



APRI

American
Prosecutors
Research Institute

*DNA Evidence Policy
Considerations for
the Prosecutor*

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This information is offered for educational purposes only and is not legal advice. This project was supported by Award No. 2002-DD-BX-0005, from the Bureau of Justice Assistance, U.S. Department of Justice. Points of view or opinions expressed in this document are those of the authors and do not necessarily represent the official position of the United States Department of Justice, the Bureau of Justice Assistance, the National District Attorneys Association or the American Prosecutors Research Institute.

The American Prosecutors Research Institute is the nonprofit research, training and technical assistance affiliate of the National District Attorneys Association.

DNA Evidence Policy Considerations for the Prosecutor

September 2004

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INTRODUCTION

DNA evidence catapulted criminal justice into a new era. Never before have prosecutors had a more powerful tool at their disposal for determining the identity of persons who commit crime. There are few techniques in the history of forensic science that have been more thoroughly scrutinized and validated than forensic DNA testing.¹

Developing specific policies for utilizing DNA evidence can help prosecutors and law enforcement officials establish priorities and avoid pitfalls. When policies are developed proactively, they enable localities to respond appropriately to the challenges presented by DNA evidence. Implementation of policies reduces the likelihood of wasted resources, unnecessary litigation and, most importantly, erosion of public confidence. At the same time, implementation of policies enhances the overall fairness of the adjudicatory process.

In November 2003, the American Prosecutors Research Institute (APRI) brought together over 200 prosecutors, law enforcement officers, DNA analysts, Sexual Assault Nurse Examiners (SANE) and other criminal justice community members for a two-and-a-half-day conference. Conference participants discussed and evaluated different approaches regarding DNA evidence and the maximization of both resources and probative value. Attendees identified recurrent issues and potential policy responses.

This monograph summarizes key points that were made at the conference, offers options for developing policy and identifies critical issues to consider. It brings together several promising policy ideas that jurisdictions may implement or modify to fit their unique needs and capabilities.

All of the policies developed at the APRI conference share two common denominators: First, they are sensitive to the specific needs of different jurisdictions, with their differing populations, caseloads and resources. A

¹ Hogan, S. and Swinton, S. "Meeting Defense Challenges to DNA Evidence," APRI *Silent Witness* 15(1)(2003).

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small jurisdiction with one central state laboratory will have different needs than a large jurisdiction with a large backlog of cold cases and a network of state-supported laboratories.

Second, they involve the participation of law enforcement agencies, SANE examiners, prosecutors' offices, and labs. Without their participation and cooperation, success of these policies is unlikely. However, the cooperative development of appropriate policies with regard to the identification, collection, development, discovery and use of DNA evidence will allow for the elimination of backlog, expeditious case management and successful prosecutions—in short, achieving the full potential that DNA evidence has to offer.

Specifically, it is essential to develop policies that set up a triage system with regard to the appropriateness of the use of DNA evidence in (1) new cases, (2) suspect-less cases and (3) collaterally-attacked closed cases. It is equally important to develop policies that address the way that relevant agencies will respond to defense discovery requests. Each of these issues is discussed below. (Sample policies are accessible on-line at www.ndaa-apri.org; see Appendix A.)

NEW CASES

N*ew cases* are defined as those cases in which the offense has been newly detected but the perpetrator has not yet been charged. With regard to new cases, participants at the APRI conference identified two issues that would most benefit from policy development:

- Early case evaluation (or evidence review)
- Discovery

Early Case Evaluation By A Multidisciplinary Team

Case evaluation, or evidentiary review, improves the management of current cases containing biological evidence and caseloads. For some jurisdictions, the concept of multidisciplinary case review is novel. Others have successfully employed multidisciplinary case evidence review for years.

Some kinds of cases—such as child sexual abuse or homicide—have historically used multidisciplinary evidence reviews, because communication and early analysis produce both a stronger case-in-chief and a stronger rebuttal to whatever defense is proffered. With technological advancements, neither time nor distance should impede a coordinated and comprehensive review of any recently discovered violent crime. In contrast, lack of communication and organization can become very costly, both to the case and to the agencies within the forensic community, especially when unnecessary testing diverts valuable time and money or necessary testing is not done timely if at all.

In evaluating every case, prosecutors, police and forensic scientists or criminalists should determine what evidence is probative of the defendant's guilt. This evidentiary or case review should be a collaborative process. By reviewing cases as soon as possible after a crime has been discovered, the panel can identify which pieces of evidence are amenable to DNA testing, which have the most probative value, and/or which should be tested first.

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The case review panel must also identify potential defenses, which will help determine the appropriate testing to better challenge untrue defenses. For example, testing may be relevant in homicide cases in which the anticipated defense is the justified use of deadly force (or self-defense), to corroborate the physical evidence or eyewitnesses, or in a sexual assault case to corroborate the victim's account that there were two assailants involved in the offense, or to compare the location of the DNA mixtures with the victim's account of the offense. Finally, a multidisciplinary case review allows all of the respective parties in a case to understand, document in reports and testify accurately about why certain items were, or were not, tested. Avoiding unnecessary testing of evidence reduces the strain on laboratory resources and frees up those resources for more appropriate use.

Case review policy should include assigning and determining communication responsibilities and methods, so that everyone is clear about which agency must notify the review committee, which types of cases should receive automatic case review, and timelines. Departments or agencies can evaluate the listed evidence and decide, either before it is sent to the lab or after the lab verifies receipt, whether all or part of the evidence on the list should be tested. Jurisdictions have employed different methods to accomplish these goals. A case review team could meet every other week if the caseload is high enough. Some jurisdictions have a policy that the multidisciplinary committee shall review cases within a preset period of time (e.g., 48 hours).

All team members should participate in the decisions regarding methodology for case review (e.g., meetings or conference calls, supported by transcribed, faxed, or copied documents, or merely recorded by the attendees for inclusion in their respective files). In the state of Wyoming, the policy under consideration contains the following language.

In charged felony cases, the evidence review team shall meet at the time set for the preliminary hearing (regardless of whether such prelim has been waived). Members shall include the assigned prosecutor, the lead investigator, scientists from the laboratory unit responsible for a significant portion of the anticipated testing and

such other parties or agency representatives as appropriate. The review meeting will be conducted by conference call.

The following are some suggested guidelines for multidisciplinary case review:

Prosecutor Responsibilities:

- Designating which agencies will participate in the evidence reviewing team.
- Designating an “on-call” or “on-duty” prosecutor who would either respond to crime scenes or be available by telephone on a 24-hour basis for homicide, sexual assault or other cases.
- Setting any ongoing case review or pre-trial conference dates and times for certain cases.
- Assigning responsibility to a specific prosecutor for notifying the laboratory and police when a case is either abandoned or closed.

Laboratory Responsibilities:

- Assigning a specific staff member to participate in multidisciplinary case reviews that may occur prior to evidence testing.²
- Immediately notifying police and prosecutors if sample consumption or exhaustion is anticipated.
- Immediately notifying police and prosecutors if there is a CODIS³ match or cold hit.

Police Responsibilities:

- Assigning a police officer (often a supervisor) to participate in collective case or evidence review prior to any testing.
- Immediately notifying prosecutors if a chain of custody issue is either anticipated or created.
- Immediately notifying prosecutors and the laboratory if information of a CODIS match or cold hit is received.

² Another avenue to explore is using the lab supervisors to testify in court, who may have more time for case review and testifying because they do not carry a case load like bench analysts. This practice frees up the bench analysts to continue working cases. The Florida Department of Law Enforcement has found this approach successful.

³ CODIS, Combined DNA Index System, was authorized by The DNA Identification Act of 1994. CODIS refers to the hardware and software that links a network of local (LDIS), state (SDIS) and national (NDIS) databases housing DNA samples of convicted offenders and crime scene samples. CODIS also refers to the FBI’s own DNA database.

Discovery in DNA Cases

One of the most time-consuming aspects of prosecution can be responding to criminal discovery demands involving DNA evidence and expert witnesses. Errors in handling discovery requests can result in the exclusion of evidence, reversal of convictions or the imposition of other sanctions.

Prosecutors are often unfamiliar with the type of records maintained by crime laboratories, the media used to store them and any restrictions on disclosure that exist by law or policy. Effective prosecutors know that “non-crisis” planning, good communication and ample response times are essential to proper discovery. A consistent jurisdictional policy that provides for a response that is timely, uniform, and comprehensive—and that does not place an undue burden on the lab—is a worthwhile investment. Such a policy could consider report content, mutually-agreeable responses to omnibus and irregular defense requests, and/or mutually-agreeable responses to ethical issues best remedied in discovery.

Developing a policy regarding report content should include two situations that are mutually exclusive yet always occurring: there is either *sample consumption* or *remaining sample available for testing*.

Sample Consumption

In some jurisdictions, defense attorneys have obtained pre-trial orders that prohibit testing by a crime laboratory “that would alter or consume in any way” biological material obtained from crime scene evidence. Such orders essentially prevent any DNA testing, since DNA profiles cannot be developed without consuming at least some of the sample evidence. This fact was not lost upon the United States Supreme Court⁴ when it found that, “[i]n general, the destruction or failure to preserve potentially useful evidence does not constitute a violation of the due process clause, unless it can be shown that the police, the prosecutor or the laboratory acted in bad faith.”⁵ Consequently, when appropriate, prosecutors should aggressively pursue denial of defense motions that prohibit testing.

⁴ See, *Arizona v. Youngblood*, 488 U.S. 51 (1988).

⁵ See also, *Dixon v. State*, 275 Ga. 232 (Georgia Sup. Ct. 2002).

In the majority of states, DNA testing can legally proceed without notice to defense counsel even though the testing will consume all of the sample material.⁶ A few states, such as Colorado and Massachusetts, require that advance notice be provided to the defense before consumptive testing can be performed. In all states, upon consumption of a biological sample, it is the prosecutor's duty to inform the defense of such consumption. Whether or not required by state law, a policy of having the laboratory routinely indicate in its reports that the sample was consumed fulfills the prosecutor's discovery duty.⁷

Remaining Sample Available for Testing

In most cases, a sample remains available for testing. For a number of reasons, recording in laboratory reports as early and as often throughout discovery as possible that "there is remaining sample for testing," is critical. The primary reason, to prevent successful collateral attack, will be discussed further below.⁸ A secondary reason is to prepare the judge to make appropriate evidentiary rulings for examining and cross-examining the scientific witnesses. These critical rulings include: (1) trial questioning about the remaining sample and the importance assigned to it; (2) the reasons scientists strive to provide it; and (3) the defense counsel's pertinent efforts (or lack thereof) to retest it. A third reason may be to ensure the accuracy of the defense's representation that defense discovery is complete—not only to avoid unnecessary last-minute delay, but also to eliminate appellate issues of adequate assistance of counsel.

Many laboratories have strict policies concerning access to DNA testing areas and forbid supervision of DNA testing by outside persons.⁹ In only a very small number of states do crime laboratories permit defense representatives (scientists and/or defense attorneys) to supervise DNA testing. Prohibiting outsiders prevents the corruption or contamination of the

⁶ See, *Catterson v. Jones*, 233 A.D. 2d 502 (2d Dept., 1996, New York State).

⁷ Notice requirements regarding consumptive testing may vary from state to state. Prosecutors and laboratory personnel in all states have similar ethical responsibilities, if not statutory ones.

⁸ For an in-depth analysis of this topic, see, Kreeger, L. and Weiss, D. "Keeping a Conviction Secure," *APRI Silent Witness* 8(2)(2003).

⁹ See, *People v. Monagas*, 161 Misc. 2d 898 (N.Y. Sup. Ct. 1994) (defense representatives could not supervise DNA testing at the FBI laboratory).

laboratory's sterile conditions and interruption of the flow of all lab work, which furthers the interests of evidence integrity and judicial efficiency. The most satisfactory alternative proposed—defense retesting of the evidence in the laboratory of its choosing—addresses the concern of accuracy.

Answering lengthy, generic defense discovery requests diverts scarce time from essential laboratory functions. In most DNA cases, defense attorneys make standard requests for certain types of documents and use standard request forms. For example, defense attorneys typically demand information concerning laboratory accreditation, records concerning the validation of DNA testing methods used by the lab and proficiency testing results. Because responses to these demands do not require the disclosure of case-specific information, routine production of suitable responses is possible.

One example of an approach to providing this “omnibus discovery response” comes from Miami-Dade County, Florida. There, prosecutors worked with laboratory officials to develop CD-ROMs that contain most, if not all, of the general information regularly sought by defense attorneys in their discovery demands in DNA cases. (Appendix B provides a table of contents for the CD-ROM.) Before choosing this format, the team from Miami-Dade considered posting this information on a secure Internet site, but found that they could not adequately secure the information. If successful firewalls or other security methods can be developed, the Internet may be a viable alternative.

Another approach is to compile all of the appropriate responsive information and make it available for viewing (and/or copying at the defendant's expense) in either the prosecutor's office or the laboratory public areas.¹⁰ To improve the efficiency of their communication, some prosecutors' offices, especially larger offices, assign one or more prosecutors as liaisons with the crime laboratory. Both approaches make it easier to “triage” requests for discovery materials.

¹⁰ See, *State v. Whitehead*, 2001 Tenn. Crim. App. LEXIS 732 (Tenn. Crim. App. Ct., 2001).
Also see, Kreeger, L. “Discovery Issues,” *APRI Silent Witness*, 7(3)(2003).

Finally, there are two ethical obligations prosecutors meet through their complete laboratory discovery responses. They are: (1) to preserve evidence that possesses an apparent exculpatory value and that will not be obtainable by other reasonably available means, and (2) to assure that the defendant has access to the “basic tools” and “raw materials integral to the building of an effective defense.”¹¹

One issue raised repeatedly in appellate exculpatory evidence cases is a lack of biological evidence for the defense to test independently. “A wrongly accused person’s best insurance against the possibility of being falsely incriminated is the opportunity to have testing repeated.” This recommendation from the National Research Council in the 1996 publication, *The Evaluation of Forensic DNA Evidence*,¹² underscores the importance of defense retesting. Clearly, the prosecutor must disclose evidence consumption as early as possible—ideally on the lab report. Another potentially exculpatory issue is the inconclusive test result. Across the nation, crime laboratories generally indicate inconclusive results clearly in their reports. Such reports should be disclosed to the defense as a matter of course—regardless of whether the prosecutor intends to call the analyst as a witness or whether the prosecution believes the finding is relevant.

Providing exculpatory evidence, regardless of whether it has been requested, goes to a prosecutor’s ethical responsibility to ensure that the defendant receives effective assistance of counsel. Satisfying this requirement early in a prosecution is a preemptive action—to keep an eventual conviction secure.¹³ To accomplish that purpose, prosecutors can (1) provide the defense every opportunity to retest the evidence, and (2) insist that the trial record include a strategic, legitimate reason *not* to retest.

¹¹ See, *California v. Trombetta*, 467 U.S. 479, 81 L.Ed.2d 413, 104 S.Ct. 2528 (1984) citing *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1962). See also, *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed.2d 53, 105 S.Ct. 1087 (1985).

¹² National Research Council (NRC II), *The Evaluation of Forensic DNA Evidence*, National Academy Press, Washington DC, 1996.

¹³ Id. “Discovery Issues,” APRI *Silent Witness*, 7(3). See also, Roth, D.R., “High Ethical Standards: The Foundation for Every Prosecutor,” *The Prosecutor’s Deskbook*, APRI: Alexandria, Virginia, pp. 29 - 30 (2003).

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Policies for independent defense testing should reflect consideration of laboratories' logistical concerns, for example, who should bear the costs of meeting the crime laboratory's specific requirements for storing, packaging and shipping biological material. Maintaining the proper chain of custody after the evidence is released to the independent laboratory and timetables for testing are additional issues that should not be permitted to burden the laboratory or jeopardize the state's case.

Finally, in developing policy in this area, it is necessary to ensure reciprocal discovery of testing results to the extent provided by state law. It is also important to remember that parties are always free to enter into a reciprocal discovery agreement (which can be made subject to court order and made part of the record). Moreover, the trial judge may impose an order requiring reciprocal discovery when there has been defense testing, unless prohibited by state law.

Issues to consider when formulating policies for discovery are listed below:

Prosecutor Responsibilities:

- Providing legal research that supports agreed-upon positions.
- Jointly, with the crime lab, developing an omnibus discovery response and consistently using it.
- Supporting the laboratory's prohibition of defense attorney or expert intrusion into laboratory testing sections.
- Determining the logistical support for the lab in the event of defense testing, for example, chain of custody or billing procedures.

Laboratory Responsibilities:

- Including language regarding sample consumption or documenting the presence and availability of sample remaining for testing in every report.
- Jointly, with the prosecutor, developing an omnibus discovery response and consistently using it.
- Recording and reporting (in writing) all inquiries, efforts and contacts by defense counsel regarding any case.

SUSPECT-LESS CASES

DNA evidence is extremely important in solving suspect-less cases, which are often old, unsolved cases, usually referred to as *cold cases*. They may have remained unsolved because DNA evidence analysis was not available when the crime was committed, or the crime scene evidence was tested but failed to yield a suspect match.

There is a difference between *cold cases* and *cold hits*. Cold cases, described above, are suspect-less cases often solved through DNA *cold hits*. “Cold” refers to the suspect-less nature of the case, regardless of its age. “Hits” refer to any match of crime-scene DNA to a DNA profile of a known human being, usually from a DNA database. A *cold hit* can occur in a case of any age. Forensic DNA evidence databanks rely upon software that constantly compares profiles from crime scenes to profiles developed from people. As soon as crime-scene DNA data from a case of any age is entered into the database, the software rapidly searches for a match.

Unsolved Cases

Until there is a hit, the evidence samples remain in storage. As a result, one of the biggest problems plaguing the justice community is the backlog of untested evidence.¹⁴ Aggressively reviewing old unsolved cases can address some of the backlog issues. At a minimum, cold case review policies should: (1) establish a triage system for reviewing cases, submitting existing DNA data into the databases, and initiating DNA testing of untested evidence samples; and (2) address the logistics of implementing the triage system.

One of the initial steps in addressing the backlog issue should be identifying which and how many cases have remaining and available biological evidence. Several questions will arise, e.g., will all unsolved cases be reviewed, or only those in which there is reason to believe a serial rapist

¹⁴ National Institute of Justice, Special Report, “Using DNA to Solve Cold Cases.” U.S. Department of Justice; July 2002.

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or a serial burglar was involved? Is viability of a prosecution the determinative factor for testing? Should cases only be tested when all necessary witnesses are available and cooperative, or should all unsolved cases with biological evidence be tested regardless of the viability of the prosecution? Does the DNA laboratory have the availability, resources and/or personnel to test backlog or cold-case evidence, or will the testing have to be outsourced?¹⁵ The logistics of an unsolved case policy would resolve the who, what, where and when.

Some of the answers to some of these questions depend on location. For example, jurisdictions that have long-standing SANE programs are likely to have a larger number of cases with preserved biological evidence. Those jurisdictions may want to review sexual assault cases before reviewing homicides or burglaries. Similarly, jurisdictions with established databanks are likely to benefit from early identification of likely serial criminals.

Next, who will review the cases? Is a case to be reviewed by only one person or by several people? Some jurisdictions have used active duty police officers, retired police officers or supervised legal interns. Other jurisdictions have used officers to review unsolved cases while supplementing the case review committees with a couple of prosecutors. Still more have used equal numbers of officers and prosecutors and simply divided the casework proportionately. If the review team is predominantly officers, prosecutors can provide essential legal input.

The policy should include guidelines for where the reviewing process will take place, either at the law enforcement facility or at the prosecutor's office. Are the files of such a nature that they can or cannot be removed from the storage facility?

Finally, what deadline will be set for project completion? Is there a sunset date or statute of limitations for certain offenses?

¹⁵ Because backlog elimination is so important, some government entities have set aside funds to enable crime labs to "outsource" cases to private labs. Outsourcing can also work well when the crime lab lacks certain technological capacity, for example, to test Y-Chromosome Short Tandem Repeats.

The Solving Unsolved Cases program in Alameda County, California, has addressed a number of these issues, as follows:

Whenever a truly suspect-less case which involves biological sexual assault evidence arises the investigator should contact DDA Rock Harmon to schedule a review of the case. A copy of the entire investigation, including property records, will be provided at that time. That file will be maintained by the District Attorney's Office.

When formulating policies to address suspect-less cases, certain responsibilities are shared by prosecutors, police, and labs:

- Participating in the development of triage decisions; and
- Assigning case-review responsibilities to specific members of the multidisciplinary team, at specific locations, by certain deadlines.¹⁶

In addition, prosecutors have a responsibility to review each case after initial case review by the multidisciplinary team, to anticipate potential defenses and plan appropriate responses.

Police have a responsibility to:

- Determine the number of cases with remaining biological evidence, and determine if material witnesses or victims are available.

The laboratory has a responsibility to:

- Estimate the number of cases that can be tested within established time frames.

Cold Hits

Cold-hit policies address the most appropriate laboratory, law enforcement and prosecution responses to the notification of a hit. The solving of a cold case is often a newsworthy event, which raises several important issues. If the proper agencies do not act expeditiously, the victims,

¹⁶ When considering establishing a multidisciplinary team to evaluate cold cases, it may be wise to include representatives of any agency whose members form part of a chain of evidence, so that the prosecutor's office might be alerted to any chain-of-custody gaps.

survivors, witnesses and suspects will learn of the identification of the suspect from the news media. The consequences can be disastrous. Victims or witnesses may not know that they have a right not to speak to reporters, or they may not be able to communicate their refusal in a way that does not constitute a comment on the case. Witnesses' remarks may be taken out of context, or their statements may come back to them in cross-examination by a defense attorney. Victims deserve personalized attention, with sensitivity to their possible trauma,¹⁷ and access to someone who can answer their questions. Properly preparing a victim for a likely media event can prevent these damaging outcomes.

Potential sources of leaks extend beyond the evaluating team. To the extent possible, the team should elicit the cooperation of magistrates who issue search warrants or arrest warrants.¹⁸ Correctional officers should be cautioned not to disclose information regarding a high-profile suspect so that police may continue their investigation. The consequences for premature, unauthorized leaks should be included in the policy. No single agency should be precluded from celebrating the identification of a criminal, but all should wait until the case has been prepared.

As part of the follow-up investigation after the notification of a hit, a confirmation DNA sample must be acquired from the identified suspect. There are three ways a confirmation sample may be obtained legally: through consent, search warrant or abandonment. Prosecutors may prefer one approach to another because there may be ramifications with a jury; therefore, the method to be used should be discussed beforehand. It is also beneficial for prosecutors to participate in drafting consent forms and search warrants, to avoid suppression issues. Finally, the method used to obtain the confirmation sample is often intertwined with whether damaging offender statements can be obtained. The following language from a cold hit protocol developed by Alameda County may be helpful:

A computer generated cold hit is meant to begin the investigation, rather than represent the end of the investigation. There are sub-

¹⁷ A helpful resource for victims is the pamphlet, *Understanding DNA Evidence: A Guide for Victim Service Providers*, available at www.ojp.usdoj.gov/ovc/publications/bulletins/dna_4_2001/ncj85690.pdf

¹⁸ Procedures exist in some jurisdictions regarding the sealing of warrants.

stantial legal considerations to be made about the case as a whole, some of which involve the form of legal admissibility of evidence derived from the cold hit.

Offenders' statements are always an important piece of evidence; though not always apparent, they are often affirmative admissions. Furthermore, depending upon the crime committed, an offender's statements may be crucial to overcoming an untrue defense, such as victim consent in sexual assault cases. For example, when an offender gives a statement denying having any contact with the victim, let alone raping her, DNA evidence connecting this offender to the victim can be quite powerful. Similarly, an offender statement describing the crime in a way that is inconsistent with the physical evidence (e.g., a defendant states that a struggle occurred at a specific location but all the blood—verified by DNA evidence—belonging to victim and offender is found at a different location altogether) can be devastating to the defense.

A consistent cold hit policy can maximize the power of DNA as forensic evidence. Investigators working under such a policy should know why they should obtain a sample consensually and how to obtain incriminating suspect statements in the process. They should be prepared to interview the suspect about all known allegations, since the very nature of DNA databanks promotes identification of repeat offenders.¹⁹ Furthermore, agencies that have developed cold hit policies may be able to prevent the media and/or corrections officers from informing the defendant that he has been “matched.” Finally, the use of proactive unsolved case policies, together with reactive cold hit policies, will bring justice for the sometimes-forgotten victims as well as the unprosecuted criminals.

¹⁹ The identification and resolution of more than one crime committed by an offender has several obvious benefits, including filing the appropriate charges for prosecution, leverage for plea agreements, use of other crimes/bad act evidence, or enhancement of punishment at sentencing hearings.

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Outlined below are shared and assigned responsibilities in cold hit cases.

Laboratory responsibilities:

- Promptly notifying the relevant law enforcement agency and prosecutor's office.
- Providing an inventory of what relevant evidence in the cold case is in the custody of the lab.

Prosecution responsibilities:

- Reviewing the viability of the case before law enforcement obtains a confirmation DNA sample from the subject.
- Assisting law enforcement with letters or orders controlling access or movement of the defendant prior to any interview.
- Assisting law enforcement in lawfully obtaining the confirmation DNA sample from the subject.
- Notifying the victim and witnesses.

Police responsibilities:

- Identifying other unsolved cases likely to have been committed by the offender.
- Confirming the availability of biological evidence in those cases.
- Locating the suspect identified by the hit.
- Obtaining a confirmation sample from the suspect.
- Interviewing the suspect.
- Completing the investigation.

COLLATERALLY-ATTACKED CLOSED CASES

Collaterally-attacked closed cases are cases in which the defendant has been convicted of an offense and seeks to collaterally attack his conviction. Prosecutorial policies that address post-conviction relief enhance public trust in the integrity of the legal system. A proactive search for potentially problematic cases, testing or retesting in cases when the results would be consequential, and publication of the results, are all essential to reinforcing public confidence.

Generally, both the trial prosecutor and the elected or appointed prosecutor should be involved in deciding whether to set aside a conviction based upon exclusionary DNA results. Jurisdictions vary in who they select to review closed cases: law enforcement officers, law students, or senior prosecutors. Some jurisdictions have included defense lawyers in limited roles. Others have defined a limited role for advocates who meet with the victims throughout the process.

A few jurisdictions have established precedent conditions for cases to be included in a review: (1) the conviction occurred before a certain date, and (2) the defendant must have maintained his assertion of mistaken or wrongful identification.²⁰ The Ramsey County (MN) Attorney's Office initiated a review of past crimes against persons that were prosecuted in 1994 or earlier. They further defined the scope of the review by requiring that (1) biological evidence must still be available, (2) the defendant had consistently maintained his innocence based upon mistaken or wrongful identification, and (3) current DNA technology could provide exonerating evidence. (Appendix C is the protocol for post-conviction DNA testing developed by the Ramsey County Attorney's Office.) In the event that retesting results exclude the defendant, jurisdictions have stipulated in review policies that (1) the exclusion demonstrates "actual

²⁰ The "actual innocence" standard does not depend solely upon a defendant's trial strategy, but rather upon a review of the evidence in its entirety. The "actual innocence" standard is endorsed by the National District Attorneys Association's Policy Positions on DNA Technology. The policy was adopted by the NDAA Board of Directors on July 22, 2001. See, http://www.ndaa-apri.org/pdf/dna_policy_position_july_20_2003.pdf

innocence,” (2) the exclusion provides a reasonable probability of a favorable verdict or outcome, or (3) the DNA exclusion evidence is materially relevant to the defense raised in the case.

An important consideration is the role the convicted offenders should play. After all, they are the best situated to know of actual misidentification. In Oregon, letters were written inviting eligible defendants to apply for post-conviction testing, explaining strict deadlines and the rules to the testing process. The defendants’ responses, or lack thereof, were integral to the decision-making process.

Responsibilities to consider when formulating policies for post-conviction case review are listed below:

Prosecution responsibilities:

- Establishing the appropriate review standard to be used in case selection and in identifying cases to be tested or retested.
- Establishing appropriate deadlines for review completion.
- Assigning responsibility for the evaluation and interpretation of exclusionary test results, and determining the appropriate official response.

Law enforcement responsibilities:

- Identifying which cases were closed before DNA evidence was available to the jurisdiction.
- Identifying which cases
 - Still have biological evidence remaining, and
 - Resulted in a conviction of a person still alive.

Laboratory responsibilities:

- Identifying which cases still have biological evidence amenable to testing.

Policies should also address which agency will be responsible for notifying the victim or next-of-kin and the appropriate timing of the notification.

CONCLUSION

Once prosecutors, police and labs have developed non-crisis working relationships and established appropriate policies, they can make mutually satisfactory decisions to prioritize the allocation of resources. Should remaining evidence in old unsolved cases be reviewed before all other cases, or should post-conviction cases, perhaps smaller in number, be reviewed first? If old, unsolved cases are to be reviewed first, then should only cases with suspects merit evidence review before testing? These difficult decisions can be made with deliberation and forethought through a comprehensive review of available resources; coordination among law enforcement, laboratory analysts, and prosecutors; and implementation of policies for guidance.

Backlog elimination is imperative, as an increasing number of states are taking DNA samples from all convicted felons.²¹ The policies described above, when combined, can make significant progress towards reducing the backlog. For example, because “pre-DNA” post-conviction and cold cases generally occur in manageable numbers, it may be prudent to review, test and resolve them promptly.²²

Prosecutors have been reactive for too long in their use of forensic DNA evidence. When prosecutors are proactive, they can help the labs eliminate backlog and remain current in casework. In doing so, they will enhance public confidence in our criminal justice system.

²¹ As of this writing, 31 states have passed legislation authorizing the taking of DNA samples from all persons convicted of any felony. Those states are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Jersey, New Mexico, North Carolina, Oregon, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin and Wyoming.

²² Having deadlines or “sunsets” in post-conviction cases, and even in some kinds of cold cases, provides the opportunity to resolve some types of backlog and to achieve finality.

APPENDIX A

SAMPLE POLICIES RELATING TO DNA EVIDENCE

The following documents are available on-line at APRI's Web site:
www.ndaa-apri.org.

Memorandum of Understanding or Policy on DNA Evidence, Sheridan County, Wyoming

The proposed evidentiary review protocol assists the legal and forensic community in reviewing, identifying and prioritizing cases that include biological evidence.

Alameda County (CA) Protocol for DNA Database Support and Utilization

This cold case protocol explains how database searches can aid in identifying unknown assailants and procedures that are employed when a "hit" is made.

Document Production for DNA Discovery Motions: The Miami-Dade SAO Approach

This memorandum reviews several options for responding to discovery motions relating to DNA evidence.

Ramsey County Attorney's Office DNA Project

The Ramsey County Attorney's Office has developed a set of forms and specific instructions for carrying out post-conviction case review.

APPENDIX B

State Attorney

Eleventh Judicial Circuit of Florida
E. R. Graham Building
1350 N.W. 12TH Avenue
Miami, Florida 33136-2111

Katherine Fernandez Rundle

State Attorney
Telephone (305) 547-0100

2003 Index of DNA Materials Contained on CD-ROM

The following materials are contained on the CD-ROM in the order that they appear on the disc.

I. STATEMENTS OF QUALIFICATIONS

The statement of qualifications for the following DNA analysts are included:

- Bishop
- Chin-See
- Colon
- Hamlin
- Hass
- Hinz
- Johnson
- Kenyon
- Kristaly
- Page
- Ruggles
- Stoiloff
- Wolson

II. ACCREDITATION

The following materials pertaining to accreditation by the American Society of Crime Laboratory Directors (ASCLD) are included:

- ASCLD accreditation letter, dated 12/6/00
- ASCLD Certificate of Accreditation
- ASCLD application for accreditation

III. DATABASE

The following materials pertaining to the MDPD DNA database are included:

- Dr. Chakraborty's report dated 3/1/01 re the STR testing of the database
- MDPD Crime Lab Internal Memorandum dated 10/22/90 summarizing how the samples for the database were collected
- Allele tables for database using Cofiler
- Allele tables for database using Profiler Plus

IV. AUDITS

The following audit reports are included:

- 11/2002 Internal Audit
- 11/2001 Audit by Georgia Bureau of Investigation
- 12/18/00 Internal Audit
- 6/5/00 Audit by Office of Inspector General – Dallas Regional Audit Office for compliance with CODIS requirements

V. PROTOCOLS

The following sections of the Quality Assurance Manual and protocols regarding serology and DNA testing are included:

- Section 10-2 Audits
- Section 11-1 Methods and Techniques
- Section 11-1A STR Methods
- Section 12-1 Instrument and Software Operation
- Section 5-1 Instruments and Equipment
- Section 7-1 Evidence Handling Procedure
- Section 8-1 Data Analysis and Reporting
- Section 8-2 Statistical Basis for Interpretation
- Internal Controls and Standards Procedure
- Serology: Semen Identification Procedures
- Serology: Blood Identification
- Serology: Saliva Identification
- Cofiler Validation Report
- Profiler Validation Report
- Inventory of Equipment Report
- Internal Memorandum documenting that the MDPD Crime Lab purchases its reference materials for traceable quality control from the National Institute of Standards and Technology (NIST)

APPENDIX C

Office of the Ramsey County Attorney

Susan Gaertner
County Attorney

TO: All County Attorney Staff

FROM: Susan Gaertner
Ramsey County Attorney

SUBJECT: Protocol for Postconviction
DNA Testing: Ramsey County
DNA Project

DATE: March 1, 2001

This directive establishes the procedures we will follow to apply current DNA technology to past convictions. The Ramsey County DNA Project arises from our ethical duty as prosecutors to seek the truth and assure that justice is done in every case. It takes advantage of the expertise that this office has developed over the years in this critical area of forensics.

While we are taking this initiative, we are also respectful of the prerogatives of defense counsel. Further, the Protocol is mindful of the rights of the victim or victim's survivors and the need for the trial attorney to be part of the review process.

Attached you will find the forms used in the project.

PURPOSE: To fulfill the County Attorney's responsibility to see that justice is done in every case by applying today's state of the art DNA technology to past criminal cases.

SCOPE OF THE PROJECT: On March 1, 2001, the County Attorney directed that this office initiate a review of past crimes against person cases as follows:

DNA EVIDENCE POLICY CONSIDERATIONS FOR THE PROSECUTOR

- A. This office will systematically examine the cases of all defendants who were prosecuted for a crime against person by the Ramsey County Attorney's Office in 1994 or earlier, were sentenced to the Minnesota Department of Corrections and are currently in prison. This date recognizes that after 1994, DNA testing was commonly available and routinely applied in criminal cases in Ramsey County.
- B. The case review focuses on whether there is biological evidence that is available to be tested, whether the defendant has consistently maintained his innocence based upon mistaken or wrongful identification, and whether current DNA technology could provide exonerating evidence.

CASE REVIEW: There are three stages of Case Review, beginning with examination of the criminal file by law clerks, followed by independent analysis by an Assistant County Attorney, and leading to consideration of the case, where appropriate, by the County Attorney.

- A. **Law Clerk Initial Case Review.** The initial review of the case is done by law clerks.
 - 1. Working through the defendants' names alphabetically, the law clerks order the criminal case files and prepare the Case Review Report (see attached sample). The case review report will contain the following information:
 - a. Prisoner name
 - b. District Court and County Attorney case numbers
 - c. Offense date
 - d. Sentencing date
 - e. Minnesota Department of Corrections identification number
 - f. Prison location
 - g. Crimes convicted of
 - h. Guilty plea, Alford plea, or trial
 - i. Assistant County Attorney who handled the case
 - j. Postconviction proceedings
 - k. Statements of defendant to police
 - l. Statements of defendant at trial
 - m. Statements of defendant to probation officer
 - n. Name of reviewing clerk and review completion date

- o. Was there biological evidence in the case, and is it still available (may be at the Police Department, in the court file, Regions Hospital, the BCA or other location)?

The law clerk will attach the following supporting documents to the Case Review Report:

- a. Complaint or Indictment
- b. Guilty Plea form or, if the case was tried, the Certificate of Conviction
- c. Probation Report
- d. Copy of appellate decision(s).

B. Assistant County Attorney Review. An Assistant County Attorney will review the Case Review Report prepared by the law clerk and determine the following:

- 1. Has the defendant maintained a continuous claim of innocence because of misidentification?
- 2. Was biological evidence collected in the case that is material to the defendant's participation in the crime?
- 3. Would that biological evidence, if tested using DNA typing techniques and assuming the results excluded the defendant as donor of the DNA, 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 had been available at the time of conviction?
- 4. If so, does the biological evidence still exist and is that evidence in an appropriate condition for DNA typing, including the establishment of a proper chain of custody?
- 5. If so, the Assistant County Attorney will undertake immediate steps to ensure the evidence is not destroyed.

C. County Attorney Review. When a case meets the above criteria, the Assistant County Attorney will present the case to the County Attorney to determine further action. The trial attorney, if currently an Assistant County Attorney, will participate in the review. If the decision is made to conduct DNA typing in a case, the Assistant County Attorney will contact the defendant's last attorney of record to advise counsel of the offer of DNA typing of the existing biological evidence. If that attorney no longer represents the defendant, the Office of the State Public Defender will be contacted. If the

DNA EVIDENCE POLICY CONSIDERATIONS FOR THE PROSECUTOR

defendant, through counsel, declines testing, no further DNA typing will occur.

TESTING OF THE DNA SAMPLE: When there is biological evidence of sufficient quantity and quality to be tested, DNA typing will be sought from the Minnesota Bureau of Criminal Apprehension or the FBI. If either laboratory is unable to perform DNA typing due to technological or time constraints, testing will be sought from another government or private laboratory. If the sample is so small or degraded that additional testing would consume the entire sample, the sample will be sent for testing to a laboratory agreed upon by both the County Attorney's Office and defense counsel.

VICTIM CONTACT: Once the decision to test evidence in a particular case is made, contact with the victim or next of kin in the case will be made by a Victim Witness program to advise the person of the case status. The victim(s) or next of kin will continue to be kept apprised of any developments in the postconviction analysis of the case.

INMATE REQUESTS: If a request for postconviction DNA testing is received from any inmate who was convicted in Ramsey County, or from any attorney who formerly or currently represents that inmate, the case will be examined. A letter will be sent to the inmate, or, if represented, to counsel, advising of the outcome of the review. If the decision is made to perform DNA typing, notification will be made to the inmate or attorney of record.

If the request is made from an inmate convicted in another county, the request will be referred to the State Public Defender's Office and to the County Attorney's office that handled the prosecution. A letter will be sent to the inmate advising of the referral.

POSTCONVICTION EXONERATION: If postconviction DNA typing demonstrates a reasonable probability of a more favorable verdict or sentence in a particular case, the County Attorney will file a request with the trial court for dismissal of the charges or for sentencing relief. If appropriate, the County Attorney will request the inmate be released from prison or that a request for clemency or other appropriate relief be granted by the Pardon Board of the State of Minnesota.

SUSAN GAERTNER
Ramsey County Attorney

RESOURCE LIST

Butler, John M., “Forensic DNA Typing,” *Overview and History of DNA Typing*, Academic Press, 2001.

National Research Council (NRC-II), *The Evaluation of Forensic DNA Evidence*, National Academy Press, Washington DC, 1996.

National Institute of Justice, Special Report, *Using DNA to Solve Cold Cases*, U.S. Department of Justice; July 2002.

The following Web sites provide information about the forensic application of DNA:

www.ndaa-apri.org—National District Attorneys Association and American Prosecutors Research Institute (NDAA-APRI). **APRI** is a nonprofit research, training and technical resource for prosecutors.

www.ojp.usdoj.gov—Office of Justice Programs (OJP). **OJP**, a section of the United States Department of Justice, is devoted to funding, training, programs, statistics and research.

www.ojp.usdoj.gov/nij—National Institute of Justice (NIJ). **NIJ** is the research, development, and evaluation agency of the U.S. Department of Justice and is solely dedicated to researching crime control and justice issues.

www.ncjrs.org—National Criminal Justice Reference Service (NCJRS). **NCJRS** is a federally funded resource offering justice and information to support research, policy, and program development worldwide.

www.dnaresource.com—Smith Alling Lane, P.A. Smith Alling Lane provides a website sponsored by Applied Biosystems that contains for information about the latest developments in forensic DNA policy and statistics.

DNA EVIDENCE POLICY CONSIDERATIONS FOR THE PROSECUTOR

www.denverda.org—Denver District Attorney’s Web site. The Denver District Attorney’s Office maintains a Web site that catalogs opinions concerning DNA evidence admissibility and use.

GLOSSARY

DEOXYRIBONUCLEIC ACID (DNA) – Genetic material present in the nucleus of a cell. This molecule contains all of the information necessary to code for all living things. Half of the material is inherited from each biological parent. DNA is organized into a double helix composed of two complementary chains of paired nucleotides.

CASE EVALUATION – Review of cases that have biological evidence amenable to DNA testing to determine what evidence is probative, what evidence requires immediate DNA testing and what priority the remaining evidence in the case should be given.

CASE REVIEW PANEL – The reviewing body that collaborates and conducts case evaluation.

CODIS – COmbined DNA Indexing System. CODIS refers to the hardware and software that links a network of local (LDIS), state (SDIS) and national (NDIS) databases housing DNA samples of convicted offenders and crime scene samples. CODIS also refers to the FBI's own DNA database. CODIS was authorized in The DNA Identification Act of 1994 (Public Law 103 322).

CODIS MATCH OR COLD HIT – The term used when a DNA profile within the CODIS databank, from either crime scene profile or offender profile, matches the DNA profile of a specific person or another piece of evidence from another crime scene that is also in the CODIS system.

COLD CASES – Cases, new or old, that have not been solved.

COLLATERALLY-ATTACKED CLOSED CASES – An attack brought after a conviction that has been adjudicated through direct appeal.

EXCULPATORY EVIDENCE – Evidence that tends to relieve the defendant from blame or responsibility.

DNA EVIDENCE POLICY CONSIDERATIONS FOR THE PROSECUTOR

MULTIDISCIPLINARY CASE REVIEW – The convening group of attorneys, police officers, forensic scientists and others with relevant knowledge that performs evidentiary case review, either immediately after commission of the crime or after a charging decision has been made.

RECIPROCAL DISCOVERY AGREEMENT – The obligation created by the state’s Rules of Criminal Procedure and/or case law that requires both the prosecutor and the defense attorney to provide each other discoverable information.

SAMPLE CONSUMPTION – The total depletion or exhaustion of existing sample of biological evidence in the performance of DNA testing.

SEXUAL ASSAULT NURSE EXAMINER (SANE) – Registered nurses who have been trained and certified in the examination of sexual assault victims and who complete sexual assault or rape kits for the collection of evidence.

ACKNOWLEDGEMENTS

The DNA Forensics Program would like to thank the following individuals for their contributions and support:

Susan Gaertner, County Attorney, Ramsey County, St. Paul, Minnesota

Rockne Harmon, Senior Deputy District Attorney, Alameda County, California

Stephen Hogan, Senior Counsel, New York State Police, Albany, New York

Brenda Mezick, Assistant State Attorney, Miami-Dade County, Florida

Matthew Redle, County and Prosecuting Attorney, Sheridan County, Wyoming

Stephanie Stoiloff, Forensic DNA Analyst, Miami-Dade Police Department, Florida



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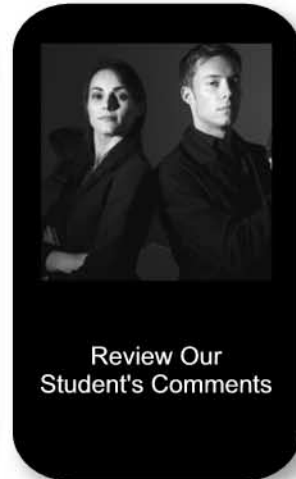
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