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Postconviction DNA Testing *The DNA testing law does not address potential remedies if exculpatory evidence is revealed*

By **MICHAEL CHAMBERLAIN**

California's postconviction DNA testing law is set forth in Penal Code § 1405. It was enacted in 2000 and amended in 2001. (Also in 2000, the California legislature enacted Penal Code § 1417.9 as companion legislation, providing for the preservation of biological evidence following felony convictions.) Section 1405 provides currently incarcerated convicted felons the opportunity to seek DNA testing. It does not, however, address potential remedies for the convicted person should testing reveal exculpatory evidence. In that sense, it is simply a vehicle for specialized discovery following conviction. Section 1405 includes the following major components:

Appointment of counsel

Section 1405 provides for appointment of counsel to assist indigent inmates prior to filing the actual testing motion. (§ 1405, subd. (b).) If the request is properly made and counsel has not been previously appointed, the trial court "shall" appoint counsel "to investigate and, if appropriate, to file a motion for DNA testing . . ." (§ 1405, subd. (b)(3)(B).) A proper request for attorney assistance contains (1) a statement by the inmate that he was not the perpetrator of the crime, (2) a statement by the inmate that DNA testing is relevant to his assertion of innocence, and (3) a statement by the inmate concerning previous appointment of counsel under section 1405. (§ 1405, subd. (b)(1).)

The California Court of Appeal criticized this provision in *In re Kinnamon* (2005) 133 Cal.App.4th 316. It stated that "[t]he required information [in the motion for appointment of counsel] does not include a theoretical or factual showing of the relevance of DNA testing. A statement that DNA testing is relevant suffices. The appointment of counsel is discretionary only if counsel has been previously appointed under section 1405." (133 Cal.App.4th at p. 321.) According to the *Kinnamon* court, this is an overindulgent statutory allowance: "The lax statutory standard will result in a wasteful expenditure of time and money where appointed counsel does not file a motion because it is not

‘appropriate.’ . . . In light of the deference owed to final judgments, at the very least prisoners should be required to make some showing that DNA evidence would raise a reasonable probability of more favorable treatment in the trial court before counsel is appointed.” (*Id.* at pp. 324, 325.)

Nonetheless, the *Kinnamon* court refused to interpret § 1405, subd. (b), as permitting anything other than the mandatory appointment of counsel where the basic criteria are met.

The DNA testing motion

The motion for DNA testing must be filed in the trial court that entered judgment in the case. (§ 1405, subds. (a), (e).) This is the appropriate forum because the factual orientation of the issue will require the judge to be as familiar as possible with the underlying facts of the case. Subdivision (c) of § 1405 sets forth five substantive requirements for the testing motion. These showings must be verified under penalty of perjury by the applicant. The motion must:

- (1) “Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.”
- (2) “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.”
- (3) “Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.”
- (4) “Reveal the results of any DNA or other biological testing that was conducted previously by either the prosecution or defense, if known.”
- (5) “State whether any motion for testing under this section previously has been filed and the results of that motion, if known.” (§ 1405, subd. (c)(1)(A)-(E).)

Notice of the motion must be served on the county district attorney, the attorney general, and the court, crime laboratory or police agency in possession of the biological evidence. (§ 1405, subd. (c)(2).) Any party objecting to the motion for testing has 60 days in which to file a responsive pleading.

Requirements for successful motion

Finally, subdivision (f) of § 1405 enumerates eight factually based criteria that must be “established” for the motion to be granted. These criteria generally echo the required content of the motion as discussed above, but include the following elements that often fuel contention and merit further discussion.

Subdivision (f)(2) requires the applicant to establish that “[t]he 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.” For example, if in the course of a pre-DNA technology investigation and trial the probative biological evidence could have been (or was) casually handled by investigators, lab technicians, attorneys, court clerks or even jurors, the resulting possibility of contamination may very well negate the value of postconviction testing.

In other words, if a DNA profile other than the defendant’s on the crime scene evidence is not necessarily inconsistent with his guilt, then there may be reason not to have the evidence tested. This provision might also prevent the applicant from submitting for testing biological evidence or “reference” samples from third parties that were not originally collected and preserved in such a way as to ensure their origin and authenticity.

Subdivision (f)(3) requires that the “identity of the perpetrator of the crime was, or should have been, a significant issue in the case.” In most cases, this would preclude successful DNA testing motions where the applicant pleaded guilty or offered a consent defense to a sexual assault charge. The court hearing the postconviction DNA testing motion would also have to consider the totality of identification evidence available at trial in evaluating whether identity was a significant issue. The court could weigh, for example, fingerprint evidence, eyewitness testimony, party admissions, modus operandi evidence, videotape evidence or even other DNA evidence.

Subdivision (f)(4) requires the applicant to make a “prima facie . . . showing that the evidence sought to be tested is material to [his] . . . identity as the perpetrator of . . . the crime.” As a general matter, a prima facie showing may not be founded upon speculation (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1241, fn. 38) or conclusory allegations. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) Material evidence must “tend to establish guilt” or be “directly probative of the crimes charged.” (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1212, quoting *People v. Thompson* (1980) 27 Cal.3d 303, 330-332.) Applying these principles to postconviction DNA testing, if the test results could only be inconclusive or inculpatory, the evidence tested cannot be material within the meaning of subdivision (f)(4).

For example, if a homicide occurs near a picnic table in a public park, and the convicted person requests that DNA testing be performed on two cigarette butts found nearby, the court could very well conclude that the no prima facie showing of materiality can be made. If the DNA on the cigarette butts does not match the convicted person, that result is not necessarily inconsistent with his guilt. Absent evidence supporting an alternative interpretation, the cigarettes could have just as easily been smoked before the murder by innocent picnickers. They would not be probative of the killer’s identity. On the other hand, sperm collected on a rape kit swab may be very probative of a rapist’s identity within the meaning of subdivision (f)(4), absent evidence of consensual partners, multiple perpetrators or other complicating factors.

Subdivision (f)(5) requires the applicant to demonstrate that “[t]he 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.” This provision often represents the crux of the argument in favor of, or in opposition to, postconviction testing. Its “reasonable probability” standard mirrors the standard employed in evaluating whether evidence is material under *Brady v. Maryland* (1963) 373 U.S. 83, such that failure to disclose it to a defendant violates due process and fair trial rights. In that context, favorable evidence is material “only where there exists a ‘reasonable probability’ that had the evidence been disclosed the result at trial would have been different.” (*Wood v. Bartholomew* (1995) 516 U.S. 1, 5, quoting *Kyles v. Whitley* (1995) 514 U.S. 419, 433-434.)

A reasonable “possibility,” in the *Brady* line of cases, is insufficient to establish a “reasonable probability of a different result.” (*Strickler v. Greene* (1999) 527 U.S. 263, 291, emphasis in original; see also *United States v. Agurs* (1976) 427 U.S. 97, 109-110 [“The mere possibility that an item of undisclosed evidence might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.”].) Instead, material “*Brady* evidence” would “put the whole case in such a different light as to undermine confidence in the verdict.” (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 435.) Courts assessing whether the convicted person can demonstrate a reasonable probability that the testing will be exculpatory may consider other evidence of guilt, even if not introduced at trial. (§ 1405, subd. (f)(5).)

Appellate remedy

An order granting or denying a postconviction DNA testing request is not appealable. (§ 1405, subd. (j).) A party dissatisfied with the outcome may petition the Court of Appeal for a writ of mandate or prohibition, however. The writ petition must be filed within 20 days of the trial court’s order. (In capital cases, the writ petition is filed in the California Supreme Court.)

The testing order

Once the parties stipulate to postconviction DNA testing, or once the testing motion is granted over opposition, the court will issue an order setting forth the parameters of the testing to be performed. An appropriate court order should include the following details:

- An exact description of the evidence items to be tested. For example, do all 20 hairs found in the victim’s hand require testing, or is a representative sampling sufficient?
- The testing technology that will be used (e.g., STRs, Y-STRs, mtDNA).

- Which laboratory will do the testing, and how evidence will be transported to that facility.
- Instructions regarding the order in which evidence items will be tested. The items having the highest chance of containing probative and testable biological evidence should be tested first, and the results may eliminate the need for additional costly testing.
- A provision requiring the testing laboratory to assess the feasibility of testing the evidence before actually proceeding.
- Acknowledgment that evidence may be consumed in the course of testing. In the alternative, the testing laboratory could be instructed to notify all parties if it appears that testing will consume the entirety of an evidence item.
- A requirement that the testing laboratory complete the testing of evidence item(s), including dissemination of its report to all parties, before proceeding with the analysis of any relevant reference samples from the defendant, victim or third parties.
- All underlying data and laboratory notes will be made available to all parties upon request.
- Agreement that the defendant will provide new known reference samples upon request for comparative analysis.
- Permission for the testing laboratory to retest any evidence items it deems necessary.
- Any DNA testing not contemplated by the order cannot occur without the mutual consent of all parties or further court order. This may include testing the same evidence items using different scientific methodologies.
- Instructions regarding disposition of the evidence following completion of the DNA testing. Commonly evidence is retained by the testing laboratory or returned to a law enforcement facility.
- Terms of payment for testing services. If the testing is performed by a private laboratory, the Superior Court ordering the testing will be responsible for payment. (Pen. Code, § 1405, subd. (i)(2).)

Conclusion

Some day, hopefully soon, every case prosecuted in which DNA evidence is available and probative of identity will include the presentation of highly discriminatory DNA evidence to the finder of fact. Following that milestone, postconviction DNA testing will

rarely, if ever, be required. Until then, however, the postconviction DNA testing laws enacted by California and other jurisdictions are available to those convicted offenders who can satisfy their criteria.

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Test — 1 Hour MCLE Credit

This test will earn one hour of MCLE credit.

- 1.** A person is convicted of misdemeanor sexual battery and sentenced to six months in jail. While incarcerated, he makes a motion for postconviction DNA testing pursuant to Penal Code § 1405. Section 1405, however, does not permit the court to consider the merits of the defendant's claim.
- 2.** California Penal Code § 1405 mandates the retention of biological evidence in all felony cases for as long as the defendant remains incarcerated.
- 3.** A convicted felon who was imprisoned but has been released on parole may make a motion for postconviction DNA testing because he is still subject to government control and supervision.
- 4.** A prison inmate makes an unsuccessful motion for postconviction DNA testing and is represented by counsel for that purpose. Three years later, he realizes that other biological evidence may exist and requests counsel for purposes of filing a second motion for DNA testing. He makes all the assertions required by Penal Code § 1405(b)(1). The court has no discretion and must appoint counsel.
- 5.** A motion for postconviction DNA testing must be made to the trial court that entered judgment in the case.
- 6.** A motion for postconviction DNA testing is researched, prepared and filed by counsel on behalf of an incarcerated felon. In addition to her points and authorities, the attorney drafts and signs a sworn declaration attesting to her investigation of the case and addressing each of the five criteria listed in § 1405(c)(1). No other documents are included. The motion should be denied as procedurally deficient on its face.
- 7.** A prison inmate was convicted of murder in 1982. Before trial, the government's crime laboratory had conducted conventional serology ("ABO") testing to determine the blood type of certain bloodstains located at the crime scene. That evidence was not introduced at trial. Twenty-five years later, in making a motion for postconviction DNA testing, the convicted person must inform the court of the 1982 serology testing and results.
- 8.** If the convicted person has appealed his conviction to the Court of Appeal, notice of the motion for postconviction DNA testing must be served on the appellate court as well as the trial court.
- 9.** An incarcerated felon files a motion for postconviction DNA testing on May 4 and requests a June 4 hearing date. The motion is procedurally flawed.

10. A person is convicted of second degree burglary. At trial, he took the stand and admitted entering the store, but denied that he entered with the intent to commit theft. Following conviction, he seeks DNA testing of the baseball cap left by the burglar as he fled the store, arguing that it would show that he did not wear the cap so was not the burglar. The trial court correctly denies the motion for testing.

11. A trial court hearing a motion for postconviction DNA testing may properly consider whether the evidence sought to be tested has been contaminated through contact with persons unrelated to the commission of the crime.

12. To prevail on a postconviction DNA testing motion, the convicted person must demonstrate a reasonable possibility that the verdict or sentence would have been more favorable to the defense if the testing had been available at the time of trial.

13. A prison inmate was convicted of aiding and abetting a multiple-perpetrator rape by restraining the victim. There was no evidence that he had sexual contact with the victim. He requests postconviction DNA testing of the rape kit vaginal swabs collected by medical personnel during the post-crime examination. His request will likely be granted.

14. In adjudicating a motion for postconviction DNA testing, the court considers eyewitness' hearsay statements in a police report. The statements had not been received into evidence at trial. The court erred in doing so.

15. Following the granting of an applicant's motion for postconviction testing, the District Attorney appeals the outcome, filing the notice of appeal 29 days after the trial court's ruling. This was a timely request for the appropriate appellate review.

16. A court order that directs a laboratory to conduct "DNA testing" on an item of evidence is improperly vague.

17. A court should not order DNA testing when the testing itself may consume the entirety of the evidence item.

18. An inmate convicted of rape seeks postconviction DNA testing of (1) the rape kit swabs, (2) his reference sample, and (3) the victim's husband's reference sample. The court order for testing mandates simply that "all items identified be subjected to DNA testing using PCR-STR technology" and does not specify a testing sequence. This order is flawed.

19. Following the issuance of an order for postconviction DNA testing pursuant to § 1405, the Superior Court must bear all private laboratory testing costs out of its own budget.

20. A person convicted of rape makes a successful motion for postconviction DNA testing. The test results exclude him as a source of the semen left by the perpetrator.

Section 1405 requires that the trial court grant his subsequent petition for a writ of habeas corpus based on newly discovered evidence.

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