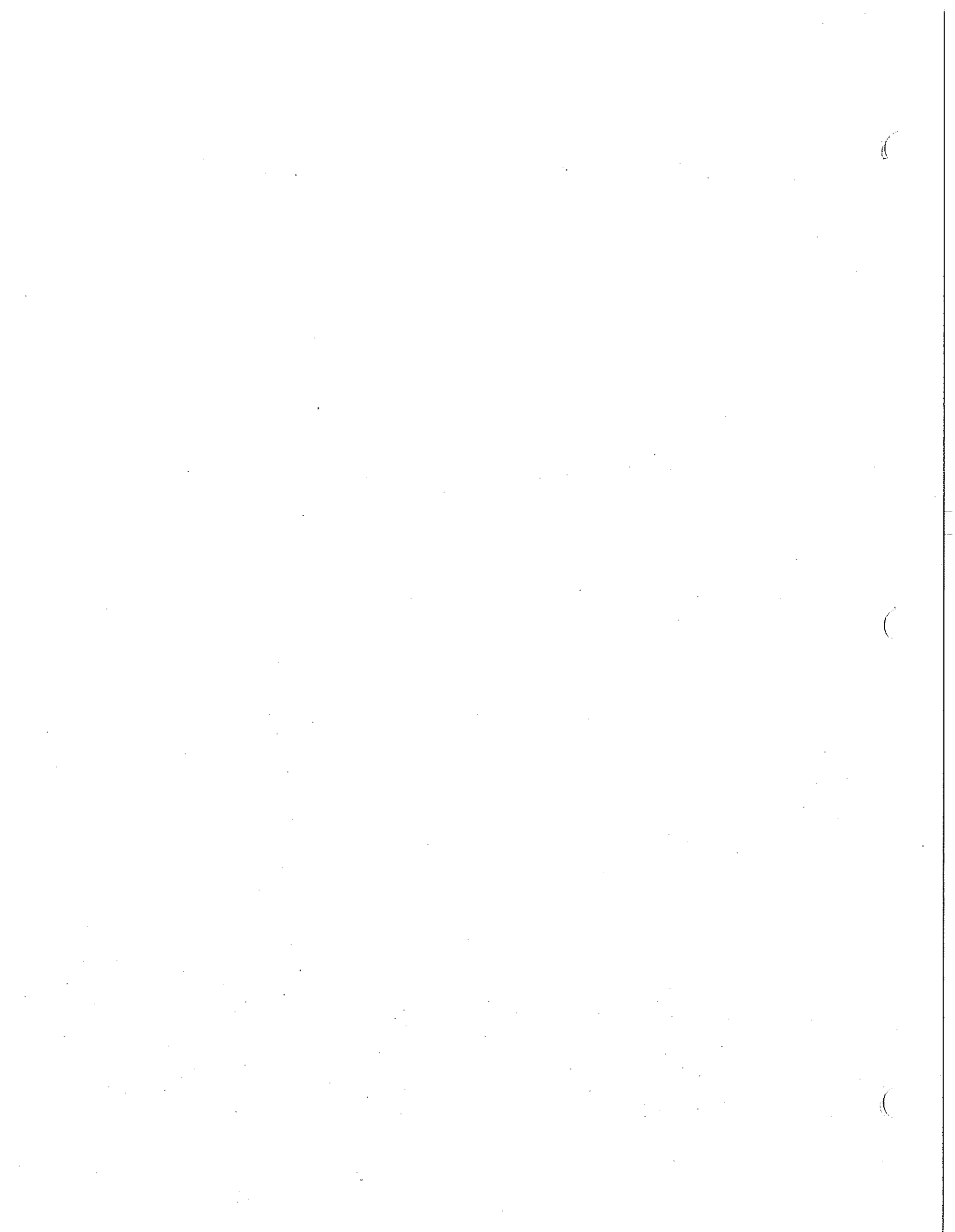


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POST CONVICTION ASSISTANCE CENTER

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California Commission on the Fair Administration of Justice
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December 8, 2006

Dear Commissioners,

I write to provide background information from Los Angeles County on the status of post conviction DA testing pursuant to Penal Code 1405 and on the methodology we utilize locally to implement the statute.

After the 2001 enactment of Penal Code 1405, the local stakeholders, the Public Defender's Office, District Attorney's Office and my office, Post Conviction Assistance Center met with the Presiding Judge and Assistant Presiding Judge of the Criminal Courts to discuss protocols for implementation of the statute. In addition, the Attorney General's Office set up a task force to explore issues related to Cold Case funding and testing and to look into issues which might arise as a result of enactment of Penal Code 1405. District Attorney Steve Cooley also sent a letter to the Chiefs of each of the 53 Los Angeles county law enforcement agencies advising them of their new responsibilities as a result of the enactment of Penal Code 1405 and 1417.9.

Preliminarily, in April 2001, our Presiding Judge set forth a protocol to be followed by our court and related entities. Specifically, all requests for DNA testing, even if made via prison mail, are to be forwarded to the master calendar court, Department 100, for collection and review. These requests are then reviewed by the Public Defender to determine whether they were counsel of record. If so, they are appointed on the case. If not, my office is appointed. These are ex parte appointments. The Court file is pulled by court staff and we then copy whatever paperwork is contained therein. Our initial role is investigatory and we are appointed for that purpose.

Prior to the enactment of Penal Code 1417.9 in 2001 it was common for criminal justice agencies and the Superior Court to destroy evidence and booked property within certain time limitations

usually within the statute of limitations for that offense. As a lawyer who has handled both trial matters and appellate/habeas matters for the past twenty five years, this came as no great surprise. In the five years we have been handling 1405 requests, we have determined that in 80% of the requests, all evidence in the case has been destroyed. We consider it a stroke of good fortune when we find a case in which the evidence has been retained *and* DNA testing would be material to the issues in the case.

After the initial meeting with the Court in early 2001 and the development of the protocol, our working group, Deputy Public Defender Jennifer Friedman, Deputy District Attorney Lisa Kahn, and myself, met with the Los Angeles County Coroner and his staff, the Clerk of the Superior Court and Evidence Room personnel, the Property Room personnel and Forensic Lab personnel from our two largest police agencies, LAPD and Sheriff, and various other command staff representatives and legal counsel for the two law enforcement agencies. We also contacted SART Centers and SART nursing personnel and Victim's Rights groups.

During these meetings we discussed the new laws, answered questions, and learned what information each entity or group retained and required in order to conduct their own internal search for evidence. This issue is extremely complex as each entity books, stores or retains evidence utilizing their own system, codes, and identifying information.

For example, the Coroner's office in a homicide case needs victim name and date of death or Coroner case number. The Court staff looking for exhibits needs the case number and date of remittitur from the Court of Appeal to check the evidence room. LAPD needs the police agency file number or DR number and in some cases, the date the specific item of property was booked. This information can only be found on the actual police report from the case. Sheriff needs this information as well. (Under California law the police report is not a public record.) As is apparent, in these instances the case number and/or defendant's name is of little or no assistance.

At some of the smaller police agencies where we have not had frequent contact, I have been advised that only the former Detective on the case can provide me with the information about the evidence. As one might imagine, this has led to some interesting, and on occasion, surprising phone conversations. And, in each instance I have had no trouble in eventually obtaining the cooperation I needed and an answer and documentation which could be relied upon.

It is our obligation as attorney for Petitioner to provide this preliminary information to the agency so that they can conduct the search. This information can be difficult, and in some cases, has been almost impossible to obtain. Our clients rarely if ever have the paperwork reflecting this information. Our first review in these cases is of the Court file. Thereafter, we contact the former attorney and request their file. As appointed counsel of record we are entitled to the file pursuant to State Bar rules. On several occasions I have had to file motions requesting a contempt hearing when my colleagues refused to provide me with their file. (The file usually arrived with the lawyer on the date set for the contempt hearing.) Shockingly, although criminal defense attorneys are required to keep case files in perpetuity, they often do not do so. And, the Court file rarely contains the police reports which are the most critical piece of information we need to provide the police agency so that they can look for the evidence.

Although Penal Code 1054.9 only authorizes discovery in LWOP or capital cases, our District Attorney's Office has been extremely helpful and courteous in assisting us when we have no other source of information. In cases where we cannot obtain the information from the Court of Appeal record, the Court file, or the former attorney file, the District Attorney's office will provide us with their file, (if they can locate it) so that we can obtain the data we need to provide to the agency so that they may determine if evidence has been retained. In some cases even the DA file cannot be located. As a last resort on a lifer's case we tried the state prison authorities. We recently were surprised to learn that the Board of Prison Terms does not have police reports or trial transcripts to review or utilize in making parole determinations. Apparently they use information from probation reports. Sadly, the Court of Appeal has recently instituted a policy of destroying trial records after only twenty years. In some instances, neither side can determine what happened at trial.

However, in the great majority of our cases we can fairly readily obtain the needed information. We then provide agencies with that information informally via email or letter. If we are dealing with a new police agency or entity we have not dealt with before, I explain our informal protocol and provide contact numbers of the District Attorney staff and the Court so that the representative may discuss the matter with someone other than myself. This usually is successful. To date, I have never had to issue a subpoena for information. I have advised agency representatives that it is the Court's policy that as I am appointed counsel of record, for purposes of investigating the 1405 issue, I am authorized to issue an sdt if I need to. Most agencies prefer not to waste staff time by sending a representative to court.

After we provide the data needed, a search is conducted by the agency to determine whether the evidence is there, what the evidence is, and if it is destroyed, when that occurred. Since many of the cases we handle pre-date the existence of automated evidence tracking systems, this search is often labor intensive for the agency and for their staff. We respect this fact and often wait several months for an answer. If the evidence has been destroyed, we require and routinely receive declarations from agency staff, (which we prepare for them) indicating the fact of the destruction and the date of destruction if that information is available. Often the agencies can provide internal documentation of the destruction. If the evidence is gone, we file a written motion with declarations and documentation "closing the request for DNA testing" due to the destruction of the evidence. A copy is placed in the court file and a copy mailed to the Petitioner. Again, this entire process is ex parte and the District Attorney's involvement at this point occurs only if we need to conduct a review of their file to obtain the needed information to provide to the agency.

In situations where the evidence has been retained, we then take the next step to determine the viability of the request. We obtain the trial record from the Court of Appeal and the police reports from whatever source possible including the District Attorney's Office. In many old cases, the record of the trial or police or lab reports tell us there may have been some sort of prior forensic analysis, for example, standard serology testing. In these instances we often request that the Sheriff's Crime Lab via Barry Fisher, or the LAPD Crime Lab via Steve Johnson or Greg Mattheson, pull the old lab file and provide copies of documents, notes and reports so that we do not duplicate efforts, funds or testing and so that all parties are on the same page. Again, both agencies have been cooperative and more than helpful in assisting us and the District Attorney in

our case reviews.

In cases where we are going forward and have copied the trial record, or have the police reports we provide copies to the District Attorney's Office either ahead of time or concurrently with the filing of the motion. This avoids duplication of effort and is our way of providing a courtesy in return. In some instances we provide a memorandum and documents to the District Attorney's Office prior to the filing of a motion. We lodge a copy of the transcript with the Court for the Court's review of the record. In some instances the 1405 motion is pro forma, and the District Attorney has been willing to stipulate to testing. In other cases, the motion is hotly contested and decided upon by the Court.

Lastly, I think it important to note that the "*local understanding*" here in Los Angeles has been to view the Penal Code 1405 motion as a discovery tool in contemplation of a petition for writ of habeas corpus. While it is unclear exactly what the Legislature intended, it is clear that the statute does not provide a specific remedy upon receipt of exculpatory DNA test results. At the inception of our handling of these cases, there was a high level of uncertainty about this issue. Now we pretty much ignore it. We deal with these unusual cases and situations one case at a time.

More often than not the result has been that after DNA testing, we have still had to file a habeas petition to overturn the conviction. Sometimes we are successful, sometimes not. These cases often take a huge amount of attorney staff time and investigation post 1405 motion. One reason for this is that in my view, if this is a petitioner's first habeas all potential habeas issues should be raised, not just the new DNA testing result. My office is deemed appointed to provide this habeas representation and will also provide continuous representation to, or through, retrial.

I hope this information is of assistance to the Commission.

Very truly yours,


Gigi Gordon

cc: Michael Judge
John Spillane, Lael Rubin