BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Sections 1405 and 1417.9 as added by Statues 2000, Chapter 821, and amended by 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* ADOPTION OF PARAMETERS AND GUIDELINES PURSUANT TO GOVERNMENT CODE SECTION 17557 AND TITLE 2, CALIFORNIA CODE OF REGULATIONS, SECTION 1183.12 *(Adopted on May 31, 2007)*

PARAMETERS AND GUIDELINES

On May 31, 2007, the Commission on State Mandates adopted the attached Parameters and Guidelines.

Paula Higashi
PAULA HIGASHI, Executive Director

June 1, 2007
Date

Adopted: May 31, 2007

PARAMETERS AND GUIDELINES

Penal Code Sections 1405 and 1417.9

Statutes 2000, Chapter 821; Statutes 2001, Chapter 943

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

County of Los Angeles, Claimant

I. SUMMARY OF THE MANDATE

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

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

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

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

II. ELIGIBLE CLAIMANTS

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

III. PERIOD OF REIMBURSEMENT

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

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

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

IV. REIMBURSABLE ACTIVITIES

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

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or

declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

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

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

For each eligible claimant, the following activities are reimbursable:

A. Indigent Defense Counsel[1] and/or District Attorney Activities

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

   a. For indigent defense counsel to investigate the DNA-testing and represent the convicted person. (Pen. Code, § 1405, subd. (c), as added by Stats. 2000, ch. 821). The following activities are reimbursable:

      i) Reading letters from convicted persons or those writing on behalf of convicted persons.

      ii) Writing to or responding to initial correspondence from convicted persons and their attorneys seeking information regarding Penal Code section 1405.

      iii) Retrieving and reviewing court files, public defender files, and appellate counsel files.

      iv) Researching legal, technical, and scientific issues.

      v) Interviewing witnesses.

      vi) Subpoenaing records.

      vii) Meeting with clients (convicted persons) in person or on the telephone, as well as written consultation.

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

   a. For counsel to prepare and file a motion for DNA testing, if the person is indigent and has met the statutory requirements, and if counsel was not previously appointed by the court pursuant to Penal Code section 1405 before January 1, 2002. (Pen. Code, § 1405, subds. (a) & (b)(3)(A)).

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

[1] This category includes the Public Defender, Alternate Public Defender, and court-appointed indigent defense counsel.

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

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

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

      ii) Reviewing the file and trial transcript.

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

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

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

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

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

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

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

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

   a. Prepare and file petition for writ of mandate or prohibition to appeal trial court's order on motion for DNA-testing, or respond to petition for writ of mandate or prohibition by indigent defense counsel and the district attorney (Pen. Code, § 1405, subd. (j)). The following activities are also reimbursable:

      i) Appointing counsel,

      ii) Filing motions,

      iii) Litigating motions pursuant to Penal Code section 1405, subdivision (j), and

      iv) Time spent in court.

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

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

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

1. One-Time Activities
    a. Update departmental policies and procedures to retain and preserve biological material in felony cases.
    b. Train evidence and property custodians on storage methods necessary to comply with the requirement to retain biological material secured in connection with a felony case (one-time per employee).
    c. Train investigative personnel, to whom crime lab services are provided, in the methods and procedures necessary to retain biological material (one-time per employee).
    d. Update and test computer software and equipment necessary to identify and retrieve all biological materials associated with a particular case in order to categorize and store evidence items by type of biological material.
2. Ongoing Activities
    a. Write or respond to initial correspondence from convicted persons and their attorneys seeking information regarding Penal Code section 1417.9.
    b. Identify and track biological material that meets the requirements of the subject law to ensure its proper storage and retention.
    c. Respond to requests for biological material held at local agency crime labs which have not been previously examined. This involves a computer and record search for the location or disposition of the biological material sought, manual retrieval of the biological material, and forwarding it to the appropriate party.
    d. Respond to requests for the analysis of evidence held at the local agency crime labs in order to determine if biological material is present and suitable for DNA testing. This involves laboratory testing and analysis and the issuance of a final report.
    e. Meet and confer with parties (attorneys, investigators, etc.) to determine the suitability of DNA testing on the retained biological material in a particular case.

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

f. Prepare and track biological material that is sent to agreed upon private vendor DNA laboratories for testing.

g. Respond to requests for biological material held at local agency Property and Evidence Units, including computer and record searches for the location or disposition of the biological material sought, manual retrieval of the biological material, and forwarding it to the appropriate party. This activity includes the costs of going to the agency's storage facility, and with the help of a storage agency representative, either locating lost evidence or locating documentation which demonstrates that the evidence has been destroyed.

V. CLAIM PREPARATION AND SUBMISSION

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

A. Direct Cost Reporting

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

1. Salaries and Benefits

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

2. Materials and Supplies

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

3. Contracted Services

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

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for

purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

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

6. Training

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

B. Indirect Cost Rates

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

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

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

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

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

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

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[3] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING REVENUES AND REIMBURSEMENTS

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

VIII. STATE CONTROLLER'S CLAIMING INSTRUCTIONS

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

[3] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

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.

STATE OF CALIFORNIA
OFFICE *of the* ATTORNEY GENERAL
BILL LOCKYER

On January 1, 2001, a new postconviction testing law was enacted in California. This law, which provides a mechanism for inmates to seek postconviction DNA testing of evidence, creates a new safety check on our criminal justice system that will ensure any wrongly convicted person has the ability to prove his or her innocence through use of newly developed technology. It is the goal of the Postconviction Testing/Evidence Retention Task Force and the California law enforcement community to offer full and fair access to postconviction testing for meritorious claims.

Implementation of postconviction testing procedures raises significant questions regarding evidence retention which law enforcement agencies and the courts will need to address. In order to provide guidance to law enforcement agencies, prosecutors and the courts, on which the core responsibilities for implementation fall, I formed this Task Force. Its charge was to develop consensus about the likely impact of the new law and to provide information, in the form of non-binding recommendations, to assist agencies in complying with its mandates.

The non-binding recommendations compiled in this report address the scope of California's postconviction testing law, its impact on the manner in which evidence is handled and stored, and the length of time for which evidence must be retained. The Task Force's deliberations and final recommendations were informed by current best practices among California law enforcement for evidence handling and storage.

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

Sincerely,

Bill Lockyer

BILL LOCKYER
Attorney General
State of Caifornia

TABLE OF CONTENTS

Executive Summary

In January 2001, the Attorney General of California called together individuals from law enforcement, district attorneys offices, and judiciary and forensic laboratories to form a Postconviction Testing/Evidence Retention Task Force to address the new **Postconviction DNA Testing Law (SB 1342)** that went into effect January 1, 2001.

Under SB 1342, it is the responsibility of governmental entities, including the courts, in felony conviction cases to retain evidence after conviction in a manner suitable for DNA testing.

The Task Force's charge was to provide information on compliance with the law's mandate regarding biological evidence. (The Task Force did not address the legal issues raised by motions for postconviction testing under the new law.)

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

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

Task force recommendations are not binding; they are intended to increase awareness among California law enforcement agencies regarding the postconviction law and to offer guidance for complying with its mandates.

RETENTION OF BIOLOGICAL EVIDENCE

Agencies should retain all items that have a **"reasonable likelihood"** of containing biological evidence. The determination of whether evidence is reasonably likely to contain biological material should be made by or in consultation with an official who has the experience and background sufficient to make such a determination. **If there is any reasonable question, the item should be retained.** The case investigator or prosecutor should be contacted if possible.

STORAGE AND HANDLING OF BIOLOGICAL EVIDENCE AT TRIAL

Courts should attempt to obtain a stipulation from the parties that biological material need not be brought into court and that secondary evidence (photographs, computer images, video tape, etc.) may be used. Courts are urged to discourage the opening of any package containing biological material.

If a court cannot retain evidence on a long-term basis, court personnel should contact the appropriate agency (prosecutor, law enforcement agency or laboratory) for assistance with long-term storage. In such circumstances, the court should document the location of any evidence that is not retained by the court. The court should attempt to obtain a stipulation from the parties that all biological evidence will be retained for storage by the appropriate agency following trial.

In order to maintain the possibility of successful DNA testing with techniques currently in use, evidence containing biological material:

- Should be stored in a dried condition.
- Should be stored frozen, under cold/dry conditions, or in a controlled room temperature environment with little fluctuation in either temperature or humidity.
- Should **not** be subjected to repeated thawing or freezing.

DISPOSAL OF BIOLOGICAL EVIDENCE

In all felony cases, evidence containing biological material **must** be retained until:

1. Notice of disposal is given to all appropriate parties and **no response** is received within 90 days of the notice being sent;

   OR

2. After the inmate is no longer incarcerated in connection with the case.

Even if one of the conditions above is met, it is recommended that the retaining agency contact the investigating officers to see if they have any objections to disposing of evidence.

Summary of Senate Bill 1342

Senate Bill 1342 was passed by the Legislature and signed by Governor Gray Davis on September 28, 2000. As chaptered, the bill added to the Penal Code sections 1405 and 1417.9 and deleted section 1417.

WHO IS ELIGIBLE TO MAKE A MOTION

The statute grants to a defendant who was convicted of a felony and currently serving a term of imprisonment, the right to make a written motion before the court which entered the conviction for the performance of forensic DNA testing.

THE MOTION

The motion must include an explanation of why:

- The applicant's identity was or should have been a significant issue in the case;
- How the requested DNA testing would raise a reasonable probability that the verdict or sentence would have been more favorable if the DNA testing had been available at the trial resulting in the judgment of conviction; and,
- A reasonable attempt to identify the evidence to be tested and the type of DNA testing sought.

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

CRITERIA FOR GRANTING THE MOTION FOR POSTCONVICTION DNA TESTING

The law directs the court to grant the motion for DNA testing if **all** of the following has been established:

1. The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;
2. The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect;
3. The identity of the defendant was or should have been a significant issue in the case;
4. The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator or accomplice to the crime or enhancement which resulted in the conviction or sentence;
5. The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the defendant's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction. The court in its discretion may consider any evidence whether or not it was introduced at the trial;
6. The evidence sought to be tested either was not tested previously, or was tested previously but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results;
7. The testing requested employs a method generally accepted within the scientific community; and,
8. The motion is not made solely for the purpose of delay.

Any order granting or denying a motion for DNA testing shall not be appealable, and shall be reviewable only through petition for writ of mandate or prohibition as specified.

LENGTH OF TIME FOR WHICH EVIDENCE MUST BE RETAINED

The statute requires the appropriate governmental entity to retain any biological material secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with the case.

The statutes allows a governmental entity to destroy biological materials while an inmate is incarcerated in connection with the case if the following conditions are met:

1. The governmental entity notifies the person who remains incarcerated in connection with the case, any counsel of record, the public defender and the district attorney in the county of conviction, and the Attorney General of its intention to dispose of the material; and,
2. The entity does not receive a response within 90 days of the notice in one of the following forms:
    a. A motion requesting that DNA testing be performed, which allows that the material sought to be tested only be retained until such time as the court issues a final order;
    b. A request under penalty of perjury that the material not be destroyed because a motion for DNA testing will be filed within 180 days, and a motion is in fact filed within that time period; or,
    c. A declaration of innocence under penalty of perjury filed with the court within 180 days of the judgment of conviction or before July 1, 2001, whichever is later, however the court shall permit the destruction of the evidence upon a showing that the declaration is false or that there is no issue of identity which would be affected by future testing.

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

MANNER IN WHICH EVIDENCE MUST BE RETAINED

The statute provides that the governmental entity has the discretion to determine how evidence containing biological material is retained, as long as it is retained in a condition suitable for DNA testing. *(See Handling and Storage of Evidence at Trial, page 6.)*

Retention of Biological Evidence

Penal Code section 1417.9 mandates the "appropriate governmental entity shall retain any biological material secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case." This section addresses the legal parameters of the retention requirement and the types of evidence that may be considered "biological material secured in connection with a criminal case."

The statute should be read as part of the framework formulated by SB 1342, related to postconviction DNA testing, and not as rewriting law enforcement's duty to keep evidence it would not have retained as a matter of competent and reasonable law enforcement practice. Accordingly, agencies should not be required to retain material without apparent evidentiary value, or material that is clearly collateral to any question of identity[1].

Nor should the statute be read to require an unreasonable level of conjecture and speculation about what evidence may or may not constitute biological material. A literal reading of section 1417.9 would require the appropriate governmental entity to retain any item of evidence that is or was the product of a living organism, tissue, or toxin, regardless of its application to a case, would compel coroners to refuse burial of bodies, and would remove all government discretion to test a sample in a manner that could consume it – clearly at odds with prevailing law. In accordance with established rules for statutory interpretation, the statute should be read to avoid such absurd and unintended consequences.[2]

LIMITATIONS OF DUTY TO RETAIN EVIDENCE

1. The statute does not expand law enforcement's obligations regarding the collection of evidence nor does it impose any affirmative duty on forensic laboratories to determine prior to trial what items actually contain biological evidence.[3]
2. The statute does not alter existing laws requiring burial and disposal of bodies, or affirmatively require coroners to retain human remains in contravention of present practices.

COMMENTS

Penal Code section 1417.9 ensures that law enforcement keep for a longer time all known biological material with apparent potential significance on an issue of identity. Our recommendation to retain a broader category of evidence is based upon the availability of trained personnel to evaluate evidence and possible questions regarding statutory interpretation. If the burden of retaining the evidence proves unworkable, we will inform the Legislature of this fact when the Legislature considers extension of the evidence retention provision in 2002.[4]

Types of Evidence that Should be Retained

Although the statute mandates only that law enforcement keep all known biological material, we recommend that agencies retain all items that have a **reasonable likelihood** of containing biological evidence. Courts have treated **reasonable likelihood** to mean more than a "possibility" or "speculation."[5]

Any official making the decision to discard evidence should have experience and background sufficient to make the decision, regarding the likelihood the item contains biological evidence, or should consult with a person having such qualifications. **If there is any reasonable question, the item should be retained.** The case investigator or prosecutor should be contacted if possible.

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

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

   Examples of evidentiary substrates where biological material has been found include:

   - ☐ **Clothing and footwear**
   - ☐ **Sexual assault evidence kits**
   - ☐ **Bedding**
   - ☐ **Carpeting and furniture**
   - ☐ **Walls, floors, and ceilings**
   - ☐ **Cigarette butts, envelope flaps, stamps, and chewing gum**
   - ☐ **Beverage and drinking containers**
   - ☐ **Weapons (knife, axe, ball, bat, etc.)**
   - ☐ **Bullets**
   - ☐ **Personal effects of victim or suspect (hats, eyeglasses, toothbrushes, etc.)**
   - ☐ **Any evidence known to have been handled by the suspect or victim**

2. The evidence is part of a kit specifically collected for the purpose of securing biological material, e.g. rape kits, blood alcohol samples.

3. There is affirmative evidence the item contains biological material that can be used to trace identity. Affirmative evidence of biological material means:

   a. The item is one traditionally considered to be biological evidence. DNA has been successfully isolated and analyzed from:

      - ☐ **Blood**
      - ☐ **Semen**
      - ☐ **Tissues**
      - ☐ **Bones, teeth and body organs**
      - ☐ **Hair**
      - ☐ **Saliva**
      - ☐ **Sweat**
      - ☐ **Urine and feces**
      - ☐ **Fingernail scrapings**
      - ☐ **Vaginal secretion**

      Thus, items such as the victim's stained underwear or T-shirt should not be discarded.[7]

   b. The item already has been subject to a presumptive test showing biological material exists.

4. For other reasons, the item has a reasonable likelihood of containing biological evidence as determined by an official with experience and background sufficient to make the decision, or in consultation with a person having such qualifications. If there is any reasonable question, the item should be retained. The case investigator or prosecutor should be contacted, if possible.

Storage of Biological Evidence

THE CRIME laboratory's ability to successfully perform DNA testing on biological evidence recovered from a crime scene, victim or suspect depends on:

- The quantity and quality of the sample
- The time and environmental conditions between deposit and collection of the evidence
- The types of specimens collected
- How evidence is stored

The first three factors depend largely on the circumstances of the specific crime and the collection techniques used. They are not addressed in this report. However, one must be mindful these factors will continue to influence the suitability of biological evidence for testing.

The following recommendations address the final factor, storage of evidence. Evidence suitable for DNA testing that is not properly stored, may be subject to decomposition, deterioration, and/or contamination. Proper storage can minimize decomposition, deterioration and the risk of contamination.

However, regardless of the method chosen to store biological evidence, there will be some degree of sample degradation over time.

In addition, the manner in which evidence was stored in the past also may affect its suitability for DNA testing. Evidence predating the statutory mandate and possibly containing biological material suitable for DNA testing may have been stored under conditions with little control over storage environment or the prevention of contamination. In such cases, the biological material may already have deteriorated, decomposed or been contaminated to the extent that it is no longer suitable for DNA testing.

The following recommendations were developed for the use of all agencies that store evidence to improve the likelihood that evidence containing biological material will be suitable for future DNA testing. The recommendations are divided into two sections: the first addresses short-term storage and handling at trial, and the second addresses long-term storage after the defendant is convicted.

RECOMMENDATIONS

Handling and Storage of Evidence at Trial

Optimal storage of evidence containing biological material may not be realistic or possible during trial. The following recommendations are designed to reduce the potential for decomposition and contamination of biological material during trial.

Courts should limit use of biological material at trial.

Courts should attempt to obtain a stipulation from the parties that biological material need not be brought into court and that secondary evidence (photographs, computer images, video tape, etc.) may be used. Courts are urged to discourage the opening of any package containing biological material.

Courts unable to retain evidence in proper manner should contact the appropriate agency for long-term storage.

If a court cannot properly retain evidence on a long-term basis, court personnel should contact the appropriate agency (prosecutor, law enforcement agency or laboratory) for assistance with long-term storage. In such circumstances, the court should document the location of any evidence that is not retained by the court. The court should attempt to obtain a stipulation from the parties that all biological evidence will be retained for storage by the appropriate agency following trial.

Long-Term Storage of Biological Evidence

Storage conditions

In order to maintain the possibility of successful DNA typing with techniques currently in use, evidence containing biological material:

- Should be stored in a dried condition (or remain dry)
- Should be stored frozen, under cold/dry conditions, or in a controlled room temperature environment with little fluctuation in either temperature or humidity
- Should not be subjected to repeated thawing and refreezing

Dry evidence

Wet or moist evidence containing biological materials should be removed from direct sunlight, air dried, and stored frozen, under cold/dry conditions, or in a controlled room temperature environment as soon as practicable after collection. Elevated temperatures (e.g., hair dryer) should not be used to expedite the drying of wet or moist evidence. Room temperature conditions are satisfactory for drying evidence. Spreading the evidence items out and exposing them to room air can quicken the drying process of folded or bulky items. Care should be exercised to prevent transfer or loss of biological material or trace evidence during the drying process.

Area for drying evidence

The area used to air dry wet or moist evidence items containing biological materials should be clean so as to:

- Prevent cross-contamination between any two or more items in a case e.g., evidence of suspect separated from evidence of victim
- Minimize opportunities for contamination from external sources

Packaging evidence

Paper (e.g., clean butcher paper or paper bags) should be used to package evidence items containing biological materials. Plastic is not recommended for packaging or storing moist or wet evidence items due to the acceleration of the decomposition of biological materials on the evidence items.

Liquid samples

Liquid samples, including liquid blood, collected in glass containers (e.g., blood collection tubes) should not be frozen. Freezing may cause the glass container to break. Liquid blood can be refrigerated for a short period of time. For long-term storage of liquid samples, the samples:

- Can be transferred onto clean cloth or filter paper
- Dried at room temperature
- Should be stored frozen, under cold/dry conditions, or in a controlled room temperature environment with little fluctuation in either temperature or humidity

Extracted DNA samples	Extracted or amplified DNA samples or any reusable products of the typing process (e.g., sample substrate such as extracted cloth, slides prepared during differential extraction) should be stored under frozen conditions. If the original source of DNA or the extracted DNA from the original source is available, then the amplified product does not have to be retained.
Other issues regarding storage	The use of chemical preservatives, vacuum packaging, or the use of unusual containers or packaging materials to preserve evidence containing biological materials for storage should be discussed with crime laboratory personnel.
Chain of custody record	A complete chain of custody record should exist and be maintained for all evidence that is or will be retained for possible future testing.
Limit, control and document access to evidence	Evidence should be stored in a locked storage area when left unattended. Access to the locked storage area should be limited and controlled. To minimize the handling of evidence with biological material, the designated custodian should control access to evidence. If such evidence is handled, the custodian should ensure that proper protective measures are followed to ensure handler safety and the integrity of the evidence. Other than in open court, direct access to evidence such as viewing, handling, and transfer of custody, should be documented.
Identify and label evidence known to contain biological material.	Evidence known to contain biological material should be identified as such with a prominent label affixed by the person who identifies it as containing biological material.
Retain evidence in original packaging	As a general principle, evidence should be retained in its original packaging. Evidence packaged in paper upon receipt may be removed temporarily from paper and placed in plastic for viewing at trial or for other purposes, but it should be returned to paper for long-term storage to prevent degradation of the biological material. Items packaged together upon receipt should be kept together; items packaged separately upon receipt should not be commingled.
Store evidence under seal	To the extent reasonably possible, evidence should be stored under seal (seal with tape, marked with the identity of person affixing the seal). If a package is opened for inspection, it should be resealed before returning for storage.
Wear protective gear	Persons handling evidence containing biological material should take appropriate precautions to prevent cross-contamination and to protect themselves and others from biohazards. They should wear clean gloves and other appropriate personal protective gear, as needed.

EXPERIENCE WITH STORAGE HAS SHOWN:

- Evidence containing biological material suitable for DNA testing is best stored in a dried condition.
- Storage of evidence containing biological material in a wet or moist condition may result in the degradation or loss of DNA evidence.
- Colder temperatures retard degradation better than warmer temperatures.
- When evidence containing biological material is in a dried condition and stored at room temperature, the biological material should still be typeable at one year and may be typeable much longer than one year.
- DNA typing techniques currently in use are extremely sensitive and will work on partially degraded samples.

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

RESULTS OF LABORATORY STUDIES

Controlled laboratory studies have shown that:

- When evidence containing biological materials is stored in a dried condition at room temperature, the biological material should still be typeable at one year or longer.
- Evidence that originally contained a minimal amount of biological material may not be typeable due to the amount of DNA rather than due to any degradation that occurs as a result of storage at room temperature.

References

- *American Society of Crime Laboratory Directors (2001)* "Laboratory Accreditation Board 2001 Manual." ASCLD/LAB. 139 J. Technology Drive, Garner, NC 27529.
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- Lee, H. Gaensslen, R.E. Bigbee, P.D. Kearney, J.J. (1991) *Guidelines for the Collection and Preservation of DNA Evidence*, J. Forensic Ident. 344/41 (5).
- Kline, M. Redman, J. Duewer, D. *Examination of DNA Stability on Different Storage Media*, Chemical Science and Technology Laboratory National Institute of Standards and Technology.
- Wallin, J.M. Buoncristiani, M.R. Lazaruk, K.D. Fildes, N. Holt, C.L. Walsh, P.S. (1999) *TWGDAM Validation of the AmpFLSTR Blue PCR Amplification Kit for Forensic Casework Analysis*, J. Forensic Sci 43(4): 854-870.

GLOSSARY OF TERMS

Cold/dry storage conditions	Cold/dry storage conditions refer to storage of evidence at a temperature at or below 7°C (45°F) and humidity not exceeding 25% relative humidity.
Controlled environment	Controlled environment refers to a storage environment that employs environmental controls (heating and air conditioning) that limit fluctuations in temperature and humidity.
Decompose	Decompose is defined as decay, break up or separate into component parts.
Degradation	Degradation is defined as the transition from a higher to a lower level of quality.
Deteriorate	Deteriorate is defined as to make or become worse; lower in quality or value.
Dried condition	Dried condition refers to having no moisture: not wet, not damp or moist.
Frozen	Frozen refers to storing by freezing. Laboratory freezer storage temperatures are at or below –10°C (14°F).
Room temperature and humidity	Room temperature typically refers to a range of temperatures between 15.5°C (60°F) and 24°C (75°F). Humidity in the storage areas should not exceed 60% relative humidity.
Terminology	The verbs "shall," "must" and "will" indicate mandatory requirements; "should" is used to denote recommended practices; "may" is used in the permissive sense.

Disposal of Biological Evidence

In all felony cases, evidence containing biological material must be retained until:

1. **Notice is given to all appropriate parties and no response is received within 90 days of the notice being sent;** *(See Appendix A: Sample Notification Form, page 13.)*

   OR

2. **After the inmate is no longer incarcerated in connection with the case.**

Even if one of the conditions above is met, we suggest that the retaining agency contact the investigating officers to see if they have any objections to disposing of evidence.

RECOMMENDATIONS

Before an inmate is released

NOTIFICATION

The retaining agency may dispose of biological material **before** the prisoner is released from custody if the entity sends proper notice to all parties and **does not receive a response within 90 days** (Penal Code section 1417.9(b) *See Appendix A: Notification of Disposal (Sample Form) page 13.*

Parties that must be notified:

1. The inmate;
2. The counsel of record for the inmate (this includes counsel who represented the inmate in superior court and any counsel who represented the inmate on appeal);
3. The public defender in the county of conviction;
4. The district attorney in the county of conviction; and,
5. The Attorney General Investigating officers are not included as parties to be notified. However, retaining agencies also may want to contact the investigating officers to determine if they have objections to disposing of evidence.

Response to notification: The retaining agency may dispose of evidence in the case 90 days after sending notification to proper entities **unless** the retaining agency receives any of the following:

- A motion for postconviction DNA testing, filed pursuant to Penal Code section 1405; however, upon filing of that application, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.
- A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing that is followed within 180 days by a motion for DNA testing. The convicted person may request an extension of the 180-day period in which to file a motion for DNA testing, and the agency retaining the biological material has the discretion to grant or deny the request.
- A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing.

After an inmate is released

Agencies that retain evidence can in many cases dispose of biological material once the inmate is no longer incarcerated. However, many agencies do not receive regular notification of inmate release. This may present challenges for retaining agencies that may be unaware that the inmate has been released and that the evidence can be discarded.

There are two potential means by which a retaining agency can determine whether an inmate has been released:

1. **Contact the California Department of Corrections.**

   To find information on whether a particular inmate has been released from prison, an agency may call the Department of Corrections ID/Warrants Unit at (916) 445-6713 and provide the inmate's name and DOB, or CDC number, if available. The retaining agency can call the investigating agency to determine the inmate's name and DOB.

   Note: The ID/Warrants Unit does not provide this information in writing.

2. **Notification of release of certain felons**

   Specified agencies are notified of impending release of certain inmates. Penal Code section 3058.6 requires the Department of Corrections or Board of Prison Terms to notify the chief of police, sheriff, or both, and the district attorney of the county where a prisoner was convicted of a violent felony, 45 days before the prisoner is released. Section 3058.61 provides similar notification prior to the release of convicted stalkers.

   Agencies that receive Penal Code section 3058 et seq. release notices should forward them to the appropriate personnel (property room managers, etc.) including investigating officers. The retaining agency should place a follow-up call to the ID/Warrants Unit to ensure the felon was actually released before disposing of any biological material retained in connection with the case.

For all other felons, the retaining agencies can receive release notification under Penal Code section 3058.5, which provides that the Department of Corrections release information to police agencies, within 10 days upon request, of all parolees who are or may be released in their city or county.

Appendix A – Notification of Disposal (Sample Form)

[Addressee: e.g., Inmate, Counsel] _____

[Address:] _____

[City, State, Zip Code:] _____

Penal Code Section 1417.9 Notification

[Date:] _____

[Case Name:] _____

[Superior Court Number:] _____

[Court Of Appeal Number:] _____

[Notifying Agency and Address:] _____

PLEASE TAKE NOTICE that in accordance with Penal Code section 1417.9, subdivisions (a) and (b), any biological material secured in connection with the above-entitled case will be disposed of within 90 days of **[insert date notification sent:_____]**, the date this notification was sent, unless this notifying agency receives any of the following:

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

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

III. A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later. However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under Penal Code section 1417.9 or on an application by or on behalf of the convicted person filed pursuant to Penal Code section 1405.

Appendix B – Text of Senate Bill 1342

Senate Bill No. 1342

CHAPTER 821

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

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

LEGISLATIVE COUNSEL'S DIGEST

SB 1342, Burton. Forensic testing: post conviction.

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

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

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

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

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

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

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

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

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

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

(2) Notice of the motion shall be served on the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested. Responses, if any, shall be filed within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted.

(3) If any DNA or other biological evidence testing was conducted previously by either the prosecution or defense, the results of that testing shall be revealed in the motion for testing, if known. If evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the court shall order the prosecution or defense to

provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA testing.

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

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

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

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

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

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

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

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

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

(A) It was not tested previously.

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

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

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

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

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

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

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

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

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

testing, a DNA laboratory shall be required to give priority to the DNA testing ordered pursuant to this section over the laboratory's other pending casework.

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

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

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

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

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

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

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

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

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

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

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

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

Appendix C – SB 1342 Task Force Members

CALIFORNIA ATTORNEY GENERAL'S OFFICE

SACRAMENTO OFFICE

Jan Bashinski
Ward Campbell
Dave Druliner
Janet Gaard
Chris Janzen
Les Kleinberg
Bret Morgan
Peter Siggins

SAN FRANCISCO OFFICE

Enid Camps
Joan Killeen
Ann Patterson

BERKELEY OFFICE

Lance Gima
Gary Sims

LOS ANGELES OFFICE

Mary Sanchez

SAN DIEGO OFFICE

Rick Millar

CALIFORNIA ASSN. OF PROPERTY AND EVIDENCE

Maryann Duncan
Concord Police Department

Mr. Ash Kozuma, Property Manager
Sacramento Police Deptartment

Barbara Peters
Simi Valley Police Department

CALIFORNIA ASSN. OF CRIME LAB DIRECTORS

Bob Jarzen, President
Laboratory of Forensic Services

William Lewellen, Secretary
San Mateo County Sheriff's Office, Forensic Laboratory

CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

Woody Clarke, Deputy District Attorney
San Diego County District Attorney's Office

Rock Harmon
Alameda County District Attorney

Larry Brown, Executive Director
California District Attorneys Association

CALIFORNIA STATE CORONER'S ASSOCIATION

Captain Tim Buckhout
Alameda County Sheriff's Department

CALIFORNIA POLICE CHIEFS ASSOCIATION

Sergeant Mike Noonan
Alameda Police Department

Larry Valiska
Alameda Police Department

Chief Burnham (Burny) Matthews
Alameda Police Department

John Lovell

CALIFORNIA STATE SHERIFF'S ASSOCIATION

Jerry Shadiger, Sheriff-Coroner
Colusa County Sheriff-Coroner

Nick Warner
Nick Warner & Associates

CALIFORNIA PEACE OFFICERS ASSOCIATION

Captain Michael Lanam
Fremont Police Department

Lieutenant Gus Arroyo
Fremont Police Department

CALIFORNIA JUDICIAL COUNCIL

Hon. J. Richard Couzens
Placer County Superior Court

Charlene Walker, Division Manager
Sacramento County Superior Court

Joshua Weinstein
Administrative Office of the Courts

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

June Clark
Office of Governmental Affairs

INDIVIDUALS NOT REPRESENTING ORGANIZATIONS

Commander Mario Sanchez
Calexico Police Deptartment

Dean Gialamas
Los Angeles Sheriffs Department

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

Commanding Officer David Peterson
Los Angeles Police Department, Property Division

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

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

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

FOOTNOTES

[1] See Penal Code 1417.9 (b)(2)(C) & 1405 (d); SB 1342 Senate Bill Analysis, August 30, 2000, p. 5, items (3)-(4) [noting Sheriff's Offices and Police Departments differ in how long they store evidence, but most do not store evidence after appeals have been exhausted].

[2] *Santa Clara Local Transportation Authority* v. *Guardino* (1995) 11 Cal.4th 220, 235; *In re Bittaker* (1997) 55 Cal.App.4th 1004, 1009; Cf.*People* v. *Tookes* (N.Y.1996) 639 N.Y.S.2d 913, 915 [assessing practical impact of New York's postconviction DNA testing statute, and rejecting broad interpretation].

[3] Cf. *Arizona* v. *Youngblood* (1988) 488 U.S. 51, 59 [police do not have a constitutional duty to perform any particular tests]; *People* v. *Daniels* (1991) 52 Cal.3d 815, 855.

[4] See Penal Code 1417.9(c) ["This section shall remain in effect only until January 1, 2003, and on that date is repealed unless a later enacted statute that is enacted before January 1, 2003, deletes or extend

[5] *Boyde* v. *California* (1990) 494 U.S. 370, 380; *People* v. *Proctor* (1992) 4 Cal.4th 499, 523; *Strickler* v. *Greene* (1999) 527 U.S. 263, 299-300, Souter, J., dissenting; *Cf., California v. Trombetta (1984)* 467 U.S. 479, 488 [constitutional duty of States to preserve evidence is limited to evidence that might be expected to play a role in the suspect's defense].

[6] Cf. *Arizona* v. *Youngblood* (1988) 488 U.S. 51, 58 [limiting duty to preserve evidence in part to "those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant"].

[7] See, generally, National Commission, *Postconviction DNA Testing: Recommendations for Handling Requests* (NIJ Sept.1999) at pp. xv, 21-22.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

June 1, 2007, I served the:

Adopted Parameters and Guidelines
Post Conviction: DNA Court Proceedings (00-TC-21, 01-TC-08)
Penal Code Sections 1405 and 1417.9 as added by Statues 2000, Chapter 821, and amended by Statutes 2001, Chapter 943
County of Los Angeles, Claimant

by placing a true copy thereof in an envelope addressed to:

Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
Kenneth Hahn Hall of Administration
500 West Temple Street, Room 603
Los Angeles, CA 90012-2766

Ms. Ginny Brummels
State Controller's Office
Division of Accounting and Reporting
Local Reimbursement Section
3301 C Street, Suite 501
Sacramento, CA 95816

State Agencies and Interested Parties (See attached mailing list);

and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully paid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 1, 2007 at Sacramento, California.

Victoria Soriano

VICTORIA SORIANO