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 California

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Executive Summary

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

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

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

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

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

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

RETENTION OF BIOLOGICAL EVIDENCE

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

STORAGE AND HANDLING OF BIOLOGICAL EVIDENCE AT TRIAL

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

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

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

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

DISPOSAL OF BIOLOGICAL EVIDENCE

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

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

   OR

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

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

Summary of Senate Bill 1342

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

WHO IS ELIGIBLE TO MAKE A MOTION

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

THE MOTION

The motion must include an explanation of why:

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

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

CRITERIA FOR GRANTING THE MOTION FOR POSTCONVICTION DNA TESTING

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

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

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

LENGTH OF TIME FOR WHICH EVIDENCE MUST BE RETAINED

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

The 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.

BASIS FOR CONCLUSIONS

EXPERIENCE WITH STORAGE HAS SHOWN:

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

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

RESULTS OF LABORATORY STUDIES

Controlled laboratory studies have shown that:

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

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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- 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.