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
PAULA HIGASHI, Executive Director

August 7, 2006
Date

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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 Geanacou 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, subds. (a) & (b)(3)(A)). Also, providing notice of the motion to "the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested" is mandated as of January 1, 2002 (Pen. Code, § 1405, subd. (c)(2)).

- **Prepare and file response to the motion:** Effective January 1, 2001, to prepare and file a response to the motion for testing, if any, by the district attorney "within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause" (Pen. Code, § 1405, subd. (c)(2)).
- **Provide prior test lab reports and data:** When the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the prosecution or defense, whichever previously ordered the testing, provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).
- **Writ review:** Effective January 1, 2001, prepare and file petition, or response to petition, for writ review by indigent defense counsel and the district attorney of the trial-court's decision on the DNA-testing motion (Pen. Code, § 1405, subd. (j)).
- **Retain biological material:** Effective January 1, 2001, retain all biological material that is secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)).

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[1] and not part of the original criminal action.[2] The statutes also establish procedures and timelines for the retention of biological evidence.

The post-conviction remedy applies to cases where biological evidence is available and is previously untested or tested by a less reliable test, and where identity of the perpetrator was an issue. The test claim statutes specify how a defendant files a motion to obtain DNA testing and what conditions must be met before the court grants the testing motion.

In 2001, the original test claim statute was amended (Stats. 2001, ch. 943) to clarify that the defendant's right to file a motion for post-conviction DNA testing cannot be waived, nor can the

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

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

right be waived to receive notice of a governmental entity's intention to dispose of biological material before expiration of the period of imprisonment.[3]

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

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

1. A written motion shall be verified by the convicted person under penalty of perjury and shall do all of the following:
   A. Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.
   B. Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.
   C. Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.
   D. If prosecution or defense previously conducted any DNA or other biological testing, the results of that testing shall be revealed in the motion, if known.[7]
   E. State whether any motion for testing under this section previously has been filed and the results of that motion, if known.
2. Notice of the motion shall be served on the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested.[8]

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

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

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

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

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

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

Responses to DNA-testing motion: Once a motion is filed, the statute provides that responses, if any, shall be filed within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause.[9]

Access to lab reports and data: If the court finds that the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, it shall order the party at whose request the testing was conducted to provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing.[10]

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

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

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

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

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

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

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

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

A. It was not tested previously.

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

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

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

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

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

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

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

> (1) If the court grants the motion for DNA testing, the court order shall identify the specific evidence to be tested and the DNA technology to be used. (2) The testing shall be conducted by a laboratory mutually agreed upon by the district attorney in a noncapital case, or the Attorney General in a capital case, and the person filing the motion. If the parties cannot agree, the court's order shall designate the laboratory to conduct the testing and shall consider designating a laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB).

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

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

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

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

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

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

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[12] 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.[13]

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

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

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

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

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

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

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

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

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[13] 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 contendre."

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

Preexisting Law

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

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

Claimant Position

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

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

- **Initial Contact** – Writing or responding to initial correspondence from inmates, attorneys or others seeking information regarding Penal Code section 1405 and 1417.9.
- **Investigating Claims** - Reading letters from inmates or others writing on behalf of inmates, retrieving and reviewing court files, trial attorney files, appellate counsel files, researching legal, technical and scientific issues, interviewing witnesses, subpoenaing records and preparing to write a motion pursuant to Penal Code section 1405. Meeting with inmates in person or on the telephone as well as written consultation.
- **Preparing Motions** - Includes preparing motions pursuant to Penal Code section 1405 and responding to notices sent pursuant to Penal Code section 1417.9.
- **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

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[14] Penal Code section 1236 et seq..

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

[16] The test claim includes detail for each of the bulleted activities.

District Attorney's Office, the Attorney General, and individuals from other Innocence Projects.

- **DNA Source Identification and Tracking** - Meeting with judges, clerks, law enforcement personnel regarding preservation of evidence and locating evidence, touring law enforcement labs and storage facilities.
- **Development and Procedure** - Preparing protocols, administrative forms, meeting with SB 90 adviser and one-time activities associated with setting up the Post-Conviction DNA unit within the District Attorney's Office [for Public Defender services, the activity claimed is "one-time activities associated with setting up the unit."]
- **Court** - Time spent in court including but not limited to appointment of counsel, filing of motions and litigation associated with motions pursuant to Penal Code section 1405 and 1417.9.
- **Travel** - Travel-related expenses associated with meeting with inmate in connection with preparation of 1405 motion.
- **DNA testing modality selection** - Travel, lodging and related expenses associated with research and becoming conversant in newly developed technological advances in the field of DNA analysis.

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

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

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

- Develop policies and procedures (one time activity).
- Meet and confer with attorneys regarding the coordination of efforts in implementing the subject law (one time activity).

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[17] 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[18] including the evidence retention conditions (one time activity).
- Train evidence and property custodians on storage and notification methods and procedures (one-time activity).
- Design, develop, and test computer software and equipment necessary to identify and retrieve biological materials (one-time activity).
- Initial contacts to specified parties to seek permission to dispose of biological evidence.
- Identify and track evidence for proper retention and storage.
- Respond to request for biological evidence held.
- Maintain biological evidence in refrigerated facilities and add and maintain refrigerated facilities.
- Court testimony on chain of custody and disposition of biological evidence.

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

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

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

> Section 1417.9 is also included in this amendment as Chapter 943, Statutes of 2001, further expands the duties of local government to include those persons who may have waived certain rights. … Therefore, as amended herein, the County is now required to provide more service – to provide notice to those with waivers as well as those without such waivers. In addition, as amended herein, the County must provide services in investigating and filing motions for post-conviction DNA testing to more indigents – now including those waiving rights as set forth in new Section 1405(m) … ."[20]

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

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[18] This document is attached to the Final Staff Analysis as Exhibit J.

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

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

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 contendre, that their right to file a motion for post-conviction DNA testing cannot be waived.

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

COMMISSION FINDINGS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Activities in section 1405 mandated by the state

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Even though the indigent defense counsel files the DNA-testing motion "if appropriate," 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."[35] Because whether or not to file the DNA testing motion is a matter of professional judgment, the indigent defense counsel's duty to file it, if appropriate, is not truly discretionary. Rather, it is an activity mandated by the state.

Therefore, if the person is indigent and has met the other statutory requirements, 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 ...."[36]

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

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

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

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

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

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

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

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

[38] *Ibid.*

[39] *Ibid.*

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

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

[42] Government Code section 26521.

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

[44] *Ibid.*

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

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

For these reasons, 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.[50] As indicated in the analysis below, when the court is left without discretion, the provision is a state mandate rather than a mandate by the court. Therefore, 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

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[45] *Ibid.*

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

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

[48] *Ibid.*

[49] Government Code section 26521.

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

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."[51] Deciding on a DNA-testing lab falls within this professional duty because of the perception that the choice of lab might affect the test's outcome. Therefore, 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."[52]

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

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

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

As stated above, the state mandates the program that allows convicted persons to seek DNA testing, and mandates the appointment of indigent defense counsel under specified conditions. The indigent defense counsel's duty is "to present his case vigorously in a manner as favorable to the client [or defendant] as the rules of law and professional ethics will permit."[53] Filing or responding to writ review for denial of a DNA-testing motion falls within this professional duty because, based on the public defender's professional judgment, the superior court judge may have wrongfully denied the petition. Therefore, 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 ...."[54] 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,[55] require an expenditure for additional services or which unavoidably make the providing of existing services

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

[54] Government Code section 26521.

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

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

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

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

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

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

Based on the statutory language ("the court may, in its discretion, appoint counsel..."), appointment of counsel when counsel has previously been appointed is an activity wholly within the discretion of the court. Thus, the Commission finds this activity is a mandate of the court

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[56] *Id.* at page 57.

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

[58] *Id.* at page 71.

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

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

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.[61] Claimant also alleges the Sheriff's activities of court testimony on the chain of custody and disposition of biological evidence.

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

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

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

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

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

Therefore, 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.[62]

C. Activities in section 1417.9 mandated by the state

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

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

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

Because the plain language of section 1417.9, subdivision (a), requires the local entity to retain biological material secured in connection with a felony case,[64] 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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[62] This finding includes denial of the activity claimant alleged for the sheriff to transport convicted persons and provide oral testimony at hearings.

[63] These related activities are not expressly required by the statute, 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)).

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

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

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

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

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

Here, as in *Kern,* the initial decision to dispose of the biological material is voluntary or discretionary. This decision, in turn, triggers a mandatory duty to notify those incarcerated. Thus, because this statute authorizes but does not require the local entity to dispose of the biological material before the convicted person's release from prison, 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. [67] Only one of these findings is necessary to trigger article XIII B, section 6.[68]

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

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

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

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

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

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

- **Representation and investigation**: For indigent defense counsel investigation of the DNA-testing and representation of the convicted person (except for drafting and filing the DNA-testing motion) effective January 1, 2001 (Pen. Code, § 1405, subd. (c) as added by Stats. 2000, ch. 821).
- **Prepare and file motion for DNA testing & representation**: if the person is indigent and has met the statutory requirements, and if counsel was not previously appointed by the court, for counsel to prepare and file a motion for DNA testing, if appropriate, effective January 1, 2002 (Pen. Code, § 1405, subds. (a) & (b)(3)(A)). Also, providing notice of the motion to "the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested" is mandated as of January 1, 2002 (Pen. Code, § 1405, subd. (c)(2)).
- **Prepare and file response to the motion:** Effective January 1, 2001, to prepare and file a response to the motion for testing, if any, by the district attorney "within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause" (Pen. Code, § 1405, subd. (c)(2)).
- **Provide prior lab reports and data:** When the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the prosecution or defense, whichever previously ordered the testing, provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).
- **Writ review:** Effective January 1, 2001, prepare and file petition, or response to petition, for writ review by indigent defense counsel and the district attorney of the trial-court's decision on the DNA-testing motion (Pen. Code, § 1405, subd. (j)).
- **Retain biological material:** Effective January 1, 2001, retain all biological material that is secured in connection with a felony case for the period of time that any person remains incarcerated in connection with that case (Pen. Code, § 1417.9, subd. (a)).

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.[70] And the test claim legislation must increase the level of governmental service provided to the public.[71] Each activity is discussed separately.

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

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

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

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

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

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

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

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

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

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

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,[74] not part of the original criminal action, since the action is not to bring someone "to trial and punishment."[75] As such, the motion for DNA testing is not an extension of the original criminal trial.

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

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

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

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

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

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

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

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

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

- **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.[80]

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

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

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

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

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

[82] *Ibid.*

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.[83] In addition, no statutory exceptions listed in Government Code section 17556 can apply. Government Code section 17514 defines "cost mandated by the state" as follows:

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

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

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

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

The issue, therefore, is whether there is sufficient additional revenue to fund the program. 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 posses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person.
> (2) In order to pay the state's share of any testing costs, the laboratory designated in subdivision (e) shall present it bill for services to the superior court for approval and payment. It is the intent of the Legislature to appropriate funds for this purpose in the 2000-01 Budget Act.

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

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

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.[85]

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

Therefore, 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, subds. (a) & (b)(3)(A)). Also, providing notice of the motion to "the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested" is mandated as of January 1, 2002 (Pen. Code, § 1405, subd. (c)(2)).
- **Prepare and file response to the motion:** Effective January 1, 2001, to prepare and file a response to the motion for testing, if any, by the district attorney "within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause" (Pen. Code, § 1405, subd. (c)(2)).
- **Provide prior test lab reports and data:** When the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the prosecution or defense,

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

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

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, subds. (a) & (b)(3)(A)). Also, providing notice of the motion to "the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested" is mandated as of January 1, 2002 (Pen. Code, § 1405, subd. (c)(2)).
- **Prepare and file response to the motion:** Effective January 1, 2001, to prepare and file a response to the motion for testing, if any, by the district attorney "within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause" (Pen. Code, § 1405, subd. (c)(2)).
- **Provide prior test lab reports and data:** When the evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the prosecution or defense, whichever previously ordered the testing, provides all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing effective January 1, 2001 (Pen. Code, § 1405, subd. (d)).
- **Agree on a DNA lab:** Effective January 1, 2001, for the public defender and the district attorney to agree on a DNA-testing laboratory (Pen. Code, § 1405, subd. (g)(2)).
- **Writ review:** Effective January 1, 2001, prepare and file petition, or response to petition, for writ review by indigent defense counsel and the district attorney of the trial-court's decision on the DNA-testing motion (Pen. Code, § 1405, subd. (j)).

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

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, subds. (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[1] 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

[1] 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.