

February 20, 2007

**CALIFORNIA COMMISSION
ON THE FAIR ADMINISTRATION OF JUSTICE**

**EMERGENCY
REPORT AND RECOMMENDATIONS
REGARDING DNA TESTING BACKLOGS**

The California Commission on the Fair Administration of Justice was established by California State Senate Resolution No. 44 “to study and review the administration of criminal justice in California, determine the extent to which that process has failed in the past,” examine safeguards and improvements, and recommend proposals to further ensure that the administration of criminal justice in California is just, fair and accurate.

This Report will address the current California backlogs in the processing of DNA samples taken from suspects arrested for violent felonies and the entering of the data into the databank, as well as the delays in testing of rape kits and other DNA samples collected during criminal investigations. There are numerous other issues of justice, fairness and accuracy with regard to the availability and use of forensic evidence in the California criminal justice system, which will be addressed in future Commission reports. The problem of backlogs, however, is urgently in need of immediate attention. Recognizing this urgency, the Commission decided to address this issue first, and to issue its emergency report and recommendations as quickly as possible.

The use of DNA profiles has rapidly become one of the most useful tools available to correctly identify criminal perpetrators. Recognizing its great potential, California voters adopted the DNA Fingerprint, Unsolved Crime and Innocence Protection Act by popular initiative at the November, 2004 general election, by a 62% margin. Also known as Proposition 69, the measure mandates a vast expansion of the statewide DNA Database and Data Bank program, recognizing it as the most reasonable and certain means to solve crimes, to aid in the identification of missing and unidentified persons, and to exonerate persons wrongly suspected or accused of crime. Proposition 69 requires the taking of buccal swab samples, along with thumbprints and palmprints, from any person convicted of any felony offense, as well as any person arrested for or charged with a homicide or

sexual offense. Commencing January 1, 2009, Proposition 69 provides that coverage will expand to require the submission of samples for any adult persons arrested or charged with any felony offense. The buccal swab samples are deposited with the DNA Laboratory of the California Department of Justice, which is required to perform DNA analysis and enter the results in a DNA data bank and database. DNA profiles are also uploaded into the national databank [CODIS] maintained by the FBI.¹

The Commission was informed that as of January 31, 2007, the California Department of Justice had received 895,409 buccal swab samples pursuant to Proposition 69, and had uploaded profiles for 736,863, leaving a backlog of 158,546. It is anticipated that the backlog will be reduced below 60,000 by June 30, 2007. For each of the next three years, the Department anticipates receiving 240,000 samples per year. In 2009, when samples will be taken from every adult felony arrestee, the Department estimates the number will jump another 160,000, to 400,000 per year.

The vast increase of samples in such a short period of time has severely burdened the capacity of the Department's DNA Laboratory in Richmond, California. The reductions in backlog achieved thus far have been accomplished by an expansion of the Richmond Laboratory facilities and staff, an increase in incentive pay for overtime, and some outsourcing of analysis to other laboratories. Opportunities for outsourcing are limited, however, since only the DOJ lab is permitted to upload DNA profiles into the CODIS national databank. But the greatest challenge the laboratory faces is in recruiting and retaining criminalists to fill existing vacancies. There are currently twenty vacancies for criminalists in Department of Justice labs, including six vacant supervisor positions. The Department of Justice laboratories are at a serious disadvantage in recruiting criminalists because of the differential in starting pay offered by other public laboratories in the State of California. The Department reports that currently, rank and file DOJ Criminalists and supervisors/managers are at least 30% behind city and county crime laboratory salaries. Despite recent stopgap measures, the serious salary differential between the state laboratory and other public

¹ CODIS [The Combined DNA Index System] is a national database used by qualified law enforcement officials to link DNA evidence found at a crime scene with a suspect whose DNA is already on file. It was established by the Federal Bureau of Investigation pursuant to authority granted by the Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994). Subsequently, all fifty state legislatures enacted statutes, requiring convicted offenders to provide DNA samples for entry into the CODIS system. *See* H.R. Report No. 106-900(I), at 8 (Sept. 26, 2000). Proposition 69 expanded the California statutes to include arrested suspects as well as convicted offenders.

laboratories remains, and is not addressed in the currently pending state budget.

Backlogs and delays in the entry of offender DNA profiles into the databank have a serious impact upon the work of all law enforcement agencies in California. If an offender's profile is not yet in the databank, a forensic sample from a crime scene entered into the databank by any crime laboratory in the state will not produce a match, leaving the offender free to commit additional crimes. The potential exoneration of a suspect by finding a match to someone else will also be foreclosed.

The DNA data bank is already producing "cold hits" at a remarkable rate, identifying perpetrators of crimes that had gone unsolved for many years in California. Delays in the processing of offender profiles can result in irretrievable loss of the opportunity to resolve unsolved cases. Frequently, when an innocent person is exonerated by means of DNA testing, the testing also produces a "cold hit" of another suspect who remained at large to victimize others. The production of "cold hits" also impacts the availability of investigative, prosecution and defense resources at the local level. Proposition 69 provided some funding to local agencies to collect buccal samples, but no resources for follow-up investigations of "cold hits." In Los Angeles alone, forty "cold hits" were produced in January, 2007.

The Commission was also informed that delays of six months or more have become the norm at local crime laboratories for analysis of rape kits and other DNA samples collected during criminal investigations. The consequences of such delays were described for the Commission by Gail Abarbanel, Director of the Rape Treatment Center at Santa Monica-UCLA Medical Center. She described the case of a rape victim whose rape kit sat on a shelf, unopened, for several months despite the investigating detective's extraordinary efforts to expedite the testing. When it was finally tested, it produced a "cold hit" identifying a rapist who had attacked at least two other victims, one a child, during the period of delay. Such delays not only endanger potential victims, they may also result in unnecessary incarceration of innocent suspects. In another case described by Ms. Abarbanel, a Rancho Cucamonga man accused of raping a 4-year-old girl was held in jail for seven months before DNA tests were finally conducted which exonerated him. Some rape kits are *never* tested. Oakland reports that it processes fewer than half of the rape kits collected in the city. One of the crime labs in Los Angeles reports a backlog of 5,000 unopened rape kits.

DNA testing is not the only laboratory forensic service that is seriously backlogged in California. The State Laboratory reports that the general turnaround times for samples are:

Blood alcohol – 12 days;

Toxicology – 10 days;

Controlled Substances – 17 days;

Clandestine Laboratories – 30 days;

Criminalistics (Firearms, Biology and DNA) – 180 days;

Latent Prints – 290 days.

In order to provide a 30 day turnaround for all cases which have been pending for over 30 days, the State Laboratory would have to hire 92 new forensic scientists. At current salary levels, this is virtually impossible.

California Penal Code Section 680 already provides that law enforcement agencies have an obligation to victims to conduct timely testing of rape kit and other crime scene evidence. A state norm of a six month delay is not timely. Delays put potential victims at risk by letting offenders go free, deprive innocent accused of prompt exoneration, and inflict delays in the orderly processing of criminal cases in our courts.

The California Commission on the Fair Administration of Justice recommends immediate implementation of the following measures to address the problems of DNA testing backlogs and other problems in California:

- 1. The California Department of Justice should immediately ascertain the staffing levels required for the State Laboratory to reduce the backlog in the uploading of DNA profiles to thirty days or less, both now and when the future demands of Proposition 69 take effect. The salary level necessary to fill and maintain those staffing levels should also be ascertained.**
- 2. Emergency budget appropriations should be immediately introduced, to provide state funding to staff the State Laboratory at the levels ascertained pursuant to the Commission's first recommendation.**
- 3. The California Attorney General should immediately commence consultation with state and local public laboratories, criminalists,**

law enforcement, prosecutor's offices, public defenders and private defense lawyers, victim representatives and judges to address the problems of DNA forensic technology resources in California. The following concerns should be urgently addressed:

- A. Identify the nature and scope of current capacity problems, backlogs of unprocessed evidence and systems issues that impede the utilization of DNA forensic technology to its fullest potential.**
- B. Identify best practices that enhance collection and timely processing of DNA evidence, including crime scene and rape kit evidence, to meet the needs of the criminal justice system.**
- C. Make recommendations for eliminating current backlogs and preventing future backlogs of unprocessed evidence in state and local public laboratories.**
- D. Evaluate the efficiency and effectiveness of the current organization of resources in the State of California, to determine what systems and strategies will most effectively serve the needs of the State of California.**
- E. Recommend strategies for training and educational programs to address the shortages of trained personnel to meet the staffing needs of crime labs throughout the State of California.**
- F. Assess the impact of "cold hits" upon local investigative, prosecution and defense resources.**
- G. Report to the Legislature and Governor regarding the legislative or administrative steps that must be taken to insure timely processing of evidence in California's criminal justice system.**

4. The Legislature and the Governor should provide adequate support to quickly respond to the needs identified by the Attorney General.

Respectfully submitted,

California Commission on the Fair Administration of Justice:

John K. Van de Kamp, Chair

Jon Streeter, Vice Chair

Diane Bellas, Alameda County Public Defender

Harold O. Boscovich, Jr., Danville

Chief William Bratton, Los Angeles Police Department

Jerry Brown, California Attorney General

Glen Craig, Sacramento

Jim Fox, San Mateo County District Attorney

Rabbi Allen Freehling, Los Angeles

Michael Hersek, California State Public Defender

Sheriff Curtis Hill, San Benito County

Prof. Bill Hing, University of California at Davis

Michael P. Judge, Los Angeles County Public Defender

George Kennedy, Santa Clara County District Attorney

Michael Laurence, Habeas Corpus Resource Center

Alejandro Mayorkas, Los Angeles

Judge John Moulds, Sacramento

Prof. Cookie Ridolfi, Santa Clara University School of Law

Douglas Ring, Santa Monica

Greg Totten, Ventura County District Attorney

Gerald F. Uelmen, Executive Director

Chris Boscia, Executive Assistant

California Commission on the Fair Administration of Justice

900 Lafayette St., Suite 608, Santa Clara, California 95050

Telephone 408-554-5002; FAX 408-554-5026

Website: <http://www.ccfaj.org>.