

Memorandum of Understanding or Policy on DNA Evidence

Introduction:

The prosecutor, law enforcement officer and crime lab analyst are charged with the obligation to find truth to protect the innocent and to prosecute the guilty. The prosecutor, the scientist and the police officer also have an obligation to pursue developments within the criminal justice system that will enhance its ability to provide justice.

Forensic evidence is frequently indispensable to finding truth. Inexplicably though, forensic laboratory services are a limited resource. The abuse of forensic resources through frivolous requests for testing and analysis undermines the ability of a laboratory to deliver critical information to police and prosecutors. Requests for laboratory testing and analysis should be made with intelligence and discretion. This does not mean that testing necessary to resolve a significant issue should be forgone. Instead it suggests the desirability of shared knowledge, thorough communication, and multi-disciplinary analysis of a case to insure prioritization of samples and efficient resource.

This policy (**or memorandum**) is intended to apply to the submission of evidence for any scientific testing offered by the _____ State Crime Laboratory. Because of the demands placed upon DNA analysis, the policy's initial application will be placed on that form of testing. The procedures discussed below may be applied to other forensic disciplines as well.

Evidence Review

Before submitting evidence to the _____ State Crime Laboratory for testing and/or analysis, there shall be a meeting of a law enforcement agency representative, the prosecutor and laboratory staff.¹ Each participant has a separate and important perspective that benefits the process of identifying evidence to be submitted (from evidence that should not) for testing. The purpose of the meeting is to review the evidence based upon the factual and legal issues present in the case.

Evidence Collection

It is the responsibility of law enforcement to properly document and collect all potentially relevant evidence in a case. Once documented and collected, law enforcement is responsible for properly maintaining and storing evidence and properly submitting those items appropriate for testing. Often at the time of collection, perpetrator identities, theories of prosecution and likely defenses or other pertinent information

¹ Others may be included in the meeting dependent upon circumstances. Others may include assisting agencies and additional laboratories (e.g. SANE-SARTs, Toxicology analysts or victim advocates.

relative to the crime are unknown to investigating officers. This requires law enforcement to err on the side of caution and over-collection of evidence, particularly in the early stages of an investigation.

By the time the investigation has been completed or a suspect has been arrested, greater information is available that may permit prosecutor, investigator and scientist to identify the most probable sources of forensic information germane to the actual issues in the case. If a case will be submitted for prosecution, it is the responsibility of law enforcement to provide the up-to-date investigative report narratives, evidence logs, and photographs at the evidence review.

Evidence Review Team

Members

Members of the evidence review team may include the following:

- 1) Laboratory scientists
- 2) Law enforcement investigators, evidence officers or agency designees
- 3) Prosecutors
- 4) Victim advocates²
- 5) Other appropriate parties or agencies.³

Roles and Responsibilities

Laboratory Scientist:

- 1) Laboratory scientists are responsible for providing technical analysis of the case, explaining anticipated issues and providing a reasonable time line for testing completion.
- 2) If evidence is submitted prior to the team review, it is the responsibility of the laboratory to provide a receipt of submitted evidence to the law enforcement agency and a copy of that receipt to the prosecutor. The receipt shall include a list of the evidence received, evidentiary item numbers assigned by the laboratory and laboratory case number(s).
- 3) In the event that probative evidence must be subjected to testing by more than one forensic discipline, the laboratory scientist present will determine in which order the evidence will be tested, *e.g. latent fingerprints before toxicology*.

Law Enforcement:

- 1) Law enforcement investigators are responsible for providing relevant factual information regarding the investigation including collection methods,

² A victim advocate may be included within the team to facilitate an appropriate flow of information to victims of crime as mandated under the _____ Victim's Bill of Rights Act. Further, in the case of a "cold hit" under CODIS or AFIS, the advocate may be indispensable in advising the victim of the "cold hit," its significance, likely follow up investigation and answer additional questions of concern.

³ These might include, but are not limited to, other law enforcement agency representatives (*e.g.*, in a multi-jurisdictional investigation), a sexual assault forensic examiner or a forensic pathologist.

documentation and storage of evidentiary items regardless of whether a prosecutor was present at the scene.

- 2) Law enforcement investigators are responsible for seeing that all relevant or potentially relevant evidence are properly documented, collected and stored.
- 3) Law enforcement investigators are responsible for collection of all appropriate known and elimination samples prior to submission. Investigators may obtain assistance from prosecutors in determining legally permissible means by which such samples may be obtained at the time of the review.
- 4) The law enforcement representative shall be responsible for composing the evidence submission request based upon the discussion and decisions made at the evidence review team meeting. It shall be the responsibility of the law enforcement agency to submit evidence to the laboratory within 1 week of the evidence review meeting.

Prosecutor:

- 1) The prosecutor is responsible for providing an analysis of the legal issues apparent in the case based upon the factual information provided by law enforcement or as may develop during the course of prosecution.
- 2) The prosecutor is responsible for keeping all other members of the evidence review team advised of the likely charges, deadlines of discovery, pre-trial and trial scheduling and outcomes.

In order to facilitate the evidence review meeting, law enforcement or the prosecutor may provide the laboratory scientist with evidence logs or other material as necessary, including but not limited to scene or other photographs. It is recommended requisite forms for the transfer and receipt of evidence be brought. The evidence review team may authorize laboratory personnel to stop testing further evidentiary items at any point once valid test results establish the existence of those contested elements of the charge(s) for which testing was sought. For example, if the identity of a perpetrator is in issue in a case of sexual assault, the evidence review team may authorize that DNA testing cease if a suspected perpetrator profile is developed from 1 vaginal swab.

Charged Misdemeanor Cases

In most misdemeanor cases, demands for laboratory services are relatively minor and typically will only involve one laboratory discipline.

Requests for testing should be limited only to those matters strictly necessary to establish the elements of the offense or to rebut an apparent theory of defense. For example, in a misdemeanor controlled substance possession case it is not necessary that each pipe and baggie be submitted for testing where only one controlled substance is suspected to be present, e.g., marijuana. Unless the weight of the substance exceeds the statutory minimum required for a felony, the testing of 3 baggies and a pipe of suspected marijuana would only yield one count of misdemeanor possession. The selection of one item most likely to yield a positive identification of the substance is sufficient and will be made.

In a misdemeanor case, the evidence review team will be comprised of the assigned prosecutor, the lead investigating officer, the evidence officer or the law enforcement agency designee. Only if the anticipated testing involves two or more testing disciplines, the evidence review team will include a laboratory scientist. If other factors warrant, a laboratory scientist or other involved person or agency may augment the evidence review team.

In a charged misdemeanor case, the evidence review team shall meet not later than a week following the defendant's arraignment. The evidence review meeting may be conducted by conference call. It is the prosecutor's responsibility to schedule the evidence review meeting. The law enforcement representative shall be responsible for composing the evidence submission request based upon the decisions made at the evidence review team meeting. It shall be the responsibility of the law enforcement agency to submit evidence to the laboratory within 1 week of the evidence review meeting.

In a misdemeanor case, the prosecutor shall, at the time of the first case review conference, request a trial setting in all cases in which forensic testing, examination or analysis may be requested, unless the case has been otherwise resolved.⁴ The prosecutor's office shall be responsible for advising laboratory personnel of all trial settings involving laboratory staff.⁵ This affords laboratory personnel a scheduling date for completion of testing, examination or analysis.

Charged Felony Cases

In a case in which felony charges have been filed, the evidence review team shall meet at the time set for preliminary hearing (regardless of whether such preliminary hearing has been or is, waived). The evidence review meeting may be conducted by conference call.

Careful, intelligent analysis of the factual pattern and relevant legal issues should assist in discriminating between necessary and unnecessary testing. For example, vaginal swabs collected pursuant to a sexual assault forensic examination may not require testing but fingernail scrapings may, where the relevant issues in a case concern consent and not identity.

Uncharged Cases

In cases that have not been submitted for prosecution or have been submitted for prosecution but charges are awaiting the results of proposed testing, review by the evidence review team may be scheduled by the lead investigator, a prosecutor or laboratory scientist. The members of the evidence review team shall be the lead

⁴ Laboratory personnel should be advised, because of the volume of cases per judge, trial settings in the _____ Judicial District are stacked. Stacked trial settings are assigned a priority number. If a case assigned a higher priority number has not been resolved prior to the scheduled trial date that case will proceed to trial and the case in which testing has been requested will be continued to another trial date. It is the responsibility of the assigned prosecutor to keep laboratory staff apprised of the status of cases and trial settings.

⁵ This notice shall be in addition to the service of a subpoena.

investigator, prosecutor, laboratory scientist and other appropriate parties or agencies. The review meeting may be conducted by conference call.

Review and analysis shall be conducted as described above. During the evidence review meeting it will be determined if a suspect or suspects have been identified, if appropriate known standards have been collected from identified suspects and if not, what information or procedures will be necessary to obtain such samples.

If a suspect has not been developed the evidence review team shall determine what evidence shall be submitted for testing for inclusion in AFIS or the forensic case database in CODIS. Evidentiary items not necessary for identification through AFIS or CODIS will not be submitted to the laboratory at that time except as may otherwise be necessary to further investigative leads.

"Cold" Hits

In the event of the development of a "cold" hit under CODIS or AFIS, it is the scientist's responsibility to schedule an evidence review meeting with the lead investigator and prosecutor. Following receipt of notice of such a meeting, the lead investigator or prosecutor may supplement the evidence review team with such other parties or agencies as may be appropriate, e.g., a victim advocate.

The purpose of the evidence review meeting in this instance shall be to identify appropriate follow-up investigation, evidence collection and additional evidentiary submissions.

Laboratory Inability to Complete Requested Testing:

If, upon receipt of notice of the scheduled trial setting or deadline for discovery, laboratory staff determines that the requested testing, examination or analysis cannot be completed by the scheduled trial date or deadline for discovery, the laboratory scientist shall immediately notify the assigned prosecutor and advise the prosecutor of that fact and the reason therefore. The prosecutor shall then seek a continuance of the scheduled trial date citing the reason provided.

Distribution of Testing Result and Reports:

Following completion of requested testing, examination or analysis, it is the responsibility of the examining scientist to report their findings in writing to the requesting agency. Laboratory staff shall provide a courtesy copy of the laboratory report to the assigned prosecutor. If no prosecutor has been assigned,⁶ the courtesy copy shall be sent to the _____ County and Prosecuting Attorney.

The prosecutor shall be responsible for seeing that further distribution, pursuant to the rules of discovery, is made.

During the investigation or prosecution of a case or in the event of a "cold hit", news media inquiries regarding testing results and laboratory reports shall be referred to

⁶ This may occur where a case has not yet been charged.

the prosecutor. This insures with Rules of Professional Responsibility regarding fair trials as promulgated by the _____ Supreme Court. If investigation has been completed and no prosecution will follow, the prosecutor, investigating agency or laboratory may disclose results of testing according to their policy. Prior to doing so, it is recommended that the investigating agency or laboratory consult with their legal counsel regarding the requirements of the _____ Public Records Act.

Sample Depletion:

In the event that it is determined that requested testing may exhaust an evidentiary sample for further testing, it is the responsibility of the laboratory scientist to notify the prosecutor of that fact. The prosecutor shall make the determination whether testing should continue as requested pursuant to the requirements of *Arizona v. Youngblood*,⁷ taking into consideration availability of additional samples.⁸ If it is determined by the prosecutor that it is necessary to exhaust the sample, the prosecutor shall send a letter authorizing such depletion to the laboratory. A courtesy copy of the letter authorizing depletion will be submitted to appropriate law enforcement agency. When sample depletion occurs it should be noted in any resulting lab report at the earliest opportunity, in order to avoid unnecessary pre-trial discovery litigation.

Supplemental Evidence Review Meetings:

During the course of investigation or prosecution additional facts may come to light warranting an additional meeting of the evidence review team with respect to an individual case. Any member of the evidence review team may request such a supplemental meeting.

Notification of Trial Settings and Discovery Deadlines:

It is the responsibility of the prosecutor or his office to keep team members advised of trial settings and/or discovery deadlines. The prosecutor's office shall be responsible for sending law enforcement agencies and the laboratory a written report of cases submitted to the laboratory for testing. Such notice shall include the name of the assigned prosecutor, the lead investigator, the name of the defendant, laboratory case number and scheduled trial and/or discovery deadline dates. A report shall be submitted weekly by the prosecutor's office to the laboratory with a courtesy copy to relevant law enforcement agencies.

It is the responsibility of each prosecutor to notify immediately the prosecutor's office by intra-office e-mail, of any change of plea.⁹ Staff shall immediately enter such information into the case-tracking database.¹⁰

⁷ Add citation.

⁸ This may include, for example, additional untested vaginal swabs from a sexual assault kit or amplified product from PCR.

⁹ This alerts pertinent office staff to notify witnesses and provides notification to the laboratory of the change in case status so that additional unnecessary testing is not conducted.

¹⁰ **Note to Attorneys and Staff of the _____ County Attorney's Office:** To facilitate the notification process called for under this policy/memorandum, all cases containing physical evidence which may be submitted for testing

It is the responsibility of the laboratory to notify the prosecutor and lead investigator, in writing or by e-mail, of the names of all laboratory scientists conducting testing in a given case.

This policy shall be effective the * day of *, 2003.

Prosecuting County Attorney

State Crime Laboratory

Police Department or County Sheriff

Northeast Enforcement Team-DCI

College Campus Police

will be "red-flagged" at the time of review by the prosecutor. Upon the creation of a case file, the file folder will be "red-flagged."