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AB-2521 Criminal procedure: confidentiality and DNA testing. (2023-2024)

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Date Published: 07/18/2024 09:00 PM

Assembly Bill No. 2521

CHAPTER 153

An act to amend Sections 987.9 and 1405 of the Penal Code, relating to criminal procedure.

[Approved by Governor July 18, 2024. Filed with Secretary of State July 18, 2024.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2521, Waldron. Criminal procedure: confidentiality and DNA testing.

Existing law, in the trial of a capital case or specified murder cases, authorizes an indigent defendant, through the defendant's counsel, to request the court for funds for the specific payment of investigators, experts, and others for preparation or presentation of the defense. Existing law requires the fact that an application has been made to be confidential and the contents of the application to be confidential. Existing law provides that this confidentiality does not preclude any court from providing the Attorney General with access to documents protected by these provisions when the defendant raises an issue on appeal or collateral review where the recorded portion of the record relates to the issue raised.

This bill would, instead, provide that this confidentiality does not preclude any court from providing the prosecuting agency representing the state in the proceeding with that access.

Existing law authorizes a person who was convicted of a felony and is currently serving a term of imprisonment to make a written motion for performance of forensics deoxyribonucleic acid (DNA) testing. Existing law requires the DNA testing, if granted by the court, to be conducted by a laboratory that is mutually agreed upon by the district attorney in a noncapital case, and the Attorney General in a capital case, and the person filing the motion, as specified.

This bill would instead require that DNA testing to be conducted by a laboratory that is mutually agreed upon by the district attorney or Attorney General and the person filing the motion, regardless of the type of case.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 987.9 of the Penal Code is amended to read:

987.9. (a) In the trial of a capital case or a case under subdivision (a) of Section 190.05, the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an

appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

(b) (1) The Controller shall not reimburse any county for costs that exceed Department of General Services' standards for travel and per diem expenses. The Controller may reimburse extraordinary costs in unusual cases if the county provides sufficient documentation of the need for those expenditures.

(2) At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section.

(c) The Controller shall adopt regulations pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, controlling reimbursements under this section. The regulations shall consider compensation for investigators, expert witnesses, and other expenses that may or may not be reimbursable pursuant to this section. Notwithstanding the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the Controller shall follow any regulations adopted until final approval by the Office of Administrative Law.

(d) The confidentiality provided in this section shall not preclude any court from providing the prosecuting agency representing the state in the proceeding with access to documents protected by this section when the defendant raises an issue on appeal or collateral review where the recorded portion of the record, created pursuant to this section, relates to the issue raised. When the defendant raises that issue either on appeal or in a collateral review where an order to show cause has issued, the funding records, or relevant portions thereof, shall be provided to the prosecuting agency representing the state in the proceeding at their request. In this case, the documents shall remain under seal and their use shall be limited solely to the pending proceeding.

SEC. 2. Section 1405 of the Penal Code is amended to read:

1405. (a) A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion, pursuant to subdivision (d), before the trial court that entered the judgment of conviction in their case, for performance of forensic deoxyribonucleic acid (DNA) testing.

(b) (1) An indigent convicted person may request appointment of counsel in order to prepare a motion pursuant to subdivision (d) by sending a written request to the court. The request shall include the person's statement that they were not the perpetrator of the crime and shall explain how the DNA testing is relevant to their assertion of innocence. The request also shall include the person's statement as to whether they previously have 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 them that the matter cannot be considered without the missing information.

(3) (A) Upon a finding that the person is indigent, they have 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) This section does not 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) Upon request of the convicted person or convicted person's counsel, the court may order the prosecutor to make all reasonable efforts to obtain, and police agencies and law enforcement laboratories to make all reasonable efforts to provide, the following documents that are in their possession or control, if the documents exist:

(1) Copies of DNA lab reports, with underlying notes, prepared in connection with the laboratory testing of biological evidence from the case, including presumptive tests for the presence of biological material, serological tests, and analyses of trace evidence.

(2) Copies of evidence logs, chain of custody logs and reports, including, but not limited to, documentation of current location of biological evidence, and evidence destruction logs and reports.

(3) If the evidence has been lost or destroyed, a custodian of record shall submit a report to the prosecutor and the convicted person or convicted person's counsel that sets forth the efforts that were made in an attempt to locate the evidence. If the last

known or documented location of the evidence prior to its loss or destruction was in an area controlled by a law enforcement agency, the report shall include the results of a physical search of this area. If there is a record of confirmation of destruction of the evidence, the report shall include a copy of the record of confirmation of destruction in lieu of the results of a physical search of the area.

(d) (1) The motion for DNA testing shall be verified by the convicted person under penalty of perjury and shall include all of the following:

(A) A statement that they are innocent and not the perpetrator of the crime.

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

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

(D) 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.

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

(F) 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 90 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.

(e) 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.

(f) If the court determines that the convicted person has met all of the requirements of subparagraphs (A) to (F), inclusive, of paragraph (1) of subdivision (d), the court may, as it deems necessary, order a hearing on the motion. The judge who conducted the trial, or accepted the convicted person's plea of guilty or nolo contendere, shall conduct the hearing 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. Either party, upon request, may request an additional 60 days to brief issues raised in subdivision (g).

(g) 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. The convicted person is only required to demonstrate that the DNA testing they seek would be relevant to, rather than dispositive of, the issue of identity. The convicted person is not required to show a favorable result would conclusively establish their innocence.

(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. In determining whether the convicted person is entitled to develop potentially exculpatory evidence, the court shall not decide whether, assuming a DNA test result favorable to the convicted person, they are entitled to some form of ultimate relief.

(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.

(h) (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 that meets the FBI Director's Quality Assurance Standards and that is mutually agreed upon by the Attorney General or district attorney and the person filing the motion. If the parties cannot agree, the court shall designate a laboratory that meets the FBI Director's Quality Assurance Standards. Laboratories accredited by the following entities have been determined to satisfy this requirement: the American Association for Laboratory Accreditation (A2LA), the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), and Forensic Quality Services (ANSI-ASQ National Accreditation Board FQS).

(3) If the accredited laboratory selected by the parties or designated by the court to conduct DNA testing is not a National DNA Index System (NDIS) participating laboratory that takes or retains ownership of the DNA data for entry into the Combined DNA Index System (CODIS), the laboratory selected to perform DNA testing shall not initiate analysis for a specific case until documented approval has been obtained from an appropriate NDIS participating laboratory's technical leader of acceptance of ownership of the DNA data from the selected laboratory that may be entered into or searched in CODIS.

(i) In accordance with the court's order pursuant to subdivision (h), the laboratory may communicate with either party, upon request, during the testing process. 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.

(j) (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 (h) 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.

(k) 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.

(l) 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.

(m) 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.

(n) 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.

(o) 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.