417.9, Statutes of 2000, Chapter 821, Statutes of 2001, Chapter 943;
Los Angeles County Test Claim [CSM: 01-TC-08/00-TC-21]
Post Conviction: DNA Court Proceedings

We submit the subject recommendations for implementing the [above] test claim legislation.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

J. Tyler McCauley
Auditor-Controller

JTM:JN:LK
Enclosures

"To Enrich Lives Through Effective and Caring Service"

BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

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E-Mail: michael.chamberlain@doj.ca.gov

July 9, 2002

Mr. Leonard Kaye
Auditor/Controller's Office
City of Los Angeles
500 West Temple Street, Room 603
Los Angeles, CA 90012

Dear Leonard:

Enclosed is a copy of the Attorney General's Task Force Report we discussed.

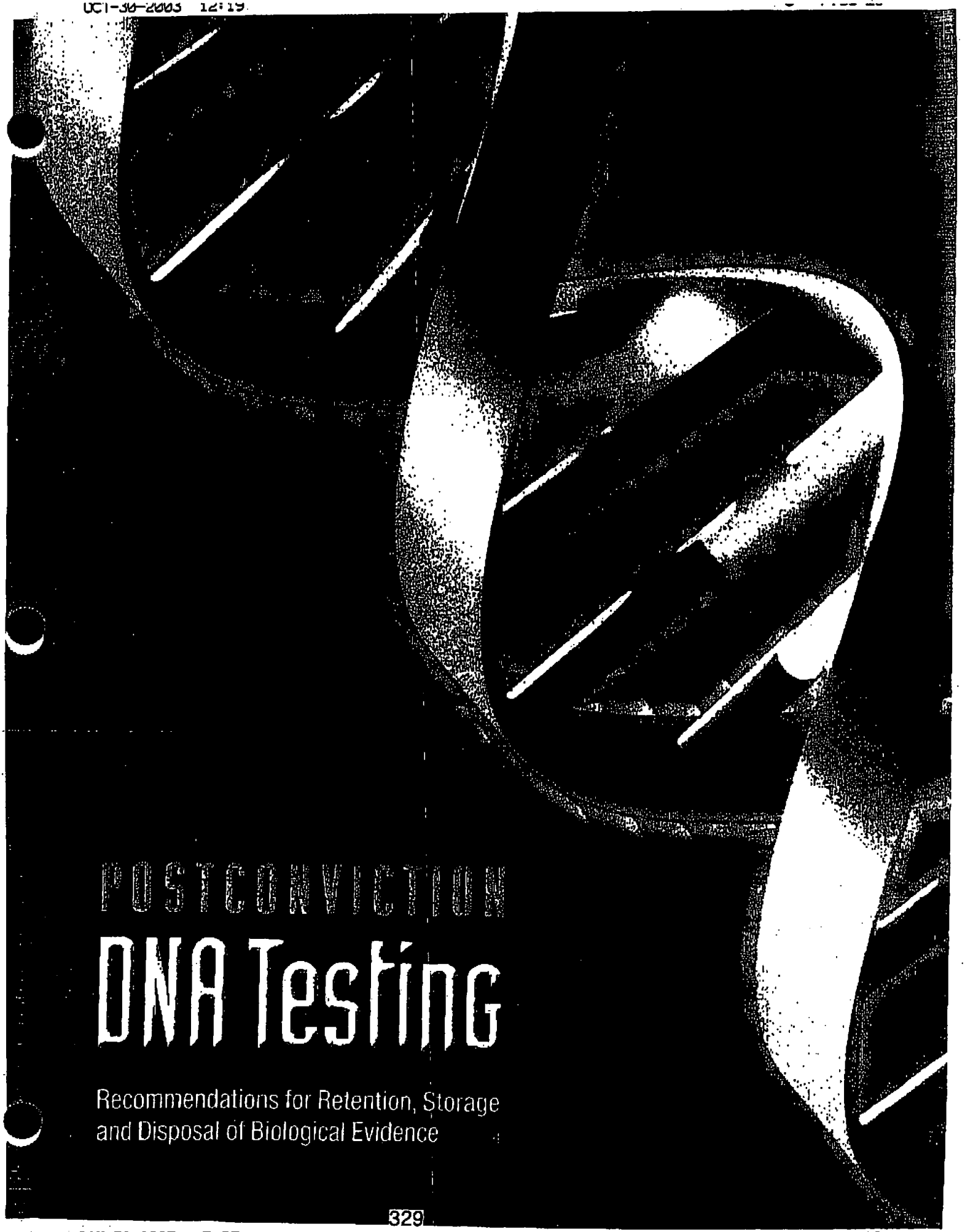
Once again, thank you very much for all of your help on this project, and let us know if there is anything we can do to help out in the ongoing test claim process.

Very truly yours,

Mike Chamberlain

MICHAEL CHAMBERLAIN
Deputy Attorney General

For BILL LOCKYER
Attorney General



POSTCONVICTION DNA Testing

Recommendations for Retention, Storage and Disposal of Biological Evidence

STATE OF CALIFORNIA
OFFICE of the ATTORNEY GENERAL
BILL LOCKYER

On January 1, 2001, a new postconviction testing law was enacted in California. This law, which provides a mechanism for inmates to seek postconviction DNA testing of evidence, creates a new safety check on our criminal justice system that will ensure wrongly convicted persons have the ability to prove their innocence through the use of newly developed technology. It is the goal of the Postconviction Testing/Evidence Retention Task Force and the California law enforcement community to offer full and fair access to postconviction testing for meritorious claims.

Implementation of postconviction testing procedures raises significant questions regarding evidence retention which law enforcement agencies and the courts will need to address. I formed this Task Force in order to provide guidance to law enforcement agencies, prosecutors and the courts, on which the core responsibilities for implementation fall. Its charge was to develop consensus about the likely impact of the new law and to provide information, in the form of non-binding recommendations, to assist agencies in complying with its mandates.

The non-binding recommendations compiled in this report address evidence handling and storage issues under California's new postconviction testing law. The Task Force's deliberations and final recommendations were informed by current best practices among California law enforcement for evidence handling and storage.

Cooperation among law enforcement, district attorneys, the judiciary, and defense counsel to utilize postconviction testing in appropriate cases will provide Californians with confidence in the fairness of our criminal justice system. I believe that the Task Force's report reflects a spirit of cooperation and commitment to seeing that justice is done in California.

Sincerely,

Bill Lockyer

BILL LOCKYER
Attorney General
State of California

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Executive Summary

In January 2001, the Attorney General of California called together individuals from law enforcement, district attorneys offices, the judiciary and forensic laboratories to form a Postconviction Testing/Evidence Retention Task Force to address the new **Postconviction DNA Testing Law (SB 1342)** that went into effect January 1, 2001. The law was amended by SB 83, effective January 1, 2002.

Under California's postconviction evidence retention and testing law, Penal Code sections 1405 and 1417.9, it is the responsibility of governmental entities, including the courts, in felony conviction cases to retain evidence after conviction in a manner suitable for DNA testing.

The Task Force's charge was to provide information on compliance with the law's mandate regarding biological evidence. (The Task Force did not address the legal issues raised by motions for postconviction testing under the new law.)

Task force recommendations are not binding; they are intended to increase awareness among California law enforcement agencies regarding the postconviction law and to offer guidance for complying with its mandates.

RETENTION OF BIOLOGICAL EVIDENCE

Agencies should retain all items that have a **"reasonable likelihood"** of containing biological evidence. The determination of whether evidence is reasonably likely to contain biological material should be made by or in consultation with an official who has the experience and background sufficient to make such a determination. **If there is any reasonable question, the item should be retained.** The case investigator or prosecutor should be contacted if possible.

STORAGE AND HANDLING OF BIOLOGICAL EVIDENCE AT TRIAL

Courts should attempt to obtain a stipulation from the parties that biological material need not be brought into court and that secondary evidence (photographs, computer images, video tape, etc.) may be used. Courts are urged to discourage the opening of any package containing biological material.

If a court cannot retain evidence on a long-term basis, court personnel should contact the appropriate agency (prosecutor, law enforcement agency or laboratory) for assistance with long-term storage. In such circumstances, the court should document the location of any evidence that is not retained by the court. The court should attempt to obtain a stipulation from the parties that designated items containing biological evidence will be retained for storage by the appropriate agency following trial.

In order to maintain the possibility of successful DNA testing with techniques currently in use, evidence containing biological material:

- Should be stored in a dried condition.
- Should be stored frozen, under cold/dry conditions, or in a controlled room temperature environment with little fluctuation in either temperature or humidity.
- Should not be subjected to repeated thawing or freezing.

DISPOSAL OF BIOLOGICAL EVIDENCE

In all felony cases, evidence containing biological material must be retained until:

1. Notice of disposal is given to all appropriate parties and no response is received within 90 days of the notice being sent;

   OR

2. After the inmate is no longer incarcerated in connection with the case.

Even if one of the conditions above is met, it is recommended that the retaining agency contact the investigating officers to see if they have any objections to disposing of evidence.

Summary of Postconviction Evidence Retention and Testing Law

enate Bill 1342 was passed by the Legislature and signed by Governor Gray Davis on September 28, 2000. As chaptered, the bill added to the Penal Code sections 1405 and 1417.9 and deleted section 1417. Senate Bill 83 amended the law effective January 1, 2002.

WHO IS ELIGIBLE TO MAKE A MOTION

The statute grants to a defendant who was convicted of a felony and currently serving a term of imprisonment the right to make a written motion before the court which entered the conviction for the performance of forensic DNA testing.

An indigent convicted person may request appointment of counsel by sending a written request to the court.

THE MOTION

The motion for DNA testing must be verified by the convicted person under penalty of perjury and must:

- Explain why the applicant's identity was or should have been a significant issue in the case;
- Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction;
- Make reasonable attempts to identify the evidence to be tested and the type of DNA testing sought;
- State whether any previous postconviction DNA testing motion has been filed under the section and the results of that motion; and,
- Be served on the Attorney General, the district attorney and the agency holding the evidence sought to be tested, if known.

The motion also must include the results of any previous DNA or other biological testing conducted by the prosecution or defense. The court shall order the party in possession of those results to provide access to the reports, data and notes prepared in connection with the previous DNA or other forensic tests. The court in its discretion, may order a hearing on the motion.

CRITERIA FOR GRANTING THE MOTION FOR POSTCONVICTION DNA TESTING

The law directs the court to grant the motion for DNA testing if all of the following has been established:

1. The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;
2. The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect;
3. The identity of the defendant was or should have been a significant issue in the case;
4. The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator or accomplice to the crime or enhancement which resulted in the conviction or sentence;
5. The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the defendant's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction. The court in its discretion may consider any evidence whether or not it was introduced at the trial;
6. The evidence sought to be tested either was not tested previously, or was tested previously but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results;

7. The testing requested employs a method generally accepted within the scientific community; and,
8. The motion is not made solely for the purpose of delay.

Any order granting or denying a motion for DNA testing shall not be appealable, and shall be reviewable only through petition for writ of mandate or prohibition as specified.

LENGTH OF TIME FOR WHICH EVIDENCE MUST BE RETAINED

The statute requires the appropriate governmental entity to retain all biological material that is secured in connection with a criminal felony case for the duration of the inmate's incarceration in connection with the case.

A governmental entity may only destroy biological materials while an inmate is incarcerated in connection with the case if the following conditions are met:

1. The governmental entity notifies the person who remains incarcerated in connection with the case, any counsel of record, the public defender and the district attorney in the county of conviction, and the Attorney General of its intention to dispose of the material; and,
2. The entity does not receive a response within 90 days of the notice in one of the following forms:
   a. A motion requesting that DNA testing be performed. Upon filing of such a motion, the governmental agency must retain the materials sought to be tested only until such time as the court issues a final order;
   b. A request under penalty of perjury that the material not be destroyed because a motion for DNA testing will be filed within 180 days, and a motion is in fact filed within that time period; or,
   c. A declaration of innocence under penalty of perjury filed with the court within 180 days of the judgment of conviction or before July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity which would be affected by future testing.

This provision sunsets on January 1, 2003 and is repealed as of that date unless a later enacted statute extends or deletes this provision.

MANNER IN WHICH EVIDENCE MUST BE RETAINED

The statute provides that the governmental entity has the discretion to determine how evidence containing biological material is retained, as long as it is retained in a condition suitable for DNA testing. *(See Handling and Storage of Evidence at Trial, page 6.)*

Retention of Biological Evidence

Penal Code section 1417.9 mandates the "appropriate governmental entity shall retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case." This section addresses the legal parameters of the retention requirement and the types of evidence that may be considered "biological material secured in connection with a criminal case."

The statute should be read as part of the framework formulated by SB 1342, related to postconviction DNA testing, and not as rewriting law enforcement's duty to keep evidence it would not have retained as a matter of competent and reasonable law enforcement practice. Accordingly, agencies should not be required to retain material without apparent evidentiary value, or material that is clearly collateral to any question of identity[1].

Nor should the statute be read to require an unreasonable level of conjecture and speculation about what evidence may or may not constitute biological material. A literal reading of section 1417.9 would require the appropriate governmental entity to retain any item of evidence that is or was the product of a living organism, tissue, or toxin, regardless of its application to a case. Such an interpretation would compel coroners to refuse burial of bodies, and would remove all government discretion to test a sample in a manner that could consume it – clearly at odds with prevailing law. In accordance with established rules for statutory interpretation, the statute should be read to avoid such absurd and unintended consequences.[2]

LIMITATIONS OF DUTY TO RETAIN EVIDENCE

1. The statute does not expand law enforcement's obligations regarding the collection of evidence nor does it impose any affirmative duty on forensic laboratories to determine prior to trial what items actually contain biological evidence.[3]
2. The statute does not alter existing laws requiring burial and disposal of bodies, or affirmatively require coroners to retain human remains in contravention of present practices.

COMMENTS

Penal Code section 1417.9 ensures that law enforcement keep for a longer time all known biological material with apparent potential significance to an issue of identity. Our recommendation to retain a broader category of evidence *(see page 5)* is based upon the availability of trained personnel to evaluate evidence and possible questions regarding statutory interpretation. If the burden of retaining the evidence proves unworkable, we will inform the Legislature of this fact when the Legislature considers extension of the evidence retention provision in 2002.[4]

RECOMMENDATIONS

Parameters of Evidence Retention Requirement

Although the statute mandates only that law enforcement keep all known biological material, we recommend that agencies retain all items that have a **reasonable likelihood** of containing biological evidence. Courts have treated **reasonable likelihood** to mean more than a "possibility" or "speculation."[5]

Any official making the decision to discard evidence should have the experience and background sufficient to make the decision regarding the likelihood that the item contains biological evidence, or should consult with a person having such qualifications. **If there is any reasonable question, the item should be retained.** The case investigator or prosecutor should be contacted if possible.

Types of Evidence that Should be Retained

AN ITEM SHOULD BE RETAINED IF ANY OF THE FOLLOWING APPLY:

1. The item was clearly documented as having been collected for biological testing[6], and it is one that forensic science has demonstrated can be tested for DNA.

   Examples of evidentiary substrates where biological material has been found include:

   - ☐ **Clothing and footwear**
   - ☐ **Sexual assault evidence kits**
   - ☐ **Bedding**
   - ☐ **Carpeting and furniture**
   - ☐ **Walls, floors, and ceilings**
   - ☐ **Cigarette butts, envelope flaps, stamps, and chewing gum**
   - ☐ **Beverage and drinking containers**
   - ☐ **Weapons (knife, axe, bat, etc.)**
   - ☐ **Bullets**
   - ☐ **Personal effects of victim or suspect (hats, eyeglasses, toothbrushes, etc.)**
   - ☐ **Any evidence known to have been handled by the suspect or victim**

2. The evidence is part of a kit specifically collected for the purpose of securing biological material, e.g. sexual assault kits.

3. There is affirmative evidence the item contains biological material that can be used to trace identity. Affirmative evidence of biological material means:

   a. The item is one traditionally considered to be biological evidence. DNA has been successfully isolated and analyzed from:

      - ☐ **Blood**
      - ☐ **Semen**
      - ☐ **Tissues**
      - ☐ **Bones, teeth and body organs**
      - ☐ **Hair**
      - ☐ **Saliva**
      - ☐ **Sweat**
      - ☐ **Urine and feces**
      - ☐ **Fingernail scrapings**
      - ☐ **Vaginal secretion**

      Thus, items such as the victim's stained underwear or T-shirt should not be discarded.[7]

   b. The item already has been subject to a presumptive test showing biological material exists.

4. For other reasons, the item has a reasonable likelihood of containing biological evidence as determined by an official with the experience and background sufficient to make the decision, or in consultation with a person having such qualifications. If there is any reasonable question, the item should be retained. The case investigator or prosecutor should be contacted, if possible.

Storage of Biological Evidence

The crime laboratory's ability to successfully perform DNA testing on biological evidence recovered from a crime scene, victim or suspect depends on:

- The quantity and quality of the sample
- The time and environmental conditions between deposit and collection of the evidence
- The types of specimens collected
- How evidence is stored

The first three factors depend largely on the circumstances of the specific crime and the collection techniques used. They are not addressed in this report. However, one should be aware that these factors will influence the suitability of biological evidence for testing.

The following recommendations address the final factor, storage of evidence. Evidence suitable for DNA testing that is not properly stored, may be subject to decomposition, deterioration, and/or contamination. Proper storage can minimize decomposition, deterioration and the risk of contamination.

However, regardless of the method chosen to store biological evidence, there will be some degree of sample degradation over time.

In addition, the manner in which evidence was stored in the past may affect its suitability for DNA testing. Evidence predating the statutory mandate and possibly containing biological material suitable for DNA testing may have been stored under conditions with little control over storage environment or the prevention of contamination. In such cases, the biological material already may have deteriorated, decomposed or been contaminated to the extent that it is no longer suitable for DNA testing.

The following recommendations were developed for the use of all agencies that store evidence to improve the likelihood that evidence containing biological material will be suitable for future DNA testing. The recommendations are divided into two sections: the first addresses short-term storage and handling at trial, and the second addresses long-term storage after the defendant is convicted.

RECOMMENDATIONS

Handling and Storage of Evidence at Trial

Optimal storage of evidence containing biological material may not be realistic or possible during trial. The following recommendations are designed to reduce the potential for decomposition and contamination of biological material during trial.

Courts should limit use of biological material at trial.	Courts should attempt to obtain a stipulation from the parties that biological material need not be brought into court and that secondary evidence (photographs, computer images, video tape, etc.) may be used. Courts are urged to discourage the opening of any package containing biological material.
Courts unable to retain evidence in the proper manner should contact the appropriate agency for long-term storage.	If a court cannot properly retain evidence on a long-term basis, court personnel should contact the appropriate agency (prosecutor, law enforcement agency or laboratory) for assistance with long-term storage. In such circumstances, the court should document the location of any evidence that is not retained by the court. The court should attempt to obtain a stipulation from the parties that all biological evidence will be retained for storage by the appropriate agency following trial.

Long-Term Storage of Biological Evidence

Storage conditions

In order to maintain the possibility of successful DNA typing with techniques currently in use, evidence containing biological material:

- Should be stored in a dried condition (or remain dry)
- Should be stored frozen, under cold/dry conditions, or in a controlled room temperature environment with little fluctuation in either temperature or humidity
- Should not be subjected to repeated thawing and refreezing

Drying of wet or moist evidence

Wet or moist evidence containing biological material should be removed from direct sunlight, air dried, and stored frozen, under cold/dry conditions, or in a controlled room temperature environment as soon as practicable after collection. Elevated temperatures (e.g., hair dryer) should not be used to expedite the drying of wet or moist evidence. Room temperature conditions are satisfactory for drying evidence. Spreading the evidence items out and exposing them to room air can quicken the drying process of folded or bulky items. Care should be exercised to prevent transfer or loss of biological material or trace evidence during the drying process.

Area for drying evidence

The area used to air dry wet or moist evidence items containing biological materials should be clean so as to:

- Prevent cross-contamination between any two or more items in a case e.g., evidence of suspect separated from evidence of victim
- Minimize opportunities for contamination from external sources

Packaging evidence

Paper (e.g., clean butcher paper or paper bags) should be used to package evidence items containing biological material. Plastic is not recommended for packaging or storing moist or wet evidence items due to the acceleration of the decomposition of biological material on the evidence items.

Liquid samples

Liquid samples, particularly liquid blood reference samples from victims or suspects, collected in glass containers (e.g., blood collection tubes) should not be frozen. Freezing may cause the glass container to break. Liquid blood can be refrigerated for a short period of time. For long-term storage of liquid samples, the samples:

- Can be transferred onto clean cloth or filter paper
- Dried at room temperature
- Should be stored frozen, under cold/dry conditions, or in a controlled room temperature environment with little fluctuation in either temperature or humidity

Extracted DNA samples	Extracted DNA samples should be stored under frozen conditions. Consideration should be given to saving amplified product, or slides prepared during differential extraction, if none of the original source or extracted DNA remains.
Other issues regarding storage	The use of chemical preservatives, vacuum packaging, or the use of unusual containers or packaging materials to preserve evidence containing biological material for storage should be discussed with crime laboratory personnel.
Chain of custody record	A complete chain of custody record should exist and be maintained for all evidence that is or will be retained for possible future testing.
Limit, control and document access to evidence	Evidence should be stored in a locked storage area when left unattended. Access to the locked storage area should be limited and controlled. To minimize the handling of evidence with biological material, the designated custodian should control access to evidence. If such evidence is handled, the custodian should ensure that proper protective measures are followed to ensure handler safety and the integrity of the evidence. Other than in open court, direct access to evidence such as viewing, handling, and transfer of custody, should be documented.
Identify and label evidence known to contain biological material	Evidence known to contain biological material should be identified as such with a prominent label affixed by the person who identifies it as containing biological material.
Retain evidence in original packaging	As a general principle, evidence should be retained in its original packaging. Evidence packaged in paper upon receipt may be removed temporarily from paper and placed in plastic for viewing at trial or for other purposes, but it should be returned to paper for long-term storage to prevent degradation of the biological material. Items packaged together upon receipt should be kept together; items packaged separately upon receipt should not be commingled.
Store evidence under seal	To the extent reasonably possible, evidence should be stored under seal (seal with tape, marked with the identity of person affixing the seal). If a package is opened for inspection, it should be resealed before returning for storage.
Wear protective gear	Persons handling evidence containing biological material should take appropriate precautions to prevent cross-contamination and to protect themselves and others from biohazards. They should wear clean gloves and other appropriate personal protective gear, as needed.

BASIS FOR CONCLUSIONS

EXPERIENCE WITH STORAGE HAS SHOWN:

- Evidence containing biological material suitable for DNA testing is best stored in a dried condition.
- Storage of evidence containing biological material in a wet or moist condition may result in the degradation or loss of DNA evidence.
- Colder temperatures retard degradation better than warmer temperatures.
- When evidence containing biological material is in a dried condition and stored at room temperature, the biological material should still be typeable at one year and may be typeable much longer than one year.
- DNA typing techniques currently in use are extremely sensitive and will work on partially degraded samples.
- Evidence that originally contained a minimal amount of biological material may not be typeable due to the amount of DNA rather than due to any degradation that occurs as a result of storage at room temperature.
- Regardless of the method chosen to store biological evidence, there will be some degree of sample degradation.

References

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GLOSSARY OF TERMS

Cold/dry storage conditions	Cold/dry storage conditions refer to storage of evidence at a temperature at or below 7°C (45°F) and humidity not exceeding 25% relative humidity.
Controlled environment	Controlled environment refers to a storage environment that employs environmental controls (heating and air conditioning) that limit fluctuations in temperature and humidity.
Decompose	Decompose is defined as decay, break-up or separation into component parts.
Degradation	Degradation is defined as the transition from a higher to a lower level of quality.
Deteriorate	Deteriorate is defined as to make or become worse; lower in quality or value.
Dried condition	Dried condition refers to having no moisture: not wet, not damp or moist.
Frozen	Frozen refers to storing by freezing. Laboratory freezer storage temperatures are at or below –10°C (14°F).
Room temperature and humidity	Room temperature typically refers to a range of temperatures between 15.5°C (60°F) and 24°C (75°F). Humidity in the storage areas should not exceed 60% relative humidity.
Terminology	The verbs "shall," "must" and "will" indicate requirements; "should" is used to denote recommended practices; "may" is used in the permissive sense.

FOOTNOTES

[4] See Penal Code 1417.9 (b)(2)(C) & 1405 (d); SB 1342 Senate Bill Analysis, August 30, 2000, p. 5, items (3)-(4) [noting Sheriff's Offices and Police Departments differ in how long they store evidence, but most do not store evidence after appeals have been exhausted].

[5] *Santa Clara Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 235; *In re Bittaker* (1997) 55 Cal.App.4th 1004, 1009; *Cf. People v. Tookes* (N.Y.1996) 639 N.Y.S.2d 913, 915 [assessing practical impact of New York's postconviction DNA testing statute, and rejecting broad interpretation].

[6] Cf. *Arizona v. Youngblood* (1988) 488 U.S. 51, 59 [police do not have a constitutional duty to perform any particular tests]; *People v. Daniels* (1991) 52 Cal.3d 815, 865.

[7] See Penal Code 1417.9(c) ["This section shall remain in effect only until January 1, 2003, and on that date is repealed unless a later enacted statute that is enacted before January 1, 2003, deletes or extends that date."]

[8] *Boyde v. California* (1990) 494 U.S. 370, 380; *People v. Proctor* (1992) 4 Cal.4th 499, 523; *Strickler v. Greene* (1999) 527 U.S. 263, 299-300, Souter, J., dissenting; *Cf.: California v. Trombetta (1984)* 467 U.S. 479, 488 [constitutional duty of States to preserve evidence is limited to evidence that might be expected to play a role in the suspect's defense].

[9] Cf. *Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [limiting duty to preserve evidence in part to "those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant"].

[10] See, generally, National Commission, *Postconviction DNA Testing: Recommendations for Handling Requests* (NIJ Sept. 1999) at pp. xv, 21-22.

Disposal of Biological Evidence

In all felony cases, evidence containing biological material must be retained until:

1. **Notice is given to all appropriate parties and no response is received within 90 days of the notice being sent;** *See Appendix A: Notification of Disposal (Sample Form) page 13.*

   OR

2. **After the inmate is no longer incarcerated in connection with the case.**

Even if one of the conditions above is met, we suggest that the retaining agency contact the investigating officers to see if they have any objections to disposing of evidence.

RECOMMENDATIONS

Before an Inmate is Released

NOTIFICATION

The retaining agency may dispose of biological material **before** the prisoner is released from custody if the entity sends proper notice to all parties and **does not receive a response within 90 days** (Penal Code section 1417.9(b). *See Appendix A: Notification of Disposal (Sample Form) page 13.*

Parties that must be notified:

1. The inmate;
2. The counsel of record for the inmate (this includes counsel who represented the inmate in superior court and any counsel who represented the inmate on appeal);
3. The public defender in the county of conviction;
4. The district attorney in the county of conviction; and,
5. The California Attorney General.

Investigating officers are not included as parties to be notified. However, retaining agencies also may want to contact the investigating officers to determine if they have objections to disposing of evidence.

Response to notification: The retaining agency may dispose of evidence in the case 90 days after sending notification to proper entities **unless** the retaining agency receives any of the following:

- A motion for postconviction DNA testing, filed pursuant to Penal Code section 1405; however, upon filing of that application, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.
- A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing that is followed within 180 days by a motion for DNA testing. The convicted person may request an extension of the 180-day period in which to file a motion for DNA testing, and the agency retaining the biological material has the discretion to grant or deny the request.
- A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing.

After an Inmate is Released

Agencies that retain evidence can in many cases dispose of biological material once the inmate is no longer incarcerated. However, many agencies do not receive regular notification of inmate release. This may present challenges for retaining agencies that may be unaware that the inmate has been released and that the evidence can be discarded.

There are two potential means by which a retaining agency can determine whether an inmate has been released:

1. **Contact the California Department of Corrections.**

   To find information on whether a particular inmate has been released from prison, an agency may call the Department of Corrections ID/Warrants Unit at (916) 445-6713 and provide the inmate's name and date of birth, or CDC number, if available. The retaining agency can call the investigating agency to determine the inmate's name and date of birth.

   Note: The ID/Warrants Unit does not provide this information in writing.

2. **Notification of release of certain felons**

   Specified agencies are notified of impending release of certain inmates. Penal Code section 3058.6 requires the Department of Corrections or Board of Prison Terms to notify the chief of police, sheriff, or both, and the district attorney of the county where a prisoner was convicted of a violent felony, 45 days before the prisoner is released. Section 3058.61 provides similar notification prior to the release of **convicted stalkers.**

   Agencies that receive Penal Code section 3058 et seq. release notices should forward them to the appropriate personnel (property room managers, etc.) including investigating officers. The retaining agency should place a follow-up call to the ID/Warrants Unit to ensure the felon was actually released before disposing of any biological material retained in connection with the case.

For all other felons, the retaining agencies can receive release notification under Penal Code section 3058.5, which provides that the Department of Corrections release information to police agencies, within 10 days upon request, of all parolees who are or may be released in their city or county.

Appendix A: Notification of Disposal (Sample Form)

[Addressee: e.g., Inmate, Counsel] _____

[Address:] _____

[City, State, Zip Code:] _____

Penal Code Section 1417.9 Notification

[Date:] _____

[Case Name:] _____

[Superior Court Number:] _____

[Court Of Appeal Number:] _____

[Notifying Agency and Address:] _____

PLEASE TAKE NOTICE that in accordance with Penal Code section 1417.9, subdivisions (a) and (b), any biological material secured in connection with the above-entitled case will be disposed of within 90 days of **[insert date notification sent:_____]**, the date this notification was sent, unless this notifying agency receives any of the following:

I. A motion filed pursuant to Penal Code section 1405. However, upon filing of that application, **[insert notifying agency's name:_____]** will retain the material only until the time that the court's denial of the motion is final.

II. A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to Penal Code section 1405 that is followed within 180 days by a motion for DNA testing pursuant to Penal Code section 1405, unless a request for an extension is requested by the convicted person and agreed to by **[insert name of agency in possession of evidence:_____]**.

III. A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under Penal Code section 1417.9 or on an application by or on behalf of the convicted person filed pursuant to Penal Code section 1405.

Appendix B: California Penal Code Sections 1405, 1417.9

CALIFORNIA PENAL CODE SECTION 1405

1405. (a) A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction in his or her case, for performance of forensic deoxyribonucleic acid (DNA) testing.

(b) (1) An indigent convicted person may request appointment of counsel to prepare a motion under this section by sending a written request to the court. The request shall include the person's statement that he or she was not the perpetrator of the crime and that DNA testing is relevant to his or her assertion of innocence. The request also shall include the person's statement as to whether he or she previously has had counsel appointed under this section.

(2) If any of the information required in paragraph (1) is missing from the request, the court shall return the request to the convicted person and advise him or her that the matter cannot be considered without the missing information.

(3) (A) Upon a finding that the person is indigent, he or she has included the information required in paragraph (1), and counsel has not previously been appointed pursuant to this subdivision, the court shall appoint counsel to investigate and, if appropriate, to file a motion for DNA testing under this section and to represent the person solely for the purpose of obtaining DNA testing under this section.

(B) Upon a finding that the person is indigent, and counsel previously has been appointed pursuant to this subdivision, the court may, in its discretion, appoint counsel to investigate and, if appropriate, to file a motion for DNA testing under this section and to represent the person solely for the purpose of obtaining DNA testing under this section.

(4) Nothing in this section shall be construed to provide for a right to the appointment of counsel in a postconviction collateral proceeding, or to set a precedent for any such right, in any context other than the representation being provided an indigent convicted person for the limited purpose of filing and litigating a motion for DNA testing pursuant to this section.

(c) (1) The motion shall be verified by the convicted person under penalty of perjury and shall do all of the following:

(A) Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.

(B) Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.

(C) Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.

(D) Reveal the results of any DNA or other biological testing that was conducted previously by either the prosecution or defense, if known.

(E) State whether any motion for testing under this section previously has been filed and the results of that motion, if known.

(2) Notice of the motion shall be served on 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. Responses, if any, shall be filed 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.

(d) If the court finds evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, it shall order the party at whose request the testing was conducted 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.

(e) The court, in its discretion, may order a hearing on the motion. The motion shall be heard by the judge who conducted the trial, or accepted the convicted person's plea of guilty or nolo contendre, unless the presiding judge determines that judge is unavailable. Upon request of either party, the court may order, in the interest of justice, that the convicted person be present at the hearing of the motion.

(f) The court shall grant the motion for DNA testing if it determines all of the following have been established:

(1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion.

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.

CALIFORNIA PENAL CODE SECTION 1405 *(continued)*

(3) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case.

(4) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence.

(5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction. The court in its discretion may consider any evidence whether or not it was introduced at trial.

(6) The evidence sought to be tested meets either of the following conditions:

(A) The evidence was not tested previously.

(B) The evidence was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

(7) The testing requested employs a method generally accepted within the relevant scientific community.

(8) The motion is not made solely for the purpose of delay.

(g) If the court grants the motion for DNA testing, the court order shall identify the specific evidence to be tested and the DNA technology to be used. The 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. If the parties cannot agree, the court shall designate the laboratory to conduct the testing and shall consider designating a laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB).

(h) The result of any testing ordered under this section shall be fully disclosed to the person filing the motion, the district attorney, and the Attorney General. If requested by any party, the court shall order production of the underlying laboratory data and notes.

(i) (1) The cost of DNA testing ordered under this section shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person.

(2) In order to pay the state's share of any testing costs, the laboratory designated in subdivision (e) shall present its bill for services to the superior court for approval and payment. It is the intent of the Legislature to appropriate funds for this purpose in the 2000-01 Budget Act.

(j) An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General. The petition shall be filed within 20 days after the court's order granting or denying the motion for DNA testing. In a noncapital case, the petition for writ of mandate or prohibition shall be filed in the court of appeal. In a capital case, the petition shall be filed in the California Supreme Court. The court of appeal or California Supreme Court shall expedite its review of a petition for writ of mandate or prohibition filed under this subdivision.

(k) DNA testing ordered by the court pursuant to this section shall be done as soon as practicable. However, if the court finds that a miscarriage of justice will otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, a DNA laboratory shall be required to give priority to the DNA testing ordered pursuant to this section over the laboratory's other pending casework.

(l) DNA profile information from biological samples taken from a convicted person pursuant to a motion for postconviction DNA testing is exempt from any law requiring disclosure of information to the public.

(m) Notwithstanding any other provision of law, the right to file a motion for postconviction DNA testing provided by this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre.

(n) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

CALIFORNIA PENAL CODE SECTION 1417.9

1417.9. (a) Notwithstanding any other provision of law and subject to subdivision (b), the appropriate governmental entity shall retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for deoxyribonucleic acid (DNA) testing.

(b) A governmental entity may dispose of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set forth below are met:

(1) The governmental entity notifies all of the following persons of the provisions of this section and of the intention of the governmental entity to dispose of the material: any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.

(2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

(A) A motion filed pursuant to Section 1405. However, upon filing of that motion, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

(B) A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to Section 1405 that is followed within 180 days by a motion for DNA testing pursuant to Section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405.

(3) No other provision of law requires that biological evidence be preserved or retained.

(C) Notwithstanding any other provision of law, the right to receive notice pursuant to this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre.

(d) This section shall remain in effect only until January 1, 2003, and on that date is repealed unless a later enacted statute that is enacted before January 1, 2003, deletes or extends that date.

Appendix C: SB 1342 Task Force Members

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PHONE: (213) 974-8301 FAX: (213) 626-5427

J. TYLER McCAULEY
AUDITOR-CONTROLLER

DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Hasmik Yaghobyan states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 603 Kenneth Hahn Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 30th day of October 2003, I served the attached:

Documents: Response to the Commission on State Mandates', Request for Additional Information, Section 1405, 1417.9 of the Penal Code, Attorney General's "Post conviction DNA Testing Recommendations For Retention, Storage and Disposal of Biological Evidence" Pursuant to Implementing Penal Code Sections 1405 and 1417.9, Statutes of 2000, Chapter 821, Statutes of 2001, Chapter 943: Los Angeles County Test Claim [CSM: 01-TC-08/00-TC-21], Post Conviction: DNA Court Proceedings, including *a 1 page letter of J. Tyler McCauley dated 10/30/03, a 1 page letter of Michael Chamberlain, Deputy Attorney General, and a 21 page attachment, now* pending before the Commission on State Mandates.

upon all Interested Parties listed on the attachment hereto and by

[X] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date. Commission on State Mandates FAX as well as mail of originals.

[ ] by placing [ ] true copies [ ] original thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) as set forth below at the indicated address.

PLEASE SEE ATTACHED MAILING LIST

That I am readily familiar with the business practice of the Los Angeles County for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United States mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of October, 2003, at Los Angeles, California.

Hasmik Yaghobyan

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES
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CRAMENTO, CA 95814
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May 26, 2006

Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
Kenneth Hahn Hall of Administration
500 West Temple Street, Room 603
Los Angeles, CA 90012-2766

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Draft Staff Analysis and Hearing Date
Post Conviction: DNA Court Proceedings - 00-TC-21, 01-TC-08
County of Los Angeles, Claimant
Penal Code Sections 1405 and 1417.9 as added by Statues 2000, Chapter 821, and amended by Statutes 2001, Chapter 943

Dear Mr. Kaye:

The draft staff analysis of this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **Friday, June 16, 2006**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing on **Friday, July 28, 2006** at 10:00 a.m. We will notify you of the location of the hearing when a hearing room has been confirmed. The final staff analysis will be issued on or about July14, 2006. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Eric Feller at (916) 323-8221 with any questions regarding this matter.

Sincerely,

PAULA HIGASHI
Executive Director

Enc. Draft staff analysis and attachments

MAILED: FAXED:
DATE: 5/26/06 INITIAL: LD
CHRON: FILE:
WORKING BINDER:

Hearing Date: July 27, 2006
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ITEM ___

TEST CLAIM
DRAFT STAFF ANALYSIS

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

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN THE FINAL ANALYSIS.

STAFF ANALYSIS

Claimant

County of Los Angeles

Chronology

06/29/01	Test Claim filed by County of Los Angeles, Claimant
08/08/01	Department of Finance submits comments on the test claim
09/05/01	Department of Corrections submits a letter on the test claim
10/17/01	Claimant submits rebuttal comments on the state agency comments
11/05/01	Claimant submits amendment to test claim
12/19/01	Department of Finance submits comments on the test claim amendment
02/15/02	Claimant files rebuttal comments to the Dept. of Finance comments
08/21/03	Commission staff requests additional information from claimant
09/24/03	Claimant provides additional information on the claim
10/30/03	Claimant submits additional documents
02/13/04	Commission staff requests state agency comments on claimant's submissions
03/15/04	No comments received, record is closed
05/26/06	Commission staff issues draft staff analysis on the test claim

Background

Test Claim Statutes

In 2000, the Legislature enacted the test claim statutes as a post-conviction remedy for convicted felons to obtain deoxyribonucleic acid (DNA) testing of biological evidence. The DNA-testing motion is a separate civil action[1] and not part of the original criminal action.[2] The statutes also establish procedures and timelines for the retention of biological evidence.

The post-conviction remedy applies to cases where biological evidence is available and is previously untested or tested by a less reliable test, and where identity of the perpetrator was an issue. The test claim statutes specify how a defendant files a motion to obtain DNA testing and what conditions must be met before the court grants the testing motion.

In 2001, the original test claim statute was amended (Stats. 2001, ch. 943) to clarify that the defendant's right to file a motion for post-conviction DNA testing cannot be waived, nor can the

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[1] As defined by Code of Civil Procedure section 30, a civil action is "prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong."

[2] As defined by Penal Code section 683, a criminal action is "the proceeding by which a party charged with a public offense is accused and brought to trial and punishment..."

right be waived to receive notice of a governmental entity's intention to dispose of biological material before expiration of the period of imprisonment.[3]

Appointment of counsel for indigent defendants: The original statute required the court to appoint counsel for the convicted person who brings a motion under this section if that person is indigent.[4] In 2001, the Legislature added a new subdivision (b) to section 1405[5] to clarify this right to counsel. The amendment specifies how an indigent convicted person requests appointment of counsel and establishes appointment criteria for the court. The amendment also specifies that counsel investigates and, if appropriate, files a motion for DNA testing, and clarifies that representation is solely for the purpose of obtaining DNA testing and not for any post-conviction collateral proceeding.[6]

Motion for DNA testing: The original statute established a procedure for the defendant to obtain DNA testing of biological evidence. As a result of the 2001 amendment, an indigent defendant can request counsel to investigate and prepare this motion. Section 1405, former subdivision (b), now subdivision (c), establishes the following requirements for the motion:

1. A written motion shall be verified by the convicted person under penalty of perjury and shall do all of the following:
   A. Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.
   B. Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.
   C. Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.
   D. If prosecution or defense previously conducted any DNA or other biological testing, the results of that testing shall be revealed in the motion, if known.[7]
   E. State whether any motion for testing under this section previously has been filed and the results of that motion, if known.
2. Notice of the motion shall be served on 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.[8]

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[3] Penal Code section 1405 was technically amended by Statutes 2004, chapter 405. Staff makes no finding on this amendment.

[4] Penal Code section 1405, subdivision (b), formerly subdivision (c).

[5] All references herein are to the Penal Code unless otherwise indicated.

[6] Penal Code section 1405, subdivision (b)(4), as added by Statutes 2001, chapter 943.

[7] Former Penal Code section 1405, subdivision (a)(3).

[8] Penal Code section 1405, subdivision (c)(2), formerly subdivision (a)(2).

Responses to DNA-testing motion: Once a motion is filed, the statute provides that responses, if any, shall be filed 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.[9]

Access to lab reports and data: If the court finds that the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, it shall order the party at whose request the testing was conducted 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.[10]

Hearing: The court, "in its discretion," may order a hearing on the motion. The statute originally stated, "the judge who conducted the trial shall hear the motion, unless the presiding judge determines that judge is unavailable. Upon request of either party, the court may order, in the interest of justice, that the convicted person be present at the hearing of the motion." The 2001 statute amends the first sentence regarding hearing the motion as follows: "The motion shall be heard by the judge who conducted the trial, *or accepted the convicted person's plea of guilty or nolo contendre,* unless ...."[11]

Criteria for granting DNA-testing motion: Subdivision (f) of section 1405, (formerly subd. (d)) states that "[t]he court shall grant the motion for DNA testing if it determines all of the following have been established:

(1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion.

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.

(3) The identity of the perpetrator of the crime was, or should have been a significant issue in the case.

(4) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence.

(5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction. The court in its discretion may consider any evidence whether or not it was introduced at trial.

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[9] Penal Code section 1405, subdivision (c)(2), formerly subdivision (a)(2).

[10] Penal Code section 1405 subdivision (d), formerly subdivision (a)(3).

[11] Penal Code section 1405, subdivision (e), formerly subdivision (b).

(6) The evidence sought to be tested meets either of the following conditions:

A. It was not tested previously.

B. It was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.[12]

(7) The testing requested employs a method generally accepted within the relevant scientific community.

(8) The motion is not made solely for the purpose of delay.

DNA testing & results: Subdivision (g) of section 1405 (formerly subd. (e)) states:

> (1) If the court grants the motion for DNA testing, the court order shall identify the specific evidence to be tested and the DNA technology to be used. (2) The 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. If the parties cannot agree, the court's order shall designate the laboratory to conduct the testing and shall consider designating a laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB).

Subdivision (k) of section 1405 (formerly subd. (i)) provides that the testing be done as soon as practicable, but authorizes the court to expedite testing 'in the interests of justice.'

Subdivision (h) of section 1405 (formerly subd. (f)) requires test results to "be fully disclosed to the person filing the motion, the district attorney, and the Attorney General. If requested by any party, the court shall order production of the underlying laboratory data and notes."

Cost of DNA test: Subdivision (i) of section 1405 (formerly subd. (g)) requires the cost of the DNA testing to be borne by the state or the applicant, "as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person."

Judicial Review: Subdivision (j) of section 1405 (formerly subd. (h)) provides as follows:

> An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General. Any such petition shall be filed within 20 days after the court's order granting or denying a motion for DNA testing. In a non-capital case, the petition for writ of mandate or prohibition petition shall be filed in the court of appeals. In a capital case, the petition shall be filed in the Supreme Court.

Exempt from public disclosure: Subdivision (l) of section 1405 (formerly subd. (j)) provides: "DNA profile information from biological samples taken from a convicted person pursuant to a

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[12] Statutes 2001, chapter 943 substituted "It" with "The evidence" and renumbered the subdivision.

motion for post-conviction DNA testing is exempt from any law requiring disclosure of information to the public."

Severability: According to subdivision (n) (formerly subd. (k)), section 1405 is severable, and if any provision of it or its application is held invalid, "that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application."

Retain biological evidence: Penal Code section 1417.9 states that the "appropriate" governmental entity shall retain any biological evidence secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The Attorney General's Office has stated that this retention is limited to felony cases.[13]

Subdivision (a) of section 1417.9 further states that "[t]he governmental entity shall have the discretion to determine how the evidence is retained ... provided that the evidence is retained in a condition suitable for DNA testing."

Subdivision (b) authorizes the governmental entity to dispose of biological material before the expiration of the period of time if the following notification conditions are met.

(1) The governmental entity has notified all of the following persons of the provisions of this section and of their intention to dispose of the material: any person who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.

(2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

(A) A motion filed pursuant to section 1405, however, upon filing of that application, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

(B) A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to section 1405 that is followed within 180 days by a motion for DNA testing pursuant to section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405.

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[13] 88 Opinions of the California Attorney General 77 (2005).

(3) No other provision of law requires that biological evidence be preserved or retained.

The 2001 amendment added subdivision (c) to section 1417.9 to state, "the right to receive notice pursuant to this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre."

A sunset clause in the original version of section 1417.9 would have repealed it on January 1, 2003, but the sunset clause was removed by Statutes 2002, chapter 1105.

Preexisting Law

Preexisting state law provides procedures whereby a defendant may appeal a conviction.[14] Preexisting state law also specifies the conditions under which a new trial is granted, as follows:

> When a verdict has been rendered or a finding made against a defendant, the court may, upon his application, grant a new trial, in the case of when new evidence is discovered, material to the defendant and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable.[15]

Claimant Position

Claimant alleges that the test claim statutes impose a reimbursable mandate under section 6 of article XIII B of the California Constitution. After describing the test claim statutes, claimant enumerates new duties for various county departments as a result of the test claim statute.

For the District Attorney and Public Defender (for indigent defendants), claimant alleges activities related to the following:[16]

- **Initial Contact** – Writing or responding to initial correspondence from inmates, attorneys or others seeking information regarding Penal Code section 1405 and 1417.9.
- **Investigating Claims** - Reading letters from inmates or others writing on behalf of inmates, retrieving and reviewing court files, trial attorney files, appellate counsel 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 inmates in person or on the telephone as well as written consultation.
- **Preparing Motions** - Includes preparing motions pursuant to Penal Code section 1405 and responding to notices sent pursuant to Penal Code section 1417.9.

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[14] Penal Code section 1236 et seq..

[15] Penal Code section 1181, subdivision (8), as amended by Statutes 1973, chapter 167.

[16] The test claim includes detail for each of the bulleted activities. See Exhibit A, pages 113-118.

- **Meet and Confer** - Consultation and meetings with the trial attorney, appellate counsel, representatives of the Public Defender's Innocence Unit, the Post-Conviction Center, the District Attorney's Office, the Attorney General, and individuals from other Innocence Projects.
- **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.
- **Development and Procedure** - Preparing protocols, administrative forms, meeting with SB 90 adviser and one-time activities associated with setting up the Post-Conviction DNA unit within the District Attorney's Office [for Public Defender services, the activity claimed is "one-time activities associated with setting up the unit."]
- **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.
- **Travel** - Travel-related expenses associated with meeting with inmate in connection with preparation of 1405 motion.
- **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.

For the Sheriff's Department Crime Laboratory, claimant alleges activities related to the following:

- Develop policies and procedures (one time activity).
- Meet and confer with attorneys regarding the coordination of efforts in implementing the subject law (one time activity).
- Distribute the State Attorney General's Office recommendations for compliance with the law[17] including the evidence retention conditions (one time activity).
- Train investigative personnel and the staff of other law enforcement that use the crime lab.
- Initial contacts for permission to dispose of biological evidence.
- Identify and track evidence for proper retention and storage.
- Respond to request for biological evidence held.
- Respond to requests for the analysis of evidence held.
- Meet and confer with parties to determine the suitability of DNA testing on retained evidence.
- Prepare and track biological evidence sent to lab for DNA testing.
- Court testimony on chain of custody and disposition of biological evidence.
- DNA testing required of the Sheriff's Department not reimbursed by the Court.

For the Sheriff's Department Central Property and Evidence Unit, claimant alleges activities related to the following:

- Develop policies and procedures (one time activity).

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[17] This document is attached as Exhibit J.

- Meet and confer with attorneys regarding the coordination of efforts in implementing the subject law (one time activity).
- Distribute the State Attorney General's Office recommendations for compliance with the law[18] including the evidence retention conditions (one time activity).
- Train evidence and property custodians on storage and notification methods and procedures (one-time activity).
- Design, develop, and test computer software and equipment necessary to identify and retrieve biological materials (one-time activity).
- Initial contacts to specified parties to seek permission to dispose of biological evidence.
- Identify and track evidence for proper retention and storage.
- Respond to request for biological evidence held.
- Maintain biological evidence in refrigerated facilities and add and maintain refrigerated facilities.
- Court testimony on chain of custody and disposition of biological evidence.

The claimant stated that it is incurring costs well in excess of $200 annually, the standard at the time the test claim was filed.[19] The claimant estimated that costs for the public defender would be $521,234 for fiscal year 2001-2002.

In its October 2001 response to Department of Finance comments, claimant states that the program is a new program or higher level of service, and not merely extensions of the original duties of trial counsel or extensions of the original case. Claimant supports this contention as specified in the analysis below.

In November 2001, claimant amended the test claim to add Statutes 2001, chapter 943. This statute amended Section 1405 to establish a procedure for appointing counsel to investigate and prepare the DNA-testing motion so that counsel is appointed before a motion is filed (unlike the prior version of 1405, in which, according to claimant, counsel was appointed after filing the motion). Claimant also alleges activities from amended section 1417.9, subdivisions (c) and (m) as follows:

> Section 1417.9 is also included in this amendment as Chapter 943, Statutes of 2001, further expands the duties of local government to include those persons who may have waived certain rights. ... Therefore, as amended herein, the County is now required to provide more service – to provide notice to those with waivers as well as those without such waivers. In addition, as amended herein, the County must provide services in investigating and filing motions for post-conviction DNA testing to more indigents – now including those waiving rights as set forth in new Section 1405(m) ...."[20]

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[18] This document is attached as Exhibit J.

[19] The current minimum amount is $1000 (Gov. Code, § 17564).

[20] County of Los Angeles, test claim amendment (01-TC-08) submitted November 9, 2001, page 5.

In response to a request for further information from Commission staff, claimant stated in September 2003 that the Public Defender's Office received a one-time grant from the Office of Criminal Justice Planning for $160,000 to represent former clients who request counsel pursuant to Penal Code section 1405.

State Agency Position

In comments submitted in August 2001 on the original test claim, the Department of Finance (Finance) states that while the test claim may have resulted in a state mandate, "the activities described in the test claim do not constitute a new program or activity or a reimbursable cost."

Finance states that the test claim activities are "a procedure extension of the original trial" and goes on to state: "The petition involved is only raising examination of original evidence using technology not available at the time of the original case, thereby raising in question a material and substantive issue to the original criminal charge and verdict." Finance concludes, therefore, that the activities are existing responsibilities of local government.

The Department of Corrections also submitted a letter in August 2001, stating, "CDC takes no position on the merits of the County's test claim."

In December 2001, Finance commented on the test claim amendment, stating that it concurs that Statutes 2001, chapter 943 create a reimbursable state-mandated local program for the following activities pled by claimant:

- Appointing counsel to investigate and file a motion, if appropriate, for post-conviction DNA testing for indigent convicted persons.
- Providing notices to indigent convicted persons, who may have waived their rights as part of a plea agreement or plea of nolo contendre, that their right to file a motion for post-conviction DNA testing cannot be waived.

No other state agencies submitted comments on the claim.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[21] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[22] "Its

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[21] Article XIII B, section 6, subdivision (a), (as amended in November 2004) provides:

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[22] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[23] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[24]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[25]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[26] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[27] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[28]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[29]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[30] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an

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[23] *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

[24] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[25] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

[26] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[27] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[28] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[29] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[30] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

"equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[31]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

A. Activities in section 1405 mandated by the state

As enacted by Statutes 2000, chapter 821, section 1405 read, in part, as follows:

> (a) A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction in his or her case, for performance of forensic ... (DNA) testing. [¶] ... [¶]
>
> (c) The court shall appoint counsel for the convicted person who brings a motion under this section if that person is indigent.

Subdivisions (a)(1) and (a)(3) of section 1405 (currently subd. (c)(1)) specifies the content of the motion, stating it must:

> A. Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.
> B. Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.
> C. Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.
> D. If prosecution or defense previously conducted any DNA or other biological testing, the results of that testing shall be revealed in the motion, if known.
> E. State whether any motion for testing under this section previously has been filed and the results of that motion, if known.

The court grants the motion if it makes eight findings, as specified above (pp. 4-5).

Claimant seeks reimbursement for the activities of writing or responding to initial correspondence from inmates, attorneys, or others seeking information; investigating claims, preparing motions and meeting and conferring with counsel. As indicated by claimant, the indigent defense counsel appointed to investigate or file the DNA-testing motion is a public defender or otherwise provided by the local government.

This issue is whether subdivisions (a) and (c) of section 1405, as originally enacted in 2000, mandate an activity on the local entity. Staff finds that subdivision (c) does, based on the plain language in subdivision (c) that "the court shall appoint counsel."[32]

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[31] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[32] Cf. *San Diego Unified School Dist., supra,* 33 Cal.4th at page 880 states: "Accordingly, in its mandatory aspect, [the test claim statute] ... appears to constitute a state mandate, in that it

As to preparing, filing, and giving notice of the motion, subdivision (a) originally stated that it is the person convicted of the felony who does this rather than the indigent defense counsel. Therefore, drafting the DNA-testing motion is not a requirement on local entity in the original version of section 1405 (this was changed by the 2001 amendment, as discussed below).

Additionally, although this original statute did not expressly articulate the requirement for counsel to 'investigate' the claim (prior to the Stats. 2001, ch. 943 amendment), the eight findings the court must make to grant the motion were stated in subdivision (d), (now in § 1405, subd. (f) -- see pp. 4-5 above). In order to represent the convicted person and advocate these findings to the court, counsel would need to investigate the case, since he or she has a duty to "present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit."[33]

Staff finds, therefore, that indigent counsel representation and investigation of the DNA-testing (except for drafting and filing the DNA-testing motion) is a mandated activity in the original test claim statute: Statutes 2000, chapter 821 (later made express by the amendment in Stats. 2001, ch. 943), effective January 1, 2001.

As amended by Statutes 2001, chapter 943, subdivision (a) of section 1405 states, "A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion ... for performance of forensic ... (DNA) testing." Subdivision (b)(3)(A) of section 1405 was added as follows:

> Upon a finding that the person is indigent, he or she has included the information required in paragraph (1), and counsel has not previously been appointed pursuant to this subdivision, **the court shall appoint counsel to investigate and, if appropriate, to file a motion for DNA testing** under this section and to represent the person solely for the purpose of obtaining DNA testing under this section. [Emphasis added.]

According to the 2001 amendment in subdivision (m) of section 1405, the "right to file a motion for post-conviction DNA testing is absolute and shall not be waived ...[including] a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendre." Moreover, the Second District Court of Appeal has held that a trial court does not have discretion to deny a motion for the appointment of counsel under section 1405 where the petitioner's request meets the statutory criteria.[34]

Even though the indigent defense counsel files the DNA-testing motion "if appropriate," staff finds that preparing and filing the motion is mandatory. As stated above, an attorney's duty is "to present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit."[35] Because whether or not to file the DNA testing motion is a

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establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing."

[33] *Norton v. Hines* (1975) 49 Cal.App.3d 917, 922.

[34] *In re. Kinnamon* (2005) 133 Cal. App. 4th 316, 323.

[35] *Norton v. Hines, supra,* 49 Cal.App.3d 917, 922.

matter of professional judgment, the indigent defense counsel's duty to file it, if appropriate, is not truly discretionary. Rather, it is an activity mandated by the state.

Therefore, if the person is indigent and has met the other statutory requirements, staff finds that preparing and filing the motion for DNA testing and representing the person solely for the purpose of obtaining DNA testing are mandated activities that are subject to article XIII B, section 6 effective January 1, 2002.

Section 1405, subdivision (c)(2) requires the person making the motion for DNA testing to 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." Although this activity is a requirement of the person filing the motion, if the person is indigent, it will fall on the indigent defense counsel. Therefore, staff finds that effective January 1, 2002, notice of the motion as specified is also a mandated activity that is subject to article XIII B, section 6.

Subdivision (c)(2) of section 1405 (former subd. (a)(2)) also states that a response to the motion "if any, shall be filed 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." Claimant alleged the following activity: "investigate whether such a [DNA-testing] motion is meritorious, and, if necessary litigate the motion ...."[36]

Here, by using the words "if any," the statute appears to merely authorize filing a response to the DNA-testing motion. Thus, the issue is whether filing a response to this motion is a state mandate on the district attorney. For the reasons below, staff finds that it is.

The district attorney's duties are specified in Government Code section 26500, et seq.. Section 26500 states: "The district attorney is the public prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." The California Supreme Court has held that the prosecuting district attorney has the exclusive authority to prosecute individuals on behalf of the public.[37] The decision whether or not to prosecute, however, is left to the discretion of the prosecuting district attorney.[38] As to this discretion, in *People v. Eubanks,* the court stated that "the district attorney is expected to exercise his or her discretionary functions in the interests of the People at large ..." and this includes "the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name."[39] Furthermore, the Fourth District Court of Appeal has stated that if a district attorney elected not to appear at a serious felony trial,

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[36] See attached to the original test claim the Declaration of Lisa Kahn, June 18, 2001, page 1. Claimant also alleges the public defender and district attorney activity of responding to notices sent pursuant to Penal Code section 1417.9.

[37] *People v. Eubanks* (1996) 14 Cal.4th 580, 588-590 (*Eubanks*).

[38] *Ibid.*

[39] *Ibid.*

he or she "would be in gross dereliction of his [or her] duty to the people of the state under Government Code section 26500...."[40]

In addition to the role of public prosecutor, the district attorney's civil law duties are stated in Government Code sections 26520-26528,[41] including the duty to "defend all suits brought against the state in his or her county or against his or her county wherever brought ..."[42]

The issue of discretionary local activities in the context of state mandates was discussed in the recent California Supreme Court case of *San Diego Unified School District v. Commission on State Mandates,*[43] which involved legislation requiring a due process hearing prior to student expulsion. There, the court stated its reluctance to preclude reimbursement "whenever an entity makes an initial discretionary decision that in turn triggers mandated costs"[44] because, under such a strict application of the rule, "public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper."[45] Citing *Carmel Valley Fire Protection District v. State of California,*[46] where an executive order requiring that local firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate, the court pointed out that reimbursement was not foreclosed "merely because a local agency possessed discretion concerning how many firefighters it would employ – and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be

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[40] *People ex rel. Kottmeier v. Municipal Court* (1990) 220 Cal.App.3d 602, 609 (*Kottmeier*). Staff notes that the court's statements in *Eubanks* and *Kottmeier* are in the context of criminal prosecutions. However, the DNA testing procedure authorizes the prosecuting district attorney to comment on the appropriateness of DNA testing for convicted criminals, which is similar to criminal prosecutions in that the prosecuting district attorney is carrying out his or her role of protecting the public from those convicted of crimes. Therefore, the use of case law surrounding criminal prosecutions is analogous and appropriate.

[41] These duties include legal services for the county, prosecution of actions for recovery of debts, fines, penalties and forfeitures, actions to recover illegal payments, and abatement of public nuisances.

[42] Government Code section 26521.

[43] *San Diego Unified School Dist v. Commission on State Mandates., supra*, 33 Cal.4th 859, 887-888.

[44] *Ibid.*

[45] *Ibid.*

[46] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521.

subjected."[47] The court expressed doubt that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended such a result.[48]

In the claim at issue, the prosecuting district attorney's decision to respond to a petition for a DNA-testing motion must be driven by the serious public interest in public protection, as well as by saving the taxpayers the expense of unnecessary DNA testing (as the prosecutor may dispute any of the findings required for a successful DNA-testing motion). Any response to a DNA motion is very closely related to the district attorney's public prosecutor role, and also analogous to the duty to "defend all suits brought against ... his or her county ...."[49] In short, the district attorney has no choice to respond to the motion when the facts of the case so dictate.

For these reasons, staff finds that the district attorney's preparation and filing of a response to the DNA-testing motion is a state mandate within the meaning of article XIII B, section 6, effective January 1, 2001.

Section 1405, subdivision (d) (former subd. (a)(3)) states as follows:

> If the court finds evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, **it shall order the party** at whose request the testing was conducted 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. [Emphasis added.]

Claimant requests reimbursement for responding to requests for the analysis of evidence held.

Based on its mandatory language that the court 'shall' order access to the specified information, subdivision (d) leaves the court with no discretion in ordering the parties access to previous DNA-testing information.[50] As indicated in the analysis below, when the court is left without discretion, the provision is a state mandate rather than a mandate by the court. Therefore, staff finds that the following activity is subject to article XIII B, section 6, effective January 1, 2001: 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.

Section 1405, subdivision (g)(2) (former subd. (e)) states:

> The 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. If the parties cannot agree, the court shall designate

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[47] Cf. *San Diego Unified School Dist v. Commission on State Mandates, supra,* 33 Cal.4th 859, 888.

[48] *Ibid.*

[49] Government Code section 26521.

[50] Cf. *San Diego Unified School Dist., supra,* 33 Cal.4th at page 880. The Supreme Court did not resolve the discretionary mandate issue, however, as it decided the case on other grounds.

the laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB).

Claimant requests reimbursement for meeting and conferring with the trial attorney, appellate counsel, representatives of the Public Defender's Innocence Unit, etc., but it is unclear whether claimant's alleged purpose for these meetings is to agree on a DNA-testing laboratory.

The issue, nonetheless, is whether agreeing on a laboratory is a mandatory activity for the indigent defense counsel and the district attorney.

As stated above, the duty of indigent defense counsel is "to present his case vigorously in a manner as favorable to the client [or convicted person] as the rules of law and professional ethics will permit."[51] Deciding on a DNA-testing lab falls within this professional duty because of the perception that the choice of lab might affect the test's outcome. Therefore, staff finds that agreeing to a DNA-testing laboratory is a state mandate on a public defender subject to article XIII B, section 6.

As applied to the district attorney, deciding on a DNA-testing laboratory after the person has been convicted is in furtherance of enforcing criminal laws, or is closely related to it. For the same reasons stated above regarding responding to the DNA-testing motion, agreeing on a DNA-testing laboratory is within the district attorney's professional duties. Therefore, staff finds that agreeing to a DNA-testing laboratory is also a state mandate on the district attorney within the meaning of article XIII B, section 6 effective January 1, 2001.

Section 1405, subdivision (j) (former subd. (h)) states: "An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General." Claimant alleged the activity of "if necessary litigate the [DNA-testing] motion including seeking appellate relief through a writ petition if the motion is denied."[52]

Although subdivision (j) appears to merely authorize the indigent defense counsel or the district attorney to request writ review of the superior court ruling on the DNA-testing motion, the issue is whether filing or responding to writ review is a state mandate. Staff finds that it is.

As stated above, the state mandates the program that allows convicted persons to seek DNA testing, and mandates the appointment of indigent defense counsel under specified conditions. The indigent defense counsel's duty is "to present his case vigorously in a manner as favorable to the client [or defendant] as the rules of law and professional ethics will permit."[53] Filing or responding to writ review for denial of a DNA-testing motion falls within this professional duty because, based on the public defender's professional judgment, the superior court judge may have wrongfully denied the petition. Therefore, staff finds that indigent defense counsel's filing

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[51] *Norton v. Hines, supra,* 49 Cal.App.3d 917, 922.

[52] See attached to the original test claim the Declaration of Lisa Kahn, June 18, 2001, page 1, and the Declaration of Jennifer Friedman, June 6, 2001, page 1.

[53] *Norton v. Hines, supra,* 49 Cal.App.3d 917, 922.

or responding to writ review is a state mandate that is subject to article XIII B, section 6 effective January 1, 2001.

Filing writ review is also a state mandate on the district attorney. As with the discussion above regarding responding to the motion, the prosecuting district attorney's decision to file a writ review of the trial court's decision to grant the DNA-testing motion is driven by a serious interest in public protection. Filing or responding to writ review in such a case is closely related to the district attorney's public prosecutor role, and also analogous to the duty to "defend all suits brought against the state in his or her county or against his or her county ...."[54] Therefore, staff finds that filing or responding to writ review of the trial court's decision is a state-mandated activity subject to article XIII B, section 6 for the district attorney effective January 1, 2001.

B. Activities in section 1405 mandated by the court

Subdivision (b)(3)(B) of section 1405, as amended by Statutes 2001, chapter 943, states that if the court finds that the person is indigent and *that counsel has previously been appointed under this section*, "the court may, in its discretion, appoint counsel to investigate and if appropriate, to file a motion for DNA testing..."

Thus, the issue is whether, when counsel was previously appointed, it is a state mandate to investigate and, if appropriate, file the DNA-testing motion.

Article XIII B, section 9, subdivision (b), of the California Constitution excludes from either the state or local spending limit any "[a]ppropriations required for purposes of complying with mandates *of the courts* or the federal government which, without discretion,[55] require an expenditure for additional services or which unavoidably make the providing of existing services more costly." [Emphasis added.] Article XIII B places spending limits on both the state and local governments. "Costs mandated by the courts" are expressly excluded from these ceilings.[56]

The California Supreme Court has explained article XIII B as follows:

> Article XIII B - the so-called "Gann limit" - restricts the amounts state and local governments may appropriate and spend each year from the "proceeds of taxes." (§§ 1, 3, 8, subds. (a)-(c).) ... In language similar to that of earlier statutes, article XIII B also requires state reimbursement of resulting local costs whenever, after

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[54] Government Code section 26521.

[55] In *City of Sacramento v. State of California* (1990) 50 Cal. 3d 51, which interpreted section XIII B, section 9, the court held that "without discretion" as used in section 9 (b) is not the same as legal compulsion. Rather it means that the alternatives are so far beyond the realm of practical reality that they leave the state without discretion to depart from the federal standards. Thus, the court held that the state enacted the test claim statute in response to a federal mandate for purposes of article XIII B, so the state statute was not reimbursable. (*Id.* at p. 74). Although the context in *City of Sacramento* was federal mandates analyzed under article XIII B, section 9, subdivision (b), the analysis is instructive in this case.

[56] *Id.* at page 57.

> January 1, 1975, "the Legislature or any state agency mandates a new program or higher level of service on any local government, ..." (§ 6.) Such mandatory state subventions are excluded from the local agency's spending limit, but included within the state's. (§ 8, subds. (a), (b).) Finally, article XIII B excludes from either the state or local spending limit any "[a]ppropriations required for purposes of complying with mandates of *the courts* or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly." (§ 9, subd. (b) ... .) [Emphasis added.][57]

In other words, for activities undertaken to comply with a court mandate, article XIII B section 9, subdivision (b) excludes their costs from the constitutional spending cap of the affected state or local entity.[58] By contrast, expenditures for state-mandated programs under section 6 of article XIII B are exempt from a local agency's spending limit, but are not exempt from the state's constitutional spending cap.[59] Since court mandates are excluded from the constitutional spending limit, reimbursement under article XIII B, section 6 is not invoked.

As stated above, the issue is whether the appointment of counsel to investigate and if appropriate, file the DNA-testing motion, when counsel was previously appointed under section 1405, subdivision (b)(3)(B), is a mandate of the court or the state. In determining whether this provision is a court mandate, we consider whether the court has discretion in granting the request. If the court has no discretion, then the requirement is more in the nature of a state mandate rather than a court-ordered mandate. Conversely, the more discretion the court has in requiring the activity, the more likely the activity will be a court mandate.[60]

Based on the statutory language ("the court may, in its discretion, appoint counsel..."), appointment of counsel when counsel has previously been appointed is an activity wholly within the discretion of the court. Thus, staff finds this activity is a mandate of the court and not of the state. As a court mandate, it is therefore excluded from the constitutional definition of 'appropriations subject to limitation' in article XIII B, section 9 (b) of the California Constitution, making it not subject to article XIII B, section 6.

Similarly, section 1405, subdivision (e) states, "The court, in its discretion, may order a hearing on the motion [for DNA testing]." Claimant requests reimbursement for the following hearing-related activities of the district attorney and indigent defense counsel: time spent in court for appointment of counsel, filing of motions and litigation associated with motions, as well as travel-related expenses associated with meeting with inmates in connection with preparing the

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[57] *Id.* at pages 58-59.

[58] *Id.* at page 71.

[59] California Constitution, article XIII B, section 8, subdivision (a).

[60] Cf. *San Diego Unified School Dist,, supra,* 33 Cal.4th at page 880 states: "[I]n its mandatory aspect, [the test claim statute] ... appears to constitute a state mandate, in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing."

motion.[61] Claimant also alleges the Sheriff's activities of court testimony on the chain of custody and disposition of biological evidence.

The plain language of section 1405, subdivision (e) indicates that this activity is discretionary with the court, i.e., is triggered by a discretionary court order. Moreover, reading section 1405 in its entirety indicates that the court could grant or deny the motion for DNA testing without a hearing on the motion.

As discussed above, an activity that is wholly within the discretion of the court is not a state-mandated activity, but is a court mandate within the meaning of article XIII B, section 9 (b). As to subdivision (e), the plain language indicates that whether or not a hearing is held is wholly within the discretion of the court. Therefore, staff finds that a hearing on the DNA motion is a court mandate on the district attorney and indigent defense counsel, and is therefore not subject to article XIII B, section 6.[62]

C. Activities in section 1417.9 mandated by the state

Subdivision (a) of section 1417.9 of the Penal Code states:

> (a) Notwithstanding any other provision of law and subject to subdivision (b), the appropriate governmental entity shall retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for deoxyribonucleic acid (DNA) testing.

Subdivision (b), as discussed below, specifies the conditions upon which the local entity may dispose of the biological evidence. Neither subdivision (a) nor (b) was substantively amended by Statutes 2001, chapter 943. Claimant requests reimbursement for identifying and tracking evidence to maintain proper retention and storage, preparing and tracking biological evidence sent to the lab for DNA testing, and maintaining biological evidence in refrigerated facilities and adding and maintaining such facilities. Claimant also alleges related activities, such as policies and procedures, training, distribution of a State Attorney General's Office publication on the test claim statute, and designing and developing computer software and equipment necessary to identify and retrieve the biological material.[63]

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[61] Staff makes no finding on whether transporting inmates to or from state prison would be reimbursable under Penal Code section 4750 et seq.

[62] This finding includes denial of the activity claimant alleged for the sheriff to transport convicted persons and provide oral testimony at hearings.

[63] These related activities are not expressly required by the statute. Should the Commission approve this analysis, these related activities may be considered during the parameters and guidelines phase to determine the "...most reasonable methods of complying with the mandate ... ." (Cal. Code Regs, tit. 2, § 1183.12, subd. (b)(2)).

Because the plain language of section 1417.9, subdivision (a), requires the local entity to retain biological material secured in connection with a felony case,[64] staff finds that this activity is mandated by the state, and is therefore subject to article XIII B, section 6 effective January 1, 2001.

Subdivision (b) of section 1417.9 of the Penal Code states that "A governmental entity may dispose of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set for below are met ... ." The statute then 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.

Claimant requests reimbursement for making initial contacts for permission to dispose of the biological evidence.

Thus, the issue is whether notifying persons convicted of felonies of the disposal of biological material in connection with their criminal case before their release from prison is a state-mandated activity. Staff finds that it is not.

In the *Kern High School Dist.* case,[65] the California Supreme Court considered whether school districts have a right to reimbursement for costs in complying with statutory notice and agenda requirements for various education-related programs that are funded by the state and federal government. The court held that in eight of the nine programs at issue, the claimants were not entitled to reimbursement for notice and agenda costs because district participation in the underlying program was voluntary. As the court stated, "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirement related to that program does not constitute a reimbursable mandate."[66]

Here, as in *Kern,* the initial decision to dispose of the biological material is voluntary or discretionary. This decision, in turn, triggers a mandatory duty to notify those incarcerated. Thus, because this statute authorizes but does not require the local entity to dispose of the biological material before the convicted person's release from prison, staff finds that doing so is not subject to article XIII B, section 6.

D. Do the test claim statutes constitute a "program" within the meaning of article XIII B, section 6?

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program," defined as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all

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[64] The State Attorney General has opined that this retention is required only in felony cases. 88 Opinions of the California Attorney General 77 (2005).

[65] *Kern High School Dist., supra,* 30 Cal.4th 727.

[66] *Id.* at page 743. Emphasis in original.

residents and entities in the state.[67] Only one of these findings is necessary to trigger article XIII B, section 6.[68]

Of the activities discussed above,[69] only the following activities and statutes that are subject to article XIII B, section 6 are now under consideration. Thus, future reference to the test claim statutes or legislation is limited to the following:

- **Representation and investigation**: 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**: if 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 lab reports and data:** 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 effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).

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[67] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[68] *Carmel Valley Fire Protection District v. State of California, surpa,* 190 Cal.App.3d 521, 537.

[69] Claimant also requests reimbursement for preparing and tracking biological evidence sent to the lab for DNA testing, and for DNA testing required of the sheriff's department that is not reimbursed by the court. Since these activities are not expressly in statute as local government requirements, the Commission may, if it approves this test claim, consider them during the parameters and guidelines phase to determine whether they are "the most reasonable methods of complying with the mandate" (Cal.Code Regs, tit. 2, § 1183.12, subd. (b)(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)).

Staff finds that these test claim statutes constitute a program within the meaning of article XIII B, section 6. DNA testing and retention of biological material carry out a governmental function of providing a service to the public by allowing incarcerated persons to contest their criminal convictions, thereby fostering justice for those wrongly convicted. Moreover, the activities impose unique requirements on local government that do not apply generally to all residents and entities in the state. Therefore, the test claim statutes constitute a program within the meaning of article XIII B, section 6.

Issue 2: Does the test claim legislation impose a new program or higher level of service on local entities within the meaning of article XIII B, section 6?

To determine whether the "program" is new or imposes a higher level of service, the test claim legislation is compared to the legal requirements in effect immediately before enacting the test claim legislation.[70] And the test claim legislation must increase the level of governmental service provided to the public.[71] Each activity is discussed separately.

Prepare and file motion for DNA testing & representation: As discussed above, this activity requires court-appointed counsel, if not previously appointed by the court, to investigate and represent the person for the purpose of obtaining DNA testing, and as amended by Statutes 2001, chapter 943, to file a motion, if appropriate, for DNA testing and to represent the person solely for the purpose of obtaining DNA testing (Pen. Code, § 1405, subds. (a) & (b)(3)), and to provide notice of the motion as specified (§ 1405, subd. (c)(2)).[72]

Finance, in its August 2001 comments, states the following:

> [T]he activities described in the test claim do not constitute a new program or activity or a reimbursable cost. We believe that the activities ... is a procedure extension of the original trial. The petition involved is only raising examination of original evidence using technology not available at the time of the original case, thereby raising in question a material and substantive issue to the original criminal charge and verdict. ... the defense and prosecutorial activity and related investigations of this test claim are existing responsibilities of local government.

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[70] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[71] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[72] The discussion as to whether this activity is a new program or higher level of service includes the original test claim statute (Stats. 2000, ch. 821) as well as the amendments of Statutes 2001, chapter 943.

In its October 2001 response to Department of Finance comments, claimant argues that the program is not merely extensions of the original duties of trial counsel or extensions of the original case. Claimant cites a legislative analysis of SB 1342 that convicted individuals had no right to post-conviction DNA testing before the test claim statute.[73] Claimant also states that preexisting law (Pen. Code, § 1182) that authorizes a motion for a new trial is to be made prior to the imposition of judgment, unlike the test claim statute that authorizes the motion after the judgment. Claimant points out that the counsel appointed to represent the convict is often new to the case and must conduct an investigation in order to determine whether the motion is warranted, and if so, to prepare and file it. Claimant also argues that there is was no prior mechanism for obtaining a DNA test to use as the basis for habeas corpus relief, and that there is no absolute right to counsel for habeas corpus relief (citing *Pennsylvania v. Finley* (1987) 481 U.S. 551). Claimant concludes that the test claim statute is new and not an extension of a preexisting duty of trial or habeas counsel.

In its December 2001 comments, Finance states that appointing counsel to investigate and file a motion, if appropriate, for post-conviction DNA testing for indigent convicted persons is a reimbursable state-mandated program.

Staff finds that the activities of investigating and, if appropriate, filing a motion for DNA testing and representing the person solely for the purpose of obtaining DNA testing under Penal Code section 1405, constitute a new program or higher level of service. The DNA-testing motion is a separate civil action,[74] not part of the original criminal action, since the action is not to bring someone "to trial and punishment."[75] As such, the motion for DNA testing is not an extension of the original criminal trial.

Under preexisting law, a convicted person can file a petition for writ of habeas corpus or by coram nobis[76] based on newly discovered evidence.[77] However, a public defender is not required to do so.

Another preexisting statute, Government Code section 68662, requires the court to offer to appoint counsel to represent state prisoners subject to a capital sentence for purposes of state post-conviction proceedings, meaning state proceedings in which the prisoner seeks collateral relief from a capital sentence, i.e., relief other than by automatic appeal."[78] The Habeas Corpus

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[73] Assembly Committee on Public Safety, Analysis of Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as amended June 13, 2000, pages 4-5.

[74] As defined by Code of Civil Procedure section 30, a civil action is "prosecuted by one party against another for the declaration, enforcement or protection of a right, or the redress or prevention of a wrong."

[75] As defined by Penal Code section 683, a criminal action is "the proceeding by which a party charged with a public offense is accused and brought to trial and punishment..."

[76] A writ of coram nobis permits the court that rendered judgment to reconsider it and give relief from errors of fact.

[77] *In re Clark* (1993) 5 Cal. 4th 750, 766.

[78] *In re Barnett* (2003)31 Cal.4th 466, 476, fn. 6.

Resource Center, an agency in the Judicial Branch of state government, provides for this counsel.[79]

These provisions, however, are distinct from the requirements of the test claim statute. Thus, investigating, filing the motion for DNA testing, and representing the person for the purposes of obtaining DNA testing are not preexisting duties of local entities, but are a new program and higher level of service.

Inasmuch as the test claim statute imposes new requirements, staff finds that the activities of investigating and, if appropriate, filing a motion for DNA testing and representing the person solely for the purpose of obtaining DNA testing under Penal Code section 1405, constitute a new program or higher level of service.

The test claim statutes, as discussed above, also require local entities to do the following:

- **Prepare and file response to the motion:** Effective January 1, 2001, to 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 lab reports and data:** 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 effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender 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)).

Because preexisting law did not require local entities to perform the four activities listed above, staff finds that they constitute a new program or higher level of service within the meaning of article XIII B, section 6.

Retain biological material: The test claim statute requires 'the appropriate government entity' to retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)). The California Attorney General has opined that this does not require retention of biological material in connection with a misdemeanor conviction, but only applies to felony cases.[80]

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[79] See <http://www.hcrc.ca.gov> as of April 28, 2006.

[80] 88 Opinions of the California Attorney General 77 (2005).

Although preexisting law includes a law enforcement duty to preserve evidence that might be expected to play a significant role in the suspect's defense,[81] that duty is limited. The California Supreme Court outlined the limitation as follows:

> The state's responsibility [to preserve evidence] is further limited when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." [Citations omitted.] In such case, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." [Citations omitted.][82]

Thus, the preexisting duty to retain biological evidence is limited when the material, like DNA and other biological material, 'could have been subject to tests, the results of which might have exonerated the defendant." Moreover, before 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, staff 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.

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

In order for the test claim statute to impose a reimbursable state-mandated program under the California Constitution, the test claim legislation must impose costs mandated by the state.[83] In addition, no statutory exceptions listed in Government Code section 17556 can apply. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

With the test claim, claimant files a declaration that it "is incurring costs, well in excess of $200 per annum, the minimum cost that must be incurred to file a claim in accordance with Government Code section 17564(a)."[84]

Government Code section 17556, subdivision (e), precludes reimbursement for a local agency if:

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[81] *People v. Farnam* (2002) 28 Cal. 4th 107, 166.

[82] *Ibid.*

[83] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[84] The current requirement is $1000 in costs (Gov. Code, § 17564, as amended by Stats. 2004, ch. 890).

> [t]he statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or **includes additional revenue** that was specifically intended to fund the costs of the state mandate **in an amount sufficient** to fund the cost of the state mandate. [Emphasis added.]

The issue, therefore, is whether there is sufficient additional revenue to fund the program. Staff finds that there is not.

Penal Code section 1405, subdivision (i) states:

> (1) The cost of DNA testing ordered under this section shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and posses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person.
> (2) In order to pay the state's share of any testing costs, the laboratory designated in subdivision (e) shall present it bill for services to the superior court for approval and payment. It is the intent of the Legislature to appropriate funds for this purpose in the 2000-01 Budget Act.

As to the DNA testing, there is no local entity expenditure for this testing because the statute calls for the state or applicant to pay for it. However, there is no similar promise of funding for the other activities mandated by the test claim statute. Therefore, staff finds that subdivision (i) of section 1405 does not preclude reimbursement for the test claim.

In addition, the claimant indicated receipt of a $160,000 grant from the Office of Criminal Justice Planning (State of California) for providing representation to former public defender clients who request counsel for DNA-testing motions.[85]

There is no evidence in the record that this grant constitutes "additional revenue ... specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate." The grant was only for indigent counsel or public defender expenses, and was not intended to fund evidence retention or other activities required by the test claim statutes. Therefore, while this grant would be considered an offset of expenses incurred under the statute,[86] it does not preclude reimbursement for the state-mandated program.

Therefore, staff finds that the test claim statutes impose costs mandated by the state within the meaning of Government Code section 17514, and that the preclusions in Government Code section 17556 do not apply.

CONCLUSION

Staff finds 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:

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[85] Letter from J. Tyler McCauley, County of Los Angeles, September 19, 2003, page 5.

[86] California Code of Regulations, title 2, section 1183.1, subdivision (a)(7).

- **Representation and investigation**: 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**: if 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:** 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 effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender 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)).

Staff finds that all other statutes in the test claim, including holding a hearing on the DNA-testing motion, are not reimbursable state-mandated programs within the meaning of article XIII B, section 6 and Government Code section 17514.

Recommendation

Staff recommends that the Commission adopt this analysis and approve the test claim for the activities listed above.

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

BILL LOCKYER
Attorney General

OPINION	:	No. 04-405
of	:	May 17, 2005
BILL LOCKYER Attorney General	:	
SUSAN DUNCAN LEE Deputy Attorney General	:	

THE HONORABLE RAYMOND FORTNER, COUNTY COUNSEL, COUNTY OF LOS ANGELES, has requested an opinion on the following question:

Is a governmental entity required to retain biological material secured in connection with a misdemeanor case for the period of time that a person is incarcerated in connection with the case?

CONCLUSION

A governmental entity is not required to retain biological material secured in connection with a misdemeanor case for the period of time that a person is incarcerated in connection with the case.

ANALYSIS

In 2000, the Legislature enacted legislation (Pen. Code, §§ 1405, 1417.9)[1] to provide a procedure for prisoners to seek postconviction "DNA" testing of biological evidence. Subdivision (a) of section 1405 provides:

> "A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction in his or her case, for performance of forensic deoxyribonucleic acid (DNA) testing."

Section 1417.9 requires government agencies to retain biological material that may become the subject of a postconviction motion for DNA testing. As relevant here, section 1417.9 states:

> "(a) *Notwithstanding any other provision of law and subject to subdivision (b), the appropriate governmental entity shall retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case.* The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for deoxyribonucleic acid (DNA) testing.
>
> "(b) A governmental entity may dispose of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set forth below are met:
>
> "(1) The governmental entity notifies all of the following persons of the provisions of this section and of the intention of the governmental entity to dispose of the material: any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.
>
> "(2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

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[1] All further statutory references are to the Penal Code.

"(A) A motion filed pursuant to Section 1405. However, upon filing of that motion, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

"(B) A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to Section 1405 that is followed within 180 days by a motion for DNA testing pursuant to Section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

"(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405.

"(3) No other provision of law requires that biological evidence be preserved or retained.

"....."
(Italics added.)

The question presented for resolution focuses upon the language of subdivision (a) of section 1417.9, which requires the retention of all biological material "that is secured in connection with a criminal case." Because sections 1405 and 1417.9 elsewhere refer only to "felony" convictions, and not to misdemeanor convictions, we are asked whether section 1417.9 requires biological material to be preserved in misdemeanor cases. We conclude that the statute does not so require.

In interpreting the requirements of section 1417.9, we apply well established rules of statutory construction. The fundamental purpose in interpreting a statute is to ascertain the intent of the Legislature in order to effectuate the purpose of the law. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387; *In re Rojas* (1979) 23 Cal.3d 152, 155.) As part of this examination of the Legislature's intent, we may consider whether the literal language of the statute comports with its purpose as well

as whether a literal construction of one provision would be inconsistent with other provisions. In *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, the court observed:

> ". . . The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] . . . [E]ach sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to a more reasonable result will be followed [citation]."

It is apparent that section 1417.9 requires governmental entities, particularly law enforcement agencies, to retain biological material in circumstances where it may become the subject of a prisoner's postconviction motion for DNA testing. Not only was section 1417.9 enacted in conjunction with section 1405, but it makes repeated references to motions "pursuant to Section 1405." But a motion "pursuant to Section 1405" may only be filed by "[a] person who was convicted of a felony and is currently serving a term of imprisonment." (§ 1405, subd. (a).) Thus, construing section 1417.9 to require biological material to be preserved in misdemeanor cases would not further the purpose of preserving biological evidence for those who may ask to have the material tested.

It is also apparent that section 1417.9 permits government agencies to dispose of biological material when there is *no* reasonable likelihood that the material will be the subject of postconviction testing. Subdivision (b) of the statute describes the circumstances under which a government agency may give notice and dispose of biological material even though someone is incarcerated in connection with the case. Persons convicted of misdemeanors are not included in these notice procedures, unlike persons serving felony terms. It would be anomalous to construe section 1417.9 as applying in situations where persons who have no interest in whether the material should be preserved would nevertheless be the only ones who are notified of its intended destruction.

Our construction of sections 1405 and 1417.9 finds further support in the legislative history of these statutes. (See *In re Dannenberg* (2005) 34 Cal.4th 1061, 1081 ["If . . . the statutory language is susceptible of more than one reasonable construction, we can look to legislative history"].) As initially proposed, section 1405 would have made motions for postconviction DNA testing available to "[a] defendant who was convicted in a criminal case." (Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as introduced Jan. 10, 2000.)

An analysis of this early version of the bill by the Assembly Committee on Public Safety noted that "this bill would apply in all criminal cases, is not limited to felony cases, and would include misdemeanors as well." (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as amended Jun. 13, 2000, p. 7.)

On August 14, 2000, the bill was amended to make its testing procedures available only to "[a] defendant who was convicted of a felony and is currently serving a term of imprisonment . . ." and to permit biological material to be destroyed after notice to "any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case . . . ." (Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as amended Aug. 14, 2000.) It appears from the legislative committee reports that these bill amendments resulted from a concern that the costs associated with the storage of biological evidence would be "potentially significant." (See, e.g., Assem. Com. on Appropriations, Analysis of Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as amended Aug. 14, 2000, pp. 3-4.)[2]

In *Elsner v. Uveges* (2003) 106 Cal.App.4th 73, 90, the court recently reviewed a similar situation where the Legislature changed the language of a bill during the legislative process:

> ". . . We focus on the fact lawmakers once proposed a provision unambiguously stating otherwise, but deleted it when the bill was passed: ' "The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision." ' (*Beverly v. Anderson* (1999) 76 Cal.App.4th 480, 485-486; see also *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 845-846.) 'Similarly, "[t]he fact that the Legislature chose to omit a provision from the final version of a statute which was included in an earlier version constitutes strong evidence that the act as adopted should not be construed to incorporate the original provision." ' (*Beverly v. Anderson*, at p. 486.)"

Our construction of sections 1405 and 1417.9 is also consistent with the contemporaneous construction of these statutes by those charged with making them effective. In 2001, the Attorney General published a handbook, "Postconviction DNA Testing: Recommendations for Retention, Storage and Disposal of Biological Evidence," to provide assistance in complying with the requirements of the new statutes. The handbook

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[2] "Committee reports are often useful in determining the Legislature's intent. [Citation.]" (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 646.)

was produced by a task force consisting of representatives from the Attorney General's office, district attorneys' offices, law enforcement agencies, the judiciary, and forensic laboratories. The handbook recommended retention of evidence containing biological material in all felony cases, but did not allude to misdemeanor cases. As a contemporaneous construction by officials charged with putting these statutes into effect, the handbook's recommendations are persuasive in construing the terms of sections 1405 and 1417.9. (See *Gay Law Students Assn. v. Pacific Tel. & Tel. Corp.* (1979) 24 Cal.3d 458, 491; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245.)

Finally, we reject the suggestion that in this situation misdemeanor convictions must be treated the same as felony convictions under the equal protection clauses of the federal and state Constitutions. (U.S. Const., 14th Amend.; Cal. Const., art. 1, § 7; see, e.g., *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 712-713.) In *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253, the court observed:

> " ' "The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." ' [Citation.] 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' "

If two groups are not similarly situated, an equal protection claim "cannot succeed, and does not require further analysis." (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714-715; see, e.g., *In re Roger S.* (1977) 19 Cal.3d 921, 933-935.)

With respect to felony and misdemeanor convictions, "[t]here is . . . a significant difference in the quality and duration of punishment, as well as in the resultant long-term effects, which are brought about by a conviction for a felony as opposed to that for a misdemeanor." (*In re Valenti* (1986) 178 Cal.App.3d 470, 475.) Generally, misdemeanor terms are served in local detention facilities, while felony terms are served in state prison. (Pen. Code, §§ 17, 19; see *In re Eric J.* (1979) 25 Cal.3d 522, 537-538.) In *People v. Ansell* (2001) 25 Cal.4th 868, 872-873, the court pointed out additional differences:

> "Less known, perhaps, are the collateral consequences associated with a felony conviction after sentence has been served. Most of these disabilities have existed in some form for decades, and many appear in statutes outside the

> Penal Code. Some of the more common rules include disqualification from jury service, impeachment as a witness, inaccessibility to firearms, and registration as a sex offender. In addition, a felony conviction may disqualify the person from practicing many licensed trades and professions and from holding certain positions of public employment." (Fns. omitted.)

Further, a felony term of imprisonment is followed by a period of supervised parole. (Pen. Code, § 3000.) In contrast, when misdemeanants conclude their sentences, there is no further obligation or loss of civil rights. (*Newland v. Board of Governors, supra,* 19 Cal.3d at p. 712; *People v. Hibbard* (1991) 231 Cal.App.3d 145, 149.)

Given these different penalties and consequences for misdemeanor convictions, we believe that misdemeanants are not similarly situated vis-a-vis felons for purposes of sections 1405 and 1417.9. Of course, the Legislature may choose to amend these statutes to include misdemeanor cases--along the lines that it initially considered but rejected during the legislative process.

We conclude that a governmental entity is not required to retain biological material secured in connection with a misdemeanor case for the period of time that a person is incarcerated in connection with the case.

*****

CHARLES R. NORTON, Plaintiff and Appellant,
v.
LARRY L. HINES et al., Defendants and Respondents
Civ. No. 44731.

Court of Appeal, Second District, Division 5, California.

July 15, 1975.

SUMMARY

The trial court sustained a demurrer without leave to amend to a purported cause of action against attorneys for "professional negligence" in connection with their representation of a client in a prior civil action against plaintiff. The first of two causes of action in plaintiff's complaint alleged malicious prosecution of the lawsuit by the client but plaintiff specifically declined to amend his complaint to include the attorneys in that cause of action. (Superior Court of Ventura County, No. 56539, Jerome H. Berenson, Judge.)

The Court of Appeal affirmed the trial court's judgment of dismissal, holding that if a cause of action existed against the attorneys it must be pleaded as an action for malicious prosecution. To permit plaintiff to proceed on a cause of action for simple negligence, which requires a different and less demanding standard of proof, the court held, would subvert the public policy favoring free access to the courts. (Opinion by Hastings, J., with Stephens, Acting P. J., and Ashby, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Attorneys at Law § 26--Liability of Attorneys--To Persons Other Than Clients.
In an action alleging malicious prosecution by an individual of a prior civil action against plaintiff and, in a separate cause of action, "professional negligence" on the part of the attorneys who represented the individual, the trial court properly *918 sustained the attorneys' demurrer without leave to amend, where plaintiff had specifically declined to amend his complaint to include the attorneys in the cause of action for malicious prosecution. A cause of action for malicious prosecution exists if an attorney prosecutes a claim which a reasonable lawyer would not regard as tenable or proceeds with the action by unreasonably neglecting to investigate the facts and the law, and the public policy of freedom of access to the courts would be subverted by permitting maintenance of a cause of action for simple negligence, which requires a different and less demanding standard of proof.

[Attorney's liability to one other than his immediate client for consequences of negligence in carrying out legal duties, note, 45 A.L.R.3d 1181. See also Cal.Jur.3d, Attorneys at Law, § 386 et seq.; Am.Jur.2d, Attorneys at Law, § 196 et seq.]

COUNSEL

Stephen E. Lawton and Edward L. Lascher for Plaintiff and Appellant.

Nordman, Cormany, Hair & Compton, Robert L. Compton and James D. Daeschner for Defendants and Respondents.

HASTINGS, J.

The first alleged cause of action of plaintiff Norton's complaint is for damages for malicious prosecution against Frank Lind (Lind), and the second alleged cause of action thereof is for damages for "professional negligence" by Larry L. Hines, an attorney, and Nordman, Cormany, Hair & Compton, the unincorporated law firm of which Hines is a member (both Hines and the law firm will be identified collectively as "attorneys.") Attorneys' general demurrer to the second alleged cause of action of the complaint was sustained without leave to amend. Norton appeals from the order dismissing the action against attorneys.

Statement of Facts

Lind had sued Norton and another codefendant charging them, inter alia, with inducing a breach of a contract between Lind and the Oxnard *919 Community Hospital. Damages sought by Lind against Norton were in the amount of $900,000 plus costs and other monetary relief. Attorneys represented Lind. This action was pursued through the pretrial and discovery stages and was brought to

trial in which Lind was allowed to present all evidence which might support his claim against Norton, at the end of which Lind rested, "conceding that he had no evidence to support the complaint against [Norton] and stating that the action had been pursued through trial merely in the hope that some common basis for the action would develop or turn up." Judgment pursuant to provisions of Code of Civil Procedure section 631.8 was thereupon rendered in Norton's favor. [FN1]

FN1 Lind did acquire judgment against the other codefendant.

Norton's second cause of action alleges that he is in doubt as to whether the lawsuit against him was pursued by Lind upon advice of the attorneys after full disclosure and therefore joins the attorneys as alternative tortfeasors because of such uncertainty. To the extent that the attorneys did advise commencement and prosecution of the lawsuit against him after full disclosure of all the facts to them, such advice was given negligently and in violation of the standard of care for attorneys similarly situated. At the time of acting thus negligently, the attorneys foresaw, or, in the exercise of reasonable care would have foreseen, that such negligent advice would cause damages to a person in Norton's position, and to Norton in particular. Norton seeks general and special damages for negligence against attorneys.

The attorneys' general demurrer to the second cause of action was sustained without leave to amend apparently on the ground that it failed to state facts sufficient to constitute a cause of action.

Argument

On this appeal Norton contends that "an attorney owe[s] a duty to a foreseen third person to exercise reasonable care in advising his client to commence a lawsuit against that third person, when the attorney knows that his advice will in fact cause his client to commence that suit, that his client lacks probable cause to sue, and that the third person involved will thereby sustain damages." [FN2] Norton concedes this is a case of first impression. *920

FN2 At oral argument before this court Norton's attorney stated that attorneys were not made defendants to the first cause of action (malicious prosecution) because he did not believe they acted maliciously, but only negligently.

Attorneys, in defending the trial court's action in sustaining the demurrer without leave to amend, rely on the traditional concept regarding this issue, namely, that there is no privity of contract between a lawyer and the injured third party, therefore a lawyer owes no duty to anyone other than his client.

Norton urges us to depart from the decisional law supporting the rule relied on by attorneys, and to apply what he calls a 20th-century concept of tort law, namely, that foreseeability of injury to a third party should be the determinating factor and not privity of contract. He cites *Dillon v. Legg*, 68 Cal.2d 728, 739 [69 Cal.Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316], which states: "'... foreseeability of risk [is] of ... primary importance in establishing the element of duty.' [Citations.] ... 'The risk reasonably to be perceived defines the duty to be obeyed.' [Citation.] ... 'Duty, in other words, is measured by the scope of the risk which negligent conduct foreseeably entails.'" And *Diamond Springs Lime Co. v. American River Constructors*, 16 Cal.App.3d 581, 596-597 [94 Cal.Rptr. 200], where the court states: "Foreseeability of harm may be treated, alternatively, as one of the multiple factors giving rise to a duty of care; or as an element in the delineation of proximate cause. [Citations.] A defendant may be liable if his negligence is a substantial factor in causing the injury, and the presence of independent causal forces does not relieve him of liability if those forces were foreseeable. [Citations.] Except where there is no reasonable dispute over the issue, the foreseeability of harm arising from the defendant's conduct is a fact question for the jury. [Citations.]"

It is true, as Norton asserts, that in more recent times the strict requirement of privity of contract has been eased in certain well defined situations and the attorneys (and others) have been held liable for negligence to a third party. In California [FN3] the first case to recognize this concept was *Biakanja v. Irving*, 49 Cal.2d 647 [320 P.2d 16, 65 A.L.R.2d 1358], where a notary public prepared a will for his "client," but negligently failed to have the will properly attested so that it was not admitted to probate. At page 650, the court stated: "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the *921 connection between the defendant's conduct and the injury suffered, the moral

blame attached to the defendant's conduct, and the policy of preventing future harm."

FN3 For a summary of California law on this subject see 45 A.L.R.3d, Attorneys-Liability to Third Parties, section 4, pages 1190-1195.

Three years later the Supreme Court considered *Lucas v. Hamm*, 56 Cal.2d 583 [15 Cal.Rptr. 821, 364 P.2d 685]. This case involved an attorney who, in drafting his client's will, had inadvertently drafted one provision so as to render it void, thereby damaging some of the beneficiaries. Although the attorney was not liable in this case because it involved the complex rule against perpetuities, the court stated that intended beneficiaries of a will could state a cause of action against a negligent attorney on the basis of a third party beneficiary contract.

Later, in *Heyer v. Flaig*, 70 Cal.2d 223 [74 Cal.Rptr. 225, 449 P.2d 161], the court reaffirmed its decision in *Lucas v. Hamm (supra)*.

In *Donald v. Garry*, 19 Cal.App.3d 769 [97 Cal.Rptr. 191, 45 A.L.R.3d 1177], an attorney, employed by a collection agency to bring an action for the collection of a debt owed to an individual, was held liable to the individual creditor when the collection proceeding was dismissed for lack of diligent prosecution by reason of the attorney's negligence. In this case the court held at page 771 that: "An attorney may be liable for damage caused by his negligence to a person *intended to be benefited by his performance* irrespective of any lack of privity of contract between the attorney and the party to be benefited. [Citation.] The liability sounds in tort." (Italics added.) [FN4]

FN4 A recent case decided by this court is noteworthy. It is *De Luca v. Whatley*, 42 Cal.App.3d 574 [117 Cal.Rptr. 63], which considers an attorney's duty of due care toward a third person in a criminal proceeding. Plaintiff alleged that the attorney, in representing a client charged with murder at a preliminary hearing, called plaintiff as a witness, knowing, or chargeable with knowledge, that plaintiff would incriminate himself on the stand. The trial court sustained a demurrer to the complaint and dismissed the action against the attorney. In affirming the court's order of dismissal, the court stated at page 576: "To state the problem is to decide this case. When an attorney defends a person accused of crime he has but one intended *beneficiary* - his client." (Italics added.)

(1) In the case at bar a former litigant is suing adverse counsel. Clearly, an adverse party is not an intended beneficiary of the adverse counsel's client. If a cause of action exists against attorneys for the reasons alleged here, it must be pleaded as an action for malicious prosecution. We see no reason to extend applicable law now found in cases involving attorneys and third parties when there is sound and recognized public policy for limiting the cause of action to malicious prosecution under the facts as pleaded by Norton. ***922**

Malicious prosecution is a specific tort that developed in the criminal field out of a need to adjust two highly important social interests. The first is the interest of society in the efficient enforcement of the criminal law, which requires that private persons who aid in the enforcement of the law should be given an effective protection against the prejudice which is likely to arise from the termination of the prosecution in favor of the accused. The second is to protect the individual citizen against unjustifiable and oppressive litigation of criminal charges, which involves pecuniary loss, distress and loss of reputation. (Rest., Torts, p. 380.) In general, the same considerations apply to wrongful initiation of civil proceedings. The courts are open to every citizen to sue, subject only to the penalty of lawful costs if the action is unsuccessful. (52 Am.Jur.2d, Malicious Prosecution, § 10, p. 193.) [FN5] Public policy requires that a large degree of freedom of access to the courts be accorded to all persons for the settlement of their private disputes. At the same time the courts can not be "used" by a person who sues another without probable cause and with malice. The tort of malicious prosecution is designed to place restraint on a would-be plaintiff while furnishing protection to a wrongfully sued defendant. It naturally follows that the same general principles should apply to the attorney representing the litigant initiating the action. The attorney owes a duty to his client to present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit. He is an advocate and an officer of the court. He is cognizant of the public policy that encourages his clients to solve their problems in a court of law. [FN6] In our opinion, when representing his client in the initiation of a lawsuit, he should not be judged by a different standard. This is exactly the concept urged by Norton. His ***923** complaint verifies his belief that his only cause of action against Lind is for malicious prosecution (the first cause of action). Against

attorneys, however, he proceeds on a cause of action for simple negligence which requires a different and less demanding standard of proof. We believe the public policy of favoring free access to our courts is still viable. However, if Norton's cause of action against attorneys for negligence is permitted, this policy will be subverted. The attorney must have the same freedom in initiating his client's suit as the client. If he does not, lawsuits now justifiably commenced will be refused by attorneys, and the client, in most cases, will be denied his day in court. [FN7]

FN5 It has been suggested that if costs are inadequate to compensate a harassed defendant, he should look to the legislature, not to the courts. Also, if recovery were allowed in such cases a defendant who sets up a groundless defense should likewise be penalized. (See *52 Am.Jur.2d*, supra, p. 193.)

FN6 Analogous to this issue, and stressing the public policy concept immunizing attorneys from liability in performing their duties are the following cases and citation from Restatement of the Law:
In *Smith v. Hatch*, 271 Cal.App.2d 39, at page 50 [76 Cal.Rptr. 350], the court stated: "'The privilege of section 47, subdivision 2 of the Civil Code [relating to privilege of publications made in judicial proceedings] ... is based on the desire of the law to protect attorneys in their primary function - the representation of a client. ...'"
And in *Hollis v. Meux*, 69 Cal. 625 [11 P. 248], the court said at page 628: "'This rule [against a libel action] .... is founded upon public policy which requires that a judge, in dealing with the matter before him, counsel, in preferring or resisting a legal proceeding, and a witness, in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel. ...'"
According to Restatement of Torts, section 586, an attorney is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course of, and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation thereto.
Comment *a* states: "The privilege stated in this Section is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients. Therefore the privilege is absolute."
Comment *d* further provides: "The institution of a judicial proceeding includes all pleadings and affidavits necessary to set the judicial machinery in motion. The conduct of the litigation includes the examination and cross-examination of witnesses, comments upon the evidence and arguments both oral and written upon the evidence, whether made to court or jury."

FN7 Somewhat apropos to this case is a comment from the Restatement of Torts, *supra*, section 675, page 448, that reads as follows: "*d. Points of difference between criminal and civil proceedings.* In one particular a private prosecutor's reasonable belief in the guilt of the accused differs from the reasonable belief of one who initiates private civil proceedings against another. A private prosecutor does not have reasonable grounds for believing that the accused has conducted himself in a particular manner, if he merely entertains a suspicion even though he reasonably believes it may be verified upon further investigation (see Comment *c* on § 662). On the other hand, where the proceedings are civil, it is enough that the person initiating them believes that he can establish the existence of such facts to the satisfaction of the court and jury. In a word, the initiator of private civil proceedings need not have the same degree of certainty as to the relevant facts which is required of a private prosecutor of criminal proceedings. In many cases civil proceedings, to be effective, must be begun before the relevant facts can be ascertained to any degree of certainty. To put the initiator of such proceedings to a greater risk of liability would put an undesirable burden upon those whose rights cannot be otherwise effectively enforced."

We do not mean to say, or even imply, that attorneys can show a complete disregard for the rights of a prospective defendant. The law is to the contrary. In *Tool Research & Engineering Corp. v. Henigson*, 46 Cal.App.3d 675 [120 Cal.Rptr. 291], plaintiffs-appellants, successful defendants in a lawsuit brought

against them by Southwestern, sued Southwestern's attorney, Henigson, and his law firm for malicious prosecution. The court stated on pages 683-684: "Appellants do not contend that evidence supporting Southwestern's claim against them was absent or that respondents' performance as lawyers was inadequate. Rather, they argue that respondents were required to weigh the evidence ***924** for and against their clients and to proceed with their representation only if convinced that the trier of fact would accept the evidence in favor of the cause they represented. The argument is groundless. *It is the attorney's reasonable and honest belief that his client has a tenable claim that is the attorney's probable cause for representation* [FN[8]] [citations], and not the attorney's conviction that his client must prevail. The attorney is not an insurer to his client's adversary that his client will win in litigation. Rather, he has a duty 'to represent his client zealously ... [seeking] any lawful objective through legally permissible means ... [and presenting] for adjudication any lawful claim, issue, or defense.' (A.B.A. Code of Professional Responsibility, EC 7-1, DR 7-101(A)(1), discussed in 1 Witkin, Cal. Procedure (2d ed.) Attorneys, § 239.) *So long as the attorney does not abuse that duty by prosecuting a claim which a reasonable lawyer would not regard as tenable or by unreasonably neglecting to investigate the facts and law in making his determination to proceed,* his client's adversary has no right to assert malicious prosecution against the attorney if the lawyer's efforts prove unsuccessful." (Italics added.)

> FN8] Business and Professions Code, section 6068, in pertinent part, is as follows: "It is the duty of an attorney: ... (c) To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense."

Although the attorneys prevailed in the above case because they acted with probable cause, the court correctly states that a cause of action for malicious prosecution exists if the attorney prosecutes a claim which a reasonable lawyer would not regard as tenable or proceeds with the action by unreasonably neglecting to investigate the facts and the law. This in substance is the gist of Norton's cause of action against attorneys. Norton specifically declined to amend his complaint to include attorneys in the first cause of action (malicious prosecution); therefore, the court was correct in sustaining the demurrer without leave to amend.

The judgment (order of dismissal) is affirmed.

Stephens, Acting P. J., and Ashby, J., concurred.

A petition for a rehearing was denied July 31, 1975, and appellant's petition for a hearing by the Supreme Court was denied September 10, 1975. ***925**

Cal.App.2.Dist.,1975.

Norton v. Hines

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Court of Appeal, Second District, Division 6, California.
In re Todd Lee KINNAMON, on Habeas Corpus.
No. B182713.

Oct. 11, 2005.

Background: After imposition, on remand upon reversal of sentence, of consecutive sentences for petitioner's convictions for attempted murder and robbery, petitioner sought appointment of counsel for purpose of obtaining forensic deoxyribonucleic acid (DNA) testing as to his conviction of attempted murder. The Superior Court, Ventura County, No. CR45855-A, Arturo Gutierrez, J., denied request. Petitioner sought writ of mandate.

Holding: Treating petition as one for habeas corpus, the Court of Appeal, Yegan, J., held that trial court had no discretion to deny indigent defendant's request for counsel.
Petition granted.

West Headnotes

[1] **Habeas Corpus** 823
197k823 Most Cited Cases
In habeas corpus proceeding to determine whether petitioner was entitled to appointment of counsel for purpose of obtaining forensic deoxyribonucleic acid (DNA) testing as to his conviction of attempted murder, the Court of Appeal would take judicial notice of the record and opinion filed in appeal and of the superior court file. West's Ann.Cal.Evid.Code § § 452, 459; West's Ann.Cal.Penal Code § 1405.

[2] **Criminal Law** 1590
110k1590 Most Cited Cases

[2] **Criminal Law** 1602
110k1602 Most Cited Cases
Under statute allowing persons convicted of felonies to move for forensic deoxyribonucleic acid (DNA) testing, trial court had no discretion to deny request of indigent petitioner, convicted of attempted murder, for appointment of counsel for purpose of obtaining DNA testing, where petitioner's request included required information and counsel had not previously been
appointed for obtaining testing. West's Ann.Cal.Penal Code § 1405.

See 4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Criminal Procedure, § 53.

[3] **Statutes** 181(1)
361k181(1) Most Cited Cases

[3] **Statutes** 184
361k184 Most Cited Cases
In construing a statutory amendment, the court's role is to ascertain the Legislature's intent so as to effectuate the purpose of the law.

[4] **Statutes** 188
361k188 Most Cited Cases
In determining legislative intent, the court begins with the language of the statute itself, that is, it looks first to the words the Legislature used, giving them their usual and ordinary meaning.

[5] **Statutes** 188
361k188 Most Cited Cases

[5] **Statutes** 212.7
361k212.7 Most Cited Cases
If there is no ambiguity in the language of a statute, the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.

[6] **Statutes** 183
361k183 Most Cited Cases

[6] **Statutes** 189
361k189 Most Cited Cases
The language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend; to this extent, therefore, intent prevails over the letter of the law and the letter will be read in accordance with the spirit of the enactment.

[7] **Statutes** 217.3
361k217.3 Most Cited Cases
In determining legislative intent, courts may consider bill analyses prepared by the staff of legislative committees.

[8] **Statutes** 217.3
361k217.3 Most Cited Cases
In determining legislative intent of a statute, courts may consider a senate floor analysis.

**803. *318 California Appellate Project, under appointment by the Court of Appeal, Jonathan B. Steiner and Richard B. Lennon, Los Angeles, for Petitioner.

Gregory D. Totten, District Attorney, County of Ventura and Michael D. Schwartz, Senior Deputy District Attorney, for Respondent.

*319 YEGAN, J.

Petitioner, Todd Lee Kinnamon, seeks the appointment of counsel for the purpose of obtaining forensic deoxyribonucleic acid (DNA) testing as to his conviction of attempted murder. Petitioner relies on Penal Code section 1405. [FN1] We accept the concession by the District Attorney of the County of Ventura that petitioner is entitled to the relief sought in the petition.

FN1. All statutory references are to the Penal Code unless otherwise stated.

Factual and Procedural Background

After a court trial, petitioner was convicted of attempted murder (§ § 187, subd. (a), 664), first degree residential robbery (§ § 211, 212.5, subd. (a)), receiving stolen property (§ 496, subd. (a)), and grand theft of a firearm. (§ 487, subd. (d).) The trial court found true allegations that Kinnamon: (1) had personally used a deadly or dangerous weapon (a knife) in the commission of the attempted murder and robbery (§ 12022, subd. (b)); (2) had personally inflicted great bodily injury in the commission of the attempted murder (§ 12022.7); (3) had been previously convicted of two serious or violent felonies within the meaning of California's "Three Strikes Law" (§ § 667, subds. (b)-(i), 1170.12); and (4) had been previously convicted of two serious felonies within the meaning of section 667, subdivision (a). **804 Petitioner was sentenced to prison for 81 years to life.

[1] Petitioner appealed. In an unpublished opinion filed on May 31, 2000, we concluded that the trial court had erred in determining that it was required to impose consecutive prison terms for the attempted murder and robbery. We remanded the matter with directions that the trial court exercise its discretion whether to impose concurrent or consecutive terms for these offenses. In all other respects, the judgment was affirmed. *(People v. Kinnamon.* B134227 (filed 5-11-2000), opinion by Perren, J., Gilbert, P.J., Yegan, J. concurring.) [FN2] On remand, the trial court reimposed the original sentence. It ordered that the terms for attempted murder and robbery be served consecutively.

FN2. Pursuant to Evidence Code sections 452, subdivision (d), and 459, subdivision (a), we take judicial notice of the record on appeal and opinion filed in B134227. We also take judicial notice of the superior court file (CR45855A).

In April 2005 petitioner filed a request in the trial court for the appointment of counsel to prepare a motion for DNA testing pursuant to section 1405. In the request petitioner stated that he was not the perpetrator of the attempted *320 murder, that DNA testing is relevant to his assertion of innocence, and that counsel had not previously been appointed under section 1405.

The trial court denied the motion in a minute order without setting forth any reason for the denial. Petitioner then filed a petition for a writ of mandate in this court. Petitioner alleged that DNA testing was necessary to prove that his codefendant, Starla Baker, had committed the attempted murder.

We treated the petition as a petition for a writ of habeas corpus. We ordered the Director of the California Department of Corrections to show cause why a writ of habeas corpus should not issue granting the requested relief.

The District Attorney of the County of Ventura responded to the order to show cause. In its response, the district attorney stated: "[W]e concede that petitioner is entitled to the relief sought in the petition, i.e., appointment of counsel pursuant to Penal Code section 1405, subdivision (b)(1), to prepare a petition for DNA testing. (We do *not* concede that petitioner is entitled to the DNA testing itself.)"

The Trial Court Did Not Have Discretion To Deny Petitioner's Motion For The Appointment Of Counsel

[2] Section 1405, subdivision (a), allows the filing of a motion for DNA testing by "[a] person who was convicted of a felony and is currently serving a term of imprisonment...." Section 1405 was originally enacted in 2000 by Senate Bill No. 1342 (hereafter SB 1342). (Stats.2000, c. 821, § 1.) Then, section 1405 required the court "to appoint counsel for the convicted person who brings a motion under this section if that person is indigent." (*Id.*, former subd. (c).) Pursuant to this language, an indigent convicted

person arguably was not entitled to the appointment of counsel until after the filing of a motion for DNA testing. In the motion the convicted person must, inter alia, "[e]xplain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction." (*Id.*, subd. (c)(1)(B).)

Section 1405 was amended in 2001 by Senate Bill No. 83 (hereafter SB 83). (Stats.2001, c. 943, § 1.) Pursuant to the amendment, an indigent convicted person ****805** need not file a motion for DNA testing to be entitled to the appointment of counsel. As ***321** amended, section 1405 provides: "An indigent convicted person may request appointment of counsel to prepare a motion under this section by sending a written request to the court. The request shall include the person's statement that he or she was not the perpetrator of the crime and that DNA testing is relevant to his or her assertion of innocence. The request also shall include the person's statement as to whether he or she previously has had counsel appointed under this section." (*Id.*, subd. (b)(1).) If the court finds that (1) the person is indigent, (2) the request includes the required information, and (3) counsel has not previously been appointed under section 1405, then "the court shall appoint counsel to investigate and, if appropriate, to file a motion for DNA testing under this section and to represent the person solely for the purpose of obtaining DNA testing under this section." (*Id.*, subd. (b)(3)(A).) If counsel has previously been appointed, "the court may, in its discretion," again appoint counsel for the purpose of obtaining DNA testing. (*Id.*, subd. (b)(3)(B).)

[3][4][5] In construing the 2001 amendment of section 1405, "[o]ur role ... is to ascertain the Legislature's intent so as to effectuate the purpose of the law." (*In re Reeves* (2005) 35 Cal.4th 765, 770, 28 Cal.Rptr.3d 4, 110 P.3d 1218.) "In determining such intent, we begin with the language of the statute itself. [Citation.] That is, we look first to the words the Legislature used, giving them their usual and ordinary meaning. [Citation.] 'If there is no ambiguity in the language of the statute, "then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." ' [Citation.]" (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192, 96 Cal.Rptr.2d 463, 999 P.2d 686.)

The language of the 2001 amendment is unambiguous. The court must appoint counsel for an indigent convicted person if the person's request includes the required information, provided that counsel has not previously been appointed for the purpose of obtaining DNA testing. The required information does not include a theoretical or factual showing of the relevance of DNA testing. A statement that DNA testing is relevant suffices. The appointment of counsel is discretionary only if counsel has been previously appointed under section 1405.

[6] However, "it is settled that the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend. To this extent, therefore, intent prevails over the letter of the law and the letter will be read in accordance with the spirit of the enactment. [Citation.]" (*In re Michele D.* (2002) 29 Cal.4th 600, 606, 128 Cal.Rptr.2d 92, 59 P.3d 164.)

[7] ***322** In determining legislative intent, we may consider bill analyses prepared by the staff of legislative committees. (*People v. Benson* (1998) 18 Cal.4th 24, 34, fn. 6, 74 Cal.Rptr.2d 294, 954 P.2d 557.) An analysis of SB 83 by the staff of the Senate Committee on Public Safety states: "The purpose of this bill is to allow for the appointment of counsel prior to the filing of a motion for post-conviction DNA testing...." (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 83 (2001-2002 Reg. Sess.) as amended May 1, 2001, p. 1.) The bill analysis observes: "When SB 1342 ... was negotiated and then passed the Legislature last year there were discussions about making sure that the people bringing the motion had counsel even if they were indigent. That bill provided that counsel should be appointed after the ****806** person had brought a motion. What has become apparent since the bill took effect on January 1, 2001 is that it would be more efficient and equitable to appoint counsel at an earlier point in the process since many inmates do not have the ability to adequately file motions.... [¶]. .... [¶] This bill will provide for the appointment of counsel before during and after the motion is filed so that valid claims are not dismissed because an indigent person did not have the ability to file a proper motion. This should also help reduce the court's time because it is less likely that incomplete or frivolous motions will be filed." (*Id.*, at pp. 3-5.) The analysis notes that the author of the bill stated: "[E]arly appointment of counsel will help to streamline the process and ensure that frivolous or ill-prepared requests for DNA testing do not clog the courts and drain precious resources. This bill makes

clear that counsel shall be provided for indigent inmates to investigate and prepare the motion, and litigate the motion to completion." (*Id.*, at p. 3.)

The bill analysis shows that the appropriateness of filing a motion for DNA testing is not to be determined when an inmate requests the appointment of counsel to prepare such a motion. The Legislature intended that this determination should be made by counsel after an investigation. The 2001 amendment provides that "the court shall appoint counsel to investigate and, *if appropriate*, to file a motion for DNA testing ...." (§ 1405, subd. (b)(3)(B), italics added.) The Legislature anticipated that, by requiring the appointment of counsel before the filing of the motion, it would help ensure that inappropriate motions would not be filed.

[8] In determining legislative intent, we may also consider a senate floor analysis. (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 948, 28 Cal.Rptr.3d 685, 111 P.3d 954.) A senate floor analysis of SB 83 states that it "[r]equires the court to appoint counsel to investigate and, if appropriate, file a motion for post-conviction DNA testing if the convicted person is indigent, the request contains the required information, and counsel has not been previously *323 appointed. The appointment is discretionary if counsel has been previously appointed." (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 83 (2001-2002 Reg. Sess.) as amended Sept. 12, 2001, p. 3.) The senate floor analysis shows that the Legislature intended that the appointment of counsel be mandatory if an indigent convicted person's request contains the required information and counsel has not been previously appointed under section 1405. In such circumstances, there is no discretion to be exercised.

Thus, the legislative intent comports with the plain meaning of the language of the 2001 amendment of section 1405. Accordingly, it would be inappropriate for this court to add language giving the trial court discretion to deny an indigent person's request for the appointment of counsel when the request contains the required information and counsel has not been previously appointed under section 1405. As we noted in *People v. Buena Vista Mines, Inc.* (1996) 48 Cal.App.4th 1030, 1034, 56 Cal.Rptr.2d 21, "This court is loathe to construe a statute which has the effect of 'adding' or 'subtracting' language. [Citation.] ... We are compelled to add language only in extreme cases where, as a matter of law, we are convinced that the Legislature, through inadvertence, failed to utilize the word or words which give purpose to its pronouncements. [Citation.]"

Petitioner's request for the appointment of counsel met the statutory criteria mandating that his request be granted. It is **807 undisputed that petitioner is indigent. In the request he alleged that he was not the perpetrator of the attempted murder and that DNA testing is relevant to his assertion of innocence. He also alleged that counsel had not been previously appointed under section 1405. Our review of the superior court file supports this allegation. Pursuant to the letter of section 1405, the trial court did not have discretion to deny petitioner's request for the appointment of counsel solely for the purposes of section 1405.

A Suggestion to the Legislature

Cases are legion indicating that the courts do not judge the wisdom of a statute. That, however, does not mean that we are without power to suggest to the Legislature, in an attempt to remedy a perceived problem, that the sweep of its language is too broad. (See *Meritplan Ins. Co. v. Woollum* (1975) 52 Cal.App.3d 167, 176, 123 Cal.Rptr. 613; see also *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 385, 127 Cal.Rptr.2d 917, concurring opinion of Yegan, J.; Witkin, Manual on Appellate Court Opinions (1977) § 88, pp. 160-162.) By reason of the 2001 amendment of section 1405, each and every person incarcerated in state prison is entitled to the appointment of *324 counsel if he or she just drafts a request akin to the one drafted by petitioner herein. (See Appendix A.) The prisoner's offense need have nothing to do with blood, hair, or the like. For example, a recidivist forger in state prison is now entitled to the appointment of counsel if he or she requests the appointment of counsel in a manner akin to the petitioner's request. The lax statutory standard will result in a wasteful expenditure of time and money where appointed counsel does not file a motion because it is not "appropriate."

The facts of the instant case have at least something to do with blood although we have no idea just how this may aid petitioner. In our previous opinion in the appeal from the judgment of conviction, we summarized the facts as follows:

"In January 1999, Kinnamon and his friend Starla Baker went to an office in Ventura. While Kinnamon was inside, Baker stole a car. When Kinnamon came out of the office, he got into the stolen car and drove off with Baker. Later, Kinnamon placed false license plates on the stolen car. In February 4, 1999, Kinnamon and Baker drove to the home of Michael Steven. Kinnamon

wanted to get money from Steven's wife and also knew that Steven kept guns in a safe in the house. When Michael Steven told Kinnamon and Baker that his wife was not home, Kinnamon demanded that Steven open his safe. Steven refused and Kinnamon physically attacked him. During their fight, Kinnamon continued to demand that Steven open the safe. At the same time, Baker grabbed items of property which were in the house. Then, Kinnamon stabbed Steven with a knife nine times. Steven collapsed after the stabbing, and Kinnamon ran out of the house. Thinking Steven was dead, Kinnamon returned to the house and stole more property."

Our first opinion did not recite, but the record shows: (1) the victim, Michael Steven, positively identified petitioner as the only person who had attacked and stabbed him; (2) Starla Baker testified that she had tried to stop petitioner from stabbing Steven and "got cut in the process"; (3) petitioner told the police that Steven had stabbed Baker in the arm; and (4) after advisement and waiver of his constitutional rights (*Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694) petitioner admitted that he entered Steven's house to take his guns, that "it made ****808** him mad when he [Steven] stabbed his old lady [Baker] and he said 'I'd kill him again.' He [Steven] deserved to die." In view of these facts, even if a blood sample were collected and preserved and tied to Starla Baker by DNA testing, how would the test results "raise a reasonable probability that, in light of all the evidence, [petitioner's] verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction"? (§ 1405, subd. (f)(5).) Based on the testimony of Baker and petitioner, one would have expected to find Baker's blood at the crime scene.

***325** We have elaborated on our prior opinion to illustrate that the instant request is the start of a "wild goose chase" that will, in all probability, lead to absolutely nothing. In another context, we have said: "Somewhere along the line, litigation must cease." (*In re Marriage of Crook* (1992) 2 Cal.App.4th 1606, 1613, 3 Cal.Rptr.2d 905.) Petitioner's judgment is long final and there is something to be said for the sanctity of final judgments. The State of California has a "powerful interest in the finality of its judgments. This interest is particularly strong in criminal cases, for ' [w]ithout finality, the criminal law is deprived of much of its deterrent effect.' [Citations.]" (*In re Harris* (1993) 5 Cal.4th 813, 831, 21 Cal.Rptr.2d 373, 855 P.2d 391.) In light of the deference owed to final judgments, at the very least prisoners should be required to make some showing that DNA evidence would raise a reasonable probability of more favorable treatment in the trial court before counsel is appointed. This is the original purport of section 1405 before Senate Bill 83 was enacted in 2001. (See, *ante*, p. 804.)

The Legislature has apparently made a value judgment that prisoners such as petitioner should have counsel appointed to investigate and, if appropriate, file a motion for DNA testing. The Legislature has given such prisoners more rights than a person filing a petition for extraordinary relief, who is not entitled to appointed counsel as a matter of right. (E.g., *People v. Shipman* (1965) 62 Cal.2d 226, 232, 42 Cal.Rptr. 1, 397 P.2d 993; see also *People v. Chavez* 243 Cal.App.2d 761, 767, 52 Cal.Rptr. 633.) To be sure, there have been instances where DNA evidence has exonerated a convicted prisoner, and these cases have been sensationalized in the press. However, the vast majority of prisoners are in fact guilty and have been convicted and sentenced consistent with the full panoply of constitutional and statutory safeguards. Such prisoners have one traditional appeal as a matter of right and an unfettered ability to file petitions for extraordinary relief in the trial and appellate courts. In our view, these safeguards are sufficient to insure that a truly innocent person is not unjustly convicted or sentenced. In the rare case where DNA evidence may exonerate a prisoner or reduce the prisoner's sentence, it is not too much to ask that he or she make some showing to that effect before counsel is appointed.

In enacting the 2001 amendment of section 1405, the Legislature "apparently succumbed to the discredited 'ideal of perfectibility' which is 'the concept that with the expenditure of sufficient time, patience, energy, and money it is possible eventually to achieve perfect justice in all legal process.' Such a 'noble ideal has consistently spawned results that can only be described as pandemoniac' in our criminal justice system." (*In re Pratt* (1980) 112 Cal.App.3d 795, 890, fn. 45, 170 Cal.Rptr. 80, quoting from Fleming, The Price of Perfect Justice (1974) p. 3.)

***326** *Disposition*

The petition for writ of habeas corpus is granted. The superior court is directed to ****809** vacate its order denying petitioner's request for the appointment of counsel pursuant to section 1405 and enter a new order appointing counsel solely for the purpose of (1) investigating the appropriateness of DNA testing as to petitioner's conviction of attempted murder; (2)

filing a motion for DNA testing if counsel's investigation reveals that such testing is appropriate. The order to show cause, having served its purpose, is discharged.

We concur: GILBERT, P.J., and COFFEE, J.

**810

SUPERIOR COURT
FILED
APR 08 2005
MICHAEL D. PLANET
Executive Officer and Clerk
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RECEIVED
VENTURA SUPERIOR COURT
APR 08 2005

Todd L Kinnamon
V
Ventura County Superior Court

case # CR45855-A
motion To Request
Counsel To prepare
1405, B, (1) D.N.A motion

IN THE Interest of Justice, I Todd Lee, Kinnamon AM ASKing THIS COURT, Court Room #11 THE Honrable JUDGE Ken, W. Riley, To Appoint Counsel ON THE D.N.A. motion For PENAL code 187 (A) THAT I Todd Lee KINNAMON AM NOT THE perpetrator IN THIS SAID CRIME AND THAT D.N.A Testing is RELEVANT To my assertion OF INNOCENCE. I HAVE NOT HAD Previously Counsel Appointed UNDER this Section. THEREFORE I AM ASKING prayer OF Relief FROM THIS Court To grant. This Motion. For Appointment OF COUNSEL To, File motion, For PENAL Code 1405 D.N.A TESTING.

Respectfully
Todd L Kinnamon
PRO. PER
4-04-05

APPENDIX A

END OF DOCUMENT

THE PEOPLE, Plaintiff and Appellant,
v.
GORDON EUBANKS et al., Defendants and Respondents.
[Modification [FN*] of opinion (14 Cal.4th 580; 59 Cal.Rptr.2d 200, 927 P.2d 310).]

FN* This modification requires movement of text affecting pages 592-600 of the bound volume report.

No. S049490.

Supreme Court of California

Feb 26, 1997.

THE COURT.

The opinion herein, filed December 23, 1996, appearing at 14 Cal.4th 580, is modified as follows:

In footnote 4, on page 592 [typed opn. at pp. 13-14], the last sentence of the second paragraph beginning "We express no view" and ending "under section 995." is deleted in its entirety, and in its place is inserted the following: "We expressly reserve the question whether availability of a remedy under section 995 was affected by the addition of section 1424 and thus express no opinion here regarding what standard would govern motions brought under section 995."

This modification does not affect the judgment.

THE PEOPLE, Plaintiff and Appellant,
v.
GORDON EUBANKS et al., Defendants and Respondents.
No. S049490.

Dec 23, 1996.

SUMMARY

Two men were charged with felonies involving the alleged theft of trade secrets from a company that developed computer programs. During pretrial proceedings, defendants learned that the company had contributed about $13,000 to the cost of the district attorney's investigation. The trial court granted defendants' motion to disqualify, or "recuse," the entire office of the district attorney, finding that the company's financial assistance created a conflict of interest for the prosecutor, within the meaning of Pen. Code, § 1424. (Superior Court of Santa Cruz County, Nos. CR6748 and CR6749, William M. Kelsay, Judge.) The Court of Appeal, Sixth Dist., No. H011751, reversed the recusal order, concluding that any conflict was insufficiently grave to justify recusal.

The Supreme Court transferred the cause to the Court of Appeal with directions to vacate its previous judgment and dismiss the appeal as moot. The court held that although the trial court did not err in concluding that the company's financial assistance created a conflict of interest for the prosecutor, i.e., it evidenced a reasonable possibility that the prosecutor might not have exercised his discretionary functions in an evenhanded manner, the trial court erred in failing to apply the second part of the test for disqualification set out in Pen. Code, § 1424, that is, whether the resulting conflict was so grave as to make fair treatment of the defendants in all stages of the criminal proceedings unlikely if the district attorney were not recused. However, the court held that the Court of Appeal erred in determining that, assuming a conflict existed, it was not, as a matter of law, grave enough to justify recusal. It could not be said that had the trial court addressed the second part of the test for disqualification, it would have abused its discretion in finding the conflict disabling. (Opinion by Werdegar, J., with George, C. J., Mosk, Kennard, Baxter, Chin, and Brown, JJ., concurring. Concurring opinion by George, C. J., with Mosk, J., concurring.) *581

HEADNOTES

Classified to California Digest of Official Reports

(1) District and Municipal Attorneys § 2--Powers and Duties--Prosecutorial Discretion.
In California, all criminal prosecutions are conducted in the name of the People of the State of California and by their authority (Gov. Code, § 100, subd. (b)). California law does not authorize private prosecutions. Instead, the prosecution of criminal

offenses on behalf of the People is the sole responsibility of the public prosecutor, who ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. No private citizen, however personally aggrieved, may institute criminal proceedings independently, and the prosecutor's own discretion is not subject to judicial control at the behest of persons other than the accused.

(2) District and Municipal Attorneys § 1--Recusal--Statutory Grounds-- Conflict of Interest Rendering Fair Trial Unlikely--Nature of Disqualifying Conflict.
Under Pen. Code, § 1424, which establishes both procedural and substantive requirements for a motion to disqualify, or "recuse," the district attorney, such a motion must not be granted unless the evidence shows that a conflict of interest exists such as would render it unlikely that the defendant would receive a fair trial. By its terms, § 1424 allows recusal if the conflict of interest is so grave as to make a fair trial unlikely. The language of the statute establishes a two-part test: (1) is there a conflict of interest and (2) is the conflict so severe as to disqualify the district attorney from acting. Thus, while a conflict exists whenever there is a reasonable possibility that the district attorney's office may not exercise its discretionary function in an evenhanded manner, the conflict is disabling only if it is so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings. Further, whether the prosecutor's conflict is characterized as actual or only apparent, the potential for prejudice to the defendant-the likelihood that the defendant will not receive a fair trial-must be real, not merely apparent, and must rise to the level of a likelihood of unfairness. Thus, the statute does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would appear improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system.

(3) District and Municipal Attorneys § 1--Recusal--Review.
In reviewing the denial of a motion to recuse a district attorney, the role of *582 the appellate court is to determine whether there is substantial evidence to support the trial court's factual findings and, based on those findings, whether the trial court abused its discretion in denying the motion.

(4) Appellate Review § 142--Review--Discretion of Trial Court--Limitations.
The discretion of a trial court is subject to the limitations of legal principles governing the subject of its action.

(5) District and Municipal Attorneys § 1--Recusal--Two-part Statutory Test--Conflict of Interest--Gravity of Conflict Rendering Fair Trial Unlikely--Payment by Victim for Expenses of Criminal Investigation.
In a prosecution of two men for theft of trade secrets from a company that developed computer programs, although the trial court did not err in concluding that the company's financial contribution to the cost of the criminal investigation created a conflict of interest for the prosecutor, i.e., it evidenced a reasonable possibility that the prosecutor might not have exercised his discretionary functions in an evenhanded manner, the trial court erred in failing to apply the second part of the test for disqualification, or "recusal," set out in Pen. Code, § 1424, that is, whether the resulting conflict was so grave as to make fair treatment of the defendants in all stages of the criminal proceedings unlikely if the district attorney were not recused. In the absence of contrary evidence, it is assumed that the trial court applied the correct legal standard. In this case, however, there was ample evidence that the trial court failed to apply the complete test under § 1424. The court's oral remarks at the recusal hearing, which were the only record of the court's reasoning, were directed solely at the first portion of the two-part statutory test. The court repeatedly stated the standard as a "reasonable possibility" of unfairness to defendants and nowhere addressed whether the conflict was so grave as to render fair treatment unlikely. The trial court thus determined only that the district attorney suffered from a conflict of interest and never addressed whether that conflict was, under the proper standard, disabling.

[See 4 **Witkin & Epstein,** Cal. Criminal Law (2d ed. 1989) § 1793.]

(6) District and Municipal Attorneys § 1--Recusal--Statutory Grounds-- Conflict of Interest--Gravity of Conflict Rendering Fair Trial Unlikely-- Payment by Victim for Expenses of Criminal Investigation--Appellate Review of Trial Court's Finding Conflict Was Disabling.
In a prosecution of two men for theft of trade secrets from a company that developed computer programs, in which the trial court properly concluded that the company's contribution of about *583 $13,000 to the

cost of the criminal investigation created a conflict of interest for the prosecutor, the Court of Appeal erred in determining that, assuming a conflict existed, it was not, as a matter of law, grave enough to justify disqualification, or "recusal," of the district attorney. Although the trial court erred in failing to apply the second part of the test for disqualification set out in Pen. Code, § 1424, that is, whether the resulting conflict was so grave as to make fair treatment of the defendants in all stages of the criminal proceedings unlikely if the district attorney were not recused, it could not be said that had the trial court addressed the second part of the test, it would have abused its discretion in finding the conflict disabling. First, the fact that the largest payment of $9,450 was payment of money for a debt already incurred by the district attorney supported recusal. Second, the large size of the contributions tended to show that recusal was within the trial court's discretion. Finally, the trial court's assessment that the prosecution's case was factually weak supported the decision to recuse, since a factually weak case is more subject than a strong case to influence by extraneous financial considerations.

COUNSEL

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Michael D. O'Reilley, Martin S. Kaye and Eugene W. Kaster, Deputy Attorneys General, for Plaintiff and Appellant.

Gil Garcetti, District Attorney (Los Angeles), George M. Palmer and Shirley S. N. Sun, Deputy District Attorneys, as Amici Curiae on behalf of Plaintiff and Appellant.

Charles C. Marson, Morgan, Ruby, Schofield, Franich & Fredkin, Ruby & Schofield, Allen Ruby, Remcho, Johansen & Purcell, Robin B. Johansen, Joseph Remcho, Nolan & Armstrong and Thomas J. Nolan for Defendants and Respondents.

Peter A. Chang, Jr., and Vicki I. Podberesky as Amici Curiae on behalf of Defendants and Respondents.

WERDEGAR, J.

When the victim of an alleged crime contributes financially to the costs of the district attorney's investigation, does the district *584 attorney thereafter suffer from a disabling conflict of interest requiring recusal under Penal Code section 1424? On this question of first impression, we hold such financial assistance to the prosecutor's office may indeed disqualify the district attorney from acting further in a case, if the assistance is of such character and magnitude "as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings." (*People v. Conner* (1983) 34 Cal.3d 141, 148 [193 Cal.Rptr. 148, 666 P.2d 5].) In this case, where a corporation alleged to be the victim of trade secrets theft contributed around $13,000 to the cost of the district attorney's investigation, the superior court did not abuse its discretion in finding the victim's financial assistance created a conflict of interest for the prosecutor. The trial court did err in failing to apply the further test set out in Penal Code section 1424: whether the resulting conflict was so severe as to make fair treatment of the defendants *unlikely*. We conclude, however, that such a finding would not, on this record, be an abuse of discretion.

Factual and Procedural Background

Defendants Gordon Eubanks and Eugene Wang were accused, by grand jury indictment, of conspiracy to steal trade secrets (Pen. Code, § § 182, 499c), [FN1] conspiracy to receive stolen property (§ § 182, 496), and conspiracy to access and make use of computer data without permission (§ § 182, 502, subd. (c)(2)). In addition to these joint conspiracy counts, Wang was charged with several counts of trade secret theft (§ 499c) and unlawful data use (§ 502, subd. (c)(2)), while Eubanks was charged with several counts of receiving stolen property (§ 496).

FN1 Unless otherwise specified, all further statutory references are to the Penal Code.

Both defendants moved to disqualify the Santa Cruz County District Attorney for a conflict of interest pursuant to section 1424. After an evidentiary hearing, the superior court granted the recusal motion. As permitted under section 1424, the Attorney General and the Santa Cruz County District Attorney, both of whom had appeared in the superior court to oppose recusal, appealed the ruling. The Court of Appeal reversed. We granted review on defendants' petition. [FN2]

FN2 After oral argument was held in this matter, the charges against Eubanks and Wang were dismissed on request of the Santa Cruz County District Attorney. Although the matter is thus rendered moot,

> we exercise our discretion to resolve the legal issues raised, which are of continuing public interest and are likely to recur. (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 829, fn. 4 [50 Cal.Rptr.2d 101, 911 P.2d 1]; *Liberty Mut. Ins. Co. v. Fales* (1973) 8 Cal.3d 712, 715-716 [106 Cal.Rptr. 21, 505 P.2d 213].)

In September 1992, defendant Eugene Wang was a vice-president of Borland International, a software developer located in Scotts Valley (Santa *585 Cruz County). Defendant Gordon Eubanks was president and chief executive officer of Symantec Corporation, a competitor of Borland. In July of 1992, Wang had expressed dissatisfaction with a Borland management reorganization and threatened to resign. On September 1, 1992, he submitted his resignation. Fearing Wang might have conveyed internal Borland information to outsiders, Borland officers reviewed Wang's electronic mail files. They found several messages to Eubanks containing what they believed was confidential Borland information. Borland contacted the Scotts Valley police, who in turn sought investigative assistance from the district attorney's office.

During the night of September 1, and into the morning of September 2, 1992, Borland officials worked with representatives of the police department and district attorney's office preparing warrant affidavits for searches of defendants' residences and Symantec headquarters. Apparently because the police department and prosecutor's office lacked staff with the expertise to search the Symantec computers, Alan Johnson, the district attorney's chief inspector, asked Borland officials if Borland could provide one or more technically competent employees to assist in the search. The Borland representatives declined because they did not want Borland employees exposed to Symantec secrets; they suggested independent consultants be used instead.

Two computer specialists were located to assist with the September 2 search: David Klausner, who was referred by Borland's outside counsel, and Stephen Strawn, who had worked with the district attorney's office on prior occasions. Chief Inspector Johnson and John Hansen, associate general counsel for Borland, both testified that on the night of September 1 and 2, at the request of the district attorney's office, Borland agreed to pay for Klausner's services.

According to Johnson, Spencer Leyton, a senior Borland executive, indicated Borland's willingness to spend up to $10,000, and possibly more, for experts to assist in the investigation. Leyton, however, did not recall discussing the matter of expert assistance at all, although he was present and talked with Johnson on the night and morning of September 1 and 2. Borland records show a $25,000 "blanket" purchase order was drawn up and approved by the legal department in November 1992 for "miscellaneous services and fees / Symantec lawsuit." Borland records for the subsequent payments to Klausner, Strawn and others for their work on the criminal investigation bear numerical references to this purchase order.

Klausner and Strawn accompanied representatives of law enforcement agencies who executed the warrant on September 2. Klausner submitted his *586 bill for $1,400 directly to Borland on September 14, 1992. Borland paid it by a check dated January 6, 1993.

Strawn continued to work on the criminal investigation for several weeks, into October 1992, assisting the district attorney's office in retrieving and printing the contents of seized computer disc drives. In late September 1992, knowing Strawn was working on the case, Chief Inspector Johnson discussed with Arthur Danner, the Santa Cruz County District Attorney, whether Borland should be asked to pay Strawn's anticipated bill. Danner made no decision at that time. Johnson testified he then asked Borland executive Leyton whether Borland was "still willing to assist us by carrying the cost of the technicians that were necessary to process this case." Leyton, according to Johnson, answered affirmatively. Sometime after that discussion, Johnson again broached the question with Danner, who then approved submitting Strawn's invoices to Borland.

District Attorney Danner similarly testified he first considered the payment question while Strawn was still working with the office's investigators. Asked whether, at that time, he contemplated abandoning the prosecution if Borland did not pay for Strawn's services, Danner testified: "No.... It was simply at that point to have the investigation proceed because at that point we needed the additional materials and so that's what Mr. Straun [*sic*] was working on to allow us to review those materials."

Danner articulated two reasons for his ultimate decision to allow Borland to pay for Strawn's assistance: First, he understood Strawn's role to be

purely technical, and not to involve giving any opinion as to whether the materials retrieved were trade secrets. Danner considered Strawn's limited role important because it meant Borland's payment of his fee was less likely to become a significant issue at trial. Danner's second reason for approving the payment was that "at that time we were experiencing serious budgetary constraints in a particular fund that we utilize to pay professional and special witnesses and we really had very little money in our budget ...."

Strawn submitted his bill for $9,450 to the district attorney's office on October 31, 1992. After getting approval from Danner, Chief Inspector Johnson transmitted it to Borland. Borland attorney John Hansen testified he received the invoice and "sent it along for payment." His understanding was that Strawn's services had been necessary because "somebody had to go on the search along with the authorities," and hiring Strawn thus "relieved us from having to send a Borland employee into a competitor's plant." After Borland's general counsel, relying on Hansen's recommendation, approved the payment, Borland paid Strawn's bill by a check dated January 12, 1993. *587

In January 1993, Strawn submitted an additional invoice for $2,700 to the district attorney's office for work done in November and December 1992. Johnson forwarded this bill to Borland as well, but as of the date of the evidentiary hearing it had not been paid.

Finally, Borland paid a private service to transcribe audiotapes of interviews with Borland employees, for use by the prosecutor. John Hansen testified a district attorney's investigator told him, sometime in late 1992, that the investigation was "indefinitely" delayed because a clerical backlog in the district attorney's office was preventing the office staff from transcribing the tapes. Hansen offered to have Borland pay someone to make the transcriptions. In January and February 1993, Borland made payments of $1,008 and $1,224 to a reporting service for transcription of the tapes.

Defendants initially moved to recuse the entire office of the district attorney on the ground that Deputy District Attorney Jonathan Rivers, who had worked on the Eubanks-Wang case, had left the district attorney's office and been retained by Borland to work on Borland's related civil action against Symantec. In the course of a hearing on this issue, defendants learned of the payments by Borland, which were then made a separate ground for requesting recusal.

After hearing the above evidence, the superior court concluded that while Rivers's change of employment did not require recusal of the district attorney's office, the payments did. The court's rationale appears from its comments during argument on the motion (no written statement of reasons was filed). Discounting mere "appearances ... of impropriety," the court framed the issue as whether the victim's "payment of money for a debt already incurred" by the district attorney creates "an actual conflict" for the prosecutor. The standard to be applied, as the court understood it, was whether "the evidence provides a reasonable possibility that the D.A.'s office may not exercise its discretionary function in an even-handed manner."

The court emphasized Borland's payment of Strawn's bill: "[W]e have a situation here where there was a debt ... that's already been incurred. That person was going to get paid regardless of who paid it. Borland happens to make the offer and in fact does pay it, and pays other bills as well. Doesn't that put the District Attorney in a position, as a human being, to feel a greater obligation for this particular victim than some other fellow or person whom doesn't offer to pay existing debts?" Answering its own rhetorical question, the court found the payment of the district attorney's incurred debt "rather strong evidence of a reasonable possibility that the discretionary *588 function that's fundamental to a District Attorney is compromised and thereby would not necessarily be used in an even-handed manner."

The Court of Appeal reversed the recusal order. First, the appellate court disagreed with the trial court's conclusion Borland's payments created a conflict of interest. The Court of Appeal viewed the payments as "comparable to the cooperation victims often give to prosecutors in criminal cases." Any sense of obligation arising from the payments, the court believed, was necessarily "minimal," and hence insufficient to show the existence of a conflict.

Alternatively, assuming the existence of a conflict, the Court of Appeal found its gravity insufficient to justify recusal. The trial court, the Court of Appeal noted, found only a "reasonable possibility" of unfair treatment, without determining whether, as required under section 1424, the conflict rendered it "unlikely" that defendant would receive fair treatment from the prosecutor. Moreover, to find fair treatment

"unlikely" on these facts, the Court of Appeal held, would have exceeded the trial court's discretion.

Discussion

The question raised by this case is whether a crime victim's payment of substantial investigative expenses already incurred by the public prosecutor creates a disabling conflict of interest for the prosecutor, requiring his or her disqualification. Our examination of the question begins with exposition of the general principle that a public prosecutor must be free of special interests that might compete with the obligation to seek justice in an impartial manner (pt. I, *post*). In part II we focus on the statutory standard for recusal under California law, examining the origins and interpretation of section 1424. Finally, in part III, we apply the statutory standard to the case at bar, consistent with the more general principles explored earlier.

I. *The Independence and Impartiality of the District Attorney*

(1) In California, all criminal prosecutions are conducted in the name of the People of the State of California and by their authority. (Gov. Code, § 100, subd. (b).) California law does not authorize private prosecutions. Instead, "[t]he prosecution of criminal offenses on behalf of the People is the sole responsibility of the public prosecutor ..... [¶] [who] ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. [Citation.] No private citizen, however personally aggrieved, may institute criminal proceedings independently [citation], and the prosecutor's own discretion is not subject to judicial control ***589** at the behest of persons other than the accused." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451 [279 Cal.Rptr. 834, 807 P.2d 1063].)

The district attorney of each county is the public prosecutor, vested with the power to conduct on behalf of the People all prosecutions for public offenses within the county. (Gov. Code, § 26500; *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 240 [138 Cal.Rptr. 101].) Subject to supervision by the Attorney General (Cal. Const., art. V, § 13; Gov. Code, § 12550), therefore, the district attorney of each county independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings. (*People* ex rel. *Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 203 [150 Cal.Rptr. 156]; *People v. Municipal Court (Pellegrino)* (1972) 27 Cal.App.3d 193, 199-204 [103 Cal.Rptr. 645, 66 A.L.R.3d 717].)

The district attorney's discretionary functions extend from the investigation of and gathering of evidence relating to criminal offenses (*Hicks v. Board of Supervisors, supra*, 69 Cal.App.3d at p. 241), through the crucial decisions of whom to charge and what charges to bring, to the numerous choices the prosecutor makes at trial regarding "whether to seek, oppose, accept, or challenge judicial actions and rulings." (*Dix v. Superior Court, supra*, 53 Cal.3d at p. 452; see also *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 267 [137 Cal.Rptr. 476, 561 P.2d 1164] [giving as examples the manner of conducting voir dire examination, the granting of immunity, the use of particular witnesses, the choice of arguments, and the negotiation of plea bargains].)

The importance, to the public as well as to individuals suspected or accused of crimes, that these discretionary functions be exercised "with the highest degree of integrity and impartiality, and with the appearance thereof" (*People v. Superior Court (Greer), supra*, 19 Cal.3d at p. 267) cannot easily be overstated. The public prosecutor " 'is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' " (*Id.* at p. 266, quoting *Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314, 1321, 55 S.Ct. 629].)

The nature of the impartiality required of the public prosecutor follows from the prosecutor's role as representative of the People as a body, rather than as individuals. "The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of 'The People' includes the defendant and his family and those who care about him. ***590** It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name." (Corrigan, *On Prosecutorial Ethics* (1986) 13 Hastings Const.L.Q. 537, 538-539.) Thus the district attorney is expected to exercise his or her discretionary functions in the interests of the People at large, and not under the influence or control of an interested individual. (*People v. Superior Court (Greer), supra*, 19 Cal.3d at p. 267.)

While the district attorney does have a duty of zealous advocacy, "both the accused and the public have a legitimate expectation that his zeal ... will be born of objective and impartial consideration of each individual case." (*People v. Superior Court (Greer), supra*, 19 Cal.3d at p. 267.) "Of course, a prosecutor need not be disinterested on the issue whether a prospective defendant has committed the crime with which he is charged. If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means. [Citation.] True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury-not the prosecutor. It is a bit easier to say what a disinterested prosecutor is not than what he is. He is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged." (*Wright v. United States* (2d Cir. 1984) 732 F.2d 1048, 1056.)

II. *Standards for Prosecutorial Recusal Under Section 1424*

Section 1424, pursuant to which the present motion was made, was enacted in 1980. Only three years earlier, in *People v. Superior Court (Greer), supra*, 19 Cal.3d 255 (hereinafter *Greer*), this court first recognized the judicial power to recuse the district attorney as prosecutor. In *Greer*, we located the source of a court's disqualification power in Code of Civil Procedure section 128, subdivision (a)(5), which recognizes a court's power " '[t]o control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it ....' " (*Greer, supra*, 19 Cal.3d at p. 261, fn. 4; accord, *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 745 [218 Cal.Rptr. 24, 705 P.2d 347]; but see *People v. Hamilton* (1988) 46 Cal.3d 123, 139 [249 Cal.Rptr. 320, 756 P.2d 1348] [asserting *Greer* stated "common law principle"].) We further held the separation of powers doctrine did not preclude a trial court from disqualifying a district attorney. (*Greer, supra*, at pp. 262-265.)

In *Greer*, we expressed concern not only with actual conflicts of interest that might affect the evenhandedness with which a prosecutor exercised his *591 or her discretionary functions, but also with any " 'appearance of impropriety' " that might adversely affect " 'public ... confidence in the integrity and impartiality of our system of criminal justice.' " (*Greer, supra*, 19 Cal.3d at p. 268.) We therefore held a district attorney could be disqualified "when [a] judge determines that the attorney suffers from a conflict of interest which might prejudice him against the accused and thereby affect, *or appear to affect*, his ability to impartially perform the discretionary functions of his office." (*Id.* at p. 269, fn. omitted; italics added.)

(2) Section 1424 established both procedural and substantive requirements for a motion to disqualify the district attorney. Substantively, the statute provides the following standard: "The motion shall not be granted unless it is shown by the evidence that a conflict of interest exists such as would render it unlikely that the defendant would receive a fair trial."

"Section 1424 was the Legislature's response to *Greer* and other criminal cases stressing the importance of the appearance of impropriety and other 'apparent' conflicts as bases for prosecutorial disqualification." (*People v. Lopez* (1984) 155 Cal.App.3d 813, 824 [202 Cal.Rptr. 333].) The Legislature's response, however, was not as unequivocal as it might have been. As noted in *Lopez*, the statute refers simply to a "conflict of interest"; it does not explicitly require an "actual" conflict, nor does it explicitly exclude "apparent" conflicts. (*Ibid.*) On the other hand, the statute allows disqualification only when a conflict "render[s] it unlikely that the defendant would receive a fair trial," (§ 1424) whereas *Greer* allowed disqualification even when the conflict might merely "appear to affect" the prosecutor's fairness. [FN3]

FN3 An earlier version of the bill adding section 1424 would have required the movant to show "an actual conflict of interest." (Sen. Amend. to Sen. Bill No. 1520 (1979-1980 Reg. Sess.) Apr. 10, 1980.) Before enactment, the language was changed to "a conflict of interest."
At the request of amicus curiae California District Attorneys Association, we take judicial notice of documents from the legislative history of Senate Bill No. 1520, which added section 1424. These documents indicate the bill was drafted and sponsored by the Attorney General in response to *Greer*; the Attorney General's office sought the measure as a means of reducing the number of disqualifications and thereby alleviating an increase in that office's disqualification workload. (Sen. Com. on

> Judiciary, Rep. on Sen. Bill No. 1520 (1979-1980 Reg. Sess.) as amended Apr. 10, 1980, pp. 1-3.) The Attorney General, in a letter sent to all members of the Senate before that body's passage of the bill, attributes the increase in disqualifications, in part, to *Greer*'s " 'appearance of conflict' " test. (Atty. Gen., letter to members of Sen., May 12, 1980.)

We considered and resolved these interpretive questions regarding section 1424 in *People v. Conner, supra*, 34 Cal.3d 141 (hereinafter *Conner*). Recognizing the standard of section 1424 differed from that articulated in *Greer*, we nonetheless concluded that the statute "contemplates both 'actual' and 'apparent' conflict when the presence of either renders it unlikely that *592 defendant will receive a fair trial." (34 Cal.3d at p. 147.) The distinction between actual and apparent conflict is "less crucial" under the statute, we explained, because of the "additional statutory requirement" that the conflict must "render it unlikely that the defendant would receive a fair trial." (*Ibid.*) We held that a "conflict," for purposes of section 1424, "exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner. Thus, there is no need to determine whether a conflict is ' actual' or only gives an 'appearance' of conflict." (34 Cal.3d at p. 148.) But however the conflict is characterized, it warrants recusal only if "so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings." (*Ibid.*)

Conner establishes that, whether the prosecutor's conflict is characterized as actual or only apparent, the potential for prejudice to the defendant-the likelihood that the defendant will not receive a fair trial-must be real, not merely apparent, and must rise to the level of a *likelihood* of unfairness. Thus section 1424, unlike the *Greer* standard, does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system. (Accord, *People v. McPartland* (1988) 198 Cal.App.3d 569, 574 [243 Cal.Rptr. 752] ["recusal cannot be warranted solely by how a case may appear to the public"]; *People v. Lopez, supra*, 155 Cal.App.3d at pp. 827-828.) [FN4]

FN4 *People v. Hamilton, supra*, 46 Cal.3d 123, is not to the contrary. Our references there to recusal as a means of protecting "public confidence in the integrity and impartiality of the criminal justice system" (*id.* at p. 141) were in the application of the *Greer* standard, which had been exclusively applied by the parties and court at Hamilton's trial. (*Id.* at p. 141, fn. 3.)
One should note, in this connection, the distinction between a motion to recuse the district attorney, under section 1424, and a motion to set aside the information or indictment, under section 995. In *Greer* we suggested that "if the trial court determines that a district attorney's participation in the filing of a criminal complaint or the preliminary hearing on that complaint created a potential for bias or the appearance of a conflict of interest, it may conclude that the defendant was not 'legally committed' within the meaning of Penal Code section 995, and the information should be set aside." (*Greer, supra*, 19 Cal.3d at p. 263, fn. 5.) We express no opinion here regarding the standard applicable to motions under section 995.

Because the enactment of section 1424 eliminated the appearance of impropriety as an independent ground for prosecutorial disqualification, our review of the recusal order here must focus on whether Borland's payments created a conflict with the actual likelihood of prejudice to Eubanks and Wang, rather than on whether allowing such payments would, as defendants assert, be "unseemly" or create "the perception of improper influence." That our analysis focuses on actual likelihood of prejudice, however, should not *593 be taken as suggesting the potential for loss of public confidence in the criminal justice system is either unimportant or unimaginable. To the contrary, the practice of the district attorney here-soliciting and accepting the victim's underwriting of significant investigative costs-could, especially if replicated on a wide scale, raise an obvious question as to whether the wealth of the victim has an impermissible influence on the administration of justice. A system in which affluent victims, including prosperous corporations, were assured of prompt attention from the district attorney's office, while crimes against the poor went unprosecuted, would neither deserve nor receive the confidence of the public. [FN5] Even the appearance of such impropriety would be highly destructive of public

trust. Under section 1424, however, such apprehensions, alone, are no longer a ground for recusal of the district attorney.

> FN5 We do not suggest this is the current situation in Santa Cruz or any other county of California. Indeed, it has been argued that large corporations often have difficulty interesting local prosecutors, whose resources are already strained by the fight against violent crime, in the investigation and prosecution of business fraud and other complicated crimes against corporate victims. (See *International Business Machines Corp. v. Brown* (C.D.Cal. 1994) 857 F.Supp. 1384, 1388-1389.)

Conner clarified two other points of statutory interpretation important to the present case. First, by its terms, section 1424 allows recusal if the conflict of interest is so grave as to make a "fair trial" unlikely. The prosecutor's discretionary functions, however, are not limited to the trial proper, and we recognized in *Conner* that the need for prosecutorial impartiality extends to all portions of the proceedings, not only to the trial. Paraphrasing the statutory standard, we asked: "Was this conflict so grave as to render it unlikely that defendant will receive fair treatment *during all portions of the criminal proceedings*?" (*Conner, supra*, 34 Cal.3d at p. 148, italics added.) Consistently, in assessing the likelihood of prejudice, we referred to the conflict's effect on "the DA's *discretionary powers exercised either before or after trial* (e.g., plea bargaining or sentencing recommendations)." (*Id.* at p. 149, italics added; see also *People v. Lopez, supra*, 155 Cal.App.3d at p. 822 ["fair trial" in section 1424 broader than "miscarriage of justice" prejudice standard].)

Defendants here have focused on the likelihood of *pretrial* prejudice, in particular "the very real likelihood that the prosecution would pursue a weak case because it was indebted to Borland." They urge us to uphold the trial court's finding of conflict, which was based upon a perceived reasonable possibility the district attorney, out of a sense of obligation to Borland, would be unwilling to drop the charges or bargain for a lesser plea. *Conner* established that the potential for such pretrial unfairness is cognizable under section 1424. *594

Second, section 1424 requires the existence of a "conflict ... such as would render" a fair trial "unlikely." In *Conner*, we read this language as establishing a two-part test: (i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting? Thus, while a "conflict" exists whenever there is a "reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner," the conflict is disabling only if it is "so grave as to render it unlikely that defendant will receive fair treatment." (*Conner, supra*, 34 Cal.3d at p. 148.) [FN6] As shall be seen in part III.A., *post*, the trial court here erred by addressing only the first part of the test, existence of a conflict, without deciding whether the conflict was so grave as to make fair treatment unlikely.

> FN6 The legislative mandate that recusal not be ordered on a mere "possibility" of unfair treatment makes particularly compelling sense where, as here, what is at issue is the disqualification of the district attorney's entire office, rather than only one or a few deputies. "[W]hen the entire prosecutorial office of the district attorney is recused and the Attorney General is required to undertake the prosecution or employ a special prosecutor, the district attorney is prevented from carrying out the statutory duties of his elective office and, perhaps even more significantly, the residents of the county are deprived of the services of their [locally] elected representative in the prosecution of crime in the county." (*People ex rel. Younger v. Superior Court, supra*, 86 Cal.App.3d at p. 204.)

III. *Application to This Case*

A. *Existence of a Conflict of Interest*

In *Conner, supra*, 34 Cal.3d at page 149, we stated the trial court's recusal decision was reviewable only to determine if it was supported by "substantial evidence." In *People v. Hamilton, supra*, 46 Cal.3d at page 140, we declared the standard was "abuse-of-discretion." (3) To the extent these assertions created any inconsistency, it was resolved in *People v. Breaux* (1991) 1 Cal.4th 281, 293-294 [3 Cal.Rptr.2d 81, 821 P.2d 585]: "Our role is to determine whether there is substantial evidence to support the [trial court's factual] findings [citing *Conners*], and, based on those findings, whether the trial court abused its discretion in denying the motion [citing *Hamilton*]." The same two-part standard applies to review of a trial court's grant ruling.

Although there were some conflicts in the recusal hearing testimony (e.g., Johnson and Leyton differed as to whether Leyton participated in discussion of who would pay Klausner's fee), the significant facts were largely undisputed. The trial court made no explicit findings on questions of evidentiary fact. Our review, then, is limited to determining if the superior court abused its discretion, while assuming the court relied on any substantial evidence that tends to support its ruling. *595

(4) The discretion of a trial court is, of course, " 'subject to the limitations of legal principles governing the subject of its action.' " (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355 [188 Cal.Rptr. 873, 657 P.2d 365].) The Attorney General argues at length that financial contributions to the district attorney's office should not, as a matter of law, be considered as creating a conflicting interest for purposes of disqualification, because any interest of the district attorney in such contributions would be an *institutional*, rather than *personal*, interest. He emphasizes that Borland's payments "did not benefit any official's personal pocketbook," and contends the case law shows "recusal will usually require a showing of a prosecutor's personal interest in prosecution," or, stated differently, "a showing of personal or emotional involvement" on the part of the district attorney.

The Attorney General fails to persuade us any legal principle restricts the concept of a conflicting interest to a district attorney's personal financial or emotional stake in the prosecution. The cited cases in which recusal *has* been based on a prosecutor's personal involvement are not authority for a limiting rule. [FN7] As the Court of Appeal in the present case explained, "[p]ersonal interest or emotional involvement will have a particularly strong tendency to imply extraneous motivation. But it does not follow that *only* evidence of personal interest or emotional involvement will support a conclusion that there is 'a reasonable possibility that the [district attorney's] office may not exercise its discretionary function in an evenhanded manner.' (*People v. Conner, supra*, 34 Cal.3d at p. 148.)"

> FN7 The majority opinion in *People v. Superior Court (Martin)* (1979) 98 Cal.App.3d 515, 521-522 [159 Cal.Rptr. 625], a decision predating the enactment of section 1424, could be read as requiring a conflicting personal interest for recusal. The majority in that case, however, also found the defendant's claim of conflict "devoid of substance" (98 Cal.App.3d at p. 520), and Justice Grodin, in his concurring opinion, pointed out that the defendant had not suggested "any plausible scenario for conflict that would operate to his detriment." (*Id.* at p. 522.)

Section 1424, on its face, allows recusal on a showing of *any* conflict of interest that renders fair treatment unlikely, and our decisions interpreting the statute have not further restricted the concept of a conflicting interest. No reason is apparent why a public prosecutor's impartiality could not be impaired by institutional interests, as by personal ones. We have recognized the existence of such an impermissible conflict in a scheme that made the official budget of a public defender dependent on litigation decisions that also affected the interests of the defender's clients (*People v. Barboza* (1981) 29 Cal.3d 375, 380 [173 Cal.Rptr. 458, 627 P.2d 188]); in some circumstances, the same might be true of prosecutors. For example, a scheme that provides monetary rewards to a prosecutorial office might carry the potential *596 impermissibly to skew a prosecutor's exercise of the charging and plea bargaining functions. (Cf. *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 250 [64 L.Ed.2d 182, 193, 100 S.Ct. 1610] [return of penalties to prosecuting office held permissible, where budgeting system guarantees there is no "realistic possibility" the prosecuting officer will be influenced by "the prospect of institutional gain"].)

More to the present point, a prosecutor may have a conflict if institutional arrangements link the prosecutor too closely to a private party, for example a victim, who in turn has a personal interest in the defendant's prosecution and conviction. As Judge Friendly put it in *Wright v. United States, supra*, 732 F.2d at page 1056, a prosecutor "is not disinterested if he has, *or is under the influence of others who have*, an axe to grind against the defendant." (Italics added.) The tie that binds the prosecutor to an interested person may be compelling though it derives from the prosecutor's institutional objectives or obligations. Thus, in *Young v. U.S.* ex rel. *Vuitton et Fils S. A.* (1987) 481 U.S. 787 [95 L.Ed.2d 740, 107 S.Ct. 2124], the high court, pursuant to its supervisory authority, forbade a private law firm from prosecuting a contempt on behalf of the Government, because the firm, as a matter of legal ethics, bore the "obligation of undivided loyalty" to

its private client, Vuitton, which in turn had a private pecuniary interest in prosecution of the contempt. (*Id.* at p. 805 [95 L.Ed.2d at p. 757].) A public prosecutor must not be in a position of "attempting at once to serve two masters," the People at large and a private person or entity with its own particular interests in the prosecution. (*Ganger v. Peyton* (4th Cir. 1967) 379 F.2d 709, 714.) [FN8] Private influence, exercised through control over the prosecutor's personal *or* institutional concerns, is a conflict of interest, under section 1424, if it creates a reasonable possibility the prosecutor may not act in an evenhanded manner.

> FN8 In *Ganger*, the federal court vacated a Virginia assault conviction on due process grounds because the prosecuting attorney, while prosecuting Ganger criminally, also represented Ganger's wife in a divorce action, which was based on the same alleged assault. A number of cases have followed *Ganger* in holding due process forbids prosecutors from holding such conflicting interests. (See, e.g., *State of N.J. v. Imperiale* (D.N.J. 1991) 773 F.Supp. 747, 751-756; *People v. Zimmer* (1980) 51 N.Y.2d 390 [434 N.Y.S.2d 206, 414 N.E.2d 705, 708]; *Cantrell v. Com.* (1985) 229 Va. 387 [329 S.E.2d 22, 25-27].) Although defendants cite *Ganger* and other such cases, and make reference to due process in their brief, they sought recusal solely on the authority of section 1424. Nor do their citations of constitutional authority suggest that a disabling conflict of interest would be more easily shown under constitutional principles than under section 1424. For those reasons, and because we conclude the trial court did not err in finding a conflict under the statutory standard, we need not reach any constitutional question here.

Nor are we persuaded that Borland's contributions bore no potential for cognizable prejudice because, as argued by amicus curiae California District *597 Attorneys Association (CDAA), "[u]nequal treatment of victims, to the extent it exists, is a political necessity created by inadequate tax revenues, and there is no misconduct by the district attorney in reacting to such necessity in the way he deems most beneficial to the community." True, district attorneys must, of necessity, factor budgetary considerations into their exercise of prosecutorial discretion. A district attorney is not disqualified simply because, in an effort to overcome budgetary restraints, he or she has accepted assistance from the public in investigating or prosecuting a crime. At the same time, however, the courts, the public and individual defendants are entitled to rest assured that the public prosecutor's discretionary choices will be unaffected by private interests, and will be "born of objective and impartial consideration of each individual case." (*Greer, supra*, 19 Cal.3d at p. 267.)

In this connection, CDAA draws our attention to statutes establishing industry-financed funding schemes for certain types of fraud prosecutions. Insurance Code section 1872.8, subdivision (a), assesses automobile insurers up to $1 per insured vehicle per year, and allocates 51 percent of the resulting funds for distribution to district attorneys for investigation and prosecution of automobile insurance fraud cases. Insurance Code section 1872.83 establishes a similar funding scheme for workers' compensation fraud investigation and prosecution. CDAA asserts these statutes serve to demonstrate "it is ... appropriate as a matter of policy to request victims to pay some prosecution related costs." Without expressing any opinion as to whether these financing schemes may cause a conflict for district attorneys, or as to their desirability from a policy standpoint, we agree with defendants that these statutory schemes are distinguishable in a number of ways from the type of contributions at issue here: The insurers involved in the statutory funding schemes are required by law to contribute to prosecution efforts, unlike Borland, which contributed to the prosecution at the special request of the district attorney's office; the assessments are made industry-wide, rather than on one particular victim corporation, and are spent on investigation and prosecution of automobile and workers' compensation insurance fraud generally, rather than for the particular benefit of any one victim. These factors tend to reduce the likelihood any victim would gain, through financial contributions, influence over the conduct of any particular prosecution.

The Attorney General also maintains Borland's assistance to the district attorney bore no potential for improper influence because it was, in the Court of Appeal's words, "comparable to the cooperation victims often give to prosecutors in criminal cases." We disagree. True, ordinary cooperation with police and prosecutors may impose financial costs on the victim; the need to attend interviews, lineups and court proceedings, for example, may *598 cause an individual complainant to lose earnings or a corporate

complainant to lose production. Beyond such routine cooperation, victims of commercial and corporate crimes sometimes assist the prosecution by collecting and organizing necessary information from internal sources, and may even hire private investigators for external investigation of suspected crimes against the company. None of these common practices, however, include the district attorney's solicitation and acceptance of financial assistance to satisfy an already incurred obligation.

(5) In summary, we conclude financial assistance of the sort received here may create a legally cognizable conflict of interest for the prosecutor. The undisputed facts, moreover, support the trial court's conclusion such a conflict did exist in this case. The district attorney incurred a debt of $9,450 to an independent contractor, Strawn, for technical assistance in a criminal investigation. The debt was, as the deputy district attorney who argued the motion conceded, "substantial considering our resources." Certainly the amount is not de minimis. (Cf. *State v. Reizlaff* (1992) 171 Wis.2d 99 [490 N.W.2d 750, 751-753] [theft victim's $300 campaign contribution to the district attorney did not require the district attorney's disqualification from prosecution of the alleged thief].) The district attorney then asked the victim of the alleged crime, Borland, to pay the debt. Borland did so, paying as well other significant costs of the investigation. The trial court did not err in concluding these circumstances evidenced a "reasonable possibility" the prosecutor might not exercise his discretionary functions in an evenhanded manner.

We must agree, however, with the Court of Appeal that the trial court failed to apply the second part of the *Connor* test for disqualification: whether the conflict is so grave as to make fair treatment of the defendant unlikely if the district attorney is not recused. In the absence of contrary evidence, we assume a trial court applied the correct legal standard. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913-914 [141 Cal.Rptr. 133, 569 P.2d 727].) Here, however, there is ample evidence the trial court failed to apply the complete test under section 1424. The court's oral remarks at the recusal hearing, which are the only record of the court's reasoning, are directed solely at the first portion of the two-part test established by section 1424 and *Conner*. The court repeatedly stated the standard as a "reasonable possibility" of unfairness to defendants-*Conner*'s definition of a conflict-and nowhere addressed whether the conflict was so grave as to render fair treatment unlikely. The trial court thus determined only that, under the test enunciated in *Connor*, the Santa Cruz County District Attorney suffered from a conflict of interest in his prosecution of Eubanks and Wang, and never addressed whether that conflict was, under the proper standard, disabling. We proceed to consider whether, as the Court of Appeal held, a ***599** finding of disabling conflict would, on this record, be an abuse of discretion under the standard established by section 1424.

B. *Gravity of the Conflict*

As previously explained, the trial court detected a potential for unfair treatment in the possible sense of obligation the district attorney would feel for Borland's payment of a debt owed by the district attorney's office. The court elaborated on the potential prejudice as follows: "[L]et's assume that the District Attorney's office, in the review of their case ... ultimately conclude that, 'Well, you know, maybe our case isn't as strong as we thought at the inception.' Would they be-would it be easier for them to tell a victim who paid no money to the D.A.'s office, 'You don't have a case,' than it would be one that you received $15,000 [*sic*] from?"

The trial court correctly focused on the potential bias arising out of a sense of obligation to Borland, rather than on any potential "prejudice" to be found in the fact of investigatory assistance itself. That the prosecutor may have been *able* to proceed further or more quickly against defendants with Borland's assistance than without would not, by itself, constitute unfair treatment. As CDAA points out, defendants have "no right to expect that crimes should go unpunished for lack of public funds." (See *Wright v. United States, supra*, 732 F.2d at p. 1057 [prejudice from asserted prosecutorial bias not shown by hypothesis that, if a different prosecutor had been appointed, the defendant "might not have been indicted for a crime which, as the jury's verdict demonstrates, he had in fact committed."].) For that reason we cannot agree with the suggestion of amicus curiae National Association of Criminal Defense Lawyers that a victim's financial assistance *necessarily* subjects the defendant to unfair prosecutorial treatment because "[w]hen a private party underwrites the cost of one particular prosecution, that case is not subject to the same economic restraints that limit all other prosecutions." To warrant recusal of the district attorney under section 1424, instead, the evidence must show the prosecutor suffers from a disabling conflict of interest. Such a conflict is demonstrated, in this factual context, only by a showing the private

financial contributions are of a nature and magnitude likely to put the prosecutor's discretionary decisionmaking within the influence or control of an interested party. In each case, the trial court must consider the entire complex of facts surrounding the conflict to determine whether the conflict makes fair and impartial treatment of the defendant unlikely.

(6) Supporting recusal here is the fact the largest payment, that for Strawn's first $9,450 bill, was, as the trial court emphasized, "payment of *600 money for a debt already incurred" by the district attorney. The final decision to obtain payment from Borland was not made until Strawn submitted his first bill. Because Strawn had contracted with the district attorney's office, rather than Borland, Chief Inspector Johnson reasonably believed the district attorney's office would be responsible for Strawn's bills if Borland did not pay them. Borland paid Strawn's bill, moreover, in response to a direct request from the district attorney's office. While decisions from other jurisdictions have approved of some forms of victim assistance, for example in the form of an attorney hired by a victim or victim's family to assist the public prosecutor (see, e.g., *Powers v. Hauck* (5th Cir. 1968) 399 F.2d 322, 324; *Rutledge v. State* (1980) 245 Ga. 768 [267 S.E.2d 199, 200]; *State v. Riser* (1982) 170 W.Va 473 [294 S.E.2d 461, 464]), none involved the public prosecutor's request for the victim's assistance to satisfy a monetary debt already incurred. Hence, none assist our analysis here.

The size of the contributions here also tends to show recusal would be within the trial court's discretion. District Attorney Danner testified his office fund for this type of investigation was very limited, and Chief Inspector Johnson apparently regarded the investigatory costs here as large enough to warrant the unusual measure of asking the victim to pay them.

Finally, the trial court's assessment of the strength of the prosecution case supports the decision to recuse. Before hearing the recusal motion, the court held an extensive hearing on the proper means of protecting Borland's asserted trade secrets from disclosure during the criminal proceedings. (See Evid. Code, § § 1060-1063.) In the course of that hearing, the court repeatedly stated its firm impression that the subject secrets, which Wang and Eubanks were alleged to have conspired to steal, Wang to have stolen and Eubanks to have received, do not in fact meet the definition of trade secrets for criminal purposes (Pen. Code, § 499c, subd. (a)(9)), although they might be trade secrets for purposes of civil remedies (Civ. Code, § 3426.1, subd. (d)). [FN9] Arguably, a factually weak case is more subject than a strong case to influence by extraneous financial considerations, since in the absence of financial assistance from the victim the prosecutor is more likely to abandon or plea bargain such a case.

FN9 The Attorney General observes, correctly, that the trial court's comments "are not *evidence* of weakness in the case." We do not suggest they are, and express no view as to the actual strength or weakness of the prosecution case. The trial court's comments are significant only in that they tend to show that court's own preliminary assessment of the case, an assessment the court may properly take into account in making its discretionary decision on recusal.

Considering the above factors, we cannot say, as a matter of law, that had the trial court addressed the second part of the *Conner* test-the gravity of *601 the identified conflict-it would have abused its discretion in finding the conflict so grave as to render fair treatment of the defendants in all stages of the criminal proceedings unlikely. The Court of Appeal therefore erred in holding that, assuming a conflict existed, it was not, as a matter of law, grave enough to justify recusal.

Disposition

The cause is transferred to the Court of Appeal with directions to vacate its previous judgment and dismiss the appeal as moot.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Chin, J., and Brown, J., concurred.

GEORGE, C. J.

, Concurring.-I have signed the majority opinion, and write separately simply to explain that, on these facts, I believe-apart from any general concerns I may have about privately funded public prosecutions -recusal of the district attorney's office was required as a matter of law.

As the majority holds, the trial court correctly found that the prosecutor suffered a "conflict of interest" under Penal Code section 1424-i.e., there was "a reasonable possibility that the [district attorney's] office may not exercise its discretionary function in an evenhanded manner" (*People v. Conner* (1983) 34

Cal.3d 141, 148 [193 Cal.Rptr. 148, 666 P.2d 5] [construing Pen. Code, § 1424].) The majority then addresses the remaining question-whether recusal of the district attorney's office was required because the conflict made it "unlikely that the defendant would receive a fair trial." (Pen. Code, § 1424.)

As this court said in *Conner*, determination of that question calls for an inquiry as to whether the conflict is "so grave as to render it *unlikely* that defendant *will receive fair treatment* during all portions of the criminal proceedings." (*People v. Conner, supra*, 34 Cal.3d at p. 148, italics added.) The majority concludes, correctly, that on these facts the trial court would not have abused its discretion had it concluded that fair treatment of defendants was unlikely. I would stress that under the circumstances here presented, the trial court properly could not have exercised its discretion *otherwise*.

I

As the majority acknowledges, the relevant facts are as follows: (i) The district attorney solicited the alleged crime victim to pay approximately *602 $13,000 incurred by the district attorney's office in connection with that office's investigation of the case; (ii) a deputy district attorney testified that the debt owed by the office was "substantial" in view of the office's limited resources; and (iii) the trial court assessed the evidentiary support for the criminal trade secret charges against defendants as extremely weak. Certainly, as the majority concludes, all three circumstances "support" recusal under Penal Code section 1424. As explained below, and contrary to the arguments advanced by the Attorney General on behalf of the district attorney, and relied upon by the Court of Appeal herein, these circumstances also *mandate* recusal under the statute.

First, the circumstance that the district attorney *solicited* Borland International to pay the debt incurred by the district attorney rendered it problematic, if not unlikely, that the district attorney would be able to exercise objectively his prosecutorial discretion. As the trial court observed, it would be quite difficult for the district attorney to tell Borland that he has decided not to prosecute Borland's case, after *Borland, at the district attorney's request*, agreed to pay substantial bills that were submitted to, and that were the responsibility of, the district attorney's office. Accordingly, this was not, as the Attorney General asserts, merely an example of normal "cooperation by a victim corporation." Instead, the *solicited* contributions here at issue are of a different order and pose a far greater risk of improperly influencing the district attorney's exercise of charging and prosecuting discretion.

Second, as the majority acknowledges, the size of the solicited contributions increased the likelihood that defendants would not receive fair treatment. The district attorney testified that the office fund for this type of investigation was very limited, and the chief inspector "apparently regarded the investigatory costs here as large enough to warrant the unusual measure of asking the victim to pay them." (Maj. opn., *ante*, at p. 600.) As was conceded by the deputy district attorney who argued the recusal motion, "[t]he sum of money that Borland paid in the [district attorney] universe is substantial considering our resources."

Certainly, the district attorney would have appreciated that Borland stood to benefit from the criminal prosecution of defendants. Not only would such a prosecution assist Borland's parallel civil action, help protect any asserted trade secrets, and serve to deter others from committing similar acts in the future, but prosecution also would constitute a major disruption and distraction for Symantec Corporation, one of Borland's primary competitors. Under these circumstances, the solicited funds likely would be considered by Borland to be a prudent investment whether or not the prosecution ultimately was pursued to trial and conviction because, by keeping the prosecution *603 "alive a little longer," Borland would benefit competitively vis-a-vis Symantec. Thus, the district attorney could "reimburse" Borland for paying the incurred debt simply by exercising discretion to continue or extend the criminal investigation for longer than it otherwise would. As the opinion observes (maj. opn., *ante*, at p. 584, fn. 2), the district attorney maintained the charges against defendants until shortly after oral argument in this court, despite the apparent weakness of the case.

Under these circumstances, the district attorney-knowing the strategic importance of the matter to Borland, and having asked Borland to pay the district attorney's obligations-likely would feel a great sense of obligation to pursue the prosecution and would be reluctant to exercise objectively his prosecutorial discretion. This further increased the risk that defendants would not receive the fair, impartial treatment that other defendants would obtain in a similar situation.

The Court of Appeal concluded otherwise, reasoning

that an amount of money significant to a tightly budgeted public office is not necessarily large in the eyes of a successful for-profit corporation, and that, as the deputy district attorney arguing the motion put it, "the sum of money that Borland paid in the Borland universe is not great." Even if true, the district attorney's observation is of debatable relevance. The question is whether the size of the solicited contributions was sufficient to create a likelihood of unfairness to defendants arising from the alleged victim's undue influence *on the district attorney's* discretionary authority. It matters little that the $13,000 solicited funds might be "small potatoes" in Borland's eyes; the issue is the likely influence of such a payment upon the financially strapped public prosecutor in his treatment of the criminal investigation and continued prosecution of defendants.

Finally, as alluded to by the majority, the trial court made clear its "firm impression that the subject secrets ... *do not in fact meet the definition of trade secrets for criminal purposes* [citation], although they might be trade secrets for purposes of civil remedies [citation]." (Maj. opn., *ante*, at p. 600.) On the final two days of an eight-day pretrial hearing on Borland's request for a trade-secret protective order (Evid. Code, § 1061), the trial court asserted: "I don't have criminal trade secrets here in my opinion at all, and-from what I've seen, ... I'm not sure why this case is here." Later, the court stated, "I don't see criminal trade secrets here." Finally, the court repeated, "it's this Court's view that there's not a criminal trade secret involved. And there isn't, gentlemen. I still say it to you. I don't know what we're doing here ...."

As the majority observes (maj. opn., *ante*, at p. 600, fn. 9), the trial court's statements reflect clearly the trial court's considered assessment that the *604 prosecution's case was factually weak. (See also maj. opn., *ante*, at p. 600.) Contrary to the Attorney General's suggestions, it is appropriate for an appellate court to take into account the trial court's assessment that the prosecution's case is weak, in determining whether the trial court would have abused its discretion had it denied the recusal motion.

II

I agree with the majority that the trial court would not have erred had it properly applied Penal Code section 1424 and granted defendants' recusal motion. Indeed, the trial court would have erred had it ruled otherwise. In light of (i) the circumstance that the contributions were solicited to satisfy obligations of the district attorney, (ii) the size of the contributions in relation to the budget of the district attorney's office, and (iii) the trial court's clearly expressed and considered assessment that the prosecution's case was weak, I conclude that the trial court would have abused its discretion had it denied the motion to recuse.

Mosk, J., concurred.

Cal. 1996.

People v. Eubanks

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C

THE PEOPLE ex rel. DENNIS KOTTMEIER, as District Attorney, etc., Petitioner,
v.
THE MUNICIPAL COURT OF THE SAN BERNARDINO JUDICIAL DISTRICT OF SAN BERNARDINO COUNTY, Respondent; JAMES J. CHARLES, JR., et al., Real Parties in Interest
No. E007729.

Court of Appeal, Fourth District, Division 2, California.

Apr 20, 1990.

SUMMARY

On petition of a county district attorney seeking relief from a policy imposed by the municipal court requiring the attendance of a deputy prosecutor at the trial of traffic infractions, and dismissing infraction cases or entering judgments of acquittal if no deputy prosecutor was present, the Court of Appeal granted a writ of mandate directing the municipal court to vacate its orders terminating the proceedings on purported findings of not guilty as to the four individual defendants named as real parties, to reinstate the complaints, and to conduct trials in such cases in conformity with this opinion. It held that there was no due process violation in conducting traffic infraction hearings in the absence of a prosecutor and that Gov. Code, § 26500, which defines the duties of a district attorney, does not forbid a district attorney from declining to have a deputy present at such hearings. It further held that the trial court could question defendants in such cases and that it was not required to take the initiative and examine the People's witnesses, but that it could properly require the district attorney to supply a list of witnesses for each case and should then permit such witnesses to give a narrative recital. (Opinion by Hollenhorst, Acting P. J., with McDaniel and Dabney, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Criminal Law § 635--Appellate Review--Appealable Judgments and Orders-- Dismissal--Defendant Not Placed in Jeopardy.
As a rule, jeopardy does not attach until a witness has been sworn. The prosecution *603 may appeal an order or judgment dismissing or otherwise terminating a criminal action before the defendant has been placed in jeopardy. Thus, although the trial court purported to make findings of not guilty in four traffic infraction cases after refusing to allow any witnesses for the prosecution to testify because no deputy prosecutor attended the hearing, the trial court's actions were in fact dismissals under Pen. Code, § 1385 (dismissal in furtherance of justice) and the orders were appealable since jeopardy had not attached. No evidence had been taken and no finding of fact could have been made and it was clear that the results occurred not because the prosecution failed to prove guilt, but because the court refused to conduct trials.

(2) Mandamus and Prohibition § 27--Mandamus--To Courts and Court Officers-- Right of Prosecutor to Extraordinary Relief.
In traffic infraction cases involving a municipal court's policy of declining to call witnesses, even though police officers were present to testify, and of purportedly making not guilty findings if no district attorney was in court, the district attorney, who was entitled to appeal the orders since the municipal court's actions were in fact dismissals under Pen. Code, § 1385 (dismissal in the furtherance of justice), was also entitled to seek the alternative of extraordinary relief by petitioning for a writ of mandate and prohibition. Relegating the district attorney to the remedy of appeal would delay the resolution of an important public issue and add to what was already a multiplicity of appeals.

(3) District and Municipal Attorneys § 2--Powers and Duties--Statutory Definition of Duties.
The intention of Gov. Code, § 26500, which defines the duty of a district attorney, is to grant the district attorney discretion both to initiate and conduct prosecutions insofar as it means that it is the district attorney's prerogative to determine whether to file charges and whether to continue a prosecution.

(4) Criminal Law § 220--Trial--Presence of Counsel--Presence of Prosecutor.
The conduct of infraction trials without the participation of a prosecutor does not violate a defendant's due process rights. The prohibition

against appointed counsel in infraction cases (Pen. Code, § 19.6, formerly Pen. Code, § 19c) insures that a majority of defendants will be unrepresented. Thus, the presence of a prosecutor would hardly be to a defendant's advantage.

(5) District and Municipal Attorneys § 2-Powers and Duties--Declining to Have Deputy Prosecutor Attend Traffic Infraction Trials.
Gov. Code, § 26500, which defines the duty of a district attorney, does not *604 forbid a decision by the district attorney not to provide a deputy prosecutor for infraction trials.

(6) Courts § 5--Inherent and Statutory Powers--Compelling Attorney's Appearance.
A court has the power to enforce an attorney's duty to appear where a commitment to do so has been made.

(7) Courts § 5--Inherent and Statutory Powers--Court's Power to Manage Proceedings Before It.
Every court has certain inherent powers to manage the proceedings before it (Code Civ. Proc., § 128), but this power should be exercised by courts in order to insure the orderly administration of justice and not as a weapon in a battle of priorities. Thus, in four traffic infraction cases involving the municipal court's policy of declining to call witnesses, even though police officers were present to testify, and purportedly making not guilty findings if no deputy district attorney was present in court, an order requiring the municipal court to allow infraction proceedings to be held in the absence of a deputy did not necessarily invade the municipal court's powers or dignity.

(8) Criminal Law § 234--Trial--Power and Conduct of Judge--Examination of Witnesses--Examination of Prosecution Witnesses.
It is the duty of the trial court to assist in bringing out facts, within reasonable limits, to the end of reaching a just result. However, no court should be placed in the position of appearing to assist one side or the other. Thus, in traffic infraction cases in which the district attorney declined to have a deputy present in court, it was not improper for the trial court to question the defendants, but the trial court was not required to take the initiative in examining the prosecution's witnesses. The trial court, which had continuing discretion to request the presence of a prosecutor in an unusual case, could properly require the district attorney to supply a list of witnesses for each case and was then required to permit each such witness to give a narrative recital.

[See Cal.Jur.3d (Rev), Criminal Law, § 2937; 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 2884.]

COUNSEL

Dennis Kottmeier, District Attorney, and Joseph A. Burns, Deputy District Attorney, for Petitioner. *605

Roger Meadows for Respondent.

No appearance for Real Parties in Interest.

HOLLENHORST, Acting, P. J.

For the third time, the People, by and through Dennis Kottmeier, in his capacity as District Attorney for the County of San Bernardino, seek relief from this court from a policy imposed by the municipal court requiring the attendance of prosecutors at the trial of traffic infractions. [FN1] Although we have previously declined to assume jurisdiction and required petitioner to seek his available remedies in the lower courts, we find ourselves compelled at this time to intervene.

> FN1 We consider this the correct way to characterize the policy of respondent court, despite its purported compliance with the order of the superior court forbidding it to compel such attendance. As will be discussed below, the court's actions in dismissing all such cases if no prosecutor appeared was a transparent effort to force petitioner to provide a deputy.

Petitioner (hereinafter sometimes the District Attorney) filed his first petition with this court on October 3, 1989. This petition alleged that in July 1989, Judge David Merriam of respondent court notified petitioner that when he assumed the assignment of traffic trials on July 28, he would require the attendance of a deputy district attorney to represent the People. [FN2] Petitioner responded by requesting the cancellation of this policy, relying on *People v. Carlucci* (1979) 23 Cal.3d 249 [152 Cal.Rptr. 439, 590 P.2d 15]. Despite the intervention of Presiding Judge Anthony Piazza, this effort was unsuccessful, and on July 27, 1989, the District Attorney filed a petition for writ of prohibition with the superior court. On that same day, a copy of an alternative writ was served on respondent court and Judge Merriam, which forbade respondent from implementing its policy of requiring the presence of a

deputy district attorney.

> FN2 Traffic trials are apparently calendared for Friday mornings.

In response, at the calling of his traffic infraction calendar on July 28, 1989, Judge Merriam announced his intention to obey the alternative writ. However, he declined to permit any witnesses for the People to testify unless they were formally called by an attorney. As no deputy was present, the court called the defendants and not only allowed them to tell their side of the incidents, but affirmatively questioned them. In the case of each defendant whose "trial" was reflected in the transcript provided to this court, the municipal court accepted defendant's version and found the ***606** defendants not guilty. Petitioner asserted, without denial, that 13 defendants were in fact so found not guilty on that date.

The District Attorney's efforts to obtain a revised order pending the hearing on his petition for writ of prohibition failed, although Judge Merriam eventually modified his practice to that of granting acquittals under Penal Code section 1118 in all cases in which no prosecutor was present. This continued throughout the month of August and into September of 1989. The People began filing notices of appeal on all such cases, which had passed 50 by the time the first petition was filed in this court. [FN3]

> FN3 We are informed that by now, well over 130 such appeals have been filed by the People. We are also informed that, contrary to the superior court's belief that each appeal could conveniently be resolved with respect to its particular issues, the appellate department is awaiting this court's pronouncement of a general rule of law.

On September 22, the District Attorney's petition was heard by the superior court. Although no written judgment was ever presented as part of the record to this court, the superior court announced its intention to deny relief on the theory that the People's remedy by appeal in each case was adequate. The court expressed the opinion that each appeal would present a fully developed fact situation, and would also provide the opportunity for specific relief. The court noted that the original alternative writ had been effectively circumvented by the municipal court, and relied on this to show that a general order in mandate might not cover later practices or policies.

The District Attorney filed his first petition with this court on October 3, 1989, in which he sought a full review of the issues. We granted relief in only a limited sense, ordering the superior court to set aside its finding that the remedy by appeal was adequate, and directing it to hear the case on its merits.

In obedience to this order, the superior court conducted further proceedings, and issued a judgment on February 15, 1990, directing the municipal court to cease from requiring or compelling the attendance of a prosecutor at traffic infraction hearings.

With prophetic anxiety, the District Attorney again resorted to this court, seeking a broader order. We again denied the petition, but did so expressly without prejudice to future proceedings "should there be further dismissals or should the order and judgment otherwise fail to achieve a result consistent with the interests of justice." Although we were reluctant to presume that respondent would flout or deliberately circumvent the superior court's order, we hoped by our language to indicate our general agreement with the result reached. ***607**

However, the instant petition was filed on March 1, 1990. Petitioner alleges that the municipal court has once again elected to comply with the letter of the order rather than its spirit, in that, while it makes no effort to compel the attendance of a deputy district attorney by the threat of contempt or other legal coercion, it has continued to refuse to allow the People's witnesses to take the stand and has continued to dismiss the infraction cases or enter judgments of acquittal. [FN4]

> FN4 At some point over the last several months, Judge Ellen Brodie began to hear the traffic infraction calendar. She has expressed her solidarity with Judge Merriam on the issues of this case.

Availability of Relief

Four individuals have been named as real parties: James J. Charles, Jr., Dominic M. Davis, Anne M. Cordaro, and Jaime Giron. Their cases were called before respondent court on February 16, 1990. In no case was a deputy district attorney present, although police officers were present to testify; in no case was any witness sworn. When it appeared that no deputy district attorney was in court, the court declined to call any witnesses and found each defendant not guilty.

(1) The People may appeal "an order or judgment dismissing or otherwise terminating the action before

the defendant has been placed in jeopardy. ..." (Pen. Code, § 1466, subd. (2).) Jeopardy does not attach, as a rule, until a witness has been sworn. (*Richard M. v. Superior Court* (1971) 4 Cal.3d 370, 376-377 [93 Cal.Rptr. 752, 482 P.2d 664].) Although the trial court in these cases purported to make a finding of "not guilty," we think the court's actions are properly construed as dismissals under Penal Code section 1385. No evidence was taken and no finding of fact could properly have been made; it is abundantly clear that the results occurred not because the People had failed to prove guilt, but because the court refused to conduct trials.

The orders were therefore appealable, and petitioner is entitled to seek the alternative of extraordinary relief. In this case it is beyond question that relegating the People to the remedy of appeal would delay resolution of an important public issue, and add to what is already a multiplicity of appeals. (See *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 129-130 [142 Cal.Rptr. 325].)

Discussion

(2) Four distinct issues are presented by this petition. Does the conduct of infraction trials without the participation of a prosecutor violate a *608 defendant's right to due process? Does it violate the requirements of Government Code 26500? Does it improperly interfere with the court's inherent power to regulate and control its own procedures, and does it place the court in the intolerable position of playing the role of prosecutor? The first question is readily answered by resort to controlling authority; the other three require a more extended analysis.

In setting up the issues, however, we must observe that both sides have used lofty legal principles as a smoke screen to some extent. As we will have occasion to note again, this case is really a contest of wills between the court and the chief prosecutor. At oral argument, counsel for respondent stressed almost exclusively the court's desire to have a prosecutor present as an aid to the pretrial disposition of cases, and it is apparent that the essential battle is over the allocation of judicial and prosecutorial resources where both sides are stretched too thin.

This, of course, is an administrative, not a legal, dispute, and one which this court cannot effectively resolve. We must therefore confine ourselves to the legal trappings of the case.

I. Constitutional and Statutory Strictures

In *People v. Carlucci, supra*, 23 Cal.3d 249, the court held that there was no due process violation if an infraction hearing was held without the presence of the prosecutor. It further expressly held that no such violation existed by the fact that the trial judge called and questioned witnesses, although it cautioned that the trial judge, in such a case, must be careful to avoid any appearance of bias or advocacy. (At pp. 256-258.) However, in *Carlucci* the court did not consider the effect of Government Code section 26500.

That statute defines the duty of the district attorney, and states that he "shall attend the courts, *and within his or her discretion shall initiate* and conduct on behalf of the people all prosecutions for public offenses." The statute was amended in 1980 (Stats. 1980, ch. 1094, § 1), to add the portion italicized above.

In *People v. Daggett* (1988) 206 Cal.App.3d Supp. 1 [253 Cal.Rptr. 195], the appellate department of Sacramento County held that section 26500, as amended, did not require the attendance of a prosecutor at infraction trials. Relying in part on legislative history, the court ruled that the Legislature, in making the amendment, was conscious that the amended version would *609 grant the prosecutor discretion in appearing, as well as initiating a prosecution. [FN5] However, the court also pointed out that the amendments were made after the decision in *People v. Carlucci*, and that the Legislature was presumed to have been aware of the court's ruling that the prosecutor need not be present.

> FN5 Assembly Committee on Criminal Justice, Analysis of Senate Bill No. 1890, Comments, paragraph 4: "... This language appears to eliminate the existing mandate that the public prosecutor conduct all prosecutions for public offenses on behalf of the people and insert in it's [sic] stead discretionary provisions. Is this the intent? Different language should be drafted to accomplish the ostensible purpose of this provision without modifying the existing mandates (i.e. 'The public prosecutor shall attend the courts and conduct on behalf of the people all prosecutions which, within his/her discretion, have been initiated'. ..."

Although the language of Government Code section 26500 is certainly not free from doubt, we agree with the result reached in *People* v. *Daggett*. The phrase "attend the courts" is too vague to be of much use in interpretation; what courts? When? (3) On its face the

statute then appears to grant the district attorney discretion *both* to initiate *and* conduct the prosecutions. This is undoubtedly the intention of the statute, insofar as it means that it is the district attorney's prerogative to determine whether to file charges and whether to continue a prosecution. (See *People v. Adams* (1974) 43 Cal.App.3d 697, 707-708 [117 Cal.Rptr. 905].) It is less clear that the statute was intended to permit the district attorney to choose when to appear for trial, or what the result of his absence should be.

We note that it has been stated that the provisions of Government Code section 26500 requiring the presence of the prosecutor "are for the benefit of the people." (*People v. Thompson* (1940) 41 Cal.App.2d Supp. 965, 967 [108 P.2d 105].) This suggests that there is discretion not to appear, if the district attorney is willing to take the consequences of an adverse verdict or ruling, which in most misdemeanor and felony cases would be a foregone conclusion. If the District Attorney elected not to appear at a serious felony trial involving complex issues and numerous witnesses, two things would be clear: he would be in gross dereliction of his duty to the people of the state under Government Code section 26500, and the court would be justified in dismissing the case.

However, we do not think it either necessary or proper to consider such a situation, which is not before us. In *People v. Carlucci, supra*, the court extensively discussed the unique nature of infraction prosecutions and the benefits to all sides of encouraging expeditious and flexible procedures. (See also *In re Dennis* (1976) 18 Cal.3d 687, 695 [135 Cal.Rptr. 82, 557 P.2d 514].) (4), (5) The prohibition against appointed counsel in infraction cases (Pen. Code, § 19c) ensures that the majority of defendants will be ***610** unrepresented, and the presence of a prosecutor would be "hardly to defendant's advantage." (*People v. Carlucci, supra*, 23 Cal.3d at p. 258.) We need not repeat in detail that court's recital of the practical considerations underlying the decision that such cases may be handled without the presence of a prosecutor; we need only agree and hold that petitioner's decision not to provide a prosecutor for infraction trials is not forbidden by Government Code section 26500.

II. Interference With the Court's Control of Its Procedures

(6) While a court unquestionably has the power to enforce an attorney's duty to appear where a commitment to do so has been made (see *In re Stanley* (1981) 114 Cal.App.3d 588, 591 [170 Cal.Rptr. 755]), the remedy is less certain where the district attorney simply declines to personally appear in a class of cases. Thus, we think the judgment by the superior court, which forbade any attempt to compel the attendance of a deputy district attorney, was correct.

Respondent argues, however, that it had the power and the right to refuse, in effect, to hear the trials in the absence of the prosecutor. It argues that it cannot in turn be forced to conduct trials without the assistance of an attorney for the People, and to assume the responsibility of ensuring that both sides fairly and completely present their cases. [FN6]

> FN6 That respondent court's real grievance is quite different is again suggested by remarks made by Judge Brodie. After the superior court issued its judgment, she dismissed several cases due to the absence of a prosecutor, and then made the following comments, obviously directed to the law enforcement witnesses who had not been permitted to testify:
> "The Court: ... You're found not guilty, sir. [¶] Officers, I want to say something to you. I would be very upset indeed if I were you and was put in the position of having the prosecutor of this county, the district attorney of this county, place so little worth on what you are doing that they won't send a deputy to court to prosecute your cases. [¶] Where is Mr. Goss? Where is Mr. Williams? Where is Miss Djanbatian? Where is Mr. Weintre? And where is Mr. Carroll? [¶] Not one of them is in Superior Court. One of them may be in Department A doing law and motion. The other four have nowhere to go on Friday mornings, no court appearances that I am aware of. [¶] And it seems to me that the elected district attorney of this county should fulfill his duty that he has been elected to perform and send people to court. [¶] We all do our jobs. You do your jobs. I do my job. And the district attorney should be doing his job."

We agree that, applied to an extreme case, this argument is not without merit. However, as discussed above, we are not considering an extreme case, but only infractions normally processed rapidly and informally.

The evident antagonism between petitioner and at

least some members of respondent court is not difficult to understand, and neither side is wholly *611 virtuous or unreasonable. The District Attorney doubtless considers his office understaffed and overworked, and believes that his deputies may be more usefully employed in more serious cases. Respondent feels that it is being inappropriately denigrated and ignored, and that its role as the only contact many citizens have with the court system deserves more consideration by the District Attorney. (See *People* v. *Daggett, supra*, 206 Cal.App.3d at pp. Supp. 6-7, dis. opn. of Marvin, J.) However, both sides appear to forget their joint interest in both the smooth functioning of the system and the goal of achieving justice. [FN7]

> FN7 Furthermore, respondent's approach has had the unfortunate result of exposing the judicial system to ridicule. We can only wince when contemplating the reactions of those members of the public who found themselves caught up in this charade. We are also sympathetic to the burdens imposed on the individual defendants against whom the People have determined to prosecute appeals, or who have been named here as real parties. For them, a trivial transgression has exposed them to the legal system at its most protracted and irrational.

(7) Every court has certain inherent powers to control and manage the proceedings before it. (Code Civ. Proc., § 128.) However, this power "should be exercised by the courts in order to insure the orderly administration of justice" (*Hays v. Superior Court* (1940) 16 Cal.2d 260, 264 [105 P.2d 975]) and not as a weapon in a battle of priorities. We do not see that requiring respondent court to allow infraction proceedings to be held in the absence of a deputy prosecutor necessarily invades its powers or dignity.

III.

(8) Finally, respondent asserts its concern over being "compelled" to play the role of advocate in questioning the People's witnesses. We observe that the record in this case indicates that the court saw nothing improper in questioning defendants, and indeed there was not; it is the duty of the trial court to assist in bringing out the facts, within reasonable limits, to the end of reaching a just result. (*People v. Carlucci, supra*, 23 Cal.3d at p. 256; *Estate of Dupont* (1943) 60 Cal.App.2d 276 [140 P.2d 866].) In fact, Judge Merriam's practice of calling defendants and then questioning them extensively supports the inference that the present zealous concern for the court's appearance of untainted impartiality has merely been cobbled up to justify its actions.

However, we stop short of holding that respondent court must take the initiative in examining the People's witnesses, as we agree that no court should be placed in the position of appearing to assist one side over the other. This principle should be most carefully and rigorously followed where the party being questioned appears for the prosecution, to avoid the inference that the court and law enforcement are "in cahoots" and the *612 result of the trial a foregone conclusion. (See generally *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512 [116 Cal.Rptr. 260, 526 P.2d 268].)

As the superior court observed, there are difficulties in resolving the case in a manner which will cover all eventualities without placing unnecessary and improper strictures on either party. In attempting to do so, this court must to some extent depend on the good faith of both sides, although the unresolved, underlying basis of the dispute makes such reliance probably over-optimistic.

The municipal court may properly require the District Attorney to supply a list of witnesses for each case, for example; the court should then permit the witnesses to give a narrative recital. The court has no obligation, however, to assist the People's witnesses in presenting the case, and we recognize its continuing discretion to request the presence of a prosecutor in the unusual case.

We requested respondent and real parties to respond to the petition and held oral argument. The case is appropriate for the issuance of a peremptory writ in the first instance. (Code Civ. Proc., § 1088; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178-179 [203 Cal.Rptr. 626, 681 P.2d 893].)

Let a peremptory writ of mandate issue directed to the Municipal Court of San Bernardino County, directing it to vacate its orders terminating proceedings on a purported finding of "not guilty" in those actions entitled People v. James J. Charles, Jr., action No. ONM 10842; People v. Dominic M. Davis, action No. ONM 118411; People v. Anne M. Cordaro, action No. SH 592271, and People v. Jaime Giron, action No. SH 604856 and to reinstate the complaints in said action. Respondent is further directed to proceed to conduct trials in said matters in conformity with the views expressed in this opinion.

McDaniel, J., and Dabney, J., concurred. *613

Cal.App.4.Dist.,1990.

People ex rel. Kottmeier v. Municipal Court of State (Charles)

END OF DOCUMENT

Date of Hearing: June 20, 2000
Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Carl Washington, Chair

SB 1342 (Burton) - As Amended: June 13, 2000

SUMMARY : Requires the court to order DNA testing on evidence relevant to conviction of a criminal defendant upon specified conditions, and requires the appropriate governmental entity to preserve any biological material secured in a criminal case as specified. Specifically, this bill :

1) Provides that a defendant in a criminal case may make a motion in the trial court for performance of DNA testing on evidence relevant to the charges that resulted in the conviction or sentence which was not tested because either the evidence or the technology for forensic testing was not available at the time of trial.

2) Requires that the motion for DNA testing be verified by the defendant under penalty of perjury that the information contained in the motion be true and correct to the best of his or her knowledge.

3) Requires that a notice of the hearing be served on the Attorney General and the district attorney in the county of conviction 30 days prior to the hearing, and that the hearing be heard by the judge who conducted the trial unless the presiding judge determines that judge is unavailable.

4) The court shall grant the hearing on the motion if the defendant presents a prima facie case that identity was a significant issue in the case, and the court finds all of the following:

   a) The result of the testing has the scientific potential to produce new, non-cumulative evidence that is material and relevant to the defendant's assertion of innocence.

   b) The testing requested employs a method generally accepted within the scientific community.

c) The evidence to be tested is available and in a condition that would permit DNA testing requested in the motion.

d) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect.

5) Requires, if known, that the motion identify the evidence subject to the testing and the specific type of testing being requested by the defendant.

6) States that if the prosecuting attorney objects to the specific items sought to be tested, to the specific type of test requested, or if there is an issue as to the condition of a questionable sample, the court shall conduct a hearing to resolve the issues.

7) Provides that if a motion for DNA testing has been granted, the testing shall be conducted by a laboratory mutually agreed upon by the defendant and the district attorney in a non-capital case or the Attorney General in a capital case. If the parties cannot agree, the court shall designate the laboratory to conduct the test.

8) Requires that the results of any testing ordered be fully disclosed to each of the parties. If requested by either party, the court shall order production of the underlying data and notes.

9) Provides that the cost of DNA testing shall be borne by the State or by the applicant if the court finds that the applicant is not indigent and has the ability to pay. Requires that the designated laboratory present any bill for the State's share of costs to the court for approval; and upon approval, the laboratory shall submit the bill to the state treasurer for payment. If, after 30 days the superior court has taken no action on the bill, it shall be deemed approved.

10) Provides that the court may at any time appoint counsel and upon request of the defendant, in the interests of justice, the court may order the defendant present at the hearing on the motion.

11) Requires the appropriate governmental entity to preserve any

biological material secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with the case, but a governmental entity may destroy biological materials before the expiration date of the following conditions are met:

a) The governmental entity notifies the person who remains incarcerated in connection with the case, any counsel of record, the public defender and the district attorney in the county of conviction and the Attorney General.

b) No person makes an application for an order requiring DNA testing on the evidence sought to be destroyed within 180 days of receiving the above notice.

c) No other provision of law requires that the biological evidence be preserved.

EXISTING LAW :

GENERAL PROVISIONS

1) Establishes the DNA and Forensic Identification Data Base and Data Bank Act of 1998. (Penal Code Section 295(a).)

2) States that it is the Legislature's intent to use the DNA and Forensic Identification Data Bank to detect and prosecute individuals responsible for sex offenses and other violent crimes, exclude suspects who are being investigated for such crimes, and to identify missing and unidentified persons. (Penal Code Section 295(b)(3).)

3) Requires the Department of Justice's (DOJ) DNA laboratory, the California Department of Corrections (CDC), and the California Youth Authority (CYA) to adopt policies and enact regulations as necessary to give effect to the Act. (Penal Code Section 295(e)(1).)

4) Authorizes DOJ laboratories approved by ASCLD/LAB, or any approved certifying body, and any crime laboratory designated by DOJ and accredited by ASCLD/LAB to analyze crime scene samples. (Penal Code Section 297(a).)

5) States that the DOJ shall perform DNA analysis and other

forensic identification analysis only for identification purposes. Provides that all DNA profiles retained by the DOJ are confidential except as provided by statute. (Penal Code Section 295.1(a), 299.5(a).)

CONVICTED PERSONS REQUIRED TO SUBMIT SAMPLES

6) Requires any person convicted of any of the following crimes to provide two specimens of blood, a saliva sample, right thumbprints and a full palm print of each hand: any registerable sex offense, murder or attempted murder, voluntary manslaughter, felony spousal abuse, aggravated sexual assault of a child, felonious assault or battery, kidnapping, mayhem, and torture. (Penal Code Section 296(a)(1)(A - I).)

7) Provides that any person who is required to register as a sex offender who is committed to any CYA institution where the person was confined, granted probation, or released from a state hospital as a mentally disordered sex offender shall be required to give the specified biological samples. (Penal Code Section 296(a)(2).)

SAMPLES FROM SUSPECTS

8) Provides that samples obtained from a suspect shall only be compared to samples taken from the criminal investigation for which he or she is a suspect and for which the sample was originally taken either by court order or voluntarily. (Penal Code Section 297(b).)

9) Provides that a person whose DNA profile has been included in the data bank shall have his or her information and materials expunged if the conviction was reversed and the case dismissed, the person was found to be factually innocent, or the person has been acquitted of the underlying offense. (Penal Code Section 299(a).)

10) Requires the DOJ to review its data bank to determine whether it contains DNA profiles from persons who are no longer suspects in a criminal case. Evidence accumulated from any crime scene with respect to a particular person shall be stricken when it is determined that the person is no longer a

suspect. (Penal Code Section 299(d).)

FISCAL EFFECT : Unknown

COMMENTS :

1) Author's Statement . According to the author, "This bill would allow a convicted defendant to make a motion before the trial court for DNA testing that was not available at trial because

the evidence or the testing technology was not available to the defendant. California has no statute or case law that authorizes such testing. This bill balances the need for discovering the truth with procedural fairness and practicality. It does not allow DNA testing in every case - only where the identity of the accused was a significant issue at trial, and the court finds, among other things, that the result of the testing will produce new evidence that is material and relevant to the defendant's assertion of innocence. The bill also provides safeguards to ensure that the evidence is available and reliable.

"Innocent people should not serve time or be executed for crimes they did not commit. As long as an innocent person is incarcerated for a crime he or she did not commit, the guilty party remains at-large, a danger to society and unpunished."

2) Background . At the Innocence Project run by attorneys Peter Neufeld and Barry Scheck at the Cardoza Law School in Michigan, second- and third-year law students evaluate cases from all over the country to determine which cases they will seek post-conviction DNA testing. As of January 2000, the Innocence Project has "played a role in 39 exonerations." (Boyer, Peter J. "Annals of Justice: DNA on Trail", New Yorker . January 17, 2000, Page 42.) In order to qualify for help by the Innocence Project, the case had to have available biological material and "the defense had to have been that the accused had been wrongly identified by the victim." (Id. At 45.)

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. As a result, in California in cases where DNA has been tested and an inmate has been released, the inmate has had to convince the prosecutor in the

original case to allow DNA testing. Of the 70 cases in the United States that have been vacated on the basis of DNA testing, four were in California.

When discussing the case of Herman Atkins, originally prosecuted in Riverside County and recently released from prison, Neufeld of the Innocence Project stated, "California currently lacks a statute giving inmates the right to post-conviction DNA testing. . . . As a result, an inmates is at the mercy of the good-will of the prosecutor." (Los Angeles Times , February 9, 2000, Section A, Page 10.) According to the article, a motion by the Innocence Project stated, "The original prosecutor in the case resisted testing for several

years." (Id.) Upon Atkins' release, he had been in prison for 12 years and it has taken Atkins "three years to get a judge to agree to DNA testing of the biological evidence recovered from the victim, who had fingered Atkins as her attacker." (USA Today , February 29, 2000.)

At this time, only New York and Illinois have statutes providing for post-conviction testing in certain cases. Currently, in addition to this legislation, there is federal legislation proposed, as well as legislation proposed in other states.

3)Federal Legislation . SB 2073 (Leahy) provides, in part, for DNA testing of biological materials related to the investigation or prosecution that resulted in the judgment for which the person is in custody. If passed, SB 2073 would require that states make similar DNA testing available to convicted persons.

SB 2073 would require that the court order DNA testing upon a determination that the testing may produce non-cumulative, exculpatory evidence relevant to the claim of wrongful conviction or sentence. In other words, the defendant would be required to show that the testing might produce evidence favorable to the defendant. This bill only requires that defendant show that the testing has the scientific potential to produce new non-cumulative evidence, which would be the case any time previously untested materials are examined. SB 2073 requires that the person requesting the order for testing be in custody and that the material to be tested relate to the judgment for which the person is in custody. This bill does not require that the defendant be in custody, and testing can be requested on any charge that resulted in a conviction or

sentence. Therefore, a defendant may request testing on a prior conviction which served as a basis for an increased sentence. In addition, this bill would apply in all criminal cases, is not limited to felony cases, and would include misdemeanors as well. This bill requires that identity be a significant issue resulting in the conviction and, in that respect, is narrower than SB 2073.

According to the Associated Press, Senator Orrin Hatch, Chairman of the Senate Judiciary, intends to introduce legislation that would provide for DNA testing in order to establish innocence. The Hatch legislation would only be operative for two years after the date of enactment. It requires that the defendant assert actual innocence under penalty of perjury, and identity had to have been an issue at the trial. Under the Hatch proposal, an in-custody defendant would be required to show that testing of the specified evidence would, assuming

exculpatory results, establish the actual innocence of the applicant. This bill only requires that the specified evidence be relevant to the charge. Is this bill overly broad in that it does not require that the defendant show some degree of likelihood that the testing of the specified material would produce favorable evidence or establish actual innocence?

4) Attorney General's Office . The Attorney General's Office has no position on the bill at this time, but believes that the proposed standard for ordering DNA testing is too low. The Attorney General's Office states, "We share your goal providing a means by which innocent persons who have been wrongly convicted may use new scientific techniques to prove their innocence. However, as you are aware, we have significant concerns about the bill as currently drafted. Our primary concern is the standard employed. SB 1342 mandates DNA testing if identity was a significant issue at the trial, and the court finds that results of the testing 'has the scientific potential to produce new non-cumulative evidence that is material and relevant to the defendant's assertion of innocence.' We believe testing should be granted if the evidence to be tested would be dispositive, not merely relevant, on the question of innocence. Additionally, we believe it is essential to include language on a number of points of procedure so as to ensure this provision is not used to delay the execution of sentence or the administration of justice and will not unjustly divert scarce and costly

resources."

5) Technical Amendments . This bill allows a defendant who was convicted in a criminal case to make application for an order requiring that DNA testing be conducted on evidence relevant to the conviction or sentence. This bill should be amended to clarify that these provisions only apply to defendants convicted after a court or jury trial in order to prevent defendants who have pled guilty from bringing a motion. Additionally, this bill should be amended to clarify that identity had to have been a significant issue that resulted in the conviction or sentence. This bill should also be amended in order that results of any testing be disclosed to both the person filing the motion and the district attorney or Attorney General.

6) Arguments in Support .

a) According to the American Civil Liberties Union, "DNA testing has exonerated more than 60 inmates in the United States and Canada. (See DNA Bill of Rights, American Bar

Association Journal, March 2000). The advent of DNA testing raises serious concerns about the prevalence of wrongful convictions, especially wrongful convictions arising out of mistaken eyewitness identification testimony. According to a 1996 Department of Justice study entitled 'Convicted by Juries, Exonerated by Science: Case Studies of Post-Conviction DNA Exonerations', in approximately 20-30% of the cases referred for DNA testing, the results excluded the primary suspect. Without DNA testing, many of these individuals might have wrongfully continued to serve sentences for crimes they did not commit.

"As long as an innocent person is incarcerated for a crime he or she did not commit, the guilty party remains at-large, a danger to society and unpunished. The safety of society requires that the guilty party be apprehended and brought to justice."

b) The California Attorneys for Criminal Justice states, "The importance of this bill is clear. As much as we strive for a perfect justice system, we know that sometimes it does not work properly and innocent people get convicted of and are sentenced for crimes they did not commit. SB 1342

would implement a safeguard against wrongful convictions and provide a mechanism for wrongly convicted people to prove their innocence and secure their release from prison. It contains appropriate guidelines to ensure all people and entities involved have an ample opportunity to test the evidence and review the findings."

REGISTERED SUPPORT / OPPOSITION :

Support

American Civil Liberties Union
California Attorneys for Criminal Justice
Committee on Moral Concerns
Crime Victims United of California

Opposition

None on File

Analysis Prepared by : Gregory Pagan / PUB. S. / (916) 319-3744

The Habeas Corpus Resource Center (HCRC), located in San Francisco, provides counsel to represent indigent men and women under sentence of death in California. The HCRC's mission is to provide timely, high-quality legal representation for indigent petitioners in death penalty habeas corpus proceedings before the Supreme Court of California and the federal courts.

The HCRC also recruits and trains attorneys to expand the pool of private counsel qualified to accept appointments in death penalty habeas corpus proceedings and serves as a resource to appointed counsel, thereby reducing the number of unrepresented indigents on California's death row. Please refer to our capital habeas appointments information page for complete information.

NEWS AND DEVELOPMENTS

> 04.13.2006 -- Employment opportunities at HCRC

> 02.15.2006 -- Press Release Regarding Kathleen Culhane

> 12.14.2005 -- Volunteer opportunities at HCRC

> 10.05.2005 -- HCRC announces its Summer 2006 Internship program

For general media inquiries, contact media@hcrc.ca.gov.

Commission on State Mandates

Original List Date: 7/6/2001
Last Updated: 5/19/2006
List Print Date: 05/26/2006
Claim Number: 00-TC-21
Issue: Post Conviction: DNA Court Proceedings

Mailing Information: Draft Staff Analysis

Mailing List

Related

01-TC-08 Post Conviction: DNA Court Proceedings Test Claim Amendment (00-TC-21)

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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EXHIBIT L

COUNTY OF LOS ANGELES
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J. TYLER McCAULEY
AUDITOR-CONTROLLER

June 16, 2006

Ms. Paula Higashi
Executive Director
Commission on State Mandates
900 Ninth Street, Suite 300
Sacramento, California 95814

Dear Ms. Higashi:

Los Angeles County
Review of Commission's Draft Staff Analysis
Post Conviction: DNA Court Proceedings [00-TC-21, 01-TC-08]

We herein submit our review of Commission's draft staff analysis. We concur with the staff finding that a reimbursable State mandated program is imposed upon counties under the test claim legislation.

Leonard Kaye of my staff is available at (213) 974-8564 to answer questions you may have concerning this submission.

Very truly yours,

FOR

J. Tyler McCauley
Auditor-Controller

JTM:CY:LK
Enclosures

Los Angeles County
Review of Commission's Draft Staff Analysis
Post Conviction: DNA Court Proceedings [00-TC-21, 01-TC-08]

We concur with the Commission staff finding, on page 27 of their Draft Analysis issued on May 26, 2006, that a reimbursable State mandated program is imposed upon counties under the test claim legislation.

We further agree that specific activities are reimbursable because these activities are necessary in implementing the test claim legislation. These reimbursable activities, as listed on page 28 of the Draft Analysis, are:

> **"Representation and investigation:** 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:** if 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:** 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 effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).

Agree on a DNA lab: Effective January 1, 2001, for the public defender 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))."

However, we disagree with the staff finding, on page 28 of their Draft Analysis, that "... other statues in the test claim, including holding a hearing on the DNA testing motion, are not reimbursable state-mandated programs...". The basis for staff's conclusion, found on page 19 in the Draft Analysis, appears erroneous:

"Based on the statutory language ("the court may, in its discretion, appoint counsel..."), appointment of counsel when counsel has previously been appointed is an activity wholly within the discretion of the court. Thus, staff finds this activity is a mandate of the court and not of the state. As a court mandate, it is therefore excluded from the constitutional definition of 'appropriations subject to limitation' in article XIII B, section 9 (b) of the California Constitution, making it not subject to article XIII B, section 6."

We disagree with the basis for staff's conclusion. We disagree that certain activities in carrying out the defendant's new rights to post-conviction DNA court proceedings are discretionary.

We maintain that activities, such as the limited judicial discretion in appointment of counsel, "triggers" State mandated activities in carrying out the post conviction rights of the indigent to DNA court proceedings. Even staff concedes this "trigger" point when they state on page 15 of their Draft Analysis, that:

> "The issue of discretionary local activities in the context of state mandates was discussed in the recent California Supreme Court case of *San Diego Unified School District v. Commission on State Mandates*,[1] which involved legislation requiring a due process hearing prior to student expulsion. There, the court stated its reluctance to preclude reimbursement "whenever an entity makes an initial discretionary decision that in turn triggers mandated costs"[2] because, under such a strict application of the rule, "public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper."[3] " [Emphasis added.]

Therefore, the [above] appointment of counsel, while "triggered" by a discretionary event, is deemed to be a state mandated event.

Further, as noted by Ms. Jennifer Friedman of the Los Angeles County Public Defenders Office, on pages 1-2 of the County's filing with the Commission on October 12, 2001:

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[1] *San Diego Unified School Dist v. Commission on State Mandates., supra*, 33 Cal.4th 859, 887-888.

[2] *Ibid.*

[3] *Ibid.*

"The increased costs resulting from SB 1342 are due to "a new program or higher level of service" within the meaning of Government Code section 17514. The legislature itself acknowledged in enacting SB 1342 that convicted individuals serving a state prison sentence had no right to post conviction DNA testing. (See Assembly Committee on Public Safety Analysis of SB 1342, 6-21-2000, p.5.["California has no statute or case law that authorizes such testing."]

While existing law authorized an individual convicted of a crime to file a motion for a new trial based on the discovery of new evidence under certain specified circumstances, such a motion was to be made prior to the imposition of judgment. (Pen. Code § 1182). The evidence submitted as the basis for the motion was evidence that was discovered during the pendency of the case prior to judgment. On the other hand, SB 1342 (current Pen. Code § 1405), grants an individual serving a term of imprisonment the right to post conviction DNA testing when certain specified conditions are met.

Penal Code section1405, subdivision (c), requires that a court appoint counsel for all convicted persons serving a term of imprisonment who file a motion under the section. In many cases the lawyer appointed to represent the convicted person is not the lawyer who represented the individual at trial. This is an entirely new appointment made by the court. As a result of the appointment, counsel is required to conduct an investigation in order to determine whether or not a motion for post conviction DNA testing is warranted and if such a motion is warranted, then counsel must prepare to litigate the motion. (See original test claim for explanation of duties imposed.)

> In addition, while current law provides for habeas corpus relief under certain specified circumstances, there is no mechanism by which such an individual incarcerated in state prison may obtain a post conviction DNA test to use as the basis for the petition for habeas corpus relief. This statute provides a new mechanism for this purpose. Moreover, individuals do not have an absolute right to counsel appointed for the purpose of litigating a habeas corpus motion. (See Pennsylvania v. Finley (1987) 481 U.S. 551, 107 S.Ct. 1990, 1993 ["Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further"].)
>
> In sum, the duties imposed under Penal Code section 1405 are not an extension of any existing duties of trial counsel or habeas corpus counsel (if one has been appointed). The right to post conviction DNA testing did not exist prior to the enactment of this statute. The Legislature recognized the need to have counsel appointed in order to assure that this new right be fully realized."

Accordingly, reimbursement is required for hearings, appointment of counsel and other activities reasonably necessary in implementing the test claim legislation, as claimed by the County in its Commission filings:

06/29/01	Test Claim filed by County of Los Angeles, Claimant
10/17/01	Claimant submits rebuttal to state agency review
11/05/01	Claimant submits amendment to test claim
02/15/02	Claimant files rebuttal to Dept. of Finance comments
09/24/03	Claimant files answers to Commission's questions
06/16/06	Claimant files review of Commission staff test claim analysis

COUNTY OF LOS ANGELES
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J. TYLER McCAULEY
AUDITOR-CONTROLLER

Los Angeles County
Review of Commission's Draft Staff Analysis
Post Conviction: DNA Court Proceedings [00-TC-21, 01-TC-08]

Declaration of Leonard Kaye

Leonard Kaye makes the following declaration and statement under oath:

I, Leonard Kaye, SB 90 Coordinator, in and for the County of Los Angeles, am responsible for filing reconsiderations, test claims, reviews of State agency comments, Commission staff analysis, and for proposing parameters and guidelines (P's& G's) and amendments thereto, all for the complete and timely recovery of costs mandated by the State. Specifically, I have prepared the attached review of Commission's draft staff analysis of the subject reimbursement program.

I declare that it is my information and belief that the County's State mandated duties and costs in implementing the subject law require the County to provide new State-mandated services and thus incur costs which are, in my opinion, reimbursable "costs mandated by the State", as defined in Government Code section 17514:

> " ' Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I declare that I am personally conversant with the foregoing facts and if required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to matters which are stated as information and belief, and as to those matters I believe them to be true.

6/16/06; Los Angeles, CA — Leonard Kaye

Date and Place — Signature

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J. TYLER McCAULEY
AUDITOR-CONTROLLER

DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

Hasmik Yaghobyan states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 603 Kenneth Hahn Hall of Administration, City of Los Angeles, County of Los Angeles, State of California.

That on the 16th day of June 2006, I served the attached:

Documents: Los Angeles County, Review of Commission's Draft Analysis, Post Conviction: DNA Court Proceedings, [00-TC-21, 01-TC-08), including *a 1 page letter of J. Tyler McCauley dated 6/16/06, a 5 page narrative, and a 1 page declaration of Leonard Kaye, now* pending before the Commission on State Mandates.

upon The Commission on State Mandates, the original document plus a copy per the instructions provided in Case No: 04-RL-4282-10:

[X] by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date. Commission on State Mandates FAX as well as mail of originals.

[ ] by placing [ ] true copies [ ] original thereof enclosed in a sealed envelope addressed as stated on the attached mailing list.

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.

[ ] by personally delivering the document(s) listed above to the person(s) as set forth below at the indicated address.

PLEASE SEE ATTACHED MAILING LIST

That I am readily familiar with the business practice of the Los Angeles County for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business. Said service was made at a place where there is delivery service by the United States mail and that there is a regular communication by mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of June, 2006, at Los Angeles, California.

Hasmik Yaghobyan

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Office of the Attorney General
State of California

*1 Opinion No. 04-405
May 17, 2005

THE HONORABLE RAYMOND FORTNER
COUNTY COUNSEL
COUNTY OF LOS ANGELES

THE HONORABLE RAYMOND FORTNER, COUNTY COUNSEL, COUNTY OF LOS ANGELES, has requested an opinion on the following question:

Is a governmental entity required to retain biological material secured in connection with a misdemeanor case for the period of time that a person is incarcerated in connection with the case?

CONCLUSION

A governmental entity is not required to retain biological material secured in connection with a misdemeanor case for the period of time that a person is incarcerated in connection with the case.

ANALYSIS

In 2000, the Legislature enacted legislation (Pen. Code, § § 1405, 1417.9) [FN1] to provide a procedure for prisoners to seek postconviction "DNA" testing of biological evidence. Subdivision (a) of section 1405 provides:

"A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction in his or her case, for performance of forensic deoxyribonucleic acid (DNA) testing."

Section 1417.9 requires government agencies to retain biological material that may become the subject of a postconviction motion for DNA testing. As relevant here, section 1417.9 states:

"(a) Notwithstanding any other provision of law and subject to subdivision (b), the appropriate governmental entity shall retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case. The governmental entity shall have the discretion to determine how the evidence is retained pursuant to this section, provided that the evidence is retained in a condition suitable for deoxyribonucleic acid (DNA) testing.

"(b) A governmental entity may dispose of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set forth below are met:

"(1) The governmental entity notifies all of the following persons of the provisions of this section and of the intention of the governmental entity to dispose of the material: any person, who as a result of a felony conviction in the

case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.

"(2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

"(A) A motion filed pursuant to Section 1405. However, upon filing of that motion, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

"(B) A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to Section 1405 that is followed within 180 days by a motion for DNA testing pursuant to Section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

*2 "(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405.

"(3) No other provision of law requires that biological evidence be preserved or retained.

"....." (Italics added.)

The question presented for resolution focuses upon the language of subdivision (a) of section 1417.9, which requires the retention of all biological material "that is secured in connection with a criminal case." Because sections 1405 and 1417.9 elsewhere refer only to "felony" convictions, and not to misdemeanor convictions, we are asked whether section 1417.9 requires biological material to be preserved in misdemeanor cases. We conclude that the statute does not so require.

In interpreting the requirements of section 1417.9, we apply well established rules of statutory construction. The fundamental purpose in interpreting a statute is to ascertain the intent of the Legislature in order to effectuate the purpose of the law. (Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1386-1387; In re Rojas (1979) 23 Cal.3d 152, 155.) As part of this examination of the Legislature's intent, we may consider whether the literal language of the statute comports with its purpose as well as whether a literal construction of one provision would be inconsistent with other provisions. In Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735, the court observed:

"... The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context; and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] ... [E]ach sentence must be read not in isolation but in the light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to a more reasonable result will be followed [citation]."

It is apparent that section 1417.9 requires governmental entities, particularly law enforcement agencies, to retain biological material in circumstances where it may become the subject of a prisoner's postconviction motion for DNA testing. Not only was section 1417.9 enacted in conjunction with section 1405, but it makes repeated references to motions "pursuant to Section 1405." But a motion "pursuant to Section 1405" may only be filed by "[a] person who was convicted of a felony and is currently serving a term of imprisonment." (§ 1405, subd. (a).) Thus, construing section 1417.9 to require biological material to be preserved in misdemeanor cases would not further the purpose of preserving biological evidence for those who may ask to have the material tested.

*3 It is also apparent that section 1417.9 permits government agencies to dispose of biological material when there is no reasonable likelihood that the material will be the subject of postconviction testing. Subdivision (b) of the statute describes the circumstances under which a government agency may give notice and dispose of biological material even though someone is incarcerated in connection with the case. Persons convicted of misdemeanors are not included in these notice procedures, unlike persons serving felony terms. It would be anomalous to construe section 1417.9 as applying in situations where persons who have no interest in whether the material should be preserved would nevertheless be the only ones who are notified of its intended destruction.

Our construction of sections 1405 and 1417.9 finds further support in the legislative history of these statutes. (See In re Dannenberg (2005) 34 Cal.4th 1061, 1081 ["If ... the statutory language is susceptible of more than one reasonable construction, we can look to legislative history"].) As initially proposed, section 1405 would have made motions for postconviction DNA testing available to "[a] defendant who was convicted in a criminal case." (Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as introduced Jan. 10, 2000.) An analysis of this early version of the bill by the Assembly Committee on Public Safety noted that "this bill would apply in all criminal cases, is not limited to felony cases, and would include misdemeanors as well." (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as amended Jun. 13, 2000, p. 7.)

On August 14, 2000, the bill was amended to make its testing procedures available only to "[a] defendant who was convicted of a felony and is currently serving a term of imprisonment ..." and to permit biological material to be destroyed after notice to "any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case ...." (Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as amended Aug. 14, 2000.) It appears from the legislative committee reports that these bill amendments resulted from a concern that the costs associated with the storage of biological evidence would be "potentially significant." (See, e.g., Assem. Com. on Appropriations, Analysis of Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as amended Aug. 14, 2000, pp. 3-4.) [FN2]

In Elsner v. Uveges (2003) 106 Cal.App.4th 73, 90, the court recently reviewed a similar situation where the Legislature changed the language of a bill during the legislative process:

"... We focus on the fact lawmakers once proposed a provision unambiguously stating otherwise, but deleted it when the bill was passed: "'The rejection by the

Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision."' (Beverly v. Anderson (1999) 76 Cal.App.4th 480, 485-486; see also California Mfrs. Assn. v. Public Utilities Com. (1979) 24 Cal.3d 836, 845-846.) 'Similarly, "[t]he fact that the Legislature chose to omit a provision from the final version of a statute which was included in an earlier version constitutes strong evidence that the act as adopted should not be construed to incorporate the original provision."' (Beverly v. Anderson, at p. 486.)"

*4 Our construction of sections 1405 and 1417.9 is also consistent with the contemporaneous construction of these statutes by those charged with making them effective. In 2001, the Attorney General published a handbook, "Postconviction DNA Testing: Recommendations for Retention, Storage and Disposal of Biological Evidence," to provide assistance in complying with the requirements of the new statutes. The handbook was produced by a task force consisting of representatives from the Attorney General's office, district attorneys' offices, law enforcement agencies, the judiciary, and forensic laboratories. The handbook recommended retention of evidence containing biological material in all felony cases, but did not allude to misdemeanor cases. As a contemporaneous construction by officials charged with putting these statutes into effect, the handbook's recommendations are persuasive in construing the terms of sections 1405 and 1417.9. (See Gay Law Students Assn. v. Pacific Tel. & Tel. Corp. (1979) 24 Cal.3d 458, 491; Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 245.)

Finally, we reject the suggestion that in this situation misdemeanor convictions must be treated the same as felony convictions under the equal protection clauses of the federal and state Constitutions. (U.S. Const., 14th Amend.; Cal. Const., art. 1, § 7; see, e.g., Newland v. Board of Governors (1977) 19 Cal.3d 705, 712-713.) In Cooley v. Superior Court (2002) 29 Cal.4th 228, 253, the court observed:

"'"'The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment."' [Citation.] 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged."'

If two groups are not similarly situated, an equal protection claim "cannot succeed, and does not require further analysis." (People v. Nguyen (1997) 54 Cal.App.4th 705, 714-715; see, e.g., In re Roger S. (1977) 19 Cal.3d 921, 933-935.)

With respect to felony and misdemeanor convictions, "[t]here is ... a significant difference in the quality and duration of punishment, as well as in the resultant long-term effects, which are brought about by a conviction for a felony as opposed to that for a misdemeanor." (In re Valenti (1986) 178 Cal.App.3d 470, 475.) Generally, misdemeanor terms are served in local detention facilities, while felony terms are served in state prison. (Pen. Code, § § 17, 19; see In re Eric J. (1979) 25 Cal.3d 522, 537-538.) In People v. Ansell (2001) 25 Cal.4th 868, 872-873, the court pointed out additional differences:

*5 "Less known, perhaps, are the collateral consequences associated with a

felony conviction after sentence has been served. Most of these disabilities have existed in some form for decades, and many appear in statutes outside the Penal Code. Some of the more common rules include disqualification from jury service, impeachment as a witness, inaccessibility to firearms, and registration as a sex offender. In addition, a felony conviction may disqualify the person from practicing many licensed trades and professions and from holding certain positions of public employment." (Fns. omitted.)
Further, a felony term of imprisonment is followed by a period of supervised parole. (Pen. Code, § 3000.) In contrast, when misdemeanants conclude their sentences, there is no further obligation or loss of civil rights. (Newland v. Board of Governors, supra, 19 Cal.3d at p. 712; People v. Hibbard (1991) 231 Cal.App.3d 145, 149.)

Given these different penalties and consequences for misdemeanor convictions, we believe that misdemeanants are not similarly situated vis-a-vis felons for purposes of sections 1405 and 1417.9. Of course, the Legislature may choose to amend these statutes to include misdemeanor cases--along the lines that it initially considered but rejected during the legislative process.

We conclude that a governmental entity is not required to retain biological material secured in connection with a misdemeanor case for the period of time that a person is incarcerated in connection with the case.

Bill Lockyer

Attorney General

Susan Duncan Lee

Deputy Attorney General

[FN1]. All further statutory references are to the Penal Code.

[FN2]. "Committee reports are often useful in determining the Legislature's intent. [Citation.]" (California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 646.)

88 Ops. Cal. Atty. Gen. 77, 05 Cal. Daily Op. Serv. 4238, 2005 Daily Journal D.A.R. 5707, 2005 WL 1711680 (Cal.A.G.)

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CHARLES R. NORTON, Plaintiff and Appellant,
v.
LARRY L. HINES et al., Defendants and Respondents
Civ. No. 44731.

Court of Appeal, Second District, Division 5, California.

July 15, 1975.

SUMMARY

The trial court sustained a demurrer without leave to amend to a purported cause of action against attorneys for "professional negligence" in connection with their representation of a client in a prior civil action against plaintiff. The first of two causes of action in plaintiff's complaint alleged malicious prosecution of the lawsuit by the client but plaintiff specifically declined to amend his complaint to include the attorneys in that cause of action. (Superior Court of Ventura County, No. 56539, Jerome H. Berenson, Judge.)

The Court of Appeal affirmed the trial court's judgment of dismissal, holding that if a cause of action existed against the attorneys it must be pleaded as an action for malicious prosecution. To permit plaintiff to proceed on a cause of action for simple negligence, which requires a different and less demanding standard of proof, the court held, would subvert the public policy favoring free access to the courts. (Opinion by Hastings, J., with Stephens, Acting P. J., and Ashby, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Attorneys at Law § 26--Liability of Attorneys--To Persons Other Than Clients.
In an action alleging malicious prosecution by an individual of a prior civil action against plaintiff and, in a separate cause of action, "professional negligence" on the part of the attorneys who represented the individual, the trial court properly *918 sustained the attorneys' demurrer without leave to amend, where plaintiff had specifically declined to amend his complaint to include the attorneys in the cause of action for malicious prosecution. A cause of action for malicious prosecution exists if an attorney prosecutes a claim which a reasonable lawyer would not regard as tenable or proceeds with the action by unreasonably neglecting to investigate the facts and the law, and the public policy of freedom of access to the courts would be subverted by permitting maintenance of a cause of action for simple negligence, which requires a different and less demanding standard of proof.

[Attorney's liability to one other than his immediate client for consequences of negligence in carrying out legal duties, note, 45 A.L.R.3d 1181. See also Cal.Jur.3d, Attorneys at Law, § 386 et seq.; Am.Jur.2d, Attorneys at Law, § 196 et seq.]

COUNSEL

Stephen E. Lawton and Edward L. Lascher for Plaintiff and Appellant.

Nordman, Cormany, Hair & Compton, Robert L. Compton and James D. Daeschner for Defendants and Respondents.

HASTINGS, J.

The first alleged cause of action of plaintiff Norton's complaint is for damages for malicious prosecution against Frank Lind (Lind), and the second alleged cause of action thereof is for damages for "professional negligence" by Larry L. Hines, an attorney, and Nordman, Cormany, Hair & Compton, the unincorporated law firm of which Hines is a member (both Hines and the law firm will be identified collectively as "attorneys.") Attorneys' general demurrer to the second alleged cause of action of the complaint was sustained without leave to amend. Norton appeals from the order dismissing the action against attorneys.

Statement of Facts

Lind had sued Norton and another codefendant charging them, inter alia, with inducing a breach of a contract between Lind and the Oxnard *919 Community Hospital. Damages sought by Lind against Norton were in the amount of $900,000 plus costs and other monetary relief. Attorneys represented Lind. This action was pursued through the pretrial and discovery stages and was brought to

trial in which Lind was allowed to present all evidence which might support his claim against Norton, at the end of which Lind rested, "conceding that he had no evidence to support the complaint against [Norton] and stating that the action had been pursued through trial merely in the hope that some common basis for the action would develop or turn up." Judgment pursuant to provisions of Code of Civil Procedure section 631.8 was thereupon rendered in Norton's favor. [FN1]

FN1 Lind did acquire judgment against the other codefendant.

Norton's second cause of action alleges that he is in doubt as to whether the lawsuit against him was pursued by Lind upon advice of the attorneys after full disclosure and therefore joins the attorneys as alternative tortfeasors because of such uncertainty. To the extent that the attorneys did advise commencement and prosecution of the lawsuit against him after full disclosure of all the facts to them, such advice was given negligently and in violation of the standard of care for attorneys similarly situated. At the time of acting thus negligently, the attorneys foresaw, or, in the exercise of reasonable care would have foreseen, that such negligent advice would cause damages to a person in Norton's position, and to Norton in particular. Norton seeks general and special damages for negligence against attorneys.

The attorneys' general demurrer to the second cause of action was sustained without leave to amend apparently on the ground that it failed to state facts sufficient to constitute a cause of action.

Argument

On this appeal Norton contends that "an attorney owe[s] a duty to a foreseen third person to exercise reasonable care in advising his client to commence a lawsuit against that third person, when the attorney knows that his advice will in fact cause his client to commence that suit, that his client lacks probable cause to sue, and that the third person involved will thereby sustain damages." [FN2] Norton concedes this is a case of first impression. ***920**

FN2 At oral argument before this court Norton's attorney stated that attorneys were not made defendants to the first cause of action (malicious prosecution) because he did not believe they acted maliciously, but only negligently.

Attorneys, in defending the trial court's action in sustaining the demurrer without leave to amend, rely on the traditional concept regarding this issue, namely, that there is no privity of contract between a lawyer and the injured third party, therefore a lawyer owes no duty to anyone other than his client.

Norton urges us to depart from the decisional law supporting the rule relied on by attorneys, and to apply what he calls a 20th-century concept of tort law, namely, that foreseeability of injury to a third party should be the determinating factor and not privity of contract. He cites *Dillon v. Legg*, 68 Cal.2d 728, 739 [69 Cal.Rptr. 72, 441 P.2d 912, 29 A.L.R.3d 1316], which states: "'... foreseeability of risk [is] of ... primary importance in establishing the element of duty.' [Citations.] ... 'The risk reasonably to be perceived defines the duty to be obeyed.' [Citation.] ... 'Duty, in other words, is measured by the scope of the risk which negligent conduct foreseeably entails.'" And *Diamond Springs Lime Co. v. American River Constructors*, 16 Cal.App.3d 581, 596-597 [94 Cal.Rptr. 200], where the court states: "Foreseeability of harm may be treated, alternatively, as one of the multiple factors giving rise to a duty of care; or as an element in the delineation of proximate cause. [Citations.] A defendant may be liable if his negligence is a substantial factor in causing the injury, and the presence of independent causal forces does not relieve him of liability if those forces were foreseeable. [Citations.] Except where there is no reasonable dispute over the issue, the foreseeability of harm arising from the defendant's conduct is a fact question for the jury. [Citations.]"

It is true, as Norton asserts, that in more recent times the strict requirement of privity of contract has been eased in certain well defined situations and the attorneys (and others) have been held liable for negligence to a third party. In California [FN3] the first case to recognize this concept was *Biakanja v. Irving*, 49 Cal.2d 647 [320 P.2d 16, 65 A.L.R.2d 1358], where a notary public prepared a will for his "client," but negligently failed to have the will properly attested so that it was not admitted to probate. At page 650, the court stated: "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the ***921** connection between the defendant's conduct and the injury suffered, the moral

blame attached to the defendant's conduct, and the policy of preventing future harm."

FN3 For a summary of California law on this subject see 45 A.L.R.3d, Attorneys-Liability to Third Parties, section 4, pages 1190-1195.

Three years later the Supreme Court considered *Lucas v. Hamm*, 56 Cal.2d 583 [15 Cal.Rptr. 821, 364 P.2d 685]. This case involved an attorney who, in drafting his client's will, had inadvertently drafted one provision so as to render it void, thereby damaging some of the beneficiaries. Although the attorney was not liable in this case because it involved the complex rule against perpetuities, the court stated that intended beneficiaries of a will could state a cause of action against a negligent attorney on the basis of a third party beneficiary contract.

Later, in *Heyer v. Flaig*, 70 Cal.2d 223 [74 Cal.Rptr. 225, 449 P.2d 161], the court reaffirmed its decision in *Lucas v. Hamm (supra)*.

In *Donald v. Garry*, 19 Cal.App.3d 769 [97 Cal.Rptr. 191, 45 A.L.R.3d 1177], an attorney, employed by a collection agency to bring an action for the collection of a debt owed to an individual, was held liable to the individual creditor when the collection proceeding was dismissed for lack of diligent prosecution by reason of the attorney's negligence. In this case the court held at page 771 that: "An attorney may be liable for damage caused by his negligence to a person *intended to be benefited by his performance* irrespective of any lack of privity of contract between the attorney and the party to be benefited. [Citation.] The liability sounds in tort." (Italics added.) [FN4]

FN4 A recent case decided by this court is noteworthy. It is *De Luca v. Whatley*, 42 Cal.App.3d 574 [117 Cal.Rptr. 63], which considers an attorney's duty of due care toward a third person in a criminal proceeding. Plaintiff alleged that the attorney, in representing a client charged with murder at a preliminary hearing, called plaintiff as a witness, knowing, or chargeable with knowledge, that plaintiff would incriminate himself on the stand. The trial court sustained a demurrer to the complaint and dismissed the action against the attorney. In affirming the court's order of dismissal, the court stated at page 576: "To state the problem is to decide this case. When an attorney defends a person accused of crime he has but one intended *beneficiary* - his client." (Italics added.)

(1) In the case at bar a former litigant is suing adverse counsel. Clearly, an adverse party is not an intended beneficiary of the adverse counsel's client. If a cause of action exists against attorneys for the reasons alleged here, it must be pleaded as an action for malicious prosecution. We see no reason to extend applicable law now found in cases involving attorneys and third parties when there is sound and recognized public policy for limiting the cause of action to malicious prosecution under the facts as pleaded by Norton. *922

Malicious prosecution is a specific tort that developed in the criminal field out of a need to adjust two highly important social interests. The first is the interest of society in the efficient enforcement of the criminal law, which requires that private persons who aid in the enforcement of the law should be given an effective protection against the prejudice which is likely to arise from the termination of the prosecution in favor of the accused. The second is to protect the individual citizen against unjustifiable and oppressive litigation of criminal charges, which involves pecuniary loss, distress and loss of reputation. (Rest., Torts, p. 380.) In general, the same considerations apply to wrongful initiation of civil proceedings. The courts are open to every citizen to sue, subject only to the penalty of lawful costs if the action is unsuccessful. (52 Am.Jur.2d, Malicious Prosecution, § 10, p. 193.) [FN5] Public policy requires that a large degree of freedom of access to the courts be accorded to all persons for the settlement of their private disputes. At the same time the courts can not be "used" by a person who sues another without probable cause and with malice. The tort of malicious prosecution is designed to place restraint on a would-be plaintiff while furnishing protection to a wrongfully sued defendant. It naturally follows that the same general principles should apply to the attorney representing the litigant initiating the action. The attorney owes a duty to his client to present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit. He is an advocate and an officer of the court. He is cognizant of the public policy that encourages his clients to solve their problems in a court of law. [FN6] In our opinion, when representing his client in the initiation of a lawsuit, he should not be judged by a different standard. This is exactly the concept urged by Norton. His *923 complaint verifies his belief that his only cause of action against Lind is for malicious prosecution (the first cause of action). Against

attorneys, however, he proceeds on a cause of action for simple negligence which requires a different and less demanding standard of proof. We believe the public policy of favoring free access to our courts is still viable. However, if Norton's cause of action against attorneys for negligence is permitted, this policy will be subverted. The attorney must have the same freedom in initiating his client's suit as the client. If he does not, lawsuits now justifiably commenced will be refused by attorneys, and the client, in most cases, will be denied his day in court. [FN7]

FN5 It has been suggested that if costs are inadequate to compensate a harassed defendant, he should look to the legislature, not to the courts. Also, if recovery were allowed in such cases a defendant who sets up a groundless defense should likewise be penalized." (See *52 Am.Jur.2d*, supra, p. 193.)

FN6 Analogous to this issue, and stressing the public policy concept immunizing attorneys from liability in performing their duties are the following cases and citation from Restatement of the Law:
In *Smith v. Hatch*, 271 Cal.App.2d 39, at page 50 [76 Cal.Rptr. 350], the court stated: "'The privilege of section 47, subdivision 2 of the Civil Code [relating to privilege of publications made in judicial proceedings] ... is based on the desire of the law to protect attorneys in their primary function - the representation of a client. ...'"
And in *Hollis v. Meux*, 69 Cal. 625 [11 P. 248], the court said at page 628: "'This rule [against a libel action] ... is founded upon public policy which requires that a judge, in dealing with the matter before him, counsel, in preferring or resisting a legal proceeding, and a witness, in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel. ...'"
According to Restatement of Torts, section 586, an attorney is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course of, and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation thereto.
Comment *a* states: "The privilege stated in this Section is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients. Therefore the privilege is absolute."
Comment *a* further provides: "The institution of a judicial proceeding includes all pleadings and affidavits necessary to set the judicial machinery in motion. The conduct of the litigation includes the examination and cross-examination of witnesses, comments upon the evidence and arguments both oral and written upon the evidence, whether made to court or jury."

FN7 Somewhat apropos to this case is a comment from the Restatement of Torts, *supra*, section 675, page 448, that reads as follows: "*d. Points of difference between criminal and civil proceedings.* In one particular a private prosecutor's reasonable belief in the guilt of the accused differs from the reasonable belief of one who initiates private civil proceedings against another. A private prosecutor does not have reasonable grounds for believing that the accused has conducted himself in a particular manner, if he merely entertains a suspicion even though he reasonably believes it may be verified upon further investigation (see Comment *c* on § 662). On the other hand, where the proceedings are civil, it is enough that the person initiating them believes that he can establish the existence of such facts to the satisfaction of the court and jury. In a word, the initiator of private civil proceedings need not have the same degree of certainty as to the relevant facts which is required of a private prosecutor of criminal proceedings. In many cases civil proceedings, to be effective, must be begun before the relevant facts can be ascertained to any degree of certainty. To put the initiator of such proceedings to a greater risk of liability would put an undesirable burden upon those whose rights cannot be otherwise effectively enforced."

We do not mean to say, or even imply, that attorneys can show a complete disregard for the rights of a prospective defendant. The law is to the contrary. In *Tool Research & Engineering Corp. v. Henigson*, 46 Cal.App.3d 675 [120 Cal.Rptr. 291], plaintiffs-appellants, successful defendants in a lawsuit brought

against them by Southwestern, sued Southwestern's attorney, Henigson, and his law firm for malicious prosecution. The court stated on pages 683-684: "Appellants do not contend that evidence supporting Southwestern's claim against them was absent or that respondents' performance as lawyers was inadequate. Rather, they argue that respondents were required to weigh the evidence *924 for and against their clients and to proceed with their representation only if convinced that the trier of fact would accept the evidence in favor of the cause they represented. The argument is groundless. *It is the attorney's reasonable and honest belief that his client has a tenable claim that is the attorney's probable cause for representation* [FN[8]] [citations], and not the attorney's conviction that his client must prevail. The attorney is not an insurer to his client's adversary that his client will win in litigation. Rather, he has a duty 'to represent his client zealously ... [seeking] any lawful objective through legally permissible means ... [and presenting] for adjudication any lawful claim, issue, or defense.' (A.B.A. Code of Professional Responsibility, EC 7-1, DR 7-101(A)(1), discussed in 1 Witkin, Cal. Procedure (2d ed.) Attorneys, § 239.) *So long as the attorney does not abuse that duty by prosecuting a claim which a reasonable lawyer would not regard as tenable or by unreasonably neglecting to investigate the facts and law in making his determination to proceed*, his client's adversary has no right to assert malicious prosecution against the attorney if the lawyer's efforts prove unsuccessful." (Italics added.)

> FN8] Business and Professions Code, section 6068, in pertinent part, is as follows: "It is the duty of an attorney: ... (c) To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense."

Although the attorneys prevailed in the above case because they acted with probable cause, the court correctly states that a cause of action for malicious prosecution exists if the attorney prosecutes a claim which a reasonable lawyer would not regard as tenable or proceeds with the action by unreasonably neglecting to investigate the facts and the law. This in substance is the gist of Norton's cause of action against attorneys. Norton specifically declined to amend his complaint to include attorneys in the first cause of action (malicious prosecution); therefore, the court was correct in sustaining the demurrer without leave to amend.

The judgment (order of dismissal) is affirmed.

Stephens, Acting P. J., and Ashby, J., concurred.

A petition for a rehearing was denied July 31, 1975, and appellant's petition for a hearing by the Supreme Court was denied September 10, 1975. *925

Cal.App.2.Dist.,1975.

Norton v. Hines

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Court of Appeal, Second District, Division 6, California.
In re Todd Lee KINNAMON, on Habeas Corpus.
No. B182713.

Oct. 11, 2005.

Background: After imposition, on remand upon reversal of sentence, of consecutive sentences for petitioner's convictions for attempted murder and robbery, petitioner sought appointment of counsel for purpose of obtaining forensic deoxyribonucleic acid (DNA) testing as to his conviction of attempted murder. The Superior Court, Ventura County, No. CR45855-A, Arturo Gutierrez, J., denied request. Petitioner sought writ of mandate.

Holding: Treating petition as one for habeas corpus, the Court of Appeal, Yegan, J., held that trial court had no discretion to deny indigent defendant's request for counsel.
Petition granted.

West Headnotes

[1] **Habeas Corpus** 823
197k823 Most Cited Cases
In habeas corpus proceeding to determine whether petitioner was entitled to appointment of counsel for purpose of obtaining forensic deoxyribonucleic acid (DNA) testing as to his conviction of attempted murder, the Court of Appeal would take judicial notice of the record and opinion filed in appeal and of the superior court file. West's Ann.Cal.Evid.Code § § 452, 459; West's Ann.Cal.Penal Code § 1405.

[2] **Criminal Law** 1590
110k1590 Most Cited Cases

[2] **Criminal Law** 1602
110k1602 Most Cited Cases
Under statute allowing persons convicted of felonies to move for forensic deoxyribonucleic acid (DNA) testing, trial court had no discretion to deny request of indigent petitioner, convicted of attempted murder, for appointment of counsel for purpose of obtaining DNA testing, where petitioner's request included required information and counsel had not previously been
appointed for obtaining testing. West's Ann.Cal.Penal Code § 1405.

See 4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Criminal Procedure, § 53.

[3] **Statutes** 181(1)
361k181(1) Most Cited Cases

[3] **Statutes** 184
361k184 Most Cited Cases
In construing a statutory amendment, the court's role is to ascertain the Legislature's intent so as to effectuate the purpose of the law.

[4] **Statutes** 188
361k188 Most Cited Cases
In determining legislative intent, the court begins with the language of the statute itself, that is, it looks first to the words the Legislature used, giving them their usual and ordinary meaning.

[5] **Statutes** 188
361k188 Most Cited Cases

[5] **Statutes** 212.7
361k212.7 Most Cited Cases
If there is no ambiguity in the language of a statute, the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.

[6] **Statutes** 183
361k183 Most Cited Cases

[6] **Statutes** 189
361k189 Most Cited Cases
The language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend; to this extent, therefore, intent prevails over the letter of the law and the letter will be read in accordance with the spirit of the enactment.

[7] **Statutes** 217.3
361k217.3 Most Cited Cases
In determining legislative intent, courts may consider bill analyses prepared by the staff of legislative committees.

[8] **Statutes** 217.3
361k217.3 Most Cited Cases
In determining legislative intent of a statute, courts may consider a senate floor analysis.

**803 *318 California Appellate Project, under appointment by the Court of Appeal, Jonathan B. Steiner and Richard B. Lennon, Los Angeles, for Petitioner.

Gregory D. Totten, District Attorney, County of Ventura and Michael D. Schwartz, Senior Deputy District Attorney, for Respondent.

*319 YEGAN, J.

Petitioner, Todd Lee Kinnamon, seeks the appointment of counsel for the purpose of obtaining forensic deoxyribonucleic acid (DNA) testing as to his conviction of attempted murder. Petitioner relies on Penal Code section 1405. [FN1] We accept the concession by the District Attorney of the County of Ventura that petitioner is entitled to the relief sought in the petition.

FN1. All statutory references are to the Penal Code unless otherwise stated.

Factual and Procedural Background

After a court trial, petitioner was convicted of attempted murder (§§ 187, subd. (a), 664), first degree residential robbery (§§ 211, 212.5, subd. (a)), receiving stolen property (§ 496, subd. (a)), and grand theft of a firearm (§ 487, subd. (d)). The trial court found true allegations that Kinnamon: (1) had personally used a deadly or dangerous weapon (a knife) in the commission of the attempted murder and robbery (§ 12022, subd. (b)); (2) had personally inflicted great bodily injury in the commission of the attempted murder (§ 12022.7); (3) had been previously convicted of two serious or violent felonies within the meaning of California's "Three Strikes Law" (§§ 667, subds. (b)-(i), 1170.12); and (4) had been previously convicted of two serious felonies within the meaning of section 667, subdivision (a). **804 Petitioner was sentenced to prison for 81 years to life.

[1] Petitioner appealed. In an unpublished opinion filed on May 31, 2000, we concluded that the trial court had erred in determining that it was required to impose consecutive prison terms for the attempted murder and robbery. We remanded the matter with directions that the trial court exercise its discretion whether to impose concurrent or consecutive terms for these offenses. In all other respects, the judgment was affirmed. (*People v. Kinnamon*, B134227, (filed 5-11-2000), opinion by Perren, J., Gilbert, P.J., Yegan, J. concurring.) [FN2] On remand, the trial court reimposed the original sentence. It ordered that the terms for attempted murder and robbery be served consecutively.

FN2. Pursuant to Evidence Code sections 452, subdivision (d), and 459, subdivision (a), we take judicial notice of the record on appeal and opinion filed in B134227. We also take judicial notice of the superior court file (CR45855A).

In April 2005 petitioner filed a request in the trial court for the appointment of counsel to prepare a motion for DNA testing pursuant to section 1405. In the request petitioner stated that he was not the perpetrator of the attempted *320 murder, that DNA testing is relevant to his assertion of innocence, and that counsel had not previously been appointed under section 1405.

The trial court denied the motion in a minute order without setting forth any reason for the denial. Petitioner then filed a petition for a writ of mandate in this court. Petitioner alleged that DNA testing was necessary to prove that his codefendant, Starla Baker, had committed the attempted murder.

We treated the petition as a petition for a writ of habeas corpus. We ordered the Director of the California Department of Corrections to show cause why a writ of habeas corpus should not issue granting the requested relief.

The District Attorney of the County of Ventura responded to the order to show cause. In its response, the district attorney stated: "[W]e concede that petitioner is entitled to the relief sought in the petition, i.e., appointment of counsel pursuant to Penal Code section 1405, subdivision (b)(1), to prepare a petition for DNA testing. (We do *not* concede that petitioner is entitled to the DNA testing itself.)"

The Trial Court Did Not Have Discretion To Deny Petitioner's Motion For The Appointment Of Counsel

[2] Section 1405, subdivision (a), allows the filing of a motion for DNA testing by "[a] person who was convicted of a felony and is currently serving a term of imprisonment...." Section 1405 was originally enacted in 2000 by Senate Bill No. 1342 (hereafter SB 1342). (Stats.2000, c. 821, § 1.) Then, section 1405 required the court "to appoint counsel for the convicted person who brings a motion under this section if that person is indigent." (*Id.*, former subd. (c).) Pursuant to this language, an indigent convicted

person arguably was not entitled to the appointment of counsel until after the filing of a motion for DNA testing. In the motion the convicted person must, inter alia, "[e]xplain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction." (*Id.*, subd. (c)(1)(B).)

Section 1405 was amended in 2001 by Senate Bill No. 83 (hereafter SB 83). (Stats.2001, c. 943, § 1.) Pursuant to the amendment, an indigent convicted person **805 need not file a motion for DNA testing to be entitled to the appointment of counsel. As *321 amended, section 1405 provides: "An indigent convicted person may request appointment of counsel to prepare a motion under this section by sending a written request to the court. The request shall include the person's statement that he or she was not the perpetrator of the crime and that DNA testing is relevant to his or her assertion of innocence. The request also shall include the person's statement as to whether he or she previously has had counsel appointed under this section." (*Id.*, subd. (b)(1).) If the court finds that (1) the person is indigent, (2) the request includes the required information, and (3) counsel has not previously been appointed under section 1405, then "the court shall appoint counsel to investigate and, if appropriate, to file a motion for DNA testing under this section and to represent the person solely for the purpose of obtaining DNA testing under this section." (*Id.*, subd. (b)(3)(A).) If counsel has previously been appointed, "the court may, in its discretion," again appoint counsel for the purpose of obtaining DNA testing. (*Id.*, subd. (b)(3)(B).)

[3][4][5] In construing the 2001 amendment of section 1405, "[o]ur role ... is to ascertain the Legislature's intent so as to effectuate the purpose of the law." (*In re Reeves* (2005) 35 Cal.4th 765, 770, 28 Cal.Rptr.3d 4, 110 P.3d 1218.) "In determining such intent, we begin with the language of the statute itself. [Citation.] That is, we look first to the words the Legislature used, giving them their usual and ordinary meaning. [Citation.] If there is no ambiguity in the language of the statute, "then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs." [Citation.]" (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192, 96 Cal.Rptr.2d 463, 999 P.2d 686.)

The language of the 2001 amendment is unambiguous. The court must appoint counsel for an indigent convicted person if the person's request includes the required information, provided that counsel has not previously been appointed for the purpose of obtaining DNA testing. The required information does not include a theoretical or factual showing of the relevance of DNA testing. A statement that DNA testing is relevant suffices. The appointment of counsel is discretionary only if counsel has been previously appointed under section 1405.

[6] However, "it is settled that the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend. To this extent, therefore, intent prevails over the letter of the law and the letter will be read in accordance with the spirit of the enactment. [Citation.]" (*In re Michele D.* (2002) 29 Cal.4th 600, 606, 128 Cal.Rptr.2d 92, 59 P.3d 164.)

[7] *322 In determining legislative intent, we may consider bill analyses prepared by the staff of legislative committees. (*People v. Benson* (1998) 18 Cal.4th 24, 34, fn. 6, 74 Cal.Rptr.2d 294, 954 P.2d 557.) An analysis of SB 83 by the staff of the Senate Committee on Public Safety states: "The purpose of this bill is to allow for the appointment of counsel prior to the filing of a motion for post-conviction DNA testing...." (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 83 (2001-2002 Reg. Sess.) as amended May 1, 2001, p. 1.) The bill analysis observes: "When SB 1342 ... was negotiated and then passed the Legislature last year there were discussions about making sure that the people bringing the motion had counsel even if they were indigent. That bill provided that counsel should be appointed after the **806 person had brought a motion. What has become apparent since the bill took effect on January 1, 2001 is that it would be more efficient and equitable to appoint counsel at an earlier point in the process since many inmates do not have the ability to adequately file motions.... [¶]. .... [¶] This bill will provide for the appointment of counsel before during and after the motion is filed so that valid claims are not dismissed because an indigent person did not have the ability to file a proper motion. This should also help reduce the court's time because it is less likely that incomplete or frivolous motions will be filed." (*Id.*, at pp. 3-5.) The analysis notes that the author of the bill stated: "[E]arly appointment of counsel will help to streamline the process and ensure that frivolous or ill-prepared requests for DNA testing do not clog the courts and drain precious resources. This bill makes

clear that counsel shall be provided for indigent inmates to investigate and prepare the motion, and litigate the motion to completion." (*Id.*, at p. 3.)

The bill analysis shows that the appropriateness of filing a motion for DNA testing is not to be determined when an inmate requests the appointment of counsel to prepare such a motion. The Legislature intended that this determination should be made by counsel after an investigation. The 2001 amendment provides that "the court shall appoint counsel to investigate and, *if appropriate*, to file a motion for DNA testing ...." (§ 1405, subd. (b)(3)(B), italics added.) The Legislature anticipated that, by requiring the appointment of counsel before the filing of the motion, it would help ensure that inappropriate motions would not be filed.

[8] In determining legislative intent, we may also consider a senate floor analysis. (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 948, 28 Cal.Rptr.3d 685, 111 P.3d 954.) A senate floor analysis of SB 83 states that it "[r]equires the court to appoint counsel to investigate and, if appropriate, file a motion for post-conviction DNA testing if the convicted person is indigent, the request contains the required information, and counsel has not been previously *323 appointed. The appointment is discretionary if counsel has been previously appointed." (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 83 (2001-2002 Reg. Sess.) as amended Sept. 12, 2001, p. 3.) The senate floor analysis shows that the Legislature intended that the appointment of counsel be mandatory if an indigent convicted person's request contains the required information and counsel has not been previously appointed under section 1405. In such circumstances, there is no discretion to be exercised.

Thus, the legislative intent comports with the plain meaning of the language of the 2001 amendment of section 1405. Accordingly, it would be inappropriate for this court to add language giving the trial court discretion to deny an indigent person's request for the appointment of counsel when the request contains the required information and counsel has not been previously appointed under section 1405. As we noted in *People v. Buena Vista Mines, Inc.* (1996) 48 Cal.App.4th 1030, 1034, 56 Cal.Rptr.2d 21, "This court is loathe to construe a statute which has the effect of 'adding' or 'subtracting' language. [Citation.] ... We are compelled to add language only in extreme cases where, as a matter of law, we are convinced that the Legislature, through inadvertence, failed to utilize the word or words which give purpose to its pronouncements. [Citation.]"

Petitioner's request for the appointment of counsel met the statutory criteria mandating that his request be granted. It is **807 undisputed that petitioner is indigent. In the request he alleged that he was not the perpetrator of the attempted murder and that DNA testing is relevant to his assertion of innocence. He also alleged that counsel had not been previously appointed under section 1405. Our review of the superior court file supports this allegation. Pursuant to the letter of section 1405, the trial court did not have discretion to deny petitioner's request for the appointment of counsel solely for the purposes of section 1405.

A Suggestion to the Legislature

Cases are legion indicating that the courts do not judge the wisdom of a statute. That, however, does not mean that we are without power to suggest to the Legislature, in an attempt to remedy a perceived problem, that the sweep of its language is too broad. (See *Meritplan Ins. Co. v. Woolluns* (1975) 52 Cal.App.3d 167, 176, 123 Cal.Rptr. 613; see also *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 385, 127 Cal.Rptr.2d 917, concurring opinion of Yegan, J.; Witkin, Manual on Appellate Court Opinions (1977) § 88, pp. 160-162.) By reason of the 2001 amendment of section 1405, each and every person incarcerated in state prison is entitled to the appointment of *324 counsel if he or she just drafts a request akin to the one drafted by petitioner herein. (See Appendix A.) The prisoner's offense need have nothing to do with blood, hair, or the like. For example, a recidivist forger in state prison is now entitled to the appointment of counsel if he or she requests the appointment of counsel in a manner akin to the petitioner's request. The lax statutory standard will result in a wasteful expenditure of time and money where appointed counsel does not file a motion because it is not "appropriate."

The facts of the instant case have at least something to do with blood although we have no idea just how this may aid petitioner. In our previous opinion in the appeal from the judgment of conviction, we summarized the facts as follows:

"In January 1999, Kinnamon and his friend Starla Baker went to an office in Ventura. While Kinnamon was inside, Baker stole a car. When Kinnamon came out of the office, he got into the stolen car and drove off with Baker. Later, Kinnamon placed false license plates on the stolen car. In February 4, 1999, Kinnamon and Baker drove to the home of Michael Steven. Kinnamon

wanted to get money from Steven's wife and also knew that Steven kept guns in a safe in the house. When Michael Steven told Kinnamon and Baker that his wife was not home, Kinnamon demanded that Steven open his safe. Steven refused and Kinnamon physically attacked him. During their fight, Kinnamon continued to demand that Steven open the safe. At the same time, Baker grabbed items of property which were in the house. Then, Kinnamon stabbed Steven with a knife nine times. Steven collapsed after the stabbing, and Kinnamon ran out of the house. Thinking Steven was dead, Kinnamon returned to the house and stole more property."

Our first opinion did not recite, but the record shows: (1) the victim, Michael Steven, positively identified petitioner as the only person who had attacked and stabbed him; (2) Starla Baker testified that she had tried to stop petitioner from stabbing Steven and "got cut in the process"; (3) petitioner told the police that Steven had stabbed Baker in the arm; and (4) after advisement and waiver of his constitutional rights (*Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694) petitioner admitted that he entered Steven's house to take his guns, that "it made **808 him mad when he [Steven] stabbed his old lady [Baker] and he said Td kill him again. He [Steven] deserved to die." In view of these facts, even if a blood sample were collected and preserved and tied to Starla Baker by DNA testing, how would the test results "raise a reasonable probability that, in light of all the evidence, [petitioner's] verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction"? (§ 1405, subd. (f)(5).) Based on the testimony of Baker and petitioner, one would have expected to find Baker's blood at the crime scene.

*325 We have elaborated on our prior opinion to illustrate that the instant request is the start of a "wild goose chase" that will, in all probability, lead to absolutely nothing. In another context, we have said: "Somewhere along the line, litigation must cease." (*In re Marriage of Crook* (1992) 2 Cal.App.4th 1606, 1613, 3 Cal.Rptr.2d 905.) Petitioner's judgment is long final and there is something to be said for the sanctity of final judgments. The State of California has a "powerful interest in the finality of its judgments. This interest is particularly strong in criminal cases, for '[w]ithout finality, the criminal law is deprived of much of its deterrent effect.' [Citations.]" (*In re Harris* (1993) 5 Cal.4th 813, 831, 21 Cal.Rptr.2d 373, 855 P.2d 391.) In light of the deference owed to final judgments, at the very least prisoners should be required to make some showing that DNA evidence would raise a reasonable probability of more favorable treatment in the trial court before counsel is appointed. This is the original purport of section 1405 before Senate Bill 83 was enacted in 2001. (See, *ante*, p. 804.)

The Legislature has apparently made a value judgment that prisoners such as petitioner should have counsel appointed to investigate and, if appropriate, file a motion for DNA testing. The Legislature has given such prisoners more rights than a person filing a petition for extraordinary relief, who is not entitled to appointed counsel as a matter of right. (E.g., *People v. Shipman* (1965) 62 Cal.2d 226, 232, 42 Cal.Rptr. 1, 397 P.2d 993; see also *People v. Chavez* 243 Cal.App.2d 761, 767, 52 Cal.Rptr. 633.) To be sure, there have been instances where DNA evidence has exonerated a convicted prisoner, and these cases have been sensationalized in the press. However, the vast majority of prisoners are in fact guilty and have been convicted and sentenced consistent with the full panoply of constitutional and statutory safeguards. Such prisoners have one traditional appeal as a matter of right and an unfettered ability to file petitions for extraordinary relief in the trial and appellate courts. In our view, these safeguards are sufficient to insure that a truly innocent person is not unjustly convicted or sentenced. In the rare case where DNA evidence may exonerate a prisoner or reduce the prisoner's sentence, it is not too much to ask that he or she make some showing to that effect before counsel is appointed.

In enacting the 2001 amendment of section 1405, the Legislature "apparently succumbed to the discredited 'ideal of perfectibility' which is the concept that with the expenditure of sufficient time, patience, energy, and money it is possible eventually to achieve perfect justice in all legal process. Such a 'noble ideal has consistently spawned results that can only be described as pandemoniac' in our criminal justice system." (*In re Pratt* (1980) 112 Cal.App.3d 795, 890, fn. 45, 170 Cal.Rptr. 80, quoting from Fleming, The Price of Perfect Justice (1974) p. 3.)

*326 *Disposition*

The petition for writ of habeas corpus is granted. The superior court is directed to **809 vacate its order denying petitioner's request for the appointment of counsel pursuant to section 1405 and enter a new order appointing counsel solely for the purpose of (1) investigating the appropriateness of DNA testing as to petitioner's conviction of attempted murder, (2)

filing a motion for DNA testing if counsel's investigation reveals that such testing is appropriate. The order to show cause, having served its purpose, is discharged.

We concur: GILBERT, P.J., and COFFEE, J.

**810

Todd Lee Kinnamon P-50239
A-4-136-L
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APR 08 2005
MICHAEL D. PLANET
Executive Officer and Clerk
BY: [illegible] Deputy

Todd L Kinnamon
V
Ventura County Superior Court

CASE # CR45855-A
Motion To Request
Counsel To prepare
1405, B, (1) DNA Motion

IN THE Interest of Justice, I Todd Lee, Kinnamon AM ASKING THIS COURT, Court Room #11 THE Honrable JUDGE Ken, W. Riley To Appoint Counsel ON THE D.N.A. motion For Penal code 187 (A) THAT I Todd Lee Kinnamon AM NOT THE perpetrator IN This SAID Crime AND THAT D.N.A Testing is Relevant To my assertion OF INNOCENCE. I HAVE NOT HAD Previously Counsel Appointed UNDER this Section. Therefore I AM Asking Pray OF Relief From This Court To Grant. This Motion. For Appointment OF COUNSEL To, File Motion, For Penal Code 1405 D.N.A TESTING.

Respectfully
Todd L Kinnamon
PRO PER
4-04-05

APPENDIX A

END OF DOCUMENT

THE PEOPLE, Plaintiff and Appellant,
v.
GORDON EUBANKS et al., Defendants and Respondents.
[Modification [FN*] of opinion (14 Cal.4th 580; 59 Cal.Rptr.2d 200, 927 P.2d 310).]

FN* This modification requires movement of text affecting pages 592-600 of the bound volume report.

No. S049490.

Supreme Court of California

Feb 26, 1997.

THE COURT.

The opinion herein, filed December 23, 1996, appearing at 14 Cal.4th 580, is modified as follows:

In footnote 4, on page 592 [typed opn. at pp. 13-14], the last sentence of the second paragraph beginning "We express no view" and ending "under section 995." is deleted in its entirety, and in its place is inserted the following: "We expressly reserve the question whether availability of a remedy under section 995 was affected by the addition of section 1424 and thus express no opinion here regarding what standard would govern motions brought under section 995."

This modification does not affect the judgment.

THE PEOPLE, Plaintiff and Appellant,
v.
GORDON EUBANKS et al., Defendants and Respondents.
No. S049490.

Dec 23, 1996.

SUMMARY

Two men were charged with felonies involving the alleged theft of trade secrets from a company that developed computer programs. During pretrial proceedings, defendants learned that the company had contributed about $13,000 to the cost of the district attorney's investigation. The trial court granted defendants' motion to disqualify, or "recuse," the entire office of the district attorney, finding that the company's financial assistance created a conflict of interest for the prosecutor, within the meaning of Pen. Code, § 1424. (Superior Court of Santa Cruz County, Nos. CR6748 and CR6749, William M. Kelsay, Judge.) The Court of Appeal, Sixth Dist., No. H011751, reversed the recusal order, concluding that any conflict was insufficiently grave to justify recusal.

The Supreme Court transferred the cause to the Court of Appeal with directions to vacate its previous judgment and dismiss the appeal as moot. The court held that although the trial court did not err in concluding that the company's financial assistance created a conflict of interest for the prosecutor, i.e., it evidenced a reasonable possibility that the prosecutor might not have exercised his discretionary functions in an evenhanded manner, the trial court erred in failing to apply the second part of the test for disqualification set out in Pen. Code, § 1424, that is, whether the resulting conflict was so grave as to make fair treatment of the defendants in all stages of the criminal proceedings unlikely if the district attorney were not recused. However, the court held that the Court of Appeal erred in determining that, assuming a conflict existed, it was not, as a matter of law, grave enough to justify recusal. It could not be said that had the trial court addressed the second part of the test for disqualification, it would have abused its discretion in finding the conflict disabling. (Opinion by Werdegar, J., with George, C. J., Mosk, Kennard, Baxter, Chin, and Brown, JJ., concurring. Concurring opinion by George, C. J., with Mosk, J., concurring.) *581

HEADNOTES

Classified to California Digest of Official Reports

(1) District and Municipal Attorneys § 2--Powers and Duties--Prosecutorial Discretion.
In California, all criminal prosecutions are conducted in the name of the People of the State of California and by their authority (Gov. Code, § 100, subd. (b)). California law does not authorize private prosecutions. Instead, the prosecution of criminal

offenses on behalf of the People is the sole responsibility of the public prosecutor, who ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. No private citizen, however personally aggrieved, may institute criminal proceedings independently, and the prosecutor's own discretion is not subject to judicial control at the behest of persons other than the accused.

(2) District and Municipal Attorneys § 1--Recusal--Statutory Grounds-- Conflict of Interest Rendering Fair Trial Unlikely--Nature of Disqualifying Conflict.
Under Pen. Code, § 1424, which establishes both procedural and substantive requirements for a motion to disqualify, or "recuse," the district attorney, such a motion must not be granted unless the evidence shows that a conflict of interest exists such as would render it unlikely that the defendant would receive a fair trial. By its terms, § 1424 allows recusal if the conflict of interest is so grave as to make a fair trial unlikely. The language of the statute establishes a two-part test: (1) is there a conflict of interest and (2) is the conflict so severe as to disqualify the district attorney from acting. Thus, while a conflict exists whenever there is a reasonable possibility that the district attorney's office may not exercise its discretionary function in an evenhanded manner, the conflict is disabling only if it is so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings. Further, whether the prosecutor's conflict is characterized as actual or only apparent, the potential for prejudice to the defendant-the likelihood that the defendant will not receive a fair trial-must be real, not merely apparent, and must rise to the level of a likelihood of unfairness. Thus, the statute does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would appear improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system.

(3) District and Municipal Attorneys § 1--Recusal--Review.
In reviewing the denial of a motion to recuse a district attorney, the role of *582 the appellate court is to determine whether there is substantial evidence to support the trial court's factual findings and, based on those findings, whether the trial court abused its discretion in denying the motion.

(4) Appellate Review § 142--Review--Discretion of Trial Court--Limitations.
The discretion of a trial court is subject to the limitations of legal principles governing the subject of its action.

(5) District and Municipal Attorneys § 1--Recusal--Two-part Statutory Test--Conflict of Interest--Gravity of Conflict Rendering Fair Trial Unlikely--Payment by Victim for Expenses of Criminal Investigation.
In a prosecution of two men for theft of trade secrets from a company that developed computer programs, although the trial court did not err in concluding that the company's financial contribution to the cost of the criminal investigation created a conflict of interest for the prosecutor, i.e., it evidenced a reasonable possibility that the prosecutor might not have exercised his discretionary functions in an evenhanded manner, the trial court erred in failing to apply the second part of the test for disqualification, or "recusal," set out in Pen. Code, § 1424, that is, whether the resulting conflict was so grave as to make fair treatment of the defendants in all stages of the criminal proceedings unlikely if the district attorney were not recused. In the absence of contrary evidence, it is assumed that the trial court applied the correct legal standard. In this case, however, there was ample evidence that the trial court failed to apply the complete test under § 1424. The court's oral remarks at the recusal hearing, which were the only record of the court's reasoning, were directed solely at the first portion of the two-part statutory test. The court repeatedly stated the standard as a "reasonable possibility" of unfairness to defendants and nowhere addressed whether the conflict was so grave as to render fair treatment unlikely. The trial court thus determined only that the district attorney suffered from a conflict of interest and never addressed whether that conflict was, under the proper standard, disabling.

[See 4 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 1793.]

(6) District and Municipal Attorneys § 1--Recusal--Statutory Grounds-- Conflict of Interest--Gravity of Conflict Rendering Fair Trial Unlikely-- Payment by Victim for Expenses of Criminal Investigation--Appellate Review of Trial Court's Finding Conflict Was Disabling.
In a prosecution of two men for theft of trade secrets from a company that developed computer programs, in which the trial court properly concluded that the company's contribution of about *583 $13,000 to the

cost of the criminal investigation created a conflict of interest for the prosecutor, the Court of Appeal erred in determining that, assuming a conflict existed, it was not, as a matter of law, grave enough to justify disqualification, or "recusal," of the district attorney. Although the trial court erred in failing to apply the second part of the test for disqualification set out in Pen. Code, § 1424, that is, whether the resulting conflict was so grave as to make fair treatment of the defendants in all stages of the criminal proceedings unlikely if the district attorney were not recused, it could not be said that had the trial court addressed the second part of the test, it would have abused its discretion in finding the conflict disabling. First, the fact that the largest payment of $9,450 was payment of money for a debt already incurred by the district attorney supported recusal. Second, the large size of the contributions tended to show that recusal was within the trial court's discretion. Finally, the trial court's assessment that the prosecution's case was factually weak supported the decision to recuse, since a factually weak case is more subject than a strong case to influence by extraneous financial considerations.

COUNSEL

Daniel B. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Michael D. O'Reilley, Martin S. Kaye and Eugene W. Kaster, Deputy Attorneys General, for Plaintiff and Appellant.

Gil Garcetti, District Attorney (Los Angeles), George M. Palmer and Shirley S. N. Sun, Deputy District Attorneys, as Amici Curiae on behalf of Plaintiff and Appellant.

Charles C. Marson, Morgan, Ruby, Schofield, Franich & Fredkin, Ruby & Schofield, Allen Ruby, Remcho, Johansen & Purcell, Robin B. Johansen, Joseph Remcho, Nolan & Armstrong and Thomas J. Nolan for Defendants and Respondents.

Peter A. Chang, Jr., and Vicki I. Podberesky as Amici Curiae on behalf of Defendants and Respondents.

WERDEGAR, J.

When the victim of an alleged crime contributes financially to the costs of the district attorney's investigation, does the district *584 attorney thereafter suffer from a disabling conflict of interest requiring recusal under Penal Code section 1424? On this question of first impression, we hold such financial assistance to the prosecutor's office may indeed disqualify the district attorney from acting further in a case, if the assistance is of such character and magnitude "as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings." (*People v. Conner* (1983) 34 Cal.3d 141, 148 [193 Cal.Rptr. 148, 666 P.2d 5].) In this case, where a corporation alleged to be the victim of trade secrets theft contributed around $13,000 to the cost of the district attorney's investigation, the superior court did not abuse its discretion in finding the victim's financial assistance created a conflict of interest for the prosecutor. The trial court did err in failing to apply the further test set out in Penal Code section 1424: whether the resulting conflict was so severe as to make fair treatment of the defendants *unlikely*. We conclude, however, that such a finding would not, on this record, be an abuse of discretion.

Factual and Procedural Background

Defendants Gordon Eubanks and Eugene Wang were accused, by grand jury indictment, of conspiracy to steal trade secrets (Pen. Code, § § 182, 499c), [FN1] conspiracy to receive stolen property (§ § 182, 496), and conspiracy to access and make use of computer data without permission (§ § 182, 502, subd. (c)(2)). In addition to these joint conspiracy counts, Wang was charged with several counts of trade secret theft (§ 499c) and unlawful data use (§ 502, subd. (c)(2)), while Eubanks was charged with several counts of receiving stolen property (§ 496).

FN1 Unless otherwise specified, all further statutory references are to the Penal Code.

Both defendants moved to disqualify the Santa Cruz County District Attorney for a conflict of interest pursuant to section 1424. After an evidentiary hearing, the superior court granted the recusal motion. As permitted under section 1424, the Attorney General and the Santa Cruz County District Attorney, both of whom had appeared in the superior court to oppose recusal, appealed the ruling. The Court of Appeal reversed. We granted review on defendants' petition. [FN2]

FN2 After oral argument was held in this matter, the charges against Eubanks and Wang were dismissed on request of the Santa Cruz County District Attorney. Although the matter is thus rendered moot,

> we exercise our discretion to resolve the legal issues raised, which are of continuing public interest and are likely to recur. (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 829, fn. 4 [50 Cal.Rptr.2d 101, 911 P.2d 1]; *Liberty Mut. Ins. Co. v. Fales* (1973) 8 Cal.3d 712, 715-716 [106 Cal.Rptr. 21, 505 P.2d 213].)

In September 1992, defendant Eugene Wang was a vice-president of Borland International, a software developer located in Scotts Valley (Santa *585 Cruz County). Defendant Gordon Eubanks was president and chief executive officer of Symantec Corporation, a competitor of Borland. In July of 1992, Wang had expressed dissatisfaction with a Borland management reorganization and threatened to resign. On September 1, 1992, he submitted his resignation. Fearing Wang might have conveyed internal Borland information to outsiders, Borland officers reviewed Wang's electronic mail files. They found several messages to Eubanks containing what they believed was confidential Borland information. Borland contacted the Scotts Valley police, who in turn sought investigative assistance from the district attorney's office.

During the night of September 1, and into the morning of September 2, 1992, Borland officials worked with representatives of the police department and district attorney's office preparing warrant affidavits for searches of defendants' residences and Symantec headquarters. Apparently because the police department and prosecutor's office lacked staff with the expertise to search the Symantec computers, Alan Johnson, the district attorney's chief inspector, asked Borland officials if Borland could provide one or more technically competent employees to assist in the search. The Borland representatives declined because they did not want Borland employees exposed to Symantec secrets; they suggested independent consultants be used instead.

Two computer specialists were located to assist with the September 2 search: David Klausner, who was referred by Borland's outside counsel, and Stephen Strawn, who had worked with the district attorney's office on prior occasions. Chief Inspector Johnson and John Hansen, associate general counsel for Borland, both testified that on the night of September 1 and 2, at the request of the district attorney's office, Borland agreed to pay for Klausner's services.

According to Johnson, Spencer Leyton, a senior Borland executive, indicated Borland's willingness to spend up to $10,000, and possibly more, for experts to assist in the investigation. Leyton, however, did not recall discussing the matter of expert assistance at all, although he was present and talked with Johnson on the night and morning of September 1 and 2. Borland records show a $25,000 "blanket" purchase order was drawn up and approved by the legal department in November 1992 for "miscellaneous services and fees / Symantec lawsuit." Borland records for the subsequent payments to Klausner, Strawn and others for their work on the criminal investigation bear numerical references to this purchase order.

Klausner and Strawn accompanied representatives of law enforcement agencies who executed the warrant on September 2. Klausner submitted his *586 bill for $1,400 directly to Borland on September 14, 1992. Borland paid it by a check dated January 6, 1993.

Strawn continued to work on the criminal investigation for several weeks, into October 1992, assisting the district attorney's office in retrieving and printing the contents of seized computer disc drives. In late September 1992, knowing Strawn was working on the case, Chief Inspector Johnson discussed with Arthur Danner, the Santa Cruz County District Attorney, whether Borland should be asked to pay Strawn's anticipated bill. Danner made no decision at that time. Johnson testified he then asked Borland executive Leyton whether Borland was "still willing to assist us by carrying the cost of the technicians that were necessary to process this case." Leyton, according to Johnson, answered affirmatively. Sometime after that discussion, Johnson again broached the question with Danner, who then approved submitting Strawn's invoices to Borland.

District Attorney Danner similarly testified he first considered the payment question while Strawn was still working with the office's investigators. Asked whether, at that time, he contemplated abandoning the prosecution if Borland did not pay for Strawn's services, Danner testified: "No.... It was simply at that point to have the investigation proceed because at that point we needed the additional materials and so that's what Mr. Straun [*sic*] was working on to allow us to review those materials."

Danner articulated two reasons for his ultimate decision to allow Borland to pay for Strawn's assistance: First, he understood Strawn's role to be

purely technical, and not to involve giving any opinion as to whether the materials retrieved were trade secrets. Danner considered Strawn's limited role important because it meant Borland's payment of his fee was less likely to become a significant issue at trial. Danner's second reason for approving the payment was that "at that time we were experiencing serious budgetary constraints in a particular fund that we utilize to pay professional and special witnesses and we really had very little money in our budget ...."

Strawn submitted his bill for $9,450 to the district attorney's office on October 31, 1992. After getting approval from Danner, Chief Inspector Johnson transmitted it to Borland. Borland attorney John Hansen testified he received the invoice and "sent it along for payment." His understanding was that Strawn's services had been necessary because "somebody had to go on the search along with the authorities," and hiring Strawn thus "relieved us from having to send a Borland employee into a competitor's plant." After Borland's general counsel, relying on Hansen's recommendation, approved the payment, Borland paid Strawn's bill by a check dated January 12, 1993. *587

In January 1993, Strawn submitted an additional invoice for $2,700 to the district attorney's office for work done in November and December 1992. Johnson forwarded this bill to Borland as well, but as of the date of the evidentiary hearing it had not been paid.

Finally, Borland paid a private service to transcribe audiotapes of interviews with Borland employees, for use by the prosecutor. John Hansen testified a district attorney's investigator told him, sometime in late 1992, that the investigation was "'indefinitely" delayed because a clerical backlog in the district attorney's office was preventing the office staff from transcribing the tapes. Hansen offered to have Borland pay someone to make the transcriptions. In January and February 1993, Borland made payments of $1,008 and $1,224 to a reporting service for transcription of the tapes.

Defendants initially moved to recuse the entire office of the district attorney on the ground that Deputy District Attorney Jonathan Rivers, who had worked on the Eubanks-Wang case, had left the district attorney's office and been retained by Borland to work on Borland's related civil action against Symantec. In the course of a hearing on this issue, defendants learned of the payments by Borland, which were then made a separate ground for requesting recusal.

After hearing the above evidence, the superior court concluded that while Rivers's change of employment did not require recusal of the district attorney's office, the payments did. The court's rationale appears from its comments during argument on the motion (no written statement of reasons was filed). Discounting mere "appearances ... of impropriety," the court framed the issue as whether the victim's "payment of money for a debt already incurred" by the district attorney creates "an actual conflict" for the prosecutor. The standard to be applied, as the court understood it, was whether "the evidence provides a reasonable possibility that the D.A.'s office may not exercise its discretionary function in an even-handed manner."

The court emphasized Borland's payment of Strawn's bill: "[W]e have a situation here where there was a debt ... that's already been incurred. That person was going to get paid regardless of who paid it. Borland happens to make the offer and in fact does pay it, and pays other bills as well. Doesn't that put the District Attorney in a position, as a human being, to feel a greater obligation for this particular victim than some other fellow or person whom doesn't offer to pay existing debts?" Answering its own rhetorical question, the court found the payment of the district attorney's incurred debt "rather strong evidence of a reasonable possibility that the discretionary *588 function that's fundamental to a District Attorney is compromised and thereby would not necessarily be used in an even-handed manner."

The Court of Appeal reversed the recusal order. First, the appellate court disagreed with the trial court's conclusion Borland's payments created a conflict of interest. The Court of Appeal viewed the payments as "comparable to the cooperation victims often give to prosecutors in criminal cases." Any sense of obligation arising from the payments, the court believed, was necessarily "minimal," and hence insufficient to show the existence of a conflict.

Alternatively, assuming the existence of a conflict, the Court of Appeal found its gravity insufficient to justify recusal. The trial court, the Court of Appeal noted, found only a "reasonable possibility" of unfair treatment, without determining whether, as required under section 1424, the conflict rendered it "unlikely" that defendant would receive fair treatment from the prosecutor. Moreover, to find fair treatment

"unlikely" on these facts, the Court of Appeal held, would have exceeded the trial court's discretion.

Discussion

The question raised by this case is whether a crime victim's payment of substantial investigative expenses already incurred by the public prosecutor creates a disabling conflict of interest for the prosecutor, requiring his or her disqualification. Our examination of the question begins with exposition of the general principle that a public prosecutor must be free of special interests that might compete with the obligation to seek justice in an impartial manner (pt. I, *post*). In part II we focus on the statutory standard for recusal under California law, examining the origins and interpretation of section 1424. Finally, in part III, we apply the statutory standard to the case at bar, consistent with the more general principles explored earlier.

I. *The Independence and Impartiality of the District Attorney*

(1) In California, all criminal prosecutions are conducted in the name of the People of the State of California and by their authority. (Gov. Code, § 100, subd. (b).) California law does not authorize private prosecutions. Instead, "[t]he prosecution of criminal offenses on behalf of the People is the sole responsibility of the public prosecutor ... [¶] [who] ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek. [Citation.] No private citizen, however personally aggrieved, may institute criminal proceedings independently, [citation], and the prosecutor's own discretion is not subject to judicial control *589 at the behest of persons other than the accused." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451 [279 Cal.Rptr. 834, 807 P.2d 1063].)

The district attorney of each county is the public prosecutor, vested with the power to conduct on behalf of the People all prosecutions for public offenses within the county. (Gov. Code, § 26500; *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 240 [138 Cal.Rptr. 101].) Subject to supervision by the Attorney General (Cal. Const., art. V, § 13; Gov. Code, § 12550), therefore, the district attorney of each county independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings. (*People* ex rel. *Younger v. Superior Court* (1978) 86 Cal.App.3d 180, 203 [150 Cal.Rptr. 156]; *People v. Municipal Court (Pellegrino)* (1972) 27 Cal.App.3d 193, 199-204 [103 Cal.Rptr. 645, 66 A.L.R.3d 717].)

The district attorney's discretionary functions extend from the investigation of and gathering of evidence relating to criminal offenses (*Hicks v. Board of Supervisors, supra*, 69 Cal.App.3d at p. 241), through the crucial decisions of whom to charge and what charges to bring, to the numerous choices the prosecutor makes at trial regarding "whether to seek, oppose, accept, or challenge judicial actions and rulings." (*Dix v. Superior Court, supra*, 53 Cal.3d at p. 452; see also *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 267 [137 Cal.Rptr. 476, 561 P.2d 1164] [giving as examples the manner of conducting voir dire examination, the granting of immunity, the use of particular witnesses, the choice of arguments, and the negotiation of plea bargains].)

The importance, to the public as well as to individuals suspected or accused of crimes, that these discretionary functions be exercised "with the highest degree of integrity and impartiality, and with the appearance thereof" (*People v. Superior Court (Greer), supra*, 19 Cal.3d at p. 267) cannot easily be overstated. The public prosecutor " 'is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' " (*Id.* at p. 266, quoting *Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314, 1321, 55 S.Ct. 629].)

The nature of the impartiality required of the public prosecutor follows from the prosecutor's role as representative of the People as a body, rather than as individuals. "The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of 'The People' includes the defendant and his family and those who care about him. *590 It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name." (Corrigan, *On Prosecutorial Ethics* (1986) 13 Hastings Const.L.Q. 537, 538-539.) Thus the district attorney is expected to exercise his or her discretionary functions in the interests of the People at large, and not under the influence or control of an interested individual. (*People v. Superior Court (Greer), supra*, 19 Cal.3d at p. 267.)

While the district attorney does have a duty of zealous advocacy, "both the accused and the public have a legitimate expectation that his zeal ... will be born of objective and impartial consideration of each individual case." (*People v. Superior Court (Greer), supra*, 19 Cal.3d at p. 267.) "Of course, a prosecutor need not be disinterested on the issue whether a prospective defendant has committed the crime with which he is charged. If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means. [Citation.] True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury-not the prosecutor. It is a bit easier to say what a disinterested prosecutor is not than what he is. He is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged." (*Wright v. United States* (2d Cir. 1984) 732 F.2d 1048, 1056.)

II. *Standards for Prosecutorial Recusal Under Section 1424*

Section 1424, pursuant to which the present motion was made, was enacted in 1980. Only three years earlier, in *People v. Superior Court (Greer), supra*, 19 Cal.3d 255 (hereinafter *Greer*), this court first recognized the judicial power to recuse the district attorney as prosecutor. In *Greer*, we located the source of a court's disqualification power in Code of Civil Procedure section 128, subdivision (a)(5), which recognizes a court's power " '[t]o control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it ....' " (*Greer, supra*, 19 Cal.3d at p. 261, fn. 4; accord, *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 745 [218 Cal.Rptr. 24, 705 P.2d 347]; but see *People v. Hamilton* (1988) 46 Cal.3d 123, 139 [249 Cal.Rptr. 320, 756 P.2d 1348] [asserting *Greer* stated "common law principle"].) We further held the separation of powers doctrine did not preclude a trial court from disqualifying a district attorney. (*Greer, supra*, at pp. 262-265.)

In *Greer*, we expressed concern not only with actual conflicts of interest " 'that might affect the evenhandedness with which a prosecutor exercised his *591 or her discretionary functions, but also with any " 'appearance of impropriety' " that might adversely affect " 'public ... confidence in the integrity and impartiality of our system of criminal justice.' " (*Greer, supra*, 19 Cal.3d at p. 268.) We therefore held a district attorney could be disqualified "when [a] judge determines that the attorney suffers from a conflict of interest which might prejudice him against the accused and thereby affect, *or appear to affect*, his ability to impartially perform the discretionary functions of his office." (*Id.* at p. 269, fn. omitted; italics added.)

(2) Section 1424 established both procedural and substantive requirements for a motion to disqualify the district attorney. Substantively, the statute provides the following standard: "The motion shall not be granted unless it is shown by the evidence that a conflict of interest exists such as would render it unlikely that the defendant would receive a fair trial."

"Section 1424 was the Legislature's response to *Greer* and other criminal cases stressing the importance of the appearance of impropriety and other ' apparent' conflicts as bases for prosecutorial disqualification." (*People v. Lopez* (1984) 155 Cal.App.3d 813, 824 [202 Cal.Rptr. 333].) The Legislature's response, however, was not as unequivocal as it might have been. As noted in *Lopez*, the statute refers simply to a "conflict of interest"; it does not explicitly require an "actual" conflict, nor does it explicitly exclude "apparent" conflicts: (*Ibid.*) On the other hand, the statute allows disqualification only when a conflict "render[s] it unlikely that the defendant would receive a fair trial," (§ 1424) whereas *Greer* allowed disqualification even when the conflict might merely "appear to affect" the prosecutor's fairness. [FN3]

FN3 An earlier version of the bill adding section 1424 would have required the movant to show "an actual conflict of interest." (Sen. Amend. to Sen. Bill No. 1520 (1979-1980 Reg. Sess.) Apr. 10, 1980.) Before enactment, the language was changed to "a conflict of interest."
At the request of amicus curiae California District Attorneys Association, we take judicial notice of documents from the legislative history of Senate Bill No. 1520, which added section 1424. These documents indicate the bill was drafted and sponsored by the Attorney General in response to *Greer*; the Attorney General's office sought the measure as a means of reducing the number of disqualifications and thereby alleviating an increase in that office's disqualification workload. (Sen. Com. on

Judiciary, Rep. on Sen. Bill No. 1520 (1979-1980 Reg. Sess.) as amended Apr. 10, 1980, pp. 1-3.) The Attorney General, in a letter sent to all members of the Senate before that body's passage of the bill, attributes the increase in disqualifications, in part, to *Greer's* " 'appearance of conflict' " test. (Atty. Gen., letter to members of Sen., May 12, 1980.)

We considered and resolved these interpretive questions regarding section 1424 in *People v. Conner, supra*, 34 Cal.3d 141 (hereinafter *Conner*). Recognizing the standard of section 1424 differed from that articulated in *Greer*, we nonetheless concluded that the statute "contemplates both 'actual' and 'apparent' conflict when the presence of either renders it unlikely that *592 defendant will receive a fair trial." (34 Cal.3d at p. 147.) The distinction between actual and apparent conflict is "less crucial" under the statute, we explained, because of the "additional statutory requirement" that the conflict must "render it unlikely that the defendant would receive a fair trial." (*Ibid.*) We held that a "conflict," for purposes of section 1424, "exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner. Thus, there is no need to determine whether a conflict is 'actual' or only gives an 'appearance' of conflict." (34 Cal.3d at p. 148.) But however the conflict is characterized, it warrants recusal only if "so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings." (*Ibid.*)

Conner establishes that, whether the prosecutor's conflict is characterized as actual or only apparent, the potential for prejudice to the defendant-the likelihood that the defendant will not receive a fair trial-must be real, not merely apparent, and must rise to the level of a *likelihood* of unfairness. Thus section 1424, unlike the *Greer* standard, does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system. (Accord, *People v. McPartland* (1988) 198 Cal.App.3d 569, 574 [243 Cal.Rptr. 752] ["recusal cannot be warranted solely by how a case may appear to the public"]; *People v. Lopez, supra*, 155 Cal.App.3d at pp. 827-828.) [FN4]

FN4 *People v. Hamilton, supra*, 46 Cal.3d 123, is not to the contrary. Our references there to recusal as a means of protecting "public confidence in the integrity and impartiality of the criminal justice system" (*id.* at p. 141) were in the application of the *Greer* standard, which had been exclusively applied by the parties and court at Hamilton's trial. (*Id.* at p. 141, fn. 3.)
One should note, in this connection, the distinction between a motion to recuse the district attorney, under section 1424, and a motion to set aside the information or indictment, under section 995. In *Greer* we suggested that "if the trial court determines that a district attorney's participation in the filing of a criminal complaint or the preliminary hearing on that complaint created a potential for bias or the appearance of a conflict of interest, it may conclude that the defendant was not 'legally committed' within the meaning of Penal Code section 995, and the information should be set aside." (*Greer, supra*, 19 Cal.3d at p. 263, fn. 5.) We express no opinion here regarding the standard applicable to motions under section 995.

Because the enactment of section 1424 eliminated the appearance of impropriety as an independent ground for prosecutorial disqualification, our review of the recusal order here must focus on whether Borland's payments created a conflict with the actual likelihood of prejudice to Eubanks and Wang, rather than on whether allowing such payments would, as defendants assert, be "unseemly" or create "the perception of improper influence." That our analysis focuses on actual likelihood of prejudice, however, should not *593 be taken as suggesting the potential for loss of public confidence in the criminal justice system is either unimportant or unimaginable. To the contrary, the practice of the district attorney here-soliciting and accepting the victim's underwriting of significant investigative costs-could, especially if replicated on a wide scale, raise an obvious question as to whether the wealth of the victim has an impermissible influence on the administration of justice. A system in which affluent victims, including prosperous corporations, were assured of prompt attention from the district attorney's office, while crimes against the poor went unprosecuted, would neither deserve nor receive the confidence of the public. [FN5] Even the appearance of such impropriety would be highly destructive of public

trust. Under section 1424, however, such apprehensions, alone, are no longer a ground for recusal of the district attorney.

FN5 We do not suggest this is the current situation in Santa Cruz or any other county of California. Indeed, it has been argued that large corporations often have difficulty interesting local prosecutors, whose resources are already strained by the fight against violent crime, in the investigation and prosecution of business fraud and other complicated crimes against corporate victims. (See *International Business Machines Corp. v. Brown* (C.D.Cal. 1994) 857 F.Supp. 1384, 1388-1389.)

Conner clarified two other points of statutory interpretation important to the present case. First, by its terms, section 1424 allows recusal if the conflict of interest is so grave as to make a "fair trial" unlikely. The prosecutor's discretionary functions, however, are not limited to the trial proper, and we recognized in *Conner* that the need for prosecutorial impartiality extends to all portions of the proceedings, not only to the trial. Paraphrasing the statutory standard, we asked: "Was this conflict so grave as to render it unlikely that defendant will receive fair treatment *during all portions of the criminal proceedings*?" (*Conner, supra*, 34 Cal.3d at p. 148, italics added.) Consistently, in assessing the likelihood of prejudice, we referred to the conflict's effect on "the DA's *discretionary powers exercised either before or after trial* (e.g., plea bargaining or sentencing recommendations)." (*Id.* at p. 149, italics added; see also *People v. Lopez, supra*, 155 Cal.App.3d at p. 822 ["fair trial" in section 1424 broader than "miscarriage of justice" prejudice standard].)

Defendants here have focused on the likelihood of *pretrial* prejudice, in particular "the very real likelihood that the prosecution would pursue a weak case because it was indebted to Borland." They urge us to uphold the trial court's finding of conflict, which was based upon a perceived reasonable possibility the district attorney, out of a sense of obligation to Borland, would be unwilling to drop the charges or bargain for a lesser plea. *Conner* established that the potential for such pretrial unfairness is cognizable under section 1424. *594

Second, section 1424 requires the existence of a "conflict ... such as would render" a fair trial "unlikely." In *Conner*, we read this language as establishing a two-part test: (i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting? Thus, while a "conflict" exists whenever there is a "reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner," the conflict is disabling only if it is "so grave as to render it unlikely that defendant will receive fair treatment." (*Conner, supra*, 34 Cal.3d at p. 148.) [FN6] As shall be seen in part III.A., *post*, the trial court here erred by addressing only the first part of the test, existence of a conflict, without deciding whether the conflict was so grave as to make fair treatment unlikely.

FN6 The legislative mandate that recusal not be ordered on a mere "possibility" of unfair treatment makes particularly compelling sense where, as here, what is at issue is the disqualification of the district attorney's entire office, rather than only one or a few deputies. '"[W]hen the entire prosecutorial office of the district attorney is recused and the Attorney General is required to undertake the prosecution or employ a special prosecutor, the district attorney is prevented from carrying out the statutory duties of his elective office and, perhaps even more significantly, the residents of the county are deprived of the services of their [locally] elected representative in the prosecution of crime in the county," (*People ex rel. Younger v. Superior Court, supra*, 86 Cal.App.3d at p. 204.)

III. *Application to This Case*

A. *Existence of a Conflict of Interest*

In *Conner, supra*, 34 Cal.3d at page 149, we stated the trial court's recusal decision was reviewable only to determine if it was supported by "substantial evidence." In *People v. Hamilton, supra*, 46 Cal.3d at page 140, we declared the standard was "abuse-of-discretion." (3) To the extent these assertions created any inconsistency, it was resolved in *People v. Breaux* (1991) 1 Cal.4th 281, 293-294 [3 Cal.Rptr.2d 81, 821 P.2d 585]: "Our role is to determine whether there is substantial evidence to support the [trial court's factual] findings [citing *Conners*], and, based on those findings, whether the trial court abused its discretion in denying the motion [citing *Hamilton*]." The same two-part standard applies to review of a trial court's grant ruling.

Although there were some conflicts in the recusal hearing testimony (e.g., Johnson and Leyton differed as to whether Leyton participated in discussion of who would pay Klausner's fee), the significant facts were largely undisputed. The trial court made no explicit findings on questions of evidentiary fact. Our review, then, is limited to determining if the superior court abused its discretion, while assuming the court relied on any substantial evidence that tends to support its ruling. *595

(4) The discretion of a trial court is, of course, " 'subject to the limitations of legal principles governing the subject of its action.' " (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355 [188 Cal.Rptr. 873, 657 P.2d 365].) The Attorney General argues at length that financial contributions to the district attorney's office should not, as a matter of law, be considered as creating a conflicting interest for purposes of disqualification, because any interest of the district attorney in such contributions would be an *institutional*, rather than *personal*, interest. He emphasizes that Borland's payments "did not benefit any official's personal pocketbook," and contends the case law shows "recusal will usually require a showing of a prosecutor's personal interest in prosecution," or, stated differently, "a showing of personal or emotional involvement" on the part of the district attorney.

The Attorney General fails to persuade us any legal principle restricts the concept of a conflicting interest to a district attorney's personal financial or emotional stake in the prosecution. The cited cases in which recusal *has* been based on a prosecutor's personal involvement are not authority for a limiting rule. [FN7] As the Court of Appeal in the present case explained, "[p]ersonal interest or emotional involvement will have a particularly strong tendency to imply extraneous motivation. But it does not follow that *only* evidence of personal interest or emotional involvement will support a conclusion that there is 'a reasonable possibility that the [district attorney's] office may not exercise its discretionary function in an evenhanded manner.' (*People v. Conner, supra*, 34 Cal.3d at p. 148.)"

FN7 The majority opinion in *People v. Superior Court (Martin)* (1979) 98 Cal.App.3d 515, 521-522 [159 Cal.Rptr. 625], a decision predating the enactment of section 1424, could be read as requiring a conflicting personal interest for recusal. The majority in that case, however, also found the defendant's claim of conflict "devoid of substance" (98 Cal.App.3d at p. 520), and Justice Grodin, in his concurring opinion, pointed out that the defendant had not suggested "any plausible scenario for conflict that would operate to his detriment." (*Id.* at p. 522.)

Section 1424, on its face, allows recusal on a showing of *any* conflict of interest that renders fair treatment unlikely, and our decisions interpreting the statute have not further restricted the concept of a conflicting interest. No reason is apparent why a public prosecutor's impartiality could not be impaired by institutional interests, as by personal ones. We have recognized the existence of such an impermissible conflict in a scheme that made the official budget of a public defender dependent on litigation decisions that also affected the interests of the defender's clients (*People v. Barboza* (1981) 29 Cal.3d 375, 380 [173 Cal.Rptr. 458, 627 P.2d 188]); in some circumstances, the same might be true of prosecutors. For example, a scheme that provides monetary rewards to a prosecutorial office might carry the potential *596 impermissibly to skew a prosecutor's exercise of the charging and plea bargaining functions. (Cf. *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 250 [64 L.Ed.2d 182, 193, 100 S.Ct. 1610] [return of penalties to prosecuting office held permissible, where budgeting system guarantees there is no "realistic possibility" the prosecuting officer will be influenced by "the prospect of institutional gain"].)

More to the present point, a prosecutor may have a conflict if institutional arrangements link the prosecutor too closely to a private party, for example a victim, who in turn has a personal interest in the defendant's prosecution and conviction. As Judge Friendly put it in *Wright v. United States, supra*, 732 F.2d at page 1056, a prosecutor "is not disinterested if he has, *or is under the influence of others who have*, an axe to grind against the defendant." (Italics added.) The tie that binds the prosecutor to an interested person may be compelling though it derives from the prosecutor's institutional objectives or obligations. Thus, in *Young v. U.S. ex rel. Vuitton et Fils S. A.* (1987) 481 U.S. 787 [95 L.Ed.2d 740, 107 S.Ct. 2124], the high court, pursuant to its supervisory authority, forbade a private law firm from prosecuting a contempt on behalf of the Government, because the firm, as a matter of legal ethics, bore the "obligation of undivided loyalty" to

its private client, Vultton, which in turn had a private pecuniary interest in prosecution of the contempt. (*Id.* at p. 805 [95 L.Ed.2d at p. 757].) A public prosecutor must not be in a position of "attempting at once to serve two masters," the People at large and a private person or entity with its own particular interests in the prosecution. (*Ganger v. Peyton* (4th Cir. 1967) 379 F.2d 709, 714.) [FN8] Private influence, exercised through control over the prosecutor's personal *or* institutional concerns, is a conflict of interest, under section 1424, if it creates a reasonable possibility the prosecutor may not act in an evenhanded manner.

> FN8 In *Ganger*, the federal court vacated a Virginia assault conviction on due process grounds because the prosecuting attorney, while prosecuting Ganger criminally, also represented Ganger's wife in a divorce action, which was based on the same alleged assault. A number of cases have followed *Ganger* in holding due process forbids prosecutors from holding such conflicting interests. (See, e.g., *State of N.J. v. Imperiale* (D.N.J. 1991) 773 F.Supp. 747, 751-756; *People v. Zimmer* (1980) 51 N.Y.2d 390 [434 N.Y.S.2d 206, 414 N.E.2d 705, 708]; *Cantrell v. Com.* (1985) 229 Va. 387 [329 S.E.2d 22, 25-27].) Although defendants cite *Ganger* and other such cases, and make reference to due process in their brief, they sought recusal solely on the authority of section 1424. Nor do their citations of constitutional authority suggest that a disabling conflict of interest would be more easily shown under constitutional principles than under section 1424. For those reasons, and because we conclude the trial court did not err in finding a conflict under the statutory standard, we need not reach any constitutional question here.

Nor are we persuaded that Borland's contributions bore no potential for cognizable prejudice because, as argued by amicus curiae California District **597 Attorneys Association (CDAA), "[u]nequal treatment of victims, to the extent it exists, is a political necessity created by inadequate tax revenues, and there is no misconduct by the district attorney in reacting to such necessity in the way he deems most beneficial to the community." True, district attorneys must, of necessity, factor budgetary considerations into their exercise of prosecutorial discretion. A district attorney is not disqualified simply because, in an effort to overcome budgetary restraints, he or she has accepted assistance from the public in investigating or prosecuting a crime. At the same time, however, the courts, the public and individual defendants are entitled to rest assured that the public prosecutor's discretionary choices will be unaffected by private interests, and will be "born of objective and impartial consideration of each individual case." (*Greer, supra*, 19 Cal.3d at p. 267.)

In this connection, CDAA draws our attention to statutes establishing industry-financed funding schemes for certain types of fraud prosecutions. Insurance Code section 1872.8, subdivision (a), assesses automobile insurers up to $1 per insured vehicle per year, and allocates 51 percent of the resulting funds for distribution to district attorneys for investigation and prosecution of automobile insurance fraud cases. Insurance Code section 1872.83 establishes a similar funding scheme for workers' compensation fraud investigation and prosecution. CDAA asserts these statutes serve to demonstrate "it is ... appropriate as a matter of policy to request victims to pay some prosecution related costs." Without expressing any opinion as to whether these financing schemes may cause a conflict for district attorneys, or as to their desirability from a policy standpoint, we agree with defendants that these statutory schemes are distinguishable in a number of ways from the type of contributions at issue here: The insurers involved in the statutory funding schemes are required by law to contribute to prosecution efforts, unlike Borland, which contributed to the prosecution at the special request of the district attorney's office; the assessments are made industry-wide, rather than on one particular victim corporation; and are spent on investigation and prosecution of automobile and workers' compensation insurance fraud generally, rather than for the particular benefit of any one victim. These factors tend to reduce the likelihood any victim would gain, through financial contributions, influence over the conduct of any particular prosecution.

The Attorney General also maintains Borland's assistance to the district attorney bore no potential for improper influence because it was, in the Court of Appeal's words, "comparable to the cooperation victims often give to prosecutors in criminal cases." We disagree. True, ordinary cooperation with police and prosecutors may impose financial costs on the victim; the need to attend interviews, lineups and court proceedings, for example, may **598 cause an individual complainant to lose earnings or a corporate

complainant to lose production. Beyond such routine cooperation, victims of commercial and corporate crimes sometimes assist the prosecution by collecting and organizing necessary information from internal sources, and may even hire private investigators for external investigation of suspected crimes against the company. None of these common practices, however, include the district attorney's solicitation and acceptance of financial assistance to satisfy an already incurred obligation.

(5) In summary, we conclude financial assistance of the sort received here may create a legally cognizable conflict of interest for the prosecutor. The undisputed facts, moreover, support the trial court's conclusion such a conflict did exist in this case. The district attorney incurred a debt of $9,450 to an independent contractor, Strawn, for technical assistance in a criminal investigation. The debt was, as the deputy district attorney who argued the motion conceded, "substantial considering our resources." Certainly the amount is not de minimis. (Cf. *State v. Retzlaff* (1992) 171 Wis.2d 99 [490 N.W.2d 750, 751-753] [theft victim's $300 campaign contribution to the district attorney did not require the district attorney's disqualification from prosecution of the alleged thief].) The district attorney then asked the victim of the alleged crime, Borland, to pay the debt. Borland did so, paying as well other significant costs of the investigation. The trial court did not err in concluding these circumstances evidenced a "reasonable possibility" the prosecutor might not exercise his discretionary functions in an evenhanded manner.

We must agree, however, with the Court of Appeal that the trial court failed to apply the second part of the *Connor* test for disqualification: whether the conflict is so grave as to make fair treatment of the defendant unlikely if the district attorney is not recused. In the absence of contrary evidence, we assume a trial court applied the correct legal standard. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913-914 [141 Cal.Rptr. 133, 569 P.2d 727].) Here, however, there is ample evidence the trial court failed to apply the complete test under section 1424. The court's oral remarks at the recusal hearing, which are the only record of the court's reasoning, are directed solely at the first portion of the two-part test established by section 1424 and *Conner*. The court repeatedly stated the standard as a "reasonable possibility" of unfairness to defendants-*Conner's* definition of a conflict-and nowhere addressed whether the conflict was so grave as to render fair treatment unlikely. The trial court thus determined only that, under the test enunciated in *Connor*, the Santa Cruz County District Attorney suffered from a conflict of interest in his prosecution of Eubanks and Wang, and never addressed whether that conflict was, under the proper standard, disabling. We proceed to consider whether, as the Court of Appeal held, a *599 finding of disabling conflict would, on this record, be an abuse of discretion under the standard established by section 1424.

B. *Gravity of the Conflict*

As previously explained, the trial court detected a potential for unfair treatment in the possible sense of obligation the district attorney would feel for Borland's payment of a debt owed by the district attorney's office. The court elaborated on the potential prejudice as follows: "[L]et's assume that the District Attorney's office, in the review of their case ... ultimately conclude that, 'Well, you know, maybe our case isn't as strong as we thought at the inception.' Would they be-would it be easier for them to tell a victim who paid no money to the D.A.'s office, 'You don't have a case,' than it would be one that you received $15,000 [*sic*] from?"

The trial court correctly focused on the potential bias arising out of a sense of obligation to Borland, rather than on any potential "prejudice" to be found in the fact of investigatory assistance itself. That the prosecutor may have been *able* to proceed further or more quickly against defendants with Borland's assistance than without would not, by itself, constitute unfair treatment. As CDAA points out, defendants have "no right to expect that crimes should go unpunished for lack of public funds." (See *Wright v. United States, supra*, 732 F.2d at p. 1057 [prejudice from asserted prosecutorial bias not shown by hypothesis that, if a different prosecutor had been appointed, the defendant "might not have been indicted for a crime which, as the jury's verdict demonstrates, he had in fact committed."].) For that reason we cannot agree with the suggestion of amicus curiae National Association of Criminal Defense Lawyers that a victim's financial assistance *necessarily* subjects the defendant to unfair prosecutorial treatment because "[w]hen a private party underwrites the cost of one particular prosecution, that case is not subject to the same economic restraints that limit all other prosecutions." To warrant recusal of the district attorney under section 1424, instead, the evidence must show the prosecutor suffers from a disabling conflict of interest. Such a conflict is demonstrated, in this factual context, only by a showing the private

financial contributions are of a nature and magnitude likely to put the prosecutor's discretionary decisionmaking within the influence or control of an interested party. In each case, the trial court must consider the entire complex of facts surrounding the conflict to determine whether the conflict makes fair and impartial treatment of the defendant unlikely.

(6) Supporting recusal here is the fact the largest payment, that for Strawn's first $9,450 bill, was, as the trial court emphasized, "payment of *600 money for a debt already incurred" by the district attorney. The final decision to obtain payment from Borland was not made until Strawn submitted his first bill. Because Strawn had contracted with the district attorney's office, rather than Borland, Chief Inspector Johnson reasonably believed the district attorney's office would be responsible for Strawn's bills if Borland did not pay them. Borland paid Strawn's bill, moreover, in response to a direct request from the district attorney's office. While decisions from other jurisdictions have approved of some forms of victim assistance, for example in the form of an attorney hired by a victim or victim's family to assist the public prosecutor (see, e.g., *Powers v. Hauck* (5th Cir. 1968) 399 F.2d 322, 324; *Rutledge v. State* (1980) 245 Ga. 768 [267 S.E.2d 199, 200]; *State v. Riser* (1982) 170 W.Va 473 [294 S.E.2d 461, 464]), none involved the public prosecutor's request for the victim's assistance to satisfy a monetary debt already incurred. Hence, none assist our analysis here.

The size of the contributions here also tends to show recusal would be within the trial court's discretion. District Attorney Danner testified his office fund for this type of investigation was very limited, and Chief Inspector Johnson apparently regarded the investigatory costs here as large enough to warrant the unusual measure of asking the victim to pay them.

Finally, the trial court's assessment of the strength of the prosecution case supports the decision to recuse. Before hearing the recusal motion, the court held an extensive hearing on the proper means of protecting Borland's asserted trade secrets from disclosure during the criminal proceedings. (See Evid. Code, § § 1060-1063.) In the course of that hearing, the court repeatedly stated its firm impression that the subject secrets, which Wang and Eubanks were alleged to have conspired to steal, Wang to have stolen and Eubanks to have received, do not in fact meet the definition of trade secrets for criminal purposes (Pen. Code, § 499c, subd. (a)(9)), although they might be trade secrets for purposes of civil remedies (Civ. Code, § 3426.1, subd. (d)). [FN9] Arguably, a factually weak case is more subject than a strong case to influence by extraneous financial considerations, since in the absence of financial assistance from the victim the prosecutor is more likely to abandon or plea bargain such a case.

FN9 The Attorney General observes, correctly, that the trial court's comments "are not *evidence* of weakness in the case." We do not suggest they are, and express no view as to the actual strength or weakness of the prosecution case. The trial court's comments are significant only in that they tend to show that court's own preliminary assessment of the case, an assessment the court may properly take into account in making its discretionary decision on recusal.

Considering the above factors, we cannot say, as a matter of law, that had the trial court addressed the second part of the *Conner* test-the gravity of *601 the identified conflict-it would have abused its discretion in finding the conflict so grave as to render fair treatment of the defendants in all stages of the criminal proceedings unlikely. The Court of Appeal therefore erred in holding that, assuming a conflict existed, it was not, as a matter of law, grave enough to justify recusal.

Disposition

The cause is transferred to the Court of Appeal with directions to vacate its previous judgment and dismiss the appeal as moot.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Chin, J., and Brown, J., concurred.

GEORGE, C. J.

, Concurring.-I have signed the majority opinion, and write separately simply to explain that, on these facts, I believe-apart from any general concerns I may have about privately funded public prosecutions -recusal of the district attorney's office was required as a matter of law.

As the majority holds, the trial court correctly found that the prosecutor suffered a "conflict of interest" under Penal Code section 1424-i.e., there was "a reasonable possibility that the [district attorney's] office may not exercise its discretionary function in an evenhanded manner" (*People v. Conner* (1983) 34

Cal.3d 141, 148 [193 Cal.Rptr. 148, 666 P.2d 5] [construing Pen. Code, § 1424].) The majority then addresses the remaining question-whether recusal of the district attorney's office was required because the conflict made it "unlikely that the defendant would receive a fair trial." (Pen. Code, § 1424.)

As this court said in *Conner*, determination of that question calls for an inquiry as to whether the conflict is "so grave as to render it *unlikely* that defendant *will receive fair treatment* during all portions of the criminal proceedings." (*People v. Conner, supra*, 34 Cal.3d at p. 148, italics added.) The majority concludes, correctly, that on these facts the trial court would not have abused its discretion had it concluded that fair treatment of defendants was unlikely. I would stress that under the circumstances here presented, the trial court properly could not have exercised its discretion *otherwise*.

I

As the majority acknowledges, the relevant facts are as follows: (i) The district attorney solicited the alleged crime victim to pay approximately *602 $13,000 incurred by the district attorney's office in connection with that office's investigation of the case; (ii) a deputy district attorney testified that the debt owed by the office was "substantial" in view of the office's limited resources; and (iii) the trial court assessed the evidentiary support for the criminal trade secret charges against defendants as extremely weak. Certainly, as the majority concludes, all three circumstances "support" recusal under Penal Code section 1424. As explained below, and contrary to the arguments advanced by the Attorney General on behalf of the district attorney, and relied upon by the Court of Appeal herein, these circumstances also *mandate* recusal under the statute.

First, the circumstance that the district attorney *solicited* Borland International to pay the debt incurred by the district attorney rendered it problematic, if not unlikely, that the district attorney would be able to exercise objectively his prosecutorial discretion. As the trial court observed, it would be quite difficult for the district attorney to tell Borland that he has decided not to prosecute Borland's case, after *Borland, at the district attorney's request*, agreed to pay substantial bills that were submitted to, and that were the responsibility of, the district attorney's office. Accordingly, this was not, as the Attorney General asserts, merely an example of normal "cooperation by a victim corporation." Instead, the *solicited* contributions here at issue are of a different order and pose a far greater risk of improperly influencing the district attorney's exercise of charging and prosecuting discretion.

Second, as the majority acknowledges, the size of the solicited contributions increased the likelihood that defendants would not receive fair treatment. The district attorney testified that the office fund for this type of investigation was very limited, and the chief inspector "apparently regarded the investigatory costs here as large enough to warrant the unusual measure of asking the victim to pay them." (Maj. opn., *ante*, at p. 600.) As was conceded by the deputy district attorney who argued the recusal motion, "[t]he sum of money that Borland paid in the [district attorney] universe is substantial considering our resources."

Certainly, the district attorney would have appreciated that Borland stood to benefit from the criminal prosecution of defendants. Not only would such a prosecution assist Borland's parallel civil action, help protect any asserted trade secrets, and serve to deter others from committing similar acts in the future, but prosecution also would constitute a major disruption and distraction for Symantec Corporation, one of Borland's primary competitors. Under these circumstances, the solicited funds likely would be considered by Borland to be a prudent investment whether or not the prosecution ultimately was pursued to trial and conviction because, by keeping the prosecution *603 "alive a little longer," Borland would benefit competitively vis-a-vis Symantec. Thus, the district attorney could "reimburse" Borland for paying the incurred debt simply by exercising discretion to continue or extend the criminal investigation for longer than it otherwise would. As the opinion observes (maj. opn., *ante*, at p. 584, fn. 2), the district attorney maintained the charges against defendants until shortly after oral argument in this court, despite the apparent weakness of the case.

Under these circumstances, the district attorney-knowing the strategic importance of the matter to Borland, and having asked Borland to pay the district attorney's obligations-likely would feel a great sense of obligation to pursue the prosecution and would be reluctant to exercise objectively his prosecutorial discretion. This further increased the risk that defendants would not receive the fair, impartial treatment that other defendants would obtain in a similar situation.

The Court of Appeal concluded otherwise, reasoning

that an amount of money significant to a tightly budgeted public office is not necessarily large in the eyes of a successful for-profit corporation, and that, as the deputy district attorney arguing the motion put it, "the sum of money that Borland paid in the Borland universe is not great." Even if true, the district attorney's observation is of debatable relevance. The question is whether the size of the solicited contributions was sufficient to create a likelihood of unfairness to defendants arising from the alleged victim's undue influence *on the district attorney's* discretionary authority. It matters little that the $13,000 solicited funds might be "small potatoes" in Borland's eyes; the issue is the likely influence of such a payment upon the financially strapped public prosecutor in his treatment of the criminal investigation and continued prosecution of defendants.

Finally, as alluded to by the majority, the trial court made clear its "firm impression that the subject secrets ... *do not in fact meet the definition of trade secrets for criminal purposes* [citation], although they might be trade secrets for purposes of civil remedies [citation]." (Maj. opn., *ante*, at p. 600.) On the final two days of an eight-day pretrial hearing on Borland's request for a trade-secret protective order (Evid. Code, § 1061), the trial court asserted: "I don't have criminal trade secrets here in my opinion at all, and from what I've seen, ... I'm not sure why this case is here." Later, the court stated, "I don't see criminal trade secrets here." Finally, the court repeated, "it's this Court's view that there's not a criminal trade secret involved. And there isn't, gentlemen. I still say it to you. I don't know what we're doing here ...."

As the majority observes (maj. opn., *ante*, at p. 600, fn. 9), the trial court's statements reflect clearly the trial court's considered assessment that the *604 prosecution's case was factually weak. (See also maj. opn., *ante*, at p. 600.) Contrary to the Attorney General's suggestions, it is appropriate for an appellate court to take into account the trial court's assessment that the prosecution's case is weak, in determining whether the trial court would have abused its discretion had it denied the recusal motion.

II

I agree with the majority that the trial court would not have erred had it properly applied Penal Code section 1424 and granted defendants' recusal motion. Indeed, the trial court would have erred had it ruled otherwise. In light of (i) the circumstance that the contributions were solicited to satisfy obligations of the district attorney, (ii) the size of the contributions in relation to the budget of the district attorney's office, and (iii) the trial court's clearly expressed and considered assessment that the prosecution's case was weak, I conclude that the trial court would have abused its discretion had it denied the motion to recuse.

Mosk, J., concurred.

Cal. 1996.

People v. Eubanks

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C

THE PEOPLE ex rel. DENNIS KOTTMEIER, as District Attorney, etc., Petitioner,
v.
THE MUNICIPAL COURT OF THE SAN BERNARDINO JUDICIAL DISTRICT OF SAN BERNARDINO COUNTY, Respondent; JAMES J. CHARLES, JR., et al., Real Parties in Interest
No. E007729.

Court of Appeal, Fourth District, Division 2, California.

Apr 20, 1990.

SUMMARY

On petition of a county district attorney seeking relief from a policy imposed by the municipal court requiring the attendance of a deputy prosecutor at the trial of traffic infractions, and dismissing infraction cases or entering judgments of acquittal if no deputy prosecutor was present, the Court of Appeal granted a writ of mandate directing the municipal court to vacate its orders terminating the proceedings on purported findings of not guilty as to the four individual defendants named as real parties, to reinstate the complaints, and to conduct trials in such cases in conformity with this opinion. It held that there was no due process violation in conducting traffic infraction hearings in the absence of a prosecutor and that Gov. Code, § 26500, which defines the duties of a district attorney, does not forbid a district attorney from declining to have a deputy present at such hearings. It further held that the trial court could question defendants in such cases and that it was not required to take the initiative and examine the People's witnesses, but that it could properly require the district attorney to supply a list of witnesses for each case and should then permit such witnesses to give a narrative recital. (Opinion by Hollenhorst, Acting P. J., with McDaniel and Dabney, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Criminal Law § 635--Appellate Review--Appealable Judgments and Orders-- Dismissal--Defendant Not Placed in Jeopardy.

As a rule, jeopardy does not attach until a witness has been sworn. The prosecution *603 may appeal an order or judgment dismissing or otherwise terminating a criminal action before the defendant has been placed in jeopardy. Thus, although the trial court purported to make findings of not guilty in four traffic infraction cases after refusing to allow any witnesses for the prosecution to testify because no deputy prosecutor attended the hearing, the trial court's actions were in fact dismissals under Pen. Code, § 1385 (dismissal in furtherance of justice) and the orders were appealable since jeopardy had not attached. No evidence had been taken and no finding of fact could have been made and it was clear that the results occurred not because the prosecution failed to prove guilt, but because the court refused to conduct trials.

(2) Mandamus and Prohibition § 27--Mandamus--To Courts and Court Officers--Right of Prosecutor to Extraordinary Relief.

In traffic infraction cases involving a municipal court's policy of declining to call witnesses, even though police officers were present to testify, and of purportedly making not guilty findings if no district attorney was in court, the district attorney, who was entitled to appeal the orders since the municipal court's actions were in fact dismissals under Pen. Code, § 1385 (dismissal in the furtherance of justice), was also entitled to seek the alternative of extraordinary relief by petitioning for a writ of mandate and prohibition. Relegating the district attorney to the remedy of appeal would delay the resolution of an important public issue and add to what was already a multiplicity of appeals.

(3) District and Municipal Attorneys § 2--Powers and Duties--Statutory Definition of Duties.

The intention of Gov. Code, § 26500, which defines the duty of a district attorney, is to grant the district attorney discretion both to initiate and conduct prosecutions insofar as it means that it is the district attorney's prerogative to determine whether to file charges and whether to continue a prosecution.

(4) Criminal Law § 220--Trial--Presence of Counsel--Presence of Prosecutor.

The conduct of infraction trials without the participation of a prosecutor does not violate a defendant's due process rights. The prohibition

against appointed counsel in infraction cases (Pen. Code, § 19.6, formerly Pen. Code, § 19c) insures that a majority of defendants will be unrepresented. Thus, the presence of a prosecutor would hardly be to a defendant's advantage.

(5) District and Municipal Attorneys § 2-Powers and Duties--Declining to Have Deputy Prosecutor Attend Traffic Infraction Trials.
Gov. Code, § 26500, which defines the duty of a district attorney, does not *604 forbid a decision by the district attorney not to provide a deputy prosecutor for infraction trials.

(6) Courts § 5--Inherent and Statutory Powers--Compelling Attorney's Appearance.
A court has the power to enforce an attorney's duty to appear where a commitment to do so has been made.

(7) Courts § 5--Inherent and Statutory Powers--Court's Power to Manage Proceedings Before It.
Every court has certain inherent powers to manage the proceedings before it (Code Civ. Proc., § 128), but this power should be exercised by courts in order to insure the orderly administration of justice and not as a weapon in a battle of priorities. Thus, in four traffic infraction cases involving the municipal court's policy of declining to call witnesses, even though police officers were present to testify, and purportedly making not guilty findings if no deputy district attorney was present in court, an order requiring the municipal court to allow infraction proceedings to be held in the absence of a deputy did not necessarily invade the municipal court's powers or dignity.

(8) Criminal Law § 234--Trial--Power and Conduct of Judge--Examination of Witnesses--Examination of Prosecution Witnesses.
It is the duty of the trial court to assist in bringing out facts, within reasonable limits, to the end of reaching a just result. However, no court should be placed in the position of appearing to assist one side or the other. Thus, in traffic infraction cases in which the district attorney declined to have a deputy present in court, it was not improper for the trial court to question the defendants, but the trial court was not required to take the initiative in examining the prosecution's witnesses. The trial court, which had continuing discretion to request the presence of a prosecutor in an unusual case, could properly require the district attorney to supply a list of witnesses for each case and was then required to permit each such witness to give a narrative recital.

[See Cal.Jur.3d (Rev), Criminal Law, § 2937; 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 2884.]

COUNSEL

Dennis Kottmeier, District Attorney, and Joseph A. Burns, Deputy District Attorney, for Petitioner. *605

Roger Meadows for Respondent.

No appearance for Real Parties in Interest.

HOLLENHORST, Acting, P. J.

For the third time, the People, by and through Dennis Kottmeier, in his capacity as District Attorney for the County of San Bernardino, seek relief from this court from a policy imposed by the municipal court requiring the attendance of prosecutors at the trial of traffic infractions. [FN1] Although we have previously declined to assume jurisdiction and required petitioner to seek his available remedies in the lower courts, we find ourselves compelled at this time to intervene.

> FN1 We consider this the correct way to characterize the policy of respondent court, despite its purported compliance with the order of the superior court forbidding it to compel such attendance. As will be discussed below, the court's actions in dismissing all such cases if no prosecutor appeared was a transparent effort to force petitioner to provide a deputy.

Petitioner (hereinafter sometimes the District Attorney) filed his first petition with this court on October 3, 1989. This petition alleged that in July 1989, Judge David Merriam of respondent court notified petitioner that when he assumed the assignment of traffic trials on July 28, he would require the attendance of a deputy district attorney to represent the People. [FN2] Petitioner responded by requesting the cancellation of this policy, relying on *People v. Carlucci* (1979) 23 Cal.3d 249 [152 Cal.Rptr. 439, 590 P.2d 15]. Despite the intervention of Presiding Judge Anthony Piazza, this effort was unsuccessful, and on July 27, 1989, the District Attorney filed a petition for writ of prohibition with the superior court. On that same day, a copy of an alternative writ was served on respondent court and Judge Merriam, which forbade respondent from implementing its policy of requiring the presence of a

deputy district attorney.

FN2 Traffic trials are apparently calendared for Friday mornings.

In response, at the calling of his traffic infraction calendar on July 28, 1989, Judge Merriam announced his intention to obey the alternative writ. However, he declined to permit any witnesses for the People to testify unless they were formally called by an attorney. As no deputy was present, the court called the defendants and not only allowed them to tell their side of the incidents, but affirmatively questioned them. In the case of each defendant whose "trial" was reflected in the transcript provided to this court, the municipal court accepted defendant's version and found the *606 defendants not guilty. Petitioner asserted, without denial, that 13 defendants were in fact so found not guilty on that date.

The District Attorney's efforts to obtain a revised order pending the hearing on his petition for writ of prohibition failed, although Judge Merriam eventually modified his practice to that of granting acquittals under Penal Code section 1118 in all cases in which no prosecutor was present. This continued throughout the month of August and into September of 1989. The People began filing notices of appeal on all such cases, which had passed 50 by the time the first petition was filed in this court. [FN3]

FN3 We are informed that by now, well over 130 such appeals have been filed by the People. We are also informed that, contrary to the superior court's belief that each appeal could conveniently be resolved with respect to its particular issues, the appellate department is awaiting this court's pronouncement of a general rule of law.

On September 22, the District Attorney's petition was heard by the superior court. Although no written judgment was ever presented as part of the record to this court, the superior court announced its intention to deny relief on the theory that the People's remedy by appeal in each case was adequate. The court expressed the opinion that each appeal would present a fully developed fact situation, and would also provide the opportunity for specific relief. The court noted that the original alternative writ had been effectively circumvented by the municipal court, and relied on this to show that a general order in mandate might not cover later practices or policies.

The District Attorney filed his first petition with this court on October 3, 1989, in which he sought a full review of the issues. We granted relief in only a limited sense, ordering the superior court to set aside its finding that the remedy by appeal was adequate, and directing it to hear the case on its merits.

In obedience to this order, the superior court conducted further proceedings, and issued a judgment on February 15, 1990, directing the municipal court to cease from requiring or compelling the attendance of a prosecutor at traffic infraction hearings.

With prophetic anxiety, the District Attorney again resorted to this court, seeking a broader order. We again denied the petition, but did so expressly without prejudice to future proceedings "should there be further dismissals or should the order and judgment otherwise fail to achieve a result consistent with the interests of justice." Although we were reluctant to presume that respondent would flout or deliberately circumvent the superior court's order, we hoped by our language to indicate our general agreement with the result reached. *607

However, the instant petition was filed on March 1, 1990. Petitioner alleges that the municipal court has once again elected to comply with the letter of the order rather than its spirit, in that, while it makes no effort to compel the attendance of a deputy district attorney by the threat of contempt or other legal coercion, it has continued to refuse to allow the People's witnesses to take the stand and has continued to dismiss the infraction cases or enter judgments of acquittal. [FN4]

FN4 At some point over the last several months, Judge Ellen Brodie began to hear the traffic infraction calendar. She has expressed her solidarity with Judge Merriam on the issues of this case.

Availability of Relief

Four individuals have been named as real parties: James J. Charles, Jr., Dominic M. Davis, Anne M. Cordaro, and Jaime Giron. Their cases were called before respondent court on February 16, 1990. In no case was a deputy district attorney present, although police officers were present to testify; in no case was any witness sworn. When it appeared that no deputy district attorney was in court, the court declined to call any witnesses and found each defendant not guilty.

(1) The People may appeal "an order or judgment dismissing or otherwise terminating the action before

the defendant has been placed in jeopardy. ..." (Pen. Code, § 1466, subd. (2).) Jeopardy does not attach, as a rule, until a witness has been sworn. (*Richard M. v. Superior Court* (1971) 4 Cal.3d 370, 376-377 [93 Cal.Rptr. 752, 482 P.2d 664].) Although the trial court in these cases purported to make a finding of "not guilty," we think the court's actions are properly construed as dismissals under Penal Code section 1385. No evidence was taken and no finding of fact could properly have been made; it is abundantly clear that the results occurred not because the People had failed to prove guilt, but because the court refused to conduct trials.

The orders were therefore appealable, and petitioner is entitled to seek the alternative of extraordinary relief. In this case it is beyond question that relegating the People to the remedy of appeal would delay resolution of an important public issue, and add to what is already a multiplicity of appeals. (See *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 129-130 [142 Cal.Rptr. 325].)

Discussion

(2) Four distinct issues are presented by this petition. Does the conduct of infraction trials without the participation of a prosecutor violate a *608 defendant's right to due process? Does it violate the requirements of Government Code 26500? Does it improperly interfere with the court's inherent power to regulate and control its own procedures, and does it place the court in the intolerable position of playing the role of prosecutor? The first question is readily answered by resort to controlling authority; the other three require a more extended analysis.

In setting up the issues, however, we must observe that both sides have used lofty legal principles as a smoke screen to some extent. As we will have occasion to note again, this case is really a contest of wills between the court and the chief prosecutor. At oral argument, counsel for respondent stressed almost exclusively the court's desire to have a prosecutor present as an aid to the pretrial disposition of cases, and it is apparent that the essential battle is over the allocation of judicial and prosecutorial resources where both sides are stretched too thin.

This, of course, is an administrative, not a legal, dispute, and one which this court cannot effectively resolve. We must therefore confine ourselves to the legal trappings of the case.

I. Constitutional and Statutory Strictures

In *People v. Carlucci, supra*, 23 Cal.3d 249, the court held that there was no due process violation if an infraction hearing was held without the presence of the prosecutor. It further expressly held that no such violation existed by the fact that the trial judge called and questioned witnesses, although it cautioned that the trial judge, in such a case, must be careful to avoid any appearance of bias or advocacy. (At pp. 256-258.) However, in *Carlucci* the court did not consider the effect of Government Code section 26500.

That statute defines the duty of the district attorney, and states that he "shall attend the courts, *and within his or her discretion shall initiate* and conduct on behalf of the people all prosecutions for public offenses." The statute was amended in 1980 (Stats. 1980, ch. 1094, § 1), to add the portion italicized above.

In *People v. Daggett* (1988) 206 Cal.App.3d Supp. 1 [253 Cal.Rptr. 195], the appellate department of Sacramento County held that section 26500, as amended, did not require the attendance of a prosecutor at infraction trials. Relying in part on legislative history, the court ruled that the Legislature, in making the amendment, was conscious that the amended version would *609 grant the prosecutor discretion in appearing, as well as initiating a prosecution. [FN5] However, the court also pointed out that the amendments were made after the decision in *People v. Carlucci*, and that the Legislature was presumed to have been aware of the court's ruling that the prosecutor need not be present.

> FN5 Assembly Committee on Criminal Justice, Analysis of Senate Bill No. 1890, Comments, paragraph 4: "... This language appears to eliminate the existing mandate that the public prosecutor conduct all prosecutions for public offenses on behalf of the people and insert in it's [sic] stead discretionary provisions. Is this the intent? Different language should be drafted to accomplish the ostensible purpose of this provision without modifying the existing mandates (i.e. 'The public prosecutor shall attend the courts and conduct on behalf of the people all prosecutions which, within his/her discretion, have been initiated'. ..."

Although the language of Government Code section 26500 is certainly not free from doubt, we agree with the result reached in *People* v. *Daggett*. The phrase "attend the courts" is too vague to be of much use in interpretation; what courts? When? (3) On its face the

statute then appears to grant the district attorney discretion *both* to initiate *and* conduct the prosecutions. This is undoubtedly the intention of the statute, insofar as it means that it is the district attorney's prerogative to determine whether to file charges and whether to continue a prosecution. (See *People v. Adams* (1974) 43 Cal.App.3d 697, 707-708 [117 Cal.Rptr. 905].) It is less clear that the statute was intended to permit the district attorney to choose when to appear for trial, or what the result of his absence should be.

We note that it has been stated that the provisions of Government Code section 26500 requiring the presence of the prosecutor "are for the benefit of the people." (*People v. Thompson* (1940) 41 Cal.App.2d Supp. 965, 967 [108 P.2d 105].) This suggests that there is discretion not to appear, if the district attorney is willing to take the consequences of an adverse verdict or ruling, which in most misdemeanor and felony cases would be a foregone conclusion. If the District Attorney elected not to appear at a serious felony trial involving complex issues and numerous witnesses, two things would be clear: he would be in gross dereliction of his duty to the people of the state under Government Code section 26500, and the court would be justified in dismissing the case.

However, we do not think it either necessary or proper to consider such a situation, which is not before us. In *People v. Carlucci, supra,* the court extensively discussed the unique nature of infraction prosecutions and the benefits to all sides of encouraging expeditious and flexible procedures. (See also *In re Dennis* (1976) 18 Cal.3d 687, 695 [135 Cal.Rptr. 82, 557 P.2d 514].) (4), (5) The prohibition against appointed counsel in infraction cases (Pen. Code, § 19c) ensures that the majority of defendants will be *610 unrepresented, and the presence of a prosecutor would be "hardly to defendant's advantage." (*People v. Carlucci, supra,* 23 Cal.3d at p. 258.) We need not repeat in detail that court's recital of the practical considerations underlying the decision that such cases may be handled without the presence of a prosecutor; we need only agree and hold that petitioner's decision not to provide a prosecutor for infraction trials is not forbidden by Government Code section 26500.

II. Interference With the Court's Control of Its Procedures

(6) While a court unquestionably has the power to enforce an attorney's duty to appear where a commitment to do so has been made (see *In re Stanley* (1981) 114 Cal.App.3d 588, 591 [170 Cal.Rptr. 755]), the remedy is less certain where the district attorney simply declines to personally appear in a class of cases. Thus, we think the judgment by the superior court, which forbade any attempt to compel the attendance of a deputy district attorney, was correct.

Respondent argues, however, that it had the power and the right to refuse, in effect, to hear the trials in the absence of the prosecutor. It argues that it cannot in turn be forced to conduct trials without the assistance of an attorney for the People, and to assume the responsibility of ensuring that both sides fairly and completely present their cases. [FN6]

FN6 That respondent court's real grievance is quite different is again suggested by remarks made by Judge Brodie. After the superior court issued its judgment, she dismissed several cases due to the absence of a prosecutor, and then made the following comments, obviously directed to the law enforcement witnesses who had not been permitted to testify:
"The Court: ... You're found not guilty, sir. [¶] Officers, I want to say something to you. I would be very upset indeed if I were you and was put in the position of having the prosecutor of this county, the district attorney of this county, place so little worth on what you are doing that they won't send a deputy to court to prosecute your cases. [¶] Where is Mr. Goss? Where is Mr. Williams? Where is Miss Djanbatian? Where is Mr. Weintre? And where is Mr. Carroll? [¶] Not one of them is in Superior Court. One of them may be in Department A doing law and motion. The other four have nowhere to go on Friday mornings, no court appearances that I am aware of. [¶] And it seems to me that the elected district attorney of this county should fulfill his duty that he has been elected to perform and send people to court. [¶] We all do our jobs. You do your jobs. I do my job. And the district attorney should be doing his job."

We agree that, applied to an extreme case, this argument is not without merit. However, as discussed above, we are not considering an extreme case, but only infractions normally processed rapidly and informally.

The evident antagonism between petitioner and at

least some members of respondent court is not difficult to understand, and neither side is wholly *611 virtuous or unreasonable. The District Attorney doubtless considers his office understaffed and overworked, and believes that his deputies may be more usefully employed in more serious cases. Respondent feels that it is being inappropriately denigrated and ignored, and that its role as the only contact many citizens have with the court system deserves more consideration by the District Attorney. (See *People* v. *Daggett, supra*, 206 Cal.App.3d at pp. Supp. 6-7, dis. opn. of Marvin, J.) However, both sides appear to forget their joint interest in both the smooth functioning of the system and the goal of achieving justice. [FN7]

> FN7 Furthermore, respondent's approach has had the unfortunate result of exposing the judicial system to ridicule. We can only wince when contemplating the reactions of those members of the public who found themselves caught up in this charade. We are also sympathetic to the burdens imposed on the individual defendants against whom the People have determined to prosecute appeals, or who have been named here as real parties. For them, a trivial transgression has exposed them to the legal system at its most protracted and irrational.

(7) Every court has certain inherent powers to control and manage the proceedings before it. (Code Civ. Proc., § 128.) However, this power "should be exercised by the courts in order to insure the orderly administration of justice" (*Hays v. Superior Court* (1940) 16 Cal.2d 260, 264 [105 P.2d 975]) and not as a weapon in a battle of priorities. We do not see that requiring respondent court to allow infraction proceedings to be held in the absence of a deputy prosecutor necessarily invades its powers or dignity.

III.

(8) Finally, respondent asserts its concern over being "compelled" to play the role of advocate in questioning the People's witnesses. We observe that the record in this case indicates that the court saw nothing improper in questioning defendants, and indeed there was not; it is the duty of the trial court to assist in bringing out the facts, within reasonable limits, to the end of reaching a just result. (*People v. Carlucci, supra*, 23 Cal.3d at p. 256; *Estate of Dupont* (1943) 60 Cal.App.2d 276 [140 P.2d 866].) In fact, Judge Merriam's practice of calling defendants and then questioning them extensively supports the inference that the present zealous concern for the court's appearance of untainted impartiality has merely been cobbled up to justify its actions.

However, we stop short of holding that respondent court must take the initiative in examining the People's witnesses, as we agree that no court should be placed in the position of appearing to assist one side over the other. This principle should be most carefully and rigorously followed where the party being questioned appears for the prosecution, to avoid the inference that the court and law enforcement are "in cahoots" and the *612 result of the trial a foregone conclusion. (See generally *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512 [116 Cal.Rptr. 260, 526 P.2d 268].)

As the superior court observed, there are difficulties in resolving the case in a manner which will cover all eventualities without placing unnecessary and improper strictures on either party. In attempting to do so, this court must to some extent depend on the good faith of both sides, although the unresolved, underlying basis of the dispute makes such reliance probably over-optimistic.

The municipal court may properly require the District Attorney to supply a list of witnesses for each case, for example; the court should then permit the witnesses to give a narrative recital. The court has no obligation, however, to assist the People's witnesses in presenting the case, and we recognize its continuing discretion to request the presence of a prosecutor in the unusual case.

We requested respondent and real parties to respond to the petition and held oral argument. The case is appropriate for the issuance of a peremptory writ in the first instance. (Code Civ. Proc., § 1088; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178-179 [203 Cal.Rptr. 626, 681 P.2d 893].)

Let a peremptory writ of mandate issue directed to the Municipal Court of San Bernardino County, directing it to vacate its orders terminating proceedings on a purported finding of "not guilty" in those actions entitled People v. James J. Charles, Jr., action No. ONM 10842; People v. Dominic M. Davis, action No. ONM 118411; People v. Anne M. Cordaro, action No. SH 592271, and People v. Jaime Giron, action No. SH 604856 and to reinstate the complaints in said action. Respondent is further directed to proceed to conduct trials in said matters in conformity with the views expressed in this opinion.

McDaniel, J., and Dabney, J., concurred. *613

Cal.App.4.Dist.,1990.

People ex rel. Kottmeier v. Municipal Court of State (Charles)

END OF DOCUMENT

Date of Hearing: June 20, 2000
Counsel: Gregory Pagan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Carl Washington, Chair

SB 1342 (Burton) - As Amended: June 13, 2000

SUMMARY : Requires the court to order DNA testing on evidence relevant to conviction of a criminal defendant upon specified conditions, and requires the appropriate governmental entity to preserve any biological material secured in a criminal case as specified. Specifically, this bill :

1) Provides that a defendant in a criminal case may make a motion in the trial court for performance of DNA testing on evidence relevant to the charges that resulted in the conviction or sentence which was not tested because either the evidence or the technology for forensic testing was not available at the time of trial.

2) Requires that the motion for DNA testing be verified by the defendant under penalty of perjury that the information contained in the motion be true and correct to the best of his or her knowledge.

3) Requires that a notice of the hearing be served on the Attorney General and the district attorney in the county of conviction 30 days prior to the hearing, and that the hearing be heard by the judge who conducted the trial unless the presiding judge determines that judge is unavailable.

4) The court shall grant the hearing on the motion if the defendant presents a prima facie case that identity was a significant issue in the case, and the court finds all of the following:

   a) The result of the testing has the scientific potential to produce new, non-cumulative evidence that is material and relevant to the defendant's assertion of innocence.

   b) The testing requested employs a method generally accepted within the scientific community.

c) The evidence to be tested is available and in a condition that would permit DNA testing requested in the motion.

d) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect.

5) Requires, if known, that the motion identify the evidence subject to the testing and the specific type of testing being requested by the defendant.

6) States that if the prosecuting attorney objects to the specific items sought to be tested, to the specific type of test requested, or if there is an issue as to the condition of a questionable sample, the court shall conduct a hearing to resolve the issues.

7) Provides that if a motion for DNA testing has been granted, the testing shall be conducted by a laboratory mutually agreed upon by the defendant and the district attorney in a non-capital case or the Attorney General in a capital case. If the parties cannot agree, the court shall designate the laboratory to conduct the test.

8) Requires that the results of any testing ordered be fully disclosed to each of the parties. If requested by either party, the court shall order production of the underlying data and notes.

9) Provides that the cost of DNA testing shall be borne by the State or by the applicant if the court finds that the applicant is not indigent and has the ability to pay. Requires that the designated laboratory present any bill for the State's share of costs to the court for approval; and upon approval, the laboratory shall submit the bill to the state treasurer for payment. If, after 30 days the superior court has taken no action on the bill, it shall be deemed approved.

10) Provides that the court may at any time appoint counsel and upon request of the defendant, in the interests of justice, the court may order the defendant present at the hearing on the motion.

11) Requires the appropriate governmental entity to preserve any

biological material secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with the case, but a governmental entity may destroy biological materials before the expiration date of the following conditions are met:

a) The governmental entity notifies the person who remains incarcerated in connection with the case, any counsel of record, the public defender and the district attorney in the county of conviction and the Attorney General.

b) No person makes an application for an order requiring DNA testing on the evidence sought to be destroyed within 180 days of receiving the above notice.

c) No other provision of law requires that the biological evidence be preserved.

EXISTING LAW :

GENERAL PROVISIONS

1) Establishes the DNA and Forensic Identification Data Base and Data Bank Act of 1998. (Penal Code Section 295(a).)

2) States that it is the Legislature's intent to use the DNA and Forensic Identification Data Bank to detect and prosecute individuals responsible for sex offenses and other violent crimes, exclude suspects who are being investigated for such crimes, and to identify missing and unidentified persons. (Penal Code Section 295(b)(3).)

3) Requires the Department of Justice's (DOJ) DNA laboratory, the California Department of Corrections (CDC), and the California Youth Authority (CYA) to adopt policies and enact regulations as necessary to give effect to the Act. (Penal Code Section 295(e)(1).)

4) Authorizes DOJ laboratories approved by ASCLD/LAB, or any approved certifying body, and any crime laboratory designated by DOJ and accredited by ASCLD/LAB to analyze crime scene samples. (Penal Code Section 297(a).)

5) States that the DOJ shall perform DNA analysis and other

forensic identification analysis only for identification purposes. Provides that all DNA profiles retained by the DOJ are confidential except as provided by statute. (Penal Code Section 295.1(a), 299.5(a).)

CONVICTED PERSONS REQUIRED TO SUBMIT SAMPLES

6) Requires any person convicted of any of the following crimes to provide two specimens of blood, a saliva sample, right thumbprints and a full palm print of each hand: any registerable sex offense, murder or attempted murder, voluntary manslaughter, felony spousal abuse, aggravated sexual assault of a child, felonious assault or battery, kidnapping, mayhem, and torture. (Penal Code Section 296(a)(1)(A - I).)

7) Provides that any person who is required to register as a sex offender who is committed to any CYA institution where the person was confined, granted probation, or released from a state hospital as a mentally disordered sex offender shall be required to give the specified biological samples. (Penal Code Section 296(a)(2).)

SAMPLES FROM SUSPECTS

8) Provides that samples obtained from a suspect shall only be compared to samples taken from the criminal investigation for which he or she is a suspect and for which the sample was originally taken either by court order or voluntarily. (Penal Code Section 297(b).)

9) Provides that a person whose DNA profile has been included in the data bank shall have his or her information and materials expunged if the conviction was reversed and the case dismissed, the person was found to be factually innocent, or the person has been acquitted of the underlying offense. (Penal Code Section 299(a).)

10) Requires the DOJ to review its data bank to determine whether it contains DNA profiles from persons who are no longer suspects in a criminal case. Evidence accumulated from any crime scene with respect to a particular person shall be stricken when it is determined that the person is no longer a

suspect. (Penal Code Section 299(d).)

FISCAL EFFECT : Unknown

COMMENTS :

1) Author's Statement . According to the author, "This bill would allow a convicted defendant to make a motion before the trial court for DNA testing that was not available at trial because

the evidence or the testing technology was not available to the defendant. California has no statute or case law that authorizes such testing. This bill balances the need for discovering the truth with procedural fairness and practicality. It does not allow DNA testing in every case - only where the identity of the accused was a significant issue at trial, and the court finds, among other things, that the result of the testing will produce new evidence that is material and relevant to the defendant's assertion of innocence. The bill also provides safeguards to ensure that the evidence is available and reliable.

"Innocent people should not serve time or be executed for crimes they did not commit. As long as an innocent person is incarcerated for a crime he or she did not commit, the guilty party remains at-large, a danger to society and unpunished."

2) Background . At the Innocence Project run by attorneys Peter Neufeld and Barry Scheck at the Cardoza Law School in Michigan, second- and third-year law students evaluate cases from all over the country to determine which cases they will seek post-conviction DNA testing. As of January 2000, the Innocence Project has "played a role in 39 exonerations." (Boyer, Peter J. "Annals of Justice: DNA on Trail", New Yorker . January 17, 2000, Page 42.) In order to qualify for help by the Innocence Project, the case had to have available biological material and "the defense had to have been that the accused had been wrongly identified by the victim." (Id. At 45.)

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. As a result, in California in cases where DNA has been tested and an inmate has been released, the inmate has had to convince the prosecutor in the

original case to allow DNA testing. Of the 70 cases in the United States that have been vacated on the basis of DNA testing, four were in California.

When discussing the case of Herman Atkins, originally prosecuted in Riverside County and recently released from prison, Neufeld of the Innocence Project stated, "California currently lacks a statute giving inmates the right to post-conviction DNA testing. . . . As a result, an inmates is at the mercy of the good-will of the prosecutor." (Los Angeles Times , February 9, 2000, Section A, Page 10.) According to the article, a motion by the Innocence Project stated, "The original prosecutor in the case resisted testing for several

years." (Id.) Upon Atkins' release, he had been in prison for 12 years and it has taken Atkins "three years to get a judge to agree to DNA testing of the biological evidence recovered from the victim, who had fingered Atkins as her attacker." (USA Today , February 29, 2000.)

At this time, only New York and Illinois have statutes providing for post-conviction testing in certain cases. Currently, in addition to this legislation, there is federal legislation proposed, as well as legislation proposed in other states.

3) Federal Legislation . SB 2073 (Leahy) provides, in part, for DNA testing of biological materials related to the investigation or prosecution that resulted in the judgment for which the person is in custody. If passed, SB 2073 would require that states make similar DNA testing available to convicted persons.

SB 2073 would require that the court order DNA testing upon a determination that the testing may produce non-cumulative, exculpatory evidence relevant to the claim of wrongful conviction or sentence. In other words, the defendant would be required to show that the testing might produce evidence favorable to the defendant. This bill only requires that defendant show that the testing has the scientific potential to produce new non-cumulative evidence, which would be the case any time previously untested materials are examined. SB 2073 requires that the person requesting the order for testing be in custody and that the material to be tested relate to the judgment for which the person is in custody. This bill does not require that the defendant be in custody, and testing can be requested on any charge that resulted in a conviction or

sentence. Therefore, a defendant may request testing on a prior conviction which served as a basis for an increased sentence. In addition, this bill would apply in all criminal cases, is not limited to felony cases, and would include misdemeanors as well. This bill requires that identity be a significant issue resulting in the conviction and, in that respect, is narrower than SB 2073.

According to the Associated Press, Senator Orrin Hatch, Chairman of the Senate Judiciary, intends to introduce legislation that would provide for DNA testing in order to establish innocence. The Hatch legislation would only be operative for two years after the date of enactment. It requires that the defendant assert actual innocence under penalty of perjury, and identity had to have been an issue at the trial. Under the Hatch proposal, an in-custody defendant would be required to show that testing of the specified evidence would, assuming

exculpatory results, establish the actual innocence of the applicant. This bill only requires that the specified evidence be relevant to the charge. Is this bill overly broad in that it does not require that the defendant show some degree of likelihood that the testing of the specified material would produce favorable evidence or establish actual innocence?

4) Attorney General's Office . The Attorney General's Office has no position on the bill at this time, but believes that the proposed standard for ordering DNA testing is too low. The Attorney General's Office states, "We share your goal providing a means by which innocent persons who have been wrongly convicted may use new scientific techniques to prove their innocence. However, as you are aware, we have significant concerns about the bill as currently drafted. Our primary concern is the standard employed. SB 1342 mandates DNA testing if identity was a significant issue at the trial, and the court finds that results of the testing 'has the scientific potential to produce new non-cumulative evidence that is material and relevant to the defendant's assertion of innocence.' We believe testing should be granted if the evidence to be tested would be dispositive, not merely relevant, on the question of innocence. Additionally, we believe it is essential to include language on a number of points of procedure so as to ensure this provision is not used to delay the execution of sentence or the administration of justice and will not unjustly divert scarce and costly

resources."

5) Technical Amendments . This bill allows a defendant who was convicted in a criminal case to make application for an order requiring that DNA testing be conducted on evidence relevant to the conviction or sentence. This bill should be amended to clarify that these provisions only apply to defendants convicted after a court or jury trial in order to prevent defendants who have pled guilty from bringing a motion. Additionally, this bill should be amended to clarify that identity had to have been a significant issue that resulted in the conviction or sentence. This bill should also be amended in order that results of any testing be disclosed to both the person filing the motion and the district attorney or Attorney General.

6) Arguments in Support .

a) According to the American Civil Liberties Union, "DNA testing has exonerated more than 60 inmates in the United States and Canada. (See DNA Bill of Rights, American Bar

Association Journal, March 2000). The advent of DNA testing raises serious concerns about the prevalence of wrongful convictions, especially wrongful convictions arising out of mistaken eyewitness identification testimony. According to a 1996 Department of Justice study entitled 'Convicted by Juries, Exonerated by Science: Case Studies of Post-Conviction DNA Exonerations', in approximately 20-30% of the cases referred for DNA testing, the results excluded the primary suspect. Without DNA testing, many of these individuals might have wrongfully continued to serve sentences for crimes they did not commit.

"As long as an innocent person is incarcerated for a crime he or she did not commit, the guilty party remains at-large, a danger to society and unpunished. The safety of society requires that the guilty party be apprehended and brought to justice."

b) The California Attorneys for Criminal Justice states, "The importance of this bill is clear. As much as we strive for a perfect justice system, we know that sometimes it does not work properly and innocent people get convicted of and are sentenced for crimes they did not commit. SB 1342

would implement a safeguard against wrongful convictions and provide a mechanism for wrongly convicted people to prove their innocence and secure their release from prison. It contains appropriate guidelines to ensure all people and entities involved have an ample opportunity to test the evidence and review the findings."

REGISTERED SUPPORT / OPPOSITION :

Support

American Civil Liberties Union
California Attorneys for Criminal Justice
Committee on Moral Concerns
_ Crime Victims United of California

Opposition

None on File

Analysis Prepared by : Gregory Pagan / PUB. S. / (916) 319-3744

In re WILLIAM JOHN CLARK on Habeas Corpus.
No. S022475.

Supreme Court of California

Jul 29, 1993.

SUMMARY

Defendant, who had been sentenced to death for capital murder (Superior Court of Los Angeles County, No. A083960, Harry Mock, Jr., Judge), had unsuccessfully appealed that judgment, and had unsuccessfully petitioned for a writ of habeas corpus, brought a second petition for a writ of habeas corpus claiming that in the proceedings leading to his conviction and sentence he was denied due process, a fair trial, effective assistance of counsel, and protection against cruel and unusual punishment.

The Supreme Court denied defendant's second petition. It held that generally, absent justification for the failure to present all known claims in a single, timely petition for a writ of habeas corpus, successive or untimely petitions will be summarily denied. The only exception to this rule applies to petitions which allege facts which, if proven, would establish that a fundamental miscarriage of justice occurred as a result of the proceedings leading to conviction or sentence. A fundamental miscarriage of justice is established by showing: (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the error or omission no reasonable judge or jury would have imposed a sentence of death; or (4) that the petitioner was convicted under an invalid statute. Since defendant did not state specific facts to establish that his newly made claims were presented without substantial delay or show that any claim resulted in a fundamental miscarriage of justice, defendant was not entitled to the court's consideration of the merits of the claims contained in his second petition. (Opinion by Baxter, J., with Panelli, Arabian and George, JJ., concurring. Separate concurring opinion by Lucas, P. J. Separate concurring and dissenting opinions by Mosk and Kennard, JJ.) *751

HEADNOTES

Classified to California Digest of Official Reports

(1) Habeas Corpus § 4--Exhaustion of Remedies.
Habeas corpus is an extraordinary remedy. It may not be invoked where the accused has such a remedy under the orderly provisions of a statute designed to rule the specific case upon which he or she relies for discharge. This would be an abuse of process, as the relief under the remedy provided by the statute would accomplish all that the accused was seeking and all that the writ of habeas corpus was ever designed to accomplish, namely, the discharge of the accused. The writ of habeas corpus was not created for the purposes of defeating or embarrassing justice, but to promote it.

[See 6 **Witkin & Epstein,** Cal. Criminal Law (2d ed. 1989) § 3339.]

(2) Habeas Corpus § 10--Grounds for Relief--Unconstitutional Statute-- Application of Procedural Rules Governing Habeas Corpus Petitions.
Challenges to the validity of the statute under which a habeas corpus petitioner was convicted may be raised at any time. In some cases, habeas corpus is the only remedy available by which this claim may be raised, and the importance of securing a correct determination on the question of the constitutionality of a statute warrants departure from the usual procedural limits on habeas corpus. For that reason, these claims are not subject to the rules requiring justification for delay or exhaustion of appellate remedies.

(3) Habeas Corpus § 28--Petition--Delay--Requirement of Explanation.
A petitioner is required to explain and justify any significant delay in seeking habeas corpus relief. This is particularly necessary where a petitioner has made prior attacks on the validity of the judgment without raising the issues raised in the habeas corpus petition. The burden is one placed even on indigent petitioners appearing in propria persona, and is not met by an assertion of counsel that he or she did not represent the petitioner earlier.

(4) Habeas Corpus § 1--Matters Raised--Issues Already Resolved on Appeal.
Issues resolved on appeal will not be reconsidered on habeas corpus, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction. Without this usual limitation on the use of the writ, judgments of conviction of crime would have only a semblance of finality. *752

(5) Habeas Corpus § 9--Grounds for Relief--Newly Discovered Evidence.
Whether raised in a petition for a writ of habeas corpus or by *coram nobis*, newly discovered evidence is a basis for relief only if it undermines the prosecution's entire case. It is not sufficient that the evidence might have weakened the prosecution's case or presented a more difficult question for the judge or jury. A criminal judgment may be collaterally attacked on the basis of newly discovered evidence only if the new evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase of a capital prosecution, the evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability.

(6) Habeas Corpus § 12--Grounds for Relief--Denial of Competent Counsel-- Failure to Present Evidence.
Defense counsel's alleged incompetence resulting in the failure to discover and present evidence is a basis for habeas corpus relief only if it undermines the prosecution's entire case. The presumption that the essential elements of an accurate and fair proceeding were present is not applicable in such a case, as it is when the basis on which relief is sought is newly discovered evidence. Nonetheless, the petitioner must establish prejudice as a demonstrable reality, not simply speculation as to the effect of the errors or omissions of counsel. The petitioner must demonstrate that counsel knew or should have known that further investigation was necessary, and must establish the nature and relevance of the evidence that counsel failed to present or discover. Prejudice is established if there is a reasonable probability that a more favorable outcome would have resulted had the evidence been presented, i.e., a probability sufficient to undermine confidence in the outcome. The incompetence must have resulted in a fundamentally unfair proceeding or an unreliable verdict.

(7) Habeas Corpus § 9--Grounds for Relief--Attack on Validity of Judgment.
Postconviction habeas corpus attack on the validity of a judgment of conviction is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension. However, some trial errors, even though of constitutional dimension, are not cognizable on habeas corpus because the error carries with it no risk of convicting an innocent person.

(8) Habeas Corpus § 38--Judgment and Review--Appeal.
Because no appeal lies from the denial of a petition for a writ of habeas corpus, a prisoner whose petition has been denied by the superior court can obtain review of his or her claims only by the filing of a new petition in the Court of Appeal. *753

(9) Habeas Corpus § 1--Matters Raised--Claims Already Rejected.
Absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected. The court will also refuse to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment.

[See 6 **Witkin & Epstein**, Cal. Criminal Law (2d ed. 1989) § 3344.]

(10) Habeas Corpus § 35--Judgment and Review--Summary Denial.
The denial of a habeas corpus petition without issuance of an order to show cause, often referred to as a summary denial, does not mean that the court has not considered the merits of the claims. Unless a procedural bar is apparent, the court will determine whether the petition states a prima facie case for relief, i.e., whether it states facts which, if true, entitle the petitioner to relief.

(11a, 11c) Habeas Corpus § 28--Petition--Successive Petitions--Abuse of Writ.
It is court policy to deny an application for habeas corpus which is based upon grounds urged in a prior petition which has been denied, where there is shown no change in the facts or the law substantially affecting the rights of the petitioner. Delayed and repetitious presentation of claims is an abuse of the writ. Also, a successive petition presenting additional claims that could have been presented earlier is a delayed petition that the court will ordinarily deny. Further, Pen. Code, § 1475 (successive applications for writ of habeas corpus), does not limit the court's power to decline to consider successive petitions on

their merits nor does it mandate such consideration. The court may require an explanation for the failure to include the claim or claims on which such petitions are based in the prior petition, and the justification must be sufficient to outweigh the importance of finality of judgments and to justify the imposition on the court of the burden of reviewing multiple petitions. The legislative purpose underlying § 1475 is to control abuses of the writ and thereby spare courts with jurisdiction over habeas corpus petitions the burden of repetitious petitions.

(12) Habeas Corpus § 26--Jurisdiction--Successive Petitions--Applicability of Governing Statute.
Pen. Code, § 1475, which designates the court having jurisdiction over successive petitions for habeas corpus relief, applies if the court issues either a writ or an order to show cause.

(13) Habeas Corpus § 29--Petitions--Delayed or Successive Petitions-- Justification.
Before considering the merits of a second or successive petition for a writ of habeas corpus, a court will first ask whether *754 the failure to present the claims underlying the new petition in a prior petition has been adequately explained, and whether that explanation justifies the piecemeal presentation of the petitioner's claims. In assessing a petitioner's explanation and justification for the delayed presentation of a claim, the court will also consider whether the facts on which the claim is based, although only recently discovered, could and should have been discovered earlier. A petitioner will be expected to demonstrate due diligence in pursuing potential claims. However, where the factual basis for a claim was unknown to the petitioner and he or she had no reason to believe that the claim might be made, or where the petitioner was unable to present the claim, the court will continue to consider the merit of the claim if it is asserted as promptly as reasonably possible. Also, claims which are based on a change in the law which is retroactively applicable to final judgments will be considered if they are promptly asserted and if application of the former rule is shown to have been prejudicial. These rules are not affected by the ruling of the United States Supreme Court concerning state prisoners' habeas corpus petitions in federal court.

(14) Habeas Corpus § 29--Petitions--Delayed or Successive Petitions-- Justification--Reliance on Counsel.
A prisoner bringing a successive or delayed petition for a writ of habeas corpus must explain and justify the delayed presentations of claims. The petitioner may rely on counsel who then represents him or her to include the claim in a petition to be filed by counsel if the petitioner has alerted counsel to the issue. If the petitioner is not represented by counsel, he or she need not develop the legal theory on which the claim is based, but must fully and fairly state the facts which underlie the claim for relief. Whether there has been a change of counsel is irrelevant to whether the merits of claims raised for the first time in a successive petition should be entertained. The rule is that the court will look to what the petitioner or counsel knew at the time of the appeal or the filing of the first habeas corpus petition, and demand that the failure to raise all issues in a single, timely petition be justified. In limited circumstances, consideration may be given to a claim that prior habeas corpus counsel did not competently represent a petitioner.

(15) Criminal Law § 92--Rights of Accused--Aid of Counsel--Collateral Attack on Judgment:Habeas Corpus § 1--Petitioner's Right to Counsel.
An imprisoned defendant is entitled by due process to reasonable access to the courts, and to the assistance of counsel if counsel is necessary to ensure that access. But neither U.S. Const., 8th Amend., nor the due process clause gives the prisoner, even in a capital *755 case, the right to counsel to mount a collateral attack on the judgment. However, if a petition for habeas corpus attacking the validity of a judgment states a prima facie case leading to issuance of an order to show cause, the appointment of counsel is demanded by due process concerns. Also, regardless of whether a constitutional right to counsel exists, a petitioner who is represented by counsel when a petition for a writ of habeas corpus is filed has a right to assume that counsel is competent and is presenting all potentially meritorious claims.

(16) Habeas Corpus § 29--Petitions--Delayed or Successive Petitions-- Justification--Inadequate Counsel in Connection With Previous Petition.
A prisoner bringing a successive or delayed petition for a writ of habeas corpus must explain and justify the delayed presentation of claims. If counsel failed to afford adequate representation in a prior habeas corpus application, that failure may be offered in explanation and justification of the need to file another petition. The petitioner must allege with specificity the facts underlying the claim that the inadequate presentation of an issue or omission of any issue reflects incompetence of counsel, i.e., that the issue is one which would have entitled the petitioner to relief had it been raised and adequately presented in the initial petition, and that counsel's

failure to do so reflects a standard of representation falling below that to be expected from an attorney engaged in the representation of criminal defendants. However, if the petitioner is aware of facts that may be a basis for collateral attack, and of their potential significance, he or she may not fault counsel for failing to pursue that theory of relief if the petitioner failed to advise counsel of those facts.

(17) Habeas Corpus § 29--Petitions--Delayed or Successive Petitions-- Justification--Claim Developed by New Counsel.
A prisoner bringing a successive or delayed petition for a writ of habeas corpus must explain and justify the delayed presentation of claims. However, mere omission from the previous petition of a claim developed by new counsel does not raise a presumption that prior habeas corpus counsel was incompetent, or warrant consideration of the merits of a successive petition. Also, the court will not consider on the merits successive petitions attacking the competence of trial or prior habeas corpus counsel which reflect nothing more than the ability of present counsel, with the benefit of hindsight, additional time and investigative services, and newly retained experts, to demonstrate that a different or better defense could have been mounted had trial counsel or prior habeas corpus counsel had similar advantages.

(18) Habeas Corpus § 29--Petitions--Amendments.
A court must and will assume that a petition for a writ of habeas corpus includes all *756 claims then known to the petitioner. The inclusion in the petition of a statement purporting to reserve the right to supplement or amend the petition at a later date has no effect. The court will determine the appropriate disposition of a petition for a writ of habeas corpus based on the allegations of the petition as originally filed and any amended or supplemental petition for which leave to file has been granted. If the court issues an order to show cause, the traverse may allege additional facts in support of the claim on which an order to show cause has issued. However, attempts to introduce additional claims or wholly different factual bases for those claims in a traverse do not expand the scope of the proceeding, which is limited to the claims which the court initially determined stated a prima facie case for relief.

(19a, 19c) Habeas Corpus § 29--Petitions--Successive Petitions--Capital Defendant.
Defendant, who had been sentenced to death for capital murder, had unsuccessfully appealed that judgment, and had unsuccessfully petitioned for a writ of habeas corpus, was not entitled to file a second petition for a writ of habeas corpus claiming that in the proceedings leading to his conviction and sentence he was denied due process, a fair trial, effective assistance of counsel, and protection against cruel and unusual punishment. Defendant had not adequately explained his failure to include all of the second petition claims in the prior petition; nor had he stated specific facts to establish that his newly made claims were presented without substantial delay as required by the Supreme Court Policies Regarding Cases Arising From Judgments of Death, std. 1- 1.2. Moreover, none of defendant's claims was shown to have resulted in a fundamental miscarriage of justice as defined for purposes of invoking an exception to the procedural bar to the court's entertaining of claims brought with substantial delay.

(20a, 20b) Habeas Corpus § 29--Petitions--Successive Petitions-- Timeliness.
A capital defendant's second petition for a writ of habeas corpus was untimely, since defendant failed to establish the absence of substantial delay. Although the death judgment was imposed prior to the promulgation of the Supreme Court Policies Regarding Cases Arising From Judgments of Death, the first petition was filed almost two years after their promulgation, and the second petition was filed an additional five months later. Even though defendant's appeal was not final until several years after the trial court's judgment, a petition filed promptly after the affirmance of the judgment is not necessarily timely. Otherwise, the longer the appellate process, the longer a defendant could justify delay in seeking habeas corpus relief. Further, defendant's petition was not presumptively timely under the Supreme Court policies, since it was not filed within 90 days of the final due date for his *757 reply brief on the direct appeal, and defendant did not satisfy policy standards governing timeliness of petitions for habeas corpus by adequately explaining when he became aware of the basis for his new claim.

(21a, 21b) Criminal Law § 92--Rights of Accused--Aid of Counsel-- Appeal--Capital Cases.
The Supreme Court Policies Regarding Cases Arising From Judgments of Death impose an express obligation on counsel representing appellants in capital cases to investigate possible bases for habeas corpus. This obligation, which counsel in noncapital cases do not share, is limited, however, to an investigation of potentially meritorious grounds for habeas corpus which have come to counsel's attention in the course of preparing the appeal. Counsel does not have an obligation to conduct an unfocused

investigation having as its object the uncovering of any possible factual basis for a collateral attack on the judgment. Only an investigation into specific facts known to counsel which could reasonably lead to a potentially meritorious habeas corpus claim is anticipated and required. When the factual basis for a claim is already known, the claim must be presented promptly unless facts known to counsel suggest the existence of other potentially meritorious claims which cannot be stated without additional investigation.

(22) Criminal Law § 107--Rights of Accused--Competence of Counsel--Appeal-- Duty to Investigate Basis for Collateral Attack--Noncapital Cases.

Appointed counsel in a noncapital appeal does not have an obligation to investigate possible bases for collateral attack on the judgment, and retained counsel must do so only if the client retains counsel for that purpose. Appointed counsel on appeal has a duty to present the defendant's case on direct appeal to the best of his or her ability, but counsel appointed to prosecute a direct appeal has no duty to file or to prosecute an extraordinary writ believed to be desirable or appropriate by the defendant. However, noncapital appellate counsel who is aware of a basis for collateral relief should not await the outcome of the appeal to determine if grounds for collateral relief exist. While such counsel has no obligation to conduct an investigation to discover if facts outside the record on appeal would support a petition for habeas corpus relief or other challenge to the judgment, if counsel learns of such facts in the course of his or her representation, then counsel has an ethical obligation to advise the client of the course to follow to obtain relief, or to take other appropriate action.

(23) Habeas Corpus § 29--Petitions--Timeliness Standards--Petitioner's Diligence.

The timeliness standard of the Supreme Court Policies Regarding Cases Arising From Judgments of Death, standard *758 1-1.2, does not excuse a petitioner filing a delayed petition from establishing diligence in discovering factual claims, notwithstanding wording in the standard that implies the contrary.

(24) Habeas Corpus § 29--Petitions--Timeliness Standards--Retroactive Application.

The timeliness standards of the Supreme Court Policies Regarding Cases Arising From Judgments of Death apply to all capital appeals, including those which arose prior to the adoption of the policies. However, because counsel's obligation to investigate possible collateral claims was created only by the policies, claims that were discovered only as a result of investigation commenced promptly after June 6, 1989, the date on which the policies became effective, will be deemed timely if presented promptly after counsel became aware of them.

(25) Habeas Corpus § 29--Petitions--Successive Petitions--Rule Prohibiting--Exceptions.

Generally, absent justification for the failure to present all known claims in a single, timely petition for a writ of habeas corpus, successive or untimely petitions will be summarily denied. The only exception to this rule applies to petitions which allege facts which, if proven, would establish that a fundamental miscarriage of justice occurred as a result of the proceedings leading to conviction or sentence. A fundamental miscarriage of justice is established by showing: (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; or (4) that the petitioner was convicted or sentenced under an invalid statute.

COUNSEL

Eric S. Multhaup, Gail R. Weinheimer, Jean R. Sternberg, Denise Anton and Lynne Shatzkin Coffin, under appointments by the Supreme Court, for Petitioner.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, John H. Sugiyama, Assistant Attorney General, Morris Beatus and Dane R. Gillette, Deputy Attorneys General, for Respondent. *759

BAXTER, J.

William John Clark petitions for a writ of habeas corpus, claiming that the judgment pursuant to which he is confined under a sentence of death is invalid. We conclude that his unjustified delay in presenting his claims bars consideration of the merits of the petition.

An exception to this bar would be recognized if, as a result of the defects of which petitioner complains, the conviction and/or sentence were shown to constitute a fundamental miscarriage of justice. A fundamental miscarriage of justice is established by showing: (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime or crimes of which he was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the error or omission no reasonable judge or jury would have imposed a sentence of death; or (4) that the petitioner was convicted under an invalid statute.

The allegations of the petition and supporting exhibits fail to demonstrate that petitioner could establish the existence of any of these exceptions, however. We shall, therefore, deny the petition for writ of habeas corpus.

I. Prior Proceedings

On April 5, 1990, this court affirmed a judgment of conviction of petitioner, and the imposition of the death penalty, after a jury found petitioner guilty of first degree murder with a special circumstance of murder in the commission of arson (Pen. Code, § § 189, 190.2, subd. (a)(17)(vii)), [FN1] two counts of attempted murder (§ § 664/187), arson (§ 451, subd. (a)), and rape (§ 261, subd. (2)). (*People v. Clark* (1990) 50 Cal.3d 583 [268 Cal.Rptr. 399, 789 P.2d 127].)

FN1 All statutory references herein are to the Penal Code unless otherwise noted.

There was no question that petitioner committed the acts which led to his conviction. On January 6, 1982, he threw one bucket of gasoline into the dining area of the home of David and Ava Gawronski, and another into the couple's bedroom, where both were sleeping. He ignited the gasoline with lighted highway flares. David Gawronski suffered fatal burns in the ensuing flash fire. Ava Gawronski was burned so severely that she was hospitalized for 10 months, and suffered permanent injuries and disfigurement, including the loss of her fingers and nose. *760

Petitioner admitted these acts, contesting only the prosecution's claim that he intended to kill the Gawronskis and their infant daughter, who was rescued unharmed from another bedroom. His intent, he explained, was only to drive the couple out of the home so that he could shoot and kill David Gawronski with the shotgun he carried with him, while Ava Gawronski watched. His purpose was to demonstrate, by causing her to suffer, how much Ava Gawronski, a licensed social worker and marriage and family counselor, had hurt him when she terminated the counseling she had been giving him. He admitted, however, that when he threw the flare to ignite the gasoline, he knew he was throwing it into the victims' bedroom.

The death penalty verdict was returned after a retrial of the penalty phase at which petitioner represented himself. The original jury had been unable to reach a penalty verdict.

None of the experts who examined petitioner diagnosed him as incompetent or mentally ill. The second penalty jury heard testimony by a psychologist, Dr. John Hatcher, that petitioner had a "borderline personality" between neurotic and psychotic. Petitioner had told Dr. Hatcher that he felt morally justified under his own ethical code, and had stated that he could not have asked that his act of revenge turn out any better than it had. Dr. Linda Weinberger, also a psychologist, testified that petitioner had expressed a desire to kill two other persons, and had said he would consider finding a person about to be released from prison to do this for him.

The judgment of death was imposed on February 1, 1985. Counsel on appeal was appointed by this court on March 5, 1985, the record on appeal was filed on November 21, 1986, and briefing was completed on December 26, 1989. At the time the judgment was affirmed on April 5, 1990, however, no petition for writ of habeas corpus challenging the validity of that judgment had been filed.

Almost one year later, petitioner first sought relief by habeas corpus, filing his first such petition on March 15, 1991. No explanation for the delay in seeking relief was offered in the petition. The first petition alleged: (1) that this court had denied petitioner due process and violated the ex post facto guarantees of the state and federal Constitutions in construing the arson special circumstance (§ 190.2, subd. (a)(17)(viii)); (2) that, because petitioner was incompetent, petitioner had been denied due process, effective assistance of counsel, and protection against cruel and unusual punishment at the penalty phase of his trial when the trial court acceded to petitioner's request to represent himself; and (3) that this court

had failed to apply the test of reversible error required by *761 *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711, 87 S.Ct. 824, 24 A.L.R.3d 1065], in ruling on the appellate claims of error.

After receiving opposition, and denying petitioner's request for time to supplement the petition with additional factual allegations and supporting documentation, this court concluded that the petition failed to state a prima facie case entitling petitioner to relief. The petition was denied on May 15, 1991.

II. The Second Petition

On August 16, 1991, this second petition was filed.

Petitioner explains the filing of another petition on the basis that his additional claims were "developed" in response to the decision of the United States Supreme Court in *McCleskey v. Zant* (1991) 499 U.S. 467 [113 L.Ed.2d 517, 111 S.Ct. 1454].

In this petition, petitioner challenges the validity of the judgment on the grounds that in the proceedings leading to his conviction and sentence he was denied due process, a fair trial, effective assistance of counsel, and protection against cruel and unusual punishment. These claims, as characterized by petitioner, are set forth below.

1. Failure to Recuse. The office of the Los Angeles County District Attorney, members of whose staff prosecuted petitioner, failed to recuse itself after hiring as a deputy district attorney an attorney who had represented petitioner during pretrial proceedings until October 19, 1982, when he withdrew as petitioner's counsel. This, petitioner argues, denied him due process and the right to counsel because the prosecution thereby became privy to more than one year of confidential communications, and successor counsel was denied access to the attorney as a source of information, strategy, or testimony.

2. Effective Counsel. Petitioner claims he was denied his right to effective assistance of counsel for the reasons set forth below:

a. Petitioner's counsel failed to investigate petitioner's competency to represent himself at the retrial of the penalty phase or to request the appointment of separate counsel to undertake that investigation, did not defer to petitioner's desire to testify at the penalty retrial and thus did not *762 remove one of the bases for petitioner's election to represent himself, and did not bring to the attention of the court information tending to negate petitioner's competency to represent himself or even to proceed to the penalty trial. Had counsel adequately warned petitioner of the dangers of self-representation, accommodated petitioner's concerns, brought to the attention of the court information tending to show that petitioner's election was not knowing and voluntary, or investigated petitioner's competency and developed evidence to establish that petitioner could not make a knowing and intelligent decision, petitioner would have enjoyed his right to representation by effective counsel at the penalty retrial.

b. Petitioner's counsel failed to investigate and present evidence of petitioner's conforming conduct, lack of disciplinary record, and the positive image jail personnel held of him during the three years prior to trial, and to present this as mitigating evidence at the penalty phase.

c. Petitioner's counsel failed to investigate and present evidence other than the testimony of petitioner and his parents regarding petitioner's background and upbringing. Numerous other witnesses were available, including members of petitioner's family, and his school and social contacts; in addition, documentary materials were also available. All of these would have had a mitigating effect.

d. Petitioner's counsel erroneously advised him to submit to examination by a psychologist selected by the prosecution, failed to monitor the examination, and failed to insist on a verbatim recording of the examination.

3. Due Process/Fair Trial. Petitioner was denied due process and a fair trial by the prosecutor's "false implication" to the jury that a penalty retrial was required by law. This implication assertedly undermined petitioner's testimony that letters he sent to one of his victims and to her father were not sent for the purpose of causing the recipients further emotional suffering, but in order to provoke a retrial.

4. Due Process/Fair Trial/Cruel and Unusual Punishment. Petitioner contends that he was denied due process, a fair trial, and freedom from cruel and unusual punishment in that:

a. Testimony was erroneously introduced regarding the effects of the offenses on a surviving victim and her family. This prejudicial evidence, petitioner alleges, was improperly discussed and relied on by

members of the jury as nonstatutory aggravating evidence. *763

b. The jury discussed and considered the belief that a sentence of life without possibility of parole would not be adequate to ensure incarceration of petitioner and that imposition of the death sentence was necessary to protect society.

c. The jury was misled regarding its sentencing responsibilities and discussed and believed that only evidence that would mitigate the gravity of the crime itself could be properly considered.

d. There was invidious and systematic discrimination by prosecutors in seeking the death penalty, and by jurors in imposing the death penalty, on the basis of the victims' race, social status, and gender. Petitioner was, he alleges, singled out for capital treatment because of the characteristics of the victims.

e. The imposition of the death penalty on petitioner was capricious because penologically relevant characteristics of the offense and his background are no more serious or deserving of the death penalty than those in a far greater number of similar cases with noncapital dispositions.

III. Limitations on Habeas Corpus Relief

As is apparent from a review of the above claims and the history of this case, many of the grounds asserted for relief are restatements or reformulations of arguments made and rejected on appeal or in the prior habeas corpus petition, while others are claims that could and should have been made on appeal. To the extent that new grounds for relief are stated, the petition fails to demonstrate that these claims could not have been asserted in the prior petition, or that any of the claims could not have been presented by a petition filed in conjunction with the appeal.

Before considering the possible merit of any claim, it is therefore appropriate to review the decisional and statutory law governing collateral attacks on judgments of conviction by petition for writ of habeas corpus. In addition, because no clear guidelines have emerged in our past cases, we consider when departure from those rules is warranted.

A. Limitations on Collateral Attack.

The rules governing postconviction habeas corpus relief recognize the importance of the "Great Writ," an importance reflected in its constitutional *764 status, [FN2] and in our past decisions. Indeed, the writ has been aptly termed "the safe-guard and the palladium of our liberties" (*In re Begerow* (1901) 133 Cal. 349, 353 [65 P. 828]) and is "regarded as the greatest remedy known to the law whereby one unlawfully restrained of his liberty can secure his release ...." (*Matter of Ford* (1911) 160 Cal. 334, 340 [116 P. 757].) The writ has been available to secure release from unlawful restraint since the founding of the state. (Cal. Const. of 1849, art. I, § 5; Stats. 1850, ch. 122, p. 134. See, e.g., *People v. Smith* (1850) 1 Cal. 9; *Ex parte The Queen of the Bay* (1850) 1 Cal. 157.)

FN2 California Constitution, article I, section 11: "Habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion."
The text is unchanged from that of article I, section 5 of the Constitution of 1849, and of former section 5 of the present article I of the 1879 Constitution.
While habeas corpus is recognized in article I, section 9(2) of the United States Constitution, that provision does not oblige the states to afford a habeas corpus remedy. (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 557 [95 L.Ed.2d 539, 547, 107 S.Ct. 1990].)

(1)(See fn. 3.) Our cases simultaneously recognize, however, the extraordinary nature [FN3] of habeas corpus relief from a judgment which, for this purpose, is presumed valid (see *People v. Shipman* (1965) 62 Cal.2d 226, 232 [42 Cal.Rptr. 1, 397 P.2d 993]; *In re Bell* (1942) 19 Cal.2d 488, 500 [122 P.2d 22]), the importance of finality of judgments (see *In re McIntyre* (1951) 37 Cal.2d 876 [236 P.2d 22]), and the interest of the state in the prompt implementation of its laws. (See, e.g., *In re Arguello* (1969) 71 Cal.2d 13, 17 [76 Cal.Rptr. 633, 452 P.2d 921].)

FN3 Habeas corpus is an "extraordinary remedy." (*In re Connor*, (1940) 16 Cal.2d 701, 709 [108 P.2d 10].) "[I]t may not be invoked where the accused has such a remedy under the orderly provisions of a statute designed to rule the specific case upon which he relies for his discharge. This would be an abuse of process, as his relief under the remedy provided by the statute would accomplish all that he was seeking and all that the writ of *habeas corpus* was ever designed to accomplish, to wit, the discharge of the accused." (*In re Alpine*

(1928) 203 Cal. 731, 739 [265 P. 947, 58 A.L.R. 1500].) "The writ of *habeas corpus* was not created for the purposes of defeating or embarrassing justice, but to promote it." (*Id.*, at p. 744.)

(2)(**See fn. 4.**) Procedural rules have been established by our past decisions to govern petitions for writs of habeas corpus. Such rules are necessary both to deter use of the writ to unjustifiably delay implementation of the law, and to avoid the need to set aside final judgments of conviction when retrial would be difficult or impossible. (See *In re Dixon* (1953) 41 Cal.2d 756, 761 [264 P.2d 513] [Even when the claim involves an asserted denial of constitutional rights, "[i]t would obviously be improper to permit a collateral attack because of claimed errors in the determination of the facts after ***765** expiration of the time for appeal when evidence may have disappeared and witnesses may have become unavailable."].) [FN4]

FN4 Challenges to the validity of the statute under which the petitioner was convicted do not present this problem and may be raised at any time. We recognized in *In re Bell, supra*, 19 Cal.2d 488, 493, that in some cases habeas corpus is the only remedy available by which this claim may be raised, and that "the importance of securing a correct determination on the question of constitutionality" of a statute warrants departure from the usual procedural limits on habeas corpus. For that reason these claims have not been subject to either the rules requiring justification for delay or exhaustion of appellate remedies. (See *In re Berry* (1968) 68 Cal.2d 137, 145 [65 Cal.Rptr. 273, 436 P.2d 273]; *In re Zerbe* (1964) 60 Cal.2d 666, 667-668 [36 Cal.Rptr. 286, 388 P.2d 182, 10 A.L.R.3d 840]; *In re Dixon, supra*, 41 Cal.2d 756, 762.)

(3) It has long been required that a petitioner explain and justify any significant delay in seeking habeas corpus relief. "[I]t is the practice of this court to require that one who belatedly presents a collateral attack such as this explain the delay in raising the question." (*In re Swain* (1949) 34 Cal.2d 300, 302 [209 P.2d 793].) [FN5] In *Swain*, we noted that such explanation was "particularly necessary" where a petitioner has made prior attacks on the validity of the judgment without raising the issues. (*Ibid.*) The burden is one placed even on indigent petitioners appearing in propria persona, and is not met by an assertion of counsel that he or she did not represent the petitioner earlier. [FN6]

FN5 Delay in seeking habeas corpus or other collateral relief has been measured from the time a petitioner becomes aware of the grounds on which he seeks relief. That time may be as early as the date of conviction. (See *In re Saunders* (1970) 2 Cal.3d 1033, 1040 [88 Cal.Rptr. 633, 472 P.2d 921]; *In re Wells* (1967) 67 Cal.2d 873, 875 [64 Cal.Rptr. 317, 434 P.2d 613].) Although delayed presentation to enable the petitioner to file a habeas corpus petition with the opening brief on appeal has been permitted, a petition should be filed as promptly as the circumstances allow, and the petitioner "must point to particular circumstances sufficient to justify substantial delay ...." (*In re Stankewitz* (1985) 40 Cal.3d 391, 397, fn. 1 [220 Cal.Rptr. 382, 708 P.2d 1260].)

FN6 Were the rule otherwise, the potential for abuse of the writ would be magnified as counsel withdraw or are substituted and each successor attorney claims that a petition was filed as soon as the successor attorney became aware of the new basis for seeking relief.

(4) It is also the general rule that issues resolved on appeal will not be reconsidered on habeas corpus (*In re Waltreus* (1965) 62 Cal.2d 218, 225 [42 Cal.Rptr. 9, 397 P.2d 1001]), and, " 'in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.' (*In re Dixon*, 41 Cal.2d 756, 759 [264 P.2d 513]; in accord *People v. Morrison*, 4 Cal.3d 442, 443, fn. 1 [93 Cal.Rptr. 751, 482 P.2d 663]; *In re Black*, 66 Cal.2d 331, 886- 887 [59 Cal.Rptr. 429, 428 P.2d 293]; *In re Shipp*, 62 Cal.2d 547, 551-553 [43 Cal.Rptr. 3, 399 P.2d 571].)" (*In re Walker* (1974) 10 Cal.3d 764, 773 [112 Cal.Rptr. 177, 518 P.2d 1129].) "Without this usual limitation of the use of ***766** the writ, judgments of conviction of crime would have only a semblance of finality." (*In re McInturff, supra*, 37 Cal.2d 876, 880.)

(5) For the same reasons, whether raised in a petition for writ of habeas corpus or by *coram nobis*, newly discovered evidence is a basis for relief only if it undermines the prosecution's entire case. It is not

sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury. (*In re Hall* (1981) 30 Cal.3d 408, 417 [179 Cal.Rptr. 223, 637 P.2d 690]; *In re Weber* (1974) 11 Cal.3d 703, 724 [114 Cal.Rptr. 429, 523 P.2d 229]; *In re Branch* (1969) 70 Cal.2d 200, 215 [74 Cal.Rptr. 238, 449 P.2d 174].) "[A] criminal judgment may be collaterally attacked on the basis of 'newly discovered' evidence only if the 'new' evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246 [275 Cal.Rptr. 729, 800 P.2d 1159].)

(6) The rule is similar when a petitioner attributes the failure to discover and present the evidence at trial to trial counsel's alleged incompetence. The presumption that the essential elements of an accurate and fair proceeding were present is not applicable in that case, as it is when the basis on which relief is sought is newly discovered evidence. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674, 697-698, 104 S.Ct. 2052]; *People v. Gonzalez, supra,* 51 Cal.3d 1179, 1246.) Nonetheless, the petitioner must establish "prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel. [Citation.] ... The petitioner must demonstrate that counsel knew or should have known that further investigation was necessary, and must establish the nature and relevance of the evidence that counsel failed to present or discover." (*People v. Williams* (1988) 44 Cal.3d 883, 937 [245 Cal.Rptr. 336, 751 P.2d 395].) Prejudice is established if there is a reasonable probability that a more favorable outcome would have resulted had the evidence been presented, i.e., a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington, supra,* 466 U.S. 668, 693-694 [80 L.Ed.2d at pp. 697-698]; *People v. Williams, supra,* 44 Cal.3d 883, 944-945.) The incompetence must have resulted in a fundamentally unfair proceeding or an unreliable verdict. (*Lockhart v. Fretwell* (1993) 506 U.S. ___, ___ [122 L.Ed.2d 180, 113 S.Ct. 838].)

(7) Postconviction habeas corpus attack on the validity of a judgment of conviction is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional *767 dimension. (See *In re Hall* (1981) 30 Cal.3d 408, 420 [179 Cal.Rptr. 223, 637 P.2d 690]; *In re Lessard, supra,* 19 Cal.2d 488, 493-496.) However, some trial errors, even though of constitutional dimension, are not cognizable on habeas corpus because the error " 'carries with it no risk of convicting an innocent person.' " (*In re Sterling* (1965) 63 Cal.2d 486, 487 [47 Cal.Rptr. 205, 407 P.2d 5].) In *Sterling,* as it had in *In re Lessard* (1965) 62 Cal.2d 497, 503 [42 Cal.Rptr. 583, 399 P.2d 39], the court adopted the view expressed by then-Justice Traynor in *In re Harris* (1961) 56 Cal.2d 879, 880 [16 Cal.Rptr. 889, 366 P.2d 305] (conc. opn. of Traynor, J.). Justice Traynor had reasoned that the erroneous admission of unlawfully seized evidence presented no risk that an innocent defendant might be convicted, and "[t]he risk that the deterrent effect of the [exclusionary] rule will be compromised by an occasional erroneous decision refusing to apply it is far outweighed by the disruption of the orderly administration of justice that would ensue if the issue could be relitigated over and over again on collateral attack." (*Id.,* at p. 884, conc. opn. of Traynor, J.) That reasoning persuaded the court that Fourth Amendment violations need not be considered on habeas corpus even when the issue had not been raised on appeal. "Failure to exercise these readily available remedies will ordinarily constitute such a deliberate by-passing of orderly state procedures as to justify denial of federal as well as state collateral relief." (*In re Sterling, supra,* 63 Cal.2d at p. 489.)

II. Repeated Applications, [FN7] Piecemeal Presentation of Claims, and Delay.

(8)(See fn. 7.) As we have noted, this is the second petition for writ of habeas corpus by this petitioner. Several years after his conviction and the affirmance of his appeal, he repeats claims rejected when his initial petition was denied and seeks to raise claims that were not asserted in that petition.

> FN7 Because no appeal lies from the denial of a petition for writ of habeas corpus, a prisoner whose petition has been denied by the superior court can obtain review of his claims only by the filing of a new petition in the Court of Appeal. Our reference to and discussion of successive petitions has no application to that practice, or to the filing of an original petition in this court after denial of a petition by the Court of Appeal. (*In re Crumbley* (1948) 31 Cal.2d 801, 804, fn. 1 [193 P.2d 734].)

1. *Repetitious and piecemeal claims.*

(9) It has long been the rule that absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus

H

Briefs and Other Related Documents

Supreme Court of California
In re Lee Max BARNETT on Habeas Corpus.
No. S096831.

Aug. 7, 2003.
Rehearing Denied Sept. 24, 2003.

Background: After he was sentenced to death in the Superior Court, Butte County, No. 91850, and his sentence was affirmed on direct appeal, 17 Cal.4th 1044, 74 Cal.Rptr.2d 121, 954 P.2d 384, petitioner sought habeas corpus relief both through counsel and pro se. The Supreme Court issued to Director of Corrections an order to show cause why the Supreme Court should not consider petitioner's pro se submissions.

Holdings: The Supreme Court, Baxter, J., held that:

(1) when a capital inmate files a habeas corpus petition through counsel, the Supreme Court will not file or consider the inmate's pro se submissions that challenge the legality of the inmate's death judgment or that otherwise fall within the scope of counsel's representation, and

(2) counsel need not press habeas corpus claims requested by their inmate clients, even those that might be considered nonfrivolous, if counsel, as a matter of professional judgment, decide not to present those claims, disapproving of *In re Cathey*, 55 Cal.2d 679, 12 Cal.Rptr. 762, 361 P.2d 426.

Order discharged.

West Headnotes

[1] **Attorney and Client** 62
45k62 Most Cited Cases
As a general rule, parties who are represented in court by counsel of record are required to proceed in court through their counsel.

[2] **Criminal Law** 641.4(1)
110k641.4(1) Most Cited Cases
A criminal defendant facing state capital charges has two mutually exclusive rights with respect to legal representation at trial: he may choose to be represented by professional counsel, or he may knowingly and intelligently elect to assume his own representation. U.S.C.A. Const.Amend. 6.

[3] **Criminal Law** 641.10(3)
110k641.10(3) Most Cited Cases
A capital defendant who chooses professional representation, rather than self-representation, generally is not entitled to present his or her case personally or to act as co-counsel at trial; however, such defendant may make pro se motions regarding representation, including *Faretta* requests for self-representation and for substitution of counsel. U.S.C.A. Const.Amend. 6.

[4] **Criminal Law** 641.10(3)
110k641.10(3) Most Cited Cases
Although a trial court retains discretion to allow a represented defendant's personal participation in the trial, such an arrangement ought be avoided unless the court is convinced, upon a substantial showing, that it will promote justice and judicial efficiency in the particular case. U.S.C.A. Const.Amend. 6.

[5] **Criminal Law** 633(1)
110k633(1) Most Cited Cases
It is the trial court's duty, during trial, to safeguard and promote the orderly and expeditious conduct of its business and to guard against inept procedures and unnecessary indulgences which would tend to hinder, hamper, or delay the conduct and dispatch of its proceedings.

[6] **Criminal Law** 1077.3
110k1077.3 Most Cited Cases
The Sixth Amendment does not include any right to appeal, so it implicates no basis for a right to representation by professional counsel on appeal. U.S.C.A. Const.Amend. 6.

[7] **Constitutional Law** 248(2)
92k248(2) Most Cited Cases

[7] **Constitutional Law** 271
92k271 Most Cited Cases

[7] **Criminal Law** 1077.3
110k1077.3 Most Cited Cases
The Fourteenth Amendment and its due process and equal protection guarantees prohibit discrimination

against convicted indigent inmates; consequently, an indigent inmate has a constitutional right to counsel appointed at the state's expense if the state confers a criminal appeal as of right. U.S.C.A. Const.Amend. 14.

[8] **Criminal Law** 1077.3
110k1077.3 Most Cited Cases
There is no right, constitutional, statutory, or otherwise, to self-representation in a criminal appeal in California. West's Ann.Cal.Penal Code § § 1239-1240.1.

[9] **Constitutional** Law 271
92k271 Most Cited Cases

[9] **Criminal Law** 1077.3
110k1077.3 Most Cited Cases
Neither the Sixth Amendment nor the Due Process Clause furnishes a basis for a right to self-representation in a criminal appeal. U.S.C.A. Const.Amends. 6, 14.

[10] **Criminal Law** 641.4(1)
110k641.4(1) Most Cited Cases
The sole federal constitutional right to self-representation derives from the Sixth Amendment, which pertains strictly to the basic rights that an accused enjoys in defending against a criminal prosecution and does not extend beyond the point of conviction. U.S.C.A. Const.Amend. 6.

[11] **Criminal Law** 1077.3
110k1077.3 Most Cited Cases
Capital inmates represented by counsel are not permitted to present their automatic appeals personally to the Supreme Court, that is, such inmates have no right personally to supplement or supersede counsel's briefs and arguments on the merits of their appeals.

[12] **Constitutional** Law 270.5
92k270.5 Most Cited Cases

[12] **Criminal Law** 1402
110k1402 Most Cited Cases
States have no obligation to provide an avenue of postconviction relief and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the state supply a lawyer as well. U.S.C.A. Const.Amend. 14.

[13] **Habeas Corpus** 690
197k690 Most Cited Cases
There is no federal constitutional right to counsel for state habeas corpus proceedings, not even in a capital case. U.S.C.A. Const.Amends. 6, 14.

[14] **Habeas Corpus** 690
197k690 Most Cited Cases
California confers no constitutional right to counsel for seeking collateral relief from a judgment of conviction via state habeas corpus proceedings. West's Ann.Cal. Const. Art. 1, § § 11, 15.

[15] **Habeas Corpus** 690
197k690 Most Cited Cases
When a capital inmate files a habeas corpus petition through counsel, the Supreme Court will not file or consider the inmate's pro se submissions that challenge the legality of the inmate's death judgment or that otherwise fall within the scope of counsel's representation; however, the Supreme Court will file and consider pro se submissions that pertain to matters falling outside the scope of counsel's representation. West's Ann.Cal.Gov.Code § 68662; West's Ann.Cal.Penal Code § § 1473(a), 1474.

[16] **Habeas Corpus** 690
197k690 Most Cited Cases
Counsel need not press habeas corpus claims requested by their inmate clients, even those that might be considered nonfrivolous, if counsel, as a matter of professional judgment, decide not to present those claims; disapproving of *In re Cathey*, 55 Cal.2d 679, 12 Cal.Rptr. 762, 361 P.2d 426.
See 5 Witkin, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 239; 6 Witkin, Cal. Criminal Law (3d ed. 2000) Criminal Writs, § 46.

[17] **Habeas Corpus** 202
197k202 Most Cited Cases
Habeas corpus proceedings are properly viewed as civil actions designed to overturn presumptively valid criminal judgments and not as part of the criminal process itself.

[18] **Habeas Corpus** 690
197k690 Most Cited Cases
Capital inmate's pro se objections to State's request for extension of time to file informal response to the petition for writ of habeas corpus that counsel filed on inmate's behalf fell directly within scope of counsel's representation, and thus, the Supreme Court would not file or consider such pro se objections.

[19] **Habeas Corpus** 690

197k690 Most Cited Cases
Capital inmate's pro se habeas corpus claims regarding prison conditions fell outside scope of appointed counsel's representation with respect to habeas corpus petition challenging death sentence, and thus, the Supreme Court would file and consider such pro se submissions.

***110 **1108 *469 Robert D. Bacon, Oakland, under appointment by the Supreme Court, for Petitioner Lee Max Barnett.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Carlos A. Martinez, Ward A. Campbell, Jean M. Marinovich, Ruth M. Saavedra and Eric L. Christoffersen, Deputy Attorneys General, for Respondent State of California.

***111 BAXTER, J.

Petitioner Lee Max Barnett is being held in custody pursuant to a judgment of death rendered on November 30, 1988. Petitioner is represented by appointed counsel in this state habeas corpus proceeding challenging the legality of that judgment. Despite such representation, petitioner has submitted a number of pro se habeas corpus claims, motions, and other documents to this court for filing and consideration. Because this court has begun to receive a number of pro se submissions in capital habeas corpus matters, and because our actions thereon have at times varied, we find it appropriate to announce a standard procedure for such submissions.

Consistent with the general rule that represented parties have no right to present their cases personally alongside counsel--a principle we have recognized in the context of both capital trials and appeals, and noncapital habeas corpus proceedings as well--this court will not file or consider a represented capital inmate's pro se submissions that challenge the legality of the inmate's death judgment or otherwise fall within the scope of counsel's representation. Conversely, we shall file and consider a represented capital inmate's pro se submissions that pertain to matters falling outside the scope of counsel's representation. We shall also file and consider pro se motions limited to matters concerning the inmate's representation. (See *People v. Marsden* (1970) 2 Cal.3d 118, 84 Cal.Rptr. 156, 465 P.2d 44 (*Marsden*) [motion to substitute counsel].)

I.

The facts underlying petitioner's convictions are not pertinent to the procedural matter presented here. It suffices to note that a jury convicted petitioner in 1988 of one count of assault with a firearm, several counts of kidnapping and robbery, and one count of first degree murder. Petitioner committed his crimes upon encountering the victims unexpectedly in 1986 at a remote campsite in a Butte County gold mining area. **1109 The evidence at trial included testimony from persons present at the encounter, including petitioner, and from others who had contact with petitioner the summer before the crimes occurred or immediately afterward.

*470 The relevant procedural facts are as follows. Appointed counsel Michael Willemsen and Ronald A. Parravano represented petitioner in his automatic appeal and concurrent state habeas corpus proceeding (judgment of death affirmed May 4, 1998, in *People v. Barnett* (1998) 17 Cal.4th 1044, 74 Cal.Rptr.2d 121, 954 P.2d 384; concurrent habeas corpus petition denied Nov. 17, 1999). On July 12, 2000, we granted the request of Willemsen and Parravano to withdraw from all further representation. We also appointed Robert D. Bacon, who currently represents petitioner in federal postaffirmance capital-related habeas corpus proceedings, to represent petitioner through the remaining state habeas corpus and executive clemency proceedings in this matter until the judgment is reversed or until petitioner's death.

On April 5, 2001, Bacon filed in this court a 560-page second petition for writ of habeas corpus that challenges the legality of petitioner's death judgment. That petition, which attaches 20 volumes of appendices, is pending.

Beginning in November 2001, petitioner has submitted the following pro se documents to this court for our consideration: (1) a "Declaration and Motion to Supplement Habeas Corpus" in *In re Barnett* (S096831, Apr. 5, 2001) (received Nov. 2, 2001); (2) a document containing pro se habeas corpus claims No. 275 and 276 (received ***112 Nov. 19, 2001); (3) a "Declaration of Lee Max Barnett" and a "Declaration and Motion and Objections to Respondent's Request for Extension of Time, Motion for Summary Judgement" (received Nov. 21, 2001); (4) a letter referring to an alleged misleading statement of fact in Appellant's Opening Brief and the court's opinion in *People v. Barnett, supra*, 17 Cal.4th 1044, 74 Cal.Rptr.2d 121, 954 P.2d 384 (received Nov. 27, 2001); (5) a document containing pro se "Supplemental Habeas Claim # 278" (received Dec. 7, 2001); (6) a document entitled "Impediments to Filing preAEDPA &

Entitlement to preAEDPA Standards on Review" (received Jan. 9, 2002); (7) a petition for writ of habeas corpus that complains both of "prison conditions impeding & obstructing habeas" and of denial of petitioner's rights to a speedy trial and a speedy appeal (received Mar. 6, 2002); and (8) a petition for writ of habeas corpus that complains the superior court erred in denying a petition for writ of habeas corpus filed on August 28, 2001 in Marin County Superior Court, No. SC 120773 (received Apr. 2, 2002).

The foregoing documents do not criticize Bacon's effectiveness and do not seek his removal. While the last two documents complain primarily of prison conditions, the others largely purport to present, as habeas corpus claims, various assignments of trial court and appellate error, prosecutorial misconduct, and ineffectiveness of all prior appointed counsel. To this day, however, Bacon continues to represent petitioner in these state court proceedings, and petitioner has never disavowed the state habeas corpus petition Bacon prepared on his behalf.

*471 In view of the pro se documents petitioner submitted, we issued an order on April 10, 2002, that directed the Director of Corrections to show cause why this court should not file the foregoing documents and consider their merits, notwithstanding the fact that petitioner is currently represented by counsel. [FN1] (See generally *People v. Mattson* (1959) 51 Cal.2d 777, 797-798, 336 P.2d 937 (*Mattson*); *People v. Clark* (1992) 3 Cal.4th 41, 173, 10 Cal.Rptr.2d 554, 833 P.2d 561 (*Clark*); *In re Cathey* (1961) 55 Cal.2d 679, 684, 12 Cal.Rptr. 762, 361 P.2d 426 (*Cathey*).) We requested briefing on the following issues: (1) whether and to what extent this court should accept for filing and consideration, from a capital inmate who is represented by counsel, a pro se petition for writ of habeas corpus that challenges the legality of the inmate's death judgment; (2) whether and to what extent this court should accept for filing and consideration, from a represented capital inmate, a pro se petition for writ of habeas corpus that complains of prison conditions; and (3) whether and to what **1110 extent this court should accept for filing and consideration, from a represented capital inmate, pro se motions, pro se declarations, and other pro se submissions such as those petitioner submitted here.

FN1. Our order specified that briefing of the merits of any matter set forth in petitioner's pro se submissions is deferred pending further order of this court.

Respondent filed a return to the order to show cause. Counsel for petitioner then filed a traverse to respondent's return, and petitioner submitted his own pro se "reply" to the return as well.

II.

[1] As a general rule, parties who are represented in court by counsel of record are required to proceed in court through their counsel. As a prelude to determining the proper disposition of petitioner's pro se submissions, we find it useful to review the rules regarding legal representation ***113** and pro se submissions applicable to capital trial and appellate proceedings.

[2] A criminal defendant facing state capital charges has two mutually exclusive rights with respect to legal representation at trial. "He may choose to be represented by professional counsel, or he may knowingly and intelligently elect to assume his own representation." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1162, 259 Cal.Rptr. 701, 774 P.2d 730 (*Hamilton*); see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1368, 65 Cal.Rptr.2d 145, 939 P.2d 259; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1003, 30 Cal.Rptr.2d 818, 874 P.2d 248.) These are federal constitutional rights that derive from the Sixth Amendment, as made applicable to the states by the Fourteenth Amendment. (*Faretta v. California* (1975) 422 U.S. 806, 818, 95 S.Ct. 2525, 45 L.Ed.2d 562.)

[3] *472 Significantly, however, a capital defendant who chooses professional representation, rather than self-representation, is not entitled to present his or her case personally or to act as cocounsel at trial. [FN2] (*PEOPLE V. FRIERSON* (1991) 53 cal.3d 730, 741, 280 cal.rptr. 440, 808 P.2d 1197; *Hamilton, supra*, 48 Cal.3d at p. 1162, 259 Cal.Rptr. 701, 774 P.2d 730, and cases cited therein; see also *Mattson, supra*, 51 Cal.2d at p. 789, 336 P.2d 937.) There are sound reasons for this rule. " Undesirable tactical conflicts, trial delays, and confusion often arise when a defendant who has chosen professional representation shares legal functions with his attorney." (*Hamilton, supra*, 48 Cal.3d at p. 1162, 259 Cal.Rptr. 701, 774 P.2d 730.)

FN2. There is one exception to this rule: Defendants may make pro se motions regarding representation, including requests for self-representation (*Faretta v. California, supra*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562) and for substitution

of counsel (*Marsden, supra,* 2 Cal.3d 118, 84 Cal.Rptr. 156, 465 P.2d 44).

[4][5] Accordingly, when a defendant exercises his or her constitutional right to representation by professional counsel, it is counsel who "is in charge of the case" and the defendant "surrenders all but a handful of 'fundamental' personal rights to counsel's complete control of defense strategies and tactics." (*Hamilton, supra,* 48 Cal.3d at p. 1163, 259 Cal.Rptr. 701, 774 P.2d 730.) Although a trial court retains discretion to allow a represented defendant's personal participation, such an arrangement ought be avoided unless the court is convinced, upon a substantial showing, that it will promote justice and judicial efficiency in the particular case. (*People v. Frierson, supra,* 53 Cal.3d at p. 741, 280 Cal.Rptr. 440, 808 P.2d 1197; *Mattson, supra,* 51 Cal.2d at p. 797, 336 P.2d 937.) Indeed, it is the trial court's duty "to safeguard and promote the orderly and expeditious conduct of its business and to guard against inept procedures and unnecessary indulgences which would tend to hinder, hamper or delay the conduct and dispatch of its proceedings." (*Mattson, supra,* 51 Cal.2d at p. 792, 336 P.2d 937.)

[6][7] A criminal defendant's rights regarding legal representation are more limited on appeal than at trial. The Sixth Amendment does not include any right to appeal, so it implicates no basis for a right to representation by professional counsel on appeal. (See *People v. Scott* (1998) 64 Cal.App.4th 550, 558, 75 Cal.Rptr.2d 315, cited in *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.* (2000) 528 U.S. 152, 155, 120 S.Ct. 684, 145 L.Ed.2d 597 (*Martinez*).) The Fourteenth Amendment and its due process and equal protection guarantees, however, prohibit discrimination against convicted indigent inmates; consequently, an indigent inmate has a ***114 constitutional right to counsel **1111 appointed at the state's expense where, as here, the state confers a criminal appeal as of right. (*Douglas v. California* (1963) 372 U.S. 353, 356-357, 83 S.Ct. 814, 9 L.Ed.2d 811.) The right to appointed counsel promotes an appellate system " 'free of unreasoned distinctions' " by assuring that indigent inmates, like inmates in better economic circumstances, have an adequate opportunity to present their claims fairly within the adversarial system. *473(*Ross v. Moffitt* (1974) 417 U.S. 600, 612, 94 S.Ct. 2437, 41 L.Ed.2d 341.) Consistent with these constitutional principles, California provides a statutory right to appointed counsel for both capital and noncapital criminal appeals. (Pen.Code, §§ 1239, 1240, 1240.1.)

[8][9][10] Notably, however, there is no right--constitutional, statutory, or otherwise--to self-representation in a criminal appeal in California. (See *People v. Stanworth* (1969) 71 Cal.2d 820, 834-835, 80 Cal.Rptr. 49, 457 P.2d 889 [no right to dismiss counsel in capital appeals]; *People v. Scott, supra,* 64 Cal.App.4th at pp. 569 573, 75 Cal.Rptr.2d 315 [noncapital appeals].) In particular, neither the Sixth Amendment nor the due process clause of the Fourteenth Amendment to the federal Constitution furnishes a basis for finding such a right. (*Martinez, supra,* 528 U.S. at pp. 160-163, 120 S.Ct. 684.) As the United States Supreme Court recently explained, the sole constitutional right to self-representation derives from the Sixth Amendment, which pertains strictly to the basic rights that an accused enjoys in defending against a criminal prosecution and does not extend beyond the point of conviction. (*Martinez, supra,* 528 U.S. at pp. 154, 160-161, 120 S.Ct. 684.) Emphasizing that the change in one's position from "defendant" to "appellant" is a significant one, the high court found that the balance between a criminal defendant's interest in acting as his or her own lawyer and a state's interest in ensuring the fair and efficient administration of justice "surely tips in favor of the [s]tate" once the defendant is no longer presumed innocent but found guilty beyond a reasonable doubt. (*Id.* at p. 162, 120 S.Ct. 684.) Consequently, the court concluded, states may exercise broad discretion when considering what representation to allow and may require an indigent inmate "to accept against his will a state-appointed attorney" for representation on a direct appeal without violating the federal Constitution. (*Martinez, supra,* 528 U.S. at p. 164, 120 S.Ct. 684.)

[11] As relevant here, represented capital inmates are not permitted to present their automatic appeals personally to this court. That is, such inmates have no right personally to supplement or supersede counsel's briefs and arguments on the merits of their appeals. (*Clark, supra,* 3 Cal.4th at p. 173, 10 Cal.Rptr.2d 554, 833 P.2d 561; *Mattson, supra,* 51 Cal.2d at p. 798, 336 P.2d 937.) As we explained in *Mattson,* pro se submissions pertaining to an appeal will not be filed or considered "[b]ecause of the undesirability of fruitlessly adding to the burdens of this court the time-consuming task of reading *pro se* documents which are not properly before us, and, if they be read, of consequently enlarging [the] opinion by a recountal and discussion of the contentions made in propria persona...." (*Mattson, supra,* 51 Cal.2d at p. 798, 336 P.2d 937.)

Thus, all appellate motions and briefs must be

prepared and filed by counsel and may not be submitted pro se. (*Clark, supra,* 3 Cal.4th at p. 173, 10 Cal.Rptr.2d 554, 833 P.2d 561.) Although we will accept and consider pro se motions regarding representation (i.e., *Marsden* motions to substitute counsel), such motions "must be clearly labeled as such" and "must be ***115 limited to matters concerning representation." *474 (*Clark, supra,* 3 Cal.4th at p. 173, 10 Cal.Rptr.2d 554, 833 P.2d 561.) Any other pro se document offered in an appeal "will be returned unfiled" (*ibid.*), or, if mistakenly filed, will be stricken from the docket (*Matson, supra,* 51 Cal.2d at p. 798, 336 P.2d 937). [FN3]

> FN3. Petitioner contends that respondent should be "estopped" from arguing here that represented capital inmates may not file papers pro se in appellate and habeas corpus proceedings because respondent supposedly advanced a contrary position in *Martinez, supra,* 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597. That is, respondent assured the United States Supreme Court, both in briefing and during oral argument, that appellate courts in California routinely permit represented criminal appellants to make pro se filings. The contention lacks merit. Whether or not respondent should be estopped from arguing a point, this court is not estopped from applying correct constitutional and policy principles.
> In any event, we note the only apparent statement in *Martinez* that bears on the matter is the high court's observation that "the rules governing appeals in California, and presumably those in other States as well, seem to protect the ability of indigent litigants to make *pro se* filings. See, e.g., *People v. Wende,* 25 Cal.3d 436, 440 [158 Cal.Rptr. 839] 600 P.2d 1071, 1073 (1979); see also *Anders v. California,* 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493] (1967)." (*Martinez, supra,* 528 U.S. at p. 164, 120 S.Ct. 684.) The citations to *People v. Wende* and *Anders v. California* make it apparent that the court's focus was on the sort of situation, not presented here, where counsel submits an appellate brief that raises no specific issues on the client's behalf or that describes the appeal as frivolous.

**1112 With this overview in mind, we now assess whether and to what extent similar restrictions should apply to pro se submissions by represented inmates in capital habeas corpus proceedings before this court.

The federal Constitution guarantees that habeas corpus shall not be suspended, except as necessary for public safety during a rebellion or invasion. (U.S. Const., art. I, § 9, cl.2.) Notwithstanding the fact that the concept of habeas corpus relief is the subject of a constitutional provision, while appellate relief is not, an inmate's rights regarding legal representation in a state habeas corpus proceeding are even more limited than on an appeal.

[12][13] "Postconviction relief is even further removed from the criminal trial than is discretionary direct review. [FN4] It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. [Citation.].... States have no obligation to provide this avenue of relief, [citation], and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the state supply a lawyer as well." (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 556-557, 107 S.Ct. 1990, 95 L.Ed.2d 539; see *In re Scott* (2003) 29 Cal.4th 783, 815, 129 Cal.Rptr.2d 605, 61 P.3d 402 [state capital habeas corpus proceeding in which a referee was appointed to take evidence and make findings on an inmate's claims of ineffective assistance of counsel was civil in nature].) Consequently, there is no federal constitutional right to counsel for state habeas corpus proceedings, not even in a capital case. ***475** (*Murray v. Giarratano* (1989) 492 U.S. 1, 10, 109 S.Ct. 2765, 106 L.Ed.2d 1 (plur. opn. of Rehnquist, C. J.); see *Coleman v. Thompson* (1991) 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640.)

> FN4. As used by the Supreme Court here, the term "postconviction relief" refers to collateral relief, that is, relief from a conviction other than by direct appeal or discretionary direct review. (Cf. *post,* fn. 6.)

[14] California likewise confers no constitutional right to counsel for seeking collateral relief from a judgment of conviction via state habeas corpus proceedings. Nonetheless, the long-standing practice of ***116** this court is to appoint qualified counsel to work on behalf of an indigent inmate in the investigation and preparation of a petition for a writ of habeas corpus that challenges the legality of a death judgment. [FN5] (*In re Sanders* (1999) 21 Cal.4th 697, 717, 87 Cal.Rptr.2d 899, 981 P.2d 1038; *In re Anderson* (1968) 69 Cal.2d 613, 633, 73 Cal.Rptr. 21, 447 P.2d 117; Cal. Supreme Ct., Internal Operating Practices & Proc., XV, Appointment of Attorneys in Criminal Cases; Cal. Supreme Ct., Policies Regarding Cases Arising from

Judgments of Death, policy 3.) This practice, now codified in principle at Government Code section 68662, promotes the state's interest in the fair and efficient administration of justice and, at the same time, protects the interests of all capital inmates by assuring that they are provided a reasonably adequate opportunity to present us their habeas corpus claims.

> FN5. An attorney willing to be appointed to represent an inmate in such a proceeding must meet certain minimum qualifications and must demonstrate the commitment, knowledge, and skills necessary to represent the inmate competently. (Cal. Rules of Court, rule 76.6(a), (b), (c), & (f).) Appointed counsel are charged with "the duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus," as delineated in our court's policies regarding cases arising from death judgments. (Cal. Supreme Ct., Internal Operating Practices & Proc., XV E.)

We turn now to the question whether inmates have a right to self-representation when seeking habeas corpus relief in our courts. Although the United States Supreme Court has not ruled on this matter specifically, it is logical to conclude that if there is no federal constitutional right to self-representation in a state appeal as of right **1113 (*Martinez, supra,* 528 U.S. at p. 163, 120 S.Ct. 684), then there is no such constitutional right in state collateral proceedings. Not only does the Sixth Amendment right to self-representation at trial clearly not apply, but the autonomy interests that survive a judgment of conviction surely are no greater once the judgment is affirmed on appeal and the inmate is relegated to the civil remedy of seeking collateral relief.

Inmates, moreover, have no state constitutional right to self-representation in habeas corpus proceedings. Like its federal counterpart, the California Constitution guarantees that habeas corpus shall not be suspended, except as necessary for public safety during a rebellion or invasion. (Cal. Const., art. I, § 11.) That provision makes no mention of representational rights, and furnishes no more a basis for such rights than the federal provision.

Recent legislation, however, alludes to the matter of self-representation. Government Code section 68662 provides that our court "shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings, [FN6] and shall enter an order containing one of the following: [¶] (a) The appointment of counsel to represent the prisoner in postconviction state proceedings upon a finding that the person is indigent and has accepted the offer to appoint counsel or is unable to competently decide whether to accept or reject that offer. [¶] (b) *A finding, after a hearing if necessary, that the prisoner rejected the offer to appoint counsel and made that decision with full understanding of the legal consequences of the decision.* [¶] (c) The denial to appoint counsel upon a finding that the person is not indigent." (Italics added; see Gov.Code, former § 68652, ***117 added by Stats.1997, ch. 869, § 3.) Although these provisions contemplate that a capital inmate may decline our offer of counsel at the outset, so long as he or she fully understands the legal consequences of such a decision, they specify no right to withdraw an election of professional legal representation once made.

> FN6. As used in Government Code section 68662, the term "state postconviction proceedings" refers to state proceedings in which the prisoner seeks collateral relief from a capital sentence, i.e., relief other than by automatic appeal. (Cf. *ante,* fn. 4.)

Additionally, the Penal Code specifies that "[e]very person unlawfully imprisoned or restrained" may prosecute a writ of habeas corpus (Pen.Code, § 1473, subd. (a)) by means of a petition "signed *either* by the party for whose relief it is intended, *or* by some person in his behalf" (*id.,* § 1474, italics added). But neither of these provisions is contravened by a rule that a "person" represented by counsel *for the specific purpose of pursuing habeas corpus remedies* must generally exercise the right to prosecute the writ *through that counsel,* who, in such cases, acts "in his behalf."

Certainly, capital inmates who are represented by habeas corpus counsel have no more right to present their cases personally alongside their attorneys than do represented capital defendants at trial or on appeal.

As is the situation in a capital trial or appeal, there is no constitutional or statutory provision that grants a represented inmate the right to file pro se petitions, motions, objections, or other briefing in furtherance of his or her capital habeas corpus case. Nor do our published practices, procedures or policy standards governing capital habeas corpus proceedings afford such a right. Moreover, we indicated quite some time ago that the general rule *477 prohibiting a

represented party's pro se documents applies in the habeas corpus context. (See *Cathey, supra,* 55 Cal.2d at p. 684, 12 Cal.Rptr. 762, 361 P.2d 426 [represented petitioner seeking release from the custody of the California Medical Facility at Vacaville]; accord, *In re Mosier* (1973) 163 Mont. 540, 511 P.2d 1320, 1321 [per curiam order dismissing noncapital defendant's petition for writ of habeas corpus alleging unconstitutionality of his confinement]; *In re Stirewalt* (C.A.A.F. 2001) 56 M.J. 506, 507 [refusing to entertain a pro se habeas corpus petition where the petitioner had been previously represented by counsel, had a right to continuing representation by government-provided counsel, and had given no indication that he had been inappropriately deprived of representation]; *In the Matter of Stroik* (Del., Sept. 23, 1998, No. 377, 1998) 1998 WL 736284 [unpublished disposition **1114 holding that a noncapital defendant could not file a pro se habeas corpus petition because it was directly related to postconviction matters in which he was represented by counsel]; *Gilbert v. Secretary* (Fla.Dist.Ct.App.1994) 632 So.2d 1104, 1105; *Ex parte Taylor* (Tex.Crim.App.1975) 520 S.W.2d 33, 34; *Pitts v. Hopper* (N.D.Ga.1971) 327 F.Supp. 119, 120.)

[15][16] In consideration of all of the foregoing, the rule we adopt is this: This court will not file or consider a represented capital inmate's pro se submission to the extent it challenges, or otherwise pertains to (see *post,* fn. 11), the legality of the death judgment. [FN7] Challenges that go ***111 to the legality of the death judgment fall squarely within the scope of habeas corpus counsel's representation, and there appears no legitimate reason why capital inmates who have habeas corpus counsel should not be required to submit such matters to their attorneys for investigation and proper presentation to this court in a petition prepared and filed by their attorneys. [FN8] Indeed, with their formal legal training, professional experience, and unrestricted access to legal and other resources, counsel possess distinct advantages over their inmate clients in investigating the factual and legal grounds for potentially meritorious habeas corpus claims and in recognizing and preparing legally sufficient challenges to the validity of the inmates' death judgments. (See generally ***478***Jones v. Barnes, supra,* 463 U.S. at p. 751, 103 S.Ct. 3308 [noting the superior ability of counsel to present the client's case on appeal].)

FN7. Consistent with our rule on appeal, however, we will file and consider a pro se motion regarding an inmate's representation (i.e., a *Marsden* motion) to the extent it is clearly labeled and limited to such matters. (See *Clark, supra,* 3 Cal.4th at p. 173, 10 Cal.Rptr.2d 554, 833 P.2d 561; *Marsden, supra,* 2 Cal.3d 118, 84 Cal.Rptr. 156, 465 P.2d 44.)
Additionally, we clarify that this opinion does not speak to pro se submissions in which the represented inmate expresses a desire to immediately end state habeas corpus proceedings, to forgo executive clemency proceedings, and to urge the state's implementation of the death penalty in his or her case.

FN8. Of course, counsel need not press habeas corpus claims requested by their inmate clients, even those that might be considered nonfrivolous, if counsel, as a matter of professional judgment, decide not to present those claims. (See generally *Jones v. Barnes* (1983) 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987.) We hereby disapprove of *Cathey, supra,* 55 Cal.2d 679, 12 Cal.Rptr. 762, 361 P.2d 426, to the extent it suggests we will file or consider pro se applications or briefs if counsel merely offers the pro se documents for filing on the inmate's behalf.

[17] A rule declining the filing and consideration of a represented capital inmate's pro se submissions as such is consistent with the general rule that represented parties have no right to present their cases personally alongside counsel--a principle we have recognized in the context of both capital trials and appeals, and in noncapital habeas corpus proceedings as well. [FN9] Restricting pro se submissions by represented inmates also is consistent with the established rule in California that represented parties in civil matters must act through their counsel. [FN10] (*Boca etc. R.R. Co. v. Superior Court* (1907) 150 Cal. 153, 155, 88 P. 718 [civil trials]; *Electric Utilities Co. v. Smallpage* (1934) 137 Cal.App. 640, 641-642, 31 P.2d 412 [civil appeals].) Such a restriction is reasonable and serves to promote the fair and efficient administration of justice while avoiding inept procedures, repetitious and piecemeal claims, tactical conflicts, and confusion. (See generally *Martinez, supra,* 528 U.S. at p. 163, 120 S.Ct. 684.)

FN9. We recognize that inmates convicted solely of noncapital crimes typically are represented only by appellate counsel who

have no obligation to investigate or present grounds for habeas corpus relief. (See *In re Clark* (1993) 5 Cal.4th 750, 783-784, fn. 20, 21 Cal.Rptr.2d 509, 855 P.2d 729.) Nothing in this opinion should be construed to bar a court's filing and consideration of pro se habeas corpus petitions and claims from a noncapital inmate unless counsel has also been specifically retained or appointed to prosecute habeas corpus remedies on the inmate's behalf.

FN10. As indicated, habeas corpus proceedings like the one before us are properly viewed as civil actions designed to overturn presumptively valid criminal judgments and not as part of the criminal process itself. (*Pennsylvania v. Finley*, *supra*, 481 U.S. at p. 556, 107 S.Ct. 1990; *Murray v. Giarratano*, *supra*, 492 U.S. at p. 13, 109 S.Ct. 2765 (conc. opn. of O'Connor, J.); *In re Reno*, *supra*, 28 Cal.4th at p. 815, 129 Cal.Rptr.2d 505, 52 P.3d 402.)

III.

[18] As our order to show cause reflects, petitioner submitted eight pro se documents relating to this court for filing and consideration. We shall return to petitioner as unfiled the following six documents: (1) the "Declaration and Motion to Supplement **119 Habeas Corpus" in *In re Barnett* (S096831, Apr. 5, 2001) (received Nov. 2, 2001); (2) the document containing pro se habeas corpus claims No. 275 and 276 (received Nov. 19, 2001); (3) the "Declaration of Lee Max Barnett" and the "Declaration and Motion and Objections to Respondent's Request for Extension of Time, Motion for Summary Judgment" (received Nov. 21, 2001); (4) the letter referring to an alleged misleading statement of fact in Appellant's Opening Brief and the court's opinion in *People v. Barnett*, *supra*, 17 Cal.4th 1044, 74 Cal.Rptr.2d 121, 954 P.2d 384 (received Nov. 27, 2001); (5) the document containing pro se "Supplemental Habeas Claim # 278" (received Dec. 3, 2001); (6) the document entitled "Impediments to Filing preAEDPA & Entitlement to preAEDPA Standards on Review"**479 (received Jan. 9, 2002). These documents consist largely of issues and claims that pertain to the legality of the death judgment and therefore are within the scope of counsel's representation. [FN11]

FN11. The third listed document includes objections to respondent's request for an extension of time to file an informal response to the petition for writ of habeas corpus that counsel filed on petitioner's behalf. The handling of such objections falls directly within the scope of counsel's representation.

[19] Conversely, we shall file the following two pro se documents under separate file numbers: (1) the petition for writ of habeas corpus that complains both of "prison conditions impeding & obstructing habeas" and of denial of petitioner's rights to a speedy trial and a speedy appeal (received Mar. 6, 2002); and (2) the petition for writ of habeas corpus that complains the superior court erred in denying a petition for writ of habeas corpus filed on August 28, 2001 in Marin County Superior Court, No. SC 120773 (received Apr. 2, 2002). Because these documents complain primarily of prison conditions, reflecting matters falling outside the scope of appointed counsel's representation, we shall consider, at a future time and independently of the habeas corpus proceeding herein denominated as case No. S096831, those submissions on their merits. (See *ante*, fn. 1.) To the extent, however, that these documents also include contentions that challenge or otherwise pertain to the legality of the death judgment, such contentions are not properly presented and we shall decline their consideration.

The order to show cause is discharged.

WE CONCUR: GEORGE, C.J., WERDEGAR, CHIN, BROWN, MORENO, and POLLAK [FN*], JJ.

FN* Associate Justice of the Court of Appeal, First Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

31 Cal.4th 466, 73 P.3d 1106, 3 Cal.Rptr.3d 108, 03 Cal. Daily Op. Serv. 7028, 2003 Daily Journal D.A.R. 8794

Briefs and Other Related Documents (Back to top)

• S096831 (Docket) (Apr. 05, 2001)

END OF DOCUMENT

Supreme Court of California
THE PEOPLE, Plaintiff and Respondent,
v.
JACK GUS FARNAM, Defendant and Appellant.
No. S010808.

June 10, 2002.

SUMMARY

Defendant was convicted by a jury of one count of first degree murder (Pen. Code, § 187, subd. (a)) of a 55-year-old woman, one count of rape (Pen. Code, § 261), and one count of sodomy (Pen. Code, § 286). The jury found true the special circumstances that defendant committed the murder while engaged in burglary, robbery, rape, and sodomy (Pen. Code, § 190.2, subd. (a)(17)), and that defendant previously had been convicted of first degree murder (Pen. Code, § 190.2, subd. (a)(2)) of another woman under similar circumstances. After a penalty trial, the jury returned a verdict of death and the trial court imposed that sentence. Before jury deliberations in the guilt phase, defendant moved to waive a separate proceeding to determine the truth of the prior murder special-circumstance allegation, the trial court granted the motion, and defendant's stipulation to the truth of the allegation was submitted to the jury before its deliberations. (Superior Court of Los Angeles County, No. A780838, Clarence A. Stromwall, Judge.)

The Supreme Court affirmed. The court held that the trial court did not violate defendant's federal constitutional right to a fair trial by allowing evidence of his prior murder conviction to be presented to the jury in advance of guilt deliberations. Although Pen. Code, § 190.1, subd. (b), makes clear that a trial court may not force a capital defendant to undergo a unitary trial of the separate issues of the defendant's guilt of first degree murder and the truth of a prior murder conviction special-circumstance allegation, it does not explicitly forbid a defendant from validly waiving a bifurcated trial of such issues in an affirmative, knowing, and voluntary manner, and defendant did so. There was also a valid tactical reason for the waiver. The court also held that the trial court did not abuse its discretion in denying defendant's challenges for cause to four jurors he alleged were prejudicially disposed in favor of the death penalty, or in denying defendant's objection to the prosecution's peremptory challenges against five jurors on group bias grounds. The court held that the trial court did not err in refusing to discharge four women jurors, one of whom, in the presence of the others, was attacked while returning to court from lunch and had her purse *108 snatched. The court held that the evidence was sufficient to sustain the sodomy conviction and special circumstance finding. The court further held that no prejudicial error occurred respecting evidentiary matters, instructions, or alleged prosecutorial misconduct during the guilt phase, and that defendant was not denied effective assistance of counsel.

As to the penalty phase, the court held that the trial court properly permitted the prosecutor to present evidence of prior violent incidents, including the earlier murder, as aggravating factors. The court also held that defendant's confession to the prior murder was not obtained in violation of his constitutional rights, and that the trial court properly admitted it into evidence. The trial court did not abuse its discretion in admitting into evidence 32 autopsy photographs of the prior murder victim. The court held that the trial court had no sua sponte duty to give an instruction on the meaning of a life sentence without the possibility of parole, and that its instructions on aggravating and mitigating circumstances were proper. The court held that the prosecutor's use of strong language in reference to defendant in closing argument did not constitute misconduct. The court held that the trial judge was not required to recuse himself from hearing defendant's automatic modification motion for having said to the jury, at the conclusion of the trial, "let me indicate to you that in my humble opinion, your decision was correct." Although the comment to the jury was inappropriate to the extent it suggested the judge had already decided to deny modification, other remarks indicated that the judge intended his comments to have therapeutic value for the jurors rather than a legal purpose. Moreover, his remarks at the modification hearing reflected that he was willing and capable of fairly and impartially performing his statutory duty to review the jury's death verdict independently, and he did so. (Opinion by Baxter, J., expressing the unanimous view of the court.)

HEADNOTES

c. *Preservation of Evidence*

Defendant contends the state's failure to preserve biological evidence collected from the victim's body and home denied him due process, a fair trial, and the right to reliable guilt and penalty determinations. Specifically, defendant claims that the state's failure to properly refrigerate or freeze carpet samples, sexual assault kit evidence, blood and semen samples, and ***166** the victim's bedspread resulted in the degradation of material exculpatory evidence. Moreover, he claims, the trial court erroneously denied a defense request for a jury instruction on the matter [FN29] and a motion for a new trial on the same ground.

> FN29 The proposed instruction read: "While in the possession of law enforcement, the following items of evidence were either not suitably refrigerated or frozen: carpet samples, sexual assault kit evidence, and semen and/or blood samples. [¶] You must take the failure to preserve this evidence as indicating that among the inferences which may reasonably have been drawn from this evidence, those inferences most favorable to the defendant are the more probable."

(27) " 'Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488 [104 S.Ct. 2528, 2535, 81 L.Ed.2d 413]; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976 [39 Cal.Rptr.2d 607, 891 P.2d 153].) To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." [Citations.] The state's responsibility is further limited when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57 [109 S.Ct. 333, 337, 102 L.Ed.2d 281].) In such case, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.." (*Id.* at p. 58 [109 S.Ct. at p. 337]; accord, *People v. Beeler, supra*, 9 Cal.4th at p. 976.)' [Citation.]" (*People v. Catlin, supra*, 26 Cal.4th at pp. 159-160.)

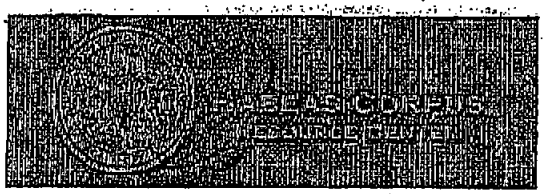
Defendant's claims are devoid of merit. Here, the crux of his complaint is that the state failed to properly "preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Arizona v. Youngblood, supra*, 488 U.S. at p. 57 [109 S.Ct. at pp. 337-338].) Accordingly, to prevail on his claims defendant must show bad faith on the part of the state. (*Id.* at p. 58 [109 S.Ct. at p. 337].) He does not do so. At the time the samples were taken in 1982, the police had no suspects in the Mar crimes, and the police crime laboratory did not routinely refrigerate samples other than those in sexual assault kits. Freezers were not even available in the police department's property division until the end of 1983. Defendant does not contend that the prosecution withheld any evidence or reports pertaining to the sexual assault kit or any other evidence gathered from the crime scene. Because the record ***167** fails to reflect any bad faith on the part of the state, the inaction complained of did not result in any due process violation. (*Ibid.*) Accordingly, the trial court committed no error in refusing defendant's instructional sanction or in determining that a new trial was not necessary.

Finally, consistent with our conclusion that the state breached no duty to defendant in failing to freeze or refrigerate evidence, we reject defendant's related contention that trial counsel was ineffective for failing to request and secure suppression of any testimony by the prosecution experts who examined the evidence.

5. *Prosecutorial Misconduct*

Defendant contends that the prosecutor committed multiple acts of prejudicial misconduct during the guilt phase by engaging in inflammatory argument, misstating the evidence, misleading the jury, and expressing her personal opinions regarding witness testimony and defendant's guilt.

(28) " 'Improper remarks by a prosecutor can " 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.' " (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 2471, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 1871, 40 L.Ed.2d 431]; cf. *People v. Hill* (1998) 17 Cal.4th 800, 819 [72 Cal.Rptr.2d 656, 952 P.2d 673].)' [Citation.] 'But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " 'the use of deceptive or



The Habeas Corpus Resource Center (HCRC), located in San Francisco, provides counsel to represent indigent men and women under sentence of death in California. The HCRC's mission is to provide timely, high-quality legal representation for indigent petitioners in death penalty habeas corpus proceedings before the Supreme Court of California and the federal courts.

The HCRC also recruits and trains attorneys to expand the pool of private counsel qualified to accept appointments in death penalty habeas corpus proceedings and serves as a resource to appointed counsel, thereby reducing the number of unrepresented indigents on California's death row. Please refer to our capital habeas appointments information page for complete information.

NEWS AND DEVELOPMENTS

> 04.13.2006 -- Employment opportunities at HCRC

> 02.15.2006 -- Press Release Regarding Kathleen Culhane

> 12.14.2005 -- Volunteer opportunities at HCRC

> 10.05.2005 -- HCRC announces its Summer 2006 internship program

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