

## MEMO

TO: The Honorable Fred Patton and members of the Closed Case Task Force

FROM: Alice Craig, Jeff Hahn, Darrin Devinney and Justin Edwards

RE: September 2021 Proposed report to the Legislature of the State of Kansas

Mr. Chairman and members of the Task Force,

The above-named have discussed issues related to the reporting of “closed case” DNA (and other forensic testing) reports. To better focus our response to the legislature, we have attempted to identify the primary issue and determine if there are areas of improvement to ensure no person who may have been wrongly convicted is left without immediate access to testing results.

To that end, we propose the following response to the legislative mandate provided in HB2290.

### ISSUE:

Are there CODIS “hits” that are not being communicated to prisoners, in a timely manner, which would exonerate them or cast doubt on their conviction?

### BACKGROUND:

The Combined DNA Index System (CODIS) is the FBI’s “program of support for criminal justice DNA databases as well as the software used to run these databases.”<sup>1</sup> The FBI grants state and local agencies access to this database, which allows them to compare unknown DNA samples to persons whose known DNA sample has been taken and submitted to the CODIS database.

When evidence is collected and submitted for DNA testing, if a sufficient sample of DNA is left behind and no known contributor has been identified, the sample can be submitted for comparison against the CODIS database. In Kansas, the agency primarily responsible for submission into the CODIS database is the Kansas Bureau of Investigation (KBI). There are two regional laboratories, in Sedgwick and Johnson Counties, which can submit samples to be compared against the database.

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<sup>1</sup> <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet#:~:text=What%20is%20CODIS%3F%20CODIS%20is%20the%20acronym%20for,as%20the%20software%20used%20to%20run%20these%20databases>. Last accessed September 24, 2020

When an alert to a potential match is noted by the CODIS software, it produces a “hit” report, which is then reported by the KBI to the local law enforcement agency that submitted the DNA for comparison. The local agency is then requested to obtain a known sample of the suspect’s DNA for confirmation, as CODIS hits are not confirmatory.

#### DISCUSSION:

There are many situations where a CODIS “hit” may arise, but most often these hits will occur either during the active investigation of a case, or when previously untested DNA is ordered tested post-conviction. In either of these situations, these forensic reports are routinely provided through the discovery process.

The previously unknown scenario arose when a since-closed case resulted in a CODIS hit from a previously submitted piece of evidence. Imagine the following hypothetical: An investigation produces multiple pieces of evidence capable of being tested for the presence of DNA. All but one of those pieces of evidence generate a DNA profile consistent with the known profile of the defendant. The remaining piece of evidence has a DNA profile suitable for submission to CODIS and is submitted to the KBI. Defendant’s case proceeds to trial, resulting in a conviction and a sentence. Years later, a new investigation generates a new CODIS “hit” report on the original evidence. Who is given the new CODIS results?<sup>2</sup>

The concern of some is that nothing happens with that report and potentially exculpatory evidence is not provided to an incarcerated defendant.

The KBI utilizes Laboratory Information Management Systems (LIMS) software to log incoming evidence and report out results for all forensic testing, including DNA reports. This software allows KBI scientists to log incoming evidence, track its progress through the agency, and submit reports to law enforcement through a portal. Once the report is ready, submitting agencies can log in to the portal and retrieve the report. In the above scenario, the KBI notifies the agency involved in the current submission but also provides a report to the agency that submitted the original piece of evidence to CODIS through LIMS.

Prosecutors have access to the LIMS system through the Kansas Criminal Justice Information System (KCJIS) portal. The LIMS database is searchable by KBI case number, suspect name and/or submitting agency case number. Even if the submitting law enforcement agency fails to obtain the report in a timely manner, the prosecutor can access the LIMS portal and obtain a copy of the same report, enabling expedient discovery. Prosecutors can see all reports submitted in their jurisdiction and will have access to any new CODIS hits even on old cases.

## PROPOSED CHANGES:

### **Protocol for Cold Case CODIS Hits**

Each Law Enforcement Agency should develop a protocol for notifying the prosecuting agency of any LIMS report. **The Task Force recommends the Kansas County and District Attorneys Association (KCDA) develop a Best Practices for Prosecutors.**

The prosecuting agency has an on-going **ethical** duty to disclose the information to **last** counsel of record for the Defendant. The prosecuting agency should promptly determine if there is an immediate investigative reason not to turn the information over to defense counsel. **The investigation should be concluded within a reasonable time.** At the conclusion of the investigation by law enforcement, the report should be transmitted to the defense counsel of record regardless of the investigative result. **If defense counsel of record is unavailable, the District Court should appoint counsel to review the CODIS hit.**

### **Education**

The KBI currently provides training through the Kansas Law Enforcement Training Center (KLETC) to all law enforcement about the availability of the LIMS portal. It has become apparent that not all prosecutors may be aware of its availability. By extension, defense counsel has been unaware of its existence.

- The KBI has committed to providing repeat and ongoing training to prosecutors and law enforcement across the State of Kansas about the availability and use of the LIMS portal.
- The KBI should provide training on CODIS and the LIMS system through the State Board of Indigent Defense Services (SBIDS) and the Kansas Association of Criminal Defense Lawyers (KACDL).
- The Kansas County and District Attorneys Association (KCDA) is encouraged to offer such training to its membership on no less than a quadrennial schedule, coinciding with the election of new county and district attorneys.
- KCDA should also remind its members of the obligation to provide these reports as part of the ongoing discovery process required by *Brady v. Maryland* and statute.
- Armed with the knowledge of the existence of the LIMS portal, defense counsel will be better able to make specific request of prosecutors to check for the availability of updated reports related to their clients' cases.

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<sup>2</sup> One important consideration involves who is allowed access to the report. 34 USCA §12592(b)(3) limits CODIS access to state and local labs which agree to restrict the release of DNA identification information. Violation of these restrictions can result in the loss of access to the database by the KBI.

## CONCLUSION:

The above-named believe increased training and better awareness of the LIMS portal will significantly reduce the potential risk of exculpatory forensic reports not being provided to incarcerated persons. Protocols should be formulated to ensure that both the prosecuting agency and corresponding defense counsel have the opportunity to evaluate any CODIS hit to ensure proper functioning of the justice system. We recommend the Task Force adopt these recommendations as its own and report back to the Kansas Legislature with a recommendation to end the Task Force.