

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

Penal Code Sections 1405 and 1417.9

Statutes 2000, Chapter 821; Statutes 2001, Chapter 943

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

County of Los Angeles, Claimant

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County of Los Angeles, Claimant

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**EXECUTIVE SUMMARY**

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

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

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

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

### **Discussion**

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

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

#### *IV. Reimbursable Activities*

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

#### Indigent Defense Counsel and District Attorney

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

#### Retention of Biological Material

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

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

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

#### Inmate Custody and Transportation

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

#### Documentation

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

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

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

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

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

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



**Staff Recommendation**

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

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

## Claimant

County of Los Angeles

## Chronology

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

## Summary of the Mandate

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

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

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

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

## Discussion

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

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

### *IV. Reimbursable Activities*

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

#### Indigent Defense Counsel and District Attorney

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DOF also stated in its comments that:

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

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

#### Retention of Biological Material

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

The Statement of Decision specifically states:

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

The claimant also proposed the following activities:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### *B. Ongoing Activities*

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

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

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

Claimant also proposed:

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

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

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

Claimant proposed:

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

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

Claimant also proposed:

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

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

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

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

The claimant proposed:

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

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

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

Finally, the claimant proposed:

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

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

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

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

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

#### Inmate Custody and Transportation

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

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

#### Time Study Language

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

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

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

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

##### 1. Labor Costs

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

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

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

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

## 2. Storage Costs

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

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

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

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

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

## *VII. Offsetting Revenues and Reimbursements*

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

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

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

**Staff Recommendation**

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

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



## PROPOSED PARAMETERS AND GUIDELINES

Penal Code Sections 1405 and 1417.9

Statutes 2000, Chapter 821; Statutes 2001, Chapter 943

*Post Conviction: DNA Court Proceedings*

00-TC-21, 01-TC-08

County of Los Angeles, Claimant

### I. SUMMARY OF THE MANDATE

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

- **Representation and investigation by indigent defense counsel:** Effective January 1, 2001, ~~F~~for indigent defense counsel investigation of the DNA-testing and representation of the convicted person (except for drafting and filing the DNA-testing motion) ~~effective January 1, 2001~~ (Pen. Code, § 1405, subd. (c), as added by Stats. 2000, ch. 821).
- **Prepare and file motion for DNA testing & representation by indigent defense counsel:** Effective January 1, 2002, ~~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, subs. (a) & (b)(3)(A)). Also, ~~providing~~ notice of the motion to “the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested” ~~is mandated as of January 1, 2002~~ (Pen. Code, § 1405, subd. (c)(2)).
- **Prepare and file response to the motion:** Effective January 1, 2001, ~~to~~ prepare and file a response to the motion for testing, if any, by the district attorney “within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause” (Pen. Code, § 1405, subd. (c)(2)).
- **Provide prior test lab reports and data:** Effective January 1, 2001, ~~W~~when the evidence was subjected to DNA or other forensic testing previously, ~~by for~~ either the prosecution or defense, ~~the prosecution or defense,~~ whichever previously ordered the testing, to provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing ~~effective January 1, 2001~~ (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the ~~public defender~~ indigent defense counsel and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).

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

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

## II. ELIGIBLE CLAIMANTS

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

## III. PERIOD OF REIMBURSEMENT

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

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

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

## IV. REIMBURSABLE ACTIVITIES

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

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

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

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

For each eligible claimant, the following activities are reimbursable:

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

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

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

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

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

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

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

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

~~2.b.~~ 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~~ (Pen. Code, § 1405, subd. (c)(2)).

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

~~1.a.~~ Prepare and file a response to the motion for testing, if any, by the district attorney “within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause” (Pen. Code, § 1405, subd. (c)(2)). The following activities are also reimbursable:

- i) Consulting and meeting about DNA-testing for the convicted person with the trial attorneys, appellate counsel, members of the Alternate Public Defender’s Innocence Unit, the Post Conviction Center, the district attorney’s office, the Attorney General, or individuals from other Innocence Projects.
- ii) Reviewing the file and trial transcript.
- iii) Interviewing persons who worked on the criminal conviction, such as the trial attorney, investigating officer, or criminalist.
- iv) Performing other investigative activities necessary to respond to the inmate’s motion.

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

~~1.a.~~ Provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing ~~When the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the prosecution or defense, whichever previously ordered the testing, provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing~~ (Pen. Code, § 1405, subd. (d)).

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

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

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

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

~~1.a.~~ Prepare and file petition for writ of mandate or prohibition to appeal trial court’s order on motion for DNA-testing, or ~~response~~ respond to petition for writ of mandate

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

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

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

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

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

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

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

1. One-Time Activities

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

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

## 2. Ongoing Activities

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

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

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

### A. Direct Cost Reporting

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

#### 1. Salaries and Benefits

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

#### 2. Materials and Supplies

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

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

### 3. Contracted Services

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

### 4. Fixed Assets and Equipment

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

### 5. Travel

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

### 6. Training

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

## B. Indirect Cost Rates

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

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

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

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

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

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

## VI. **RECORD RETENTION**

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

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



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

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

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

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

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

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

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

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

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

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

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

# 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 any wrongly convicted person has the ability to prove his or her innocence through 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. In order to provide guidance to law enforcement agencies, prosecutors and the courts, on which the core responsibilities for implementation fall, I formed this Task Force. 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 the scope of California's postconviction testing law, its impact on the manner in which evidence is handled and stored, and the length of time for which evidence must be retained. The Task Force's deliberations and final recommendations were informed by current best practices among California law enforcement for evidence handling and storage.

Cooperation between law enforcement, district attorneys, the judiciary, and defense counsel to utilize postconviction testing in appropriate cases will provide Californians with assurance of the fairness our criminal justice system. I believe that the Task Force's report reflects a spirit of cooperation and of commitment to seeing that justice is done in California.

Sincerely,  
  
 BILL LOCKYER  
 Attorney General  
 State of California

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In January 2001, the Attorney General of California called together individuals from law enforcement, district attorneys offices, and 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.

Under SB 1342, 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.)

It has always been the responsibility of entities having custody of evidence, including courts and district attorneys offices, to adhere to good practices for storage of evidence that will:

- Maintain the potential value of the evidence for re-testing;
- Maintain a proper chain of custody; and,
- Ensure the safety of employees and the public.

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 all 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 Senate Bill 1342

Senate 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.

### 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.

### THE MOTION

The motion must 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 also must include the results of any previous DNA tests. The court, if necessary, must order the party in possession of those results to provide access to the reports, data and notes prepared in connection with the previous DNA tests to all parties.

### 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 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.

The statute allows a governmental entity to 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, which allows that the material sought to be tested only be retained 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 that 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

**P**enal Code section 1417.9 mandates 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." 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<sup>1</sup>.

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, 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.<sup>2</sup>

### 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.<sup>3</sup>
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 on an issue of identity. Our recommendation to retain a broader category of evidence 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.<sup>4</sup>



## RECOMMENDATIONS

### Types of Evidence that Should be Retained

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."<sup>5</sup>

Any official making the decision to discard evidence should have experience and background sufficient to make the decision, regarding the likelihood 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.

#### An item should be retained if any of the following apply:

1. The item was clearly documented as having been collected for biological testing, and it is one which forensic science has demonstrated can be tested for DNA.<sup>6</sup>

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, ball, 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. rape kits, blood alcohol samples.

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.<sup>7</sup>

- 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 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

**T**HE 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 must be mindful these factors will continue to 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 also 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 may already 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 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.

## RECOMMENDATIONS

### 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

#### Dry evidence

Wet or moist evidence containing biological materials 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 materials. Plastic is not recommended for packaging or storing moist or wet evidence items due to the acceleration of the decomposition of biological materials on the evidence items.

#### Liquid samples

Liquid samples, including liquid blood, 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 or amplified DNA samples or any reusable products of the typing process (e.g., sample substrate such as extracted cloth, slides prepared during differential extraction) should be stored under frozen conditions. If the original source of DNA or the extracted DNA from the original source is available, then the amplified product does not have to be retained.

**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 materials 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.

Regardless of the method chosen to store biological evidence, there will be some degree of sample degradation.

### RESULTS OF LABORATORY STUDIES

Controlled laboratory studies have shown that:

- When evidence containing biological materials is stored in a dried condition at room temperature, the biological material should still be typeable at one year or longer.
- 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.

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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 separate 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 mandatory requirements; "should" is used to denote recommended practices; "may" is used in the permissive sense.

# 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: Sample Notification 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 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.

## RECOMMENDATIONS

### 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 DOB, or CDC number, if available. The retaining agency can call the investigating agency to determine the inmate's name and DOB.

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, the governmental entity shall retain the material only until the time that the court 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 the governmental entity in possession of the 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.

## Senate Bill No. 1342

### CHAPTER 821

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.

(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.)

# Appendix C - SB 1342 Task Force Members

## CALIFORNIA ATTORNEY GENERAL'S OFFICE

SACRAMENTO OFFICE

Jan Bashinski

Ward Campbell

Dave Drullner

Janet Gaard

Chris Janzen

Les Kleinberg

Bret Morgan

Peter Siggins

SAN FRANCISCO OFFICE

Enid Camps

Joan Killeen

Ann Patterson

BERKELEY OFFICE

Lance Gima

Gary Sims

LOS ANGELES OFFICE

Mary Sanchez

SAN DIEGO OFFICE

Rick Millar

## CALIFORNIA ASSN. OF PROPERTY AND EVIDENCE

Maryann Duncan

Concord Police Department

Mr. Ash Kozuma, Property Manager

Sacramento Police Department

Barbara Peters

Simi Valley Police Department

## CALIFORNIA ASSN. OF CRIME LAB DIRECTORS

Bob Jarzen, President

Laboratory of Forensic Services

William Lewellen, Secretary

San Mateo County Sheriff's Office, Forensic Laboratory

## CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

Woody Clarke, Deputy District Attorney

San Diego County District Attorney's Office

Rock Harmon

Alameda County District Attorney

Larry Brown, Executive Director

California District Attorneys Association

## CALIFORNIA STATE CORONER'S ASSOCIATION

Captain Tim Buckhout

Alameda County Sheriff's Department

## CALIFORNIA POLICE CHIEFS ASSOCIATION

Sergeant Mike Noonan  
Alameda Police Department

Larry Valiska  
Alameda Police Department

Chief Burnham (Bunny) Matthews  
Alameda Police Department

John Lovell

## CALIFORNIA STATE SHERIFFS ASSOCIATION

Jerry Shadiger, Sheriff-Coroner  
Colusa County Sheriff-Coroner

Nick Warner

Nick Warner & Associates

## CALIFORNIA PEACE OFFICERS ASSOCIATION

Captain Michael Lanam  
Fremont Police Department

Lieutenant Gus Arroyo  
Fremont Police Department

## CALIFORNIA JUDICIAL COUNCIL

Hon. J. Richard Couzens  
Placer County Superior Court

Charlene Walker, Division Manager  
Sacramento County Superior Court

Joshua Weinstein  
Administrative Office of the Courts

Tressa Kentner, Court Executive Officer  
Superior Court of San Bernardino County

June Clark  
Office of Governmental Affairs

## INDIVIDUALS NOT REPRESENTING ORGANIZATIONS

Commander Mario Sanchez  
Calaveras Police Department

Dean Gialamas  
Los Angeles Sheriffs Department

Camille Hill  
Orange Co. District Attorney's Office, Sexual Assault Unit

Commanding Officer David Peterson  
Los Angeles Police Department, Property Division

John Santy  
Orange County District Attorney's Office  
Sexual Assault Unit, TrackRS Project

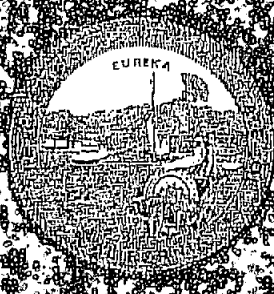
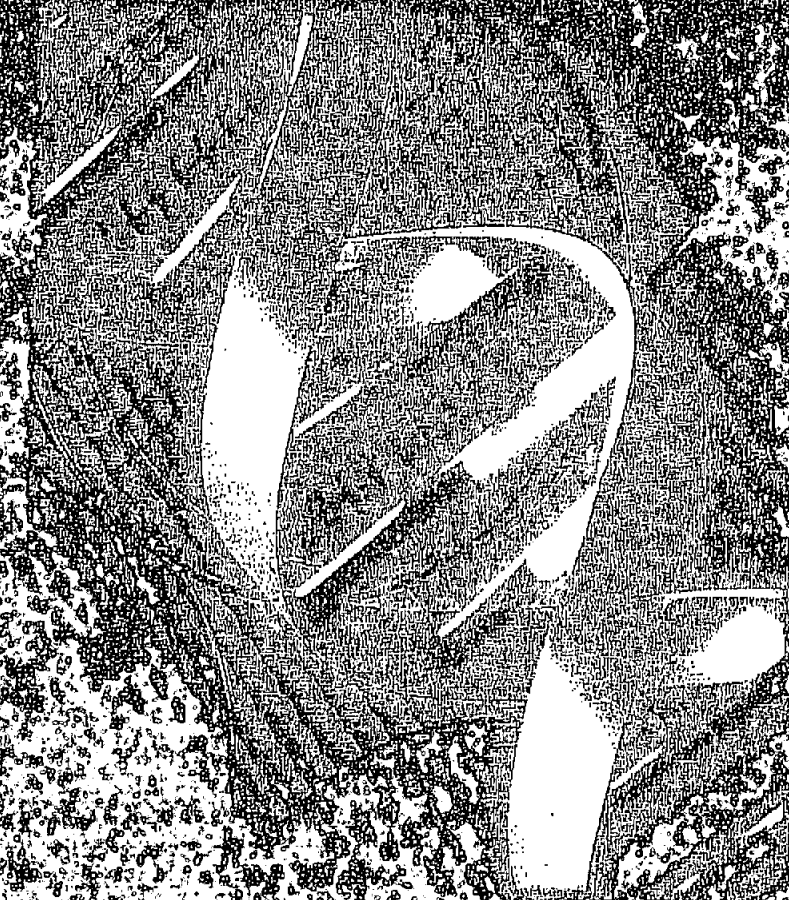
Tom Nasser, Assistant Director  
Orange County Sheriff-Coroner Department  
Forensic Science Services

Frank McGuire, Deputy District Attorney  
Yolo County District Attorney's Office

## FOOTNOTES

- <sup>1</sup> 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].
- <sup>2</sup> *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. Toohes* (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].
- <sup>3</sup> 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, 855.
- <sup>4</sup> 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."
- <sup>5</sup> *Boyd v. California* (1990) 494 U.S. 370, 380; *People v. Proctor* (1992) 4 Cal.4th 499, 523; *Strickler v. Green* (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].
- <sup>6</sup> 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"].
- <sup>7</sup> See, generally, National Commission, *Postconviction DNA Testing: Recommendations for Handling Requests* (NIJ Sept. 1999) at pp. xv, 21-22.





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## COMMISSION ON STATE MANDATES

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August 7, 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: Adopted Statement of Decision and Draft Parameters and Guidelines**  
*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 Statutes 2000, Chapter 821, and  
amended by Statutes 2001, Chapter 943

Dear Mr. Kaye:

The Commission on State Mandates adopted the attached Statement of Decision on July 28, 2006. State law provides that reimbursement, if any, is subject to Commission approval of parameters and guidelines for reimbursement of the mandated program, approval of a statewide cost estimate, a specific legislative appropriation for such purpose, a timely-filed claim for reimbursement, and subsequent review of the claim by the State Controller's Office.

Following is a description of the responsibilities of all parties and of the Commission during the parameters and guidelines phase:

- **Draft Parameters and Guidelines.** Pursuant to California Code of Regulations, title 2, section 1183.12 (operative September 6, 2005), the Commission staff is expediting the parameters and guidelines process by enclosing draft parameters and guidelines to assist the claimant. The proposed reimbursable activities are limited to those approved in the Statement of Decision by the Commission.
- **Claimant's Review of Draft Parameters and Guidelines.** Pursuant to California Code of Regulations, title 2, section 1183.12, subdivisions (b) and (c), the successful test claimant may file modifications and/or comments on the proposal with Commission staff by **August 22, 2006**. The claimant may also propose a reasonable reimbursement methodology pursuant to Government Code section 17518.5 and California Code of Regulations, title 2, section 1183.13. The claimant is required to submit an original and two (2) copies of written responses to the Commission and to simultaneously serve copies on the state agencies and interested parties on the mailing list.
- **State Agencies and Interested Parties Comments.** State agencies and interested parties may submit recommendations and comments on staff's draft proposal and the claimant's

modifications and/or comments within 15 days of service. State agencies and interested parties are required to submit an original and two (2) copies of written responses or rebuttals to the Commission and to simultaneously serve copies on the test claimant, state agencies, and interested parties on the mailing list. The claimant and other interested parties may submit written rebuttals. (See Cal. Code Regs., tit. 2, § 1183.11.)

- **Adoption of Parameters and Guidelines.** After review of the draft parameters and guidelines and all comments, Commission staff will recommend the adoption of an amended, modified, or supplemented version of staff's draft parameters and guidelines. (See Cal. Code Regs., tit. 2, § 1183.14.)

Please contact Nancy Patton at (916) 323-3562 if you have any questions.

Sincerely,



PAULA HIGASHI  
Executive Director

Enclosures: Adopted Statement of Decision, Draft Parameters and Guidelines

MAILED: \_\_\_\_\_  
DATE: 8/7/06  
INITIAL: JP  
FAXED: \_\_\_\_\_  
FILE: \_\_\_\_\_  
CHRON: \_\_\_\_\_  
WORKING BINDER: \_\_\_\_\_

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Penal Code Sections 1405 and 1417.9  
Statutes 2000, Chapter 821; Statutes 2001,  
Chapter 943;

Filed on June 29, 2001.

By County of Los Angeles, Claimant.

Case No.: 00-TC-21, 01-TC-08

*Post-Conviction: DNA Court Proceedings*

STATEMENT OF DECISION  
PURSUANT TO GOVERNMENT CODE  
SECTION 17500 ET SEQ.; TITLE 2,  
CALIFORNIA CODE OF  
REGULATIONS, DIVISION 2,  
CHAPTER 2.5, ARTICLE 7.

*(Adopted on July 28, 2006)*

**STATEMENT OF DECISION**

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 28, 2006. Leonard Kaye appeared for the County of Los Angeles. Susan Geaniacou appeared for the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 7 to 0.

**Summary of Findings**

The Commission 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, subs. (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)).

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Penal Code Sections 1405 and 1417.9  
Statutes 2000, Chapter 821; Statutes 2001,  
Chapter 943;

Filed on June 29, 2001

By County of Los Angeles, Claimant.

No. 00-TC-21, 01-TC-08


*Post Conviction: DNA Court Proceedings*

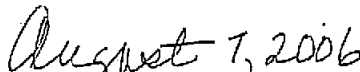
STATEMENT OF DECISION PURSUANT TO  
GOVERNMENT CODE SECTION 17500  
ET SEQ.; TITLE 2, CALIFORNIA CODE OF  
REGULATIONS, DIVISION 2, CHAPTER 2.5,  
ARTICLE 7

*(Adopted on July 28, 2006)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

  
\_\_\_\_\_  
PAULA HIGASHI, Executive Director

  
\_\_\_\_\_  
Date

- **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)).

The Commission 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.

## 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<sup>1</sup> and not part of the original criminal action.<sup>2</sup> 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

<sup>1</sup> 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."

<sup>2</sup> 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.<sup>3</sup>

**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.<sup>4</sup> In 2001, the Legislature added a new subdivision (b) to section 1405<sup>5</sup> 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.<sup>6</sup>

**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.<sup>7</sup>
  - 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.<sup>8</sup>

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<sup>3</sup> Penal Code section 1405 was technically amended by Statutes 2004, chapter 405. Staff makes no finding on this amendment.

<sup>4</sup> Penal Code section 1405, subdivision (b), formerly subdivision (c).

<sup>5</sup> All references herein are to the Penal Code unless otherwise indicated.

<sup>6</sup> Penal Code section 1405, subdivision (b)(4), as added by Statutes 2001, chapter 943.

<sup>7</sup> Former Penal Code section 1405, subdivision (a)(3).

<sup>8</sup> 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.<sup>9</sup>

**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.<sup>10</sup>

**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 contendere, unless ...."<sup>11</sup>

**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.
- (6) The evidence sought to be tested meets either of the following conditions:
  - A. It was not tested previously.

<sup>9</sup> Penal Code section 1405, subdivision (c)(2), formerly subdivision (a)(2).

<sup>10</sup> Penal Code section 1405 subdivision (d), formerly subdivision (a)(3).

<sup>11</sup> Penal Code section 1405, subdivision (e), formerly subdivision (b).

- 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.<sup>12</sup>
- (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 motion for post-conviction DNA testing is exempt from any law requiring disclosure of information to the public."

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<sup>12</sup> Statutes 2001, chapter 943 substituted "It" with "The evidence" and renumbered the subdivision.



**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.<sup>13</sup>

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

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<sup>13</sup> 88 Opinions of the California Attorney General 77 (2005).

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 contendere."

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.<sup>14</sup> 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.<sup>15</sup>

#### 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:<sup>16</sup>

- **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.
- **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

<sup>14</sup> Penal Code section 1236 et seq..

<sup>15</sup> Penal Code section 1181, subdivision (8), as amended by Statutes 1973, chapter 167.

<sup>16</sup> The test claim includes detail for each of the bulleted activities.

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<sup>17</sup> 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).
- Meet and confer with attorneys regarding the coordination of efforts in implementing the subject law (one time activity).

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<sup>17</sup> This document is attached to the Final Staff Analysis as Exhibit J.

- Distribute the State Attorney General's Office recommendations for compliance with the law<sup>18</sup> 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.<sup>19</sup> 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) ...<sup>20</sup>

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

<sup>18</sup> This document is attached to the Final Staff Analysis as Exhibit J.

<sup>19</sup> The current minimum amount is \$1000 (Gov. Code, § 17564).

<sup>20</sup> County of Los Angeles, test claim amendment (01-TC-08) submitted November 9, 2001, page 5.

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 were found to be reimbursable. Claimant disagrees, however, with the 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 contendere, 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.

## COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution<sup>21</sup> recognizes the state constitutional restrictions on the powers of local government to tax and spend.<sup>22</sup> "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."<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup>

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.<sup>26</sup> 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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<sup>21</sup> 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.

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

<sup>23</sup> *County of San Diego v. State of California (County of San Diego)* (1997) 15 Cal.4th 68, 81.

<sup>24</sup> *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

<sup>25</sup> *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*).

<sup>26</sup> *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.<sup>27</sup> A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."<sup>28</sup>

Finally, the newly required activity or increased level of service must impose costs mandated by the state.<sup>29</sup>

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.<sup>30</sup> 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."<sup>31</sup>

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

<sup>28</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

<sup>29</sup> *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.

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

<sup>31</sup> *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. The Commission finds that subdivision (c) does, based on the plain language in subdivision (c) that "the court shall appoint counsel."<sup>32</sup>

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."<sup>33</sup>

The Commission 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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<sup>32</sup> 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."

<sup>33</sup> *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 contendere*." 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.<sup>34</sup>

Even though the indigent defense counsel files the DNA-testing motion "if appropriate," the Commission 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."<sup>35</sup> 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, the Commission 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, the Commission 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 ...."<sup>36</sup>

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, the Commission 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.

<sup>34</sup> *In re. Kinnamon* (2005) 133 Cal. App. 4th 316, 323.

<sup>35</sup> *Norton v. Hines*, *supra*, 49 Cal.App.3d 917, 922.

<sup>36</sup> 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.<sup>37</sup> The decision whether or not to prosecute, however, is left to the discretion of the prosecuting district attorney.<sup>38</sup> 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."<sup>39</sup> 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...."<sup>40</sup>

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

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*,<sup>43</sup> 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"<sup>44</sup> 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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<sup>37</sup> *People v. Eubanks* (1996) 14 Cal.4th 580, 588-590 (*Eubanks*).

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *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.

<sup>41</sup> 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.

<sup>42</sup> Government Code section 26521.

<sup>43</sup> *San Diego Unified School Dist v. Commission on State Mandates*, *supra*, 33 Cal.4th 859, 887-888.

<sup>44</sup> *Ibid.*

has been established that reimbursement was in fact proper.<sup>45</sup> Citing *Carmel Valley Fire Protection District v. State of California*,<sup>46</sup> 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."<sup>47</sup> 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.<sup>48</sup>

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 ...."<sup>49</sup> In short, the district attorney has no choice to respond to the motion when the facts of the case so dictate.

For these reasons, the Commission 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.<sup>50</sup> 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, the Commission 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

<sup>45</sup> *Ibid.*

<sup>46</sup> *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521.

<sup>47</sup> Cf. *San Diego Unified School Dist v. Commission on State Mandates*, *supra*, 33 Cal.4th 859, 888.

<sup>48</sup> *Ibid.*

<sup>49</sup> Government Code section 26521.

<sup>50</sup> 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.

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 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."<sup>51</sup> 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, the Commission 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, the Commission 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."<sup>52</sup>

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. The Commission finds that it is.

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<sup>51</sup> *Norton v. Hines*, *supra*, 49 Cal.App.3d 917, 922.

<sup>52</sup> 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."<sup>53</sup> 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, the Commission 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..."<sup>54</sup> Therefore, the Commission 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,<sup>55</sup> require an expenditure for additional services or which unavoidably make the providing of existing services

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<sup>53</sup> *Norton v. Hines*, supra, 49 Cal.App.3d 917, 922.

<sup>54</sup> Government Code section 26521.

<sup>55</sup> 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.<sup>56</sup>

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.]<sup>57</sup>

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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup>

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, the Commission finds this activity is a mandate of the court

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<sup>56</sup> *Id.* at page 57.

<sup>57</sup> *Id.* at pages 58-59.

<sup>58</sup> *Id.* at page 71.

<sup>59</sup> California Constitution; article XIII B, section 8, subdivision (a).

<sup>60</sup> 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."

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 motion.<sup>61</sup> 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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<sup>61</sup> 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, the Commission 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.<sup>62</sup>

### 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.<sup>63</sup>

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,<sup>64</sup> the Commission 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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<sup>62</sup> This finding includes denial of the activity claimant alleged for the sheriff to transport convicted persons and provide oral testimony at hearings.

<sup>63</sup> These related activities are not expressly required by the statute, so they 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)).

<sup>64</sup> 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. The Commission finds that it is not.

In the *Kern High School Dist.* case,<sup>65</sup> 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."<sup>66</sup>

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, the Commission 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.<sup>67</sup> Only one of these findings is necessary to trigger article XIII B, section 6.<sup>68</sup>

Of the activities discussed above,<sup>69</sup> 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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<sup>65</sup> *Kern High School Dist.*, *supra*, 30 Cal.4th 727.

<sup>66</sup> *Id.* at page 743. Emphasis in original.

<sup>67</sup> *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56.

<sup>68</sup> *Carmel Valley Fire Protection District v. State of California*, *surpa*, 190 Cal.App.3d 521, 537.

<sup>69</sup> 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, subs. (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)).

The Commission 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 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.<sup>70</sup> And the test claim legislation must increase the level of governmental service provided to the public.<sup>71</sup> 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, subs. (a) & (b)(3)), and to provide notice of the motion as specified (§ 1405, subd. (c)(2)).<sup>72</sup>

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.<sup>73</sup> 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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<sup>70</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

<sup>71</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

<sup>72</sup> 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.

<sup>73</sup> 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.

The Commission 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,<sup>74</sup> not part of the original criminal action, since the action is not to bring someone "to trial and punishment."<sup>75</sup> 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<sup>76</sup> based on newly discovered evidence.<sup>77</sup> 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.<sup>78</sup> The Habeas Corpus Resource Center, an agency in the Judicial Branch of state government, provides for this counsel.<sup>79</sup>

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, the Commission 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:

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<sup>74</sup> 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."

<sup>75</sup> 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..."

<sup>76</sup> A writ of coram nobis permits the court that rendered judgment to reconsider it and give relief from errors of fact.

<sup>77</sup> *In re Clark* (1993) 5 Cal. 4th 750, 766.

<sup>78</sup> *In re Barnett* (2003) 31 Cal. 4th 466, 476, fn. 6.

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

- **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, the Commission 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.<sup>80</sup>

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,<sup>81</sup> 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.]<sup>82</sup>

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

<sup>80</sup> 88 Opinions of the California Attorney General 77 (2005).

<sup>81</sup> *People v. Farnam* (2002) 28 Cal. 4th 107, 166.

<sup>82</sup> *Ibid.*

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, the Commission finds that effective January 1, 2001, it is a new program or higher level of service to retain DNA or other biological evidence secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case.

**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.<sup>83</sup> 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)."<sup>84</sup>

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. The Commission 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 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 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.

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<sup>83</sup> *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

<sup>84</sup> The current requirement is \$1000 in costs (Gov. Code, § 17564, as amended by Stats. 2004, ch. 890).

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, the Commission 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.<sup>85</sup>

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,<sup>86</sup> it does not preclude reimbursement for the state-mandated program.

Therefore, the Commission 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

The Commission 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, subs. (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,

<sup>85</sup> Letter from J. Tyler McCauley, County of Los Angeles, September 19, 2003, page 5.

<sup>86</sup> California Code of Regulations, title 2, section 1183.1, subdivision (a)(7).

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)).

The Commission 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.



## DRAFT PARAMETERS AND GUIDELINES

Penal Code Sections 1405 and 1417.9

Statutes 2000, Chapter 821; Statutes 2001, Chapter 943

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

County of Los Angeles, Claimant

### I. SUMMARY OF THE MANDATE

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

- **Representation and investigation:** 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, subs. (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)).

The Commission found 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.

## II. ELIGIBLE CLAIMANTS

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

## III. PERIOD OF REIMBURSEMENT

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

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

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

## IV. REIMBURSABLE ACTIVITIES

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

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

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

For each eligible claimant, the following activities are reimbursable:

A. Representation and investigation. *Reimbursement period begins January 1, 2001.*

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

B. Prepare and file motion for DNA testing & representation. *Reimbursement period begins January 1, 2002.*

1. 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 (Pen. Code, § 1405, subs. (a) & (b)(3)(A)).
2. 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 (Pen. Code, § 1405, subd. (c)(2)).

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

1. 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)).

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

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

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

1. For the public defender and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).

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

1. 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)).

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

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

## V. CLAIM PREPARATION AND SUBMISSION

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

### A. Direct Cost Reporting

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

#### 1. Salaries and Benefits

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

#### 2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

#### 3. Contracted Services

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

#### 4. Fixed Assets and Equipment

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

#### 5. Travel

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

## B. Indirect Cost Rates

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

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

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

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

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

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

## VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter<sup>1</sup> is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the

<sup>1</sup> This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

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

#### VII. OFFSETTING SAVINGS AND REIMBURSEMENTS

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

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

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

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

#### IX. REMEDIES BEFORE THE COMMISSION

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

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

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

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

Commission on State Mandates

Original List Date: 7/6/2001  
Last Updated: 7/7/2006  
List Print Date: 08/07/2006  
Claim Number: 00-TC-21  
Issue: Post Conviction: DNA Court Proceedings

Mailing Information: Notice of adopted SOD

Mailing List

Related Matter(s)

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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COUNTY OF LOS ANGELES  
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J. TYLER McCAULEY  
AUDITOR-CONTROLLER

August 22, 2006

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



Dear Ms. Higashi:

Los Angeles County  
Proposed Parameters and Guidelines [Ps&Gs]  
Post Conviction: DNA Court Proceedings CSM-TC-08

Pursuant to the California Code of Regulations, title 2, section 1183.12, subdivisions (b) and (c), we are filing our proposed Ps&Gs which address specific reimbursable activities reasonably necessary in implementing the subject program. In addition, we recommend a 'reasonable reimbursement methodology' to simplify claiming and reduce administrative costs.

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

**Los Angeles County**  
**Parameters and Guidelines [Ps&Gs] Narrative**  
**Post Conviction: DNA Court Proceedings [CSM: 00-TC-21, 01-TC-08]**

The County of Los Angeles [County] herein files parameters and guidelines [Ps&Gs], in accordance with the California Code of Regulations, title 2, section 1183.12, subdivisions (b) and (c), for the Post Conviction: DNA Court Proceedings program. These Ps&Gs address specific reimbursable activities which are reasonably necessary in performing mandatory duties and which are encompassed by the Commission on State Mandates [Commission] funding decision, adopted on July 28, 2006.

In addition, a 'reasonable reimbursement methodology', permitted under Government Code section 17518.5<sup>1</sup>, is recommended in order to simplify the administrative claiming process and reduce costs.

**Landmark Legislation**

The Post Conviction: DNA Court Proceedings legislation<sup>2</sup> is a key landmark in California's efforts to provide a post-conviction remedy for convicted felons to obtain deoxyribonucleic acid (DNA) testing of biological evidence. This 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 Post Conviction: DNA Court Proceedings program is complex. The test claim statutes detail how a defendant files a motion to obtain DNA testing and what conditions must be met before the court grants the testing motion. The statutes also establish procedures and timelines for the retention of biological evidence.

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<sup>1</sup> Section 17518.5 defines a "Reasonable reimbursement methodology" as "... a formula for reimbursing local agency and school district costs mandated by the state that meets the following conditions: (1) The total amount to be reimbursed statewide is equivalent to total estimated local agency and school district costs to implement the mandate in a cost-efficient manner. (2) For 50 percent or more of eligible local agency and school district claimants, the amount reimbursed is estimated to fully offset their projected costs to implement the mandate in a cost-efficient manner".

<sup>2</sup> In this matter, the pertinent parts of this legislation are Penal Code sections 1405 and 1417.9 as added or amended by Statutes 2000, Chapter 821 and Statutes 2001, Chapter 943.

## Commission's Decision

On July 28, 2006, the Commission adopted a 'Statement of Decision', finding that the test claim legislation imposes a reimbursable state-mandated program on local agencies within the meaning of article XXIB, section 6 of the California Constitution and Government Code section 17514.

The Commission decided that local agencies should be reimbursed for implementing certain provisions of the pertinent ['test claim'] legislation. On pages 29-30 of Commission's 'Statement of Decision', these reimbursable provisions were grouped into general categories, herein labeled as categories A through G, as follows:

A. "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)."

B. "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))."

C. "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))."

D. "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)).”

E. “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)).”

F. “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)).”

G. “Retain biological material: Effective January 1, 2001, retain all biological material that is secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)).”

The Commission’s ‘Statement of Decision’ did not include detailed activities which are ‘reasonably necessary’ in implementing the ‘test claim’ legislation. These detailed activities are provided herein under Commission’s categories A. through G. and under a category entitled ‘Inmate Custody and Transportation’.

In addition to the continuing activities, one-time activities which are also reasonably necessary in implementing the test claim legislation are included herein. These one-time activities include: designing and developing computer software and equipment necessary to identify and retrieve stored biological material; developing and implementing policies and procedures; and, training professional staff on DNA testing standards and protocols.

In these Ps&Gs, specific reimbursable activities are grouped into categories: Indigent Defense Counsel<sup>3</sup>, District Attorney, Retention of Biological Evidence and Inmate Custody and Transportation.

#### Indigent Defense Counsel

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 and amended by Chapter 943, Statutes of 2001, the test claim legislation.

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<sup>3</sup> This category includes the Public Defender, Alternate Public Defender, and court-appointed indigent defense counsel.

The reasonably necessary activities required to implement the new indigent defense duties are detailed in the declaration of Jennifer Friedman, Coordinator of the Los Angeles County Public Defender Innocence Unit, in Exhibit B of County's June 29, 2001 test claim filing with the Commission. Such reasonably necessary activities and their related Commission reimbursement components<sup>4</sup> [in bold print] are as follows.

**A. Representation and investigation**

1. Development and Procedure – preparing protocols, administrative forms, meeting with SB90 advisor and one time activities associated with setting up this unit.
2. Initial Contact – Writing or responding to initial correspondence from inmates, attorneys or other seeking information regarding Penal Code Section 1405 and 1417.9.
3. Investigating Claims – Reading letters from inmates or those writing on behalf of inmates, retrieving court files, public defender file, 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.

**B. Prepare and file motion for DNA testing & representation**

1. Preparing Motions – includes preparing motions pursuant to Penal Code Section 1405 and responding to notices sent pursuant to Penal Code Section 1417.9.
2. 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.

**C. Prepare and file response to the motion**

1. Meet and Confer – Consultation and meetings with the trial attorneys, appellate counsel, members of the Alternate Public Defender's Innocence

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<sup>4</sup> See Commission's reimbursement components on pages 2-3 herein.

Unit, the Post Conviction Center, the DA's Office, the Attorney General, and individuals from other Innocence Projects.

**D. Provide prior test lab reports and data**

1. 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.

**E. Agree on a DNA lab**

1. 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.”

**F. Writ review**

1. 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.

Ms. Friedman states in her declaration, on page 2, that “... duties of attorneys, support personnel, investigators, and associated services and supplies, mandated under the subject law ... [as detailed above] ... are ... reasonably necessary in complying with the subject law” and include secretarial and paralegal personnel as well as necessary services and supplies, including copying, long distance telephone calls, DNA analysis training seminars, and travel services.

District Attorney

District Attorneys 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 and amended by Chapter 943, Statutes of 2001, the test claim legislation. The reasonably necessary activities required to implement new District Attorney duties are detailed in the declaration of Lisa Kahn, Deputy-in-Charge, Forensic Sciences Section, in Exhibit A of County's June 29, 2001 test claim filing with the Commission. Such reasonably necessary activities and their related Commission's reimbursement components [in bold print] are as follows.



**A. Representation and investigation**

1. Development and Procedure – preparing protocols, administrative forms, meeting with SB90 advisor and one time activities associated with setting up this unit.
2. Initial Contact – Writing or responding to initial correspondence from inmates, attorneys or other seeking information regarding Penal Code Section 1405 and 1417.9.
3. Investigating Claims – Reading letters from inmates or those writing on behalf of inmates, retrieving court files, public defender file, 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.

**B. Prepare and file motion for DNA testing & representation**

1. Preparing Motions – includes preparing motions pursuant to Penal Code Section 1405 and responding to notices sent pursuant to Penal Code Section 1417.9.
2. 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.

**C. Prepare and file response to the motion**

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

**D. Provide prior test lab reports and data**

1. 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.

E. Agree on a DNA lab

1. 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.”

F. Writ review

1. 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.

Ms. Kahn states in her declaration, on page 2, that “... duties of attorneys, support personnel, investigators, and associated services and supplies, mandated under the subject law ... [as detailed above] ... are ... reasonably necessary in complying with the subject law” and include secretarial and paralegal personnel as well as necessary services and supplies, including copying, long distance telephone calls, DNA analysis training seminars, and travel services.

Retention of Biological Evidence

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 and amended by Chapter 943, Statutes of 2001, the test claim legislation. In particular, the Sheriff's Department must now implement Section 1417.9, 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 of the County's June 29, 2001 filing with the Commission, 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 include making the necessary upgrades to the computer programming and hardware to the Crime Lab's electronic chain of custody module.

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

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."

Regarding compliance with the subject law, County staff notified and discussed new requirements set forth in Section 1417.9 of the Penal Code. As explained in the declaration of Dean M. Gialamas, Crime Laboratory Assistant Director, Sheriff's Department, attached as Exhibit 2 of the County's September 19, 2003 filing with the Commission:

"...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."

### Continuing Activities

Dean Gialamas continues to indicate in his declaration, cited above, that reasonably necessary activities in implementing the test claim legislation includes:

"Training investigative personnel with the Los Angeles County Sheriff's Department and the staff of 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.

Initiating 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 request 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 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."

Additional activities which are reasonably necessary in implementing the retention of biological evidence requirements are explained in the declaration of L. Peter Zavala, Administrative Services Manager III, Central Property and Evidence Unit, in Exhibit E of the County's June 17, 2001 filing with the Commission, 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 procedures necessary to comply with the subject law."

One-time activities in the retention of biological evidence include the design, development, and testing of computer software and equipment necessary to identify and retrieve all biological materials associated with a particular case. 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. However, under the test claim legislation additional tracking features are required. And these changes were substantial, as was explained in the declaration of L. Peter Zavala, Administrative Manager Services III, Sheriff's Department, attached as Exhibit 1 of the County's September 19, 2003 filing with the Commission:

"...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".

#### Continuing Activities

Mr. Zavala explains the nature of the continuing biological evidence retention requirements, in his declaration, cited above, as follows:

"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 request for biological evidence held at the Central Property and Evidence Unit of the Los Angeles 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 maintaining such facilities [e.g. utilities]."

Due to the new evidence retention requirements set forth in the test claim legislation, the Los Angeles County sheriff's Department has had to purchase more refrigerators in order to preserve the biological material<sup>5</sup>. As it was explained in the declaration of L. Peter Zavala, Administrative Manager Services III, Sheriff's Department, attached as Exhibit 1 of the County's September 19, 2003 filing with the Commission:

"... 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."

It is reasonably necessary that the new retention of biological evidence standards implemented by local agencies conform to the Attorney General's Task Force

<sup>5</sup> See the Attorney General's Task Force Report on implementing the subject Post-conviction DNA Testing Program, attached hereto, detailing standards for preserving biological evidence. For example, on page 14, "... cold/dry storage conditions refer to storage of evidence at a temperature at or below 7 degrees C (45 degrees F) and humidity not exceeding 25% relative humidity".

Report on implementing the subject Post-conviction DNA Testing Program standards, attached hereto. In this manner, the uniform and reliable preservation of biological evidence throughout the State will be ensured, as the Legislature clearly intended. Accordingly, these Attorney General Task Force standards are incorporated herein by reference.

Finally, local agency staff must provide Court testimony on the 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.”

#### Inmate Custody and Transportation

The Los Angeles County Sheriff's Department has a new duty to house and transport a State prison inmate during the course of his or her DNA post conviction proceedings as is explained in the declaration of Conrad Meredith, Administrative Services III, Sheriff's Department, attached as Exhibit 3 of the County's September 19, 2003 filing with the Commission, 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.”

Reimbursement for the transportation and housing of state prisoners during the course of their DNA Post-conviction proceedings proposed herein is based on a local jurisdictions' approved California Department of Corrections and Rehabilitation daily jail rates and mileage rates. Such approved rates for the County are found in the attachments hereto, on pages 28-30.

#### Proposed "Reasonable Reimbursement Methodology"

A 'reasonable reimbursement methodology', permitted under Government Code section 17518.5, is recommended in order to simplify the administrative claiming process and reduce costs. A claimant may elect to be reimbursed on an actual cost basis or on a 'reasonable reimbursement methodology' basis for the continuing labor costs of the Indigent Defense Counsel<sup>6</sup> and District Attorney.

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<sup>6</sup> This category includes the Public Defender, Alternate Public Defender, and court-appointed indigent defense counsel.

## Labor Costs

The 'reasonable reimbursement methodology' to recover the labor costs of the Indigent Defense Counsel and District Attorney components is based on one or more monthly time surveys for each staff working on activity categories A. through F., as detailed pages 4-7 herein<sup>7</sup>, for one particular Post Conviction: DNA Court Proceedings case. Each employee would enter time on a survey form upon beginning working on a case and continue doing so throughout the duration of the case. Additional monthly survey forms may be used as necessary to record all the time spent on a case. A sample monthly time survey form is found on the following page.

The time recorded on each time survey form would then be totaled and multiplied by that employee's productive hourly rate, as that term is defined in the State Controller's Office annual claiming instruction manual, found on [www.sco.ca.gov](http://www.sco.ca.gov). The total labor cost for the case is the sum of each employee's labor costs. The resulting cost per case is then multiplied by the number of cases<sup>8</sup>. If 4 through 9 cases occur during the year, 2 cases should be time surveyed. If 10 or more cases occur during the year, a 20% sample, rounded to the nearest whole number of cases, should be taken.

## Storage Costs

The 'reasonable reimbursement methodology' formula to recover the continuing facility, utility, equipment, service and supply Retention of Biological Evidence component would be based on the ratio of the number of biological evidence specimens retained in felony cases to the number of all biological evidence specimens. So, for example, if 10,000 out of 40,000 such specimens were for felony cases, then 25% of the total biological evidence specimen retention costs<sup>9</sup> would be reimbursable<sup>10</sup>. One-time costs associated with retention activities, as well as personnel costs, would be claimed as actual costs.

<sup>7</sup> Also included on this form are activities I. [training] and J. [other activities]. For these activities, employees need to attach a brief explanation.

<sup>8</sup> Regarding the number of public defender cases, the Attorney General has been collecting data. See their sample letter to counties, attached hereto on page 27.

<sup>9</sup> Since July of 2002, the Attorney General has been contacting local agencies and urging them to compile a detailed record of their costs for this program, as noted on pages 24-25 in the attachments hereto.

<sup>10</sup> Regarding the numbers of State inmates who may have biological evidence stored, the Economist on August 12, 2006, on page 23, attached hereto on page 33, estimates that there are 172,000 inmates, with the population expected to grow by 21,000 over the next five years.



Post Conviction: DNA Court Proceedings  
Time Survey Form

CASE Reference, Number														Month		Year																		
Name (Last, first, middle initial)						Civil service classification						Employee number				Program				Job location														
TYPE OF ACTIVITY	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	TOTAL		
Day of the Week (optional)																																		
A Representation & Investigation																																		
B Prepare/File Motion for DNA Testing & Representation																																		
C Prepare & File Response to the Motion																																		
D Provide Prior Test Lab Reports and Data																																		
E Agree on DNA Lab																																		
F Writ Review																																		
I Training																																		
J Other																																		
Other Programs/Activities																																		
General Administration																																		
Paid Time Off																																		
<b>TOTAL HOURS</b>																																		
Employee's signature (BLUE INK ONLY)						Employee's telephone number						Date				Supervisor's signature (BLUE INK ONLY)				Date														

**INSTRUCTIONS:**

- See Post Conviction: DNA Court Proceedings Parameters and Guidelines for descriptions of the types "TYPE OF ACTIVITY" A. through J.
- Survey must be completed on a daily basis for the entire survey month. Enter the amount of time spent performing each type of service during your paid work hours in the column for that day.
- Draw a vertical line through all columns representing days that are unpaid days (regular days off and unpaid leave).
- Record all of your time in 15 minute increments. If using decimals, use .25, .50, and .75 to record partial-hour increments.
- At the end of each day, total each column in the "TOTAL HOURS" box at the bottom of the column. Each day's total must equal hours worked per day.
- At the end of the month, total all boxes in each row and record the sum to the "TOTAL" box at the right margin. Total amounts and record the sum in the box at the bottom-right corner.
- The sum in the bottom-right corner must equal the sum of the bottom row. Sign and date your survey on the last working day of the month and give it to your supervisor.



COUNTY OF LOS ANGELES  
DEPARTMENT OF AUDITOR-CONTROLLER

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J. TYLER McCAULEY  
AUDITOR-CONTROLLER

Los Angeles County  
Proposed Parameters and Guidelines [Ps&Gs]  
Post Conviction: DNA Court Proceedings [CSM: 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 subject proposed Ps&Gs for the Post Conviction: DNA Court Proceedings 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.

8/22/06, Los Angeles, CA

Date and Place

Signature

Attachments

Los Angeles County  
Parameters and Guidelines Narrative  
Post Conviction: DNA Court Proceedings

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x



**BILL LOCKYER**  
Attorney General

State of California  
**DEPARTMENT OF JUSTICE**



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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,

MICHAEL CHAMBERLAIN  
Deputy Attorney General

For BILL LOCKYER  
Attorney General



# POSTCONVICTION DNA Testing

Recommendations for Retention, Storage  
and Disposal of Biological Evidence



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 individuals whose postconviction DNA testing of evidence clears a new way to 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. The goals of the postconviction testing evidence retention Task Force and the California law enforcement community will be to provide fair access to postconviction testing for those who have claims.

Implementation of postconviction testing procedures raises significant questions regarding evidence retention with law enforcement agencies and the courts will need to address. I formed this task force to provide guidance to law enforcement agencies, prosecutors and the courts on which the core responsibilities for implementation of this law were to develop consensus about the fiscal 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.

Bill Lockyer

BILL LOCKYER  
Attorney General  
State of California



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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

Senate 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;

**SUMMARY OF POSTCONVICTION EVIDENCE RETENTION AND TESTING LAW (continued)**

- 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.

- 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.

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.

This provision sunsets on January 1, 2003 and is repealed as of that date unless a later enacted statute extends or deletes this provision.

**LENGTH OF TIME FOR WHICH EVIDENCE MUST BE RETAINED**

**MANNER IN 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.

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.)

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,

# Retention of Biological Evidence

**P**enal 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<sup>1</sup>.

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.<sup>2</sup>

## 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.<sup>3</sup>
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.<sup>4</sup>



## 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."<sup>5</sup>

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<sup>6</sup>, 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.<sup>7</sup>

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.



**RECOMMENDATIONS**

**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**

- American Society of Crime Laboratory Directors (2001) "Laboratory Accreditation Board 2001 Manual." ASCLD/LAB. 139 J Technology Drive, Garner, NC 27529.
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- Kline, M., Redman, J. Duewer, D. *Examination of DNA Stability on Different Storage Media*, Chemical Science and Technology Laboratory National Institute of Standards and Technology.
- Wallis, M., Boonristant, M.R. Lazaruk, K.D. Fildes, N. Holt, C.L. Walsh, P.S. (1999) TWGDAM Validation of the Amplicon STR Plus PCR Amplification Kit for Forensic Casework Analysts, *J. Forensic Sci* 43(4): 854-870.

## 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**

- <sup>1</sup> See Penal Code 1417.9 (b) (2) (C) & 1405 (d); SB 1342 Senate Bill Analysts, 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].
- <sup>2</sup> *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].
- <sup>3</sup> 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, 855.
- <sup>4</sup> 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."]
- <sup>5</sup> *Boyd 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].
- <sup>6</sup> 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"].
- <sup>7</sup> 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.

**RECOMMENDATIONS**

**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 contendere, 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 jus-

tice, 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 contendere.

(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 contendere.

(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

## CALIFORNIA ATTORNEY GENERAL'S OFFICE

### SACRAMENTO OFFICE

Jan Bashinski, Chief, Bureau of Forensic Services  
 Ward Campbell, Supervising Deputy Attorney General  
 David Druliner, Special Counsel to the Criminal Division  
 Janet Gaard, Director, Legislative Affairs  
 Chris Janzen, Director, Administrative Services Division  
 Les Kleinberg, Special Assistant AG Legislative Unit  
 Brett Morgan, Deputy Attorney General  
 Ann Patterson, Special Asst. to the Attorney General

### SAN FRANCISCO OFFICE

Enid Camps, Supervising Deputy AG, DNA Legal Unit  
 Joan Killeen, Deputy Attorney General

### BERKELEY DNA LABORATORY

Lance Gima, Assistant Chief (DNA), BFS  
 Gary Sims, DNA Laboratory Director, BFS

### LOS ANGELES OFFICE

Mary Sanchez, Supervising Deputy Attorney General

### SAN DIEGO OFFICE

Frederick Millar, Supervising Deputy Attorney General

## CALIFORNIA ASSN. OF PROPERTY AND EVIDENCE

Maryann Duncan  
 Property and Evidence Officer, Concord Police Department  
 Ash Kozuma  
 Property Manager, Sacramento Police Department  
 Barbara Peters  
 Police Services Assistant, Simi Valley Police Department

## CALIFORNIA ASSN. OF CRIME LAB DIRECTORS

Bob Jarzen  
 Director, Sacramento County Laboratory of Forensic Services  
 William Lewellen  
 San Mateo County Sheriff's Office, Forensic Laboratory

## CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

Larry Brown  
 Executive Director, California District Attorneys Assn.  
 Woody Clarke  
 Deputy District Attorney, San Diego County  
 Rockne Harmon  
 Deputy District Attorney, Alameda County

## CALIFORNIA STATE CORONER'S ASSOCIATION

Captain Tim Buckhout  
 Alameda County Sheriff's Department

## CALIFORNIA POLICE CHIEFS ASSOCIATION

John Lovell  
 Law Offices of John Lovell  
 Chief Burnham (Burny) Matthews  
 Alameda Police Department  
 Sergeant Mike Noonan  
 Alameda Police Department  
 Larry Valiska  
 ID Technician, Alameda Police Department

## CALIFORNIA STATE SHERIFFS ASSOCIATION

Hon. Jerry Shadiger  
 Sheriff-Coroner, Colusa County  
 Nick Warner  
 Nick Warner & Associates

## CALIFORNIA PEACE OFFICERS ASSOCIATION

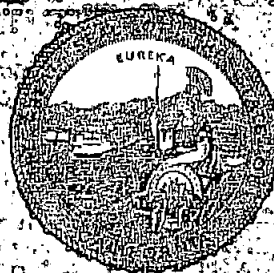
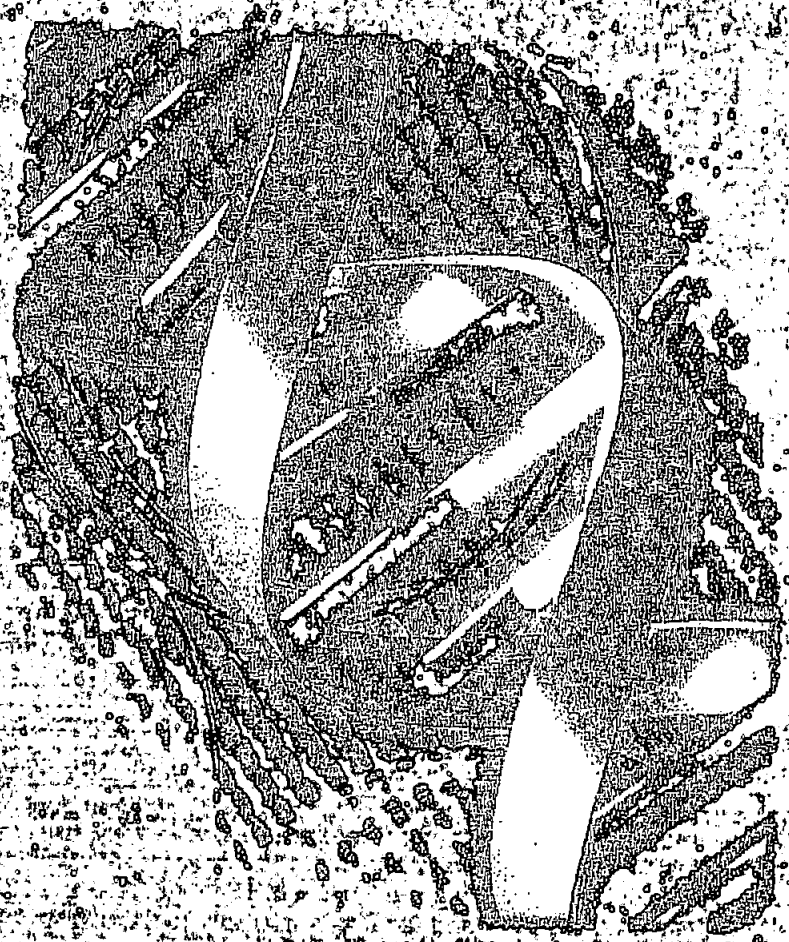
Lieutenant Gus Arroyo  
 Fremont Police Department  
 Captain Michael Lanam  
 Fremont Police Department

## CALIFORNIA JUDICIAL COUNCIL

June Clark  
 Administrative Office of the Courts  
 Tressa Kentner  
 Court Executive Officer, Superior Court of San Bernardino Co.  
 Hon. J. Richard Couzens  
 Placer County Superior Court  
 Charlene Walker  
 Division Manager, Sacramento County Superior Court  
 Joshua Weinstein  
 Administrative Office of the Courts

## OTHER CALIFORNIA AGENCIES

Dean Gialamas  
 Assistant Director, Los Angeles Sheriff's Department,  
 Scientific Services Bureau  
 Camille Hill  
 Orange Co. District Attorney's Office, Sexual Assault Unit  
 Frank McGuire  
 Deputy District Attorney, Yolo County  
 Tom Nasser  
 Assistant Director, Orange County Sheriff-Coroner  
 Department of Forensic Science Services  
 Commanding Officer David Peterson  
 Los Angeles Police Department, Property Division  
 Commander Mario Sanchez  
 Calexico Police Department  
 John Santy  
 Orange County District Attorney's Office  
 Sexual Assault Unit, TrackRS Project



STATE OF CALIFORNIA  
DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL  
BILL LOCKYER

P.O. Box 944255  
Sacramento, California 94244-2550  
(800) 952-5225  
[www.caag.state.ca.us](http://www.caag.state.ca.us)

BILL LOCKYER  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-7005  
(415) 703-5500

FAX TRANSMISSION COVER SHEET

IMPORTANT/CONFIDENTIAL: This communication is intended only for the use of the individual or entity to which it is addressed. This message contains information from the State of California, Attorney General's Office, which may be privileged, confidential, and exempt from disclosure under applicable law. If the reader of this communication is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited.

DATE: July 9, 2002 TIME: 12:35 NO. OF PAGES: 2  
(INCLUDING COVER SHEET)

TO:  
NAME: Mr. Leonard Kaye  
OFFICE: L.A. SB 90 coordinator  
LOCATION: \_\_\_\_\_  
FAX NO: \_\_\_\_\_ PHONE NO: \_\_\_\_\_

FROM:  
NAME: Mike Chamberlain, DAG  
OFFICE: San Francisco Criminal Div.  
LOCATION: \_\_\_\_\_  
FAX NO: \_\_\_\_\_ PHONE NO: 415-703-5892

MESSAGE/INSTRUCTIONS

Leonard - Thank you for your time on the telephone, and for reviewing the attached draft letter. Your help has been invaluable to the AG's office (and California law enforcement in general!)

If you have any suggestions or comments about the letter, please call me at the above number.

Thanks again, Mike

PLEASE DELIVER AS SOON AS POSSIBLE!  
FOR ASSISTANCE WITH THIS FAX, PLEASE CALL THE SENDER

July 9, 2002

Letter to All California Law Enforcement Agencies from Attorney General Bill Lockyer  
Re: Postconviction DNA Evidence Retention and Storage: Task Force Report and Update

Enclosed please find a copy of *Postconviction DNA Testing: Recommendations for Retention, Storage and Disposal of Biological Evidence*. This Task Force report contains non-binding recommendations to help guide agencies in meeting Penal Code Section 1417.9's mandate to retain "all biological material that is secured in connection with a criminal case . . . in a condition suitable for . . . DNA testing." Penal Code Section 1417.9, in conjunction with Penal Code Section 1405, permits incarcerated felons to establish actual innocence through postconviction DNA testing of existing evidence.

Since the Task Force Report's publication, questions have arisen regarding reimbursement of local costs associated with Section 1405/1417.9 mandates. Your county should be aware of the avenues available to it to request reimbursement for the day-to-day and one-time expenditures necessary in light of Section 1405/1417.9, and the status of the governing test claim.

In 2001, Los Angeles County filed test claim 00TC-21 with the Commission on State Mandates (CSM) to confirm that counties' section 1405/1417.9-related expenses such as evidence storage, district attorney and public defender time, and laboratory analysis are compensable from State funds. If the test claim decision certifies that Sections 1405/1417.9 impose a compliance mandate upon local entities, Los Angeles County will submit draft parameters and guidelines addressing the extent to which counties can recover expenses for evidence retention, postconviction testing, and related litigation. The draft parameters and guidelines will be subject to public comment. Once the CSM adopts its final parameters and guidelines, the State Controller's Office will distribute claim forms to county auditor/controller offices to document accrued and anticipated expenses sanctioned under CSM guidelines. A legislative appropriation of funds and annual reimbursement to counties will follow.

If your county has not already done so, it should consider compiling a detailed record of costs associated with Section 1405/1417.9 compliance for eventual presentation to the State Controller's Office. To ensure full participation in the claims process and specific consideration of your county's expenses within the CSM guidelines, your county also may want to add itself to the CSM "service-of-process list." It may do so immediately by contacting CSM Executive Director Paula Higashi at (916) 323-3562. Finally, should county representatives seek more detailed information concerning the test claim, they should contact Mr. Leonard Kaye, Esq., the SB 90 Coordinator for Los Angeles County and lead counsel on the test claim. He can be reached at (213) 974-8564. The Attorney General's DNA Legal Unit (415-703-5892 or 5976) also is available to answer or direct questions associated with the Task Force Report.

Again, I wish to thank all of the Task Force participants for their thoughtful participation in preparing the attached report.

FACSIMILE TRANSMISSION

FROM

LOS ANGELES COUNTY PUBLIC DEFENDER EXECUTIVE OFFICES  
210 WEST TEMPLE STREET, 19TH FLOOR  
LOS ANGELES, CA 90012

PLEASE DELIVER TO:

Date: 4/27/04

NAME Lenard Kay

AGENCY & LOCATION \_\_\_\_\_

FACSIMILE NO. ( ) \_\_\_\_\_ PHONE NO. 48564

FROM:

NAME ROBERT E. KALUNIAN

CHIEF DEPUTY PUBLIC DEFENDER

TELEPHONE NO. (213) 974-7060

FAX NO. (213) 625-5031

SUBJECT DNA

NO. OF PAGES (including cover sheet): 2

NOTE \_\_\_\_\_

PRIVACY NOTICE

This message is intended only for the use of the individual or entity to which it is addressed. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited.

If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via U.S. Mail.

**BILL LOCKYER**  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



455 GOLDEN GATE AVENUE, SUITE 11000  
SAN FRANCISCO, CA 94102-7000

Public: (415) 703-5500  
Telephone: (415) 703-5892  
Facsimile: (415) 703-1234  
E-Mail: michael.chamberlain@doj.ca.gov

March 29, 2004

Ms. Jennifer Friedman  
Deputy Public Defender  
Los Angeles County Public Defender's Office  
201 W. Temple Street, 19th Floor  
Los Angeles, CA 90012

RE: Postconviction DNA Testing Data

Dear Ms. Friedman:

The Department of Justice is currently collecting data on the usage and fiscal impact of California's postconviction DNA testing statute, Penal Code § 1405. To that end, we would appreciate it if you could let us know how many inmate requests and/or inquiries – whether or not they resulted in a filed 1405 motion – your office has received since the inception of the statute in January 2001. It would also be helpful if you could provide the number of DNA testing motions actually filed.

This information will assist the State in calculating the ratio of inmate inquiries to motions filed, and will permit a more accurate assessment of how much money is being spent by public defenders' offices and other court-appointed attorneys to review and follow-up on inmate DNA testing inquiries. As you may be aware, the Commission on State Mandates is currently reviewing a test claim filed by Los Angeles County concerning expenses incurred by law enforcement, prosecutors, courts, and public defense attorneys in the course of complying with Section 1405 and Penal Code § 1417.9. (CSM Test Claim No. 000TC-21.) The State is, of course, interested in ensuring that Section 1405 operate as the Legislature intended, and that all participants in the statutory process receive appropriate reimbursement for their costs.

Thank you in advance for your cooperation, and please feel free to contact me if you have any questions or require further information.

Very truly yours,

MICHAEL CHAMBERLAIN  
Deputy Attorney General

For **BILL LOCKYER**  
Attorney General





COUNTY OF LOS ANGELES  
DEPARTMENT OF AUDITOR-CONTROLLER

KENNETH HAHN HALL OF ADMINISTRATION  
500 WEST TEMPLE STREET, ROOM 603  
LOS ANGELES, CALIFORNIA 90012-2766  
PHONE: (213) 974-8321 FAX: (213) 617-8106

J. TYLER McCAULEY  
AUDITOR-CONTROLLER

May 16, 2006

TO: Ed Rogner  
Contract Law Enforcement Bureau  
Sheriff's Department

FROM: Connie Yee, Chief *Cey*  
Accounting Division

SUBJECT: Fiscal Year 2006-07 Statewide Prisoner Transportation.

As requested, we developed the Fiscal Year 2006-07 cost for statewide prisoner transportation services provided to other counties. The cost per prisoner mile is \$.60 and the prisoner meal cost is \$6.17. These rates were developed to recover the cost of transporting prisoners on North Trips and should not be used to bill the State for Prisonline trips.

If you have any questions, please call Rick Vandenberg at (213) 893-0972.

JN:RV  
I:\SheriffTransportation\statewidetrans2007.doc

## OFFICE OF AUDITS AND COMPLIANCE

501 J Street, Sacramento, CA 95814

P.O. Box 942883

Sacramento, CA 94283-0001



April 19, 2006

Leroy Baca, Sheriff  
 County of Los Angeles  
 Sheriff's Department Headquarters  
 4700 Ramona Blvd.  
 Monterey Park, CA 91754-2169

Dear Sheriff Baca:

The Office of Audits and Compliance has completed a review of the County of Los Angeles Fiscal Year (FY) 2005/06 Daily Jail Rate (DJR) proposal for reimbursement of claims pursuant to Section 4016.5 of the Penal Code and Section 1776 of the Welfare and Institutions Code. An approved DJR is subject to audit and resolution as described in Chapter VIII, Section B, of the DJR Manual for FY 2005/06.

Fiscal Year	Facility Name	Daily Jail Rate
2005/06	Male Prisoners	\$68.22
2005/06	Female Prisoners	\$68.22
2005/06	Jail Hospital + Male	\$753.43 (\$685.21+\$68.22)
2005/06	Jail Hospital + Female	\$753.43 (\$685.21+\$68.22)
2005/06	Jail Ward	\$718.58

The "Prior Rate Estimate Adjustment Schedule" applicable to the FY 2005/06 DJR calculation details the following:

*Male Prisoners* is subject to the \$59.00 cap, no adjustment will be made.

*Female Prisoners* is subject to the \$59.00 cap, no adjustment will be made.

*Jail Hospital* (not including Maintenance Rates) was under-reimbursed by \$24.81/day.

*Jail Ward* was under-reimbursed by \$78.90/day.

The Prior Rate Estimate Adjustment Schedule represents the net difference between the DJR originally applied to detention services provided by this facility during FY 2003/04 and the actual expenses for that period submitted as the basis for the FY 2005/06 DJR calculation.

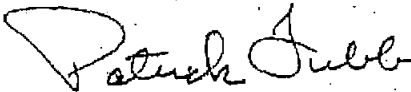
As in years past, the County may use the Prior Rate Adjustment Schedule to adjust the reimbursements received for detention costs of FY 2003/04. If the County was overpaid for services provided during FY 2003/04 and/or FY 2005/06, a recovery by the CDCR will be effected from invoices submitted for FY 2005/06; if the County was underpaid for services provided during FY 2003/04 and/or FY 2005/06, the County may submit a Consolidated Amended Invoice, Parolee/Inmate Detention, CDCR Form 2131-B (refer to FY 2005/06 DJR Manual, Appendix IX). Please submit all invoices for underpayments no later than May 31, 2006, via the California Department of Corrections and Rehabilitation, Division of Adult Parole Operations, regional office specified under Section VI, "CDCR Claims Processing" of the FY 2005/06 DJR Manual (Page 31).

Additionally, Los Angeles County's PC 2910 Cost Proposal has been reviewed. The approved rate is contingent upon audit and resolution as described in the Contract for FY 2005/06. We are approving the following Contract Rate for FY 2005/06:

Fiscal Year	Facility Name	Contract Rate
2005/06	Peter Pitchess Facility	\$68.22

If there are any questions, please contact Catherine Malbouvier, Daily Jail Rate Auditor, at (916) 358-2125.

Sincerely,



PATRICK TUBB  
Staff Management Auditor  
Fiscal and Business Management  
Audits Unit

Enclosure

cc: Division of Juvenile Justice/  
Accounting Services Bureau - Attn: Connie Tabarez  
Los Angeles County Sheriff's Department  
Celeste Milby  
Los Angeles County Auditor-Controller's Office  
Rick Vandenberg, Principal Accountant-Auditor

California's prisons

# Packing them in

LOS ANGELES

Gross overcrowding has led to a sky-high recidivist rate. Will money help?

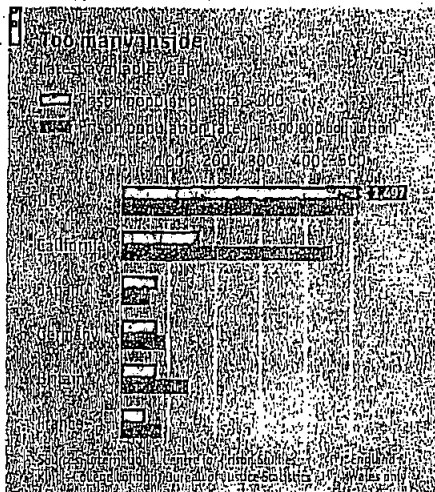
EARLIER this summer Arnold Schwarzenegger, California's governor, said that the state's penal system was "falling apart in front of our very eyes". Indeed so. Some 172,000 inmates are crowded into institutions—from the state's 33 prisons to its 12 "community correctional facilities"—that are meant to house fewer than 90,000. Drug abuse is rampant; so too are diseases such as HIV and hepatitis C. Race-based gangs pose the constant threat of violence, riot and even murder. And with more than 16,000 prisoners sleeping in prison gymnasiums and classrooms, rehabilitation programmes are virtually non-existent—which helps to explain why two-thirds of California's convicts, the highest rate in the country, are back in prison within three years of being released.

Will the governor's summons of a special session of the state legislature, beginning this week, bring a remedy? The reason for the session is to discuss Mr Schwarzenegger's request for almost \$5.8 billion of public money to be pumped into the prison system. Bonds for \$2 billion would finance ten 500-bed "re-entry facilities" for prisoners nearing the end of their sentences; another \$2 billion would expand existing prisons; \$1.2 billion would be earmarked for two new prisons; and \$500m would go for new prison hospitals.

Money alone will provide neither an immediate solution nor a lasting one. The first problem is that California simply puts too many offenders in prison. The imprisonment rate, which has risen almost eight-fold since 1970 and is way ahead of any European country, has consistently meant overcrowding despite the construction of 22 new prisons in the past 20 years.

The 1994 "three-strikes" law, approved by voters in a referendum, means handing out 25-years-to-life sentences for often trivial third offences—and results in the growing presence in prison of elderly inmates who cost the taxpayer far more than the average of \$34,000 a prisoner. Meanwhile, the practice of returning parole violators to prison, even for relatively trivial mis-steps such as missing a drugs test, also strains the system; some 11% of inmates are parole violators. Added to all these are more than 5,000 illegal immigrants being held on behalf of the federal government.

The second problem is that any attempt to reform California's penal policy becomes hostage to politics. Two years ago, the governor was exuding optimism. He



added the word "rehabilitation" to California's department of corrections, appointed Rod Hickman, a reform-minded former prison guard, to oversee the system, and promised to lessen the power of the 31,000-strong prison guards' union, not least by breaking the "code of silence" that protects corrupt or violent guards.

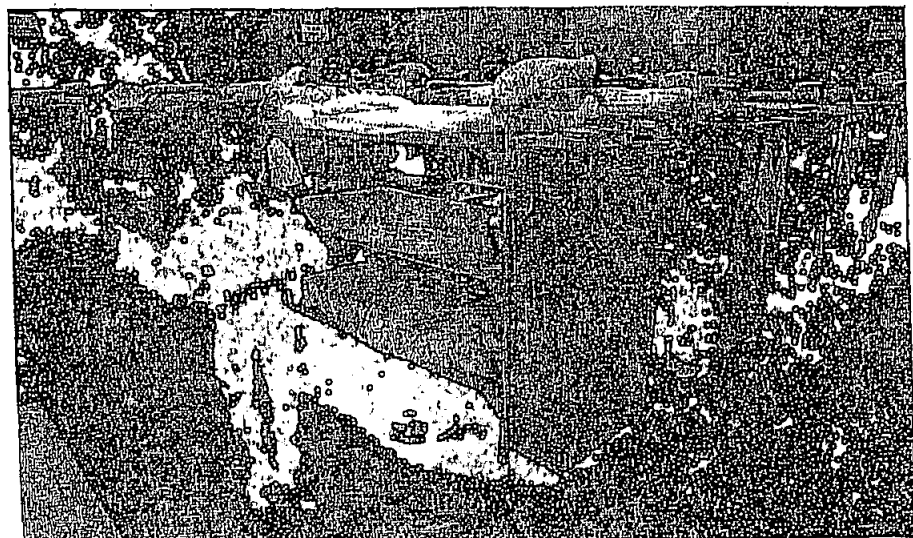
But that was then. The reality now is that Mr Hickman resigned in March and his successor, Jeanne Woodford, did so in April. According to John Hagar, a "special master" appointed by Thelton Henderson, a federal judge, to investigate the corrections department, the resignations were part of a Schwarzenegger retreat, exempli-

fied by the meetings between his new chief of staff, Susan Kennedy, a Democratic activist who now works for the Republican governor, and the prison guards' union. "Integrity and remedial plan efforts must begin at the top, and then percolate down," wrote Mr Hagar. "Beginning January 2006, however, it appears that the requisite leadership has been absent from the governor's office. Evidence before the special master indicates that the governor's office may have given the code of silence in California's prisons a new lease on life."

Mr Hagar may be right, but he does not have a November election to win. Mr Schwarzenegger does, and he is aware both of the hardline instincts of Californian voters (two years ago they refused to soften the three-strikes law) and of the ability of the prison guards' political donations to sway elections. Rather worryingly for the governor, the union, which has yet to decide whom to endorse in November, this week started running TV ads criticising his reform ideas.

Mr Schwarzenegger's Democratic opponent in November, Phil Angelides, describes this week's special session as an election-year stunt. Yet it could turn out to be a clever one. If the lawmakers accept the governor's ideas, he can take the credit; if they refuse, he can blame them for the prisons mess.

Whichever way the lawmakers go, that mess will continue. With no moderation in sentencing policies on the horizon, the prison population is expected to grow by another 21,000 over the next five years—enough to outpace any prison-building programme. That, in turn, will increase the likelihood that Mr Henderson, having last year taken the prison medical system into receivership, will take direct control of the whole prison set-up. With the judge above the political fray, the dream of prison reform might finally be realised. □



Three strikes means triple-deckers

Los Angeles County  
Proposed Parameters and Guidelines  
Post Conviction: DNA Court Proceedings



Los Angeles County  
Proposed Parameters and Guidelines [Ps&Gs]  
Post Conviction: DNA Court Proceedings<sup>1</sup> [CSM: 00-TC-21, 01-TC-08]

I. **SUMMARY OF THE MANDATE**

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

- **Representation and investigation:** 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)).

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<sup>1</sup> The test claim legislation is found in Penal Code Sections 1405 and 1417.9, Statutes 2000, Chapter 821; Statutes 2001, Chapter 943.

- **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)).

## II. ELIGIBLE CLAIMANTS

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

## III. PERIOD OF REIMBURSEMENT

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



943, is operative January 1, 2002. Therefore, costs incurred pursuant to Statutes 2000, chapter 821, are reimbursable on or after January 1, 2001, and costs incurred pursuant to Statutes 2001, chapter 943, are reimbursable on or after January 1, 2002.

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

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

#### IV. REIMBURSABLE ACTIVITIES

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

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

However, corroborating documents cannot be substituted for source documents.

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

For each eligible claimant, the following activities, grouped into Indigent Defense Counsel<sup>2</sup>, District Attorney, Retention of Biological Evidence and Inmate Custody and Transportation categories, are reimbursable

### I. Indigent Defense Counsel

#### A. Representation and investigation. *Reimbursement begins January 1, 2001.*

1. Development and Procedure – preparing protocols, administrative forms, meeting with SB90 advisor and one time activities associated with setting up this unit.
2. Initial Contact – Writing or responding to initial correspondence from inmates, attorneys or other seeking information regarding Penal Code Section 1405 and 1417.9.
3. Investigating Claims – Reading letters from inmates or those writing on behalf of inmates, retrieving court files, public defender file, 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.

#### B. Prepare and file motion for DNA testing & representation. *Reimbursement begins January 1, 2002.*

1. Preparing Motions – includes preparing motions pursuant to Penal Code Section 1405 and responding to notices sent pursuant to Penal Code Section 1417.9.

---

<sup>2</sup> This category includes the Public Defender, Alternate Public Defender, and court-appointed indigent defense counsel.

2. 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.

C. Prepare and file response to the motion. *Reimbursement period January 1, 2001.*

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

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

1. 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.

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

1. 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.

F. Writ review. *Reimbursement begins January 1, 2001.*

1. 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.

## II. District Attorney

A. Representation and investigation. *Reimbursement begins January 1, 2001.*

1. Development and Procedure – preparing protocols, administrative forms, meeting with SB90 advisor and one time activities associated with setting up this unit.

2. Initial Contact – Writing or responding to initial correspondence from inmates, attorneys or other seeking information regarding Penal Code Section 1405 and 1417.9.
3. Investigating Claims – Reading letters from inmates or those writing on behalf of inmates, retrieving court files, public defender file, 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.

B. Prepare and file motion for DNA testing & representation.

*Reimbursement begins January 1, 2002.*

1. Preparing Motions – includes preparing motions pursuant to Penal Code Section 1405 and responding to notices sent pursuant to Penal Code Section 1417.9.
2. 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.

C. Prepare and file response to the motion. *Reimbursement period January 1, 2001.*

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

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

1. 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.

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

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.

F. Writ review. *Reimbursement begins January 1, 2001.*

I. 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.

III. Retention of Biological Evidence *Reimbursement begins 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.

One-Time Activities

A. Development of Departmental policies and procedures necessary to comply with the post conviction forensic testing requirements of the subject law, which include making the necessary upgrades to the computer programming and hardware to the Crime Lab's electronic chain of custody module.

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

C. 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.

D. 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.

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

F. Design, development, and testing of computer software and equipment necessary to identify and retrieve all biological materials associated with a particular case to comply with the following requirements:

- a) Category store evidence items by grade of crime- felony or misdemeanor
- b) Type of evidence- biological
- c) Distribution of disposal notification as required by Penal Code Section 1417.9.

#### Continuing Activities

G. Training investigative personnel, to whom crime lab services are provided, in the methods and procedures necessary to comply with the subject law.

H. Initiating contacts to specified parties to seek permission to dispose of biological evidence.

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

J. Responding to request for biological evidence held at local agency crime labs which have not been previously examined. This involves a computer and record search for the location or disposition of the evidence sought, manual retrieval of the evidence, and forwarding it to the appropriate party.

K. Responding to requests for the analysis of evidence held at the local agency crime labs in order to determine if biological evidence is present and suitable for DNA testing. This involves laboratory testing and analysis and the issuance of final report.

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

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

N. Provide Court testimony on chain of custody and disposition of biological evidence. This may include the basis and reasons for the disposition of evidence collected prior to this subject law.

O. Reimbursement of local agency costs of DNA testing for indigent inmate cases, which is not reimbursed by the State or Superior Court under other funding provisions due to insufficient funding.

P. Initiating contacts to specified parties to seek permission to dispose of biological evidence.

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

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

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

#### IV. Inmate Custody and Transportation *Reimbursement begins January 1, 2001.*

A. Reimbursement for the costs of transporting and housing state prisoners during the course of their DNA Post-conviction proceedings, based on a local jurisdiction's approved California Department of Corrections and Rehabilitation daily jail rates and mileage rates.

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

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

## A. Direct Cost Reporting

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

### 1. Salaries and Benefits

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

### 2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

### 3. Contracted Services

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

### 4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and



installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

#### 5. Travel

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

#### B. Indirect Cost Rates

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

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

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

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

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

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

### C. Reasonable Reimbursement Methodology

A 'reasonable reimbursement methodology', permitted under Government Code section 17518.5, is available to claim specified labor and storage costs.

#### 1. Labor Costs

The 'reasonable reimbursement methodology' to recover the labor costs of the Indigent Defense Counsel and District Attorney components is based on one or more monthly time surveys for each staff working on activity

categories A. through F. for one particular Post Conviction: DNA Court Proceedings case. Each employee enters time on a survey form upon beginning working on a case and continues doing so throughout the duration of the case. Additional monthly survey forms may be used as necessary to record all the time spent on a case. A sample monthly time survey form is attached hereto.

The time recorded on each time survey form would then be totaled and multiplied by that employee's productive hourly rate, as that term is defined in the State Controller's Office annual claiming instruction manual, found on www.sco.ca.gov. The total labor cost for the case is the sum of each employee's labor costs. The resulting cost per case is then multiplied by the number of cases. If 4 through 9 cases occur during the year, 2 cases should be time surveyed. If 10 or more cases occur during the year, a 20% sample, rounded to the nearest whole number of cases, should be taken.

## 2. Storage Costs

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

## VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to

support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

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

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

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

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

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

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

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

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

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

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

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Executive Director  
Commission on State Mandates  
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California State Association of Counties  
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Yolo County District Attorney's Office  
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Riverside County  
Auditor Controller  
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Wellhouse & Associates  
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COUNTY OF LOS ANGELES  
DEPARTMENT OF AUDITOR-CONTROLLER

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

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 22nd day of August 2006, I served the attached:

Documents: Los Angeles County, Proposed Parameters & Guidelines [Ps&Gs], Post Conviction DNA Court Proceedings CSM TC-08, including a 1 page letter of J. Tyler McCauley dated 8/22/06, a 14 page narrative, a 1 page declaration of Leonard Kaye, a 31 page attachment, and a 15 page set of Ps&Gs, now pending before the Commission on State Mandates.

upon all Interested Parties listed on the attachment hereto and by

- 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.
- 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 22nd day of August, 2006, at Los Angeles, California.

  
\_\_\_\_\_  
Hasmik Yaghobyan





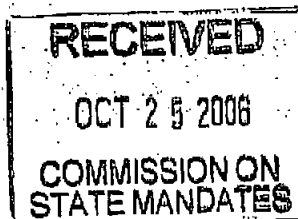
DEPARTMENT OF  
**FINANCE**

ARNOLD SCHWARZENEGGER, GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95834-2706 ■ WWW.DOF.CA.GOV

October 23, 2006

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



Dear Ms. Higashi:

The Department of Finance has reviewed the proposed Parameters and Guidelines submitted by Los Angeles County (claimant) on August 22, 2006, for the *Post Conviction: DNA Court Proceedings* mandate (CSM-00-TC-21, 01-TC-08).

The proposal contains numerous activities identified by the claimant as reasonably necessary to carry out the mandate. We do not believe that any of the one-time activities (p. 7-8, activities A through F) identified by the claimant are reimbursable because sufficient documentation has not been provided by the claimant to demonstrate that they are necessary to implement the test claim legislation. Following is a list of the continuing activities that appear to be consistent with the Statement of Decision adopted by the Commission on State Mandates (Commission) on July 28, 2006 (page numbers where claimed activities appear in the proposed Parameters and Guidelines are in parentheses):

Indigent Defense Counsel

- Investigating claims (p. 4)
- Preparing motions pursuant to Penal Code Section 1405, excluding response to notices pursuant to Penal Code Section 1417.9 (p.4)
- Travel (p. 5)
- Agree on a DNA lab (p. 5), excluding travel and lodging costs.
- Writ review related to motions filed pursuant to Penal Code Section 1405, excluding motions filed pursuant to Penal Code Section 1417.9 (p. 5)
- Provide prior test lab reports and data (p.5) – While this activity has been deemed reimbursable by the Commission, the detail provided by the claimant on how it would be implemented appears to exceed the scope of activity contained in the Statement of Decision.

To the extent possible, local governments should refer the above activities to organizations such as the Northern California Innocence Project and the California and Hawaii Innocence Project. These organizations are housed in California law schools and are dedicated to exonerating wrongfully convicted persons through post conviction DNA testing. The Innocence Projects utilize law students to accomplish some of the duties listed above, including investigating claims submitted by inmates and preparing motions for DNA testing pursuant to Penal Code Section 1405. Supervising attorneys on staff have extensive expertise in this area and students are available to dedicate significant amounts of time to these cases. Utilizing the Innocence

Projects represents a low-cost option for complying with the mandate and provides inmates with very high quality legal representation. The Northern California Innocence Project, located at the Santa Clara University School of Law, has indicated a desire and ability to take on an increased number of Penal Code Section 1405 cases.

Local agency reimbursement for legal representation should be limited to the county rate. In the event that a private attorney has agreed to provide services on a pro bono basis, the local agency should not be entitled to reimbursement.

#### District Attorney

- Travel to and from court houses to litigate motions filed pursuant to Penal Code Section 1405 (p. 6)
- Prepare and file response to motion filed pursuant to Penal Code Section 1405 (p. 6)
- Agree on a DNA lab (p. 6-7), excluding travel and lodging costs.
- Writ review related to motions filed pursuant to Penal Code Section 1405, excluding motions filed pursuant to Penal Code Section 1417.9 (p. 7)

#### Retention of Biological Evidence

- Identification and Tracking of Evidence (p. 8)
- Maintaining Biological Evidence (p. 9)

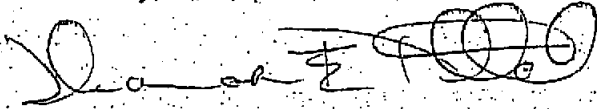
The claimant indicates that many activities in addition to those noted above are required to comply with the mandate. For example, the claimant requests reimbursement for seeking permission to dispose of biological evidence prior to the end of the term of incarceration. The test claim legislation does not require local governments to receive permission for early disposal of evidence, rather, it requires notification be served on various parties. Furthermore, the Commission did not find the notification to be a reimbursable activity because it is triggered by a discretionary decision made by local governments. The Commission should deny reimbursement for this and other claimed activities that are not specifically mandated by the test claim legislation or are not consistent with the Statement of Decision.

The claimant proposes a reasonable reimbursement methodology (Methodology), which would rely on a time study for labor costs and a ratio of biological evidence retained in felony cases to the total number of biological evidence specimens for storage costs. Because the time study has not yet been completed, it is not possible to comment on whether it would meet the Methodology criteria contained in law for labor costs. In addition, we believe the Attorney General's Postconviction Testing/Evidence Retention Task Force (Task Force) should be consulted regarding the Methodology for storage costs because of its members' extensive expertise in the field. The Task Force contains representatives from the Attorney General's Office, local law enforcement agencies, and forensics experts. The Task Force has produced a report containing recommendations to assist local governments in complying with the statute's provisions related to the handling and storage of biological evidence, which can serve as the foundation for a Methodology.

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 September 21, 2006, 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 Carla Castañeda, Principal Program Budget Analyst at (916) 445-3274.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas E. Dithridge". The signature is written in a cursive style with some loops and flourishes.

Thomas E. Dithridge  
Program Budget Manager

Attachments

Attachment A

DECLARATION OF CARLA CASTAÑEDA  
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 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.

Oct 23, 2006

at Sacramento, CA

Carla Castañeda

Carla Castañeda

## 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 915 L Street, 12 Floor, Sacramento, California 95814.

On October 23, 2006, 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, 12 Floor, for Interagency Mail Service, addressed as follows:

A-16  
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Commission on State Mandates  
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Facsimile No. 445-0278

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State Controller's Office  
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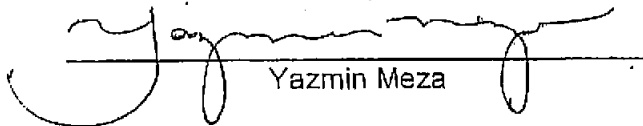
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MAXIMUS  
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Ms. Beth Hunter  
Centration, Inc.  
8570 Utica Avenue, Suite 100  
Rancho Cucamonga, CA 91730

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 October 23, 2006 at Sacramento, California.

  
Yazmin Meza

**COMMISSION ON STATE MANDATES**

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March 16, 2007

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 Affected State Agencies and Interested Parties (See Enclosed Mailing List)*

**Re: Draft Staff Analysis and Proposed Parameters and Guidelines**  
*Post Conviction: DNA Court Proceedings – 00-TC-21, 01-TC-08*  
Penal Code Sections 1405 and 1417.9 as added by Statutes 2000, Chapter 821, and  
amended by Statutes 2001, Chapter 943  
County of Los Angeles, Claimant

Dear Mr. Kaye:

The draft staff analysis and proposed parameters and guidelines are complete and enclosed for your review and comment.

**Written Comments**

Any party or interested party may file written comments on the draft staff analysis and proposed parameters and guidelines by **April 13, 2007**. The Commission's regulations require comments filed with the Commission to be simultaneously served on the parties and interested parties and to be accompanied by a proof of service. To request an extension of time to file comments, please refer to section 1183.01, subdivision (c), of the Commission's regulations.

**Hearing**

This matter is tentatively set for hearing on **May 31, 2007**; at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. This item will be scheduled for the consent calendar unless any party objects. 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), of the Commission's regulations.

Mr. Leonard Kaye  
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**Special Accommodations**

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

If you have any questions, please contact Cathy Cruz Jefferson at (916) 323-8218.

Sincerely,



PAULA HIGASHI  
Executive Director

Enclosures



ITEM \_\_\_\_\_

**DRAFT STAFF ANALYSIS  
PROPOSED PARAMETERS AND GUIDELINES**

Penal Code Sections 1405 and 1417.9

Statutes 2000, Chapter 821; Statutes 2001, Chapter 943

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

County of Los Angeles, Claimant

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**EXECUTIVE SUMMARY**

The Executive Summary will be included in the Final Staff Analysis.

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## Claimant:

County of Los Angeles

## Chronology

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

## Summary of the Mandate:

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

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

- o **Retain biological material:** Effective January 1, 2001, retain all biological material that is secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)).

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

## Discussion

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

Substantive changes were made to the following sections of the proposed parameters and guidelines.

### IV. Reimbursable Activities

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

#### Indigent Defense Counsel and District Attorney

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

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

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

Staff finds that preparing protocols and administrative forms, meeting with the SB 90 advisor, and other "one-time" activities associated with setting up the unit are too broad to be included as activities that are reasonable methods of complying with the mandate to represent and investigate. Also, staff notes that

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

other "one-time activities" should be specifically identified. Therefore, staff did not include any of the proposed development and procedure activities.

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

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

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

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

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

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

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

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

However, staff notes that preparing motions is the primary activity and does not need to be restated as an additional activity. Also, staff finds that indigent defense counsel responding to notices sent pursuant to Penal Code section 1417.9 is vague and ambiguous and may conflict with the Commission's finding that notifying persons convicted of felonies about the disposal of biological evidence pursuant to Penal Code section 1417.9, subdivision (b), does not constitute a reimbursable

state-mandated activity.<sup>2</sup> Therefore, staff did not include it as a reimbursable activity.

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

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

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

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

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

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

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

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

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

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

Following the activity to provide prior test lab reports and data, staff specifically noted that reimbursement is not required for the time spent by the indigent defense counsel and district

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<sup>2</sup> Exhibit A, page 125.

attorney at a hearing on the motion for DNA-testing pursuant to Penal Code section 1405, subdivision (e).<sup>3</sup>

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

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

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

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

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

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

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

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

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

DOF also stated in its comments that:

To the extent possible, local governments should refer the [Indigent Defense Counsel] activities to organizations such as the Northern California Innocence Project and the California and Hawaii Innocence Project. [...] The Innocence Projects utilize law students to accomplish some of the duties listed, including investigating claims submitted by inmates and preparing motions for DNA testing pursuant to Penal Code Section 1405. [...] Utilizing the Innocence

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<sup>3</sup> Exhibit A, page 124.

Projects represents a low-cost option for complying with the mandate and provides inmates with very high quality legal representation.<sup>4</sup>

Staff notes that while this may be a cost-effective option, the Commission cannot *require* local agencies to use the services of such organizations unless it is required by statute.

#### Retention of Biological Material

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

The Statement of Decision specifically states:

[B]efore the test claim statute, there was no duty to retain biological evidence past the date of conviction or when the time for appeal had expired. [9] Therefore, the Commission finds that effective January 1, 2001, it is a new program or higher level of service to retain DNA or other biological evidence secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case.<sup>5</sup>

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

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

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

There is no reimbursement for biological exhibits introduced in court in cases where the death penalty is imposed unless someone remains incarcerated after the execution of sentence who does not have the death penalty imposed. Subdivision (d) of section 1417.1 requires retaining

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<sup>4</sup> Exhibit C, pages 213-214.

<sup>5</sup> Exhibit A, page 130.



exhibits until "30 days after the date of execution of sentence." "Execution" means "completion, fulfillment, or perfecting of anything, or carrying it into operation and effect."<sup>6</sup> Thus, subdivision (d) means the biological evidence is retained 30 days after the death penalty is carried into effect, at which time the convicted person would no longer be incarcerated (the Statement of Decision requires that biological evidence only be kept for the period of time *any person remains incarcerated* in connection with that case, Pen. Code, § 1417.9, subd. (a)).

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

Even if the biological material secured in connection with a felony case is not introduced in court as an exhibit in the criminal action or proceeding, reimbursement is not required for the retention of biological material *until after* the criminal action or proceeding becomes final. The purpose of the test claim statute is to provide for "post-conviction discovery"<sup>7</sup> of material in connection with a criminal case to assist a convicted felon who "is currently serving a term of imprisonment" in filing a motion for DNA testing, following the conviction, pursuant to Penal Code section 1405 (Pen. Code, §§ 1405, subd. (a), and 1417.9).

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

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

1. Development of departmental policies and procedures necessary to comply with the post conviction forensic testing requirements of the subject law, which include making the necessary upgrades to the computer programming and hardware to the Crime Lab's electronic chain of custody module.
2. Meet and confer with trial attorneys and other counsel regarding the coordination of efforts in implementing the subject law.
3. 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.
4. 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.
5. Train evidence and property custodians on storage and notification methods necessary to comply with the subject law.

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

<sup>7</sup> The bill analysis said: "In California, there is no right to post-conviction discovery in criminal cases nor is there a set procedure for letting the courts evaluate whether a defendant should have access to post-conviction testing of DNA." Assembly Committee on Public Safety, Analysis of Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as amended June 13, 2000, page 5.

6. Design, development, and testing of computer software and equipment necessary to identify and retrieve all biological materials associated with a particular case to comply with the following requirements:

- a) category store evidence items by grade of crime – felony or misdemeanor
- b) type of evidence – biological
- c) distribution of disposal notification as required by Penal Code section 1417.9.”

Staff notes that activities 1 and 2 go beyond the scope of the mandate, and therefore, were not included as reimbursable activities. Staff also did not include activity 3 as a reimbursable activity because distribution of the Attorney General's recommendations by the claimant is not necessary as the report is available on the world wide web at <http://www.ag.ca.gov/publications/finalproof.pdf>.

Staff limited activities 4, 5, and 6, to be consistent with the Statement of Decision and the primary activity to retain biological material. Thus, departmental policies and procedures are limited to those in order to retain and preserve biological material in felony cases. Moreover, under activity 6 – design, develop, and test computer software and equipment – staff notes that the primary activity is limited to retention of biological material that is secured in connection with a felony case, and that notices pursuant to Penal Code section 1417.9 were specifically denied in the Statement of Decision.<sup>8</sup> Therefore, staff modified this activity as follows: “Design, develop, and test computer software and equipment necessary to identify and retrieve all biological materials associated with a particular case in order to categorize and store evidence items by type of biological material.”

DOF commented that none of the proposed one-time activities should be reimbursable because “sufficient documentation has not been provided by the claimant to demonstrate that they are necessary to implement the test claim legislation.”<sup>9</sup>

Staff notes that two declarations signed under penalty of perjury were submitted with the test claim declaring that these one-time activities, among others, are new duties as a result of the test claim legislation, and have resulted in costs for the Los Angeles County Sheriff's Department.<sup>10</sup> Accordingly, staff finds that with the exception of activities 1, 2, and 3, the proposed one-time activities, as modified by staff, are the most reasonable methods of complying with the mandate to retain biological material in a condition suitable for DNA testing.

#### B. Ongoing Activities

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

- “1. Training investigative personnel, to whom crime lab services are provided, in the methods and procedures necessary to comply with the subject law;
2. Initiating contacts to specified parties to seek permission to dispose of biological evidence.

<sup>8</sup> Exhibit A, page 125.

<sup>9</sup> Exhibit C, page 213.

<sup>10</sup> Declarations by L. Peter Zavala, Administrative Services Manager III, Central Property and Evidence Unit with the County of Los Angeles Sheriff's Department; and Dean M. Gialamas, Crime Laboratory Assistant Director, Scientific Services Bureau with the County of Los Angeles Sheriff's Department.

3. Identification and tracking of evidence that meets the requirements of the subject law to ensure its proper storage and retention.
4. Responding to request for biological evidence held at local agency crime labs which have not been previously examined. This involves a computer and record search for the location or disposition of the evidence sought, manual retrieval of the evidence, and forwarding it to the appropriate party.
5. Responding to requests for the analysis of evidence held at the local agency crime labs in order to determine if biological evidence is present and suitable for DNA testing. This involves laboratory testing and analysis and the issuance of the final report.
6. Meet and confer with parties (attorneys, investigators, etc.) to determine the suitability of DNA testing on the retained evidence in a particular case.
7. Preparation and tracking of biological evidence that is sent to agreed upon private vendor DNA laboratories for testing.
8. Provide Court testimony on chain of custody and disposition of biological evidence. This may include the basis and reasons for the disposition of evidence collected prior to this subject law.
9. Reimbursement of local agency costs of DNA testing for indigent inmate cases, which is not reimbursed by the State or Superior Court under other funding provisions due to insufficient funding.
10. Initiating contacts to specified parties to seek permission to dispose of biological evidence.
11. Identification and tracking of evidence that meets the requirements of the subject law to ensure its proper retention and storage.
12. Responding to request for biological evidence held at local agency Property and Evidence Units, including computer and record searches for the location or disposition of the evidence sought, manual retrieval of the evidence, and forwarding it to the appropriate party.
13. Maintaining biological evidence in refrigerated facilities to preserve its suitability for DNA testing pursuant to the subject law. This activity requires refrigerated facilities as well as maintaining such facilities (e.g. utilities) in accordance with standards and protocols published in the Attorney General's Task Force Report on implementing the subject Post-Conviction DNA Testing Program, incorporated herein by reference and attached hereto."

DOF commented that activities 3 and 13 are consistent with the Statement of Decision.

Staff notes that activities 10 and 11 are duplicates of activities 2 and 3, and thus, staff deleted the latter activities. Activity 2 was specifically denied in the Statement of Decision because it is triggered by a discretionary decision made by local agencies,<sup>11</sup> and activity 8 was also denied as the hearing on the DNA-testing motion pursuant to Penal Code section 1405, subdivision (e),

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

was denied.<sup>12</sup> Regarding activity 9, the Commission found that there is no local entity expenditure for DNA testing because the statute calls for the state or applicant to pay the cost.<sup>13</sup> Therefore, staff did not include activities 2, 8, 9, 10, and 11 as reimbursable activities.

As to activity 1, staff notes that there is currently no justification in the record to support ongoing training for investigative personnel, and thus, staff moved this activity under "One-Time Activities" and limited the training to methods and procedures necessary to retain biological material.

Staff notes that legislative analyses indicate that Senate Bill 1342 (Stats. 2000, ch. 821) "requires the court to allow testing if certain conditions are met, such as the evidence is available and in a condition suitable for testing."<sup>14</sup> Further, according to the author, this bill also "provides safeguards to ensure that the evidence is available and reliable."<sup>15</sup> However, Penal Code section 1417.9, subdivision (b), states that a governmental entity may dispose of biological material before the period of time mandated if, among other things, the notifying entity does not receive within 90 days of notification, a motion filed pursuant to Penal Code section 1405. Therefore, staff finds that the remaining proposed ongoing activities 3, 4, 5, 6, 7, 12, and 13 are reasonable methods of complying with the mandate to retain biological material in a condition suitable for DNA testing.

However, staff notes that as proposed, activity 13 implies that refrigerated facilities are mandated by the Attorney General's Task Force Report. Penal Code section 1417.9, subdivision (a), states that the governmental entity has discretion to determine how the evidence is retained, provided that it is retained in a condition suitable for DNA testing. Staff also notes that retention of biological material is the primary activity and does not need to be restated as an additional activity. Thus, staff revised the primary activity to state: "Retention of biological material in a condition suitable for future DNA testing." Moreover, staff noted that the recommendations published in the *Attorney General's SB 1342 Task Force Report* on implementing the subject *Post Conviction: DNA Court Proceedings* program may be used (see Attachment A).

Additionally, as mentioned previously, staff added the ongoing activity to "write or respond to initial correspondence from convicted persons and their attorneys seeking information regarding Penal Code section 1417.9" under activity B as a reasonable method of complying with the mandate to retain biological material in a condition suitable for DNA testing.

#### Inmate Custody and Transportation

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

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<sup>12</sup> Exhibit A, page 131.

<sup>13</sup> Exhibit A, pages 123-124.

<sup>14</sup> Senate Committee on Appropriations, Analysis of Sen. Bill No. 1342 (1999-2000 Reg. Sess.) as amended April 25, 2000, page 1.

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

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

#### V. Claim Preparation and Submission

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

##### 1. Labor Costs

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

The time recorded on each time survey form would then be totaled and multiplied by that employee's productive hourly rate, as that term is defined in the State Controller's Office annual claiming instruction manual, found on [www.sco.ca.gov](http://www.sco.ca.gov). The total labor cost for the case is the sum of each employee's labor costs. The resulting cost per case is then multiplied by the number of cases. If 4 through 9 cases occur during the year, 2 cases should be time surveyed. If 10 or more cases occur during the year, a 20% sample, rounded to the nearest whole number of cases, should be taken.

##### 2. Storage Costs

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

DOF commented that the Attorney General's Post Conviction DNA Testing Task Force should be consulted regarding the methodology for storage costs because of the members' extensive expertise in the field. Staff contacted the Attorney General's Office in January and was informed that the task force disbanded following release of their report regarding recommendations for

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

retention, storage, and disposal of biological evidence in 2002. Staff recently included several members of the former task force on the mailing list for this program and will encourage their feedback on this draft staff analysis and the proposed parameters and guidelines.

Staff reviewed the claimant's proposal and concluded that it is not a reasonable reimbursement methodology because it does not satisfy the conditions specified in Government Code section 17518.5, subdivision (a), which specifically states:

"Reasonable reimbursement methodology" means a formula for reimbursing local agency and school district costs mandated by the state that meets the following conditions:

- (1) The total amount to be reimbursed statewide is equivalent to total estimated local agency and school district costs to implement the mandate in a cost-efficient manner.
- (2) For 50 percent or more of eligible local agency and school district claimants, the amount reimbursed is estimated to fully offset their projected costs to implement the mandate in a cost-efficient manner.

Government Code section 17518.5 states that a reasonable reimbursement methodology shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state. Here, the claimant proposed methodologies that would rely on a time study for labor costs and a ratio of the number of biological evidence specimens retained in felony cases to the total number of all biological evidence specimens for storage costs.

The proposed methodologies must satisfy the conditions in Government Code section 17518.5, subdivision (a). Staff finds that there is no evidence in the record to demonstrate that the proposed reasonable reimbursement methodologies meet the conditions required by Government Code section 17518.5, because there is no evidence that the proposed amount is estimated to fully offset the projected costs to implement the mandate in a cost-efficient manner for 50 percent or more of eligible local agencies.

Therefore, based on the evidence in the record, staff recommends the actual cost methodology for the retention costs. However, staff concludes that using time studies to support indigent defense counsel and district attorney costs may be appropriate for this program. Thus, staff included the following language under section IV:

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

Moreover, staff added the training component as a direct cost under this section because training was included as a reimbursable activity under section IV.B, "Retention of biological material in a condition suitable for DNA-testing," activities 1.b. and 1.c.

## *VII. Offsetting Revenues and Other Reimbursements*

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

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

### **Staff Recommendation**

Staff recommends that the Commission adopt the proposed parameters and guidelines, beginning on page 17.

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

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





## PROPOSED PARAMETERS AND GUIDELINES

Penal Code Sections 1405 and 1417.9

Statutes 2000, Chapter 821; Statutes 2001, Chapter 943

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

County of Los Angeles; Claimant

### I. SUMMARY OF THE MANDATE

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

- **Representation and investigation by indigent defense counsel:** Effective January 1, 2001, for indigent defense counsel investigation of the DNA-testing and representation of the convicted person (except for drafting and filing the DNA-testing motion) effective January 1, 2001 (Pen. Code, § 1405, subd. (c), as added by Stats. 2000, ch. 821).
- **Prepare and file motion for DNA testing & representation by indigent defense counsel:** Effective January 1, 2002, 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:** Effective January 1, 2001, when the evidence was subjected to DNA or other forensic testing previously, by for either the prosecution or defense, the prosecution or defense, whichever previously ordered the testing, to provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender indigent defense counsel and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).

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

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

## II. ELIGIBLE CLAIMANTS

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

## III. PERIOD OF REIMBURSEMENT

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

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

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

## IV. REIMBURSABLE ACTIVITIES

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

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

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

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

For each eligible claimant, the following activities are reimbursable:

A. Indigent Defense Counsel and/or District Attorney Activities

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

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

i) Reading letters from convicted persons or those writing on behalf of convicted persons.

ii) Writing to or responding to initial correspondence from convicted persons and their attorneys seeking information regarding Penal Code section 1405.

iii) Retrieving and reviewing court files, public defender files, and appellate counsel files.

iv) Researching legal, technical, and scientific issues.

v) Interviewing witnesses.

vi) Subpoenaing records.

vii) Meeting with clients (convicted persons) in person or on the telephone, as well as written consultation.

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

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

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

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

2.b. 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 (Pen. Code, § 1405, subd. (c)(2)).

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

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

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

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

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

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

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

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

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

1.a. Prepare and file petition for writ of mandate or prohibition to appeal trial court's order on motion for DNA-testing, or response respond to petition for writ of mandate or prohibition, for writ review by indigent defense counsel and the district attorney of the trial court's decision on the DNA-testing motion (Pen. Code, § 1405, subd. (j)).  
The following activities are also reimbursable:

i) Appointing counsel,

ii) Filing motions,

iii) Litigating motions pursuant to Penal Code section 1405, subdivision (j), and

iv) Time spent in court.

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

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

B. Retention of biological material in a condition suitable for DNA-testing<sup>2</sup>

(Pen. Code, § 1417.9, subd. (a)). Reimbursement period begins January 1, 2001.

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

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

#### 1. One-Time Activities

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

#### 2. Ongoing Activities

- a. Write or respond to initial correspondence from convicted persons and their attorneys seeking information regarding Penal Code section 1417.9.
- b. Identify and track biological material that meets the requirements of the subject law to ensure its proper storage and retention.
- c. Respond to requests for biological material held at local agency crime labs which have not been previously examined. This involves a computer and record search for

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

the location or disposition of the biological material sought, manual retrieval of the biological material, and forwarding it to the appropriate party.

- d. Respond to requests for the analysis of evidence held at the local agency crime labs in order to determine if biological material is present and suitable for DNA testing. This involves laboratory testing and analysis and the issuance of a final report.
- e. Meet and confer with parties (attorneys, investigators, etc.) to determine the suitability of DNA testing on the retained biological material in a particular case.
- f. Prepare and track biological material that is sent to agreed upon private vendor DNA laboratories for testing.
- g. Respond to requests for biological material held at local agency Property and Evidence Units, including computer and record searches for the location or disposition of the biological material sought, manual retrieval of the biological material, and forwarding it to the appropriate party.

## V. CLAIM PREPARATION AND SUBMISSION

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

### A. Direct Cost Reporting

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

#### 1. Salaries and Benefits

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

#### 2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

#### 3. Contracted Services

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

claimed. Submit contract consultant and attorney invoices with the claim and a description of the contract scope of services.

#### 4. Fixed Assets and Equipment

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

#### 5. Travel

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

#### 6. Training

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

#### B. Indirect Cost Rates

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

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

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

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

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

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

## VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

## VII. OFFSETTING SAVINGS AND REIMBURSEMENTS

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

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



## VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

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

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

## IX. REMEDIES BEFORE THE COMMISSION

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

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

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

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



# POSTCONVICTION DNA TESTING

Recommendations for Retention, Storage  
and Disposal of Biological Evidence



STATE OF CALIFORNIA  
OFFICE OF THE ATTORNEY GENERAL  
BILL LOCKYER

On January 11, 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 any wrongly convicted person has the ability to prove his or her innocence through 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. In order to provide guidance to law enforcement agencies, prosecutors and the courts on which the core responsibilities for implementation fall, I formed this Task Force. 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 the scope of California's postconviction testing law, its impact on the manner in which evidence is handled and stored, and the length of time for which evidence must be retained. The Task Force's deliberations and final recommendations were informed by current best practices among California law enforcement for evidence handling and storage.

Cooperation between law enforcement, district attorneys, the judiciary, and defense counsel to utilize postconviction testing in appropriate cases will provide Californians with assurance of the fairness our criminal justice system. I believe that the Task Force's report reflects a spirit of cooperation and a commitment to seeing that justice is done in California.

Sincerely,

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, and 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.

Under SB 1342, 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.)

It has always been the responsibility of entities having custody of evidence, including courts and district attorneys offices, to adhere to good practices for storage of evidence that will:

- Maintain the potential value of the evidence for re-testing;
- Maintain a proper chain of custody; and,
- Ensure the safety of employees and the public.

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 all 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 Senate Bill 1342

Senate 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.

### 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.

### THE MOTION

The motion must 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 also must include the results of any previous DNA tests. The court, if necessary, must order the party in possession of those results to provide access to the reports, data and notes prepared in connection with the previous DNA tests to all parties.

### 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 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.

The statute allows a governmental entity to 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, which allows that the material sought to be tested only be retained 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 that 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

**P**enal Code section 1417.9 mandates 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." 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<sup>1</sup>.

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, 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.<sup>2</sup>

## 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.<sup>3</sup>
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 on an issue of identity. Our recommendation to retain a broader category of evidence 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.<sup>4</sup>

## Types of Evidence that Should be Retained

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."<sup>5</sup>

Any official making the decision to discard evidence should have experience and background sufficient to make the decision, regarding the likelihood 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.

### An item should be retained if any of the following apply:

1. The item was clearly documented as having been collected for biological testing, and it is one which forensic science has demonstrated can be tested for DNA.<sup>6</sup>

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, ball, 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. rape kits, blood alcohol samples.

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.<sup>7</sup>

- 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 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

**T**HE 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 must be mindful these factors will continue to 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 also 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 may already 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 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.

## RECOMMENDATIONS

### 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

#### Dry evidence

Wet or moist evidence containing biological materials 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 materials. Plastic is not recommended for packaging or storing moist or wet evidence items due to the acceleration of the decomposition of biological materials on the evidence items.

#### Liquid samples

Liquid samples, including liquid blood, 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

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**Extracted DNA samples**

Extracted or amplified DNA samples or any reusable products of the typing process (e.g., sample substrate such as extracted cloth, slides prepared during differential extraction) should be stored under frozen conditions. If the original source of DNA or the extracted DNA from the original source is available, then the amplified product does not have to be retained.

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**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 materials for storage should be discussed with crime laboratory personnel.

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**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.

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**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.

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**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.

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**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.

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**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.

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**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.

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**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.

Regardless of the method chosen to store biological evidence, there will be some degree of sample degradation.

**RESULTS OF LABORATORY STUDIES**

Controlled laboratory studies have shown that:

- When evidence containing biological materials is stored in a dried condition at room temperature, the biological material should still be typeable at one year or longer.
- 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.

**References**

- *American Society of Crime Laboratory Directors* (2001) "Laboratory Accreditation Board 2001 Manual," ASCLD/LAB, 139 J. Technology Drive, Garner, NC 27529.
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- Lee, H. Gaensslen, R.E. Bigbee, P.D. Kearney, J.J. (1991) *Guidelines for the Collection and Preservation of DNA Evidence*, *J. Forensic Ident.* 344/41 (5).
- Klinic, M. Redman, J. Diewer, D. *Examination of DNA Stability on Different Storage Media*, Chemical Science and Technology Laboratory National Institute of Standards and Technology.
- Wallin, J.M. Buoncristiani, M.R. Lazaruk, K.D. Fildes, N. Holt, C.L. Walsh, P.S. (1999) *TWGDAM Validation of the AmpFLSTR Blue PCR Amplification Kit for Forensic Casework Analysts*, *J. Forensic Sci* 43(4): 854-870.

## 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 separate 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 mandatory requirements; "should" is used to denote recommended practices; "may" is used in the permissive sense.

## 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: Sample Notification 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 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.



## RECOMMENDATIONS

### 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 DOB, or CDC number, if available. The retaining agency can call the investigating agency to determine the inmate's name and DOB.

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-captioned 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, the governmental entity shall 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 the governmental entity in possession of the 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.

Senate Bill No. 1342

CHAPTER 821

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.

(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.

# Appendix C - SB 1342 Task Force Members

## CALIFORNIA ATTORNEY GENERAL'S OFFICE

### SACRAMENTO OFFICE

Jan Bashinski  
Ward Campbell  
Dave Druliner  
Janet Gaard  
Chris Janzen  
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Bret Morgan  
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### SAN FRANCISCO OFFICE

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### BERKELEY OFFICE

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### LOS ANGELES OFFICE

Mary Sanchez

### SAN DIEGO OFFICE

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## CALIFORNIA ASSN. OF PROPERTY AND EVIDENCE

Maryann Duncan  
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Mr. Ash Kozuma, Property Manager  
Sacramento Police Department  
Barbara Peters  
Simi Valley Police Department

## CALIFORNIA ASSN. OF CRIME LAB DIRECTORS

Bob Jarzen, President  
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William Lewellen, Secretary  
San Mateo County Sheriff's Office, Forensic Laboratory

## CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

Woody Clarke, Deputy District Attorney  
San Diego County District Attorney's Office  
Rock Harmon  
Alameda County District Attorney  
Larry Brown, Executive Director  
California District Attorneys Association

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Alameda County Sheriff's Department

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Alameda Police Department  
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Alameda Police Department  
Chief Burnham (Burny) Matthews  
Alameda Police Department  
John Lovell

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Colusa County Sheriff-Coroner  
Nick Warner  
Nick Warner & Associates

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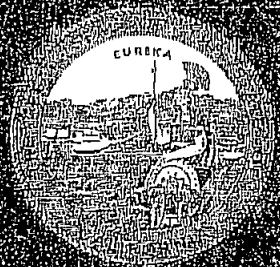
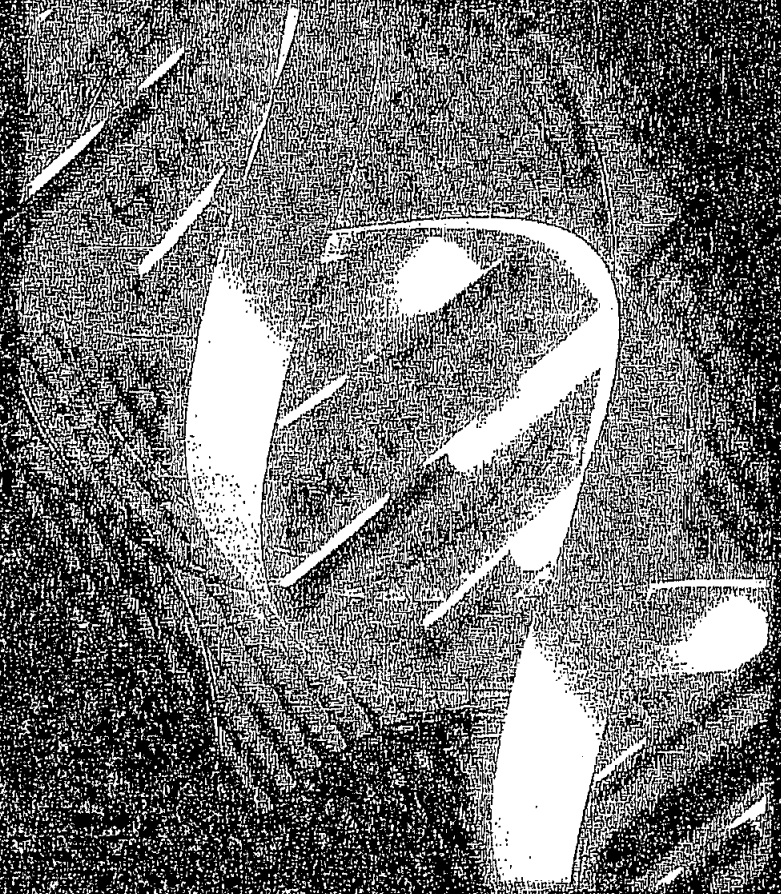
## INDIVIDUALS NOT REPRESENTING ORGANIZATIONS

Commander Marlo Sanchez  
Calexico Police Department  
Dean Gialamas  
Los Angeles Sheriff's Department  
Carnille Hill  
Orange Co. District Attorney's Office, Sexual Assault Unit  
Commanding Officer David Peterson  
Los Angeles Police Department, Property Division  
John Santy  
Orange County District Attorney's Office  
Sexual Assault Unit, TrackRS Project  
Tom Nasser, Assistant Director  
Orange County Sheriff-Coroner Department  
Forensic Science Services  
Frank McGuire, Deputy District Attorney  
Yolo County District Attorney's Office



## FOOTNOTES

- <sup>1</sup> 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].
- <sup>2</sup> *Santa Clara Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 235; *In re Biltaher* (1997) 55 Cal. App. 4th 1004, 1009; Cf. *People v. Toohes* (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].
- <sup>3</sup> 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, 855.
- <sup>4</sup> 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 it."
- <sup>5</sup> *Boyd 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].
- <sup>6</sup> 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"].
- <sup>7</sup> See generally National Commission, *Postconviction DNA Testing: Recommendations for Handling Requests* (NIJ Sept. 1999) at pp. xv, 21-22.



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Commission on State Mandates

Original List Date: 7/6/2001 Mailing Information: Draft Staff Analysis  
Last Updated: 2/20/2007  
List Print Date: 03/16/2007 Mailing List  
Claim Number: 00-TC-21  
Issue: Post Conviction: DNA Court Proceedings

Related Matter(s)

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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J. TYLER McCAULEY  
AUDITOR-CONTROLLER

**RECEIVED**  
APR 11 2007  
COMMISSION ON  
STATE MANDATES

April 11, 2007

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 Proposed Parameters and Guidelines  
Post Conviction: DNA Court Proceedings [00-TC-21, 01-TC-08]

We herein submit our review of Commission's draft staff analysis and proposed parameters and guidelines for the Post Conviction: DNA Court Proceedings reimbursement program.

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

Very truly yours,

*John Naimo* FOR  
J. Tyler McCauley  
Auditor-Controller

JTM:CY:LK  
Enclosures

Review of Commission's Proposed Parameters and Guidelines  
Post Conviction: DNA Court Proceedings [00-TC-21, 01-TC-08]

We concur with Commission's draft staff analysis and proposed parameters and guidelines [Ps&Gs] for the Post Conviction: DNA Court Proceedings program in so far as reimbursement is provided for many of the new duties imposed upon local government<sup>1</sup>.

However, Commission staff appear to have omitted some reimbursable activities which are reasonably necessary in implementing this landmark legislation<sup>2</sup>.

Specifically, Jennifer Friedman, lawyer and forensic science coordinator with the Los Angeles County Public Defender's Office, notes, in her attached declaration, that the following reimbursable activities should be added to the Post Conviction: DNA Court Proceedings Ps&Gs:

1. The Ps&Gs "... should include reimbursement for indigent defense counsel costs in preparing and filing a declaration of innocence within 180 days of the judgment of conviction as required by Penal Code Section 1417.9." Reimbursement is required as "... filing a declaration of innocence may be the appropriate and necessary response by defense counsel. Penal code section 1417.9 requires that indigent defense counsel do one of three things upon notification that an item of evidence will be destroyed (1) File a Penal Code Section

---

<sup>1</sup> Commission's staff analysis and proposed Ps&Gs, issued on March 16, 2007, list reimbursable activities on pages 18-22.

<sup>2</sup> The Post Conviction: DNA Court Proceedings legislation is a key landmark in California's efforts to provide a post-conviction remedy for convicted felons to obtain deoxyribonucleic acid (DNA) testing of biological evidence. This 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 detail how a defendant files a motion to obtain DNA testing and what conditions must be met before the court grants the testing motion. The statutes also establish procedures and timelines for the retention of biological evidence.

1405 motion; (2) File a request under penalty of perjury that a motion will be filed within 180 days; or (3) File a declaration of innocence within 180 days of the judgment of conviction.”

2. The Ps&Gs “... should include reimbursement for indigent defense costs incurred in searching for DNA evidence which cannot be readily retrieved, including the costs of going to the agency’s storage facility and, with the help of a storage agency representative, either locating the lost evidence or locating documentation which demonstrates that the evidence has been destroyed. ... [F]requently, a law enforcement agency will, in a response to a request for an item of physical evidence, state that the item is no longer in the possession of a particular agency. However, the agency is unable to demonstrate that the evidence has in fact been destroyed. In this case, defense counsel must go to the agency’s storage facility and attempt (with the help of an agency representative) to either locate the lost item or locate documentation which demonstrates that the item has been destroyed. In past cases this type of search by defense counsel has turned up both lost items of evidence and lost documentation.”

Accordingly, it is recommended that language providing for reimbursement of additional indigent defense counsel services be inserted into Section IV. A.1.a. on page 19 of Commission’s draft Ps&Gs as subsections viii and ix:

viii. To prepare and file a declaration of innocence within 180 days of the judgment of conviction as required by Penal Code Section 1417.9

ix. To search for DNA evidence which cannot be readily retrieved, including the costs of going to the agency’s storage facility and, with the help of a storage agency representative, either locating the lost evidence or locating documentation which demonstrates that the evidence has been destroyed.

In addition, Section IV. A.3.a.i., on page 20 of Commission's draft Ps&Gs, is insufficient in describing the types of reimbursable activities necessary to prepare and file a response to the 1405 motion. Also required are activities to: review the file and the trial transcript; interview the trial attorney, investigating officer, criminalist; and other investigative activities necessary in order to respond to the inmate's motion.

Accordingly, Section IV. A.3.a.i., on page 20 of Commission's draft Ps&Gs, should be continued to include:

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

In addition, the basis for excluding time spent on an evidentiary hearing as a reimbursable activity appears erroneous. In an analogous context, [habeas corpus], prosecutors are reimbursed for time spent in evidentiary hearings.

Accordingly, it is recommended that the statement, on page 20 of Commission's draft Ps&Gs, excluding reimbursement for the “... time spent ... at a hearing on the motion for DNA-testing ...”, be deleted from the Ps&Gs. Indeed, the time spent on an evidentiary hearing is a necessary and critical aspect of the entire program --- a clearly reimbursable activity.

Also, staff, on page 10 of their analysis, omit the reimbursable activity of distributing the Attorney General's Post Conviction DNA Testing Recommendations for the Retention, Storage and Disposal of Biological Evidence report from the County's proposed Ps&Gs. Staff argue that this is not a “... reimbursable activity because distribution of the Attorney General's recommendations by the claimant is not necessary because this report is readily available on the world wide web at [http://www.ag.ca.gov/publications/final\\_proof.pdf](http://www.ag.ca.gov/publications/final_proof.pdf).” But for how long? And, if revised, will claimants use the revised web site version or the original version?



Accordingly, it is strongly recommended that claimants be reimbursed for distributing the original version of the Attorney General's Post Conviction DNA Testing Recommendations for the Retention, Storage and Disposal of Biological Evidence report which, according to staff, on page 21, "... may be used..." in determining allowable costs.

Alternatively, the Attorney General's report should be incorporated into the Ps&Gs and included as an integral part [XI] of the Ps&Gs. In that way, the expanded Ps&Gs would be incorporated into the State Controller's Office claiming instructions to include the Attorney General's report. Under this alternative, Section XI would be stated as follows:

The Attorney General's Post Conviction DNA Testing Recommendations for the Retention, Storage and Disposal of Biological Evidence report, attached as an integral part of these Ps&Gs, may be used in determining allowable costs.

**LAW OFFICES OF THE  
LOS ANGELES COUNTY PUBLIC DEFENDER**

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**MICHAEL P. JUDGE**  
Public Defender

**Los Angeles County  
Draft Parameters and Guidelines  
Commission Filing 00-TC-21, 01-TC-08  
Post Conviction: DNA Court Proceedings**

**Declaration of Jennifer Friedman**

Jennifer Friedman makes the following declaration and statement under oath:

I, Jennifer Friedman, am a lawyer with the Los Angeles County Public Defender's Office. I am the forensic science coordinator. One of duties was to oversee and coordinate the work undertaken by the Public Defender's Office as set forth in Penal Code Section 1405 and 1417.9.

I declare that I have reviewed the draft staff analysis and proposed parameters and guidelines [Ps&Gs] for the Post Conviction: DNA Court Proceedings reimbursement program.

I declare that it is my information or belief that the following reimbursable activities, as underlined below, should be added to the Post Conviction: DNA Court Proceedings Ps&Gs.

I declare that it is my information or belief that the Ps&Gs should include reimbursement for indigent defense counsel costs in preparing and filing a declaration of innocence within 180 days of the judgment of conviction as required by Penal Code Section 1417.9.

I declare that it is my information or belief that reimbursement for filing a declaration of innocence may be the appropriate and necessary response by defense counsel. Penal code section 1417.9 requires that indigent defense counsel do one of three things upon notification that an item of evidence will be destroyed (1) File a Penal Code Section

1405 motion; (2) File a request under penalty of perjury that a motion will be filed within 180 days; or (3) File a declaration of innocence within 180 days of the judgment of conviction.


I declare that it is my information or belief that the Ps&Gs should include reimbursement for indigent defense costs incurred in searching for DNA evidence which cannot be readily retrieved, including the costs of going to the agency's storage facility and, with the help of a storage agency representative, either locating the lost evidence or locating documentation which demonstrates that the evidence has been destroyed.

I declare that it is my information or belief that frequently, a law enforcement agency will, in a response to a request for an item of physical evidence, state that the item is no longer in the possession of a particular agency. However, the agency is unable to demonstrate that the evidence has in fact been destroyed. In this case, defense counsel must go to the agency's storage facility and attempt (with the help of an agency representative) to either locate the lost item or locate documentation which demonstrates that the item has been destroyed. In past cases this type of search by defense counsel has turned up both lost items of evidence and lost documentation.

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 or belief, and as to those matters I believe them to be true.

4/5/07 Los Angeles, CA.  
Date and Place

  
Signature



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DEPARTMENT OF AUDITOR-CONTROLLER**

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J. TYLER McCAULEY  
AUDITOR-CONTROLLER

**Review of Commission's Proposed Parameters and Guidelines  
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 subject review of proposed Ps&Gs for the Post Conviction: DNA Court Proceedings 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.

4/11/07; Los Angeles, CA  
Date and Place

*Leonard Kaye*  
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 11th day of April, 2007, I served the attached:

Documents: Los Angeles County, Review of Commission's Proposed Parameters and Guidelines, Post Conviction: DNA Court Proceedings [00-TC-21, 01-TC-08], including a 1 page letter of J. Tyler McCauley dated 4/11/07, a 4 page narrative, a 2 page declaration of Jennifer Friedman, and a 1 page declaration of Leonard Kaye, now pending before the Commission on State Mandates.

upon all Interested Parties listed on the attachment hereto and by

- 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.
- 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 11th day of April, 2007, at Los Angeles, California.

Hasmik Yaghobyan







DEPARTMENT OF  
**FINANCE**  
OFFICE OF THE DIRECTOR

ARNOLD SCHWARZENEGGER, GOVERNOR

STATE CAPITOL B. ROOM 1145 ■ SACRAMENTO CA ■ 95814-4998 ■ WWW.DOF.CA.GOV

April 13, 2007

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

RECEIVED

APR 17 2007

COMMISSION ON  
STATE MANDATES

Dear Ms. Higashi:

As requested in your letter of March 16, 2007, the Department of Finance (Finance) has reviewed the draft staff analysis and proposed parameters and guidelines for Test Claim No. 00-TC-01, 01-TC-08 "Post Conviction: DNA Court Proceedings" submitted by Los Angeles County (claimant).

Retention of Biological Material – One-time Activities

Finance disagrees that one-time activities for retention of biological material (Activities B(1)(a)-B(1)(d) on pg. 21 of the draft staff analysis) are reimbursable. The proposed activities in this section are to develop policies and procedures, train staff, and design computer software and equipment. Retention of biological material is not a new activity. As noted in the draft staff analysis, preexisting Penal Code Section 1417.1 requires all exhibits introduced into court, including biological material, to be retained until the criminal action or proceeding becomes final. Therefore, local agencies were required to conduct the one-time activities related to implementing systems for retention of biological material under Penal Code Section 1417.1 prior to enactment of the test claim legislation.

Retention of Biological Material – Ongoing Activities

Finance does not object to the primary activity of "Retention of biological material in a condition suitable for future DNA testing" or Activity B(2)(b) "Identify and track biological material that meets the requirements of the subject law to ensure its proper storage and retention." We agree with the proposed parameters and guidelines that reimbursement for these activities should be provided only after the criminal proceeding becomes final through the term of incarceration. The remaining ongoing activities listed (Activities B(2)(a) and B(2)(c)-B(2)(g)) are not directly related to the retention or storage of biological material and should not be reimbursable.

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 March 16, 2007 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 Carla Castañeda, Principal Program Budget Analyst at (916) 445-3274.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas E. Dithridge". The signature is written in a cursive style with a horizontal line extending to the right.

Thomas E. Dithridge  
Program Budget Manager

Attachments

Attachment A

DECLARATION OF CARLA CASTAÑEDA  
DEPARTMENT OF FINANCE  
CLAIM NO. CSM-00-TC-21, 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.

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.

April 13, 2007  
at Sacramento, CA

Carla Castañeda  
Carla Castañeda

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 915 L-Street, 12 Floor, Sacramento, CA 95814.

On April 13, 2007, 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, 12 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

Mr. Leroy Baca  
Los Angeles County Sheriffs Department  
4700 Ramona Boulevard  
Monterrey Park, CA 91754-2169

B-08  
Mr. Jim Spano  
State Controller's Office  
Division of Audits  
300 Capitol Mall, Suite 518  
Sacramento, CA 95814

Executive Director  
California State Sheriffs' Association  
P.O. Box 980790  
West Sacramento, CA 95798

A-15  
Ms. Susan Genacou  
Department of Finance  
915 L Street, Suite 1190  
Sacramento, CA 95814

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

Mr. Mark Sigman  
River County Sheriff's Office  
4095 Lemon Street  
P.O. Box 512  
Riverside, CA 92502

Mr. David Wellhouse  
David Wellhouse & Associates, Inc.  
9175 Kiefer Blvd. Suite 121  
Sacramento, CA 95826

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

Ms. Cindy Monfort  
County of San Bernardino  
Office of the District Attorney  
316 No. Mountain View Avenue  
San Bernardino, CA 92415-0004

A-15

Ms. Donna Ferebee  
Department of Finance  
915 L Street, 11<sup>th</sup> Floor  
Sacramento, CA 95814

Mr. J. Bradley Burgess  
Public Resources Management Group  
1380 Lead Hill Boulevard, Suite #106  
Roseville, CA 95661

Ms. Sharon K. Joyce  
Department of Corrections  
Legal Affairs Division  
P.O. Box 942883  
Sacramento, CA 94283-0001

A-15

Ms. Carla Castaneda  
Department of Finance  
915 L Street, 11<sup>th</sup> Floor  
Sacramento, CA 95814

Mr. Jim Jagers  
P.O. Box 1993  
Carmichael, CA 95609

Ms. Bonnie Ter Keurst  
County of San Bernardino  
Office of the Auditor/Controller-Recorder  
222 West Hospitality Lane  
San Bernardino, CA 92415-0018

Sgt. J. Bricker  
Alameda County Sheriff's Office  
15001 Foothill Blvd.  
San Leandro, CA 94578-0192

B-08

Ms. Ginny Brummels  
State Controller's Office  
Division of Accounting & Reporting  
3301 C Street, Suite 500  
Sacramento, CA 95816

D-08

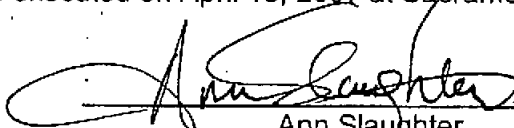
Ms. Julie Basco  
Department of Justice  
4949 Broadway, Room B243  
Sacramento, CA 95820

Mr. Allan Burdick  
MAXIMUS  
4320 Auburn Blvd., Suite 2000  
Sacramento, CA 95841

Mr. Glen Everroad  
City of Newport Beach  
3300 Newport Blvd.  
P.O. Box 1768  
Newport Beach, CA 92659-1768

Ms. Beth Hunter  
Centration, Inc.  
8570 Utica Avenue, Suite 100  
Rancho Cucamonga, CA 91730

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 April 13, 2007 at Sacramento, California.

  
Ann Slaughter

