

AMENDED IN SENATE MAY 7, 2014
AMENDED IN SENATE MARCH 17, 2014

SENATE BILL

No. 980

Introduced by Senator Lieu
(Coauthor: Senator Leno)

February 11, 2014

An act to amend Sections 1405 and 1417.9 of, and to add Section 1405.1 to, the Penal Code, relating to DNA testing.

LEGISLATIVE COUNSEL'S DIGEST

SB 980, as amended, Lieu. Prisoners: DNA testing.

(1) Existing law allows an incarcerated person who has been convicted of a felony to make a written motion for the performance of forensic deoxyribonucleic acid (DNA) testing according to a specified procedure.

This bill would, upon appointment or retention of counsel to investigate and file a motion pursuant to these provisions, or at any time after a petition for DNA testing has been filed, authorize a court to order that counsel be provided access to physical evidence for the purpose of examining physical evidence relating to the investigation, arrest, and prosecution of the defendant upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the counsel's effort to investigate whether a motion for DNA testing is appropriate, as specified. By increasing the duties of local governments in providing access to physical evidence, this bill would impose a state-mandated local program.

(2) Existing law requires a court to grant the motion for DNA testing if it determines, among other things, that 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.

This bill would instead require the court to grant the motion if it determines that the DNA testing results would be relevant to the issue of the identity of the perpetrator, and would require the court to presume the requested testing results would be exculpatory. The bill also would make conforming changes regarding the required contents of a petition requesting DNA testing. The bill would authorize a court to order a database search of the Combined DNA Index System to compare a profile obtained from the results of DNA testing conducted pursuant to these provisions to the profiles contained in the databank. The bill would change the accreditation requirements for a laboratory that may be designated by the court to perform the DNA testing pursuant to these provisions if the parties cannot mutually agree on a laboratory, as specified.

(3) Existing law requires the appropriate governmental entity to retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with the case. Existing law allows the governmental entity to dispose of biological material before the expiration of this time period if the governmental entity notifies the inmate and his or her counsel, and the notifying entity does not receive, within 90 days of sending the notification, a motion for DNA testing, a request that the material not be destroyed because a motion for DNA testing will be filed within 180 days, or a declaration of innocence that has been filed with the court within 180 days of the judgment of conviction.

This bill would require the governmental entity to retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated, on probation, or on parole in connection with the case. The bill would allow the governmental entity to dispose of biological material before the expiration of this time if the governmental entity notifies the inmate and his or her counsel, and the notifying entity does not receive, within one year of sending the notification, a motion for DNA testing, a request that the material not be destroyed because a motion for DNA testing will be filed within one year, or a declaration of innocence that has been filed with the court within one year of the judgment of conviction. By increasing the duties of local governmental entities in regard to the retention of biological material, this bill would impose a state-mandated local program.

If evidence has been destroyed in violation of these provisions, and if the appropriate governmental entity receives a request for evidence, the bill would require the agency to submit a statement that a representative from the agency personally searched for the requested evidence and determined that the evidence has been destroyed. This bill would require the statement to be signed under penalty of perjury. By expanding the crime of perjury, this bill would impose a state-mandated local program. The bill would require the court to consider appropriate remedies if it finds that biological evidence has been destroyed.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

This bill would make a technical, nonsubstantive change to these provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

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

1 SECTION 1. Section 1405 of the Penal Code is amended to
2 read:

3 1405. (a) A person who was convicted of a felony and is
4 currently serving a term of imprisonment may make a written
5 motion before the trial court that entered the judgment of conviction
6 in his or her case, for performance of forensic deoxyribonucleic
7 acid (DNA) testing.

8 (b) (1) An indigent convicted person may request appointment
9 of counsel to prepare a motion under this section by sending a
10 written request to the court. The request shall include the person's
11 statement that he or she was not the perpetrator of the crime and
12 that DNA testing is relevant to his or her assertion of innocence.
13 The request also shall include the person's statement as to whether
14 he or she previously has had counsel appointed under this section.

1 (2) If any of the information required in paragraph (1) is missing
2 from the request, the court shall return the request to the convicted
3 person and advise him or her that the matter cannot be considered
4 without the missing information.

5 (3) (A) Upon a finding that the person is indigent, he or she
6 has included the information required in paragraph (1), and counsel
7 has not previously been appointed pursuant to this subdivision,
8 the court shall appoint counsel to investigate and, if appropriate,
9 to file a motion for DNA testing under this section and to represent
10 the person solely for the purpose of obtaining DNA testing under
11 this section.

12 (B) Upon a finding that the person is indigent, and counsel
13 previously has been appointed pursuant to this subdivision, the
14 court may, in its discretion, appoint counsel to investigate and, if
15 appropriate, to file a motion for DNA testing under this section
16 and to represent the person solely for the purpose of obtaining
17 DNA testing under this section.

18 (4) This section does not provide for a right to the appointment
19 of counsel in a postconviction collateral proceeding, or to set a
20 precedent for any such right, in any context other than the
21 representation being provided an indigent convicted person for the
22 limited purpose of filing and litigating a motion for DNA testing
23 pursuant to this section.

24 (c) Upon appointment of counsel pursuant to subdivision (b),
25 or upon retention of counsel in all other cases, to investigate and,
26 if appropriate, to file a motion for DNA testing pursuant to this
27 section, and upon request of counsel, or at any time after a petition
28 has been filed pursuant to this section, a court may order that
29 counsel, or counsel's representatives, be provided access to
30 physical evidence for the purpose of examination, including, but
31 not limited to, any physical evidence relating to the investigation,
32 arrest, and prosecution of the defendant, upon a showing that there
33 is good cause to believe that access to physical evidence is
34 reasonably necessary to the counsel's effort to investigate whether
35 a motion for DNA testing is appropriate. Upon request of counsel,
36 and upon a showing that there is good cause to believe that it is
37 reasonably necessary to counsel's effort to investigate whether a
38 motion for DNA testing is appropriate, the court also may order
39 all of the following:

1 (1) The appropriate governmental entity to locate and provide
2 counsel with any documents, notes, logs, or reports relating to
3 items of physical evidence collected in connection with the case
4 or to otherwise assist the defendant in locating items of biological
5 evidence that the governmental entity contends have been lost or
6 destroyed.

7 (2) The appropriate governmental entity to take reasonable
8 measures to locate biological evidence that may be in its custody.

9 (3) The appropriate governmental entity to assist counsel in
10 locating relevant evidence that may be in the custody of a public
11 or private hospital, public or private laboratory, or other facility.

12 (4) The production of laboratory documents of analyses
13 performed from the time of evidence intake to disposition, in the
14 original form provided by the laboratory, as prepared in connection
15 with the examination or analyses of any items collected as evidence
16 that may contain biological material. This includes, but is not
17 limited to, the underlying data and laboratory notes prepared in
18 connection with DNA tests, presumptive tests for the presence of
19 biological material, serological tests, and analyses of trace
20 evidence, if the evidence had been subjected to that testing. Any
21 and all items from the requested case file shall be made available,
22 including digital files and nonphotocopied photograph-quality
23 prints of photographs taken.

24 (d) (1) The motion for DNA testing shall be verified by the
25 convicted person under penalty of perjury and shall do all of the
26 following:

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

29 (B) Explain, in light of all the evidence, how the requested DNA
30 testing would be relevant to the issue of the identity of the
31 perpetrator.

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

34 (D) Reveal the results of any DNA or other biological testing
35 that was conducted previously by either the prosecution or defense,
36 if known.

37 (E) State whether any motion for testing under this section
38 previously has been filed and the results of that motion, if known.

39 (2) Notice of the motion shall be served on the Attorney General,
40 the district attorney in the county of conviction, and, if known, the

1 governmental agency or laboratory holding the evidence sought
2 to be tested. Responses, if any, shall be filed within 60 days of the
3 date on which the Attorney General and the district attorney are
4 served with the motion, unless a continuance is granted for good
5 cause.

6 (e) If the court finds evidence was subjected to DNA or other
7 forensic testing previously by either the prosecution or defense, it
8 shall order the party at whose request the testing was conducted
9 to provide all parties and the court with access to the laboratory
10 reports, underlying data, and laboratory notes prepared in
11 connection with the DNA or other biological evidence testing.

12 (f) The court, in its discretion, may order a hearing on the
13 motion. The motion shall be heard by the judge who conducted
14 the trial, or accepted the convicted person's plea of guilty or nolo
15 contendere, unless the presiding judge determines that judge is
16 unavailable. Upon request of either party, the court may order, in
17 the interest of justice, that the convicted person be present at the
18 hearing of the motion.

19 (g) Before the ~~grant~~ *granting* of a motion for DNA testing
20 pursuant to this section, the defendant is not required to show that
21 a favorable test would conclusively establish his or her innocence.
22 Rather, the court shall grant the motion for DNA testing if it
23 determines all of the following have been established:

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

26 (2) The evidence to be tested has been subject to a chain of
27 custody sufficient to establish it has not been substituted, tampered
28 with, replaced, or altered in any material aspect, if the chain of
29 custody does not establish the integrity of the evidence, the testing
30 itself has the potential to establish the integrity of the evidence.
31 For purposes of this section, evidence that has been in the custody
32 of law enforcement, other government officials, or a public or
33 private hospital shall be presumed to satisfy the chain of custody
34 requirement of this paragraph, absent specific evidence of material
35 tampering, replacement, or alteration.

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

38 (4) The convicted person has made a prima facie showing that
39 the evidence sought to be tested is material to the issue of the
40 convicted person's identity as the perpetrator of, or accomplice

1 to, the crime, special circumstance, or enhancement allegation that
2 resulted in the conviction or sentence.

3 (5) The requested DNA testing results would be relevant to the
4 issue of the identity of the perpetrator. In making this determination
5 pursuant to this paragraph, the court shall presume the requested
6 testing results will be exculpatory, and shall determine whether
7 the requested DNA testing results would be relevant to the issue
8 of the identity of the perpetrator. Exculpatory results may be results
9 that exclude the convicted person, or results that both exclude the
10 convicted person and match another suspect or an offender in the
11 Combined DNA Index System (CODIS) as defined in Section
12 1405.1, or match an unrelated crime or crimes in CODIS. The
13 court in its discretion may consider any evidence whether or not
14 it was introduced at trial.

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

17 (A) The evidence was not tested previously.

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

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

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

25 (h) (1) If the court grants the motion for DNA testing, the court
26 order shall identify the specific evidence to be tested and the DNA
27 technology to be used.

28 (2) The testing shall be conducted by a laboratory mutually
29 agreed upon by the district attorney in a noncapital case, or the
30 Attorney General in a capital case, and the person filing the motion.
31 If the parties cannot agree, the court shall designate the laboratory
32 to conduct the testing and shall consider designating a laboratory
33 accredited by an accreditation body that is a signatory to the
34 International Laboratory Accreditation Cooperation (ILAC) Mutual
35 Recognition Agreement (MRA) and offers forensic laboratory
36 accreditation services.

37 (3) Analysts, technicians, or other agents of the laboratory
38 conducting the testing, including local or state governmental
39 laboratories, shall communicate directly with and provide
40 documentation directly to both parties simultaneously, and shall

1 not communicate with one party individually, unless the parties
2 agree otherwise.

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

7 (j) ~~(1) The costs of DNA testing, litigation costs incurred by~~
8 ~~appointed counsel for the defendant, and fees to appointed counsel~~
9 ~~for his or her representation of the defendant, ordered pursuant to~~
10 ~~this section, shall be borne by the state if it is shown that the~~
11 ~~applicant is indigent and not able to pay. These costs shall not be~~
12 ~~borne by the county where the motion is filed and granted. If the~~
13 ~~applicant is not indigent, and is able to pay, the court may order~~
14 ~~the applicant to bear the costs. The cost of DNA testing ordered~~
15 ~~under this section shall be borne by the state or the applicant, as~~
16 ~~the court may order in the interests of justice, if it is shown that~~
17 ~~the applicant is not indigent and possesses the ability to pay.~~
18 However, the cost of any additional testing to be conducted by the
19 district attorney or Attorney General shall not be borne by the
20 convicted person.

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

26 (k) An order granting or denying a motion for DNA testing
27 under this section shall not be appealable, and shall be subject to
28 review only through petition for writ of mandate or prohibition
29 filed by the person seeking DNA testing, the district attorney, or
30 the Attorney General. The petition shall be filed within 20 days
31 after the court's order granting or denying the motion for DNA
32 testing. In a noncapital case, the petition for writ of mandate or
33 prohibition shall be filed in the court of appeal. In a capital case,
34 the petition shall be filed in the California Supreme Court. The
35 court of appeal or California Supreme Court shall expedite its
36 review of a petition for writ of mandate or prohibition filed under
37 this subdivision.

38 (l) DNA testing ordered by the court pursuant to this section
39 shall be done as soon as practicable. However, if the court finds
40 that a miscarriage of justice will otherwise occur and that it is

1 necessary in the interests of justice to give priority to the DNA
2 testing, a DNA laboratory shall be required to give priority to the
3 DNA testing ordered pursuant to this section over the laboratory's
4 other pending casework.

5 -

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

10 (n) Notwithstanding any other provision of law, the right to file
11 a motion for postconviction DNA testing provided by this section
12 is absolute and shall not be waived. This prohibition applies to,
13 but is not limited to, a waiver that is given as part of an agreement
14 resulting in a plea of guilty or nolo contendere.

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

19 SEC. 2. Section 1405.1 is added to the Penal Code, to read:

20 1405.1. (a) If the court grants a motion for DNA testing
21 pursuant to Section 1405, testing is performed, and a DNA profile
22 is obtained from the results of DNA testing of biological material
23 that excludes the convicted person, the court may, on its own
24 motion or by motion of the defendant, order a database search of
25 the Combined DNA Index System (CODIS) to compare the profile
26 obtained from the results of DNA testing of biological material to
27 the profiles contained within the CODIS databank. DNA profiles
28 shall meet current national DNA database index system eligibility
29 standards and conform to current Federal Bureau of Investigation
30 quality assurance standards in order to be eligible for search against
31 the state index system.

32 (b) For the purposes of this section, profiles contained within
33 the CODIS databank includes those profiles contained with the
34 Convicted Offender Index, the Forensic Index, the Arrestee Index,
35 the Missing or Unidentified Persons Index, and the Missing Persons
36 Reference Index.

37 SEC. 3. Section 1417.9 of the Penal Code is amended to read:

38 1417.9. (a) Notwithstanding any other provision of law and
39 subject to subdivision (b), the appropriate governmental entity
40 shall retain all biological material that is secured in connection

1 with a criminal case for the period of time that any person remains
2 incarcerated, on probation, or on parole in connection with that
3 case. The governmental entity shall have the discretion to determine
4 how the evidence is retained pursuant to this section, provided that
5 the evidence is retained in a condition suitable for deoxyribonucleic
6 acid (DNA) testing.

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

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

18 (2) The notifying entity does not receive, within one year of
19 sending the notification, any of the following:

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

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

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

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

1 (c) Notwithstanding any other provision of law, the right to
2 receive notice pursuant to this section is absolute and shall not be
3 waived. This prohibition applies to, but is not limited to, a waiver
4 that is given as part of an agreement resulting in a plea of guilty
5 or nolo contendere.

6 (d) If evidence has been destroyed in violation of this section
7 or otherwise, and if the appropriate governmental entity receives
8 a request for evidence under Section 1405, the appropriate
9 governmental entity shall submit a statement that a representative
10 from the agency personally searched for the requested evidence,
11 without relying upon the agency's internal index or evidence
12 location database, and determined that the evidence has been
13 destroyed. The statement shall be signed under penalty of perjury
14 by the agency's representative who conducted the search. If the
15 court finds that biological evidence was destroyed in violation of
16 the provisions of this section, it shall consider appropriate remedies.

17 SEC. 4. No reimbursement is required by this act pursuant to
18 Section 6 of Article XIII B of the California Constitution for certain
19 costs that may be incurred by a local agency or school district
20 because, in that regard, this act creates a new crime or infraction,
21 eliminates a crime or infraction, or changes the penalty for a crime
22 or infraction, within the meaning of Section 17556 of the
23 Government Code, or changes the definition of a crime within the
24 meaning of Section 6 of Article XIII B of the California
25 Constitution.

26 However, if the Commission on State Mandates determines that
27 this act contains other costs mandated by the state, reimbursement
28 to local agencies and school districts for those costs shall be made
29 pursuant to Part 7 (commencing with Section 17500) of Division
30 4 of Title 2 of the Government Code.