

Report of the Alvin Sykes Cold Case DNA Task Force to the 2022 Kansas Legislature

CO-CHAIRPERSONS: Senator Kellie Warren and Representative Fred Patton

OTHER LEGISLATIVE MEMBERS: Senator David Haley and Representative John Carmichael

OTHER NON-LEGISLATIVE MEMBERS: Alice Craig, Audrey Cress, Darrin Devinney, Justin Edwards, Jeff Hahn, Brian Hill, Robert Jacobs (designee for Kirk Thompson), Robert Lee, Reid Nelson, Jacquelyn Rokusek, and Cory Sheedy

CHARGE

As directed by KSA 2020 Supp. 21-6901 (and as amended by provisions of 2021 HB 2077, which updated the name and duration of the former Kansas Closed Case DNA Task Force), this task force, in consultation with practitioners and experts, is to develop a plan to ensure uniform statewide policies and procedures that address, at a minimum:

- Timely receipt of the data relating to hits to the combined DNA index system (CODIS) from the forensic laboratory;
- Directly connecting the data relating to the hits to the relevant case files;
- Proper policies and procedures to ensure all hits are accounted for and followed up on;
- Procedures to address how the key parties can conduct a reasonable and timely investigation into the significance of the hits; and
- Sharing the hits in data from both solved and unsolved cases with other key parties, including the relevant prosecutors' offices, the original defense attorney and the last known attorney of record, crime victims and surviving relatives, and a local organization that litigates claims of innocence.

Alvin Sykes Cold Case DNA Task Force

FINAL REPORT

Conclusions and Recommendations

Protocol for Cold Case CODIS Hits

Each law enforcement agency should develop a protocol for notifying the prosecuting agency of a criminal case of any corresponding Laboratory Information Management System (LIMS) report when a cold case Combined DNA Index System (CODIS) hit occurs. The Task Force also recommends the Kansas County and District Attorneys Association (KCDAA) develop a “Best Practices for Prosecutors” regarding the protocol for cold case CODIS hits. The Legislature should continue to monitor the implementation of these protocols.

Because the prosecuting agency has an ongoing ethical duty to disclose the LIMS report to the last counsel of record for the defendant, the prosecuting agency should promptly determine whether there is an immediate investigative reason not to turn the information over to defense counsel.

The criminal case investigation should be concluded within a reasonable time and, at the conclusion of the investigation by law enforcement, the LIMS 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 Kansas Bureau of Investigation (KBI) currently provides training through the Kansas Law Enforcement Training Center to all law enforcement officers 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 also been unaware of its existence.

- The KBI has committed to providing repeat and ongoing training to prosecutors and law enforcement across Kansas regarding the availability and use of the LIMS portal.
- The KBI should provide training on CODIS and LIMS through the State Board of Indigents’ Defense Services and the Kansas Association of Criminal Defense Lawyers (KACDL).
- The KCDAA is encouraged to offer such training to its membership once every four years, at a minimum, coinciding with the election of new county and district attorneys.
- The KCDAA should also remind its members of the obligation to provide these reports as part of the ongoing discovery process required by *Brady v. Maryland*, 373 US 83 (1963) and statute.

With the knowledge of the existence of the LIMS portal, defense counsel will be better able to make specific requests of prosecutors to check for the availability of updated reports related to their clients’ cases.

Proposed Legislation: None. [Note: A minority of the Task Force members expressed a need to enact the above recommendations into law.]

BACKGROUND

Bills enacted in 2019 and 2021 established and provided direction to the Task Force.

In 2019, enacted HB 2290, among other things, established the Kansas Closed Case Task Force (Task Force) (codified at KSA 2019 Supp. 21-6901). HB 2290 directed the Task Force to, in consultation with practitioners and experts, develop a plan to ensure uniform statewide policies and procedures that address, at a minimum:

- Timely receipt of the data relating to hits to the combined DNA index system (CODIS) from the forensic laboratory;
- Directly connecting the data relating to hits to the CODIS to the relevant case file;
- Proper policies and procedures to ensure all hits are accounted for and followed up on;
- Procedures to address how the key parties can conduct a reasonable and timely investigation into the significance of the hits; and
- Sharing the hits in data from both solved and unsolved cases with other key parties, including the relevant prosecutors' offices, the original defense attorney and the last known attorney of record, crime victims and surviving relatives, and a local organization that litigates claims of innocence.

HB 2290 required the Task Force to complete a plan for implementation of a protocol relating to hits to closed cases, including a mechanism to ensure uniform compliance at the local law enforcement level, by October 1, 2020. The bill also required the Task Force, on or before December 1, 2020, to submit a report containing a

plan for uniform implementation of the protocol throughout the state, including articulated benchmarks to facilitate and measure adoption, and directed that this report be posted on a public website maintained by the Kansas Bureau of Investigation (KBI) and presented to the Governor, the Speaker of the House of Representatives, and the President of the Senate.

HB 2290 specified the 15 voting members of the Task Force, as follows:

- The chairperson of the standing Senate Committee on Judiciary;
- The ranking minority member of the standing Senate Committee on Judiciary;
- The chairperson of the standing House Committee on Judiciary;
- The ranking minority member of the standing House Committee on Judiciary;
- The Governor or the Governor's designee;
- The Attorney General or the Attorney General's designee;
- The Director of the KBI or the Director's designee;
- The state CODIS administrator as designated by the Director of the KBI Forensic Science Laboratory;
- A sheriff as designated by the Kansas Sheriffs Association;
- A chief of police as designated by the Kansas Association of Chiefs of Police;
- A prosecutor as designated by the Kansas County and District Attorneys Association;

- The executive director of the State Board of Indigents' Defense Services (BIDS) or the executive director's designee;
 - The president of the Kansas Bar Association or the president's designee;
 - The director of victim services of the Department of Corrections or the director's designee; and
 - One member designated by the Governor who represents an organization that litigates claims of innocence.
- Adjusted the designee provision related to the CODIS administrator member of the Task Force;
 - Removed or updated outdated language;
 - Extended the deadline for completion of a plan for implementation until October 1, 2021, and the deadline for submission of the required report until December 1, 2021;
 - Extended the expiration date for the Task Force from December 30, 2020, until December 30, 2021; and
 - Provided for staff support for the Task Force by the Office of Revisor of Statutes, the Legislative Research Department, and the Division of Legislative Administrative Services.

HB 2290 designated the chairperson of the Senate Committee on Judiciary and the chairperson of the House Committee on Judiciary as co-chairpersons of the Task Force. The bill required the Task Force to hold its initial meeting on or before October 1, 2019.

The Task Force held its initial meeting on September 25, 2019. At that meeting, a legislator member and a representative of the Midwest Innocence Project presented an overview and background of the legislation creating the Task Force, and a representative of the KBI presented an overview of CODIS and current practices for CODIS hit dissemination.

Following the initial meeting, a subcommittee of the Task Force met and prepared a memorandum containing a proposed report to submit to the Legislature to complete the charge of HB 2290. However, before the full Task Force could meet and consider the proposed report, the COVID-19 pandemic began and prevented the Task Force from completing its work by the deadlines established in HB 2290.

In 2021, enacted HB 2077, among other things, made the following adjustments to the Task Force:

- Renamed it the Alvin Sykes Cold Case DNA Task Force;

These changes are codified at KSA 2021 Supp. 21-6901.

TASK FORCE MEETINGS IN 2021

Following the 2021 Session, the Legislative Coordinating Council approved two meeting days for the Task Force, which met on August 19 and September 15, 2021.

August 19, 2021

At the August 19 meeting, the subcommittee members presented the memorandum they had prepared with a proposed report to the Legislature. [Note: The memorandum is attached to this report as Appendix A.]

In discussing the process leading to the memorandum, the subcommittee members noted they had found a lack of information regarding the process in place related to CODIS hits, as well as the factors that may cause a delay in a hit or the reporting of a hit.

The subcommittee discussed the importance of using the Laboratory Information Management System (LIMS), software the KBI utilizes to log

evidence and report results for forensic testing, including DNA reports. Prosecutors have access to LIMS through the Kansas Criminal Justice Information System, and LIMS data may be searched by KBI case number, suspect name, submitting agency case number, or a combination. Prosecutors have access to all reports submitted in their jurisdiction, including any new CODIS hits on old cases. The subcommittee also noted limitations on access to reports generated from CODIS, such as federal restrictions, must also be taken into consideration.

Due to the limited information available on the use of CODIS and LIMS within the criminal justice system, the subcommittee focused its proposed recommendations on education and training, including:

- Mandatory training by the KBI for law enforcement;
- Education of prosecutors through the Kansas County and District Attorneys Association (KCDAA) regarding the availability of LIMS; and
- Education for defense counsel on the availability of LIMS information, although the discovery obligation associated with the information rests with the prosecutor.

One subcommittee member stated the focus of the memorandum was on first steps to be taken, and there could be additional clarification or strengthening needed, especially regarding access and education for defense counsel.

Task Force members then discussed whether additional requirements were needed to ensure that law enforcement agencies provide adequate notification to interested parties of generated CODIS reports received by the agencies.

At a member's request, a Co-chairperson asked staff to provide Task Force members with information regarding cold cases that DNA information had helped resolve. [Note: This information was provided via email following the meeting and is included with the minutes for the

August 19 meeting.] The Co-chairperson then asked the subcommittee and other Task Force members to consider the proposed recommendations and what changes might be needed before adopting them at the September meeting of the Task Force.

September 15, 2021

At the September 15 meeting, the subcommittee members presented a revised memorandum containing additional recommendations for law enforcement agency protocols for cold case CODIS hits, transmission of information to defense counsel, and KBI training on CODIS and LIMS through BIDS and KACDL. [Note: The revised memorandum is attached to this report as Appendix B.]

Task Force members then asked questions of the subcommittee members and discussed various related topics, including the following:

- Whether a specific time frame for notification is needed or would be too difficult given the differences among cases;
- Who should be notified on behalf of the defendant if defense counsel of record on the case is no longer available, and whether a court should appoint counsel or notify the defendant directly in such a case;
- Whether legislation is needed to help implement the Task Force recommendations, or if implementation should be left to development of agency protocols and best practices by the KCDAA; and
- What ethical duties prosecutors have to provide CODIS result information to defendants.

Following the discussion, the Task Force, by consensus, modified the subcommittee's revised proposed recommendations to:

- Add language recommending the KCDAA develop best practices for prosecutors;

- Add language recommending the Legislature continue to monitor the implementation of the protocols;
- Clarify that prosecuting agencies have an ongoing ethical duty to disclose the information to last counsel of record for the defendant;
- Add language stating the investigation should be concluded within a reasonable time;
- Add language stating that the district court should appoint counsel to review the CODIS hit if defense counsel of record is unavailable; and
- Add language reflecting that a minority of Task Force members believe there is a need to enact these recommendations into law.

CONCLUSIONS AND RECOMMENDATIONS

The Task Force developed its recommendations over two meetings in which a subcommittee of Task Force members presented proposals for discussion (attached to this report as Appendix A and Appendix B). Following discussion on these proposals, the Task Force made the following recommendations. [Note: For the sake of clarity and consistency, the wording of some recommendations in this report has been modified from the version approved by the Task Force at the September 15, 2021 meeting (attached as Appendix C), but no substantive changes have been made.]

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 also recommends the KCDAAs develop “Best Practices for Prosecutors” regarding the protocol for cold case CODIS hits. The Legislature should continue to monitor implementation of these protocols.

Because the prosecuting agency has an ongoing ethical duty to disclose the information to the last counsel of record for the defendant, the prosecuting agency should promptly determine whether there is an immediate investigative reason not to turn the information over to defense counsel. The investigation should be concluded within a reasonable time and, 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 the 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 to all law enforcement officers 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 also been unaware of its existence.

The KBI has committed to providing repeat and ongoing training to prosecutors and law enforcement across the state regarding the availability and use of the LIMS portal.

The KBI should provide training on CODIS and LIMS through BIDS and KACDL.

KCDAA is also encouraged to offer such training to its membership once every four years, at a minimum, coinciding with the election of new county and district attorneys.

KCDAA should also remind its members of the obligation to provide these reports as part of the ongoing discovery process required by *Brady v. Maryland*, 373 US 83 (1963) and statute.

With the knowledge of the existence of the LIMS portal, defense counsel will be better able to make specific requests of prosecutors to check for the availability of updated reports related to their clients’ cases.

[Note: A minority of the Task Force members expressed a need to enact the above recommendations into law.]

APPENDIX A

MEMO

TO: The Honorable Fred Patton and members of the Closed Case Task Force
FROM: Professor Alice Craig, Jeff Hahn, Darrin Devinney and Justin Edwards
RE: 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.”¹ 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.

¹ <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

APPENDIX A

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?²

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:

² 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.

APPENDIX A

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 have 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 Kansas County and District Attorneys Association (KCDAA) 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.
- KCDAA 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.

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. 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.

APPENDIX B

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,

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

ISSUE:

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BACKGROUND:

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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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APPENDIX B

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?²

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.

APPENDIX B

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 prosecuting agency should promptly determine if there is an immediate investigative reason not to turn the information over to defense counsel. 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. The prosecuting agency has an on-going duty to disclose the information to counsel of record for the Defendant as part of discovery.

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.
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- 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.
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APPENDIX B

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.

APPENDIX C

MEMO

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APPENDIX C

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APPENDIX C

CONCLUSION:

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