

West's Ann.Cal.Penal Code § 1405



**Effective: January 01, 2005**

West's Annotated California Codes [Currentness](#)

Penal Code ([Refs & Annos](#))

Part 2. Of Criminal Procedure ([Refs & Annos](#))

▣ [Title 10.](#) Miscellaneous Proceedings

▣ [Chapter 11.](#) Errors and Mistakes in Pleadings and Other Proceedings

**→ § 1405. Motion for DNA testing**

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

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

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

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

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

(4) Nothing in this section shall be construed to provide for a right to the appointment of counsel in a postconviction collateral proceeding, or to set a precedent for any such right, in any context other than the representation being provided an indigent convicted person for the limited purpose of filing and litigating a motion for DNA testing pursuant to this section.

(c)(1) The motion shall be verified by the convicted person under penalty of perjury and shall do all of the following:

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

(B) Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.

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

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

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

(2) Notice of the motion shall be served on the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested. Responses, if any, shall be filed within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted for good cause.

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

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

(f) The court shall grant the motion for DNA testing if it determines all of the following have been established:

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

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.

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

(4) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence.

(5) 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. The court in its discretion may consider any evidence whether or not it was introduced at trial.

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

(A) The evidence was not tested previously.

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

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

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

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

(2) The testing shall be conducted by a laboratory mutually agreed upon by the district attorney in a noncapital case, or the Attorney General in a capital case, and the person filing the motion. If the parties cannot agree, the court shall designate the laboratory to conduct the testing and shall consider designating a laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB).

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

(i)(1) The cost of DNA testing ordered under this section shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person.

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

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

(k) DNA testing ordered by the court pursuant to this section shall be done as soon as practicable. However, if the court finds that a miscarriage of justice will otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, a DNA laboratory shall be required to give priority to the DNA testing ordered pursuant to this section over the laboratory's other pending casework.

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

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

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

#### CREDIT(S)

(Added by [Stats.2000, c. 821 \(S.B.1342\), § 1](#). Amended by [Stats.2001, c. 943 \(S.B.83\), § 1](#); [Stats.2004, c. 405 \(S.B.1796\), § 16](#).)

#### HISTORICAL AND STATUTORY NOTES

2007 Electronic Update

2001 Legislation

[Stats.2001, c. 943](#) (S.B.83) rewrote this section, which had read:

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

"(1) The motion shall be verified by the convicted person under penalty of perjury and shall do all of the following:

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

"(B) Explain in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.

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

"(2) Notice of the motion shall be served on the Attorney General, the district attorney in the

county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested. Responses, if any, shall be filed within 60 days of the date on which the Attorney General and the district attorney are served with the motion, unless a continuance is granted.

"(3) If any DNA or other biological evidence testing was conducted previously by either the prosecution or defense, the results of that testing shall be revealed in the motion for testing, if known. If evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, the court shall order the prosecution or defense to provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA testing.

"(b) The court, in its discretion, may order a hearing on the motion. The motion shall be heard by the judge who conducted the trial unless the presiding judge determines that judge is unavailable. Upon request of either party, the court may order, in the interest of justice, that the convicted person be present at the hearing of the motion.

"(c) The court shall appoint counsel for the convicted person who brings a motion under this section if that person is indigent.

"(d) The court shall grant the motion for DNA testing if it determines all of the following have been established:

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

"(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.

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

"(4) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence.

"(5) 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. The court in its discretion may consider any evidence whether or not it was introduced at trial.

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

"(A) It was not tested previously.

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

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

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

"(e) If the court grants the motion for DNA testing, the court order shall identify the specific evidence to be tested and the DNA technology to be used. The testing shall be conducted by a laboratory mutually agreed upon by the district attorney in a noncapital case, or the Attorney General in a capital case, and the person filing the motion. If the parties cannot agree, the court's order shall designate the laboratory to conduct the testing and shall consider designating a laboratory accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board (ASCLD/LAB).

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

"(g)(1) The cost of DNA testing ordered under this section shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person.

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

"(h) An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General. Any such petition shall be filed within 20 days after the court's order granting or denying the motion for DNA testing. In a noncapital case, the petition for writ of mandate or prohibition shall be filed in the court of appeals. In a capital case, the petition shall be filed in the California Supreme Court. The court of appeals or California Supreme Court shall expedite its review of a petition for writ of mandate or prohibition filed under this subdivision.

"(i) DNA testing ordered by the court pursuant to this section shall be done as soon as practicable. However, if the court finds that a miscarriage of justice will otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, a DNA laboratory shall be required to give priority to the DNA testing ordered pursuant to this section over the laboratory's other pending casework.

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

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

## 2004 Legislation

[Stats.2004, c. 405](#) (S.B.1796), in subd. (g), redesignated the first sentence of the subd. as par. (1) and the second and third sentences as par. (2); and in subd. (i)(2), substituted a reference to subd. (g) for a reference to subd. (e).

Subordination of legislation by [Stats.2004, c. 405](#) (S.B.1796), to other 2004 legislation and cost reimbursement provisions, see Historical and Statutory Notes under [Evidence Code § 912](#).

## LAW REVIEW AND JOURNAL COMMENTARIES

[California dreaming? The golden state's restless approach to newly discovered evidence of innocence. Daniel S. Medwed, 40 U.C. Davis L. Rev. 1437 \(2007\).](#)

Capital punishment. Robert M. Sanger, [44 Santa Clara L.Rev. 101 \(2003\)](#).

[DNA: Law enforcement's miracle of technology: The missing link to truth and justice. Jerilyn Stanley, 32 McGeorge L.Rev. 601 \(2001\).](#)

[Don't believe everything you read: A review of modern "post-conviction" DNA testing statutes. Kathy Swedlow, 38 Cal.W.L.Rev. 355 \(2002\).](#)

The ethical obligations of prosecutors in cases involving postconviction claims of innocence. Judith A. Goldberg and David M. Siegel, [38 Cal.W.L.Rev. 389 \(2002\)](#).

[I'm innocent: Can a California innocence project help exonerate me? . . . Not if the Antiterrorism and Effective Death Penalty Act \(AEDPA\) has its way. Erik Degrate, 34 W. St. U. L. Rev. 67 \(2006\).](#)

Timely justice: The balance between claims of actual innocence and finality of judgments. Deanna F. Lamb, 28 Lincoln L.Rev. 17 (2000-2001).

## RESEARCH REFERENCES

**ALR Library**

[125 ALR 5th 497](#), Dna Evidence as Newly Discovered Evidence Which Will Warrant Grant of New Trial or Other Postconviction Relief in Criminal Case.

**Encyclopedias**

[92 Am. Jur. Proof of Facts 3d 379](#), Proof of Reliability of Eyewitness and Earwitness Testimony.

[CA Jur. 3d Appellate Review § 563](#), Matters Judicially Noticed.

[Cal. Jur. 3d Criminal Law: Rights of the Accused § 85](#), Right to Appointed Counsel.

**Treatises and Practice Aids**

[5 Criminal Procedure, Second Edition § 24.11](#), Post-Verdict Motions.

[5 Witkin Cal. Crim. L. 3d Criminal Trial § 34](#), Proceedings Covered.

[4 Witkin Cal. Crim. L. 3d Intro. to Crim. Proc. § 53](#), Collection of Forensic Information.

## NOTES OF DECISIONS

### **Discretion of court [2](#)**

#### **Judicial notice [3](#)**

#### **Misdemeanors [1](#)**

##### [1](#). Misdemeanors

A governmental entity is not required to retain biological material secured in connection with a misdemeanor case for the period of time that a person is incarcerated in connection with the case. Op.Atty.Gen. 04-405 ([May 17, 2005](#)), [2005 WL 1711680](#).

##### [2](#). Discretion of court

Under statute allowing persons convicted of felonies to move for forensic deoxyribonucleic acid (DNA) testing, trial court had no discretion to deny request of indigent petitioner, convicted of attempted murder, for appointment of counsel for purpose of obtaining DNA testing, where petitioner's request included required information and counsel had not previously been appointed for obtaining testing. [In re Kinnamon \(App. 2 Dist. 2005\) 34 Cal.Rptr.3d 802, 133 Cal.App.4th 316](#). Criminal Law ↪ 1590; Criminal Law ↪ 1602

##### [3](#). Judicial notice

In habeas corpus proceeding to determine whether petitioner was entitled to appointment of counsel for purpose of obtaining forensic deoxyribonucleic acid (DNA) testing as to his conviction of attempted murder, the Court of Appeal would take judicial notice of the record and opinion filed in appeal and of the superior court file. [In re Kinnamon \(App. 2 Dist. 2005\) 34 Cal.Rptr.3d 802, 133 Cal.App.4th 316](#). Habeas Corpus ↪ 823

West's Ann. Cal. Penal Code § 1405, **CA PENAL § 1405**

Current through Ch. 750 of 2007 Reg.Sess. urgency legislation

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