

ALAMEDA COUNTY PROTOCOL FOR DNA DATABASE SUPPORT AND UTILIZATION

(Penal Code Sections 295-300)

INTRODUCTION

Forensic DNA typing has already had a substantial impact on the criminal justice system. Convictions have been obtained which would have previously been impossible; wrongly accused defendants have been freed both before trial and after long periods of incarceration. It has become commonplace for DNA typing to be used to corroborate other forms of evidence in achieving criminal convictions. For the criminal justice system to benefit fully, all that remains is for systematic procedures to be implemented in order to solve old, unsolved cases and new cases where no suspect is ever developed.

Every state in the U.S. now has a statute requiring offenders convicted of certain crimes to provide samples which will be subjected to DNA typing and stored in a database. The database now provides a motivation for developing systematic procedures to help solve the old, unsolved cases and the new suspect less case. If biological evidence is available it can be used to include/exclude existing suspects. If a suspect is identified, the case may be filed. If all suspects are excluded, the evidence DNA profile may be searched against the offender database.

There are three steps law enforcement must take towards solving these crimes. First, all unsolved crimes must be identified. Second, those which might be solved by DNA typing must be set aside. Third, DNA typing must be performed and the results compared against all existing suspects, if any, or against the expanding state and national offender databases. Alameda County has already developed and implemented procedures for these three steps, which have solved many unsolved rape cases, and twenty unsolved murders as far back as 1974.

SOLVING UNSOLVED CASES

Having developed the Alameda County program, the potential now exists for solving both old and new crimes. The old crimes are those, which were previously unsolved due to the absence of investigative leads or the availability of DNA typing. When this program was initiated, the expectation was that the only cases where biological evidence could identify the criminal would be cases where there had never been any viable suspects. With this expectation in mind, the only hope for solving these crimes was to perform DNA typing and hope to find the offender when the database search was conducted. Experience has shown that this expectation was wrong.

As of early 2003, twenty murder cases have been solved as a result of this program. The earliest of these murders occurred in 1974, the latest in 2002. In most of the 20 cases, the crimes were solved by typing the evidence and comparing it with the person now considered to be the most likely suspect.

Five of these crimes have been attributed to one suspect, six to another, one each to the other individuals. Almost all of the suspects had previously provided samples for the DNA database. However, in cases where the suspect was known, the database search was never conducted because the crimes were solved by typing the offender sample and comparing it directly against the biological evidence. In none of these instances were the suspects aware of the renewed interest in them or in the cases. In one case the connection was made by an informal comparison of PCR PM/DQa data from the evidence with evidence, which had been analyzed in another pending case in the same lab.

In Alameda County there are still hundreds of other cases with critical biological evidence, some with viable suspects who have neither been exonerated nor incriminated by DNA typing because the biological evidence has never been analyzed. These suspects must be addressed directly because, in most

instances, either their samples were not collected or they have not been convicted of a qualifying offense. In either instance, simply performing DNA typing and searching the DNA database would not result in identifying the assailants. If the viable suspects are excluded by DNA typing, the case becomes a suspect less case and the potential for solving it exists only by searching the evidence DNA profile against the DNA offender database.

These dozens of cases represent the tip of the iceberg of the numbers of other cases which might be solved through the use of DNA typing. In order to determine the true number one must first identify all unsolved crimes whose prosecution is not barred by the Statute of Limitations. This information is not currently readily available via computer.

Each agency should review unsolved cases to determine if DNA typing may contribute to solving them and prosecuting the offenders. In some instances the solution may come from typing the known available evidence and favorably comparing the results against the previous suspect/suspects. When the cases are reviewed, care must be taken to avoid disregarding cases because it is unknown whether or not there is biological evidence. Several of the cases solved to date had never before been evaluated for forensic evidence. Historically, government crime labs have discouraged the submission of physical evidence to be evaluated to determine if there is biological evidence until there is a named suspect.

Because this program will focus exclusively on unsolved or suspect less cases, no previous efforts will usually have been made to evaluate evidence for the presence of biological evidence. (Recently a 1975 homicide was solved in this manner, in part relying on evidence of sexual assault which had never before been located or evaluated because there had never been a suspect.) In addition, the power of DNA typing has rendered items such as cigarette butts, fingernail clippings, and chewing gum quite powerful, when they were insignificant at the time of the crime. The investigator reviewing these cases

should simply ask, "If there is biological evidence, could it help solve the crime?"

It is estimated that there will be a few hundred cases in this category.

The evidence must then be evaluated in the laboratory in an attempt to locate biological evidence, which might help solve the crime. Once the evidence is identified, it must be subjected to DNA typing to include/exclude any known suspects directly, then searched against the database if no suspects remain.

The following discussion describes the protocol in Alameda County for the submission of suspect fewer cases with biological evidence.

PROTOCOL FOR SUBMISSION OF SUSPECTLESS CASES

There are approximately 350 reported rapes, which result in hospital examinations per year in Alameda County. Approximately 100 of these develop into criminal prosecutions. There are many different reasons the remaining 250 rapes do not lead to prosecution. A significant number of these crimes are never prosecuted because the assailant is unknown. There is now a prospect for solving some of these cases through a search of a DNA database of previously convicted offenders. There have already been hundreds of computer search hits on cases such as these in the United States, not enough have been from California.

The following discussion describes the procedures, which have been implemented in Alameda County to assist local law enforcement agencies in having biological evidence analyzed and the DNA profile searched against the database of known offenders.

The California DOJ DNA lab currently has over 200,000 offender samples. These offender samples are meant to be compared against unsolved, suspect less

cases in the expectation that matches will be found between offenders and some of this suspect less case. Comparisons are also routinely made to compare the unsolved cases to each other. These case-to-case hits may provide investigative leads, which might contribute to identifying the offender.

In Alameda County, both the Alameda County Sheriff's Department Lab and The Oakland Police Department Lab provide forensic DNA typing services for County law enforcement agencies. In the alternative any nationally accredited forensic DNA lab can generate the PCR profile, which will then be stored and searched against the offender database.

The following constitutes the protocol, which must be followed by Alameda County law enforcement agencies in order to comply with the DOJ memo. This protocol has been reviewed and approved by the DOJ lab director.

1. Whenever a truly suspect less case, which involves biological sexual assault evidence, arises, the investigator should contact DDA Rock Harmon (272-6281) to schedule a review of the case. A copy of the entire investigation, including property records, will be provided at that time. That file copy will be maintained in the District Attorney's Office in the event that one of the submitted cases produces a cold hit.

"Suspect less" may mean an old case where all investigative leads have been fruitlessly pursued. On the other hand, it may also include a recent crime for which there have been no investigative leads tending to identify a suspect. Depending on the circumstances of the case, a very recent crime may meet the "suspect less" criteria. Waiting some arbitrary period of time before acknowledging that a case is "suspect less" may allow the assailant additional time to commit similar crimes.

The goal of this program is to prosecute cases. Before a copy of the file is turned over to the District Attorney's Office, the investigator should contact material witnesses to ensure their availability for testimony, as long as this would not compromise the secrecy of the renewed investigation.

2. Once the DA review has been conducted, the case will be discussed with the forensic DNA lab, for the purpose of prioritizing the evidence to be examined.

If the victim had engaged in recent consensual sex, a reference sample from that consensual sex partner should be obtained before the evidence is submitted to the lab for DNA extraction.

Any remaining evidence should be retained by the submitting law enforcement agency under appropriate storage conditions.

3. Once the PCR typing is successfully completed, the samples will be compared to the existing database. These comparison runs are made periodically. Because new offender samples are added to the database on a regular basis, the evidence profile from the suspect less case will continue to be compared against other suspect less cases and the offender database on a regular basis. If a computer hit is made between an offender and one of these cases, the contingency described later in these guidelines will be followed.

4. The DOJ lab will generate a written report after the evidence profile has been searched. Upon receipt of the search report, the investigator will review the case with DDA Rock

Harmon. At that time, if appropriate, a "John Doe" DNA-based arrest warrant will be issued thereby tolling the Statue of Limitations. Both the District Attorney court file and the police department investigative file should contain a copy of the DOJ profile search report and the arrest warrant docket number for future reference purposes.

5. If no computer generated hit arises, but a suspect is developed by normal investigative means, the following procedures should be followed. First, the investigator should determine if the new suspect has already been convicted of one the crimes listed in 290.2/296 P.C. If the suspect has been convicted, the investigator should determine if the suspect has already provided a sample. One source of this information is Corpus. By entering "CPQP.PFN#" and seeing if there is a date after "DNA: ---". If there is a date following DNA, then it has been confirmed that the suspect has previously provided a 290.2/296 sample. If there is no date after DNA, it is still possible that the suspect has been sampled. A check of the suspect's state CII rap for an entry can disclose whether the samples have been collected is now possible. The entry may also disclose whether the samples have been typed, as well. The final way to ascertain whether samples have been collected or typed is to contact the DOJ-DNA lab directly. It is possible that a suspect has already provided a sample pursuant to 290.2/296 P.C., but that sample had not been typed at the time of the original database search. This information may be obtained by

contacting DDA Harmon.

If the suspect has been convicted of a 296 PC enumerated crime, but has never provided a sample, the investigator should contact DDA Harmon for assistance in procuring a sample from the suspect.

If the new suspect has never been convicted of one of the 290.2/296 offenses, a sample must be procured by other legal means. Once a reference sample has been obtained, the new suspect's PCR profile should be determined. This typing should be performed by the lab, which did the initial typing.

6. Each department should consider how to safeguard against the inadvertent destruction of the remaining evidence in these suspect less cases to preclude having a computer hit and only then discovering that all remaining evidence was destroyed in accordance with some arbitrary destruction date.

COLD HIT PROTOCOL

The DOJ lab will inform both the lead investigator from the submitting law enforcement agency and DDA Rock Harmon as soon as is possible of the fact of the cold database hit. (In OPD cases the DOJ lab will notify Lab director Mary Gibbons and DDA Harmon.) Authorization to inform the DA's office will be contained in the transmittal forms, which accompany the original evidence submission.

Upon receipt of that information, DDA Harmon and the investigator will confer as soon as possible. (In OPD cases the investigator, Mary Gibbons, and DDA Harmon will confer.)

During the initial conference, the following subjects will be reviewed:

- a. the suspect's custody status or present whereabouts,
- b. the preparation of a search warrant to obtain a new reference sample to ensure that the database reference sample is in fact from the identified suspect,
 1. Whether or not an arrest warrant has previously been issued,
- d. the location and availability of material witnesses to testify, especially if the crime was not recently committed,
- e. the availability of other physical evidence to be analyzed, including other biological evidence, in order to corroborate the computer cold hit,

A computer-generated cold hit is meant to begin the investigation of a crime, rather than to represent the end of the investigation. There are substantial legal considerations to be made about the case as a whole, some of which involve the form of legal admissibility of the evidence derived from the cold hit.

It may be that, after careful investigation subsequent to a cold hit, the only evidence to charge a suspect is based on the evidence of the cold hit. Some suspects may confess if confronted with the evidence against them. Some may deny any contact with the victim. Some may provide innocent explanations for the presence of the biological evidence, which identifies them as a suspect who was not apparent at the time the evidence was submitted. Each case may be unique. As such, each case should be treated differently.

Each of these cases will be reviewed by DDA Harmon for charging at the appropriate time after investigation.