

REAUTHORIZATION OF THE INNOCENCE
PROTECTION ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED ELEVENTH CONGRESS
FIRST SESSION

—————
SEPTEMBER 22, 2009
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Serial No. 111-74
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Printed for the use of the Committee on the Judiciary



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U.S. GOVERNMENT PRINTING OFFICE

52-410 PDF

WASHINGTON : 2010

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REAUTHORIZATION OF THE INNOCENCE PROTECTION ACT

TUESDAY, SEPTEMBER 22, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:30 p.m., in room 2141, Rayburn House Office Building, the Honorable Robert C. “Bobby” Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Conyers, Cohen, Quigley, and Gohmert.

Staff Present: (Majority) Jesselyn McCurdy, Counsel; Karen Wilkinson, Fellow, Federal Public Defender Office Detailee; Ron LeGrand, Counsel; Veronica Eligan, Professional Staff Member; (Minority) Caroline Lynch, Counsel; and Robert Woldt, FBI Detailee.

Mr. SCOTT. The Innocence Protection Act, a part of the Justice for All Act of 2004, is set to expire on September 30, 2009. There is currently no pending legislation for reauthorization of the IPA.

Today we will hear testimony about issues surrounding the actual, specifically the issues that have developed during its implementation and what we have done to address those problems. The Post-Conviction DNA Testing Grant Program and the Capital Representation Improvement Grant Program are also going to be considered.

Now, the Bloodsworth Grants Program authorizes the Attorney General to grant funding for States for post-conviction DNA testing to help ascertain whether individuals have been wrongly convicted. The Innocence Project reports that to date there have been 242 post-conviction exonerations through DNA testing in the United States, spanning 34 States. Seventeen of the 242 exonerees were on death row, and true suspects and/or perpetrators have been identified in 104 of the DNA exoneration cases. The average length of time served by exonerees is 12 years. Total number of years served is approximately 3,019. The average age of exonerees at the time of their wrongful conviction was 26.

The most recent exoneree is Mr. Kenneth Ireland, who is with us here today. Mr. Ireland spent 21 years in prison wrongfully convicted of rape and murder of a female factory worker and mother of four until DNA testing of crucial evidence excluded him as a con-

tributor of the DNA specimen. To date the actual murderer has not been identified.

The success of post-conviction DNA is evident by the exonerations it has yielded and has the potential to exonerate what is estimated to be hundreds more who are wrongly convicted. Initially, post-conviction DNA testing under the Bloodsworth Grant Program was seriously underutilized due to unattainable standards for grant applications. Congress had funded a total of \$5 million per year for the grants for fiscal years 2005 to 2009, but the funds were not distributed until fiscal year 2008. We learned that statutory language in the act had set the evidence retention standards for authorizing the grants so high as to make it almost impossible for any State to qualify. Only three States, Virginia, Connecticut and Arizona, had applied for the grants in the first cycle, but none were successful.

We eventually corrected the problem through appropriations language, but it is disappointing to know that such a technical problem went as long as it did before correction, given that the lives and freedom of wrongfully convicted people hung in the balance. For fiscal year 2008 Congress appropriated an additional \$4.8 million and asserted a temporary change in the statutory language that OJP suggested so that applicant States would be able to meet the requirements for grant under the Innocence Protection Act.

Thus, \$11.8 million became available along with the new temporary language intended to facilitate the grant post-conviction DNA testing funds. I understand that five States have applied for those grants, and I am looking forward to hearing testimony about whether the new standard achieved the desired outcome for those applications. I also look forward to working with my colleagues to determine whether or not the temporary language inserted into the fiscal year 2008 should be made permanent or whether we should make other corrections in the law.

DNA technology has given us the means to identify the wrongly convicted. We now have the responsibility to use those means. DNA testing has indeed been an invaluable tool for ensuring that the guilty are identified beyond a reasonable doubt, and that the wrongfully accused and convicted are cleared of suspicion with their reputations restored.

However, like any tool, it is only successful to the extent to which it is employed. We will hear today from some of those most qualified to provide insights and suggestions as to ways of correcting any remaining problems in the act and both the Bloodsworth grant and the Innocence Protection act generally.

We will also hear testimony about the Capital Defense Improvement Grants Program. Part of the Innocence Protection Act, section 421 of the act, authorizes the U.S. Attorney General to provide grants to States for the purpose of establishing, implementing, or improving an effective system for providing competent legal representation of indigent defendants in capital cases. In like manner, section 422 provides for grants of an equal amount to be awarded to prosecutors at the same time in order to enhance their ability to represent the public in State capital cases. Neither of these grant programs permit the funds to be used directly or indirectly for the representation or prosecution of specific capital cases. Es-

essentially the funds are limited to training and support for both defenders and prosecutors.

While this type of grant program represents a departure from the historic trend of Federal funding going solely to State prosecution, some of the indigent defense advocate community have complained that this equitable grant requirement of the program does little, if anything, to decrease the disparity between the indigent defense and prosecution functions in State capital cases.

Every State has a funded competent prosecution structure in place. The same is not true for indigent defense. There are States like Connecticut and North Carolina that have funded, organized indigent defenders or Public Defender systems. Then there are others.

In a briefing paper submitted to the Committee earlier this year, a coalition of advocates comprised of the ACLU, the Brennan Center for Justice, the Constitution Project, the Innocence Project, and the NAACP Legal Defense and Education Fund, and others declared that, and I quote, the indigent defense services in the United States are in a state of perpetual crisis. In 1999, a Department of Justice report concluded that indigent defense was in a chronic state of crisis.

So everybody agrees that indigent defense, as a whole, needs more funding. Studies clearly show that lack of adequate funding has led to crushing caseloads, insufficient pay for defense attorneys, lack of proper training and oversight of defense attorneys, insufficient funding for investigators, experts and mental health professionals, lack of independence by defense and, ultimately, the wrongful conviction of the innocent.

In Texas, six people have been executed without any habeas corpus review because their lawyers missed the statute of limitations. Three of the six were represented by the same lawyer. The lawyer falsely claimed that he tried to file, but the time stamp machine at the courthouse was broken. It was not. Believe it or not, the lawyer is still practicing; is currently representing over 400 people accused of crimes.

Many States have been either unwilling or unable to adequately fund and administer indigent defense systems. Instead the judiciary is permitted to inject itself into the defense function, forcing attorneys to carry excessive caseloads, failing to provide attorneys with investigators, experts and support services they need to uphold the basic responsibilities of adequate representation, neglecting to provide any type of meaningful supervision to hold lawyers accountable for less than zealous representation, and failing to make available ongoing training to keep attorneys abreast of ever evolving criminal justice sciences. These poorly administered and underfunded systems compromise the ability of lawyers employed by or under contract with those systems to meet their constitutional and ethical obligations to their clients.

So I look forward to hearing from our witnesses on the progress with the implementation of the Innocence Protection Act. And now it is my pleasure to recognize the esteemed Ranking Member of the Subcommittee, the gentleman from Texas, Judge Gohmert.

Mr. GOHMERT. Thank you, Chairman Scott. I do appreciate the holding of this hearing on the reauthorization of Kirk Bloodsworth

Post-Conviction DNA Testing Program in the capital case litigation initiative, both of which were authorized by the Innocence Protection Act of 2004. President Bush announced his DNA initiative in 2003 to provide funds and attention to the areas of DNA backlog issues, post-conviction testing and capacity enhancement. He did so with the understanding that the responsible and timely use of DNA technology would serve the interests of justice in courtrooms and communities throughout this country.

I point this out because all too often our forensic capabilities, particularly post-conviction DNA testing, is portrayed as a left or right issue. Nothing could be farther from the truth. We should be about seeking justice regardless of party or position on the political spectrum. From its outset, the DNA initiative sought to harness DNA's tremendous potential to simultaneously serve victims, aid law enforcement and protect the innocent. Today, 44 States and the Federal Government provide for post-conviction DNA testing where circumstances dictate, many modeled on Federal legislation requiring the post-conviction retention of biological samples and providing for testing upon legitimate claims of innocence.

A little over a year ago the Department of Justice had received just eight grant applicants in 4 years of the Kirk Bloodsworth program, with only five grant awards, all in fiscal year 2008. At that time, I asked the Department why this program was being underutilized. Today that number has grown to 18 applicant States and 14 grant recipients. While the progress is notable, it is just as important for Congress to understand what is behind these numbers as it was when only five States applied for grants.

With 44 States providing for post-conviction DNA testing, and the public outcry each time even a single person is exonerated through the use of DNA, it is obvious that these numbers don't add up, particularly in light of Congress's efforts to make the program language less restrictive in 2008. Given these facts, I am curious why only 18 States have applied, and I look forward to hearing our panel's views on what the future of this program holds, how we might improve it, and whether or not more needs to be done. And I do thank you for being here because I know the pay is not all that good since it is zero. But we do appreciate your being here today and look forward to your input.

Thank you.

Mr. SCOTT. Thank you. The gentleman from Michigan, the Chairman of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I congratulate you and Judge Gohmert on this hearing because it is so important. The amount of injustice that is going on in the criminal justice system is criminal. I mean, it is really so bad and it has been going on so long that people are getting kind of used to it; like that is just the way it is; there is nothing that can be done about it. And this hearing is a statement that there are some of us who think that there is something that can be done about it.

Attorney Diana Oo was with me in Angola prison in Louisiana. We were visiting three inmates. No, two inmates, one had been released somehow. But they were all sentenced to life imprisonment in solitary confinement. That means you get out 1 hour a day every day for exercise or the yard, and that is it. You go back into soli-

tary confinement. And what did the prisoners do there? Well, we went to one place where they were building their own coffins. How do you like that for training on the job?

And so I come to this as one who has had a lot of problems with this. There is a University of Michigan study that documented that many of the people that were found innocent served an average of 10 years in prison before release. The number of false convictions can possibly be in the tens of thousands in the United States of America. So we have got a big job on our hands. I have been meeting with the Michigan public defenders and they tell me about, that they can't get reimbursed even anywhere near adequately to compensate for what they would have to do to put on a halfway decent defense. So it is not good. And pro bono is not all that high either. There are some low numbers there.

So, Mr. Chairman, Judge Gohmert, this is where the rubber hits the road in the whole idea of justice because—and I don't want to start any class warfare, but it is only the people without any income that have to have public defenders, that have to have pro bono, have to have young lawyers assigned cases that fall asleep or forget to—how could you have a case and forget that there is a limitation period on the appeal that could be the difference between whether a person is executed or not?

This is the beginning of an incredibly enormously important hearing, and I commend you both.

Mr. SCOTT. The gentleman has time remaining. Were you going to yield time to the gentleman from—

Mr. CONYERS. Quigley? Never. No, nothing for Quigley. Well, okay.

Mr. QUIGLEY. Thank you, Mr. Chairman and Mr. Chairman. And I just want to focus on what the Ranking Member discussed, and that was the issues of justice here. For what it is worth, a 10-year veteran of 26 in California and Chicago as a criminal defense attorney, I had a ringside seat to the inequities that exist. And from my own home State, Illinois, the record is a sad one. We have exonerated, which I guess is the good news, more people on death row than we have executed. But it is a sorry record of the initial convictions.

In addition, a good friend of mine is the Public Defender of Cook County now, former Judge A.C. Cunningham. Earlier this year, he was within a day of withdrawing from all their capital cases because their entire amount of funding from the State of Illinois was going to be cut off. So for those who think this is a problem from a while ago and DNA has cured it, it is simply not the case. It is extraordinary to watch this.

And when I left 26th Street I was elected as a Cook County Commissioner. My first task was to help settle a case called the Ford Heights four, wildly notorious, where we found four people who were innocent guilty. They were put on death row. One was within days of being executed. And if I can't strike at the hearts of those who don't like this sort of thing, I would remind them that we settled for \$36 million, something which sadly takes place all too often in our country.

So I appreciate the indulgence of the Chairman, and our panelists' time and effort. Thank you.

Mr. SCOTT. Thank you. We will you now introduce our panelists. The first witness is Ms. Lynn Overmann, Senior Advisor, Office of Justice Programs, with the U.S. Department of Justice. Ms. Overmann is an alumni of Bryn Mawr College and New York University School of Law. Immediately prior to coming to the Justice Department in May of this year, she was in private practice. Prior to that she served as Assistant Public Defender with the Miami-Dade Public Defender's Office.

Our second witness will be Barry Scheck, who is a Professor of Law At Benjamin Cardozo School of Law in New York. He and his colleague, Peter Neufeld, co-founded and co-direct the Innocence Project, an independent, nonprofit organization that is closely affiliated with the law school which uses DNA evidence to exonerate the wrongly convicted. In 17 years of existence the project has either represented or assisted the representation of the vast majority of the 242 individuals who have been exonerated through post-conviction testing. And Mr. Scheck and Mr. Neufeld were moving forces in getting the Innocence Protection Act initially passed.

Third witness is Karen Goodrow, who is the Director of the Connecticut Innocence Project, a unit within the Public Defender services of the State of Connecticut. She is an alumni of Western New England College School of Law, and has worked primarily in the public sector. 2006, she used the post-conviction DNA testing. Through the use of post-conviction DNA testing she and attorney Brian Carlow secured the release of James Calvin Tillman, a gentleman who served 18½ in prison for crimes he did not commit. Has also represented Mr. Miguel Roman and Mr. Kenneth Ireland, both of whom were exonerated through post-conviction DNA testing after having been incarcerated in excess of 20 years.

Next witness is Peter Marone, Director of the Commonwealth of Virginia Department of Forensic Sciences, and I am proud to introduce him because Virginia has a reputation of being in the forefront of DNA testing. I believe the first conviction for DNA testing was in Virginia. If it wasn't the first it was one of the first. It was the first?

Mr. MARONE. One of the first.

Mr. SCOTT. One of the first and we have been in the forefront, his department has been in the forefront of forensic sciences for many years. He graduated from the University of Pittsburgh with both bachelor's and master's degrees in chemistry, and he was appointed Director of the Virginia Department of Forensic Science in February 2007. He is a member of numerous professional forensic science organizations.

And finally Steven Bright is President and Senior Counsel of the Southern Center for Human Rights in Atlanta, teaches at Yale and Georgetown Law Schools. His work at the center has included representatives of people facing death penalty trials and appeals in the State and Federal courts, class action lawsuits to remedy human rights violations in prisons and jails and challenges to inadequate representation provided to poor people accused of crimes. He has received the American Bar Association's Thurgood Marshall Award in 1998, named news maker of the year in 2003 for his contributions in bringing about the creation of a Public Defender system in Georgia, and he received the Defense Lawyers Lifetime

Achievement Award from the National Association of Criminal Defense Lawyers in 2008.

Each witness's written testimony will be entered into the record in its entirety, and I would ask each witness to summarize his or her testimony in 5 minutes or less. To help stay within that time limit there is a device on the table. It will start green, turn to yellow when you have approximately a minute to go, and it will turn red when your 5 minutes have expired.

Ms. Overmann.

TESTIMONY OF LYNN OVERMANN, SENIOR ADVISOR, OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Ms. OVERMANN. Mr. Chairman, Ranking Member Gohmert, and Members of the Subcommittee, I am pleased to have the opportunity to discuss the Department of Justice's efforts to implement the Innocence Protection Act of 2004. We appreciate the Subcommittee's interest in this matter.

During a recent speech to the American Council of Chief Defenders, U.S. Attorney General Holder renewed the Department's commitment to improve the quality of indigent defense. In his speech, the Attorney General candidly acknowledged that there is a crisis in indigent defense in this country. Resources for Public Defender programs lag far behind other justice system programs, constituting only about 3 percent of all criminal justice expenditures in some of our Nation's largest counties. We know that defenders in many jurisdictions carry huge caseloads that make it difficult for them to fulfill their legal and ethical responsibilities to their clients.

Our challenge is to ensure that the accused have a competent defense and that, in the event that an innocent person is convicted, that person will ultimately be exonerated.

At the Office of Justice Programs, or OJP, we understand that this challenge is not new. As a result, OJP has taken several steps to address this issue. We have multiple initiatives covering both our National Institute of Justice, or NIJ, and our Bureau of Justice Assistance, BJA.

NIJ administers the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program. The program helps States defray the costs associated with post-conviction DNA testing of rape, murder, and nonnegligent manslaughter cases. To date, NIJ has awarded over \$17.6 million to 14 States through this program. Fiscal year 2009 is the second year that NIJ awarded Bloodsworth grants. In fiscal year 2008 five States applied for and received awards totaling over \$7.8 million. This year NIJ received 13 applications and awarded grants to nine States for a total of more than \$9.8 million.

All of the funds appropriated for this program from fiscal year 2006 through fiscal year 2009 have now been awarded. I am aware that there have been concerns about the delay in awarding these funds. I have addressed the reasons for this delay in my written testimony. But I wanted to highlight some of the steps OJP took to help address the problem.

In fiscal year 2008, OJP worked closely with the House and Senate Appropriations Committees to ease the statutory requirements

that presented problems with awarding the Bloodsworth funds. In both fiscal year 2008 and fiscal year 2009, NIJ conducted extensive outreach to ensure that key State and local government officials, as well as forensic professionals, were aware of the program to help encourage even more applications in fiscal year 2009. These efforts included a post-conviction symposium with practitioners from 46 States. We are pleased that this outreach helped lead to the increase in applications in fiscal year 2009 and the resulting increase in awards this year. We plan to continue to seek input from the field in the future.

Although the Bloodsworth program may have gotten off to a slow start, we are confident that it is now moving in the right direction. We look forward to continuing to work with Congress to ensure that contingent on funding availability the program continues to grow.

Another key OJP effort is the Capital Case Litigation Initiative, or CCLI, which BJA established in fiscal year 2005. CCLI is a partnership to create specialized training for trial judges, State and local defense counsel, and prosecutors who litigate death penalty cases. In fiscal year 2009 BJA focused CCLI funding on making available high quality training on a competitive basis to capital case litigators in States that demonstrate the greatest need. By the end of September, BJA will have awarded more than 1.8 million in funding to eight States. Per the Innocence Protection Act, funding is split equally between prosecutor and defense purposes. BJA's goal with CCLI remains ensuring that the limited funds available are used in the most productive ways possible to improve justice for all.

OJP's support for indigent defense and exoneration initiatives goes beyond the programs established by the Innocence Protection Act. In fiscal year 2009 BJA initiated two new programs. One program focuses on improving the functioning of the criminal justice system and includes funding for indigent defenders. The second program, the Wrongful Prosecution Review Program, provides funding to nonprofit organizations and Public Defender offices dedicated to exonerating the innocent.

We are also planning a National Indigent Defense Conference, which will be held February here in Washington. Public defenders from each state will be invited to bring with them a key state stakeholder to help foster collaboration within the States.

Finally, the Attorney General has convened a working group within the Department of Justice to address the ways the Department can work with our State and local partners to help improve indigent defense services. Please be assured that Attorney General Holder, the Department of Justice, and OJP in particular are committed to working with our State, local, and tribal partners to protect innocent people who are wrongfully convicted.

We are also committed to working with Congress on this issue. As the Attorney General recently said, when a system breaks down we all lose.

This concludes my statement, Mr. Chairman. Thank you for the opportunity to testify today. I welcome the opportunity to answer any questions the Subcommittee may have.

[The prepared statement of Ms. Overmann follows:]

PREPARED STATEMENT OF LYNN OVERMANN



Department of Justice

STATEMENT

OF

LYNN OVERMANN
SENIOR ADVISOR
OFFICE OF JUSTICE PROGRAMS

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

“REAUTHORIZATION OF THE INNOCENCE PROTECTION ACT”

PRESENTED ON

SEPTEMBER 22, 2009

**LYNN OVERMANN
SENIOR ADVISOR
OFFICE OF JUSTICE PROGRAMS
U.S. DEPARTMENT OF JUSTICE**

Mr. Chairman, Ranking Member Gohmert and Members of the Subcommittee: I am pleased to have the opportunity to discuss the Department of Justice's (DOJ) efforts to implement the Innocence Protection Act of 2004. We appreciate this Subcommittee's interest in this issue.

My name is Lynn Overmann and I am a Senior Advisor in the Office of the Assistant Attorney General for the Office of Justice Programs (OJP) within the Department of Justice. OJP's mission is to increase public safety and improve the fair administration of justice across America through innovative leadership and programs. A critical part of this mission is ensuring that the accused have a competent defense and that, in the unfortunate event that an innocent person is convicted, this person will ultimately be exonerated.

During a speech to the American Council of Chief Defenders (ACCD), a section of the National Legal Aid & Defender Association, U.S. Attorney General Eric Holder opened a new era of dialogue with the nation's indigent defense leaders and renewed the Department's commitment to improve the quality of indigent defense by proposing steps for improving the nation's criminal justice system. In his speech, the Attorney General candidly acknowledged that there is a crisis in indigent defense in this country. Resources

for public defender programs lag far behind other justice system programs, constituting only about three percent of all criminal justice expenditures in our nation's largest counties. We know that defenders in many jurisdictions carry huge caseloads that make it difficult for them to fulfill their legal and ethical responsibilities to their clients.

When defendants fail to receive competent legal representation, their cases are vulnerable to costly mistakes that can take a long time to correct. Lawyers on both sides can spend years dealing with appeals arising from technical infractions and procedural errors. When that happens, no one wins.

At OJP we understand that this challenge is not new. As a result, OJP has taken several steps in addressing this issue. We have multiple initiatives covering both our National Institute of Justice (NIJ) and our Bureau of Justice Assistance (BJA).

Kirk Bloodsworth Postconviction DNA Testing Grant Program

NIJ administers the Kirk Bloodsworth Postconviction DNA Testing Grant program. The program helps states defray the costs associated with postconviction DNA testing of forcible rape, murder, and nonnegligent manslaughter cases and to locate and analyze biological evidence samples associated with these cases. NIJ has awarded a total of over \$17.6 million to 14 states through this program.

Fiscal Year 2009 is the second year that NIJ has awarded Bloodsworth grants. In Fiscal Year 2008, five states -- Arizona, Kentucky, Texas, Virginia, and Washington -- applied for and received awards totaling over \$7.8 million. We have already seen some promising signs from these grants. In Arizona, 162 inmates have applied for assistance under the grant. These applications are currently being reviewed. In Kentucky, 97 cases are currently being reviewed through program funds.

This year, NIJ received 13 applications and awarded grants to nine states -- : Connecticut, Minnesota, North Carolina, Colorado, Louisiana, Wisconsin, California, New Mexico, and Maryland -- for a total of more than \$9.8 million.

I am aware that there are concerns about the delay in awarding these funds. These delays were due to very strict eligibility requirements in Section 413 of the Justice for All Act. Funds were first appropriated for the Bloodsworth program in Fiscal Year 2006. No solicitation was issued that fiscal year because of the difficulty crafting a solicitation consistent with the stringent language of the statute. Generally speaking, the statute requires states to demonstrate that all jurisdictions within the state comply with the detailed and strict eligibility requirements for preserving biological evidence and providing post-conviction DNA testing contained in the law.

In Fiscal Year 2007, NIJ issued a solicitation announcing its Post-Conviction DNA Testing Assistance Program consistent with the stringent requirements of Section 413. The solicitation included detailed information regarding eligibility. Only three

states applied. After review, it was determined that none of the three applicants had established eligibility for the program. As a result, NIJ was unable to make any awards. Both the Fiscal Year 2006 and Fiscal Year 2007 appropriations were carried over into Fiscal Year 2008.

FY 2008 appropriations language eased the stringencies of Section 413. Generally speaking, the new language provided OJP with administrative flexibility to require that the states demonstrate only that they have in place rules, regulations, and practices intended to ensure that all jurisdictions within the state comply with the detailed and stringent eligibility requirements for preserving biological evidence and providing post-conviction DNA testing contained in the law.

In Fiscal Year 2008, NIJ conducted extensive outreach to ensure that key state and local government officials as well as forensics professionals were aware of the solicitation. NIJ also worked with organizations such as the American Society of Crime Lab Directors and the American Academy of Forensic Sciences to notify their membership about this program. While we were pleased that we were able to award funds in Fiscal Year 2008, we were also disappointed that more states did not apply.

After the Fiscal Year 2008 application process, NIJ surveyed the states that did not apply to try to determine their reasons for declining. The explanations varied. For example, some states maintained that they had sufficient funds to conduct Postconviction DNA analysis, while other states claimed that they had few applicable cases.

For this fiscal year, NIJ undertook an extensive outreach program, including a post-conviction symposium with representatives from all 50 states. We are confident that this outreach helped lead to the increase in applications and the resulting increase in awards.

Although the Bloodsworth Postconviction DNA program may have gotten off to a slow start, we are confident that it is moving in the right direction. All of the funds appropriated for this program from Fiscal Year 2006 through Fiscal Year 2009 have now been awarded.

We will continue to work with Congress to ensure that, contingent on funding availability, more states can apply for and receive funding. In addition we will work with state and local criminal justice systems and laboratories to ensure that states have procedures in place to ensure that DNA and other biological evidence is preserved in the way the Innocence Protection Act intended.

Capital Case Litigation Initiative

BJA established the Capital Case Litigation Initiative (CCLI) in 2005 as a partnership to create specialized trainings for trial judges, state and local defense counsel and prosecutors who litigate death penalty cases. The program's goal was to improve the reliability of jury verdicts in death penalty cases and ensure quality representation for the accused.

BJA partnered with three lead agencies, the National District Attorneys Association (NDAA), the National Legal Aid & Defenders Association (NLADA) and the National Judicial College (NJC), to develop a training specific to each discipline. By the end of the Fiscal Year (FY), training sessions were delivered at the state and local levels. These trainings focus on investigation techniques; pretrial and trial procedures, including the use of expert testimony and forensic science evidence; advocacy in capital cases; and capital case sentencing-phase procedures. In Fiscal Year 2006 and 2007, BJA continued this program, providing trainings for prosecutors, defense attorneys and judges across the nation.

In FY 2008, the CCLI appropriation was specifically tied to new legislation, the Innocence Protection Act (IPA), a subsection of the Justice For All Act (JFAA). This change in appropriation compelled substantial changes to the program design. Specifically the Act mandates that funding be split equally between capital prosecutors and defense attorneys purposes. CCLI applicants are now limited to state agencies in states that conduct, or will conduct, prosecutions in which capital punishment is sought, and there is no specific statutory authority for the training of judges, which had been an integral part of previous CCLI program designs. For the state agency to be eligible, it must have an "effective system: (as defined in the IPA) for providing competent legal representation for indigent defendants in capital cases.

In FY 2008, BJA provided funding for programs in four states. BJA also provided general technical assistance through Georgia State University, which is implementing a defense-initiated victim outreach (DIVO) program in capital cases in up to four states, targeting both prosecutors and defense attorneys. DIVO creates the infrastructure within the criminal justice system to sustain the pretrial negotiation process that involves the defense, judiciary, and prosecution to ensure more reliable jury verdicts and sentences. In addition, with BJA support, the National Clearinghouse for Science, Technology and the Law (NCSTL) is developing two forensic trainings for prosecutors and defense attorneys who may try capital cases. The training focuses on deciphering what evidence is necessary for trial, and subsequently must be sent to the crime lab for analysis, in addition to general forensic knowledge necessary in death penalty trials. Consistent with the statute, equal amounts of funds were used to train prosecutors and defense attorneys.

In FY 2009, BJA is focusing CCLI funding on making available high-quality training on a competitive basis to capital case litigators in all death penalty states. By the end of September, BJA will award more than \$1.8 million in funding to eight states - eight states: Arizona, Georgia, Kentucky, Louisiana, Ohio, Oklahoma, Pennsylvania and South Carolina. Per the statute, funding is split equally between prosecutor and defense purposes.

BJA's goal with CCLI remains ensuring that the limited funds available are used in the most productive ways possible to improve justice for all and to move forward in close coordination with key partners that represent both sides of the issue.

National Initiatives: Adjudication Program

In FY 2009 BJA, using funds from the Byrne Competitive grant program, initiated the National Initiatives: Adjudication Program. This program focuses on national initiatives to improve the functioning of the criminal justice system, through indigent defense, community prosecution, and addressing the “CSI effect” hypothesis (that the CSI television shows affect the public perceptions, and, in turn, impact jury trials either by burdening the prosecution by creating greater expectations about forensic science than can be delivered or burdening the defense by creating exaggerated faith in the capabilities and reliability of the forensic sciences). By the end of September, BJA will award more than \$3.1 million under this initiative.

Wrongful Prosecution Review Program

After consulting with those in the field who work to exonerate potentially wrongfully convicted defendants, and consistent with Congressional guidance, BJA used a carveout of FY09 CCLI funding to create the Wrongful Prosecution Review discretionary grant program to provide high quality and efficient representation for defendants with post-conviction claims of innocence. While in some cases, post-conviction DNA testing alone can prove innocence, many cases will rely on other forms of proof, and other cases will involve DNA testing together with additional proof and/or

expert testimony, which may be extremely costly. The Wrongful Prosecution Review Program's goal is to provide quality representation to the wrongfully convicted; alleviate burdens placed on the criminal justice system through costly and prolonged post-conviction litigation; and identify, when possible, the actual perpetrator of the crime.

The Wrongful Prosecution Review Program will support public defender offices and non-profit state and local organizations dedicated to exonerating the innocent. These organizations include in-house post-conviction programs with demonstrable experience and competence in litigating post-conviction claims of innocence. The program will also support national organizations to work collaboratively with the state and local organizations to competently and efficiently litigate post-conviction claims of innocence. This will include providing trainings on such topics as evaluation/screening of cases during intake, forensic re-analysis, expert consultation and testimony, and general litigation issues. In FY 2009, BJA will award more than \$2.5 million for the Wrongful Prosecution Review Program, composed of 11 grants to state and non-profit entities and one training and technical assistance award.

National Indigent Defender Conference

The Office of Justice Programs is planning a national indigent defense conference, which we hope to hold next March. This conference will bring together public defenders from every state to address topics such as coalition building, standards development, access to technology, and the judicial role in the appointment of counsel. We also plan to have defenders bring a key stakeholder with them – someone from

prosecution or the bench, for example. We will share more information about this conference as our planning progresses.

In addition, the Attorney General has convened a working group within the Department of Justice to address the ways that the Department can work with our state and local partners to help improve indigent defense services.

Attorney General Holder, the Department of Justice, and OJP in particular are committed to working with our state, local and tribal partners to protect innocent people who are wrongfully convicted. We are also committed to working with Congress on this issue. As the Attorney General said before the American Council of Chief Defenders, “When the system breaks down, we all lose.”

This concludes my statement, Mr. Chairman. Thank you for the opportunity to testify today. I welcome the opportunity to answer any questions you or Members of the Subcommittee may have.

Mr. SCOTT. Thank you very much.
Mr. Scheck.

TESTIMONY OF BARRY C. SCHECK, CO-DIRECTOR AND CO-FOUNDER, THE INNOCENCE PROJECT, BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK, NY

Mr. SCHECK. First I would like to thank Chairman Scott, Ranking Member Gohmert and, of course, Chairman Conyers. I will never forget going to Angola prison, and you should note that Herman Wallace's Federal habeas—Albert Woodfox's Federal habeas application has been granted by the district court since we were there. It is now on appeal to the, Fifth Circuit, and I am hopeful that he will be exonerated.

I would like to get right to the point because we have put in extensive testimony, and we are indebted to this Committee because you were able to get changes in the appropriation language so we could open up that Bloodsworth money.

But I would like to go back to the very beginning. And if you look at the Justice for All Act, there were actually three other provisions aside from 412, which is Bloodsworth, but there were three other provisions: section 303 that dealt with DNA training and education for law enforcement, correction personnel, and court officers; section 305, DNA research and development; section 308, DNA identification of missing persons. And originally, all of those provisions were supposed to be tied to section 413, which required that each State come up with schemes for evidence preservation, and that they also pass a post-conviction DNA statute that was comparable to the Federal act.

When the Bush administration began implementing the Justice for All Act, it appropriated by itself, with the President's initiative, monies for 303, 305 and 308, and detached it from 413. And most of the money is in 303, 305 and 308. And as Ms. Overmann and I were discussing, a lot of that money actually goes toward services that crime labs use to preserve evidence and for administration. So our proposal very, very simply is, number one, when you reauthorize this act, put section 413 requirements on 303, 305 and 308.

Now, as far as those evidence preservation requirements are concerned, obviously the changes made in the appropriations language were very helpful in opening up the money. But, as Mr. Marone and I were talking before the hearing, we at the Innocence Project recognize as we go from State to State that we have to be completely realistic about what States can do in terms of preserving evidence. And so what we are proposing now is that there ought to be a national working group on evidence preservation that can come up with some good and realistic schemes and definitions, things, requirements that the States can meet. We don't want States not to get money under 303, 305, 308, much less the Bloodsworth Act, by being unable to meet overly stringent and unrealistic evidence preservation requirements. But those should be in place for everyone's sake.

We included, you know, just as atmospheric, a chart in our testimony here detailing exonerations in each jurisdiction of every Member of this Committee, where there had been what I would like to call an Innocence Project trifecta, a DNA exoneration, a DNA data

bank hit, and an innocent perpetrator apprehended. And when we calculated these numbers, in terms of the number of—I am sorry—exoneration of an innocent, a data bank hit on the real perpetrator, and the subsequent prosecution of that real perpetrator. And we were very careful.

For those friends of ours in Florida, there is one case here, Jerry Frank Townsend and Frank Lee Smith. Frank Lee Smith was sentenced to death, was on death row. He died when the DNA exonerated him.* Jerry Frank Townsend, who collected \$4 million yesterday in Florida courts in a compensation case, pled guilty as a mentally retarded man to eight rape murders that he didn't commit. And all of those crimes, Frank Lee Smith's crime, when he was convicted, and Jerry Frank Townsend were committed by one man, Eddie Lee Moseley. And law enforcement officials in the Florida and Dade County area believe that Eddie Lee Moseley committed 62 rapes and murders for which he was not apprehended while these two people are in jail, one of them on death row.

Now, the Innocence Project's cases that Bloodsworth addresses are really cold cases. And if evidence preservation requirements are put into place, police can also, in an expeditious way, solve cold cases. So this is helping everyone. And that is why you should extend 413 requirements across the board to all categories.

Two other simple fixes that we think would help this legislation, and it has to do with the Federal Post-Conviction DNA Act. We believe that there ought to be a provision in the act, common sense, that a Federal district court judge and hopefully the States will begin to apply this as well, on an application from a defense lawyer, either before the trial or after the trial, where there has been a DNA profile created by a CODIS approved laboratory, a judge on a showing of good cause or in the interest of justice can order that profile run in the CODIS data bank to get a hit. Unfortunately, in some instances we have run into situations in States where police or prosecutors will not run DNA profiles from crime scenes in the data bank, either before the trial or after the trial. And we need judges to have the authority to order that when necessary in certain cases. It is just common sense. And that is something that should be added, as well as a slight definition.

In the Federal Act, they say that you have to show that, quote, identity was at issue in your trial. And some have construed this to mean that if somebody gave a confession, then identity wasn't at issue. And I don't have to tell this panel the number of cases where DNA exonerations have proven that there were false confessions. There is just too many of them to even go into, whether it be Earl Washington in Virginia or Eddie Joe Lloyd in Michigan, or Chris Achoa in Texas, just to name a few, or God knows how many in Illinois, Mr. Quigley.

Those are my remarks.

[The prepared statement of Mr. Scheck follows:]

*On December 15, 2000, 11 months after his death, and 14 years after his 1986 conviction, Frank Lee Smith was exonerated based on exculpatory DNA testing results.

PREPARED STATEMENT OF BARRY C. SCHECK

**TESTIMONY OF BARRY C. SCHECK, ESQ.,
CO-FOUNDER, CO-DIRECTOR OF
THE INNOCENCE PROJECT;
PROFESSOR OF LAW, CARDOZO LAW SCHOOL
AT YESHIVA UNIVERSITY
ON BEHALF OF
THE INNOCENCE PROJECT**

**BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND
HOMELAND SECURITY**

SEPTEMBER 22, 2009

**REGARDING
REAUTHORIZATION AND IMPROVEMENT OF
DNA INITIATIVES OF THE
JUSTICE FOR ALL ACT OF 2004**

**Testimony of Barry C. Scheck
On Behalf of the Innocence Project
Before the House Judiciary Committee
Subcommittee on Crime, Terrorism, and Homeland Security
September 22, 2009**

Chairman Scott and Members of the Subcommittee, my name is Barry Scheck and I am co-founder and co-director of The Innocence Project, affiliated with Cardozo Law School at Yeshiva University, and I am here to testify with regard to the Reauthorization and Improvement of DNA Initiatives of the Innocence Protection Act, contained within the Justice For All Act of 2004 (JFAA). Thank you for inviting me to testify before you today.

The Innocence Project assists persons in proving their innocence through post-conviction DNA testing. To date there have been 242 men and women exonerated by post-conviction DNA testing nationwide. The Innocence Project has, in the vast majority of these cases, either represented or assisted in the representation of these innocents.

Simply put, the emergence of forensic DNA technology changed the fabric of the criminal justice system. Whereas prior to the advent of forensic DNA there were few clear ways to assess prisoners' claims of wrongful conviction, DNA testing of crime scene evidence can provide the criminal justice system with significant and enduring proof of innocence or guilt, from the initial stages of an investigation to years after a conviction. And while forensic DNA testing is only itself dispositive of guilt or innocence in a limited number of criminal cases, when it *is* dispositive it can answer the question of innocence or guilt beyond dispute. With the ability to transcend fallible

human judgment, DNA testing – and particularly post-conviction DNA exonerations – have proven the potential for error that exists in our criminal justice system, that our appeals processes are not sufficient for identifying those errors, and perhaps most importantly, that there are consistent factors that mislead our criminal process which should be should be examined and remedied.

Congress recognized DNA's potential for justice, and it was bi-partisan support that led to passage of the Innocence Protection Act contained in the Justice for All Act of 2004. The JFAA established, for the first time, a number of federal statutory innocence protections and federal incentives to help states uncover their wrongful convictions. Even then-President George W. Bush noted in his 2005 State of the Union address: "In America we must make doubly sure no person is held to account for a crime he or she did not commit. So we are dramatically expanding the use of DNA evidence to prevent wrongful conviction."

Yet despite the passionate and overwhelming support for this critical legislation in Congress - and in direct contrast to the words spoken by the President - the Innocence Project was disillusioned to watch Congress's JFAA innocence protection grant programs thwarted by an alternate set of grant programs in "The President's DNA Initiative," which provided similar DNA-related grant funding to states, but lacked the JFAA's requirement that recipient states properly preserve biological evidence and access to post-conviction DNA testing. As a result, Congress's intended incentive for states to enable post-conviction DNA testing did not meaningfully exist. This was devastating for

both the wrongfully convicted individuals for whom DNA testing was their only path to proving innocence, and for those hoping that the JFAA would enhance state and local systems of justice by not only fostering appropriate post-conviction DNA testing, but also enabling those jurisdictions to recognize and learn from wrongful convictions proven by post-conviction DNA testing.

But all is not lost. The spirit of the JFAA's Kirk Bloodsworth Post-Conviction DNA Testing Assistance Program was ultimately respected under the Office of Justice Programs's grant funding more recently, and that same respect led to the National Institute of Justice (NIJ) convening a Post-Conviction DNA Case Management Symposium in early 2009 that assembled all corners of the criminal justice system from virtually every state to examine the issue.

What's more, reauthorization of the JFAA innocence incentives contained in Section 413 - and the specific post-conviction DNA testing grant in Section 412 - can enable states to make up for those years lost by still providing the full opportunity to access those grant programs as originally envisioned by members of both parties when the JFAA was originally enacted.¹

¹ Another important innocence protection established in the Justice for All Act was the Paul Coverdell Forensic Science Improvement Grant Program contained in Section 311(b), which is not the subject of today's hearing, but also under consideration for re-authorization. Attached for the Committee's information is the Innocence Project's report about the value of the JFAA provisions that relate to the Coverdell grant program, which can also be found at: <http://www.innocenceproject.org/docs/CoverdellReport.pdf>

My testimony today will provide:

- A description of the significance of the innocence protections embedded in the Innocence Protection Act (Section 1);
- An overview and background of the innocence protections contained in Sections 411, 412 and 413 of the Justice for All Act, including concerns about their past implementation, administration and effectiveness (Section 2);
- A description of the specific areas that require additional attention to honor the Congressional intent of the Justice for All Act (Section 3); and
- Recommendations to enhance the value of the Justice for All Act's DNA Initiatives as tools to preserve biological evidence, settle claims of innocence and solve crimes (Section 4).

1. The Significance of the Innocence Protections Contained in the Innocence Protection Act: Post-conviction Access to DNA Testing & the Preservation of Biological Evidence

The preservation of biological evidence and access to post-conviction DNA testing – fundamental elements of the IPA's innocence protections – are as important today as ever. Increasingly, DNA testing is performed on crime scene evidence before trial, and such testing has consistently demonstrated that many defendants thought to be perpetrators of serious, violent felonies are not, in fact, those who committed the crimes. Of the first eighteen thousand forensic DNA tests performed at the FBI, more than five thousand prime suspects – before their cases were tried – were excluded as the source of

the biological material found at the crime scene.² Many of these individuals were, in fact, innocent. It is my understanding that the percentage of those exonerated by pre-trial DNA testing has remained steady over time.

The Value of Statutory Access to Post-conviction DNA Testing

Thus today, with the benefit of DNA testing before trial, many of those for whom DNA evidence can indicate innocence or guilt are unlikely to become wrongfully convicted for those crimes. This was not the case as recently as just a few years ago, when pre-trial DNA testing was not conducted as regularly. In fact, the Innocence Project continues to unearth cases where post-conviction DNA testing proves the innocence of those convicted in both the relatively recent and distant past.

Unfortunately, when forensic DNA testing was first made available, it provided little help to the truly innocent who were facing charges like rape or murder, or who had been previously convicted. For these men and women, hope existed only later, with the potential of the performance of DNA testing on the crime scene evidence connected to their cases. For many, if not most of them, such testing represented a last chance to prove their innocence, as they had already exhausted all available state remedies, as well as federal habeas corpus relief. Yet without the benefit of state statutes providing access to post-conviction DNA testing, they faced daunting, if not unattainable, paths to such testing.

² U.S. Dept. of Justice, Federal Bureau of Investigation, Ensuring Public Safety and National Security Under the Rule of Law: A Report to the American People on the Work of the FBI 1993-1998.

The scales of justice began to tilt when states started to pass laws allowing convicted persons access to post-conviction DNA testing. These laws not only allowed DNA testing to be performed on genetic material that was never tested at trial; it also allowed more modern, sophisticated technology to be utilized on previously tested evidence that had yielded inexact or unreliable conclusions.

Over time, newer DNA technologies have emerged, enabling us to create perpetrator DNA profiles from physical evidence that was previously useless. A review of the NJ's list of items where biological evidence can be found illustrates the variety of items that, today, can be successfully tested with improved technology: fingernail scrapings analyzed with Y DNA tests; skins cells in the hinge of eyeglasses; dandruff, saliva, hair, sweat, and skin cells from hats, bandanas and masks; saliva cells on tape or ligatures; traces of blood on a bullet; traces of blood and/or hairs on, or in the crevices of, a variety of weapons used to inflict injury; or even blood and tissue cells swabbed from the bullet inside a gun, identifying the person who might have last loaded it.³ The list of these evidence items that are being successfully tested now, but could never have been tested successfully only a few years ago, is enormous. As DNA testing methods continue to emerge, they reveal new information about even those crimes committed in the distant past. Postconviction DNA testing statutes have begun to contemplate these technological

³ In the 2002 report by the National Institute of Justice, "Using DNA to Solve Cold Cases" available at <http://www.ncjrs.gov/pdffiles1/nij/194197.pdf>, the authors identify "some common items of evidence that may have been collected previously but not analyzed for the presence of DNA evidence (Exhibit 4), p. 21.

advances and many now include provisions that permit additional testing in cases where previous testing using older testing methods could not produce conclusive results.

The passage of postconviction DNA testing statutes also explicitly exempted DNA testing motions and related proceedings from the procedural bars that govern other forms of post-conviction relief. Before the emergence of this discrete statutory avenue that allowed petitioners to seek post-conviction DNA testing, the innocent were forced to rely on the good will of state actors to consent to such testing. In states without postconviction DNA testing laws, many efforts to achieve testing were stymied, egregiously delayed or flatly denied.

Consider the following case of justice denied in the absence of a postconviction DNA testing law. In March of 1989, New Jerseyan Larry Peterson was convicted of the sexual assault and murder of a woman in Burlington County. Although three men originally indicated to police that they were with Mr. Peterson at the time the murder took place, they later changed their accounts during interrogations and told law enforcement that Mr. Peterson confessed to them that he had indeed committed the crime. One forensic scientist testified at trial that her hair comparison analysis tied Mr. Peterson to the murder and another analyst with the New Jersey State Police testified that there was seminal fluid on the victim's jeans and sperm on her underwear. No seminal fluid or sperm was found in her rape kit. All tests on these items of evidence were inconclusive at the time of trial.

Mr. Peterson testified in his own defense at trial. Alibi witnesses supported his whereabouts during the time of the crime. Work records also showed that he did not

work on the day that the victim was found – the day he supposedly confessed to the crime on his way to work. The jury convicted Mr. Peterson of felony murder and aggravated sexual assault in March 1989. He was sentenced to life plus twenty years in prison.

Although there was no postconviction DNA testing law in New Jersey, Mr. Peterson first sought access to DNA testing in 1994 under the state's existing postconviction review process. When the court finally heard his motion in 1998, it denied his petition. In 2000, the Appellate Division affirmed the denial of his petition for post-conviction relief ruling that there was overwhelming evidence of guilt in his case. In March of 2001, the Supreme Court denied his Petition for Certification.

Mr. Peterson was without hope until New Jersey passed a statute granting access to post-conviction DNA testing. The law was made effective on July 7, 2002. On July 8, 2002, Larry Peterson became the first New Jerseyan to file a petition for postconviction DNA testing under the new law and ultimately testing was granted, after an appeal of an initial denial.

In February of 2005, the Serological Research Institute (SERI) reported the results of testing: Mr. Peterson was excluded as a contributor of any and all of the biological evidence. Although the New Jersey State Police Laboratory had reported that there was no semen in the victim's rape kit, SERI identified sperm on her oral, vaginal, and anal swabs. Two different male profiles were found. One of the males was one of the victim's consensual partners, and his profile was also found on her underwear, jeans, and rape kit. The other unknown male was found on all of the swabs in her rape kit. Based

on this evidence, Mr. Peterson's conviction was vacated in July 2005. On May 26, 2006, the prosecution decided to drop all charges against Mr. Peterson. Without the passage of New Jersey's postconviction DNA testing law, Mr. Peterson would have perished in prison.

Today, 47 states have passed DNA testing laws, which vary in substance and scope. In many states with laws, the "right" to DNA testing is sharply limited and remains illusory for many categories of potentially innocent defendants. Many existing postconviction DNA testing laws suffer from a range of shortcomings, including:

- Some laws allow only certain categories of defendants to seek testing, and thus exclude large classes of deserving applicants from seeking testing.
 - ✓ The states of Alabama and Kentucky, for instance, limit the universe of applicable petitioners to those convicted of capital crimes.
 - ✓ Despite the fact 25% of the 242 individuals proven innocent through DNA testing initially pled guilty, or provided false confessions or admissions, many state laws still do not permit access to DNA when the defendant originally pled guilty or confessed to the crime.
- Some laws preclude testing when it was previously available, but not conducted or accomplished. In some cases where p-c DNA testing could provide the answer the innocence or guilt, courts refuse to order testing because it hadn't been requested at trial. Such a law, for instance, effectively bars testing for individuals who, at trial, did not possess effective counsel.
- Some laws fail to explicitly affirm judicial discretion in the following areas, which harm not only the ability to settle claims of innocence, but in many instances, identify the true perpetrator of crimes:
 - ✓ Laws fail to enable judicial orders requiring pre- and post-conviction comparisons of profiles derived from crime scene evidence to be run in the Combined DNA Index System (CODIS), the nation's DNA database. (See Appendix A for a description of the Jeffrey Deskovic case, which describes how the absence of an explicit authorization to direct comparison of crime evidence to the CODIS system can frustrate or egregiously delay efforts to prove innocence.)

- Several laws do not allow individuals to appeal denied petitions for testing.
- A number of states fail to require full, fair and prompt proceedings once a DNA testing petition has been filed, allowing the potentially innocent to languish interminably in prison.

It is our hope that in the near future, wrongfully convicted defendants in every state in the country will have the proper opportunity to establish his innocence through post-conviction DNA testing. Recently, U.S. Attorney General Eric Holder expressed his hope, in the interest of justice and identifying the true perpetrators of crimes, that “all levels of government will follow the federal government’s lead by working to expand access to DNA evidence.” In light of this statement and to the extent that states look to the federal government for leadership in this area, clarification of the federal statute would benefit those states seeking federal guidance.

Retention of Biological Evidence:

The Cornerstone of Settling Claims of Innocence & Solving Cold Cases

Access to postconviction DNA testing is only productive, of course, if the biological evidence collected from crime scenes is properly preserved and readily retrievable.

Unfortunately, in our work, despite exhaustive efforts to locate evidence, we are forced to close case after case because while our thorough intake process has determined that the biological evidence from the crime scene could, if located, provide DNA evidence of innocence or guilt, our exhaustive search has caused us to conclude that that crime scene evidence has been lost or destroyed. Between 2004 and 2008, the Innocence Project closed more than 20% of our cases after such exhaustive searches, because the potentially

dispositive biological evidence could not be found.

Interestingly, those jurisdictions that have produced the largest numbers of DNA exonerations – and subjected to heightened public excoriation – may not, in fact, actually produce more wrongful convictions than their neighbors. Rather, these jurisdictions often have better evidence retention policies, which consequently allow more wrongful convictions to be revealed. Dallas County, for instance, has produced more DNA exonerations than all but three entire states, New York, Illinois and its home state of Texas, to which it has contributed the lion’s share of wrongful convictions proven through DNA testing. Yet according to news reports, the Dallas Police Department “has kept everything dating back to the 1980’s in catalogued freezers.”⁴ According to an editorial in the *Dallas Morning News*: “Two of the key reasons that Dallas County is turning so many wrongly convicted men free is because it preserved evidence long after winning convictions – in some cases, for decades.”⁵ It is a simple fact that those jurisdictions that destroy biological evidence prevent the innocents’ ability to prove wrongful convictions.

Properly preserved evidence not only helps the law enforcement community to settle claims of innocence; it helps cold case detectives and investigators to crack old cases. In January of this year, at the National Institute of Justice’s two-day Postconviction DNA Case Management Symposium, Retired Major Kevin M. Wittman of the Charlotte-Mecklenburg (NC) Police Department detailed his agency’s efforts to re-catalogue and

⁴ Editorial, Organization at Crime Lab is Long Overdue. (2008, May 12). *Houston Chronicle*.

⁵ Editorial, Dallas County’s long-preserved evidence key in exonerations. (2008, July 2). *The Dallas Morning News*.

test old biological evidence. When the decision was made to move the Charlotte Police Department's base of operations to a new location, previously un-catalogued samples, cuttings, clippings and standards from 1,314 cases were uncovered in two upright freezers at the department's in-house crime lab. Since it was the logical time to do so, all of this evidence was repackaged, inventoried and bar-coded.

This initiative allowed Homicide and Sexual Assault review teams working in conjunction with cold case units to review old case files and test old biological evidence in a multitude of cases. Because crime scene evidence was now accessible, for the first time in years there was new movement on cases that had previously languished. Major Wittman told that crowd that as a result of the re-inventory, a staggering 41 arrests (18 homicides; 23 sexual assaults) were made in Charlotte, NC.

New forms of DNA analysis make it possible to test evidence that even just a few years ago could not have yielded probative results, underscoring the necessity of proper evidence retention practices. Recent advances have made it possible to identify the source of evidence from an amount of biological material that otherwise simply could not enable identification of a perpetrator. Testing advances like these have enabled the exoneration of wrongfully convicted people in a significant number of cases. (Please refer to Appendix B for case studies demonstrating the need to preserve biological evidence and the value of subjecting old evidence to modern DNA testing methods.) In such cases and in direct cold case investigations, such testing advances have enabled

investigators to identify the true perpetrators of crimes through comparisons to the CODIS database.

Significantly, although they have not traditionally been recognized as such, innocence claims are simply another form of cold cases. It is clear that reforming our nation's evidence retention practices, as demonstrated by the Charlotte experience, holds the promise of solving decades-old cases; what is less readily apparent, but of equal importance for crime-solving, is the ability of preserved evidence, coupled with access to post-conviction DNA testing, to identify true perpetrators of crimes. In 105 of the nation's 242 DNA exonerations, the process of settling these claims of innocence also resulted in the detection of the true perpetrator, in many cases through a "hit" to the CODIS database.⁶

Of particular interest to this Committee is the number of true perpetrators of crimes identified through CODIS hits in their home states. There are fifteen wrongfully convicted men, proven through DNA testing, from this Committee's home states, who served a total of more than 200 years in prison for crimes they did not commit and whose true perpetrators were identified through a database hit. Also noteworthy are the number of *additional* crimes which these true perpetrators of crimes committed while our clients, the truly innocent, languished behind bars. After these 15 innocent men were wrongfully convicted of their earlier crimes, the true perpetrators went on to commit – and be

⁶ After these 105 innocent men (whose true perpetrators were identified in the process of settling their innocence claims) were wrongfully convicted of their earlier crimes, the true perpetrators went on to commit – and be convicted of – 19 murders, 56 rapes and 15 other violent crimes.

convicted of – seven additional murders and eight rapes. (Please refer to Appendix C for a chart detailing this data.)

Put simply, the DNA initiatives and innocence protections codified in the Justice for All Act do not only serve to free the innocent; they possess the ability to solve and prevent crime by identifying the true perpetrators of crimes. If executed as intended by Congress, and perhaps slightly enhanced to fulfill their greatest potential, the Justice for All Act's DNA initiatives will have a profound effect on the administration of justice across the nation.

II. Overview of the Innocence Protections Contained in Sections 411, 412 and 413 of the Justice for All Act and Concerns About Past Implementation

Passed with tremendous bi-partisan Congressional support and signed by President George W. Bush, the JFAA of 2004 was a valuable legislative act, guiding the way for enhancement of victim services, aiding law enforcement and prosecutors, and protecting the innocent. Containing the Innocence Protection Act, the JFAA was intended to serve as an incentive to states to enable proper post-conviction DNA testing by rewarding states – through four federal-to-state funding programs related to DNA outlined in JFAA Section 413 – with proper policies and practices for the preservation of biological evidence and post-conviction DNA testing. JFAA Section 413, in relevant part, requires that “For each of fiscal years 2005 through 2009, all funds appropriated to carry out sections 303, 305, 308, and 412 shall be reserved for grants to *eligible entities*... (2) demonstrate that the State in which the eligible entity operates (preserve biological

evidence and provide access to post-conviction DNA testing).”⁷

The four JFAA incentive grant programs covered by Section 413 are found in the following JFAA Sections:

- 303, DNA Training and Education for Law Enforcement, Correctional Personnel, and Court Officers;
- 305, DNA Research and Development;
- 308, DNA Identification of Missing Persons; and
- 412, Kirk Bloodsworth Post-Conviction DNA Testing Grant Program.

During drafting of the Justice for All Act, lawmakers understood that given local politics and competing policy priorities, the only way to be sure to induce states to mandate the proper preservation of biological evidence and provide access to post-conviction DNA testing was through the power of the purse. As a means of significantly encouraging state compliance with these requirements aimed at spurring state innocence protections, Section 413 grant requirements were attached to more than these four grant programs, but following negotiations, only four funding streams were ultimately subjected to those requirements. In spite of this outcome, there was great hope that the four grant programs combined would be sufficient to realize the goals of properly preserving evidence and establishing access to postconviction DNA testing on the state level.

Despite Congressional intent, the Bush Administration undermined the promise of three of the four JFAA grant programs contained in Section 413 by creating alternative sources

⁷ JUSTICE FOR ALL ACT § 413, 42 U.S.C. § 14136 (2004) (emphasis added).

of DNA funding which did not require that recipient states also preserve biological evidence or provide statutory access to post-conviction DNA testing.

The Bloodsworth program (Section 412) was the only grant program governed by the JFAA Section 413 innocence incentives that was actually funded in a manner consistent with JFAA intent. The other three grant programs intended to be governed by Section 413 innocence protections were funded not as JFAA programs, but instead under the President's DNA Initiative,⁸ to which approximately \$50 million was disbursed to state applicants between FY05 and FY08. (FY09 announcements have not yet been made.) In comparison, only \$7,821,741 was disbursed to states under the Bloodsworth program between FY05-FY08. Thus the intended JFAA innocence incentives were never appropriated and administered at a level sufficient to encourage state compliance on the scale that Congress intended. As a result, significant evidence preservation and post-conviction DNA testing shortcomings still exist in states across the nation.

Put simply, the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program was the only JFAA "Incentive Grant to States to Ensure Consideration of Claims of Actual Innocence (found in Section 413)" that was actually funded and administered as such. This funding structure effectively eviscerated the federal-to-state incentives originally sought by Congress and greatly diminished the jurisdictional reach of the Bloodsworth program itself.

⁸ The following "mirror" programs from the President's DNA Initiative replaced sections 303, 305 and 308 respectively: Forensic Science Training Development and Delivery Program; Research and Development; and Identifying Missing Persons.

In addition to serving as a Section 413 innocence incentive program, the Bloodsworth grant program itself was specifically intended to provide funds to enable states to process post-conviction claims of innocence that could be proven by post-conviction DNA testing. It is worth noting that the Bloodsworth program does not only fund the work of innocence projects directly; OJP has encouraged state applicants to draft proposals that fund a range of entities involved in settling innocence claims, from law enforcement agencies charged with post-conviction case review to crime laboratories performing DNA testing. Indeed, law enforcement agencies have inquired of us what the Innocence Project is doing to help police departments handle requests for post-conviction case review and DNA testing. We inform them that our organization has long supported the Bloodsworth program funding for this purpose, and that we would share the concern expressed through such questions with Congress as they address the re-authorization of the JFAA and subsequent appropriations.

The Bloodsworth program was first authorized for FY05. Funds were not appropriated for this program, however, until FY07.⁹ Over a year after FY07 applications were submitted – and despite initial indications from NIJ that at least some of the applications were meritorious – the NIJ informed the applicants that their applications had been rejected. No specific reason for the rejection was provided to any applicant. (See attached testimony of Peter Neufeld, Esq. on behalf of the Innocence Project before the

⁹ Because of the time delay between the FY07 and FY08 solicitations for the Postconviction DNA Testing Assistance Program, we previously understood – as represented in written testimony submitted to the Senate Judiciary Committee on January 23, 2008 and the House Judiciary Committee on April 10, 2008 (attached as Appendix D) – that the first solicitation was issued in FY06 and that no solicitation was offered in FY07. In fact, OJP indicates that no solicitation was offered in FY06 and the first solicitation associated with this grant program was offered in FY07. All three grant applicants in FY07 were rejected for funding. Funds only began to be disbursed under this grant program under the FY08 solicitation.

Senate Judiciary Committee, United States Senate regarding “Oversight of the Justice for All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell Grant Programs?,” January 23, 2008, and testimony of Peter Neufeld, Esq. before the Committee on the Judiciary, United States House of Representatives regarding “Reauthorization and Improvement of DNA Initiatives of the Justice for All Act of 2004,” April 10, 2008, attached as Appendix D.) The general reason provided by NIJ was the failure of applicants to meet the JFAA post-conviction access and evidence preservation requirements.

The Department of Justice ultimately sought appropriations-related language to loosen the preservation of evidence and post-conviction DNA access requirements of states applying for Bloodsworth funds. Congress included that language, which NIJ employed in its post-conviction DNA testing solicitations in FY08 and FY09. That language required evidence retention and access to postconviction DNA testing not for all crimes as the JFAA had required (by setting the minimum threshold for state practice at the level of the federal rules in those areas), but rather in three crime categories only: rape, murder and nonnegligent manslaughter.

In FY08, there were five applicants, all of whom received funding. The program was offered again for FY09, and the former program manager of NIJ’s post-conviction portfolio, Charles Heurich, indicated unofficially that the number of state applicants for the Bloodsworth program for FY09 more than doubled over the previous year. (FY09 funding recipients have not yet been announced.)

The NJ's Postconviction DNA Case Management Symposium, held in early 2009, was a promising sign for the Bloodsworth program. The Symposium brought together relevant stakeholders from nearly every state in the nation to explore how best to frame constructive state-level postconviction DNA case management processes. For many states, the Symposium was the first opportunity for stakeholders – representing prosecutors' offices, the defense community, Innocence Projects, the crime lab community, etc. – who were traditionally, by virtue of their interactions in the criminal justice system, locked in adversarial stances – to converse and confer about how they might find agreement and facilitate collaborations on these cases with the goal of achieving better justice outcomes. Such agreement clearly arose during the course of the Symposium, and it seems likely that significant groundwork was laid for the future success of this work at the state level.

As a result of that success and the Bloodsworth program's slow but steady introduction as a valuable tool to states interested in meaningfully providing post-conviction DNA testing, Congress's intent to encourage state-level post-conviction DNA testing is just beginning to be realized.

III. Specific Areas that Require Additional Attention to Honor the Congressional Intent of the Justice for All Act

Assuring Greater Funding for Post-conviction Case Review and DNA Testing Through Reauthorization of the Bloodsworth Program

We have had an opportunity to review the President's proposed DOJ budget to Congress, which is set to go to House and Senate Appropriations committees. In its budget, the

Administration chose not to list allocations for specific programs. Instead, it bundled traditionally “named” programs under the umbrella of “DNA related and forensic programs and activities (to include research and development, training and education and technical assistance).” From what we understand, the Bloodsworth program would represent “technical assistance.” We imagine that the decision to bundle these programs together was a desire for flexibility in the allocation of this money. Because there seems to have been a \$5M cut in this category, there will be fewer resources for these programs. It is critically important that funds for the Bloodsworth be specified as such, and provided at levels enabling at least as much funding as in FY09, in the Congressional budget.

The Enduring Need to Address State-level Questions and Concerns About How Best to Achieve Proper Preservation of Evidence Practices

States have been slow to implement the modern evidence retention policies that can enable cold case investigators and those engaged in the resolution of postconviction claims of innocence to capture the enduring probative value of DNA evidence. In our state-level advocacy work, it has become clear that states are eager to capture DNA’s potential in preserved evidence, but that they are uncomfortable implementing such changes without the clear information and guidance about how best to do so.

NIJ clearly recognizes the importance of properly preserved evidence. Janet Reno was invited to keynote the 2008 NIJ Annual Conference with an emphasis on the issue and NIJ dedicated a specific panel to the preservation of evidence at its 2009 Postconviction DNA Case Management Symposium referenced earlier in this testimony. In the closing panel of that Symposium, entitled “Lessons Learned: Challenges Related to Post

Conviction DNA Testing Assistance,” all eight facilitators – each representing the nation’s regional stakeholders, with whom they’d held breakout sessions – reported that their regions needed and requested guidance and direction for the effective preservation of evidence. Excerpts from actual statements follow.

“One of the big issues that has been discussed over the last two days is evidence retention...What is evidence? How long do you keep it? We don’t have any answers to it.” --- Martha Bashford, Assistant District Attorney, New York County District Attorney’s Office (representing the states of Connecticut, Maine, Massachusetts, Rhode Island and Vermont)

“[With respect to] preservation of evidence, both locating and finding it, we talked a lot about a desire for standards or best practices around retention and preservation...we recommend a cross-sector working group to refine existing models and make some recommendations that takes into consideration all of the different models...there is a desire for shared decision-making between prosecutors, law enforcement and defense on retention of evidence.” -- Christine M. Cole, Executive Director, Program in Criminal Justice, Harvard University Kennedy School of Government (representing the states of Illinois, Indiana, Kentucky, Ohio & Wisconsin)

“Evidence retention is just huge...technology is changing...of course people are looking to the National Institute of Justice for resources for retention.” - Mary Lou Leary, former Executive Director, National Center for Victims of Crime (representing the states

of Alaska, Nevada, Oregon & Washington)

“We spent most of our time talking about issues of evidence retention and destruction...We talked a lot about inconsistent policies by local law enforcement. There is no training or support in implementing or even enforcing these policies.” - Cabell C. Cropper, Executive Director, National Criminal Justice Association (representing the states of Arizona, Louisiana, Oklahoma & Texas)

“We talked about the need for standardization within the states and lot of people thought there was a need for standardization nationally. National standards and guidelines are really important regarding cataloguing and storage. Some people thought it might be helpful to have a technical working group on issues of warehousing and standardization for handling evidence.” - Ronald S. Reinstein, Judge (Retired), Superior Court of Arizona (representing the states of Maryland, Virginia, West Virginia & the District of Columbia)

“Perhaps it would behoove all of us if a best practices standard or best practices recommendations were made for evidence preservation.” – George W. Clarke, Judge of Superior Court, San Diego Superior Court (representing the states of Colorado, Idaho, Iowa, Kansas, Minnesota, Michigan, Missouri, Montana, Nebraska, South Dakota, Utah & Wyoming)

“The number one issue was the property rooms and the ability to find evidence that was

in those rooms and the storage of property as well.” – Kenneth E. Melson, Director, Executive Office for United States Attorneys (representing the states of Delaware, New Jersey, New York, & Pennsylvania)

“The group requested again a best practices recommendations series on evidence preservation. We need a rational evidence destruction policy and again where the different stakeholders come together to formulate it.” – Jules Epstein, Law professor, Widener University School of Law, Wilmington, DE (representing the states of Florida, Georgia, Mississippi, North Carolina, South Carolina & Tennessee)

“We support the creation of an NIJ working group on evidence retention, specifically one geared towards identifying best practices and model policies.” – Mark P. Smith, Vice President, The Center for American and International Law (representing California, Hawaii and the Northern Mariana Islands)

In light of these assertions, it is evident that states need incentives and guidance to implement evidence retention policies. Congress intended to encourage states to enable the innocent to use DNA to prove wrongful convictions, but that intent was thwarted – in large part by the President’s DNA Initiative. Section 413 of the JFAA required applicant states’ evidence requirements to minimally comport with the federal standard outlined in Section 3600A of the JFAA (which required retention of biological evidence in all federal crimes for the length of time that a defendant remains incarcerated). Only 20% of states currently meet this federal standard.

While NIJ's outreach to criminal justice communities nationwide through its 2009 Symposium and its clarification of preservation of evidence requirements have helped increase the number of Bloodsworth program applications, many states that could use these funds have not yet applied, and even those who receive them still need federal assistance to ensure justice. There is still a large demand for Bloodsworth-related funding, but the precondition that states meet the program's requirements is onerous given the fact that minimal guidance and few incentives exist to meet them.

In short, criminal justice practitioners from across the country are vociferously requesting guidance in this area. Because of the established experience and expertise on this issue at the U.S. Department of Justice – and given the mission of the NIJ – it seems clear that the NIJ can provide critical support for Congress's intent on this issue by providing states with expert guidance about how to preserve biological evidence as efficiently and properly as possible. Given the breadth of stakeholder interest in this subject – and their common bottom line – it would seem most valuable for NIJ to convene these stakeholders to best appreciate their expertise and concerns to craft recommended best practices.

We hope Congress and the NIJ will explore how their respective work and interests can come together to enable justice and safety in this area.

States Also Need Incentives and Federal Guidance to Address their Existing Access to Post-conviction DNA Schema

While there has been significant attention paid to concerns regarding the preservation of evidence provisions of JFAA Section 413, as previously noted, many states still do not meet the federal threshold for access to post-conviction DNA testing. In this regard, too, therefore, JFAA Section 413 is a critically important incentive for states to ensure access to justice and public safety. For instance, the JFAA requires access to testing for any offense. Twenty-one states currently meet this threshold, but an additional twenty-four states, plus the District of Columbia, allow for post-conviction access to DNA testing for individuals convicted of serious, felony crimes. (16 states allow all defendants convicted of felonies to petition; 8 states and D.C. allow individuals convicted of serious or violent felonies to petition for DNA testing). Only three states in the nation do not have laws establishing statutory access to post-conviction DNA testing; only two states with existing laws bar individuals accused of serious, felony crimes from seeking testing.

While most states minimally comply with the federal standard regarding access to post-conviction DNA testing, some of the 47 states with existing laws could benefit from clear explications of what is being sought by NIJ in state post-conviction access to DNA testing schema. For instance, some states only allow individuals convicted of capital or death-eligible crimes to petition for testing; others contain arbitrary time preclusions (i.e. only individuals convicted of crimes before a certain date may apply for testing) or procedural barriers (i.e. individuals who confessed to crimes may not seek testing).

IV. Specific Recommendations for Justice for All Act Reauthorization to Settle Claims of Innocence & Solve Crimes

In order to assure that the innocence protections intended under the JFAA can be achieved, all four incentive grant programs attached to Section 413 of the JFAA should be reauthorized and funded. As noted earlier in this testimony, the four grant programs governed by Section 413 of the JFAA are:

- Section 303, DNA Training and Education for Law Enforcement, Correctional Personnel, and Court Officers;
- Section 305, DNA Research and Development;
- Section 308, DNA Identification of Missing Persons; and
- Section 412, Kirk Bloodsworth Postconviction DNA Testing Grant Program.

Failure to re-authorize and fund these programs would leave moot the incentives created under the JFAA. Despite their influence being thwarted by Executive maneuverings following the JFAA's original passage, and despite some improvements in post-conviction DNA testing access and the preservation of biological evidence in the intervening years, many states still fail to provide the innocent with access to proving their innocence through post-conviction DNA testing.

Congress already created a valuable vehicle for motivating states to establish proper rules for access to post-conviction DNA testing and the preservation of biological evidence: Section 413 of the Justice for All Act of 2004. Re-authorization of that section and funding of those programs will provide the unrealized incentives Congress intended in 2004.

Recommendation #1 – Provide Incentives to States to Implement Innocence Reforms Through Reauthorization and Funding of All Four Section 413 Grant Programs

The Innocence Project recommends Congressional reauthorization and funding of all four of the JFAA Section 413 grant programs for FY 2009 – FY 2014. The additional five years of funding will, in part, replace those years essentially lost due to the implementation challenges of Section 412, the Bloodsworth Postconviction DNA Testing Assistance Program. However, it is worth stating that even if all of the funding connected to this grant program had been disbursed as early as FY05 as intended by Congress, the survival of this grant program would still be essential to meet the ongoing need to perform postconviction case review and DNA testing.

It is only through the incentives offered by the four grant programs in Section 413 of the JFAA that states will appreciate the value of implementing innocence reforms in the face of other competing needs.

Recommendation #2 – Extension of Provisional Language Guiding the Kirk Bloodsworth DNA Testing Assistance Program (and other reauthorized Section 413 grant programs):

As a result of its stated difficulty in administering Kirk Bloodsworth Postconviction DNA Testing Grant Program in years past, the Department of Justice sought the following provisional language to loosen Section 413 grant requirements to assure the disbursement of unspent, unobligated funds, as well as those funds for the remaining fiscal years in the funding cycle:

\$5,000,000 shall be for the purposes described in the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program (Public Law 108-405, section 412); Provided, that unobligated funds appropriated in FY 2006 and FY 2007 for grants as authorized under sections 412 and 413 of the foregoing Public Law are hereby made available, instead, for the purposes herein before specified;

The Department of Justice represented that this provisional language freed them from the constraints of the Justice for All Act's authorizing language and ultimately allowed for the disbursement of funds associated with this grant program.

As with last year's appropriation language, the Innocence Project recommends an extension of the use of this provisional language so that future grant applicants can meet Section 413 requirements and receive expeditious funding under the Kirk Bloodsworth Postconviction DNA Testing Assistance Program. This provisional language should also apply to the other Section 413 grant programs that are reauthorized, so that larger pots of federal-to-state funding – and by extension greater incentives – are made available to states that take steps to ensure compliance with the innocence protections sought in the Justice for All Act.

Recommendation #3 - Addressing Insufficiency of State Level Evidence Retention Policies and Its Effect on the Disbursement of Section 413 Funds

Many states have not applied for Bloodsworth funding because their evidence retention policies fall short of even the relaxed requirements articulated in the two most recent solicitations. In order to honor the Congressional intent of providing immediate funding for postconviction DNA testing to all states in need of financial support in this area, we propose a short-term (#3(a)) and long-term solution (#3(b)) to address the preservation of evidence requirement, which has been a proven barrier to the disbursement of funds.

Recommendation #3(a): Short-term Stopgap Measure to Allow Postconviction DNA Testing Funds to Immediately Flow to All States in Need: Addressing Preservation of Biological Evidence on the State Level Through a One Time Waiver

Allow potential applicants who do not meet the evidence retention obligation, even given the relaxed requirements under the loosened appropriations language, to seek postconviction DNA testing funding – and other federal-to-state grant funding subject to evidence retention requirements under Section 413 – if the following requirements are met:

- ✓ the applicant state has an adequate postconviction DNA framework;*
- ✓ the chief legal officer of the state issues an order enacting a moratorium on the destruction of biological evidence in all violent, felony crimes statewide pending a permanent statewide evidence retention policy; and*
- ✓ the applicant state has taken steps – either through the Executive or legislative branch – to establish a statewide working group to become compliant with Bloodsworth evidence retention requirements, with an established timeline and articulated process for the production of an updated statewide policy.*

This stopgap measure shall only be applicable to an applicant state once; if efforts are not made to address evidence retention in earnest after grant awards are made, future applications should be not permitted.

Recommendation# 3(b) - Long-term Solution to Address Evidence Retention: Establishment of a National Technical Work Group on the Proper Preservation of Biological Evidence

The creation of multiple state-level working groups to address biological evidence retention would be unnecessary if federal guidance was provided to the states on best practices in this area. Our office has already requested that the NIJ convene a national

technical working group on the proper preservation of biological evidence and delivered a working document that describes a proposal for consideration.

- ✓ *The Innocence Project requests Congress to join our organization in calling on the NIJ to establish a National Technical Working Group on the Proper Preservation of Biological Evidence.*

- ✓ *Should a National Technical Working Group be established, potential grant applicants in future years could issue moratoria on evidence destruction pending the recommendations of the federal working group.*

- ✓ *Should a National Technical Working Group be established, it would not only provide the long-awaited and critically necessary technical support to states regarding best practices for the retention of biological evidence; it could also provide non-binding guidance to the Office of Justice Programs about how best to achieve the evidence retention goals articulated in Section 413 for those grant programs subject to those requirements.*

We believe this longer-term solution is more efficient than the short-term solution offered above, as it would obviate the need for multiple state-level evidence preservation working groups and allow Section 413 monies to flow immediately so long as state-level moratoria on evidence destruction are issued. It is our hope that the establishment of a national technical working group will replace the need to implement the stopgap, or waiver, measure in future years.

Recommendation #4 – Consideration of Modest Proposals to Realize More Fully the Potential of Section 411 of the Justice for All Act

Section 411 of the Justice for All Act established statutory access to postconviction DNA testing for individuals convicted of federal crimes. Understandably, the creation of this alternate avenue to seek postconviction relief had to be balanced with concerns about overwhelming the federal courts and flooding the criminal justice system with frivolous requests for postconviction DNA testing. As has been our experience on the state level, however, those jurisdictions establishing statutory access to postconviction DNA testing have not reported an overflow of superfluous petitions.¹⁰

In light of this reality, and combined with Attorney General Holder's recent remarks that states would do well to follow the federal lead with respect to establishing state-level statutory access to postconviction DNA testing, the Innocence Project believes that the federal statute should be broadened to assure that more categories of deserving candidates for testing have the opportunity to do so. This is of significant importance given the fact that states will be looking to the federal government for guidance in this area as they establish testing laws for the first time or seek changes to their existing laws in the

¹⁰ In order to determine the burden post-conviction DNA testing motions place on courts nationwide, the Innocence Project has done its best to understand states' experience with these motions. The Innocence Project queried the National Conference of State Legislatures, the U.S. Department of Justice Bureau of Justice Statistics, American Judges Association, and the National Center for State Courts, among other entities. Despite the many inquiries, it became clear that no one entity in the United States maintains a record of how many such petitions are filed across the country. The Innocence Project has been deeply and closely involved with the court proceedings in states in which post-conviction DNA petitions have been filed and knows of no state that claims "a flood of litigation" has resulted from enactment of a post-conviction DNA testing statute. In 2006 the Innocence Project also polled members of the Innocence Network (comprising more than 30 other like projects throughout the nation) to see if they could provide us with hard numbers on the petitions for post-conviction DNA testing filed in their states. Of the many states that responded, not one represented to us that their state suffered from a flood of litigation. California, for instance, has the nation's largest prison population. When its post-conviction DNA testing law was made effective in January of 2001, the California Office of the Attorney General estimated that requests peaked at 20 per month statewide. Today that number hovers, at most, around 1-2 requests monthly.

interests of justice. As well, the following recommendations will also function in service of law enforcement efforts to identify the true perpetrators of crime by expanding access to previously barred individuals and maximizing use of CODIS, the national DNA database.

Therefore, the Innocence Project recommends consideration of the following proposals to clarify, and in some areas, enhance the federal postconviction DNA testing law:

1. Establish Judicial Authority to Order Comparisons of Crime Scene Evidence to the Combined DNA Index System (CODIS)

Section 411 does not provide explicit judicial authority to order the comparison of profiles derived from crime scene evidence to the CODIS database; the discretion to do so currently lie solely in the hands of law enforcement. As the nation's DNA exonerations have demonstrated, the ability to realize the full potential of the national DNA database will not only help to free the innocent; it will also supply the needed evidence to identify and prosecute the truly guilty.

The Jeffrey Deskovic case, described in greater detail in Appendix A, describes precisely why such database comparisons serve the interests of justice. When Mr. Deskovic first sought a comparison of the crime scene evidence in his case to the CODIS database – in the hopes of identifying the true perpetrator of the crime for which he was wrongfully convicted – a federal habeas court rejected the application as outside its authority to act and appellate lawyers in the Westchester County District Attorney's office advised that

New York's post-conviction DNA statute did not cover his request because he was not seeking *a new DNA testing technique* to demonstrate he was excluded from the semen found on vaginal swabs. (He had already been excluded by earlier DNA tests from these samples, but ultimately convicted regardless of that DNA exclusion, as the prosecution had argued at trial that the semen came from a prior consensual partner.)

Notwithstanding that legal opinion, the newly elected District Attorney Janet DiFiore personally authorized new DNA tests so a DNA profile from the vaginal swab samples could be run through CODIS. Within two days there was a "hit" to Steven Cunningham, a convicted murderer who was in prison for strangling the sister of his live-in girlfriend, who immediately confessed. Mr. Deskovic, a teenager with no criminal record, served 16 years in prison for the rape and murder committed by Mr. Cunningham, a wrongful conviction that could have been exposed years earlier had the statutory fix proposed below been in place.

This case demonstrates that without the establishment of statutory authority for judges to order comparisons of crime scene evidence in CODIS upon request of an accused or convicted person, the innocent are forced to rely upon the good will and discretion of government actors. In the interests of consistent justice, federal law should explicitly permit a judge to grant a petitioner's motion for such evidence comparison whenever the judge deems that action to be in the interests of justice, be that during the course of an investigation or following a defendant's conviction.

We recommend that the federal postconviction DNA testing law be amended to allow,

upon court order, for a DNA profile derived from the crime scene evidence, to be compared to the CODIS database, either pre-trial or post-conviction. We propose the following model language to address this area in need of renovation:

For purposes of making an application pursuant to 18 U.S.C.A. § 3600, for purposes of making a credible application for executive clemency, or before trial, for purposes of obtaining exculpatory evidence, a court may order that a law enforcement entity that has access to the Combined DNA Index System submit the DNA profile obtained from probative biological material from crime scene evidence to determine whether it matches a profile of a known individual or a profile from an unsolved crime. The petitioner must show that the DNA profile derived from probative biological material from crime scene evidence complies with the Federal Bureau of Investigation's scientific requirements for the uploading of crime scene profiles to the National DNA Index System.

2. Inclusion of a Provision that Clarifies that Individuals Who Confessed to Crimes May Seek Postconviction DNA Testing Under the Federal Statute

A false confession, admission, or dream statement was found to have contributed to nearly 25% of the wrongful convictions in America's 242 DNA exonerations. While for most it is virtually impossible to fathom why a person would wrongly confess to a crime he or she did not commit, researchers who study this phenomenon have determined that the following factors contribute to or cause false confessions:

- Real or perceived intimidation of the suspect by law enforcement
- Use of force by law enforcement during the interrogation, or perceived threat of force
- Compromised reasoning ability of the suspect, due to exhaustion, stress, hunger, substance use, and, in some cases, mental limitations, or limited education
- Devious interrogation techniques, such as untrue statements about the presence of incriminating evidence
- Fear, on the part of the suspect, that failure to confess will yield a harsher

punishment

Just a few of the DNA exoneration cases involving a false confession are detailed in Appendix E. Unfortunately, despite the demonstrated prevalence of false confessions, a notable provision – which requires the petitioner to prove “identity was at issue” at trial – in some state laws have been interpreted by the courts to bar post-conviction DNA testing to those who confessed to the crime for which they were convicted. This significant provision is contained in the federal postconviction access to DNA testing law and reads: “If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial.”¹¹

We recommend that this provision in the federal postconviction DNA testing law be clarified to read:

If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial. The fact that evidence of a confession by the applicant was introduced into evidence does not preclude an application for testing under this clause from being granted.

Conclusion

Since the passage of the Justice for All Act, more than 75 wrongfully convicted people have been identified through post-conviction DNA testing. Not one of these exonerations was supported by the post-conviction DNA testing assistance funding, as established and intended by Congress. Instead, innocence organizations, prosecutors offices, and other

¹¹ JUSTICE FOR ALL ACT § 411(a)(7).

groups dedicated to postconviction case review, many operating on minimal budgets, were compelled to make tough decisions, choosing between many deserving clients in order to prioritize a lucky few.

We are fortunate that these DNA exonerations were realized in spite of a failure to achieve the federal assistance sought by the sponsors and supporters of the Justice for All Act. It is impossible to know how many more would have been able to prove their innocence if these funds had flown as Congress had originally intended.

Fortunately, given the OJP's improved administration of such funding, the value of the NIJ's Postconviction DNA Case Management Symposium for demonstrating to those throughout the criminal justice system the value of their work on post-conviction case management, and Attorney General Holder's words of commitment to using DNA as a tool for safety and justice, it is clear that re-authorization and appropriations for these JFAA programs can yet achieve the promise they originally held.

Thank you for the opportunity to present before you today. If the Committee has any questions about any of the testimony presented, it would be my pleasure to explore these matters further with you.

APPENDIX A – The Jeffrey Deskovic Case: Demonstrating the Need to Compare Crime Scene Evidence to CODIS for the Purposes of Settling Claims of Innocence and Identifying True Perpetrators of Crimes

On the afternoon of November 15, 1989, Peekskill police discovered the body of a 15-year-old girl. She appeared to have been raped, beaten, and strangled. Jeff Deskovic, then 16 years old, was a classmate of the victim's. He became a suspect because he was late to school the day after the victim disappeared. Police also believed he seemed overly distraught at the victim's death, visiting her wake three times.

Police spoke with Deskovic eight times in December 1989 and January 1990. Deskovic had begun his own "investigation" of the case, giving officers notes about possible suspects. Police asked Deskovic to submit to a polygraph examination and he agreed in late January 1990. He believed that, if cleared, he could continue to help police with their investigation.

Deskovic was taken to a private polygraph business run by an officer with the local Sheriff's Department, who, according to trial testimony, had been hired to "get the confession." Deskovic was held in a small room there with no lawyer or parent present. He was provided with coffee throughout the day but no food. In between polygraph sessions, detectives interrogated Deskovic.

Deskovic's alleged confession occurred after six hours, three polygraph sessions, and extensive questioning by detectives between sessions. One of the detectives accused Deskovic of having failed the test and said he had been convinced of Deskovic's guilt for several weeks. According to the detective, Deskovic then stated he "realized" three weeks ago he might be the responsible party. Deskovic was asked to describe the crime and began speaking in the third person, switching to first person part way through the narrative. Deskovic said, "I lost my temper" and admitted he had hit the victim in the head with a Gatorade bottle, put his hand over her mouth and kept it there too long. During the confession, Deskovic sobbed. By the end of the interrogation, he was under the table, curled up in the fetal position, crying.

DNA testing was conducted before trial. The results showed that Deskovic was not the source of semen in the rape kit. Deskovic had been told before the alleged confession that if his DNA did not match the semen in the rape kit, he would be cleared as a suspect. Instead, prosecution continued on the strength of his alleged confession. In January 1991, Deskovic was convicted by jury of 1st degree rape and 2nd degree murder, despite DNA results showing that he was not the source of semen in the victim's rape kit. The state argued that the semen had come from a consensual sex partner and that Deskovic killed the victim in a jealous rage. In January 2006, the Innocence Project took on Deskovic's case. The semen from the rape kit was tested with newer technology for entry into the New York State DNA databank of convicted felons. In September 2006, the semen was matched to convicted murderer Steven Cunningham, who was in prison for strangling the sister of his live-in girlfriend. After 16 years in prison, on September 20, 2006, Jeff Deskovic was released and his conviction was overturned.

Appendix B - Case Studies Demonstrating the Critical Need to Preserve Evidence and the Value of Subjecting Old Evidence to Modern DNA Testing Methods

Luis Diaz: Luiz Diaz's case involved multiple rapes. Although he was convicted in 1980, it wasn't until 2005 that Mr. Diaz was released from a Florida prison after DNA testing of a rape kit proved that he was not the notorious "Bird Road Rapist." This individual had been responsible for the attacks, and in some cases sexual assaults, of more than twenty-five women. By the time Mr. Diaz petitioned for testing in 2003, the only evidence that could be located was one rape kit, which was sent to a private lab in California. As the results were awaited, more evidence from the same case was located and sent to the Miami Dade Police Department Crime Lab. In June of 2005, testing results from both labs indicated that the male profile that was found did not match Mr. Diaz. Prosecutors then searched for evidence in all of the cases attributed to the Bird Road Rapist. Only one rape kit was located from an uncharged crime that occurred in August 1979. This kit was sent to the Miami Dade Police Department Crime Laboratory. The results indicated that, again, Luis Diaz was not the male contributor to the semen evidence. Further, the tests yielded evidence that the same unknown male had raped both victims, thereby providing investigators with important information with which to pursue the cold cases. Had the evidence in Mr. Diaz's case been lost or destroyed, he would have died in prison. None of the evidence in Mr. Diaz's case had previously been subjected to DNA analysis, as the technology was simply unavailable at the time of his conviction.

Chad Heins: Chad Heins, another Floridian, was convicted of the rape and murder of his sister-in-law. Several pieces of evidence had been collected at the crime scene, including hairs that excluded Mr. Heins, fingernail scrapings taken from under the victim's nails, and the bedsheet where the rape and murder took place. At the time of the trial in 1994, DNA testing methods were not advanced enough to identify any semen on the bedsheet or to yield a profile from the fingernail scrapings. As a result, the only biological evidence available at the time of trial was the hair evidence and prosecutors successfully argued that a stray hair from a stranger had accidentally ended up in the victim's bedroom. Mr. Heins first sought post-conviction DNA testing in 2001, and DNA tests that were eventually performed in 2003 using a more modern STR DNA testing method. The tests demonstrated that the hairs collected from the victim's bed matched to the fingernail scrapings, and that these pieces of evidence could not be tied to Mr. Heins. A more modern STR DNA testing method also demonstrated that there was, indeed, semen from the victim's bedsheet and that it also matched to the unknown man. Mr. Heins was released from prison 13 years after his conviction. This case study demonstrates the impact that modern DNA testing methods can have, teaching us that old evidence – such as the semen-stained bedsheet – that might never have been subjected to more than presumptive DNA testing could be tested today and yield a valuable crime-solving profile.

Scott Fappiano: Scott Fappiano was convicted of a rape in 1985 and consistently maintained his innocence throughout his incarceration. While a wealth of samples had been collected from the crime scene, DNA technology at the time was not sufficient to

produce a result that would conclusively identify the perpetrator of the heinous crime for which he was convicted. Some exhibits containing biological evidence used at trial were returned to the DA's office; others were vouchered and sent to New York Police Department evidence storage facilities. Two items of evidence – the rape kit and a pair of sweatpants containing semen stains—were sent in 1989 by the DA's office to a now-defunct DNA laboratory called Lifecodes, which at the time performed rudimentary DNA analysis for the state of New York. DNA in the late 1980's was limited, and although Lifecodes found semen to be present on the available evidence, they could not produce a conclusive result. In 1998, more advanced DNA testing methods had developed and a search for the original crime scene evidence was initiated. The DA's office fully cooperated with a search of its storage areas, but none of the original exhibits could be located. A similar search of NYPD storage facilities yielded nothing. After a long and uncertain search, Orchid Cellmark, a private DNA laboratory in Texas which had, after a series of mergers, taken over the Lifecodes lab, was contacted. Remarkably, in August of 2005, two test tubes containing biological samples from the crime scene were located. DNA testing of those extracts, using more progressive DNA testing methods, excluded Mr. Fappiano. He was freed from prison in October of 2006 – 21 years after his wrongful conviction. Had the liquid DNA material not been preserved by a private lab, Mr. Fappiano would still be in prison despite his actual innocence. Like Mr. Heins's case, Mr. Fappiano's case also demonstrates the value of subjecting preserved biological evidence to modern DNA testing methods.

Calvin Willis: Calvin Willis was convicted in 1982 of the brutal rape of a ten-year-old girl in Louisiana. Critical evidence had been collected, including a rape kit that contained fingernail scrapings, a bedspread, the victim's underwear and nightgown, and a pair of boxer shorts that were left on the couch at the crime scene. DNA testing wasn't yet available and so the state crime lab performed conventional serological testing on the rape kit evidence and blood typing on stains from the nightgown and bedspread. Because the victim is a type A secretor and Willis is an O secretor, he could not be excluded as the contributor to the stain. Perhaps even more troubling, Mr. Willis was identified through a flawed lineup procedure. In 1998, our office accepted his case and DNA testing was performed on the boxer shorts and the fingernail scrapings. Mr. Willis was excluded from being a contributor to any of the samples. He was released from prison in 2003, after having spent more than 21 years behind bars. Had it not been for the preserved evidence – which had not previously been subjected to DNA testing – Mr. Willis would still be in prison since he had been sentenced to life without parole.

APPENDIX C – WRONGFUL CONVICTION CASES IN WHICH THE TRUE PERPETRATOR WAS IDENTIFIED BY A CODIS HIT

State	Name of Exoneree	Years Served	Additional Crimes Committed by Real Perpetrator (Identified Through CODIS hits)
California	Kevin Green	15.5	2 murders; 3 rapes
California	David Allen Jones	9	4 murders; 1 rape
California	James Ochoa	1	
Florida	Cody Davis	0.5	
Illinois	Jerry Miller	24.5	1 rape; 3 counts of aggravated battery
New York	Leonard Callace	5.5	
New York	Jeffrey Deskovic	15.5	1 murder
New York	Michael Mercer	10.5	
Texas	Charles Chatman	26.5	
Texas	Entre Nax Karage	6.5	
Texas	Thomas McGowan	22.5	1 rape/robbery
Texas	Josiah Sutton	4.5	
Virginia	Julius Ruffin	20	1 rape
Virginia	Phillip Leon Thurman	19	
Virginia	Arthur Lee Whitfield	22.5	1 rape

**APPENDIX D- Previous Testimony Submitted by the Innocence Project Regarding
the Justice for All Act**

**TESTIMONY OF PETER NEUFELD, ESQ.
ON BEHALF OF
THE INNOCENCE PROJECT**

**BEFORE THE
SENATE JUDICIARY COMMITTEE
UNITED STATES SENATE**

JANUARY 23, 2008

**REGARDING
“OVERSIGHT OF THE JUSTICE FOR ALL ACT:
HAS THE JUSTICE DEPARTMENT
EFFECTIVELY ADMINISTERED THE
BLOODSWORTH AND COVERDELL GRANT
PROGRAMS?”**

Testimony of Peter Neufeld
On Behalf of the Innocence Project
Before the Senate Judiciary Committee
January 23, 2008

Chairman Leahy, Senator Specter, and other Members of the Committee, my name is Peter Neufeld and I am co-founder and co-director of The Innocence Project, affiliated with Cardozo Law School, and I am here to testify with regard to Oversight of the Justice for All Act as administered by the U.S. Department of Justice. Thank you for inviting me to testify before you today.

Passed with overwhelming and passionate bi-partisan Congressional support, the Justice for All Act of 2004 (JFAA) was a valuable legislative act, guiding the way for enhancement of victim services, aiding law enforcement and prosecutors, and protecting the innocent.

Today's hearing focuses on the National Institute of Justice/Office of Justice Programs (OJP) enforcement of the innocence protection provisions of the Justice for All Act. These provisions received such broad bi-partisan support despite intense Executive opposition because, as Senator Leahy noted:

Post-conviction DNA testing does not merely exonerate the innocent, it can also solve crimes and lead to the incarceration of very dangerous criminals. In case after case, DNA testing that exculpates a wrongfully convicted individual also inculcates the real criminal.¹² ... The Justice for All Act is the most significant step we have taken in many years to

¹² 150 CONG. REC. S11609-01 (2004)

improve the quality of justice in this country. The reforms it enacts will create a fairer system of justice, where the problems that have sent innocent people to death row are less likely to occur, where the American people can be more certain that violent criminals are caught and convicted instead of the innocent people who have been wrongly put behind bars for their crimes, and where victims and their families can be more certain of the accuracy, and finality, of the results.¹³

Congressional passage of the JFAA reflected clear Congressional support for innocence protections. The Innocence Project has grave concerns, however, that OJP has utterly failed to meaningfully implement those crucial innocence provisions. Indeed, OJP's selective and strikingly disparate enforcement of JFAA program requirements – combined with the failure, due in large part to Executive budget prioritization, to fund key JFAA grant programs – have seriously undermined those innocence protections, which go to the heart of that landmark legislation.

This memo details those concerns, particularly as they relate to Sections 412, 413, and 311(b) of the JFAA.

I. Overview of Primary Innocence Provisions in JFAA and Summary of Impediments to Effective Implementation

Although numerous sections of the JFAA relate to innocence concerns, the Innocence Project has closely tracked those provisions most specifically focused on exonerating the wrongfully convicted and reducing the risk of wrongful convictions in the future, namely:

- **Section 412**, which was crafted in response to the difficulties and costs confronting state inmates who wished to prove their innocence through DNA

¹³ id. at 14.

testing. Just as Congress had established a reasonable procedure for federal prisoners to obtain post conviction DNA testing, it was hoped that the **Kirk Bloodsworth Post-Conviction DNA Testing Program** would provide sufficient funds to pay for and encourage the states to implement their own post conviction DNA testing program. But in contrast to Coverdell monies that were handed out to all fifty states without any real executive branch scrutiny, OJP created so many barriers to potential grantees for Bloodsworth fund money that only three applied and all three were rejected.

- **Section 413**, which was enacted to provide an incentive to the states in order to advance two crucial innocence practices: post-conviction DNA testing and the preservation of biological evidence. Just as Congress enacted a DNA access program for federal prisoners, it also passed a critically important preservation of biological evidence statute for federal crimes. You can't conduct testing to prove innocence if the evidence has not been preserved. Nor can a detective use DNA to re-open a cold case if the evidence is destroyed. Thus the **Incentive Grants to States to Ensure Consideration of Claims of Actual Innocence** was established to provide four pools of funding to the states to encourage them to create schemes for post-conviction DNA testing and the preservation of evidence. The four JFAA grant programs covered by Section 413 include JFAA Sections:
 - o 303, DNA Training and Education for Law Enforcement, Correctional Personnel, and Court Officers;
 - o Section 305, DNA Research and Development;
 - o Section 308, DNA Identification of Missing Persons; and

- 412 Kirk Bloodsworth Post-Conviction DNA Testing Grant Program, above.

Instead of funding these four programs under the JFAA, however, the President did an end run around the “burden” of innocence practices by creating a separate funding stream for three of those four programs and left Section 412 – Bloodsworth money for post-conviction DNA testing – a poor stepchild devoid of executive branch support. As a consequence, the two critical innocence incentives were rendered toothless.

- **Section 311(b)**, which addresses the serious problem of crime lab errors and misconduct, particularly in forensic disciplines other than DNA, that can lead to wrongful convictions and the real perpetrator not being identified. The provision requires applicant jurisdictions to the **Paul Coverdell Forensic Science Improvement Grant Program** (Coverdell program) to certify that they have an appropriate government entity and process in place to conduct independent external investigations upon allegations of serious negligence or misconduct substantially affecting the integrity of forensic results. Despite the will of Congress, OJP approved every state that has applied for the grant, as long as the applicant checked off the box, irrespective of whether they truly had a capable entity and process in place to conduct independent external investigations. Our own audit has revealed states which never notified the entity listed, sub-grantees that never identify the entity, and entities that are incapable of conducting an independent external investigation

II. Executive Subversion of Congressional Intent Regarding Justice for All Act
Sections 412 and 413

Despite Congressional appropriations of approximately five million dollars per year for the Bloodsworth grant program in fiscal years 2006 and 2007, not one penny of these innocence protection funds to finance post-conviction DNA testing has been extended to states – despite a patent need for such support.

The Bloodsworth grant program was not offered at all in 2005. It was funded for 2006, and OJP issued a Request for Proposals (RFP) in the second half of 2006. For reasons likely related to the strict requirements placed upon applicants (which are described in greater detail below), only three jurisdictions applied for these funds. All three were rejected, with no specific official reason provided to those applicants for OJP's rejection. While the Bloodsworth grant program was funded by Congress for 2007, no RFP for 2007 was ever issued.

A major obstacle to OJP disbursement of Bloodsworth program funds was likely OJP's interpretation of JFAA Section 413 requirements as applied to the program.

A. OJP Stringently Applied JFAA Section 413 Requirements to Bloodsworth Program, Preventing Innocence Protection Fund Disbursement

Interestingly – and in stark contrast to the extremely lax OJP enforcement of Congressional intent of JFAA Section 311(b) innocence protections under the Coverdell grant program (described in detail below) – OJP interpreted its Congressional mandate for the Bloodsworth program so rigidly that only three jurisdictions attempted to apply.

Every single application was rejected. No specific official explanation was given to the applicants for the denial.

The reason that States did not apply for this much-needed federal DNA support - and OJP's potential¹⁴ justification for denying all funding for Bloodsworth applicants - seems likely to stem from the extraordinary hurdle that OJP set for applicants regarding how they were to "demonstrate" that they met the preservation of biological evidence requirements as presented in the RFP. The OJP demonstration requirement, when closely scrutinized, seems to have been misinterpreted, or exceedingly severely interpreted, in a manner that thwarted disbursement of any Bloodsworth funds to date.

The reasons leading to this conclusion are that:

- OJP interpreted JFAA Section 413 applicant eligibility requirements exceedingly stringently, particularly:
 - o in comparison to OJP's exceedingly lax interpretation of JFAA Section 311(b) innocence protection requirements, and
 - o when specific Section 413, upon plain reading, should be interpreted as demanding less strenuous proof than Section 311(b);
- Congress did not specifically require a role in grant application by the State Attorney General or chief legal officer in order to demonstrate compliance with the Section 413 provisions, as it had for other program where same is required; and

¹⁴ I use the term potential because it is impossible to know the actual reason for the denial of these grant applications, as no specific official reason was stated within the denial letters that we have seen, i.e. those provided to the Arizona and Connecticut applicants.

- OJP requirement of State Attorney General or chief legal officer participation in grant application presents a significant hurdle for applicants seeking post-conviction grant funding for their states.

These reasons are explained in greater detail below.

Stringent OJP Interpretation of Bloodsworth “Demonstrate” Requirement is Opposite of Lax OJP Interpretation of Coverdell “Certification” Requirement

The severe OJP interpretation of the “demonstrate” requirement under the Bloodsworth program seems malicious when compared to OJP’s lax interpretation of the “certification” requirement under the Coverdell program.

Under its grant application process, OJP has enforced the Section 413 grant program requirements so intensely in the Bloodsworth program as to prevent those innocence protection funds from ever flowing. Conversely, OJP has not denied Coverdell funding to any applicant since passage of the JFAA, despite the obvious failures of the vast majority of states to meet the JFAA Section 311(b) Coverdell forensic oversight requirement. (This refusal to enforce Section 311(b) is explored in greater detail below, and in the recently released OIG report on the subject.)

Specifically, the JFAA requires Coverdell applicants were to “certify” their compliance, whereas it requires Bloodsworth applicants to “demonstrate” their compliance. Whereas the former requirement calls for higher applicant accountability than the latter, OJP administered the two programs as if the opposite were true. This transposition of meanings as applied to these two important innocence protection

components of the JFAA strongly suggests that OJP intended to undercut the reach of those innocence protections under the Bloodsworth program.

Such interpretations are not simply theoretical; they are critically important to both assessing one's ability to qualify for grant funds and actually meeting the thresholds for funding. One cannot, therefore, discount the role OJP's interpretation when seeking to understand why so few applied for Bloodsworth program funds despite ample need in states across the nation. Nor when considering why absolutely none of those who applied were granted such funds, nor given official and specific reasons for rejection.

Taken together, OJP seemed to choose the most frustrating interpretation possible when considering how to apply the Section 413 requirements to the Bloodsworth program. The result was to deny states support for the appropriate investigation and consideration of post-conviction claims of innocence.

Congressional "Demonstrate" Requirement Extraordinarily Applied by OJP

JFAA Section 413, in relevant part, requires that "For each of fiscal years 2005 through 2009, all funds appropriated to carry out sections 303, 305, 308, and 412 shall be reserved for grants to *eligible entities that... (2) demonstrate that the State in which the eligible entity operates (preserve biological evidence and provide access to post-conviction DNA testing).*"¹⁵

OJP went further than Congress in its 2006 Bloodsworth program RFP, requiring the following: "To demonstrate that the State satisfies these requirements, an application must include formal legal opinions (with supporting materials) issued by the chief legal

¹⁵ JUSTICE FOR ALL ACT § 413, 42 U.S.C. § 14136 (2004) (emphasis added).

officer of the State (typically the Attorney General), as described below. All opinions must be personally signed by the Attorney General.”¹⁶

The plain language of the JFAA states that “eligible entities” demonstrate their compliance with the JFAA Section 413 innocence protections; yet OJP requires that the State Attorney General (or other chief legal officer) demonstrate this fact. OJP’s is clearly a more demanding application of the requirement than Congress sought.

While it might be argued that because the Bloodsworth program is one subject not only to substantive eligibility requirements, but also to the status of state law or policy on a specific subject, such an Attorney General or chief legal officer form of “demonstration” is necessary. It is true that most OJP grant programs are not contingent upon a specified status of State law or policy, and thus the Section 413 requirement distinguishes itself from most other such grant programs. That fact does not, however, necessarily require the personal signature of the State Attorney General or chief legal officer on legal memoranda to meet the “demonstrate” requirement established by Congress.

On this question one must consider the only other recent OJP grant program identified by the Innocence Project that requires such verification from a similarly high-placed State legal officer: the Office on Violence Against Women FY 2008 Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program.¹⁷ Notably, this program requires that certification of compliance with the laws specified by Congress come from such officials, *yet the requirement that such officer provide the certification is*

¹⁶ U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT’L INST. OF JUSTICE, Solicitation: Postconviction DNA Testing Assistance Program 10 (2007).

¹⁷ U.S. DEP’T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, OVW FY 2008 Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program 5 (2007).

*specified within the statute authorizing that grant program.*¹⁸ Neither JFAA Sections 413 nor 412 specify the participation of these legal officers, and certainly not “certification” from any party.

In short, if Congress wanted to require the signatures of those state officers it would have specified that, and made it a matter of certification – not demonstration, as under Section 413.

We leave it to Congress to consider the above stated concerns when assessing OJP’s interpretation of its intent as applied to the Bloodsworth program. In the interests of all potential future grant applicants, however, we urge that the question be clarified, because as we discuss below requiring State Attorney General or chief legal officer signature may well present a real hurdle for potential applicants for Bloodsworth program funds.

For Bloodsworth Program, State Attorney General or Chief Legal Officer Participation in Application Process is a Likely Obstacle to Application Submission

While the Innocence Project strongly believes that applicants should be required to demonstrate that their states meet the thresholds of evidence preservation and post-conviction DNA law or policy specified under JFAA Section 413, specifically requiring that demonstration to come from the State Attorney General or chief legal officer may prevent qualified and needy applicants from properly pursuing the Bloodsworth grant program.

¹⁸ 42 U.S.C.A. § 3796hh-1 (Westlaw 2007).

One could readily understand that of all people, States Attorneys General or chief legal officers might not be particularly interested in efforts to prove (additional) wrongful convictions in their states (as doing so would obviously prove error by the state, and could likely expose the state to liability for such wrongful convictions).¹⁹ Particularly when one considers that OJP required the personal signature of that Attorney General or chief legal officer on a legal memorandum (as opposed to a simple narrative submitted by the applicant, which is the case for other OJP grant programs where “demonstration” is required²⁰), one can understand that this requirement might have presented for some an insurmountable obstacle to successfully submitting an application. It is impossible to know whether this did in fact occur, or if the requirement itself simply chilled a potential applicant’s assessment of the return on investment of pursuing a grant application. But we submit this concern – particularly in light of the fact that such signatures may not have been legally necessary (see previous subsection) – for the Committee’s consideration.

The Bloodsworth program was the only grant program governed by the JFAA Section 413 innocence incentives that was actually funded. Unfortunately, not a penny has ever flown through the Bloodsworth grant program as administered by OJP. As described below, the other three grant programs intended to be governed by Section 413 innocence protections were funded not as JFAA programs but instead under the

¹⁹ We cite this possibility, and the potential factors therefor, not to suggest any ill-intent by any such state official, but to suggest that requiring their work and personal signature on the grant application may simply have impeded realization of Congressional intent to disburse such funds to qualified applicants.

²⁰ Not one of the 30 other grant programs identified as having been offered by OJP in the same year, 2006, requires the applicant to “demonstrate” that they meet requirements through anything other than a narrative by the applicant. Please see Exhibit A for a detailed list of those grant programs.

President's DNA Initiative, thus entirely avoiding the Section 413 innocence incentives intended by Congress.

B. The Remaining JFAA Section 413-Governed Programs were Never Funded

Section 413 of the JFAA established additional requirements of applicants to four JFAA programs (JFAA Sections 303, 305, 308 and 412, described above). These requirements were intended to serve as incentives for interested states to adopt appropriate laws and policies regarding the preservation of biological evidence and post-conviction access to DNA testing in those states.

As noted above, no Bloodsworth grant program monies have ever been disbursed. Not one of President Bush's proposed budgets since passage of the JFAA has included funding for the other three grant programs governed by Section 413 (i.e., Sections 303, 305 and 308). Strikingly similar programs were, however, funded in the President's budgets under the "President's DNA Initiative" – and as such were freed of the Congressionally intended incentives to ensure state consideration of claims of actual innocence.

Through Executive maneuvering in both the budget and grant administration processes, bi-partisan Congressional intent to provide innocence incentives under Section 413 – and innocence protections under Section 412 – have been rendered completely ineffectual.

C. The Importance of Preserved Biological Evidence and the Appropriate Remedy for State Shortcomings in Preservation Practice

To be able to ensure justice, biological evidence must have been preserved, and saved in such a way that it can be located when necessary. Congress recognized the incredible value of preserved biological evidence in the emerging DNA era through passage of the JFAA, which strongly enhanced preservation of evidence policies for federal crimes and made hundreds of millions of dollars in authorized state grant programs contingent upon proper preservation practices.

During drafting of the JFAA, lawmakers understood that given competing priorities and politics, the only way to be sure to induce states to mandate the proper preservation of biological evidence was through the power of the purse. That is why as originally drafted, this requirement appropriately attached to many funding streams, as Congress appreciated that states would only act if large quantities of federal funding compelled them to prioritize the issue. In the course of negotiations, however, the number of grant programs that expressly required proper evidence retention practices was reduced to four. As described above, three of those four programs were never funded, and while one was funded, no funds have ever been disbursed.

Ultimately, therefore, and in contrast to Congressional intent, states have been provided with no incentive from the federal government to prioritize the statewide practice of properly preserving biological evidence. This is because as implemented, the funding carrots are patently insufficient to serve as the incentive necessary.

This failure has tragic consequences for both public safety and the innocent victims of wrongful conviction. Incredible public safety potential lies latent in biological

evidence from past crimes. By properly preserving biological evidence, cold cases can be solved. Crime scene DNA can link an unknown perpetrator to other crimes – over time periods and across jurisdictions. And of course, preserved biological evidence can settle credible post-conviction claims of innocence.

Consider the following two examples of how preserved biological evidence can enable justice long overdue.

Innocence Claims Hinge on Preserved Evidence: Scott Fappiano

Scott Fappiano was convicted of a rape in 1985 and consistently maintained his innocence throughout his incarceration. While a wealth of samples had been collected from the crime scene, DNA technology at the time was not sufficient to produce a result that would conclusively identify the perpetrator of the heinous crime for which he was convicted.

Some exhibits containing biological evidence used at trial were returned to the DA's office; others were vouchered and sent to New York Police Department evidence storage facilities. Two items of evidence – the rape kit and a pair of sweatpants containing semen stains—were sent in 1989 by the DA's office to a now-defunct DNA laboratory called Lifecodes, which at the time performed rudimentary DNA analysis for the state of New York.

DNA in the late 1980's was limited, and although Lifecodes found semen to be present on the available evidence, they could not produce a conclusive result. In 1998, more advanced DNA testing methods had developed and the Innocence Project embarked upon a search for the original crime scene evidence. The DA's office fully cooperated

with a search of its storage areas, but none of the original exhibits could be located. A similar search of NYPD storage facilities yielded nothing.

After a long and uncertain search, the Innocence Project ultimately contacted Orchid Cellmark, a private DNA laboratory in Texas which had, after a series of mergers, taken over the Lifecodes lab. Remarkably, in August of 2005, two test tubes containing biological samples from the crime scene were located. DNA testing of those extracts, using more progressive DNA testing methods, excluded Mr. Fappiano. He was freed from prison in October of 2006 – 21 years after his wrongful conviction, and 8 years after the post-conviction DNA testing could have been performed if the crime scene evidence had been properly preserved.

Had the liquid DNA material not been preserved by a private lab, Mr. Fappiano would still be in prison despite his actual innocence. There were no records indicating that these other pieces of evidence had been destroyed, nor where the evidence could be found. It was by pure chance that the evidence was located.

In an effort to determine why the Innocence Project is compelled to close the cases that we do, we recently conducted an analysis of a sample of those cases. We found that we were forced to discontinue our efforts to settle innocence claims in 32% of closed cases across the nation because critical biological evidence -- upon which those innocence claims were dependent -- was destroyed or could not be found. In New York City alone, the Innocence Project is presently thwarted in its pursuit of 19 credible claims of wrongful conviction because evidence custodians cannot locate the evidence.

The nation's 212 DNA exonerees like Scott Fappiano are the lucky ones. The tortured are those wrongfully convicted persons for whom post-conviction DNA testing

could prove their innocence, but for whom that evidence has been either lost or destroyed.

Solving Cold Cases Relies Upon Preserving and Locating Evidence: The Charlotte Police Department Experience

In December of 1995, the Charlotte-Mecklenburg Police Department was relocating its property room. Evidence held in the existing evidence storage space was in disarray and difficult to locate. Forward-thinking police officials recognized an opportunity to solve old crimes and launched an initiative to re-catalogue all of its evidence, including biological evidence. Each piece of evidence was bar-coded, and when necessary, repackaged. Radio scanners were purchased so that evidence tracked on inventory forms with a barcode could be located in the storage room.

In nine months, all of Charlotte's evidence was re-catalogued and placed in one 6,700 square foot storage space. Biological evidence was segregated and neatly placed on retractable shelves in order to maximize storage space. Each envelope of evidence contained an individual property number, allowing easy access to decades-old kits, swabs, cuttings and clippings that held the promise of bringing to justice criminals who had successfully eluded apprehension for years. Following the re-cataloguing of old evidence, Charlotte's Police Department formed a Homicide Cold Case Unit in 2003. Police officials understood that the power of preserved evidence transformed their old evidence room into a crime-solving goldmine.

One such case involved the 1987 murder of a 19-year-old Charlotte woman named Jerri Ann Jones. While detectives had been stymied by her case, upon re-

cataloging of the evidence facility, physical evidence connected to her case was readily located and submitted to the crime lab for DNA examination. The results were entered into CODIS, the national DNA database. This resulted in the identification of a suspect, Terry Alvin Hyatt, who was already in prison and, upon being confronted with the fact of the CODIS match, confessed to the murder of Ms. Jones. Closure finally came to Ms. Jones's family seventeen years after she was murdered.

In today's modern DNA era, accessing properly preserved evidence from adjudicated cases has clear benefits. As DNA testing methods have advanced yet further, allowing for the creation of perpetrator profiles from even degraded crime scene evidence, the possibilities presented by preserved biological evidence are tremendous.

States Can Readily Preserve Biological Evidence; What is Needed are Incentives and Guidance

The practice of preserving biological evidence is not itself "new," nor particularly challenging. Such evidence is in fact regularly preserved in jurisdictions across states, nationwide. What is lacking is consistency in practice across – and even within – jurisdictions. The federal regulations enacted pursuant to the JFAA make clear how biological evidence can be preserved simply, appropriately, and without need for excessive storage space or extraordinary conditions of storage.

The potential to properly preserve biological evidence lies latent in every state, like the DNA profiles lying latent in that evidence. Compared to the amazing probative power that we can harness through the proper preservation of biological evidence, the

effort and resources necessary to do so are minor. What is missing is the commitment to act.

Recommended Congressional Action

As envisioned and later enacted by Congress, States could have been compelled to standardize and expand statewide evidence preservation requirements. Unfortunately, Executive and OJP maneuvering regarding JFAA implementation rendered these preservation incentives useless. But while the opportunity has been missed, it has not been lost. In the interest of significantly improving the public safety and enabling the wrongfully convicted to prove their innocence, Congress must revisit the connection of JFAA Section 413 to a significant federal funding stream in order to stimulate the achievement of its original laudable goal.

An overhaul of the funding reality should also be complemented by NIJ leadership regarding best practices for the preservation of biological evidence. Through work with many jurisdictions, the Innocence Project has seen that the will to properly preserve and catalogue preserved evidence exists, yet jurisdictional unfamiliarity with best practices for doing so has prevented action. Federal guidance – perhaps on the basis of a series of recommended protocols identified by a national working group – should be offered to states to specifically explain how biological evidence can be consistently and properly preserved.

With Congressional support and federal guidance, the discovery of preserved biological evidence – to protect the innocent and the public at large – will no longer have to rely on serendipity and happenstance.

III. Leaving the Public Unprotected: OJP Enforcement of Congressional Intent

Regarding Innocence Protections Under the Paul Coverdell Forensic Science

Improvement Grant Program

The JFAA program with the broadest reach and greatest direct potential for preventing wrongful convictions may well be Section 311(b) of the Justice for All Act. It requires that state and local jurisdictions seeking Paul Coverdell Forensic Science Improvement Grant Program (Coverdell) funds certify that:

A government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount.²¹

The Innocence Project views the Congressional mandate under Section 311(b) as a crucial step toward ensuring the integrity of forensic evidence, because we know that lab errors, both inadvertent and calculated, contribute significantly to wrongful convictions. In fact, according to a recent study by University of Virginia professor Brandon Garrett, problems with forensic evidence such as blood evidence, a fingerprint match or a hair comparison contributed to 55 percent of the convictions of the first 200 DNA exonerees in the United States.²²

Without the development of DNA testing, there would be no Innocence Project – and more than 200 factually innocent Americans would remain wrongfully convicted, 15

²¹ JUSTICE FOR ALL ACT § 311(b), 42 U.S.C. § 14136 (2004)

²² Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. (forthcoming 2008).

of whom had been on death row. With our use of this validated and unambiguous science, we have proven that wrongful convictions do in fact often result from unvalidated or unreliable forensics, or exaggerated expert testimony. Together, misapplication of forensics and misplaced reliance on unreliable or unvalidated methodologies are the second greatest contributors to wrongful convictions. Despite these demonstrated problems, independent and appropriately conducted investigations – which should be conducted when serious forensic negligence or misconduct may have transpired – have been exceedingly rare.

To that end, Section 311(b) of the JFAA brought hope of important change. The independent and external investigations mandated by Section 311(b) would enable – indeed, when necessary, force – jurisdictions to identify the root causes of demonstrated forensic problems, thus paving the way for effective remedies to prevent them from re-occurring. The provision was intended by Congress to help jurisdictions:

- Bypass internal politics that might otherwise impede the efficacy, disclosure – or even the simple performance – of such investigations,
- Identify the challenges faced by forensic entities and employees (as they are confronted with ever-increasing workloads) that may have led to problems alleged,
- Understand the steps necessary to ensure that such alleged negligence or misconduct will not re-occur, and
- Consider how other cases – past, present and future – may be connected to the same problems identified, as well as how to best address those cases.

In the wake of allegations of serious forensic negligence or misconduct, independent and external investigations and reports are essential to consistent public faith in the integrity of forensic evidence – evidence that juries rely upon greatly when determining questions of innocence or guilt.

If that faith wanes, juries can question the veracity of evidence, and might acquit – even when that evidence otherwise would prove a defendant’s guilt.

In other instances, juries have exhibited too much faith in flawed forensic evidence, which has resulted in numerous wrongful convictions. Such wrongful convictions mean that the real perpetrators eluded detection. In many of the 212 wrongful convictions proven by DNA evidence, those same real perpetrators have gone on to commit other crimes. Indeed, in the 77 exonerations in which real perpetrators have been identified, we have documented dozens of rapes and murders committed after the arrest of the wrong person and before the identification and apprehension of the real perpetrator.

Moreover, Section 311(b) was intended to help our hard-working police and prosecutors focus on the real perpetrators of crimes. If they apprehend and convict those persons as swiftly and surely as possible, they can best protect the public safety. Thus, it is not surprising that Congress recognized the crucial roles that forensics play in our courtrooms and police precincts, and Section 311(b) enjoyed overwhelming bi-partisan support. Yet as discussed below, OJP’s refusal to properly enforce Section 311(b) thwarts Congress’s intent, undermines public faith in forensic evidence, leaves the innocent at risk of wrongful conviction, and threatens the public safety.

A. Forensic Oversight – Or Lack Thereof – Before 311(b)

As noted above, before enactment of Section 311(b), there was little incentive to, in the wake of forensic error, produce a rigorous external investigation of what went wrong and how to fix it. Examples of these unexamined forensic missteps are myriad.

Jimmy Ray Bromgard and Montana

On October 1, 2002, Jimmy Ray Bromgard of Montana became the 111th person exonerated by postconviction DNA testing. The testimony of the state's Department of Justice crime lab director Arnold Melnikoff played a crucial role in sending Bromgard to prison for a young girl's rape. Although he lacked a scientific basis for asserting so, Melnikoff testified that microscopic comparisons of hair evidence demonstrated a one-in-ten-thousand chance that two hairs found on the child's bedding belonged to someone other than Bromgard.

At the request of the Innocence Project, a peer review committee of the nation's top hair examiners reviewed Melnikoff's testimony, issued a report concluding that his use of statistical evidence was junk science and urged Montana's Attorney General, which ran the lab, to set up an independent audit of Melnikoff's work in other cases.

Two more Montana inmates were exonerated by DNA in two other criminal cases where Melnikoff had offered the same fabricated statistics he offered against Bromgard. Thus, in the first three cases in Montana in which an inmate secured post conviction DNA testing, the testing cleared the inmate and in all three cases, the state's lab director and "hair expert" most likely engaged in misconduct.

At the request of the prosecution, the FBI hair unit re-examined the hairs in the Bromgard case and concluded that Mr. Bromgard was – in direct contradiction of Melnikoff's findings – excluded as the source of the hairs. Even then, the Montana Attorney General stubbornly refused to order an external independent audit. Instead, he conducted his own internal review, employing a retired law enforcement officer who had relied on Melnikoff to make cases and at least one state crime lab employee who had been trained by Melnikoff. His report concluded there was no reason to re-examine the evidence in Melnikoff's other cases. Ultimately, it was revealed that before the state Attorney General had assumed that post, he had been a county prosecutor who had used Melnikoff as his expert witness in numerous cases that either he personally tried or supervised. The Coverdell mandate of external independent investigations was designed, in part, to overcome these types of situations in which key players in an investigation process have a conflict of interest.

Virginia and the Earl Washington Audit

In 1984, Earl Washington was wrongly convicted and sentenced to death for the rape and murder of a young housewife in 1982. Although he came within nine days of execution, in 1993, he received a Governor's commutation to life based on early post-conviction DNA testing and in 2000, he received a Governor's pardon, following additional DNA testing, on the grounds of reasonable doubt. However, in both instances, the Governors explained that due to the qualified conclusions contained in the DNA reports from the Virginia Division of Forensic Science, Washington's guilt remained a possibility and as a consequence, both Governors refused to exonerate him. Given these

pronouncements, the state police continued to investigate Washington and the victim's husband believed that his wife's murderer had been inexplicably freed.

Finally, in 2004, in conjunction with a civil rights suit filed on behalf of Mr. Washington, additional DNA testing by an independent lab proved his complete factual innocence and the criminal responsibility of another man. DNA testing on the semen recovered from the victim came from one man, Kenneth Tinsley, a convicted serial rapist. The independent lab also concluded that the 2000 results generated by the Virginia crime lab on the same semen collected from the victim had been erroneous since the Virginia lab had wrongly excluded Mr. Tinsley as the source.

In response to the new results from the independent lab, the Innocence Project and Washington's attorneys urged the chief of the state crime lab to implement an external independent review to determine what went wrong in the lab to produce the erroneous results in 2000, the scope of the problem, and how to fix it. The state crime lab chief refused and instead conducted an internal audit which reported that "the conclusions reached (by the Virginia crime lab) in this case regarding Earl Washington and Kenneth Tinsley are scientifically supported by the data in the case file."

In September 2004, after the Innocence Project challenged the appropriateness of an internal review, Governor Warner ordered an independent external audit of the case to be conducted by the American Society of Crime Lab Directors Laboratory Accreditation Board (ASCLD/LAB).

In May 2005, ASCLD/LAB issued its report finding that numerous errors were made in the 1993 and 2000 DNA testing by the Virginia Bureau of Forensic Science. The

independent external auditors specifically rejected the findings of the state's internal review and criticized the state's failure not to take appropriate remedial action, declaring:

The ASCLD/LAB inspectors disagree with the statement made by the DFS internal auditors that "We find that the conclusions reached in this case regarding Earl Washington and Kenneth Tinsley are scientifically supported by the data in the case file." The poor quality of the DNA typing results and the diverse array of alleles detected by the repeat analyses, that are not reproducible, do not sustain the conclusion that the reported findings are scientifically supported by the data.

ASCLD/LAB recommended extensive remedial action including sweeping reviews of other cases. None of this would have occurred but for the independent external audit.

Because of the initial wrongful prosecution and conviction of Washington, the state's investigation of the 1982 murder ceased prematurely, and the real perpetrator remained at liberty to commit at least one other violent rape. Because of the failed laboratory work of the Virginia Division of Forensic Science, the victim's widower endured additional hardship and was denied emotional closure, needlessly, for several years. Following the ASCLD/LAB audit, the Special Prosecutor reinvestigated the case and indicted Kenneth Tinsley. Mr. Tinsley pled guilty in 2007 and received a life sentence.

Section 311 of the JFAA was designed to prevent what happened in the aftermath of the Earl Washington case. Significant errors are more likely to be revealed by an audit in which none of the employees or management of the lab under investigation take part in the review.

B. OJP's Failure to Carry Out Congressional Intent

Despite the strong bi-partisan Congressional support for the external investigations intended under the Coverdell grant program, implementation of the certification requirement has been thorny at best. The Innocence Project has surveyed applicants for Coverdell funds in each year since the JFAA's passage, and we have found significant shortcomings in enforcement of the new requirement. Too often, we have found that Congressional intent has been ignored or otherwise circumvented, and in most instances, money continues to flow to Coverdell grantees irrespective of whether they adhered to the JFAA's Coverdell mandate. We will address specific shortcomings below.

C. OJP Fails to Provide Applicants with Guidance

Although Section 311(b) dramatically changes the forensic landscape by requiring independent external investigations into allegations of serious forensic negligence or misconduct, the fact is that many jurisdictions lack the apparatus for fielding them – even though they're not supposed to receive Coverdell funding unless they do. OJP has not been helping applicants clearly understand what Congress expected of them under this program, and has been distributing the monies without properly enforcing the certification requirement.

During 2005, the first year the NIJ administered Coverdell grants with the new precondition, it became clear even before the NIJ published its 2005 Coverdell Request for Proposal (RFP) that applicants lacked clarity about what would constitute an appropriate "government entity" and "appropriate process" in keeping with Congressional intent. The Inspector General's office (OIG),

potential grantees and the Innocence Project all had questions. But OJP was not providing sound answers.

Although, in light of the serious questions raised, the NIJ could have amended its RFP – and provided grantees with guidance that could help them determine how they might comport with the external investigations requirement – it opted not to. The NIJ told the OIG that it would respond to specific questions by applicants on case-by-case bases – yet never did. Instead, upon further prodding from the OIG, it sent all grant applicants a memo that sketched three government entities and attendant processes that it deemed to be in keeping with the spirit of the JFAA, five that did not, and – while expressly stating that it was up to the applicant, rather than OJP, to determine whether the applicant complied with the JFAA²³ - required that all applicants recertify their compliance with Coverdell program requirements after reviewing the memo. (The memo is attached as EXHIBIT B.)

OJP ultimately approved every applicant that recertified – seemingly without reference to whether each applicant adhered to the memo. That approach continued into the next funding cycle, as the NIJ funded every FY06 application that included a signed certification,²⁴ despite what seem to be shortcomings on this count on many 2006 applications. (The Innocence Project currently is reviewing FY07 applications.)

²³ The NIJ incorporated the memo to applicants into the text of the 2006 Coverdell RFP and it remains in the 2007 RFP, available at <http://www.ncjrs.gov/pdffiles1/nij/sf000791.pdf#page=5>.

²⁴ For a list of 2005 grantees, http://www.ojp.usdoj.gov/nij/awards/2005_topic.htm#paul_coverdell. The 2006 list of grantees is available at http://www.ojp.usdoj.gov/nij/awards/2006_topic.htm#paul-coverdell.

Yet even if the NIJ had enforced the memo, we remain unconvinced that it provides potential applicants for Coverdell monies with the meaningful advice necessary to comport with Congress's vision for robust and external oversight entities. In fact, it seems the memo has enabled many applicants to assert that inadequate oversight mechanisms pass muster, while enabling OJP to assert that they didn't completely ignore the requirement.

The Innocence Project is not suggesting that it knows what legally satisfies the 311 (b) requirements. Nevertheless the plain language in the Justice for All Act is clear. It requires applicants for Coverdell monies to certify that a government entity exists and an appropriate process is in place to conduct *independent external* investigations. As such, the OJP's guidance was inadequate, misleading, and did not help to fulfill Congressional intent.

D. Lack of Clarity Leads to Underuse, Ineffectiveness of Coverdell Forensic Quality Assurance Protections

Only a handful of Coverdell investigations have proceeded since the 311(b) certification became part of the Coverdell grant. To our knowledge, allegations of serious negligence or misconduct have been lodged in California, New York, Texas, Washington State, and Massachusetts. Yet these allegations only result in worthwhile investigations when the investigative entities actually are external and independent, as Congress had envisioned them. Indeed, those concerns have proven well-founded.

A Comparison of Results Demonstrating Inadequacy of Internal Affairs Investigations as the “External” Entity to Conduct Such Investigations

An *internal affairs* investigation is, by definition, not an “external” investigation. Yet such an entity (along with offices of Inspectors General and independent investigators appointed by district attorneys) is among the three that the OJP tacitly endorsed in its memo explaining to applicants the Section 311(b) requirement. Specifically, the OJP suggested that a law enforcement agency receiving the grant could call on its Internal Affairs Division as its entity, so long as that IAD reported directly to the head of the law enforcement agency as well as the head of the unit of local government – and was completely free from influence or supervision by laboratory management officials.

The Innocence Project has great concern about OJP’s tacit endorsement of internal affairs as an appropriate entity to conduct Section 311(b) investigations. This is because we have yet to observe a local police department or crime laboratory internal affairs division conduct a crime lab investigation completely free from influence, if not supervision, by its upper laboratory management. Internal investigations carried out in Virginia, Montana and New York all were hopelessly compromised by conflicts of interest or by the involvement of laboratory management. Consider the following example of a Section 311(b) investigation conducted by an internal affairs unit:

Case Example 1: Santa Clara County Internal Affairs Investigation

In Santa Clara County, the entity designated to conduct the Section 311(b) investigations is what serves as the de facto internal affairs arm of the District Attorney's Office, its Bureau of Investigation. The crime lab in Santa Clara County is a division of the District Attorney's office. A robbery case prosecuted by the Santa Clara District Attorney's office, against Jeffrey Rodriguez, involved forensic evidence and testimony that was credibly alleged to have been plagued by serious negligence or misconduct. Pursuant to the certification made under the California Coverdell grant application, the Northern California Innocence Project (NCIP) petitioned the District Attorney (DA) to scrutinize the fiber analysis methods used at its laboratory which were seemingly erroneous, and were crucial to the conviction of Mr. Rodriguez – a conviction that was later overturned, and where the courts ultimately declared Mr. Rodriguez factually innocent of that crime.

Specifically, in the Rodriguez case Mark Moriyama of the Santa Clara District Attorney's crime laboratory asserted – both in written reports and in testimony – that oil-like deposits on Mr. Rodriguez's jeans connected Mr. Rodriguez to a robbery. Mr. Rodriguez was found guilty, but the conviction was ultimately overturned. In consideration of potential re-trial, other government experts from outside the lab deemed Mr. Moriyama's findings regarding the oil-like deposits insupportable, and based upon the questions raised by those subsequent analyses of the deposits, the District Attorney decided not to re-try the case against Mr. Rodriguez.

The NCIP filed an allegation of forensic negligence or misconduct with the DA's office, calling for an investigation of Mr. Moriyama's work to assess whether the lab had

relied on errant analysis to convict Mr. Rodriguez in the first place, and whether problems with fiber analysis may have tainted other cases the lab handled. Several months later, the DA's office published a report in response to the NCIP's allegation. That report focused not on providing an objective analysis of Mr. Moriyama's forensic work seeking to understand if a problem occurred, and if so why and what remedial measures might be appropriate, but instead defended the propriety of Mr. Rodriguez's conviction and the role of Mr. Moriyama's testimony therein.

In particular, the report did not adequately explain how Mr. Moriyama's forensic analysis deviated so dramatically from the examinations of other analysts who looked at the same fiber evidence and could not corroborate his conclusions. The DA's report also failed to provide guidance that might prevent recurrence of a forensic error.

The investigative shortcomings troubled many, including the editorial board of the *San Jose Mercury News*. It wrote on November 9th of last year that "(DA) Carr could have turned the complaint over to an outside expert or the state Attorney General's Office. That would have signaled to the community that when it comes to addressing problems with prosecutions, her office has nothing to hide and no one to protect." Just last month, in a rare finding that made the DA's obstreperousness all the more striking, a court in Santa Clara declared Mr. Rodriguez factually innocent of the crime for which he had been wrongfully convicted. (See the judge's order, attached as Exhibit C.)

Internal affairs divisions can be compromised by conflicts of interest that undermine their objectivity when they must report their results to the public. It is one thing for an entity's internal management to determine how to conduct itself based on its own internal reviews, but yet another thing to provide the public with assurances of

quality when there is potential fiscal liability and political embarrassment at stake for the government official to whom both the investigated and investigator ultimately report.

In contrast to a department of internal affairs, a state's office of the inspector general lacks such a conflict of interest; indeed, inspectors general exist to avoid conflicts of interest and thus maintain independence when the government is investigating itself. The following example demonstrates the difference.

Case Example 2: The New York State Office of the Inspector General's Examination of the New York City Police Department's Crime Lab

A 2007 Coverdell investigation conducted in New York, for example, exhibit the value of a greater level of independence and transparency in Coverdell investigations. In that instance, the New York State Office of the Inspector General (IG) examined the New York Police Department crime laboratory's response to 2007 allegations of misconduct among narcotics analysts at the lab. These allegations had been swept under the rug by an internal review for more than five years – and that would have continued but for the independent light shed on them by the IG, which brought the necessary attention – and action.

In approximately April 2002, rumors arose at the NYPD lab that analysts were “drylabbing” – presenting lab results without actually performing tests – in narcotics cases. During a laboratory staff meeting, an assistant chemist, Delores Soriano allegedly mentioned to a criminalist, Elizabeth Mansour, that she and “half the lab” were cutting corners. Sgt. Aileen Orta of the lab and Division Inspector Denis McCarthy decided to administer tests intended to catch Mansour and Soriano. The results were striking;

Mansour reported a presence of cocaine in seven bags when none was present. As a result of the internal review, Mansour was suspended and eventually left the NYPD.

In a separate examination, Soriano said cocaine wasn't present when, indeed, it had been. Yet the lab did not investigate the root cause of that missed result, nor did it look at any of Soriano's past cases, either. Later, tests were administered to a lab supervisor, Rameshchandra Patel, and he falsely identified cocaine. The internal investigation ended in 2002 with absolutely no re-examination of the offending analyst's casework.

Even in 2007, when the new director of the laboratory learned of the 2002 problems, he did not know that he was expected to refer the matter to New York State's designated independent entity. Eventually, after the matter came to the attention of the agency that regulates all crime labs in the state, the matter was referred to the New York State Inspector General (IG). When the IG looked into the same matters in 2007 under the auspices of a Coverdell allegation, it re-investigated, concluded that misconduct had occurred, and recommended responses that went further than the original investigation, which it had found to be sorely lacking. It also referred possible criminal charges to the District Attorney's office.

The New York IG's response contrasted starkly with that of the Santa Clara County DA's office when it was faced with a similar quandary. Unlike in Santa Clara, the New York IG looked objectively at questionable laboratory activities, without concern for reputations or liability risks, and brought to the surface matters about which the lab had remained publicly silent. This airing brought necessary attention to unresolved issues that otherwise might have been swept under the rug – and provided assurances that the

problem had been properly investigated and addressed in the interests of the integrity of forensic evidence.

Had there never been a Coverdell allegation and an independent external investigation, it seems that the public would never have heard another word about Mansour, Soriano or Patel, nor about the broader problems with which their lab was contending. Nor would there be public assurances that such problems are adequately addressed. This independent, external investigation and report by the Inspector General demonstrates why it is so important that Congressional intent that such investigations be “external” is honored.

E. Innocence Project Survey of Established Coverdell Oversight Entities and Processes Reveals Shortcomings

Regardless of the inadequacy of internal affairs as Coverdell oversight entities, the Innocence Project knows from its research that most recipients of Coverdell funds named internal affairs divisions to conduct their Section 311(b) investigations. We canvassed (through public records requests and otherwise) the oversight compliance methods of virtually all recipients of Coverdell monies in FY 05 and FY 06, and found that in many states, the bodies that applied for Coverdell funds weren't the laboratories or other forensic facilities, but instead administrative agencies that managed this money and distributed it to numerous local recipients. Some applicants asserted that they established statewide policies to meet the certification requirement of Section 311(b). In many other circumstances, applicant bodies conceded that they had signed the certifications on behalf of the forensic end-users, but asserted it was the responsibility of the local recipients to

establish investigative entities and processes. They then suggested that we contact the local grant recipients, themselves, to see how they would establish the appropriate investigative entities and processes.

When we did so, we learned that many of the local funding recipients did not know about the Coverdell external investigations requirement – nor had they been asked by either OJP or the state agencies distributing their Coverdell monies to consider it before they accepted their monies. (There were some exceptions to this rule – among them in California and Ohio. In those instances, the applicant agencies required local grantees to submit documentation that named their oversight entities – but even in these instances, it seems that no one scrutinized these submissions to ensure they adhered to the JFAA.)

Thus, in the course of our nationwide survey of Coverdell applicants and entities, we learned much about their handling of the JFAA Section 311(b) requirements. Many of the local recipients addressed the Coverdell requirement for the first time in conversations with us, and the vast preponderance of these local recipients named their internal affairs apparatuses as their Coverdell entities. By virtue of not properly understanding what was expected of such entities and processes and/or believing that internal affairs investigations would meet the letter and spirit of Congressional intent under Section 311(b), our survey revealed numerous structural impediments and conflicts that would undermine the efficacy of whatever investigations the vast majority of Coverdell recipients conducted, thereby defeating the intent of Section 311(b).

F. Other Problems with Coverdell Grant Administration

Concerns about the independence and externality of certified Coverdell oversight entities are crucial, and deserving of close examination. In addition, there are numerous other major concerns about the resultant investigations – including a relative lack thereof – that we would like to bring to the Committee’s attention.

i. Too Few Coverdell Investigations

Nationally, the adoption and utilization of the external investigatory Coverdell requirements has been glacial. In New York, where two Innocence Project co-directors sit on the New York Commission of Forensic Science -- established more than 10 years ago to oversee the state’s forensic laboratories -- four Coverdell investigations already have unfolded. Clearly, the New York Commission has taken to heart the importance of Coverdell investigations. By comparison, we are aware of only six other Coverdell investigations requested nationally.²⁵ It’s inconceivable that outside of New York there have only been six instances of serious forensic negligence and misconduct nationwide in the past three years that deserve investigation. Common sense, experience, and tracking of news reports nationwide tell us the number of incidents deserving of such investigations must be far larger.

Even if a state has established a robust oversight process in connection with 311(b), most jurisdictions do not notify the employees and other staff of their laboratories about the right and ability to make allegations. Consequently, there have been

25 In the January 2008 report by the Office of the Inspector General, “Review of the Office of Justice Programs’ Paul Coverdell Forensic Science Improvement Grants Program,” available at <http://www.usdoj.gov/oir/reports/OJP/c0801/final.pdf>, the OIG alluded to several other Coverdell investigations. The Innocence Project cannot independently verify whether these are the same investigations about which it has firsthand knowledge, or separate and additional Coverdell investigations.

dramatically fewer Coverdell allegations than we otherwise would expect. The typical Coverdell allegation has arisen after a media report – such as in a newspaper – that serious negligence or misconduct might have occurred at a lab. The media, in their watchdog role, have informed the public of concerns that others have then brought to the attention of Coverdell oversight entities. But in this arrangement, it is likely that only a handful of the instances of serious negligence or misconduct ever see the light of day. Laboratory employees – those who witness laboratory activities on a daily basis and may be in best position to report on them – need to know that the Coverdell oversight entities are there for them to raise issues safely, as whistleblowers, outside their chains of command. As such, state laboratories should inform their staff members of the Coverdell requirements. New York State took on such an effort via its Commission on Forensic Science, but other states must follow suit.²⁶

Regardless of where responsibility for these disconnects lie, it seems clear that in jurisdictions throughout the country, Coverdell funds are being received yet incidents of serious forensic negligence or misconduct are going unreported, and thus neither investigated nor remedied. As such, we have missed many opportunities to examine the shortcomings in our forensic systems, as well as those to improve the quality of our criminal justice systems. This situation is sure to continue unless there is action to address it.

²⁶ The Inspector General discusses a related issue in its January 2008 report, available at <http://www.usdoj.gov/oig/reports/OIP/e0801/final.pdf> – specifically that laboratories are not always reporting allegations of serious negligence or misconduct to their relevant oversight entities. Although the Innocence project strongly concurs with the Inspector General that notification procedures must be remedied, the specifics of the OIG’s suggestions extend beyond the scope of this testimony.

ii. Certifications Signed Even without Functional Oversight Entities

The Innocence Project, in its canvassing of Coverdell funding recipients, determined that numerous grant recipients signed their Section 311(b) Coverdell certifications without first considering which entity would conduct such investigations, and what process the entity would use in those investigations. Several states admitted this openly to the Innocence Project, (yet still received federal monies that, ostensibly, should have been denied in the absence of a supportable certification).²⁷ Without a clear plan for Coverdell compliance, many states have been playing catch-up when they've been faced with allegations – if they receive allegations at all.

iii. Certifications Signed with Uninformed Oversight Entities

The Innocence Project's national canvassing also revealed the troubling fact that some oversight entities named in applications for Coverdell monies never were informed that they had been selected for oversight duties.²⁸ In Massachusetts, for example, in 2007 the New England Innocence Project filed an allegation with the state Inspector General's office because the state's Coverdell application indicated that the IG was the office fielding the state's Coverdell allegations. The IG, however, indicated that it never had been informed of this designation, which by definition meant it was unprepared to vet the allegation immediately upon its receipt. While the IG has endeavored to undertake the task responsibly, the IG, which has required time to get up to speed on the Coverdell

²⁷ The Inspector General's Office confirmed this occurrence in its January 2008 report, available at <http://www.usdoj.gov/otg/reports/OJP/e0801/final.pdf>.

²⁸ The Inspector General's Office confirmed this occurrence in its January 2008 report, available at <http://www.usdoj.gov/otg/reports/OJP/e0801/final.pdf>.

requirement, still is investigating the allegation a full year later.²⁹ Similarly, the Innocence Project learned that the Inspector General in Illinois, named along with the Illinois State Police's internal investigatory arm to handle Coverdell allegations in Illinois, also had no notice of its designation.

iv. Subgrantees Avoid Scrutiny

In many states Coverdell grants are awarded to state offices that administer federal grants and then disburse monies to subgrantees. The Innocence Project has found that, although state recipient agencies signed certifications regarding external investigations, the actual recipients of the monies were not similarly pressed for documentation. As such, these agencies received monies without certifying – thus circumventing the certification requirement. We should note that several states have taken it upon themselves to require their subgrantees to provide them with documentation concerning the entities they'd utilize in vetting a Coverdell allegation. But the standards across the country on this front are far from uniform and, in function, wholly voluntary. As a result of this disconnect, many jurisdictions are not truly prepared to provide the public confidence in forensic evidence envisioned by Congress.

In 2007 OJP also noted in its RFP that any submitted certification applies not only with respect to an applicant itself, but also with respect to any subgrantee that receives a portion of the grant.³⁰ But it did not mandate that the applicant list the oversight

²⁹ In its review of Massachusetts' 2007 Coverdell application, the Innocence Project learned that the Massachusetts Inspector General's Office was relieved of Coverdell oversight duties and replaced by the State Auditor's Office (<http://www.mass.gov/sao/>). That agency may require a similar period to get up to speed if ever presented with an allegation.

³⁰ See EXHIBIT B, also available at <http://www.ncjrs.gov/pdffiles1/nij/s1000791.pdf#page=5>. In the RFP potential applicants found the following: "Note: In making this certification, the certifying official is certifying that these requirements are satisfied not only with respect to the applicant itself, but also with

mechanisms of all subgrantees – which means that the subgrantee problem, by and large, remains unresolved. Because the OJP isn't exploring whether the certification signees actually consult with the local grantees about their respective oversight entities, many local entities may have ineffective oversight – if they even establish oversight at all.

v. Many Entities Only Consider Misconduct, Not Negligence

When the Innocence Project examined a number of the oversight entities that we learned about through the phone calls and public records requests mentioned above, it became apparent many of them may not be equipped to handle serious negligence. Instead, they seem designed only to vet misconduct. The JFAA is clear and requires oversight entities to have both capabilities. In any plain reading of the statute, an oversight entity that lacks capacity to handle serious negligence seems to fall short on its face.

vi. No Follow-up on Apparently Insufficient Investigations

As we described above, it seems that the Coverdell investigation by the District Attorney in Santa Clara County, California, fell short of the necessary independence and externality that 311 (b) requires. Others noticed this, as well, among them appellate defender Michael Kresser. He recently requested in writing that the Santa Clara DA reopen her Section 311(b) investigation. Yet thus far, the DA has not responded to Kresser – and there seems to be no pressure from the federal level to do so. We would hope that the OJP would take some responsibility to monitor the thoroughness and independence of an investigation requested under the Coverdell requirement, and thus

respect to each entity that will receive a portion of the grant amount.”

prod effective investigations. But to this point, such follow-up has been absent in California, let alone the rest of the country.

vii. The “Process” Requirement Has Been Completely Ignored

The JFAA clearly requires not only the presence of an oversight entity in a grant recipient’s jurisdiction, but also the establishment of a process that entity would use to vet a Coverdell allegation. Shockingly, and without exception, the Innocence Project has found no applicant for Coverdell monies that specifically articulated the process its oversight entity would rely upon.³¹ Given the clear Congressional mandate that an investigatory process be in place upon certification of the JFAA Section 311(b) requirements, one could argue that no Coverdell applicant should have been funded since the certification requirement became law in 2004.

The Innocence Project has developed a model nine-step process below that oversight entities should consider as one that might meet their Coverdell investigation requirements. It seems an investigation will be thorough, independent and productive enough to provide quality assurance if an oversight entity can:

- (1) identify the source(s) and the root cause(s) of the alleged problems;
- (2) identify whether there was serious negligence or misconduct;
- (3) describe the method used and steps taken to reach the conclusions in parts 1 and 2;

³¹ The Office of the Inspector General also noted in its January 2008 report, available at <http://www.usdoj.gov/oig/reports/OJP/e0801/final.pdf>, that the “process” requirement had been circumvented in a number of places. In particular, the OIG noted that “process” was lacking in instances when a mechanism had not been established to transmit an allegation automatically from a crime lab to an oversight entity. Although we concur that such matters require remedy, we focus herein on the actual investigatory process an entity utilizes once that entity actually receives an allegation.

- (4) identify corrective action to be taken;
- (5) where appropriate, conduct retrospective re-examination of other cases which could involve the same problem;
- (6) conduct follow-up evaluation of the implementation of the corrective action, and where appropriate, the results of any retrospective re-examination;
- (7) evaluate the efficacy and completeness of any internal investigation conducted to date;
- (8) determine whether any remedial action should be adopted by other forensic systems; and
- (9) present the results of Parts 1-8 in a public report.³²

g. OJP Can and Should Require Reports of Section 311(b) Compliance Upon Re-application for Coverdell Funds

It seems unquestioned that OJP's authority allows it to examine the oversight entities more thoroughly than it has. Presently OJP applies similar scrutiny to a number of other elements of the Coverdell program. Specifically, in the 2007 Coverdell RFP, the NIJ notes that the Government Performance and Results Act (GPRA), P.L. 103-62, requires applicants who receive Coverdell funding "to provide data that measure the results of their work."³³ That requirement derives in turn from the GPRA, in which Congress recognized that "congressional policymaking, spending decisions and program oversight are seriously handicapped by insufficient attention to program performance and

³² This proposed process derives from a 2007 document of the U.S. Government Accountability Office – "Government Auditing Standards: January 2007 Revision," available at <http://www.gao.gov/audit/d07162g.pdf> (last visited July 6, 2007). See sections 3.01-3.39.

³³ See p. 12 of the the 2007 Coverdell RFP, available at <http://www.ncjrs.gov/pdffiles1/nij/s1000791.pdf>.

results.”³⁴ As such, states and even local agencies receiving Coverdell funding must “submit semiannual progress reports” and “quarterly financial status reports” during the award’s duration. Moreover, their final reports must:

- (1) include a summary and assessment of the program carried out with FY2007 grant funds,
- (2) identify the number and type of cases accepted during the FY2007 award period by the forensic laboratory or laboratories that received FY2007 grant funds, and
- (3) cite the specific improvements in the quality and/or timeliness of forensic science and medical examiner services (including any reduction in forensic analysis backlog) that occurred as a direct result of the FY2007 grant award.³⁵

In keeping with the GPRA, it seems consistent for OJP to ask Coverdell funding recipients to provide accountings of their oversight entities, processes and investigations as a means of honoring Congressional intent.

Conclusion

In 2004 OJP was handed a mandate for forensic laboratory oversight, after it received a strong bipartisan message from Congress that forensic oversight matters. But it has squandered the promise of JFAA’s Section 311 by sitting on its hands, and the nation has suffered. Faith in our nation’s forensics remains unsettled, and, by and large, allegations of serious forensic negligence or misconduct go unexamined. Given the

³⁴ Available at <http://www.whitehouse.gov/omb/management-gpra/gplaw?n.html#h2>.

³⁵ Available at <http://www.ncjrs.gov/pdffiles1/nij/s1000791.pdf#page=5>, p. 16.

critical importance of forensic evidence to life, liberty and the public safety in this nation, this is untenable, and must be addressed.

Thank you for the opportunity to present before you today. If the Committee has any questions about any of the testimony presented, it would be my pleasure to explore these matters further with you.

**TESTIMONY OF PETER NEUFELD, ESQ.
ON BEHALF OF
THE INNOCENCE PROJECT**

**BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND
HOMELAND SECURITY**

APRIL 10, 2008

**REGARDING
REAUTHORIZATION AND IMPROVEMENT OF
DNA INITIATIVES OF THE
JUSTICE FOR ALL ACT OF 2004**

Testimony of Peter Neufeld
On Behalf of the Innocence Project
Before the House Judiciary Committee
Subcommittee on Crime, Terrorism, and Homeland Security
April 10, 2008

Chairman Scott, Congressman Gohmert, and Members of the Subcommittee, my name is Peter Neufeld and I am co-founder and co-director of The Innocence Project, affiliated with Cardozo Law School, and I am here to testify with regard to the Reauthorization and Improvement of DNA Initiatives of the Justice For All Act of 2004. Thank you for inviting me to testify before you today.

Passed with overwhelming and passionate bi-partisan Congressional support and signed by President Bush, the Justice for All Act of 2004 (JFAA) was a valuable legislative act, guiding the way for enhancement of victim services, aiding law enforcement and prosecutors, and protecting the innocent.

In my testimony today I will first provide some background about the development and importance of both post-conviction DNA testing and the practices for preserving biological evidence from crime scenes. I will then address Section 412 of the Justice for All Act, the Kirk Bloodsworth Post-Conviction DNA Testing Assistance Grant Program, and Section 413, Incentive Grants to States to Ensure Consideration of Claims of Actual Innocence, both of which were meant by Congress to encourage states to provide for post-conviction DNA testing, and to preserve biological evidence. Specifically, the Bloodsworth Program was authorized to provide federal funding to

states seeking to enhance their provision of post-conviction DNA testing; the Incentive Grant program was meant to encourage states to both preserve biological evidence and provide access to post-conviction DNA testing. I defer, of course, to Debbie Smith for her expert comment upon another important component of the Justice for All Act, the Debbie Smith Act of 2004.

Both the Debbie Smith Act and the Kirk Bloodsworth Post-Conviction DNA Testing Assistance Grant Program were named for individuals, representing thousands of others, whose long suffering was eased by the ability to conduct DNA testing on crime scene profiles.

Debbie Smith waited six and a half years for the true perpetrator of her vicious rape to be identified through DNA testing. Kirk Bloodsworth served eight years in prison – two of them on death row – before DNA testing proved his innocence of the horrible child rape and murder for which he had been wrongfully convicted. In the wake of these DNA testing breakthroughs, both of these individuals have become staunch advocates for the use of forensic DNA testing. For Ms. Smith, a backlog in Virginia's DNA processing required her and the public at large to wait years before knowing that the rapist – who threatened to harm her again – was identified, convicted, and incarcerated. For Mr. Bloodsworth, after years of proclaiming his innocence, it was not until he had access to a DNA test that he was able to prove his innocence, be freed from wrongful imprisonment, and enable the state of Maryland to identify the real perpetrator of that horrific crime.

The provisions of the Justice for All Act received such broad bi-partisan support because, as Senator Leahy noted:

Post-conviction DNA testing does not merely exonerate the innocent, it can also solve crimes and lead to the incarceration of very dangerous

criminals. In case after case, DNA testing that exculpates a wrongfully convicted individual also inculpates the real criminal.... The Justice for All Act is the most significant step we have taken in many years to improve the quality of justice in this country. The reforms it enacts will create a fairer system of justice, where the problems that have sent innocent people to death row are less likely to occur, where the American people can be more certain that violent criminals are caught and convicted instead of the innocent people who have been wrongly put behind bars for their crimes, and where victims and their families can be more certain of the accuracy, and finality, of the results.³⁶

Since its U.S. introduction, forensic DNA testing has proven the innocence of 215 people who were wrongfully convicted of serious crimes they did not commit. The nation's wrongfully convicted proven innocent through DNA testing collectively spent more than two and a half thousand years behind bars for crimes they did not commit, with an average sentence of nearly a dozen years. As these wrongfully convicted people languished behind bars, the true perpetrators of these serious crimes eluded detection, in many cases only to commit additional serious crimes.

The results of post-conviction DNA testing have not only exonerated the innocent but have also helped law enforcement identify the real perpetrators. That has happened 80 times in the Innocence Project's cases to date and is occurring more frequently as techniques for extracting DNA from evidence rapidly improves and new DNA tests are developed. Indeed, as testing methods continue to evolve, so does the crime-solving potential of biological evidence left at crime scenes. Unfortunately, however, we are finding that the promise of DNA testing is hindered by inadequate and improper biological evidence retention procedures and practices. In many states, critical biological evidence is regularly prematurely destroyed, devastating innocence claims and denying crime victims the ability to learn who was responsible for their suffering.

³⁶ 150 CONG. REC. S11609-01 (2004).

These facts made passage of the Justice for All Act innocence incentives a reason for celebration; unfortunately, the subsequent Executive undercutting of these programs – through Executive budgeting and Office of Justice Programs (OJP) implementation – are best characterized as an affront to justice.

I. Background:

A. The Importance of Access to Post-conviction DNA Testing

The traditional appeals process is often insufficient for proving a wrongful conviction. It is not uncommon for an innocent person to exhaust all possible appeals without being allowed access to the DNA evidence in his case. Yet as the country now widely appreciates, when post-conviction DNA testing can provide compelling proof of a convicted person's innocence – or guilt – it should be conducted. Post-conviction DNA testing statutes therefore typically provide the only way a person can access the DNA evidence that can prove innocence, absent a protracted and very uncertain legal battle.

Post-conviction DNA testing has clear value for individuals whose cases predated the DNA era; indeed, DNA testing was not even admitted into the courts as evidence until 1988. What is less obvious is why post-conviction DNA testing is still relevant in the modern DNA age, when testing at the time of trial is more commonplace. In our work, it is not unusual for us to discover that DNA evidence, known to exist at the time of the defendant's trial, was never tested, even when DNA testing was available. There are many reasons why this may (not) have happened. Since the early and more rudimentary DNA methods available throughout most of the 1990's required a large sample in order to derive a result, an entire universe of cases that involved small samples

were never tested. Often, the methods of DNA testing used at the time of trial were inexact and yielded unreliable results. At other times the defendant may not have realized there was biological evidence to test. At others, the cost of such testing may have been prohibitive for the defendant and the court did not elect to pay for the testing. Suffice to say that it is not uncommon, even today, for biological evidence to go untested in serious cases.

But failure to test DNA at trial should never itself be a bar to post-conviction DNA testing. Today's more sophisticated technology can provide irrefutable results, where previously only inconclusive results were possible. Some new DNA testing methods are incredibly sensitive and can reveal a one-to-one match from a sample the size of a pin's head. Other novel methods are more discriminating, which means that the tests can statistically narrow down the frequency of a particular combination of genetic markers to a very small percentage of the population. Still other forms of newer testing methods allow for certain, targeted forms of testing that were not possible just a few years ago.

Y-STR testing, for instance, allows scientists to target only the DNA left by male contributors – and provides information on exactly how many male contributors there are in any given sample. This ability to target male-only DNA can play a crucial role in cases with mixed sex samples or multiple male profiles. Another new method, Mitochondrial testing, has made it possible to learn more than ever before from limited evidence. For example, a number of hairs found in a probative place, only one of which has a root, can be linked to each other by mitochondrial testing and then linked to an assailant through more traditional DNA testing of the hair with the root.

Additionally, a mask, or another piece of clothing found at a crime scene contains skin cells that have only recently (in the last five years at most) been subjected to DNA testing with any regularity. Such testing has resulted in the exoneration of wrongfully convicted people in a number of cases. Moreover, it has led investigators to the true perpetrators of crimes through hits to the national DNA database (CODIS), or to potential suspects through non-CODIS exclusion of the convicted and inclusions of other suspects.

Post-conviction DNA testing not only provides long-delayed justice to an innocent person, but also enables the police to recognize the fact the real perpetrator has eluded detection, and a re-investigation is necessary for public safety. In summary, dormant cases that would have remained forever unsolved can be, upon testing, cracked with a keystroke that can yield matches of DNA offender profiles to crime scene profiles held in computerized files.

Presently, forty-three states have post-conviction DNA testing access statutes. For those that do not, or for those that include improper deadlines for individuals seeking access, or limit post-conviction testing to only some crime categories, the JFAA has provided financial incentives to induce states to allow permanent post-conviction DNA testing access to qualified defendants. Unfortunately, as I will describe further below, the JFAA federal-to-state incentives for such testing have been thwarted by Executive budget decisions and OJP's reluctant, and then prohibitively stringent, offering of the Kirk Bloodsworth Post-Conviction DNA Testing Assistance Program.

B. The Importance of Preserved Biological Evidence

To be able to ensure justice, biological evidence must have been preserved, and saved in such a way that it can be located when necessary. Congress recognized the incredible value of preserved biological evidence in the emerging DNA era when it passed the Justice for All Act, which strongly enhanced preservation of evidence policies for federal crimes and authorized hundreds of millions of dollars for state grant programs for those states that properly preserved biological evidence.

During drafting of the JFAA, lawmakers understood that given competing priorities and politics, the only way to be sure to induce states to mandate the proper preservation of biological evidence was through the power of the purse. That is why as originally drafted, the preservation of evidence requirement was appropriately attached to many funding streams, as Congress appreciated that states would only act if large quantities of federal funding compelled them to prioritize the issue. In the course of subsequent negotiations, however, the number of grant programs that expressly required proper evidence retention practices was reduced to four. While these programs could well have served as the necessary incentive to states, three of those four programs were never funded, and while one was funded, no funds for that program have ever been disbursed.

Ultimately, therefore, and in contrast to Congressional intent, executive administration and recommended funding of the JFAA programs has effectively neutered that intent, providing states with essentially no incentive from the federal government to prioritize the statewide practice of properly preserving biological evidence. This is because as implemented, the funding carrots are patently insufficient to serve as the incentive necessary.

The failure to preserve biological evidence has tragic consequences for both public safety and the innocent victims of wrongful conviction. Incredible public safety potential lies latent in biological evidence from past crimes. By properly preserving biological evidence, cold cases can be solved. Crime scene DNA can link an unknown perpetrator to other crimes – over time periods and across jurisdictions. And of course, preserved biological evidence can settle credible post-conviction claims of innocence.

Consider the following two examples of how preserved biological evidence – and virtually only preserved biological evidence – can enable justice long overdue.

Innocence Claims Hinge on Preserved Evidence: Scott Fappiano

Scott Fappiano was convicted of a rape in 1985. He consistently maintained his innocence throughout his incarceration. While a wealth of biological samples had been collected from the crime scene, DNA technology at the time was not sufficient to produce a result that would conclusively identify the perpetrator of the heinous crime for which Mr. Fappiano had been convicted.

There had been numerous trial exhibits that contained biological evidence. Some exhibits were returned to the King's County District Attorney's office; others were vouchered and sent to New York Police Department evidence storage facilities. Two items of evidence – the rape kit and a pair of sweatpants containing semen stains—were sent in 1989 by the DA's office to a now-defunct DNA laboratory called Lifecodes, which at the time performed rudimentary DNA analysis for the state of New York.

At that time DNA testing technologies were still limited, and although Lifecodes found semen to be present on the available evidence, they could not produce a conclusive

result. In 1998, more advanced DNA testing methods had developed and the Innocence Project embarked upon a search for the original crime scene evidence. The DA's office fully cooperated with a search of its storage areas, but none of the original exhibits could be located. A similar search of NYPD storage facilities yielded nothing.

After a long and uncertain search, the Innocence Project ultimately contacted Orchid Cellmark, a private DNA laboratory in Texas which had, after a series of mergers, taken over the Lifecodes lab. Remarkably, in August of 2005, two test tubes containing biological samples from the crime scene were located. DNA testing of those extracts, using more progressive DNA testing methods, conclusively excluded Mr. Fappiano as the source of the semen. Based on this newly discovered evidence, he was freed from prison in October of 2006 – 21 years after his wrongful conviction, and 8 years after the post-conviction DNA testing could have been performed if the crime scene evidence had been properly preserved. Consistent with far too much traditional practice, most of the biological evidence had been lost or destroyed; on top of that, there were seemingly no records to indicate that what had happened to this evidence, or where it could be found. It was by pure chance that the evidence was located.

The nation's 215 DNA exonerees like Scott Fappiano are the lucky ones. The tortured are those wrongfully convicted persons for whom post-conviction DNA testing could prove their innocence, but for whom that evidence has been either lost or destroyed.

The Innocence Project recently conducted an analysis of a representative sample of our closed cases in order to determine why we close the cases that we do. We found that we were forced to discontinue our efforts to settle innocence claims in 32% of closed

cases across the nation because critical biological evidence that could clearly indicate innocence or guilt had been destroyed or could not be found. In New York City alone, the Innocence Project is presently thwarted in its pursuit of 19 credible post-conviction claims of innocence because evidence custodians cannot locate the evidence.

What Mr. Fappiano's case demonstrates – and what Congress clearly appreciates – is that by simply preserving the small amounts of biological evidence from crime scenes, even years after a conviction the public can be provided with conclusive answers in the wake of lingering and credible claims of innocence. The power of DNA technology has transformed this evidence from a nuisance to modern day “silver bullet” for solving crime. Part of the JFAA's promise is to help federal, state and local policy nationwide keep up with the crime solving promise of that technology.

Solving Cold Cases Relies Upon Preserving and Locating Evidence: The Charlotte Police Department Experience

In December of 1995, the Charlotte-Mecklenburg Police Department was relocating its property room. Evidence held in the existing evidence storage space was in disarray and difficult to locate. Forward-thinking police officials recognized an opportunity to solve old crimes and launched an initiative to re-catalogue all of its evidence, including biological evidence. Each piece of evidence was bar-coded, and when necessary, repackaged. Radio scanners were purchased so that evidence tracked on inventory forms with a barcode could be located in the storage room.

In nine months, all of Charlotte's evidence was re-catalogued and placed in one 6,700 square foot storage space. Biological evidence was segregated and neatly placed

on retractable shelves in order to maximize storage space. Each envelope of evidence contained an individual property number, allowing easy access to decades-old kits, swabs, cuttings and clippings that held the promise of bringing to justice criminals who had successfully eluded apprehension for years. Following the re-cataloguing of old evidence, Charlotte's Police Department formed a Homicide Cold Case Unit in 2003. Police officials understood that the power of preserved evidence transformed their old evidence room into a crime-solving goldmine.

One such case involved the 1987 murder of a 19-year-old Charlotte woman named Jerri Ann Jones. While detectives had been stymied by her case, upon re-cataloguing of the evidence facility, physical evidence connected to her case was readily located and submitted to the crime lab for DNA examination. The results were entered into CODIS, the national DNA database. This resulted in the identification of a suspect, Terry Alvin Hyatt, who was already in prison and, upon being confronted with the fact of the CODIS match, confessed to the murder of Ms. Jones. Closure finally came to Ms. Jones's family seventeen years after she was murdered.

States Can Readily Preserve Biological Evidence; Incentives and Guidance Are Needed

In today's modern DNA era, accessing properly preserved evidence from adjudicated cases has clear benefits. As DNA testing methods continue to advance, enabling the creation of perpetrator profiles from even degraded crime scene evidence, the crime-solving possibilities presented by preserved biological evidence are tremendous. A review of the NJ's list of objects where biological evidence can be found illustrates the variety of items that can be successfully tested with improved technology:

fingernail scrapings analyzed with Y-DNA tests; skins cells in the hinge of eyeglasses; dandruff, saliva, hair, sweat, and skin cells from hats, bandanas and masks; saliva cells on tape or ligatures; traces of blood on a bullet; traces of blood and/or hairs on, or in the crevices of, a variety of weapons used to inflict injury; or even blood and tissue cells swabbed from the bullet inside a gun, identifying the person who might have last loaded it.³⁷ The list of these evidence items that are being successfully tested now – but could never have been tested successfully only a few years ago – is enormous.

The practice of preserving biological evidence is not itself “new,” nor particularly challenging. Such evidence is in fact regularly preserved in jurisdictions across states, nationwide. What is lacking is consistency in practice across – and even within – jurisdictions. The federal regulations enacted pursuant to the JFAA make clear how biological evidence can be preserved simply, appropriately, and without need for excessive storage space or extraordinary conditions of storage.

The potential to properly preserve biological evidence lies latent in every state, like the DNA profiles lying latent in that evidence. Compared to the amazing probative power that can be harnessed through the proper preservation of biological evidence, the effort and resources necessary to do so are minor. What is missing is the commitment and inducement to act.

³⁷ In the 2002 report by the National Institute of Justice, “Using DNA to Solve Cold Cases” available at <http://www.ncjrs.gov/pdffiles1/nij/194197.pdf>, the authors identify some common items of evidence that may have been collected previously but not analyzed for the presence of DNA evidence, p. 21.

II. Overview of DNA Innocence Incentives in JFAA and Summary of Impediments to Effective Implementation

Section 412 of the Justice for All Act was crafted in response to the difficulties and costs confronting state inmates who wished to prove their innocence through DNA testing. Just as Congress had established a reasonable procedure for federal prisoners to obtain post conviction DNA testing, it was hoped that the **Kirk Bloodsworth Post-Conviction DNA Testing Program** would provide sufficient funds to pay for and encourage the states to implement their own post conviction DNA testing programs.

But in contrast to the Paul Coverdell Forensic Science Improvement Grant Program, where monies have been disbursed to all fifty states without meaningful OJP scrutiny of state compliance with the JFAA-created innocence protection requirements therein, OJP has created so many barriers to potential grantees for Bloodsworth funds that only three states bothered to apply for these much-needed post-conviction DNA testing dollars in 2006 - and all three were rejected, with no official explanation given for those rejections. Not a dollar of Bloodsworth funds have therefore been disbursed.

At OJP's urging, for FY 2008, Congress provided OJP with flexibility for disbursing Bloodsworth funds, but the significant barriers that now exist in OJP's FY 2008 Bloodsworth RFP suggest that far too many states needing those post-conviction DNA testing funds will not be able to access them.

Section 413 of the Justice for All Act was enacted to provide an incentive to the states in order to advance two crucial innocence practices: post-conviction DNA testing and the preservation of biological evidence. DNA testing to prove innocence cannot be conducted if the evidence has not been preserved. Nor can a detective use DNA to re-

open a cold case if the evidence is destroyed. In the JFAA, Congress created a post-conviction DNA access program for federal prisoners, and a requirement to preserve biological evidence in federal crimes. Congress also used the JFAA to create **Incentive Grants to States to Ensure Consideration of Claims of Actual Innocence** provide four pools of funding meant to entice states to create schema for post-conviction DNA testing and the preservation of evidence. The four grant programs governed by Section 413 include JFAA Sections:

- Section 303, DNA Training and Education for Law Enforcement, Correctional Personnel, and Court Officers;
- Section 305, DNA Research and Development;
- Section 308, DNA Identification of Missing Persons; and
- Section 412, Kirk Bloodsworth Post-Conviction DNA Testing Grant Program.

Instead of funding these four programs under the JFAA, however, the President created mirror programs for Sections 303, 305 and 308, above, under the “President’s DNA Initiative.” By doing so – and securing funding for his Initiative as opposed to the mirror JFAA programs. The administration enabled states to access these important monies without properly preserving crime scene evidence or providing for post-conviction DNA testing. This maneuvering left Section 412, the Bloodsworth program, as the only Section 413 grant program remaining. Given that the Bloodsworth funding alone provided barely a state incentive; that OJP’s Bloodsworth grant application was prohibitively stringent; and that every state that applied for Bloodsworth funds in FY 2006 (the only year prior to 2008 it was offered) was rejected without explanation, the

executive branch effectively undercut JFAA Section 413's effectiveness as an incentive for state innocence protections..

III. The Mechanics of Executive Subversion of Congressional Intent Regarding

Justice for All Act Sections 412 and 413

Despite Congressional appropriations of approximately five million dollars per year for the Bloodsworth grant program in fiscal years 2006 and 2007, not one penny of these innocence protection funds to finance post-conviction DNA testing has been extended to states – despite a patent need for such support.

The Bloodsworth grant program was not offered at all in 2005. It was funded for 2006, and OJP issued a Request for Proposals (RFP) in the second half of 2006. For reasons likely related to the strict requirements placed upon applicants (which are described in greater detail below), only three jurisdictions applied for these funds. While it seems that at least some of these three states should have qualified for these funds, OJP rejected all three, providing no specific official reason for having done so. The Bloodsworth grant program had been funded by Congress for 2007, yet no RFP for 2007 was ever issued.

At a Senate Judiciary hearing on January 23, 2008, OJP Deputy Director John Morgan represented to Congress that although all previous grant applicants for Bloodsworth monies had been rejected for funding in the last grant cycle, newly passed appropriations language would provide OJP with more discretion in interpreting the grant requirements and thus allow the monies to flow more freely.

Unfortunately, while the FY 2008 Bloodsworth RFP (and its reissue, dated February 12, 2008) has preservation of evidence requirements differing from its 2006 predecessor, other stringent – and seemingly intentionally intimidating – requirements of the 2008 Bloodsworth RFP have again discouraged many needy states from applying for these funds.

A. Changes to JFAA Section 413 are Needed; Congress Must Address Them, as OJP has Not Proven its Ability to Properly Disburse Funds Thereunder

In the FY 2006 Bloodsworth RFP, OJP interpreted its Congressional mandate for the Bloodsworth program so rigidly that only three jurisdictions attempted to apply for those important post-conviction DNA testing funds . Every single application was rejected. No specific official explanation for the denials were provided.

One significant reason that so few applied for this much-needed federal DNA support - and OJP’s potential³⁸ justification for denying all funding for 2006 Bloodsworth applicants - seems likely to stem from the extraordinary hurdle that OJP set for applicants regarding how they were to “demonstrate” that they met the preservation of biological evidence requirements as established by Congress.

1. OJP has Failed to Effectively Administer the Only JFAA Grant Program Offered

a. OJP “Demonstration” Requirements Needlessly Onerous, and Thus Prohibitive

³⁸ I use the term potential because it is impossible to know the actual reason for the denial of these grant applications, as no specific official reason was stated within the denial letters that we have seen, i.e. those provided to the Arizona and Connecticut applicants.

JFAA Section 413, in relevant part, requires that “For each of fiscal years 2005 through 2009, all funds appropriated to carry out sections 303, 305, 308, and 412 shall be reserved for grants to *eligible entities that... (2) demonstrate that the State in which the eligible entity operates (preserve biological evidence and provide access to post-conviction DNA testing).*”³⁹

Yet instead of simply allowing eligible entities to demonstrate their compliance with this requirement, OJP went further than Congress in its FY 2006 Bloodsworth program RFP, requiring the following: “To demonstrate that the State satisfies these requirements, an application must include formal legal opinions (with supporting materials) issued by the chief legal officer of the State (typically the Attorney General), as described below. All opinions must be personally signed by the Attorney General.”⁴⁰ The current 2008 solicitation now requires an “express certification” from the applicant state’s chief legal officer, attesting to the presence of a statewide policies regarding post-conviction access to DNA testing and preservation of evidence. This express certification is the personal signature of that person, under a reminder that there criminal penalties will apply if the statement is found to be false. .

There are a number of reasons that both the previous and 2008 OJP interpretation of the Congressional requirement that eligible entities “demonstrate” that they meet these requirements are onerous as applied to the Bloodsworth program:

* Congress simply required that applicants “demonstrate” their compliance;

Congress did not specifically require a role in grant application by the State

Attorney General or chief legal officer. On this point, one must consider that of

³⁹ JUSTICE FOR ALL ACT § 413, 42 U.S.C. § 14136 (2004) (emphasis added).

⁴⁰ U.S. DEPT’ T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT’ L INST. OF JUSTICE, Solicitation: Postconviction DNA Testing Assistance Program 10 (2007).

the 30 OJP RFPs identified by the Innocence Project to have been offered in FY 2006 where the applicant must “demonstrate” compliance, not one requires the applicant to do more than provide a simple narrative on that point.⁴¹

* To require either a “formal legal opinion” personally signed by a state’s chief legal officer or Attorney General – or, in the alternative, as was made clear in the FY 2008 Bloodsworth RFP, to specify that a false statement in that regard could result in “criminal prosecution” – presents a tremendous procedural barrier to applications for these monies by the entities in states that sincerely need them. One could readily understand that of all people, states’ Attorneys General or chief legal officers might not be particularly interested in efforts to prove (additional) wrongful convictions in their states (as doing so would obviously prove error by the state, and could likely expose the state to liability for such wrongful convictions).⁴²

* The only other recent OJP grant program identified by the Innocence Project that requires such verification from a similarly high-placed State legal officer: the Office on Violence Against Women FY 2008 Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program.⁴³ Notably, this program requires that certification of compliance with the laws specified by Congress come from such officials, *yet the requirement that such officer provide the certification is specified within the statute authorizing that grant program.*⁴⁴ Neither JFAA

⁴¹ Please see Exhibit A for a detailed list of those grant programs.

⁴² We cite this possibility, and the potential factors therefor, not to suggest any ill-intent by any such state official, but to suggest that requiring their work and personal signature on the grant application may simply have impeded realization of Congressional intent to disburse such funds to qualified applicants.

⁴³ U.S. DEPT’ OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, OVW FY 2008 Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program 5 (2007).

⁴⁴ 42 U.S.C.A. § 3796hh-1 (Westlaw 2007).

Sections 413 nor 412 specify the participation of these legal officers, and certainly not “certification” from any party. In short, if Congress wanted to require the signatures of those state officers it would have specified that intent.

* The stringent OJP interpretation of the requirements to access these Bloodsworth innocence protection funds stands in stark contrast to the extremely lax OJP enforcement of Congressional intent under the JFAA (Section 311(b)), where Congress required that applicants to the Paul Coverdell Forensic Science Improvement Grant Program *certify* that they have a government entity in place to conduct independent, external investigations upon allegations of serious negligence or misconduct... substantially affecting the integrity of forensic results.⁴⁵ Comparing the polar opposite OJP enforcement of the Congressionally intended innocence protections from these two different parts of the Justice for All Act, it is plain that OJP is selectively enforcing those provisions in such a way as to discourage states from honoring that Congressional mandate.⁴⁶

While the Innocence Project strongly believes that applicants should be required to demonstrate that their states meet the thresholds of evidence preservation and post-conviction DNA law or policy specified under JFAA Section 413, specifically requiring that demonstration to come from the State Attorney General or chief legal officer in the

⁴⁵ Despite what, based on Innocence Project research, seem to be significant and widespread State shortcomings in meeting this innocence protection prerequisite to State Coverdell funding, OJP has provided the funding to every state applicant with minimal regard for compliance with this requirement. See the two Department of Justice Office of Inspector General Reports criticizing OJP enforcement of this innocence protection requirement at <http://www.usdoj.gov/oig/reports/OJP/c0602/final.pdf> and <http://www.usdoj.gov/oig/reports/OJP/c0801/final.pdf>.

⁴⁶ For a more thorough exploration of the contrast in OJP enforcement of these two Justice for All Act Innocence Protections, please see: *Oversight of the Justice for All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs?* Hearing Before the Senate Judiciary Comm., 110th Cong. (2008). (Statement of Peter Nenfeld, Co-founder, The Innocence Project).

manner it has is a significant and unnecessary obstacle that seems likely to have prevented qualified and needy applicants from properly pursuing the Bloodsworth grant program. This is particularly true in the wake of the unexplained rejections for every one of the FY 2006 Bloodsworth applicants.

Recommendation

Future interpretations of JFAA Section 413 as applied to the Bloodsworth program – and indeed, the other three programs also covered by Section 413, and which are still authorized to be funded as JFAA programs – must be designed by OJP less to discourage applicants and more to enable applicants' plain demonstration of having met the Congressional requirements. We realize that OJP has discretion in the administration of programs; we hope Congress will do all in its power to ensure that such discretion, particularly as applied to the Bloodsworth and other JFAA programs governed by Section 413 of the JFAA, be properly exercised.

b. OJP Did Not Successfully Employ the Discretion Provided by Congress Regarding Preservation of Evidence in Order to Enable Appropriate Disbursement of Bloodsworth Funds

The FY 2008 Congressional CJS Appropriations bill granted OJP, at OJP's urging, flexibility in interpreting the Bloodsworth program requirements in order to better enable disbursement of those funds. In short, while any disbursement would seem to be an improvement over OJP's utter failure to disburse funds from the FY 2006 grant cycle, OJP's FY 2008 Bloodsworth RFP requires too little of applicants regarding the

preservation of evidence. Congress would do far better to amend the Section 413 requirements itself and direct OJP to craft their RFPs in a manner not likely to discourage both that needy applicants successfully submit applications, and that funds are distributed to those who simply yet clearly demonstrate their compliance with the Congressional requirements.

The FY 2006 Bloodsworth solicitation required applicants to “demonstrate” that their State satisfied post-conviction testing and preservation of evidence requirements pursuant to section 413 of the Justice For All Act.⁴⁷ The current 2008 solicitation requires that a State “certify” via statute, rule or regulation that it has a “reasonable” post-conviction testing and preservation scheme in relation to three crime categories only: forcible rape, murder, or non-negligent manslaughter.

The narrowing of required categories of crimes does indeed better enable potential applicants to seek Bloodsworth funding. Yet OJP balanced this easing of the path to qualification by also, in its original FY 2008 Bloodsworth RFP, removing language from the FY 2006 application (which had tracked the specific Congressional requirement) that would have enabled applicants to demonstrate compliance of post-conviction testing through State “practices” and demonstrate compliance of preservation of evidence practices through “local” rules, regulations or practices. Thus while part of the OJP language change made the Bloodsworth requirements easier to meet, in the same sentence they also made those funds – in a different way – less easy to meet.⁴⁸ It was

⁴⁷ The JFAA required a post-conviction DNA testing scheme for all felony offenses and a preservation scheme for all State offenses.

⁴⁸ In the initial FY 2008 Bloodsworth RFP issued by OJP, applicant states could only demonstrate compliance with post-conviction testing and preservation of evidence requirements through a “State statute, or State rule or regulation,” which represented a narrowing of means through which compliance could be demonstrated as compared with the FY 2006 Bloodsworth RFP.

only when the Innocence Project raised questions about the appropriateness of the latter change that OJP re-issued its solicitation to return that requirement to its rightful interpretation.⁴⁹ Had that not been done, it seems unlikely that such a change would have been made. The reissued solicitation was only made publicly available three weeks after its first release, and only five weeks before final applications were due. For those potential applicants that, based on the original FY 2008 RFP, believed they did not qualify for the funds, the loss of those three weeks of application time – for reasons including but not limited to the onerous chief legal officer certification requirement – may have made even the amended RFP seemingly unattainable.⁵⁰

Simply put, OJP may have tinkered with its Bloodsworth RFP in light of the wide latitude it was provided by Congress, but if the Section 413 innocence incentives are to be meaningful and the Bloodsworth post-conviction DNA funds are to actually reach those states that need them, Congress should itself re-visit the Section 413 requirements and amend them in a manner that respects the original intent yet also meaningfully enables states to reach the carrot offered by Section 413.

⁴⁹ OJP first released the Bloodsworth solicitation in late January of 2008. Our office submitted a series of concerns, in the form of questions posed to OJP's grants administrator, Charles Heurich, on February 6, 2008. In part, we were troubled by the removal of two previous allowances permitted to applicants in meeting eligibility requirements. [In the former solicitation from the previous 2006 grant cycle, compliance with post-conviction and preservation requirements could be demonstrated through State statutes, regulations, rules or practices. The new solicitation removed *State practice* as a permissible means of demonstrating compliance. In addition, in the former solicitation from the 2006 grant cycle, compliance with both post-conviction and preservation requirements could be demonstrated through *local* regulations, rules or practices or through statewide statutes, rules, regulations or practice. The new solicitation removed the opportunity to prove compliance on a *local level*.] On February 12, 2008, OJP re-released the Bloodsworth solicitation that addressed both of these concerns by incorporating two significant changes in the eligibility requirements section of the grant application. Now, on the basis of the amended solicitation, applicants can demonstrate compliance with post-conviction DNA testing requirements through the presence of a "State statute, or under State rules, regulations, or **practices**." In addition, applicants can demonstrate compliance with the preservation of evidence requirements through the presence of a "State statute, **local ordinances**, or State or **local** rules, regulations, or **practices**." (All of the new language from the reissued solicitation is bolded.)

⁵⁰ For those entities for which the original RFP requirements on this point did not create an obstacle, it does not seem that the amended application should have presented a new hurdle.

Recommendation

Narrowing the crime categories to solely murder, rape and non-negligent manslaughter as was done by OJP in the 2008 Bloodsworth RFP was a quick fix, yet ultimately fails to serve crime victims, the innocent, and the public at large in many other categories of serious crime. We understand that the desire to preserve all biological evidence must be balanced with storage space realities, but that balance should not tip to the detriment of enabling the wrongfully convicted to prove their innocence where long sentences are at stake and serious crimes have otherwise been unsolved.

Therefore, we recommend that language pertaining to evidence preservation in the JFAA as applied to state applicants for the Bloodsworth grant program be amended. Instead of requiring preservation of evidence in all offenses, biological evidence should be preserved at least in all violent felony crimes, including all sexual assaults, for no less than the length of incarceration. The Innocence Project would be happy to share its experiences and understanding of this issue in greater detail with Congresspersons and/or staff as you request.

B. To Ensure Justice for the Wrongfully Convicted Nationwide, Congress Must Fund All JFAA Section 413 Grant Programs for FY 2009, and Re-Authorize Such Funding until FY 2014

Congress connected critically important state DNA program funding to the Section 413 preservation of evidence and post-conviction DNA testing innocence incentives because it knew that making federal funding contingent upon implementation

of those innocence incentives was the most appropriate and effective way for Congress to induce such state action.

The Executive Branch, by separately offering three of those four grant programs⁵¹ without the innocence requirements through “The President’s DNA Initiative,” and then interpreting the Bloodsworth requirements so tortuously stringently as to deny all disbursements to date, has effectively neutralized that Congressional intent and incentive.

Congress not only respected the need, but actually did the hard work to generate strong bi-partisan support for state incentives to enable the wrongfully convicted to use preserved biological evidence and access to post-conviction DNA testing to prove their innocence. The Executive Branch has essentially negated that work, and the results intended to flow therefrom. We can only hope that the next administration, from whatever party it hails, will show more respect to Congressional intent on these issues and properly administer these programs. Regardless, however, the damage has been done; the Innocence Incentives of Section 413 of the Justice For All Act have not been meaningful incentives to state action on these issues.

But all is not lost. If Congress funds these grant programs for FY 2009, re-authorizes them with the Section 413 incentives for an additional five years (to replace the five years essentially lost because of the executive maneuvering) and appropriates the funds for those programs in those years, important progress can still be made to establish innocence protections in states across the nation. For as the Innocence Project has found, there are still many wrongfully convicted who have yet to be identified or proven innocent, for whom the biological evidence will need to be found, and for whom effective

⁵¹ These three grant programs are Justice for All Act Sections 303 (DNA Training and Education for Law Enforcement, Correctional Personnel, and Court Officers); Section 305 (DNA Research and Development); and Section 308 (DNA Identification of Missing Persons).

access to post-conviction DNA testing can still – finally – provide the proof of their innocence.

Recommendation

It is evident from our experiences working with states on preservation of evidence policies that they have not, to date, received the stimulus necessary to enhance preservation practices. We have found that State and local policymakers appreciate the general importance of preserving such evidence for solving cases (active and old) and enabling the wrongfully convicted to prove their innocence – yet their appreciation has not yet reached the level necessary to spur effective action. Clearly, the incentives to improve their preservation practices must be large enough to stimulate state action.

The only way that states can genuinely be compelled to properly preserve biological evidence is if this obligation is attached to large streams of federal-to-state monies. The Innocence Project recommends Congressional funding all four of the JFAA Section 413 grant programs for FY 2009; their reauthorization with the Section 413 incentives for an additional five years (to replace the five years essentially lost because of the executive maneuvering); and the appropriation of funds for those programs in those years.

This reauthorization and appropriation should also be complemented by NIJ leadership regarding best practices for the preservation of biological evidence. Through work with many jurisdictions, the Innocence Project has seen that the will to properly preserve and catalogue preserved evidence exists, yet jurisdictional unfamiliarity with best practices for doing so been a significant contributing factor to the failure to act.

Federal guidance – perhaps on the basis of a series of recommended protocols identified by a national working group or other expert entity – should be offered to states to specifically explain how biological evidence can be consistently and properly preserved.

With Congressional support and federal guidance, the discovery of preserved biological evidence – to protect the innocent and the public at large – will no longer have to rely on serendipity and happenstance.

IV. A Case Study Demonstrating the Lingering Need for the Section 413 Post-conviction Access to DNA Testing Incentive: Kennedy Brewer and Levon Brooks

Even in states that have demonstrated barriers to post-conviction DNA testing through the absence of a post-conviction DNA testing law, DNA exonerations are beginning to emerge. I would like to leave you today with the story of one of the nation's most recent DNA exonerations, which is representative of the depth of the problem that Congress intended to address with these innocence protections, and puts a human face on the policies we hope you will re-visit in order to protect the innocent – and help catch the true perpetrators of the serious crimes for which DNA evidence can prove innocence or guilt.

Just this year, Kennedy Brewer became Mississippi's first person exonerated through DNA testing. He was arrested in 1992 and was subsequently convicted – based almost entirely on questionable bite mark testimony evidence - of raping and murdering his girlfriend's three-year-old daughter, Christine Jackson.

Mr. Brewer was sentenced to death. Despite his innocence, and despite the existence of biological evidence, as well of that of DNA technology that could strongly

indicate his innocence, there existed no law or policy in Mississippi requiring the preservation of the biological evidence in Mr. Brewer's case. Nor did there exist a statutory path, much less a statutory right to

Fortunately, his trial lawyer moved for preservation of the biological evidence; fortunately, the court chose to order that the evidence be preserved. The Mississippi Supreme Court, upon considering the motion for re-trial sought by Mr. Brewer, ultimately indicated its interest in seeing the preserved biological evidence re-tested. In 2001, advanced DNA testing, requested by the Innocence Project, was conducted on semen recovered in 1992 from the victim's body. The tests produced results excluding Brewer as a possible perpetrator and revealed an unknown male profile. No subsequent effort was made to identify the real perpetrator.

It took a year after these test results were received for Mr. Brewer's conviction to be vacated. When it was, he was moved from death row to pre-trial detention in the local jail. The prosecution intended to retry Brewer for capital murder, but was not brought to trial for a full five years. Because the capital charges were not dropped during those five years, Mr. Brewer was forced to serve that time behind bars.

As the Innocence Project prepared to handle Brewer's re-trial, another man was implicated as the real perpetrator through DNA testing. The unidentified DNA profile discovered in 2001 matched to Justin Albert Johnson, one of the original suspects. When confronted with this fact, Johnson then confessed to Christine Jackson's murder; he also confessed to the rape and murder of another child in the same county, that of three-year old Courtney Smith. Johnson told the investigators that he acted alone in both crimes, which were committed 18 months apart.

Courtney Smith's mother's boyfriend was Levon Brooks. Mr. Brooks had been charged and convicted of Courtney's rape and murder. His conviction, too, rested in large part on the strength of questionable bite mark analysis performed by the same forensic odontologist in Mr. Brewer's case.

On February 15, 2008, charges against Kennedy Brewer were dropped and he was exonerated. On the same day, the Innocence Project, along with Mississippi Innocence Project co-counsel, won Levon Brooks' release from prison. Brooks was subsequently exonerated in March 2008, and he sits in this room with us today.

Mr. Brewer and Mr. Brooks are fortunate that their horrifically horrible luck in being wrongfully convicted was outmatched by their incredible luck that the biological evidence in Mr. Brewer's case was preserved and located, and that the District Attorney finally allowed the post-conviction DNA testing to be conducted. Mississippi has no law, rule, or standard practice statewide for the preservation of biological evidence. Nor does the state provide statutory access to post-conviction DNA testing. In some cases evidence is saved; in some cases it isn't. In some cases a prosecutor will allow post-conviction DNA testing, in some he or she won't.

With passage of the Justice for All Act, Congress recognized and acted upon its belief that the truth and justice that can be arrived at through post-conviction DNA testing of biological evidence should not be subject to luck, or serendipity. It should be established at the federal level, and states should be encouraged to provide the same. That is why it created Section 413, and attached it to appropriate sources of funding that are important to states. While Congressional intent on this count has been frustrated by the executive branch, Congress can and should follow through on its effort to ensure that the

wrongfully convicted nationwide have the ability to prove their innocence – and enable their governments to recognize that the real perpetrators of those crimes remain unidentified, and still need to be held to account for their crimes.

APPENDIX A
OJP-NIJ 2006 RFPs That Use "Demonstrate"

<u>RFP Name</u>	<u>Detail Page #</u>
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2. Forensic Casework DNA Backlog Reduction Program	3
3. Social Science Research on the Role and Impact of Forensic Evidence on the Criminal Justice Process	3
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10. Research and Evaluation in Community Corrections: A Multijurisdictional Study of Reduced Caseload and Related Case Supervision Strategies in Managing Medium- and High-Risk Offenders	10
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25. Modeling and Simulation Research and Development: Software for Improved Operations, Operational Modeling, Speech-to-Text Recognition, and Training Technologies	25
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30. Forensic Science Research and Development Targeting Forensic Engineering, Forensic Pathology, Forensic Odontology, Trace Evidence, Controlled Substances, and Questioned Documents	30

1 Data Resources Program 2006: Funding for the Analysis of Existing Data

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

2 Forensic Casework DNA Backlog Reduction Program**Required Documents**

The program narrative must address the project objectives, expected results, and the implementation approach. The narrative **should also demonstrate**, specifically and comprehensively, how the requested funds will reduce backlogged DNA samples. The narrative must also state clearly the number of forensic cases – forcible rape and murder/non-negligent manslaughter – currently awaiting DNA analysis and the number of cases that can be analyzed within 12 months using the Federal funding requested in this Fiscal Year 2006 application. This number should reflect the number of cases that can be analyzed above and beyond those that can be analyzed using other sources of funding. The 12-month period begins October 1, 2006.

3 Social Science Research on the Role and Impact of Forensic Evidence on the Criminal Justice Process

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance**Quality and technical merit**

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

4 **Research and Evaluation on the Abuse, Neglect, and Exploitation of Elderly Individuals, Older Women, and Residents of Residential Care Facilities**

Successful applicants must demonstrate the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff

- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

5 Social Science Research on Terrorism

Successful applicants **must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, demonstrated productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

6 Process and Outcome Evaluation of GREAT

Successful applicants must demonstrate the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate

audiences, including researchers, practitioners, and policymakers

- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

7 Evaluation of Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

8 Outcome Evaluations of Violence Prevention Programs

Promising programs and strategies with some evidence of effectiveness in the prevention of violence to and by youth are a necessary aspect of this solicitation. To be considered "promising," programs selected for outcome or impact evaluation under this solicitation must have already been developed, implemented and **demonstrated** to be effective in the prevention of violent behavior. For example, the Blueprints Project at the University of Colorado has identified promising programs using criteria from various organizations and agencies (<http://www.colorado.edu/cspv/blueprints/matrix/overviewhtml>). Although organizations may vary in the way these criteria are applied, to be labeled "promising" usually requires that quasi-experimental or experimental research designs were used in producing the evidence that programs are effective in reducing violent behavior and victimization. Selection priority will be given to outcome evaluations of programs and strategies **demonstrated** to be promising according to these types of criteria. In this regard, proposals to conduct replications and external evaluations of existing programs are encouraged.

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit

- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

9 Public Safety Interventions

NIJ seeks process and outcome evaluations of situational crime prevention interventions; that is, interventions that focus more on the situational causes of crime and less on the dispositional causes of crime. Interventions can be focused on a particular type of crime, on a situational crime prevention technique, or on a particular location. Situational interventions often address the environmental and opportunity factors involved in offender decisionmaking. Proposals **should demonstrate** an understanding of how situational crime prevention principles are understood and used by law enforcement practitioners. Applicants are especially encouraged to include the following elements as part of their proposed evaluations:

- Displacement and diffusion analyses
- Cost analysis
- Longer follow-up periods (most are 6-12 months)

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 1 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 2 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff

- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

10 Research and Evaluation in Community Corrections: A Multijurisdictional Study of Reduced Caseload and Related Case Supervision Strategies in Managing Medium- and High-Risk Offenders

NIJ anticipates funding one multijurisdictional project. Although the study sites will be determined after the grant is awarded and in consultation with NIJ and its Federal partners, the proposal should identify potential candidate jurisdictions that follow evidence-based practices and where, at a minimum, reduced caseload size can be studied. Site selection **should** focus primarily on probation agencies that have **demonstrated** a commitment to evidence-based policies and practices. A minimum of three sites will be necessary to achieve the goals of the study. Successful **applicants must demonstrate** how the proposed research will advance knowledge, practice, and policy on the management and supervision of medium- to high-risk offenders in a general supervised probation population.

Applicants for this project **must have** a strong record of successful applied research in community corrections and a **demonstrated** capacity to work effectively with State and local community corrections agencies, as evidenced by past consultative and collaborative efforts. Applicants **must have** the organizational capacity to carry out a multisite research project, to collect and appropriately analyze the wide range of data such a study will produce, and to effectively disseminate the results of the study to different audiences through a variety of approaches.

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 3 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 4 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

11 Research on Sexual Violence and Violent Behavior in Corrections

Since the passage of the Prison Rape Elimination Act of 2003 (Public Law 108-7), NIJ released three solicitations seeking proposals for quantitative research on prison sexual violence in correctional facilities. Though the objectives of the Prison Rape Elimination Act focus on sexual violence, it is clear that sexual violence occurs within the broader context of violence in correctional institutions. NIJ is seeking proposals that examine sexual violence as it pertains to violent behavior in correctional settings. Successful applicants must demonstrate how the proposed research will advance knowledge, practice, and policy in addressing the topic of sexual violence in corrections.

Successful applicants must demonstrate the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology

- 2 Soundness of methodology and analytic and technical approach
 - 3 Feasibility of proposed project and awareness of pitfalls
 - 4 Innovation and creativity (when appropriate)
- Impact of the proposed project
- 1 Potential for significant advances in scientific or technical understanding of the problem
 - 2 Potential for significant advances in the field
 - 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
 - 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
 - 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)
- Capabilities, **demonstrated** productivity, and experience of applicants
- 1 Qualifications and experience of proposed staff
 - 2 **Demonstrated** ability of proposed staff and organization to manage the effort
 - 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
 - 4 Successful past performance on NIJ grants and contracts (when applicable)
- Budget
- 1 Total cost of the project relative to the perceived benefit
 - 2 Appropriateness of the budget relative to the level of effort
 - 3 Use of existing resources to conserve costs
- Dissemination strategy
- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
 - 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

12 Study of Administration of Justice in Indian Country

Applicants must have a strong record of successful projects in Indian Country and be recognized at the national level in this area. They **must demonstrate** the capacity to work effectively with tribal authorities at all levels, as evidenced by past consultative and collaborative efforts. The **applicant must be** culturally competent and **demonstrate** the ability to recruit Native American or other staff who have experience working in each of the selected sites and who have a working knowledge of the language and culture at those sites. The applicant **must** have the organizational capacity to carry out a multisite, national case study design, collect and appropriately analyze the wide range of data such a study will produce, document the case studies, and effectively disseminate the results of the study to different audiences through a variety of approaches. Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

13 Sexual Violence from Adolescence to Late Adulthood: Research, Evaluation, and the Criminal Justice Response

Successful applicants must demonstrate the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach

- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

14 Transnational Crime

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem

- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

15 Evaluation of OJJDP's Commercial Sexual Exploitation of Children Demonstration Program in Atlanta/Fulton County

A critical aspect of the formative evaluation will be significant involvement and participation of program staff, local government, community representatives, and the federal government in the entire evaluation process. The proposed approach should, therefore, reflect the philosophy of this type of evaluation and **should demonstrate** a practical recognition of the role of the evaluator as facilitator, collaborator, and learning resource to the program staff. Both quantitative and qualitative methods of inquiry are encouraged. **Applicants should demonstrate** competency in conducting this type of evaluation. In addition, **applicants should demonstrate** experience and competency in conducting culturally sensitive research in diverse and vulnerable communities.

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

16 Research and Development on Crime Scene Tools, Techniques, and Technologies

Applicants to this solicitation **must demonstrate** an appreciation and familiarity with crime scene examination procedures and must also demonstrate knowledge of the costs of implementing and maintaining the proposed technology and training required NIJ **strongly** encourages researchers to seek guidance from or partner with appropriate State or local crime laboratories. Such associations foster a greater understanding of the issues and may strengthen the scope of the proposed research plan.

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Inclusion of appropriate scientific and legal citations to **demonstrate** awareness of the problem and the potential contribution of the proposed research to the forensic community

Quality and technical merit

- 1 Awareness of the state of current research or technology
 - 2 Soundness of methodology and analytic and technical approach
 - 3 Feasibility of proposed project and awareness of pitfalls
 - 4 Innovation and creativity (when appropriate)
- Impact of the proposed project
- 1 Potential for significant advances in scientific or technical understanding of the problem
 - 2 Potential for significant advances in the field
 - 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
 - 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
 - 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)
- Capabilities, **demonstrated** productivity, and experience of applicants
- 1 Qualifications and experience of proposed staff
 - 2 **Demonstrated** ability of proposed staff and organization to manage the effort
 - 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
 - 4 Successful past performance on NIJ grants and contracts (when applicable)
- Budget
- 1 Total cost of the project relative to the perceived benefit
 - 2 Appropriateness of the budget relative to the level of effort
 - 3 Use of existing resources to conserve costs
- Dissemination strategy
- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
 - 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

17 Research and Development on Impression Evidence

Applicants to this solicitation **must demonstrate** an appreciation of and general familiarity with existing forensic technologies as they relate to the proposed research topic They **must also demonstrate** knowledge of the costs of implementing and maintaining the proposed technology and of the training required NIJ strongly encourages researchers to seek guidance from or partner with appropriate State or local crime laboratories Such associations foster a greater understanding of the issues unique to the field of forensic science and may strengthen the scope of the proposed research plan

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Inclusion of appropriate scientific and legal citations to **demonstrate** awareness of the problem and the potential contribution of the proposed research to the forensic community

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

18 Sensor and Surveillance Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

- 1 Identification and description of the specific criminal justice need that the technology will address

- 2 Description of the operational environment in which the technology will function
- 3 Description of the specific benefit anticipated (eg, 10% reduction in a specific crime) and how the technology will produce that benefit

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

19 Biometric Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

- 1 Identification and description of the specific criminal justice need that the technology will address
- 2 Description of the operational environment in which the technology will function

- 3 Description of the specific benefit anticipated (eg, 10% reduction in a specific crime) and how the technology will produce that benefit

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

20 Forensic DNA Research and Development

Applicants to this solicitation must demonstrate an appreciation of and general familiarity with the technologies currently used for analyzing DNA evidence. They should have an understanding of issues such as chain of custody, courtroom admissibility, degraded or limited DNA, and mixtures of DNA from multiple tissues or individuals. **Applicants should also demonstrate** an appreciation of the costs to implement and maintain the proposed technology, as well as the training that will be required. NIJ **strongly** encourages researchers to seek guidance from, or partner with, appropriate State or local crime laboratories. Such associations foster a

greater understanding of the issues unique to the field of forensic DNA and may strengthen the scope of the proposed research plan

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance
Inclusion of appropriate scientific and legal citations to **demonstrate** awareness of the problem and the potential contribution of the proposed research to the forensic DNA community

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

21 Electronic Crime Research and Development

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

22 Corrections Technology

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

23 School Safety Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Successful applicants will take into consideration the school setting and its diverse populations (ie, students, administrators, visitors) for all technology proposals This solicitation requires applicants to address the needs of schools with affordable and suitable technology solutions

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 1 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

24 Pursuit Management Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable

(eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

25 Modeling and Simulation Research and Development: Software for Improved Operations, Operational Modeling, Speech-to-Text Recognition, and Training Technologies

NIJ is seeking concept papers for applied studies in the modeling of the operations of criminal justice organizations including police, corrections, or court operations, or linkages between them. The purpose is to develop widely applicable methodologies that (1) criminal justice organizations can use to **demonstrate** the utility of funding innovations in technology and operations, and (2) innovators can use to evaluate how best to design new technology.

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

The proposal must state the current status of research or technology, and the contribution of the proposed work. Whenever applicable, a brief literature review with references is expected.

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

26 Enhanced Tools for Improvised Device (IED) and Vehicle Borne IED Defeat

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

A literature review is not necessary for this solicitation; however a thorough understanding of the problem and how it relates to the bomb technician is required

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field

- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, demonstrated productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 Demonstrated ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

27 Less Lethal Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

- 1 Identification and description of the specific criminal justice need that the technology will address
- 2 Description of the operational environment in which the technology will function
- 3 Description of the specific benefit anticipated and how the technology will produce that benefit
- 4 Scientific references concerning the effect that will be produced by the device Key supporting references should be included in the concept paper's attachment

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem

- 1 Potential for significant advances in the field Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 2 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 3 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

28 Communications Technology

NIJ is seeking concept papers to research, develop, and **demonstrate** emerging technology solutions for interoperable voice communications for public safety agencies Solutions to inadequate and unreliable wireless communications are of particular importance Technologies that help increase coverage, bandwidth, and functionality by extending current technology or by developing new technology are of interest

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

The proposal must describe the current status of research and technology and the expected contribution of the proposed work Whenever applicable, a brief literature review with references is expected

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

29 Information-Led Policing Research, Technology Development, Testing, and Evaluation

Peer-review panels will evaluate concept papers using the criteria listed below. Following this assessment, NIJ will then invite selected applicants to submit full proposals. Full proposals will also be peer reviewed. NIJ staff then make recommendations to the NIJ Director. The Director makes final award decisions.

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, **demonstrated** productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 **Demonstrated** ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

30 Forensic Science Research and Development Targeting Forensic Engineering, Forensic Pathology, Forensic Odontology, Trace Evidence, Controlled Substances, and Questioned Documents

Applicants to this solicitation **must demonstrate** an appreciation of and general familiarity with existing forensic technologies as they relate to the proposed research topic **They must also demonstrate** knowledge of the costs of implementing and maintaining the proposed technology and training required NIJ **strongly** encourages researchers to seek guidance from, or partner with, appropriate State or local crime laboratories Such associations foster a greater understanding of the issues unique to the field of forensic science and may strengthen the scope of the proposed research plan

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Inclusion of appropriate scientific and legal citations to demonstrate awareness of the problem and the potential contribution of the proposed research to the forensic community

Quality and technical merit

- 1 Awareness of the state of current research or technology
- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

Impact of the proposed project

- 1 Potential for significant advances in scientific or technical understanding of the problem
- 2 Potential for significant advances in the field
- 3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life
- 4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)
- 5 Perceived potential for commercialization and/or implementation of a new technology (when applicable)

Capabilities, demonstrated productivity, and experience of applicants

- 1 Qualifications and experience of proposed staff
- 2 Demonstrated ability of proposed staff and organization to manage the effort
- 3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used
- 4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

- 1 Total cost of the project relative to the perceived benefit
- 2 Appropriateness of the budget relative to the level of effort
- 3 Use of existing resources to conserve costs

Dissemination strategy

- 1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers
- 2 Suggestions for print and electronic products NIJ might develop for practitioners and policymakers

APPENDIX E- Case Studies Demonstrating the Reality of the False Confession Phenomenon

Anthony Gray was convicted in Prince George's County, Maryland, and was sentenced to two concurrent life sentences after pleading guilty to rape and murder charges in order to avoid the death penalty. Police officers had coaxed a confession out of Gray, who is borderline retarded, by telling him that two other men arrested in connection with the case had told police that Gray was involved. DNA results generated before Gray entered his plea excluded him and the two other men as the source of the sperm recovered from the victim.

Some years later, the conviction came under intense scrutiny when a man arrested in connection with a burglary reported unpublicized details about the rape and murder for which Mr. Gray had been convicted. While DNA testing of semen recovered from the crime scene had excluded Mr. Gray and the other two men originally arrested for the crime, it did produce a match to the burglary suspect, who eventually pled guilty to the crime for which Mr. Gray had been imprisoned for seven years.

David Vasquez was arrested for the murder of a woman in Arlington, Virginia, who had been sexually assaulted and then hung. Vasquez, who is mentally impaired, confessed to the crime and provided details that were not released to the public. Mr. Vasquez could not provide an alibi and was placed near the scene of the crime by two eyewitnesses. Additionally, investigators found two pubic hairs at the crime scene that resembled those of Vasquez.

Faced with what appeared to be a collection of evidence that pointed to his guilt, Mr. Vasquez entered a guilty plea. DNA testing later proved that the murder was committed by another man, Timothy Spencer. Prosecutors joined with defense attorneys to secure the eventual pardon of Mr. Vasquez.

Christopher Ochoa pled guilty to the rape and murder of an Austin, Texas woman. He confessed to the crime and implicated another man, Richard Danziger. The state offered to give him a life sentence if he agreed to plead guilty and testify against Danziger at trial. Under threat of receiving the death penalty and by the advice of his attorney, Ochoa agreed to their terms.

At trial, however, Mr. Ochoa changed his story and claimed that he, and not Mr. Danziger, had shot the victim. Consequently, prosecutors charged Mr. Danziger with rape instead of the murder. Mr. Danziger could not provide a reason as to why Mr. Ochoa, his friend, might have testified against him.

Both men received life sentences and years later, the police, then-Governor Bush's office, and the District Attorney's Office received letters from a man named Achim Marino, claiming that he was solely responsible for the crime for which Ochoa and Danziger had been convicted. His letter told investigators precisely where to locate items that were stolen from the scene of the crime, which police were able to obtain.

Thirteen years after the commission of the crime, Ochoa and Danziger were exonerated and released from prison. Ochoa, who recently graduated law school and wishes to become a prosecutor, now states that his confession and implication of Danziger were the results of police pressure and fear of the death penalty.

Jerry Frank Townsend, a mentally retarded man in Florida, was convicted of six murders and one rape and sentenced to seven concurrent life sentences. This began when, in 1979, Townsend was arrested for raping a pregnant woman in Miami, Florida. During the investigation, he confessed to other murders. The confessions were largely the consequence of Townsend wanting to please authority figures, a common adaptive practice by someone with his limited mental capacities.

Eventually, Townsend was cleared by DNA evidence following actions in 1998, when a victim's mother asked a Ft. Lauderdale police detective to review the Townsend cases. In 2000, DNA testing of preserved evidence implicated another man, Eddie Lee Mosley, and also cleared Townsend for two of the six murders. This cast substantial doubt on the accuracy of all of Townsend's confessions. In April 2001, further DNA testing cleared Townsend of two additional killings to which he had previously confessed, and ultimately, two months later, he was cleared of all charges and released from prison – after having served twenty-two years for crimes he did not commit.

Mr. SCOTT. Thank you.
Ms. Goodrow.

TESTIMONY OF KAREN A. GOODROW, ESQ., DIRECTOR, DIVISION OF PUBLIC DEFENDER SERVICES, c/o McCARTER & ENGLISH, HARTFORD, CT

Ms. GOODROW. Thank you for having us here today. My name is Karen Goodrow. I am the Director of the Connecticut Innocence

Project. In Connecticut we are part of the Public Defender Services Division, so we are a unit of the Public Defender's Office.

Present with me is Ricky Ireland. Kenneth is his formal name, but we call him Ricky. And he has been out since August 5, I think he can tell us the number of days, 2009, after post-conviction DNA testing established his innocence. He was exonerated on August 19, 2009, when all of the charges were dismissed. He was convicted of killing Barbara Pelkey, a mother of four, during the Labor Day Weekend of 1986. The case was cold for a couple of years and he was arrested on August 11, 1988, spent the first year or so in a county jail and then, after trial, was convicted just a day, we calculated earlier in the cafeteria, the day after his 20th birthday, where he has been until just a few short weeks ago.

The amazing story—I know you have heard and read about these stories all the time. The amazing thing is getting up at 5 in the morning to hopefully make my son's lunch, you know, before I get out the door to pick Ricky up. He lives about 40 minutes from me. And I am thinking, 6 or 7 weeks ago I was visiting Ricky at the prison where he had been. We had been delivering news to him that, yes, the DNA evidence establishes what we always knew, that you are innocent, and the other two people that were never arrested that the State believed committed this offense, they are not on that DNA either. And we were discussing that with Ricky.

I don't think he is concerned that I am going to tell you this. And he just didn't believe, A, that that was the evidence, B, that this was going to get him anywhere, because after all we are public defenders. We are part of the same State system that got him in this place. And after some time we said, you know, you are going to be going to court, Ricky. And I said you are going to have to work with us here because they are not going to take you back to the prison. Once the judge grants the petition for new trial based on the DNA evidence and you are ordered released you are not going to be coming back here.

And we joke about that a little bit, just to tell you and to demonstrate the level, the level of despair for these men and women who are innocent and have been convicted and every step along the way they have been shot down. At trial he was convicted. He was represented by a public defender. The appellate court said nope, this conviction is solid. There is sufficient evidence to hold this up. The habeas court, he went through a number of different lawyers, one of whom was ultimately disbarred.

This is in Connecticut where, frankly, you probably know this already. In Connecticut they like to think that we don't make mistakes. Horrible mistakes happen. Sometime around August of 2004, if we can go back just about 5 years before Ricky was released, the chief public defender in Connecticut went to a conference and they were talking about innocence stuff and I think Barry and/or Peter were there. And he came back and he said, you know, we should start an Innocence Project in Connecticut. But we didn't have any extra funds, so he asked me and Brian Carlow would we cochair this project while we ran courthouses anyway and just cobble together maybe a few hours once or twice a week to work on innocence cases.

So that is how we breathed life into an Innocence Project in Connecticut. We obviously had lots of help from our friends in New York. Barry, specifically, Rebecca, who is here, and Steve and others. And then somewhere around February of 2006 the law firm of McCarter & English, just on a pro bono basis said, gee, you need some space. You don't have any funding. Here. You can live here with us. So they have housed us and provided pro bono assistance since that time.

Right around 2006 we applied for that cycle of Bloodsworth money. And my understanding was that Connecticut and Arizona and a third State that I have lost in my brain, were the only three to apply, and that only Arizona and Connecticut were eligible. For reasons that are still not clear to me today the money was not granted.

There is no question in my mind that Mr. Ireland could have been released earlier had we had those additional funds because, remember that at that point, we had not received our State funding yet. We were still literally going around with a box in our hand that said in red magic marker, CTIP, Connecticut Innocence Project.

In June of 2006, still underfunded by the state, but with the help of our friends from New York and the help of our friends from McCarter and the help of the Public Defender's Office, we managed to get testing for Mr. Tillman. And Mr. Tillman was released on June 6, 2006 after spending 18½ years in prison for a rape that he didn't commit. Mr. Tillman was compensated in the amount of \$5 million the following year by the State legislature. There was, at that point, no compensation statute, but they passed a special act for him.

Then we received our funding from the State and it is about less than \$500,000. And that covers me, a second lawyer, a secretary, and an investigator. And of course we don't have to pay for our offices because we are getting that pro bono, thank goodness, from the law firm.

In November of 2008, Mr. Roman, who served approximately 19½ years in prison for a murder he did not commit, was released based on post-conviction DNA testing. And I am confident again that had there been money in place prior in 2006, Mr. Roman would have gotten out earlier. Mr. Roman was exonerated in April of 2009 when the charges were dismissed.

And that brings us to August with Mr. Ireland, when the post-conviction testing established his innocence.

I can't tell you how critical it is the decision that is about to be made in terms of continuing this funding. These are real live individuals and, unfortunately, the people certainly in the Public Defender's Office who are doing this work, are doing the best they can do, but we need assistance as well. And I am very concerned about some of the States where they don't have the kind of support that I have. I recognize that I am running a very fortunate shop. But there are many people out there in many projects that need to have this funding. I would just urge you to continue.

One thing, to follow up with what Barry said on the importance of evidence preservation, we have been very lucky in Connecticut and I think part of that luck, frankly, is that we are a small State

geographically. We have only one State forensic lab. That is the lab I tend to use with my cases because I like them and they do good work, which is not to say that we couldn't hire privately if we wished to. But we have a very small State and we have good relationships. And I have been doing this work for about 25 years. I think I was 10 when I started. About 25 years. And we all know each other and I can call the lab and say, gee, you know, any luck with that CODIS search, and they are very collaborative, very cooperative. In each one of these cases we had the full cooperation of the State's Attorney, the forensics lab, and the Police Department. I also understand that that is not the norm. But in terms of evidence preservation, the key physical evidence that exonerated Mr. Tillman was a dress and stockings from the rape victim that had been put into evidence at the courthouse at the time of the trial and subsequently, during a habeas proceeding, was sent to a private DNA lab that then went under. That evidence was ultimately found at the habeas lawyer's archives. It should have been sent back to the clerk's office where it came from. That was the order of the court. But because it was sent there under the old technology and there wasn't any real result the first time around, nobody—I think, I am filling in the blanks, but I am guessing that nobody thought this evidence was very important. And that is where it ended up. Yet, because of the diligent people at Legal Aid of Hartford, they were able to finally find that evidence. We were able to establish the chain of custody and have it tested.

Same situation with Mr. Roman. For a while, we understood the evidence wasn't to be found. This was key ligatures used to bind and strangle the victim that were in the possession of the Police Department in Hartford and at first they couldn't find them. Then, with more tracking, they were able to find them because they were kept in a separate place than they originally thought. Again, Mr. Roman spent nearly 20 years in prison.

With regard to Mr. Ireland's case, the evidence essentially was found where it was believed to be found, or was believed to be, however, without getting into too much detail I will tell you that there were some mysteries attached to that evidence as well.

So it is critical that the Federal Government give the States some guidance as to the appropriate way to preserve the evidence. And my understanding is that is something that can occur through this grant process.

Thank you.

[The prepared statement of Ms. Goodrow follows:]

PREPARED STATEMENT OF KAREN A. GOODROW

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TESTIMONY OF KAREN A. GOODROW
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UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

September 22, 2009

My name is Karen A. Goodrow and I am the Director of the Connecticut Innocence Project (CTIP), which is a part of the Division of Public Defender Services for the State of Connecticut. I am here to testify with regard to Reauthorization and Improvement of DNA Initiatives of the Justice For All Act of 2004. Present with me today is my client, Mr. Kenneth Ireland, who was released from prison on August 5, 2009 after serving twenty-one years in prison for crimes for which he was innocent. Post-conviction DNA testing, which was conducted with the assistance of the Office of the State's Attorney, State of Connecticut Forensic Science Laboratory and the

Wallingford Police Department, established that Mr. Ireland was innocent of the murder and sexual assault for which he had been convicted. Mr. Ireland was exonerated on August 19, 2009, when all of the charges against him were dismissed. Thank you for inviting us here today.

The Connecticut Innocence Project began its review of Mr. Ireland's case in January, 2007, at a time when CTIP had not yet received designated funding from the State of Connecticut, and within months of CTIP being denied funds from the 2006 Bloodsworth Post-Conviction DNA Testing Grant Program. Had the Bloodsworth grant money been awarded to the Connecticut Innocence Project, Mr. Ireland's release from prison would certainly have been expedited.

1. History of the Connecticut Innocence Project:

In August, 2004, the then Chief Public Defender for the State of Connecticut established the Connecticut Innocence Project for the purpose of post-conviction review of cases of innocence. I, along with Attorney Brian Carlow of the Public Defender Division, was requested by the Chief Public Defender to Co-Chair CTIP. Our responsibilities included managing the numerous requests from inmates, reviewing their files, locating physical evidence, and in appropriate cases, obtaining post-conviction DNA testing, and litigating claims of innocence.

At this early stage, CTIP had not yet obtained designated funding from the State of Connecticut, nor did it receive any private or independent funding from any source. Indeed, case reviews and other functions of CTIP were conducted entirely by the efforts of the Co-Chairs and other volunteers within the Public Defender Division, as

well as volunteers from the private sector. During this period, both Attorney Carlow and I were supervising other public defender offices, therefore, we had limited time and resources to devote to the CTIP cases. Within the first year of its existence, the Connecticut Innocence Project was fortunate to receive pro bono assistance and office space from the private law firm of McCarter & English. The pro bono assistance from McCarter & English continues to this day, and includes all aspects of service to CTIP's clients.

II. Exoneration of James Calvin Tillman:

In January, 2005, CTIP began its review of Mr. Tillman's case. Mr. Tillman, an African-American, was convicted in 1989 after a jury trial of sexual assault in the first degree and related charges as a result of crimes committed against a white female office worker. He was sentenced to a term of imprisonment of forty-five years. The assailant was a stranger to the victim, however, she identified Mr. Tillman from photographs as her attacker. Mr. Tillman always maintained his innocence. CTIP, through the efforts and cooperation of the Office of the State's Attorney, State of Connecticut Forensic Science Laboratory, and the Hartford Police Department secured post-conviction DNA testing on crucial physical evidence from the case, including semen left on the clothing of the victim. The DNA testing revealed the existence of a single male profile on multiple areas of the clothing. Mr. Tillman was unequivocally excluded as the contributor to the DNA.

The DNA results established what Mr. Tillman steadfastly maintained throughout the case, that he was innocent. On June 6, 2006, Mr. Tillman was released

from prison after serving eighteen and one-half years in prison for crimes which he did not commit; he was exonerated on July 11, 2006, when all of the charges against him were dismissed. In 2007, the true perpetrator was identified through the national DNA databank when he was arrested in the State of Virginia on an unrelated matter and the DNA profile from the victim's clothing matched the offender's profile from Virginia.

In 2007, as a result of his wrongful conviction, Mr. Tillman was awarded compensation in the amount of \$5 million dollars through a Special Act of the Connecticut Legislature.¹

III. Connecticut Innocence Project's Application for funding from the 2006 Kirk Bloodsworth Post-Conviction DNA Testing Assistance Program:

The Connecticut Innocence Project applied for funding from the 2006 Bloodsworth Grant, but was inexplicably denied funding, in spite of the fact that Connecticut and Arizona were the only two states which met the strict requirements of the application process which were then in place. In its letter denying CTIP funding, the Department of Justice failed to explain the reasons why CTIP's application fell short of the guidelines, particularly given the fact that each of the requirements set forth in the solicitation were met. In fact, CTIP has received no explanation for the reason the 2006 grant application was denied, in spite of Connecticut's extensive statutory scheme

¹ Mr. Tillman's compensation predated the passage of Connecticut's Compensation Statute, Connecticut General Statutes, Section 54-102uu.

designed to preserve evidence and to protect the rights of the innocent, in part through access to post-conviction DNA testing.²

At the time the application for the 2006 Grant fund was made, the Connecticut Innocence Project had not yet obtained designated funding from the State of Connecticut. CTIP was still being managed by Attorney Carlow and me, and we both had primary responsibilities to other public defender offices which we supervised. In applying for the grant, it was our hope that we would receive Bloodsworth funding which would provide us with the necessary resources to expedite the review of post-conviction DNA cases of innocence. Unfortunately, CTIP was denied the Bloodsworth funding, and did not obtain designated funding from the State of Connecticut until nearly a year after the Bloodsworth application was denied.

IV. Connecticut Innocence Project's Designated Funding from the State of Connecticut in 2007:

In 2007, the Legislature of the State of Connecticut, with the approval of Governor M. Jodi Rell, designated in its budget specific funding for the Connecticut Innocence Project through the Division of Public Defender Services. I was appointed

² Connecticut's statutory scheme includes preservation of biological evidence (54-102jj), access to post-conviction DNA testing (54-102kk), DNA databank oversight (54-102m, review of wrongful convictions (54-102pp), compensation for wrongful incarceration (54-102uu), and retention of court records (51-36). See Connecticut General Statutes, Appendix, Pages 12-20.

as the Director of the Connecticut Innocence Project in August, 2007. Additional staff members include a second attorney, an investigator and an administrative assistant/paralegal. As a result of designated funding for CTIP, we have been able to review and process more quickly the many applications for assistance which we receive, resulting in two additional DNA exonerations in 2009. In addition to Mr. Ireland's exoneration in August 2009, Mr. Miguel Roman was exonerated in April, 2009.

V. Exoneration of Miguel Roman – April, 2009:

In November, 2005, CTIP began its review of Mr. Roman's case upon the request of Mr. Roman's private counsel. Mr. Roman was convicted of killing a woman with whom he had been involved; at the time of her murder, the victim was pregnant. The State's theory of the case was that Mr. Roman killed the victim because she was pregnant by Mr. Roman, providing motive for the murder. Although the crime scene was consistent with a rape/murder, DNA testing at the time of the criminal trial in 1990 concluded that the semen found in the victim did not match Mr. Roman. Mr. Roman was not charged with rape, but was convicted of murder after a jury trial, and was sentenced to a term of imprisonment of sixty years. Mr. Roman always maintained his innocence.

In 2008, CTIP, in collaboration with Mr. Roman's private counsel, and in cooperation with the Office of the State's Attorney, State of Connecticut Forensic Science Laboratory and Hartford Police Department, secured post-conviction DNA testing of crucial physical evidence, including the victim's underwear and the neck ligature used to strangle the victim. The DNA testing established the presence of a

single male profile on the vaginal swab from the victim, the victim's underwear and the neck ligature. Mr. Roman was unequivocally excluded as the contributor to the DNA. Through the State of Connecticut DNA databank, the single male profile was identified as that of the long-term boyfriend/common law husband of the victim's cousin. This individual was with the victim on the evening of her murder, was questioned by the police during their investigation, and subsequently committed sexual offenses for which he was convicted and imprisoned. The DNA profile of this individual had been maintained in the State of Connecticut DNA databank as a result of his felony conviction. Furthermore, police investigation into the innocence of Mr. Roman led to the arrest of this individual as the true perpetrator of the crime, and also led to his arrest in two other cold cases involving the murders of two young women.

After serving twenty and one-half years in prison for crimes which he did not commit, Mr. Roman was released from prison on December 19, 2008. He was exonerated on April 2, 2009 when all of the charges against him were dismissed. DNA evidence proved what Mr. Roman had steadfastly maintained, that he was innocent. Mr. Roman's release and exoneration would have certainly been expedited had the Bloodsworth Grant funding from CTIP's 2006 application been approved.

VI. Exoneration of Kenneth Ireland – August, 2009:

CTIP began its review of Mr. Ireland's case in April, 2007. Mr. Ireland was convicted in 1989 after a jury trial of the rape and murder of a female factory worker and mother of four. The State's theory of the case was that Mr. Ireland, along with two other individuals, committed the offenses against the victim. Neither of the two other

individuals was ever arrested; one individual died prior to Mr. Ireland's arrest, and the other individual died in the last year. The evidence used to convict Mr. Ireland consisted mostly of the testimony of two individuals who testified that Mr. Ireland and one of the other alleged participants had made incriminatory statements and displayed incriminatory behavior in their presence. These two witnesses received substantial award money in exchange for their testimony. Mr. Ireland always maintained his innocence.

During 1999, as part of a post-conviction habeas hearing, Mr. Ireland's habeas counsel requested that DNA testing be conducted on certain items of evidence. The testing did not yield definitive results.

In 2009, CTIP, in collaboration with the Office of the State's Attorney, State of Connecticut Forensic Science Laboratory and Wallingford Police Department, secured DNA testing of crucial evidence in the case, including vaginal swabs and vaginal smears from the victim. The DNA testing established the existence of a single male profile on the swabs and smears. Mr. Ireland, as well as the two other claimed participants, was unequivocally excluded as the contributor to the DNA. Although the DNA profile has been processed into the State and National DNA databanks, to date, there has been no identification of the true perpetrator. The State of Connecticut Forensic Laboratory conducts weekly searches of both the State and National databanks with the hope of obtaining an identification of the DNA profile in this case. Additionally, the Wallingford Police Department has reopened its investigation.

Based upon the new DNA evidence, Mr. Ireland was released from prison on August 5, 2009, after having served twenty-one years in prison for crimes which he did not commit. He was exonerated on August 14, 2009 when all of the charges against him were dismissed. The post-conviction DNA evidence proved what Mr. Ireland had steadfastly maintained, that he was innocent. Mr. Ireland's release and exoneration would have certainly been expedited had the Bloodsworth Grant funding from CTIP's 2006 application been approved.

VII. Pending Application for 2009 Post-Conviction DNA Testing Assistance Program – A Collaborative Effort

The Connecticut Innocence Project, in collaboration with the Office of the State's Attorney and the State of Connecticut Forensic Science Laboratory, has pending an application with the National Institute of Justice for funding under the 2009 Post-Conviction DNA Testing Assistance Program. The purpose of the request for funding is to help defray the costs associated with post-conviction DNA testing of forcible rape, murder and non-negligent manslaughter cases in which actual innocence might be demonstrated. The funding requested will be used in a collaborative effort by the three State agencies involved with the desired goal to expedite the identification of relevant cases for testing, and the exoneration of wrongfully convicted individuals.

With the benefit of additional resources, the process of identifying relevant cases will involve a creative collaboration between the Connecticut Innocence Project and the Office of the State's Attorney, as well as local and State police. Cases will be identified in one of two ways: (1) CTIP will conduct informational sessions with inmate

populations at each Department of Correction facility in the State of Connecticut to advise those inmates serving sentences for forcible rape, murder and non-negligent manslaughter of the availability of the program, and to instruct inmates on the process for seeking assistance; and (2) the Office of the State's Attorney will actively seek the identification of relevant cases from State and local police departments, as well as from each State's Attorney within each Judicial District.

Since its brief inception, the Connecticut Innocence Project has represented three individuals who were exonerated through the use of post-conviction DNA testing. In each case, the individual served a substantial period of time (between 18.5 and 21 years) before his wrongful conviction was corrected through the use of DNA testing. In each case, CTIP worked with the cooperation of, and/or in collaboration with the Office of the State's Attorney, the State of Connecticut Forensic Science Laboratory and local and State police departments, as well as other necessary State agencies and offices which assisted CTIP with its mission. In all three of the cases, single male DNA profiles of the actual perpetrators were identified through post-conviction DNA testing. In two of the cases, the actual perpetrator was identified and arrested. In one case, the perpetrator was arrested for two additional murders which had languished as cold cases for nearly twenty years.

VIII. Collaborative Efforts – the Necessity for Relationship-Building:

As Director of the Connecticut Innocence Project, I attended the January, 2009 Symposium in Florida sponsored by the National Institute of Justice, which was intended to set the stage for successful applications for the Post-Conviction DNA

Testing Grant Program. While in attendance, I observed stake-holders from various criminal justice agencies throughout the United States form necessary relationships, often for the first time, with the purpose of collaborating on post-conviction DNA testing. The common goal was to exonerate the innocent.

The Connecticut Innocence Project has been fortunate to have benefited from the collaborative efforts of, and the relationship-building between, key stake-holders in the criminal justice system in Connecticut. The successful results of the cases of Mr. Tillman, Mr. Roman and Mr. Ireland are due in great measure to the cooperation and assistance of these key individuals. Relationship-building between CTIP and other stake-holders has been on-going since the inception of CTIP, and has grown with time and experience. However, other states may not have had the same past opportunity to forge such beneficial working relationships. Because the Symposium was held just prior to the final year of authorized funding, four years of potential grant applicants potentially did not benefit from the lessons learned as a result of the Symposium.

The need for the Bloodsworth Grant is so critical, particularly in states where there is limited State funding and diminished private resources, that it should be permanently funded. Certainly, it is clear that the Bloodsworth Grant achieved its intended desire during its first authorization cycle for Fiscal Years 2005-2009. Additionally, the need for federal-to-state guidance regarding best practices for biological evidence retention would benefit all states. A sentiment continually heard from participants at the Florida Symposium was the fact that the critical issue in post-conviction DNA testing is the retention of biological evidence. Continued funding of the

Bloodsworth Grant would provide the necessary guidance to states on the proper retention of crucial biological evidence which is at the heart of all successful DNA exonerations.

IX. *Conclusion:*

The funding offered through the Bloodsworth Grant is essential in order for States to obtain adequate resources to insure that innocent inmates, serving lengthy sentences for crimes which they did not commit, have an opportunity to demonstrate their innocence through post-conviction DNA testing. The Bloodsworth Grant funding is particularly crucial to small projects such as CTIP, which operate on relatively modest budgets. States with small projects and limited resources rely heavily on the availability of Bloodsworth funding. In order to insure that innocent individuals wrongfully convicted and incarcerated receive justice, it is absolutely necessary that the Bloodsworth Grant be continually funded and available to States. Moreover, the use of the Bloodsworth Grant in a collaborative manner provides a necessary tool for law enforcement to insure that the true perpetrators of crime are brought to justice.

ATTACHMENTS

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profile was based has been reversed and the case dismissed. The State Police Forensic Science Laboratory shall purge all records and identifiable information in the data bank pertaining to the person and destroy all samples from the person upon receipt of (1) a written request for expungement pursuant to this section and (2) a certified copy of the court order reversing and dismissing the conviction.

(P.A. 94-245, S. 6.)

Sec. 54-102m. DNA Data Bank Oversight Panel. (a) There is established a DNA Data Bank Oversight Panel composed of the Chief State's Attorney, the Attorney General, the Commissioner of Public Safety and the Commissioner of Correction, or their designees. The Chief State's Attorney shall serve as chairperson of the panel and shall coordinate the agencies responsible for the implementation and maintenance of the DNA data bank established pursuant to section 54-102j.

(b) The panel shall take such action as necessary to assure the integrity of the data bank including the destruction of inappropriately obtained samples and the purging of all records and identifiable information pertaining to the persons from whom such inappropriately obtained samples were collected.

(c) The panel shall meet on a quarterly basis and shall maintain records of its meetings. Such records shall be retained by the chairperson. The meetings and records of the panel shall be subject to the provisions of the Freedom of Information Act, as defined in section 1-260, except that discussions and records of personally identifiable DNA information contained in the data bank shall be confidential and not subject to disclosure pursuant to the Freedom of Information Act.

(P.A. 97-242, S. 3; P.A. 04-182, S. 2.)

History: P.A. 01-185 amended Subsec. (c) to add provision that the meetings and records of the panel shall be subject to the Freedom of Information Act, except that discussions and records of personally identifiable DNA information contained in the data bank shall be confidential and not subject to disclosure pursuant to the act.

Secs. 54-102n to 54-102q. Reserved for future use.

Sec. 54-102r. Registration of persons convicted of sexual assault upon release from correctional facility or completion or termination of probation. Section 54-102r is repealed, effective October 1, 1998.

(P.A. 91-246, S. 8-12; P.A. 95-142, S. 10; 95-179, S. 12; P.A. 97-183, S. 1, 2; P.A. 98-111, S. 11.)

Sec. 54-102s. Transferred to Chapter 969, Sec. 54-260.

Secs. 54-102t to 54-102z. Reserved for future use.

PART IIb

TESTING FOR TUBERCULOSIS INFECTION

Sec. 54-102na. Tuberculosis testing: Definitions. Requirements. (a) As used in this part:

(1) "Active tuberculosis" shall have the same meaning as provided in subdivision (1) of subsection (a) of section 19a-265;

(2) "Infectious tuberculosis" shall have the same meaning as provided in subdivision (2) of subsection (a) of section 19a-265; and

Sec. 54-102dd. Inmates with infectious tuberculosis required to be isolated. Persons exposed encouraged to be tested. (a) Any inmate found to have evidence of infectious tuberculosis shall be isolated from any public contact until such time as the inmate has received treatment and has been evaluated and found to be free of infection.

(b) If an inmate found to have infectious tuberculosis is believed, based on subsequent investigation, to have exposed visitors or employees to tuberculosis, efforts shall be made to inform such persons and encourage such persons to have an evaluation for tuberculosis infection.

(P.A. 02-63, § 4.)

Sec. 54-102ee. Department contract option for testing of tuberculosis. The Department of Correction may enter into a contract agreement with an appropriate health care provider to manage the responsibilities as it relates to testing, screening or treatment of inmates for tuberculosis.

(P.A. 05-63, § 5.)

Secs. 54-102ff to 54-102ii. Reserved for future use.

PART IIc

POST-CONVICTION REMEDIES

Sec. 54-102jj. Preservation of biological evidence. (a) For the purposes of this section and section 54-102kk:

(1) "DNA testing" means forensic deoxyribonucleic acid testing; and

(2) "Agent" means a person, firm or corporation to whom the state police or a local police department entrusts or delivers evidence to undergo DNA testing.

(b) Upon the conviction of a person of a capital felony or the conviction of a person of a crime after trial, or upon order of the court for good cause shown, the state police, all local police departments, any agent of the state police or a local police department and any other person to whom biological evidence has been transferred shall preserve all biological evidence acquired during the course of the investigation of such crime for the term of such person's incarceration.

(c) The state police, a local police department, an agent or any person to whom biological evidence has been transferred may be relieved of the obligation to preserve biological evidence as provided in subsection (b) of this section by applying to the court in which the defendant's case was prosecuted for permission to destroy such biological evidence. Upon receipt of the application, the court shall give notice to all defendants charged in connection with the prosecution and shall hold a hearing. After such hearing, the court shall grant the application if it finds that the Connecticut Supreme Court has decided the defendant's appeal and the defendant does not seek further preservation of the biological evidence, or for good cause shown.

(P.A. 03-242, § 6.)

Sec. 54-102kk. DNA testing of biological evidence. (a) Notwithstanding any other provision of law governing postconviction relief, any person who was convicted of a crime and sentenced to incarceration may, at any time during the term of such

incarceration, file a petition with the sentencing court requesting the DNA testing of any evidence that is in the possession or control of the Division of Criminal Justice, any law enforcement agency, any laboratory or the Superior Court. The petitioner shall state under penalties of perjury that the requested testing is related to the investigation or prosecution that resulted in the petitioner's conviction and that the evidence sought to be tested contains biological evidence.

(b) After notice to the prosecutorial official and a hearing, the court shall order DNA testing if it finds that:

(1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing;

(2) The evidence is still in existence and is capable of being subjected to DNA testing;

(3) The evidence, or a specific portion of the evidence identified by the petitioner, was never previously subjected to DNA testing, or the testing requested by the petitioner may resolve an issue that was never previously resolved by previous testing; and

(4) The petition before the Superior Court was filed in order to demonstrate the petitioner's innocence and not to delay the administration of justice.

(c) After notice to the prosecutorial official and a hearing, the court may order DNA testing if it finds that:

(1) A reasonable probability exists that the requested testing will produce DNA results which would have altered the verdict or reduced the petitioner's sentence if the results had been available at the prior proceedings leading to the judgment of conviction;

(2) The evidence is still in existence and is capable of being subjected to DNA testing;

(3) The evidence, or a specific portion of the evidence identified by the petitioner, was never previously subjected to DNA testing, or the testing requested by the petitioner may resolve an issue that was never previously resolved by previous testing; and

(4) The petition before the Superior Court was filed in order to demonstrate the petitioner's innocence and not to delay the administration of justice.

(d) The costs of DNA testing ordered pursuant to this section shall be borne by the state or the petitioner, as the court may order in the interests of justice, except that DNA testing shall not be denied because of the inability of the petitioner to pay the costs of such testing.

(e) In a proceeding under this section, the petitioner shall have the right to be represented by counsel and, if the petitioner is indigent, the court shall appoint counsel for the petitioner in accordance with section 51-296.

(P.A. 05-242, § 7.)

Secs. 54-102ff to 54-102on. Reserved for future use.

Sec. 54-102pp. **Review of wrongful convictions.** (a) The Chief Court Administrator shall establish an advisory commission to review any criminal or juvenile case involving a wrongful conviction and recommend reforms to lessen the likelihood of a similar

wrongful conviction occurring in the future. The advisory commission shall consist of the Chief State's Attorney, the Chief Public Defender and the Victim Advocate, or their designees, a representative from the Connecticut Police Chiefs Association, a representative from the Connecticut Bar Association, and representatives from one or more law schools in this state and one or more institutions of higher education in this state that offer undergraduate programs in criminal justice and forensic science.

(b) Whenever a person who has been convicted of a crime is subsequently determined to be innocent of such crime and exonerated, the advisory commission may conduct an investigation to determine the cause or causes of the wrongful conviction. Such investigation shall include, but not be limited to, an examination of the nature and circumstances of the crime, the background, character and history of the defendant, and the manner in which the investigation, evidence collection, prosecution, defense and trial of the case was conducted. Notwithstanding any provision of the general statutes concerning the confidentiality, erasure or destruction of records, the advisory commission shall have access to all police and court records and records of any prosecuting attorney pertaining to the case under investigation. The advisory commission shall not further disclose such records.

(c) Upon the conclusion of its investigation, the advisory commission shall report its findings and any recommendations it may have for reforms to lessen the likelihood of similar wrongful convictions occurring in the future to the joint standing committee of the General Assembly on the judiciary, in accordance with the provisions of section 11-4a, and to other interested persons as deemed appropriate including the Chief Court Administrator, the Chief State's Attorney, the Chief Public Defender, the Commissioner of Public Safety and the chief of any local police department involved in the investigation of the case.

(P.A. 03-242, § 8.)

Secs. 54-102qq to 54-102tl. Reserved for future use.

Sec. 54-102nu. Compensation for wrongful incarceration. (a) A person is eligible to receive compensation for wrongful incarceration if:

- (1) Such person has been convicted by this state of one or more crimes, of which the person was innocent, has been sentenced to a term of imprisonment for such crime or crimes and has served all or part of such sentence; and
- (2) Such person's conviction was vacated or reversed and the complaint or information dismissed on grounds of innocence, or the complaint or information dismissed on a ground consistent with innocence.

(b) A person who meets the eligibility requirements of subsection (a) of this section may present a claim against the state for such compensation with the Claims Commissioner in accordance with the provisions of chapter 53. The provisions of said chapter shall be applicable to the presentation, hearing and determination of such claim except as otherwise provided in this section.

(c) At the hearing on such claim, such person shall have the burden of establishing by a preponderance of the evidence that such person meets the eligibility requirements of subsection (a) of this section. In addition, such person shall present evidence as to the damages suffered by such person which may include, but are not limited to, claims for loss of liberty and enjoyment of life, loss of earnings, loss of earning capacity, loss

of familial relationships, loss of reputation, physical pain and suffering, mental pain and suffering and attorney's fees and other expenses arising from or related to such person's arrest, prosecution, conviction and incarceration.

(d) If the Claims Commissioner determines that such person has established such person's eligibility under subsection (a) of this section by a preponderance of the evidence, the Claims Commissioner shall order the immediate payment to such person of compensation for such wrongful incarceration. In determining the amount of such compensation, the Claims Commissioner shall consider relevant factors including, but not limited to, the evidence presented by the person under subsection (c) of this section, as to the damages suffered by such person and whether any negligence or misconduct by any officer, agent, employee or official of the state or any political subdivision of the state contributed to such person's arrest, prosecution, conviction or incarceration.

(e) In addition to the compensation paid under subsection (d) of this section, the Claims Commissioner may order payment for the expenses of employment training and counseling, tuition and fees at any constituent unit of the state system of higher education and any other services such person may need to facilitate such person's reintegration into the community.

(f) Any person claiming compensation under this section based on a pardon that was granted or the dismissal of a complaint or information that occurred before October 1, 2008, shall file such claim not later than two years after October 1, 2008. Any person claiming compensation under this section based on a pardon that was granted or the dismissal of a complaint that occurred on or after October 1, 2008, shall file such claim not later than two years after the date of such pardon or dismissal.

(g) Nothing in this section shall be construed to prevent such person from pursuing any other action or remedy at law or in equity that such person may have against the state and any political subdivision of the state and any officer, agent, employee or official thereof arising out of such wrongful conviction and incarceration.

(P.A. 06-143, S. 1.)

History: P.A. 82-248 made technical revision, rewording some provisions and dividing section into Subsections but made no substantive change.

Section designed to satisfy due process requirements when court maliciously checks in a witness a personal attack on judge and judge does not act when the contempt is committed, does not expressly or implicitly repeat. See 51-53, both are operative. 1861; 1961, Chas. 191 C. 1; 0. Chas. 211 C. 564. Chas. 221 C. 458. Chas. 222 C. 571. Chas. 225 C. 595. Chas. 241 C. 569.

Sec. 51-34. Commitment for disobedience; release. Any person committed to a community correctional center in any refusal to obeying an order of any court or family support magistrate may be discharged from imprisonment by the judge of the court or family support magistrate making the order when it appears to the judge that the public interest will not suffer thereby.

(1949 Rev., §. 7703; 1959, P.A. 28 S. 851; 1965, P.A. 427; P.A. 82-248, S. 18; P.A. 89-360 S. 20, 43.)

History: 1959 act deleted provision re disobedience of order of justice of the peace; 1965 act substituted "community correctional center" for "jail". P.A. 82-248 made technical revision, rewording some provisions, but made no substantive change. P.A. 89-360 added reference to family support magistrates.

Sec. 51-35. Witness refusing to testify; imprisonment. Self-incrimination. (a) Any court or family support magistrate may commit to a community correctional center any person legally summoned who refuses to appear and testify before it in any case, there to remain at his own expense until he so testifies.

(b) A person shall not be compelled to give evidence against himself, except as otherwise provided by statute, and shall such evidence when given by him, be used against him.

(1949 Rev., §. 7704; 1969, P.A. 297; P.A. 82-248, S. 19; P.A. 89-360, §. 21, 45.)

History: 1969 act substituted "community correctional center" for "jail". P.A. 82-248 made technical revision, rewording some provisions and dividing section into Subsections, but made no substantive change. P.A. 89-360 added reference to family support magistrates in Subsec. (a).

See Sec. 7-47 re witness' lack of privilege to refuse to testify or produce required papers for General Assembly.

See Sec. 16-14 re proceeding against delinquent no officers.

See Sec. 18-8 re hearing before Department of Public Utility Control.

See Sec. 28a-722 re witness' lack of privilege to require involving insurance policies and/or special favors.

See Sec. 42a-129 re court's power to examine witnesses.

See Sec. 52-178 re protection against self-incrimination.

See Sec. 53-358 re witness's lack of privilege to refuse to testify or grounds that answers might reveal fraudulent crime on his part.

See Sec. 53-554 re refusal of defendant to testify in cases concerning recovery of money lost in gaming.

See Sec. 53-576a to 53-576g, inclusive, re gambling offenses, generally.

See Sec. 54-81 re testimony of witness of accused during trial.

See Sec. 54-82 re testimony of witness with regard to election bribery.

The power of a public officer to commit for contempt shall include, 25 C. 283. Refusal to answer is not properly a contempt. 85 C. 13. Contempt statute. 145 C. 489. Chas. 222 C. 594. Chas. 230 C. 569.

Chas. 32 US 395. State is even able to commit to prison an adult witness for refusal to testify under this section, so long as available to punish in some way. See Sec. 40b-131, 25 CS 352.

Sec. 51-36. Retention, microfilming, destruction, disposal and transferring of court records. (a) The Chief Court Administrator may cause any and all court records, papers or documents, required to be retained indefinitely or for a period of time defined by (1) rules of court, (2) directives promulgated by the Office of the Chief Court Administrator, or (3) statute, to be microfilmed. The device used to reproduce such records, papers or documents on microfilm shall be one which accurately reproduces the original thereof in detail. Such microfilm shall be considered and treated the same as the original records, papers or documents, provided a certificate of authenticity appears on each roll of microfilm. A transcript, exemplification or certified copy thereof shall for all purposes be deemed to be a transcript, exemplification or certified copy of the original. The original court records, papers or documents so reproduced may be disposed of in such manner as approved by the Office of the Chief Court Administrator. For the purposes

of this subsection, "microfilm" includes microcard, microfiche, microphotograph, electronic medium or any other process which actually reproduces or forms a durable medium for so reproducing the original.

(b) Except as provided in subsection (c) of this section, any judge of the Superior Court may order that official records of evidence or judicial proceedings in said court, the Court of Common Pleas or the Circuit Court, including officials' notes and tapes of evidence or judicial proceedings concerning title to land, taken more than seven years prior to the date of such order by any stenographer or official court reporter, be destroyed by the person having the custody thereof.

(c) (1) In any case in which a person has been convicted of a felony, other than a capital felony, the official records of evidence or judicial proceedings in the court may be destroyed upon the expiration of twenty years from the date of imposition of the sentence in such case or upon the expiration of the sentence imposed upon such person, whichever is later.

(2) In any case in which a person has been convicted after trial of a capital felony, the official records of evidence or judicial proceedings in the court may be destroyed upon the expiration of seventy-five years from the date of imposition of the sentence in such case.

(3) In any case in which a person has been found not guilty, or in any case that has been dismissed or was not prosecuted, the court may order the destruction or disposal of all exhibits entered in such case upon the expiration of ninety days from the date of final disposition of such case, unless a prior disposition of such exhibits has been ordered pursuant to section 54-35a. In any case in which a nolle has been entered, the court may order the destruction or disposal of all exhibits entered in such case upon the expiration of thirteen months from the date of final disposition of such case. Not less than thirty days prior to the scheduled destruction or disposal of exhibits under this subdivision, the clerk of the court shall send notice to all parties and any party may request a hearing on the issue of such destruction or disposal before the court in which the matter is pending.

(4) In any case in which a person has been convicted of a misdemeanor or has been adjudicated a youthful offender, the court may order the destruction or disposal of all exhibits entered in such case upon the expiration of ten years from the date of imposition of the sentence in such case or upon the expiration of the sentence imposed on such person, whichever is later, unless a prior disposition of such exhibits has been ordered pursuant to section 54-36a. Not less than thirty days prior to the scheduled destruction or disposal of exhibits under this subdivision, the clerk of the court shall send notice to all parties and any party may request a hearing on the issue of such destruction or disposal before the court in which the matter is pending.

(5) In any case in which a person is charged with multiple offenses, no destruction or disposal of exhibits may be ordered under this subsection until the longest applicable retention period under this subsection has expired. The provisions of this subdivision and subdivisions (3), (4) and (6) of this subsection shall apply to any criminal or motor vehicle case disposed of before, on or after October 1, 2006.

(6) The retention period for the official records of evidence and exhibits in any habeas corpus proceeding, petition for a new trial or other proceeding arising out of a criminal case in which a person has been convicted shall be the same as the applicable

retention period under this subsection for the criminal case from which such proceeding or petition arose.

(7) For the purposes of this subsection, "sentence" includes any period of incarceration, parole, special parole or probation.

(d) All court records other than records concerning title to land may be destroyed in accordance with rules of court. Records concerning title to land shall not be subject to any such destruction and may be retained in an electronic format, except that official notes and tapes of evidence or judicial proceedings concerning title to land may be destroyed. All court records may be transferred to any agency of this state or to any federal agency in accordance with rules of court or directives promulgated by the Office of the Chief Court Administrator, provided records in any action concerning title to land terminated by a final judgment affecting any right, title or interest in real property shall be retained for not less than forty years in the office of the clerk of the court location in which the judgment was rendered. Any other judicial branch books, records, papers or documents may be destroyed or transferred to any agency of this state or to any federal agency in accordance with directives promulgated by the Office of the Chief Court Administrator.

(e) For the purposes of this section, "official records of evidence or judicial proceedings" includes (1) the court file, that contains the original documents or copies of any original documents that have been removed, (2) all exhibits from the parties, whether marked for identification or admitted as full exhibits, and (3) the transcripts of all proceedings held in the matter, including voir dire.

(1989 Rev. S. 7210, 1993, S. 2131; 1999, P.A. 28, S. 84, P.A. 74, P.A. 24, 201, P.A. 76-95, S. 1, P.A. 76-96, S. 37, 831, P.A. 82-183, S. 1, 3; F.A. 84-162, S. 1, P.A. 87-40, S. 3, P.A. 02-29, S. 1, P.A. 02-32, S. 11; P.A. 03-153, S. 4; F.A. 00-117, S. 3.)

History: 1959 act concerning circuit court judges for municipal court judges, later court having been abolished, P.A. 74-181 revised provision to clarify responsibility of superior court judges for destruction of inferior court records and responsibility of common pleas court judge for destruction of non-law plea case records and to grant responsibility for circuit court records to common pleas judges, in circuit courts having been abolished, previous provision stated that superior court non-great and circuit court judges "may order the official records of evidence in judicial proceedings in any of such courts... to be destroyed" and added provision to destruction of records after 25 years in duration of trial court action, effective December 31, 1974, P.A. 76-25; previous provision in duration after 25 years, with provision allowing destruction of records after 25 years in duration of trial court action, effective December 31, 1974, P.A. 76-25; previous provision in duration after 25 years, with provision prohibiting destruction of records in title to land, P.A. 76-435 revised section to grant superior court judge responsibility for records of common pleas and circuit courts, reflecting merger of common pleas and superior courts, effective July 1, 1978, P.A. 82-183 added provision to transfer of records to state or federal agency in accordance with rules of court or directives of the judicial department and documents in transfer of any other judicial department books, records, papers or documents; P.A. 86-142 added Subsec. (b) authorizing the transferring of records records to administrative records provisions as follows: (b) "subject to the transferring of records to the judicial department" with the "office of the chief court administrator" as the entity responsible for promulgating directives concerning the destruction or transfer of records and making provisions regarding records in any action concerning title to land to be retained for not less than 40 years in the clerk's office where the judgment was rendered; P.A. 87-40 amended Subsec. (a) by making technical changes and adding "electronic medium"; Division further Subsec. (b) into Sections, (1) as (a) and added provision allowing destruction of records after 7 years, including official notes and tapes of evidence or judicial proceedings where original records; P.A. 02-29 amended Subsec. (a) to include technical change; amended Subsec. (b) to add exception to Subsec. (c), added new Subsec. (c) (1) & (2) which in Subdiv. (1) and (2) the retention period for records in cases in which a motion has been received after trial of a felony and in criminal felony, respectively, when granted former Subsec. (c) and Subsec. (f), and added new Subsec. (c) (3) (i) and (ii) and (d) the retention period for records of evidence or judicial proceedings; P.A. 03-26 amended Subsec. (a) by making technical changes, amended Subsec. (c) (2) by replacing "twenty-five years" from the death of such person "with" "ten years" five years from the introduction of such person"; amended Subsec. (d) by replacing reference to "Judicial Department" with reference to "judicial branch" and amended Subsec. (e) by replacing "from whom no documents have been removed" with "that contains the original document or copies of any original documents that have been removed", adding a subdivision designating and making technical changes; P.A. 06-153 amended Subsec. (a) by deleting "other than records concerning title to land", made technical changes in Subsec. (c) and amended Subsec. (c) by adding "and may be retained in an electronic format"; P.A. 06-153 amended Subsec. (c) by deleting "after trial" and replacing "disposition of" with "any other of the sentence in" in Subsec. (1), replacing "transfer of such person" with "date of expiration of the sentence" in such

cases" in Subdiv. (2) and adding Subdivs. (3) to (7) to destruction or disposal of exhibits in various criminal and motor vehicle cases and various corpus proceedings.

Subdiv. (b)
Chad. 43 C. 246.

Sec. 51-36a. Access to records maintained by Judicial Department. Policies and procedures. (a) For the purposes of this section, "employees of the Judicial Department" shall not include employees of the courts of probate or the Public Defender Services Commission, and "records" shall not include records maintained by the courts of probate or the Public Defender Services Commission.

(b) Notwithstanding any provision of the general statutes, employees of the Judicial Department may, in accordance with policies and procedures adopted by the Chief Court Administrator, access any records maintained by the Judicial Department, including erased records, and may disclose the information contained in such records in accordance with such policies and procedures.

(c) Notwithstanding any provision of the general statutes, Judicial Department contractors and authorized agents of the Judicial Department may, in accordance with policies and procedures adopted by the Chief Court Administrator, access records maintained by the Judicial Department, including erased records, and may disclose the information contained in such records in accordance with such policies and procedures.

(d) This section shall apply to all records in existence on and after June 7, 2002.

(P.A. 98-8, S. 1; P.A. 91-136, S. 4; P.A. 05-132, S. 5.)

History: P.A. 05-132 amended Subdiv. (b) by adding provisions re erased records and disclosure of information contained in records in order necessary for performance of duties and added Subdiv. (c) permitting Judicial Department contractors and authorized agents to access records, including erased records, and permitting disclosure to extent necessary for performance of duties; P.A. 05-132 amended Subdivs. (b) and (c) by adding provisions re access to Judicial Department records in accordance with policies and procedures adopted by the Chief Court Administrator, requiring provisions re access in the extent necessary for the performance of duties w/ Judicial Department records in accordance with such policies and procedures and making technical changes and added Subdiv. (d) re application of section, effective June 7, 2002.

Secs. 51-37 and 51-38. Records and files in New London County. Application of general statutes to municipal and justice courts. Sections 51-37 and 51-38 are repealed.

(1999 Rev. S. 7723, 1237, 1658; P.A. 98, S. 204; P.A. 74-83, S. 23, 29.)

CHAPTER 872^a

JUDGES

^aChad. 213 C. 51.

Sec. 51-39. Disqualification by relationship or interest. Judge or family support magistrate may act with consent of parties. (a) Except as provided in this section, a judge or family support magistrate is disqualified to act if a relationship between the judge or family support magistrate and a party in any proceeding in court before him is as near as the degree of kinship between father and son, brothers, or uncle and nephew, by nature or marriage, or as near as between landlord and tenant, or if any judge or family support magistrate may be liable to contribute to the damages, costs or expenses of any proceeding before him, or if he may receive a direct pecuniary benefit by the determination of any proceeding before him.



CONNECTICUT INNOCENCE PROJECT
State of Connecticut
DIVISION OF PUBLIC DEFENDER SERVICES

c/o McCarter & English
CityPlace 1, 36th Floor
185 Asylum Street
Hartford, CT 06103
e-mail: Karen.A.Goodrow@jud.ct.gov
(860) 275-6140 Telephone
(860) 275-6141 Fax

KAREN A. GOODROW, ESQ.
DIRECTOR

CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGE

The Connecticut Innocence Project of the Division of Public Defender Services for the State of Connecticut seeks to assist indigent individuals who are convicted of crimes for which they are innocent. In order for us to assist you, the following must apply to you:

1. You must be indigent; in other words, you must be unable to afford to hire your own attorney.
2. You must be factually innocent of the crime for which you have already been convicted. "Factually innocent" means that you are not the person who committed the crime.
3. You must not have pled guilty to the crime.
4. You must be serving a Connecticut sentence.

5. Your sentence must include at least a ten year period of incarceration.
6. You must be no less than five years from your estimated release date.
7. There must be some new evidence in your case which would establish your innocence. New evidence is evidence which was not known at the time of your sentencing. Such evidence may be the result of further investigation, or new or additional forensic testing.

If your case does not fit the above criteria, we will not be able to assist you. If your case does fit the above criteria, please answer completely the request for assistance form and send it to the Connecticut Innocence Project at the above address.

Please keep in mind that this process can take a very long time, therefore, you should continue to pursue any other legal action which you may have already started.

Thank you.

The Connecticut Innocence Project

'True Freedom' After A Two-Decade Ordeal

Murder Charge Against Man Wrongfully Convicted Is Dismissed

By DEVID OWENS
dowens@courant.com

As a court hearing in Hartford last July little more than two months Thursday morning, the state moved to drop the charge.

Prosecutors said they had no evidence to support the charge against Miguel Roman, 32, who served 20 years in prison for a crime the state now concedes he did not

commit. Roman was arrested in 1988 after the slaying of 17-year-old Carmen Lopez of Hartford.

But the state's case against Roman was so weak that Roman was released in 2008.

"I always felt bigger," she said. "I always believed in my dad's innocence." Since his release, Roman has regularly attended church and gotten to know his neighbors.

He's amazed by cell phones and the Internet. He's proud of his new job as a security guard at a local business.

Subsequent DNA testing showed that the father had no relation to Roman, although no one knew that at the time of the trial.

Prosecutors also presented conflicting information about when he was last with Lopez, and asked a friend to lie to police about where he was at the time of the murder.

Innocence Project, Peine, Roman's current attorney, who worked for five to gain his release and the law firm, McBride & English, which hires and supports the Innocence Project.

Godnow said Thursday that Roman and Tillman share another trait. "Much like James [Roman, has been] wrongfully convicted," Godnow said. "I don't expect people to be so gracious, I am constantly amazed by the strength of spirit that we see in the folks that we represent, and the grace and dignity in the worst of times."

ON THE WEB

For more on this story, visit www.courant.com/roman

Public defender Adam Godnow asked Judge to dismiss the murder charge. Godt agreed, granting Roman true freedom and wiping his name clean of the charge. Roman's attorney, Godnow, said his client, Miguel Roman, has more than two dozen relatives and friends who broke the applause. Some

ON THE WEB

For more on this story, visit www.courant.com/roman

Roman, who had been incarcerated since his arrest in 1988, was released from prison in 2008. Roman had spent a median for a new trial. His family celebrated that milestone with a big dinner. The plan was the same for Thursday night, said Ava Roman, one of his daughters.

ON THE WEB

For more on this story, visit www.courant.com/roman

At Roman's 1990 trial, prosecutors argued that Roman had had an affair with Lopez's father and that he had raped her. Roman's lawyer, Godnow, said that Roman was innocent.

ON THE WEB

For more on this story, visit www.courant.com/roman

Godnow said that the effort to gain a new trial for Roman was a result of the convictions and sentences many men and women have served on for sexual violence against women.

ON THE WEB

For more on this story, visit www.courant.com/roman

Godnow said that the effort to gain a new trial for Roman was a result of the convictions and sentences many men and women have served on for sexual violence against women.



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Aug 20, 4:47 PM EDT

Cleared Conn. man: Freedom like waking from coma

By JOHN CHRISTOPHERSEN
Associated Press Writer

HARTFORD, Conn. (AP) — Kenneth Ireland recently got a good look at himself in a real mirror for the first time in more than 20 years, and realized just how much he had aged in prison.

A Connecticut judge on Wednesday dismissed murder and rape charges against Ireland, after DNA tests showed he could not have committed the crime.

"It was a surreal moment," Ireland told The Associated Press on Thursday in his first in-depth interview since being released from prison. "I've never been outside in such an open environment without handcuffs and shackles. I didn't have to ask permission to walk any where or move around as I pleased."

In prison, Ireland could only see fuzzy glimpses of his face through tiny plastic mirrors. When he was released from prison Aug. 5, he ate a steak lunch.



AP Photo/Jessica Hill

AP Video

Ridge Claims Link Between Politics, Terror Alert

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CONNECTICUT INNOCENCE PROJECT
of the
Division of Public Defender Services
% McCarter & English
185 Asylum Street
CityPlaceI, 36th Floor
Hartford, CT 06106

Preliminary Request for Assistance

The questions below are designed to help the Connecticut Innocence Project decide whether or not your case meets certain criteria specified by the CIIP. If your request satisfies established criteria, a more detailed questionnaire will be sent to you for more information about your case. Cases selected for work-up will be chosen from the detailed questionnaire, so it is important that you fully complete the questionnaire. The fact that you are sent a screening questionnaire does not necessarily mean your case has been chosen for work-up; rather it means your case has merit worth investigating further. *Please do not contact the Connecticut Innocence Project after submitting your request. You will be contacted upon completion of the review of the request.*

Name _____ Inmate Number _____
Institution Address: _____
Location of Conviction _____ Date of Conviction _____
Offense(s) for which you are incarcerated and sentence for each (consecutive or concurrent)

Parole eligibility date _____
Summarize new evidence that has become available or that can be developed that could prove your factual innocence. This should include any new scientific evidence that can be considered.

Date: _____

Mr. SCOTT. Thank you. And Mr. Marone.

TESTIMONY OF PETER M. MARONE, DIRECTOR, VIRGINIA DEPARTMENT OF FORENSIC SCIENCE, RICHMOND, VA

Mr. MARONE. Thank you, Mr. Chairman, Ranking Member Gohmert, Chairman Conyers, Members of the Committee. Thank you for inviting me to speak. I am Peter Marone, the Director of the Virginia Department of Forensic Science.
One of the issues I want to address, and there is two, is obviously the reauthorization of the Bloodsworth Post-Conviction Pro-

gram. And it is a long story, but it gets to the point, so bear with me.

On September 30th, 2004, after the existence of cuttings that were retained in our case files were discovered, Governor Warner directed the Virginia Department of—then Division, now Department of Forensic Science to review 10 percent of the cases from 1973 to 1988. These are the time periods when we had an examiner who had a habit, she liked to use them for demonstrative purposes during court, literally took the analysis ends when she was doing absorption solution testing for ABO, she literally took the cuttings that were left, normally people threw them away, and scotch taped them to her case file. Now we don't do that because of biohazards and everything else, but she was doing that then. There was nothing to prohibit it then.

At any rate, she took those biological samples but no DNA analysis was done on them or had been previously conducted on them. And the Governor said, I want you to look for those samples, take a 10 percent sampling. At the time we thought it was 600 boxes of case cells because there was no automated LIM system to keep track of them, roughly a little over 100,000 files. We had to look through them one by one to see whether it was a firearms case, a drug case, and so forth, and first to see if there was biological evidence there. And he said okay. Biological evidence, a named suspect, find out if that suspect has been convicted. And we started off with sexual assault. So those were the original primary criteria that we had.

The purpose of that review was to locate these data and find out whether or not we could come up with any results of it. The original review resulted in 31 cases that we sent on for testing. Again, it was a pilot project. We hand picked those cases to make sure we had cases where there was obviously a significant amount of material left over. Among the original 31 cases tested, a suspect was found not to be the contributor of the foreign DNA source in six cases. Of those six cases, four of the listed suspects were found to have been properly convicted. This was something that we didn't do. The prosecutors and so forth followed up on it. Cases, for example, where the prosecutor said yes, looking at the whole case, we don't expect to find him there. He was the individual holding her down while the other individuals were doing the act. So, you know, properly convicted.

At each one of those steps when we had to look first to see if the individual was convicted, and we went to the prosecutors, the State police, the individual police departments, and the clerk's offices to find out that conviction data, I can't tell you the cooperation we got. I can't express the cooperation we got from all levels of law enforcement and judiciary. I mean, a lot of people think that people are hesitant to drag up the skeletons and such. We didn't find that to be the case. Everybody was falling all over themselves to help with this project.

Of the two individuals who were found to actually be eliminated, we call them eliminated, the judicial system does the exoneration process. One of these two individual cases originated in Alexandria, resulted in the identification of another individual who has since been convicted. Given the results of that 10 percent review, DFS

recommended and the Governor concurred that a complete search of the remaining 90 percent of such case files would be subjected to DNA testing. What we originally thought was 160,000 case files from that 10 percent sampling, we realized that this individual had worked cases from other laboratories in our system, and we looked at 600 boxes of files, 534,000 case files, all checked page by page by hand.

To make a long story short, we identified about 3,000 cases with biological evidence. Twenty-two hundred of those cases had a named suspect, and 800 cases were identified where we had evidence, a named suspect, and that person had been convicted of that crime.

Currently, we have issued about 144 reports on those. It is a long process just to identify them and now we are in the reporting out phase.

But I give that as an example. We had a starting point. We knew which cases were involved because we knew which cases had biological evidence. We had a case number, we had a jurisdiction. The problem that we are dealing with nationwide is if you don't have anecdotal information, somebody remembers the case, or the Innocence Project has taken it on as a research project, or the defendant specifically requests it, people don't have a place to start. They have no way of identifying these cases. And that is the problem.

Certainly, that symposium, the post-conviction symposium went into a training program to bring these issues up and to enlighten folks, and that has helped a lot, but it is not the end of it.

The issue of evidence handling certainly is an important issue, and it has actually acted, as we can see, as a punitive measure to getting these funds. I would hesitate to say we need to do that same thing for the other methods of funding. What I would suggest is, say, if you are going to do that, we are going to place these restrictions on it and but we going to do it in a couple of years so get ready for it so you can prepare for it and not make it punitive. In other words, you will shut everything down if you do it that way. We need to be realistic about how we impose these criteria.

Another issue I would like to address is the selection of the types of cases for eligibility for post-conviction testing. Right now the current categories are murder, nonnegligent manslaughter, and forcible rape. When you look at it, different States put these crimes into different categories and it is a crime reporting aspect of it and it is not necessarily the true aspect of the case. What I would recommend is broaden that terminology to be violent cases against a person. And it is a uniform reporting, but what it does is where this particular category of murder, nonnegligent manslaughter, and forcible rape excludes some sexual assaults that aren't counted in here. But the violent crimes against person would be included. If we are going to do it, let's do it right and make it a little bit broader.

Mr. Chairman, I cannot express enough how truly dedicated laboratory staffs are, prosecutors, police departments, nobody wants the wrong person in jail. Nobody wants the person wrongfully incarcerated. We have seen nothing other than just positive, positive response from the law enforcement community.

Thank you for your consideration, and I am open to any questions people have.
[The prepared statement of Mr. Marone follows:]

United States House Committee on the Judiciary,
Subcommittee on Crime, Terrorism, and Homeland
Security on Reauthorization of the Innocence Protection
Act

September 22, 2009

Peter M. Marone
Director
Virginia Department of Forensic Science

Mr. Chairman and Members of the Committee:

Thank you for inviting me to speak. I am Peter Marone, Director of the Virginia Department of Forensic Science. One of the issues I wish to address is the requirements established in order for a laboratory to receive federal funds to conduct post-conviction testing, specifically what is being discussed here today, the Kurt Bloodsworth Act.

On September 30, 2004, after the existence of cuttings retained in case files was discovered, Governor Warner directed the Virginia Department of Forensic Science (DFS) to review 10% of the case files from 1973-1988 where forensic serological examinations, but no DNA analysis, had previously been conducted on evidence associated (primarily) with sexual

assault cases in which the named suspect was eventually charged and convicted of the crime.

Pursuant to the Governor's Directive, the Department of Forensic Science determined that the practice of retaining swabs/cuttings in case files began in 1973 and ended in 1988. The Scientist who first began taping evidence into files worked cases primarily from the Central Laboratory and it was determined that there were approximately 600 boxes containing an estimated 164,000 case files that required a physical search to determine if evidence cuttings might have been retained.

The case files and evidence samples retained by DFS have a documented chain of custody. All case files are kept in a secure, controlled environment within the Department's facilities until they are transferred to the State Records Center, which also has limited access and climate control, for long term retention. This review was ordered because the serology section of the Department was affixing portions of the tested swabs/cuttings to analytical worksheets which were retained in the official case file folders. The swabs/cuttings were and still are securely taped in their respective sample columns. The tape covering the swabs/cuttings appears to be intact and

exhibit no apparent sign of having been removed, replaced, altered or otherwise compromised.

The purpose of this review was to locate evidential swabs/cuttings previously retained in the case files that met all the criteria for DNA testing as outlined by Governor Warner. The criteria were:

1. The serologist retained remnants of the evidence originally tested in his/her case files.
2. The serology test result indicated the presence of seminal fluid or blood.
3. There was a suspect listed and a suspect known sample submitted (or DFS has the profile of the suspect in the DNA data bank).
4. The named suspect was eventually charged and convicted for the crime referenced in the Request for Laboratory Examination and it was a sexual assault.

These criteria were expanded by Governor Warner and have been adopted by Governor Kaine to include all felony crimes against the person in addition to cases where the suspect known samples are not in the case file.

The original review by DFS resulted in 284 samples in 31 cases that met Governor Warner's criteria. Among the original thirty-one (31) cases tested, the suspect was found to not be the contributor of the foreign DNA source in six (6) cases. Of those six cases, four (4) listed suspects were found to have been properly convicted based upon other factors as determined by the relevant Commonwealth's Attorney, and in two (2) of the cases the defendant was exonerated. One of these two, a case originating in Alexandria, resulted in the identification of another individual in Virginia's DNA data bank; who has since been convicted.

DFS expanded the search voluntarily to include all of the laboratories in the DFS system because the examiner also worked cases from the other laboratories and other scientists' also retained evidence in their case files. There are approximately 1,451 boxes of files that contain an estimated 534,000 case files. Given the results of the 10% random review, DFS recommended and the Governor concurred that a complete search of the remaining 90% of such case files for evidence that could be subjected to DNA testing and lead to the eventual exoneration of wrongly convicted individuals must be done. Specifically, those cases in which a defendant was

convicted of a crime without the benefit of DNA testing at the time of trial and where such human biological evidence still exists for post-conviction testing.

This project, as massive and significant as it is provided Virginia with a known list of cases, 3,053 cases with biological evidence, 2,209 cases with evidence and a listed suspect, 800 cases where that named suspect was convicted of that crime. Currently, 140 reports have been issued. We had a starting point by identifying cases where evidence existed. Absent such a starting point, agencies have no data from which to proceed. Appropriate cases are identified by anecdotal information or after research by the Innocence Project or request of the individual.

Another issue I would like to address is the selection of types of crimes eligible for federal funding. The current categories are, “murder and non-negligent manslaughter, and forcible rape”. Referring to the Uniform Crime Report by the FBI, forcible rape is defined as carnal knowledge of a female forcibly and against her will. Assaults and attempts to commit rape by force or threat of force are also included; however, statutory rape (without force) and other sex offenses are excluded.

If the crime categories listed in the grant solicitation were to read “violent crime as defined in the Uniform Crime Reporting (UCR) Program, it would encompass almost all of the post-conviction cases with the exception of a few statutory rape cases. It would be appropriate to read the requirements as broadly as possible to allow for more individuals to be eligible for testing for possible elimination.

Below I have provided the definition of aggravated assault as well as the forcible rape criteria. The Uniform Crime Reporting (UCR) Program defines aggravated assault as an unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. The Program further specifies that this type of assault is usually accompanied by the use of a weapon or by other means likely to produce death or great bodily harm. Attempted aggravated assault that involves the display of—or threat to use—a gun, knife, or other weapon is included in this crime category because serious personal injury would likely result if the assault were completed. When aggravated assault and larceny-theft occur together, the offense falls under the category of robbery.

The UCR Program counts one offense for each female victim of a forcible rape, attempted forcible rape, or assault with intent to rape, regardless of the victim's age. A rape by force involving a female victim and a familial offender is counted as a forcible rape not an act of incest. The Program collects only arrest statistics concerning all other crimes of a sexual nature. The offense of statutory rape, in which no force is used but the female victim is under the age of consent, is included in the arrest total for the sex offenses category. Sexual attacks on males are counted as aggravated assaults or sex offenses, depending on the circumstances and the extent of any injuries.

Mr. Chairman, labs are staffed by truly dedicated individuals who are committed to finding the truth, whether exonerating wrongfully accused or uncovering the guilty.

Thank you again for your consideration and for the opportunity to address the Committee. I will be pleased to answer any of your questions.

Mr. SCOTT. Thank you.
Mr. Bright.

**TESTIMONY OF STEPHEN B. BRIGHT, PRESIDENT AND SENIOR
COUNSEL, SOUTHERN CENTER FOR HUMAN RIGHTS, AT-
LANTA, GA**

Mr. BRIGHT. Mr. Chairman, thank you very much. Mr. Chairman, Judge Gohmert, Chairman Conyers, Members of the Committee, it is an honor, as always, to be before this Committee. And Mr. Chairman, I want to take up with what you addressed in the last part of your statement.

Many people think that DNA testing is the silver bullet that is going to protect us from ever convicting an innocent person. But of course only about 20 percent of the cases have biological evidence in them that is going to provide material for testing. And to get to what you mentioned, Mr. Chairman, what is going to be required is competent legal representation. And as you pointed out, every State has prosecutors offices, every State has organized prosecutors offices by judicial district. And my, in a nutshell, testimony to this Committee is that in many jurisdictions we don't have a system of indigent defense. There is no program there at all. It is an absolute nonsystem. And the result of that is that innocent people, the most basic protection against convicting innocent people is competent legal representation and a working adversary system. And yet, we have in places in this country no system at all, individual, sole lawyers appointed to cases who may not even defend—specialized in criminal cases.

The Supreme Court will take up next month a death penalty case in which the penalty phase was handed by a person 5 months into practice. Now, the Constitution says you can't execute mentally retarded people. But you can execute mentally retarded people if the jury doesn't know the person was mentally retarded. And the jury didn't know it in that case because the lawyers didn't go right there to the schoolhouse, right there in the town and talk to the teachers who would have said he was educatably mentally retarded. His IQ was 66. They didn't talk to any of the people who would have documented that.

We know from the New Yorker article that came out just recently that a man was convicted and executed in Texas because the lawyers representing him had no idea how to defend an arson case. The lawyers on post-conviction who represented him had no idea how to defend an arson case. They didn't know when that witness testified that the glass had this pattern on it and that showed there had been an accelerant that actually the reason the pattern was on there was because the glass was hot and when the water hit it when they were putting out the fire it made the pattern.

There was another person convicted of an almost identical arson, a fellow named Ernest Ray Willis, who was represented by a good law firm that had the resources to actually have the forensic experts and the fire consultants look at the evidence and put on the testimony to show what happened, and he is free. And as we see so often, Members of the Committee, if you switch the lawyers, you switch the outcomes in the two cases. One man gets executed. One man goes free.

I filed a brief earlier this month on behalf of a man that 3½ years he has been waiting for a trial on a death penalty case. For over 2 years there was no money to fund his case, absolutely no money. Another person, Stacey Sims in Georgia, gets appointed in 2005 a lawyer in his death penalty case. A year and half later the lawyer says we haven't been paid. So the judge let's them withdraw and appoints two more lawyers. Last December they said we haven't been paid. So he allows them to withdraw. Three years now. The man has been facing the death penalty for 3 years. And so far there hasn't been one penny spent for even his defense lawyers to go to the jail and counsel him, to interview him.

Now, what kind of adversary system is this when one side, the prosecution is fully funded, has its lawyers, has its law enforcement officials, has all the people necessary, and on the other side we don't have any funding for even the most basic, just so the client can talk to his lawyer about the situation that he is in. We have one district of five counties in Georgia that went for a whole year without providing lawyers to people in conflict cases. It was like the 1950's, like *Gideon v. Wainwright* had never been decided, felony cases in which people didn't have lawyers. And the judges there, three judges who had taken an oath to uphold the Constitution of the United States, processing people through the courts who don't have lawyers.

In Alabama, as I pointed out in my statement, we had one lawyer file a brief that all it was was the dissent, Justice Ginsburg's dissent in the Baze case about lethal injection. It had absolutely nothing to do with the case before the Court. No issue in the case. It wouldn't have helped the client anyway. Lethal injection has been decided. Another client whose lawyer just abandoned them mid case.

We have the Texas cases where lawyers have filed briefs from previous years where they have talked about previous cases in the brief that had absolutely nothing to do with the case before the Court. They have mentioned witnesses who were from a case 7½ years old in their brief, and I must say I can't for the life of me understand why any court would accept a brief like that in a case.

As you mentioned, Mr. Chairman, six people have missed the statute of limitations. Three more have also missed it and are waiting to be executed in Texas, three of those represented by the same lawyer, who should have been disbarred after the first time.

What I am saying, just to—I see my time has run—it is going to take a lot more than training. It is going to take an acknowledgment of how great the failure is in this area and the need to build programs in the places where we don't have them and to say that we cannot continue to tolerate lawyers who continually miss the statute of limitations. And to provide both requirements but also to come up with some funding mechanism to recognize the fact that the Federal grants that have been going to the State prosecutors and law enforcement over the last years is one reason why the system is so out of balance and that something has to be done if we are going to say we have an adversarial system.

If we want to switch to an inquisitional system, then that is a whole 'nother question. But if we say we are going to have an adversary system, if we are going to keep the slogan Equal Justice

Under Law over the Supreme Court building, then we really need to deal with this with a great deal of urgency.

Because what we have in our courts right now is an absolute disgrace to our legal profession and to our country, and it is a violation of our Constitution. It is happening on an ongoing basis, and there is an urgent need for the Congress and the Justice Department and the States and the bar associations to do something about it.

Thank you.

[The prepared statement of Mr. Bright follows:]

PREPARED STATEMENT OF STEPHEN B. BRIGHT

Statement of

STEPHEN B. BRIGHT

President and Senior Counsel

Southern Center for Human Rights

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regarding

The Innocence Protection Act

before the

SUBCOMMITTEE ON CRIME,
TERRORISM AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY,
UNITED STATES HOUSE OF REPRESENTATIVES

September 22, 2009

Statement of
STEPHEN B. BRIGHT¹
REGARDING THE INNOCENCE PROTECTION ACT

**To the Subcommittee on Crime,
Terrorism and Homeland Security
of the Committee on the Judiciary,
United States House of Representatives**

September 22, 2009

MR. CHAIRMAN and members of the Subcommittee,

The best protection against conviction of the innocent is competent representation for those accused of crimes and a properly working adversary system. Unfortunately, a very substantial number of jurisdictions throughout the country do not have either one.

Poor legal representation is a major cause of conviction of the innocent. When the prosecution's case is not subject to adversarial testing, it increases the risk of a miscarriage of justice. *The New Yorker* recently provided a case study of how an innocent man, Todd Willingham, was sentenced to death and executed in Texas because the lawyers who represented him knew nothing about defending an arson case.²

Another man, Ernest Ray Willis, sentenced to death based on almost identical junk science in another arson case, had the good fortune to be represented in post-conviction proceedings by a New York law firm that spent what it took to get the forensic experts, fire consultants and other knowledgeable people to analyze the evidence scientifically and objectively. They found that the fire was not arson, but

1. President and Senior Counsel of the Southern Center for Human Rights in Atlanta since 2005; director of the Center from 1982 to 2005; teaches courses on capital punishment and criminal procedure at Yale and Georgetown Law Schools; has practiced law since 1975, representing people at all stages of capital and other criminal cases and in civil rights cases; has published articles and essays on the right to counsel, racial discrimination in the criminal justice system, judicial independence, and other topics. A brief biographical sketch is appended.

2. David Grann, "Trial by Fire: Did Texas Execute an Innocent Man?" *The New Yorker*, Sept. 7, 2009, page 42.

started accidentally. Among other things, juries had been told in both cases that certain patterns on glass recovered from the fires were caused by the use of an accelerant. Actually, the patterns were the result of water being used to put out the fires hitting the glass when it was hot from the fire. Willis was released. As we too often see, if you switch the lawyers in the two cases, you switch the outcomes of the cases.

Effective representation can often protect against the other main causes of conviction of the innocent: mistaken eyewitnesses identifications, self-interested informants whose testimony is not true, false confessions, and misconduct by law enforcement personnel and prosecutors. For example, last June defense lawyers in Louisville, Kentucky, discovered a videotape of court proceedings in which a prosecutor asked a judge for leniency on behalf of a witness who had testified against a defendant in a capital trial. When that same prosecutor had presented that same witness at the capital trial she had insisted there was no agreement to ask for leniency. As a result of defense counsel's diligence, the truth came to light with regard to the witnesses's credibility. The prosecutor resigned.³ But in many cases such misconduct does not come to light until years after trial, if at all.

Some people believe that we can rely on DNA testing to protect the innocent, but DNA testing reveals only a few wrongful convictions. In most cases, there is no biological evidence that can be tested. In those cases, we must rely on a properly working adversary system to bring out all the facts and help the courts find the truth.

However, there is no working adversary system in much of this country, particularly in the jurisdictions that condemn the most people to death. The disparities between the prosecution and the defense are so immense in some places that the prosecution's case is not subject to adversarial testing. Some lawyers assigned to defend people accused of crimes are completely unqualified to do so because they are unaware of the governing law. Some lawyers work under such crushing workloads that no matter how conscientious and dedicated, they are unable to give their clients the individual attention they require. There is little or no investigation and presentation of evidence on behalf of the accused. This significantly increases the risk of wrongful convictions.

3. See Brett Barrouquere, "Prosecutor resigns after controversial plea deal," *USA Today*, June 11, 2009.

I.

Many people may not be aware of just how great the disparities are between the prosecution and the defense. How bad is it? It can't get any worse than the accused not having any legal representation at all, while the prosecution is fully staffed. We filed a brief in the Georgia Supreme Court on September 2 on behalf of a mentally ill man facing the death penalty in Georgia who had gone for over two years without funding for his defense and for over one year without a lawyer *while his capital case was pending trial*.⁴ The client, who suffers from auditory and visual hallucinations, depression, and severe anxiety, reached such a state of despair during this time that he attempted suicide three times and repeatedly told both his lawyers and the prosecutor that he would just as soon give up and receive the death penalty.

Delay in funding for the defense of capital cases is not unusual in Georgia. The defense of some capital cases have not been funded for two or three years after arrest. For example, Stacey Sims was arrested in 2005 and the prosecution announced its intention to seek the death penalty. Two lawyers were appointed to represent Sims, but they moved to withdraw a year and a half later because they had not been paid. They were allowed to withdraw and two new lawyers were assigned to represent him. A year and a half later, they also moved to withdraw because they also had not been paid. The Court allowed them to withdraw as well.⁵

The pattern that has emerged in Georgia capital cases is that there is no funding for defense representation for a substantial period of time – often years – but as the date of trial approaches, the director of the indigent defense program comes up with some last-minute funding, the defense hurriedly tries to make up for months or years when nothing was or could be done because of lack of funds, and the case is forced to trial.⁶ Questions of whether the last-minute funding was adequate and whether

4. *Weis v. State*, Ga. Supreme Court No. S09A1951, Brief for Appellant, available at www.schr.org.

5. *Sims v. State*, Superior Court of Tift County, Georgia, No. 2006-CR-91, Hearing of Dec. 22, 2008.

6. *See, e.g.*, Bill Rankin & Rhonda Cook, "Jury selection in Silver Comet case may be delayed," *Atlanta J.-Const.*, April 13, 2009 (funding issues were still being resolved during jury selection of capital trial); Julie Arrington, "Funds avert fears of 'constitutional crisis,'" www.forsythnews.com/news/article/2631/, May 31, 2009 (reporting that Mack Crawford, director of the state-wide indigent defense program, informed the judge that money was available for the defense of a capital case involving a murder that occurred on March 19, 2006; *the defense lawyers had not been paid since October, 2007* for their work on the case).

defense counsel were able to make up for lost time in a few weeks or months will be litigated in habeas corpus cases in the years to come.

On the other hand, throughout the pretrial period, the prosecution has lawyers and other staff, the support of various law enforcement agencies and the state crime laboratory and resources for any experts or consultants it needs to prosecute the cases. It is contrary to every notion of fairness, due process and the proper working of an adversary system for one side to be deprived of all resources for a substantial period of time before trial, while the opposing side is fully staffed, funded, and able to prepare for trial. This makes a mockery of the adversary system.

Of course, such enormous prosecutorial advantages are not limited to capital cases. Within the past year, our office filed a lawsuit against a five-county judicial circuit in Georgia which was not providing lawyers to indigent defendants charged with felony offenses who could not be represented by the public defender office because of conflicts of interest.⁷ For example, in co-defendant cases, the public defender would represent one defendant, but often could not represent the co-defendants because they had conflicting defenses. No lawyers were appointed to defend the co-defendants because the indigent defense program in Atlanta failed to sign contracts with lawyers to represent them.

As a result, people *with pending felony charges* were not provided lawyers. This has been patently unconstitutional since 1963, when the Supreme Court decided *Gideon v. Wainwright*, 372 U.S. 355 (1963). Yet all three Superior Court judges in that judicial circuit, with the acquiescence of the District Attorney – all of whom had taken an oath to uphold the Constitution – processed cases involving over 300 people without lawyers, detaining some in jail, calling upon all to enter pleas in clear violation of the United States Supreme Court’s holding in *White v. Maryland*, 373 U.S. 59 (1963), that people accused of felonies are entitled to the advice of counsel before entering pleas, and ignoring the *Gideon* decision as if it did not exist. Again, it can’t get any worse than no lawyer at all.

The fact that the director of the Georgia public defender program, a mule trader with no experience in indigent defense, was not fired for failing to renew the contacts and allowed this situation to continue even after it had been reported in the media

7. *Mitchell v. Crawford*, Superior Court of Elbert County, Georgia.

speaks volumes about how little regard Georgia officials have for the right to counsel.⁸

Even when contracts were signed the year before, two lawyers agreed to handle 175 cases for a flat rate of \$50,000 or \$285 per case. This amount was to cover all investigation, expert witnesses, and other necessary expenses for the defense of the conflict cases. Obviously, this is only enough to provide token representation.

Prosecutors do not contract to provide representation in a haphazard, cheaper-by-the-dozen manner – handling cases some years and not others. The prosecutors in that circuit, like the rest of the state, are organized in an office with full-time prosecutors and other employees who work year to year to carry out their responsibilities to prosecute cases in an organized and competent manner.

II.

The dismal failure to provide competent counsel in capital and other criminal cases since the *Gideon* decision in 1963 has been well documented by the American Bar Association, independent organizations, law professors, journalists and anyone else who has looked into it.⁹ As Judge R. Guy Cole, Jr. of the United States Court of

8. The director of the Georgia Public Defender Standards Council, Mack Crawford, serves at the pleasure of the Governor.

9. See, e.g., National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, issued April, 2009, available at www.tcpjusticedenied.org; Stephen Henderson, "Defense Often Inadequate In Four Death-Penalty States," McClatchy Newspapers, Jan. 16, 2007, and accompanying four articles in a series regarding the poor quality of legal representation found in a study of eighty death-penalty cases from Alabama, Georgia, Mississippi, and Virginia, available at www.mcclatchydc.com/2011/story/15397.html; American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004), available at www.abanet.org/lcgalsservices/sclaid/defender/brokenpromise/fullreport.pdf; Kenneth Williams, *Ensuring the Capital Defendant's Right to Competent Counsel: It's Time for Some Standards!*, 51 WAYNE L. REV. 129, 140–141 (2005); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91 (1995); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835 (1994); Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993); Jeffrey L. Kirshmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455–60 (1996) (citing cases in which convictions were upheld even though defense lawyers were intoxicated, abusing drugs, or mentally ill). These are only a handful of the hundreds of studies and reports that document the failure to meet the constitutional requirement of the Sixth Amendment. We are well past the time when we should

Appeals for the Sixth Circuit pointed out in the case of Jeffrey Leonard, things may be getting worse. The lawyer who represented Leonard, a 20-year old, brain-damaged African American, in Kentucky did not even know his client's real name even though it was contained in the prosecution's file and in the trial court record in four different places. Leonard was tried and sentenced to death under the name of James Slaughter. Because he conducted no investigation, the lawyer did not find out that Leonard was brain-damaged and had a horrific childhood. When challenged about the quality of his work, the lawyer testified that he had tried six capital cases and headed an organized crime unit for a New York prosecutor's office.¹⁰ Neither statement was true.¹¹

The Sixth Circuit, still referring to Leonard as "Slaughter," concluded that the lawyer's performance was deficient, but, nevertheless, upheld the death sentence based upon its conclusion that the outcome would not have been different even if the lawyer had known his client's name and presented evidence of his brain damage, childhood abuse and other mitigating factors.¹² In dissent, Judge Cole summed up the sad state of the right to counsel:

We are uneasy about executing anyone sentenced to die by a jury who knows nearly nothing about that person. But we have allowed it. We are also uneasy about executing those who commit their crime at a young age. But we have allowed that as well. We are particularly troubled about executing someone who likely suffers brain damage. We rarely, if ever, allow that – especially when the jury is not afforded the opportunity to even consider that evidence. Jeffrey Leonard, known to the jury only as "James Slaughter," approaches the execution chamber with all of these characteristics. Reaching this new chapter in our

have stopped studying the problem and started doing much more about it.

10. The lawyer was indicted for perjury. The charges were dismissed in exchange for him resigning from the bar. See Andrew Wolfson, "Lawyer Radolovich to give up license," *Courier-Journal*, Louisville, Ky., Feb. 6, 2007, at 1A.

11. *Id.*

12. *Slaughter v. Parker*, 450 F.3d 224 (6th Cir. 2006), *rehearing en banc denied*, 467 F.3d 511, *cert. denied sub nom. Leonard v. Parker*, 127 S.Ct. 2914 (2007).

death-penalty history, the majority decision cannot be reconciled with established precedent. . . .¹³

The Court of Appeals for the Eleventh Circuit upheld a capital case last year in which a lawyer who had been in practice only five months was primarily responsible for preparation for the penalty phase. The young lawyer and the other two lawyers on the case never obtained school records that were readily available – right there in town – or talked to their client’s special education teachers who would have testified that his IQ was “low to mid 60s,” and that he was “educable mentally retarded or trainable mentally retarded.” They did not get an independent psychological examination. Nor did they review other documents from various agencies like the Department of Human Resources that they subpoenaed but never received. They presented nothing to the jury about the client’s very limited intellectual functioning.¹⁴ Fortunately, the Supreme Court has granted *certiorari* in the case and will hear argument on November 4.

Alabama, which has the largest number of people on death row per capita in the United States,¹⁵ pays lawyers only \$2000 per case for handling an appeal in a death penalty case. It is a two-stage appeal – to the Court of Criminal Appeals and then by application for *certiorari* to the Alabama Supreme Court. Although Alabama law provides that all death penalty cases must be “subject to review by the Alabama Supreme Court,”¹⁶ the Alabama courts have held there is no right to counsel for this critical stage of the process.¹⁷

13. *Slaughter v. Parker*, 467 F.3d 511, 512 (6th Cir. 2006) (Colc, J., dissenting from denial of rehearing en banc). Leonard was not executed only because Ernie Fletcher, the Republican Governor of Kentucky, commuted his sentence before leaving office. Fletcher recognized the denial of the right to counsel, even though the courts did not.

14. *Wood v. Allen*, 542 F.3d 1281 (11th Cir. 2008), *cert. granted*, 129 S.Ct. 2389 (2009).

15. Capital Punishment, 2007 - Statistical Table 4, Bureau of Justice Statistics *available at* <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/tables/cp07st04.htm>; Death Sentences Per Capita by State, Death Penalty Information Center (2009), <http://deathpenaltyinfo.org/death-sentences-capita-statc>. Alabama has over 200 people on its death row and has carried out over 40 executions.

16. Ala. Code § 13A-5-53 (a), (b), & (d); *see also* Ala. R. App. Pro. 39 (a) (2).

17. *State v. Carruth*, No. CR-06-1967, 2008 Westlaw 2223060 at *6 (Ala. Crim. App. May 30, 2008).

An Alabama lawyer recently filed an brief in a death penalty case which contained nothing except Justice Ginsburg's dissent in the Supreme Court's case upholding lethal injection. The dissent had nothing to do with any issue in his client's case. It could not have helped his client with regard to lethal injection because it was a *dissenting opinion*; the majority of the Court had ruled against him. This is gross incompetence on the part of an appellate lawyer. Another brief filed in an Alabama capital case in the Court of Criminal Appeals was only 10 pages long and cited seven cases.¹⁸

Michael David Carruth was simply abandoned by his lawyer during direct appeal of his capital case. After the Alabama Court of Criminal Appeals affirmed the conviction and sentence,¹⁹ the lawyer did not petition the Alabama Supreme Court for certiorari review as he was required to do both to invoke that Court's review of the issues and to preserve those issues for review by the federal courts on habeas corpus review. Nor did he notify Carruth that he had not filed a petition. Not only did the time expire to petition the Alabama Supreme Court and United States Supreme Court for review, but 11 of the 12 months for filing a state post-conviction petition or a federal habeas corpus action had passed before Carruth learned what had happened. He found out when he received a letter from the Alabama Attorney General's office notifying him he had only a month remaining before those deadlines were to expire.

Texas has carried out 440 executions, by far the most of any state, and has over 350 on its death row. (Only one other state, Virginia, has executed over 100 people since 1976. It has executed 103.) Harris County alone accounts for well over 100 executions, more than any other state except Texas itself. The incompetence of lawyers assigned to represented people accused in capital cases in Texas is well established and well known. Three people were sentenced to death in Harris County at trials where their lawyers slept. One was granted habeas corpus relief by a 9-5 vote of the United States Court of Appeals,²⁰ one was executed,²¹ and one is still on death row after the Texas Court of Criminal Appeals has twice upheld his conviction and

18. *Billups v. State*, Ala. Ct. Crim. App. No. 05-0773 (filed Dec. 1, 2006).

19. *Cattuth v. State*, 927 So. 2d 866 (Ala. Crim. App. 2005)

20. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc).

21. See David R. Dow, *The State, The Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694-95 (1996) (describing the case of Carl Johnson). Neither the Texas Court of Criminal Appeals nor the United States Court of Appeals for the Fifth Circuit published its opinion in Johnson's cases.

sentence despite his lawyer sleeping during trial.²² These are only the most egregious examples of deficient representation.²³

As in Alabama, many of those sentenced to death in Texas receive completely incompetent lawyers on appeal and in post-conviction representation.²⁴ For example, a lawyer assigned to represent Robert Gene Will filed the same brief for Will that he had filed for another inmate, Angel Resendiz, a year and a half earlier.²⁵ The lawyer missed the statute of limitations for filing Resendiz' federal habeas corpus petition. As a result, Resendiz was executed without any habeas review of his case. Will was denied relief based on the shoddy brief that had been filed earlier in Resendiz' case.

The brief filed on behalf of another man condemned to die in Texas, Justin Chaz Fuller, was incoherent, repetitious, and rambling. There too, the lawyer copied from an appeal filed seven years earlier for a different client, Henry Earl Dunn. As a result, the brief filed for Fuller contained complaints about testing for blood on a gun used by Dunn's co-defendant that had nothing to do with Fuller's case. The lawyer also copied some of Fuller's letters into the brief so that it contained unintelligible and irrelevant statements such as, "I'm just about out of carbon paper so before I run out I want to try and list everything that was added to and took from me to convict me on the next page."²⁶ Considering only this nonsensical brief, the Court of Criminal Appeals denied Fuller relief and he was executed.

There is no justification for a court accepting such briefs in any case. Without adequate briefing, a court cannot do its job in deciding a case. A court concerned

22. *McFarland v. State*, 928 S.W.2d 482 (Tex. Crim. App. 1996) (upholding conviction and sentence over dissent which argued "[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense"); *Ex Parte McFarland*, 163 S.W.3d 743 (Tex. Crim. App. 2005) (rejecting the claim again in post-conviction proceedings).

23. See the sources cited in note 9 for many more.

24. See, e.g., Texas Defender Service, *Lethal Indifference* (December 2002) available at www.texasdefender.org/publications.asp (describing inadequacy of lawyers assigned to provide post-conviction representation in Texas).

25. See Chuck Lindell, "Lawyer Makes 1 Case for 2 Killers," *Austin American-Statesman*, Feb. 26, 2006, at A1. (I append it to this statement).

26. See Maro Robbins, "Convict's Odds Today May Rest on Gibberish," *San Antonio Express-News*, Aug. 24, 2006, at A1. (It is also appended.)

with justice would remove the lawyers from the cases, refer them to the bar for a determination of whether their licenses to practice law should be revoked, and appoint competent lawyers to brief the issues so that it could consider whatever issues were present in the cases. But this poor quality of lawyering is so common in these courts that they just deny the appeals based on briefs that would not receive a passing grade in a first-year legal writing course. It would completely disrupt the operation of these courts to require adequate briefing for indigent defendants in every case.

Six people in Texas have been executed *without any habeas corpus review because their lawyers missed the statute of limitations*. Attorneys have missed the statute of limitations in three other cases and those clients will be executed as well without review. As you know, habeas corpus review is critically important. It is the first time that life tenured federal judges instead of elected state judges determine the issues. It has been the stage where innocence has been established and where grievous constitutional violations have been found.

Yet six people have been executed without such review because their lawyers failed in their most basic responsibility – filing pleadings on time. Three people who were denied review due to failure to file on time *were represented by the same lawyer*, Jerome Godinich. They were three of at least 21 capital cases to which Godinich has been appointed, and among 1,638 cases involving 1,400 different defendants he has been appointed to represent from 2006 to March, 2009.²⁷

Of course, if an assistant prosecutor missed a filing deadline even once, he or she would be fired. But it's unlikely that it would happen, because prosecutors are supervised. They practice in offices that are organized to avoid such mistakes. But in Alabama, Texas and many other jurisdictions throughout this country people facing the death penalty are represented by unsupervised solo practitioners, many of whom have no idea what they are doing.

United States District Judge Orlando Garcia described how “appalling inept” representation in state habeas corpus proceedings can prevent federal review of equally bad representation at trial, and pointed out the need for Congress to do something about it:

27. Lise Olsen, “Lawyers’ late filings can be deadly for inmates,” *Houston Chronicle*, March 22, 2009. (This article and others regarding the failure to file within the statute of limitations are appended.)

* * * Quite frankly, the quality of representation petitioner received during his state habeas corpus proceeding was appallingly inept. Petitioner's state habeas counsel made no apparent effort to investigate and present a host of potentially meritorious and readily available claims for state habeas relief. Furthermore, petitioner's state habeas counsel made virtually no effort to present the state habeas court with any evidence supporting the vast majority of the claims for state habeas relief which said counsel did present to the state habeas court. More specifically, petitioner's state habeas counsel not only inexplicably failed to present * * * allegedly mitigating evidence petitioner complains * * * his trial counsel should have presented during the punishment phase of petitioner's trial but petitioner's state habeas counsel failed to present the state habeas court with any claim for state habeas relief alleging this glaringly obvious failure by petitioner's trial counsel constituted ineffective representation.

Petitioner's state habeas counsel did little more than (1) assert a set of boilerplate, frivolous, claims which had repeatedly been rejected by both the state and federal courts and (2) fail to support even these claims with any substantial evidence. Insofar as petitioner contends his state habeas counsel merely "went through the motions" and "mailed in" a frivolous state habeas corpus application which said counsel failed to support with evidence, those complaints have merit. Wholly inept though it may have been * * * the egregiously deficient performance of petitioner's state habeas counsel does not excuse the procedural defaults arising therefrom * * *

In sum, unless and until either the Supreme Court or Congress address the inherent unfairness of a state habeas system which permits elected officials of a party-at-interest (*i.e.*, elected trial judges of the State of Texas) to (1) select wholly incompetent counsel to represent indigent prisoners in the one forum in which those prisoners have the opportunity to challenge the performance of their state-court-appointed trial counsel (*i.e.*, the prisoner's state habeas corpus proceeding) and (2) effectively insulate from federal judicial review the allegedly incompetent performance of the prisoner's state trial counsel through the egregiously inept failure of the same prisoner's state habeas counsel to present claims for state habeas relief addressing obvious ineffective assistance by the prisoner's state trial counsel, Texas prisoners will continue to be put to death without a federal habeas court ever reaching

the merits of what are often those prisoner's most substantial federal constitutional claims.

Ruiz v. Dretke, 2005 Westlaw 2620193, *2-*3 (W.D.Tex., 2005).²⁸

These are just a handful of the most recent examples of the kind of deplorable representation poor people accused of crimes receive in capital and non-capital cases. It is particularly bad in the states that sentence the most people to death and carry out the most executions. Georgia provides no compensation for representation in state post-conviction proceedings; Alabama pays only \$1,000; and Texas pays a flat rate of \$25,000 to lawyers appointed to a state habeas case.

The compensation for trial representation in many jurisdictions is so low that, while a few dedicated lawyers may take some cases, they cannot make a living representing poor people accused of crimes. The compensation is so far below what lawyers receive for any other kind of work, such as real estate closings, title searches and drawing up wills, that a lawyer cannot meet overhead expenses and still make enough to live on. There are long delays in paying lawyers. Many Georgia lawyers will no longer take court-appointed cases because the state's Public Defender Standards Council has such a bad reputation for arbitrarily cutting payments to lawyers,²⁹ delaying payments for long periods of time and, on occasion, not paying at all.³⁰

28. After first affirming a denial of relief for *Ruiz*, the United States Court of Appeals for the Fifth Circuit later held that the "balance of equities" required consideration of his ineffectiveness claim. *Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007).

29. The Council employee responsible for making payments to private lawyers, in explaining to a legislative committee how he paid the lawyers even though there was not enough money to cover the costs, repeatedly used the word "arbitrary" in explaining that he cut the amounts paid to lawyers even though he had no reason to question the time they spent on the cases and they were being paid well below market rates.

30. The Council spent over \$40,000 in a futile effort to avoid paying lawyers \$69,000 for representing an indigent defendant in a capital trial. *Georgia Public Defender Standards Council v. State*, 285 Ga. 169, 675 S.E.2d 25 (2009). Remarkably, the director of the Public Defender Standards Council had recruited the lawyers to represent the defendant in the case and promised to compensate them, but the Council later refused to pay them anything at all for their work on the case. The trial court ordered the lawyers paid, but the Council appealed in an effort to avoid payment, paying a private attorney \$40,000 to represent it *at twice the hourly rate it pays lawyers to represent people facing the death penalty*. The Georgia Supreme Court affirmed the trial court's order to pay the lawyers for the work they had done. *Id.*

As a result, many cases are handled by lawyers who are unable to get any other work. These lawyers are usually not capable of handling capital cases. In jurisdictions where lawyers are appointed by judges, lawyers are loyal to the judges whom they depend upon for their livelihood, not to their clients. These two factors – low compensation and loyalty to the judge – skew representation in ways that are adverse to the client. A lawyer who is dependent upon the judge for his or her livelihood may be unwilling to ask for a continuance even though unprepared, to challenge a prosecutor's strike of a juror even though it appears to be racially motivated,³¹ or to apply for funds for experts and investigators and make a record of the need for those funds to preserve the issues for appeal.³²

I know this from first hand experience. In teaching at training programs on both the local and national level over the last 30 years, I have been told point blank by lawyers that if they follow advice from me and others and admit they are not ready and need a continuance to investigate their cases they will not get any more appointments. I have also seen many lawyers who are indifferent or even hostile to the fate of their clients.

One of the most outstanding examples is the lawyer who represented James T. Fisher, who was sentenced to death in Oklahoma. At a hearing two months after he was appointed, the lawyer called Mr. Fisher a "little bitch" and asked the deputies to remove his handcuffs to the lawyer could "kick his ass right now." As a result of this threat from his own defense lawyer, Mr. Fisher refused to attend his own trial. The jury never saw him or heard any explanation of why he was not there. The lawyer failed to conduct any investigation, despite being provided around 18 boxes of valuable information. He simply never went through them. The lawyer was drinking heavily before and during trial.³³

The tolerance of the kind of indefensible representation I have described is indicative of the indifference of the judicial, legislative and executive branches of government and the bar in those states to the quality of representation provided to poor people accused of crimes, the lack of structure in many of those states (*i.e.*, the

31. See *Batson v. Kentucky*, 476 U.S. 79 (1986); *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008).

32. See *Ake v. Oklahoma*, 470 U.S. 68 (1985).

33. *Fisher v. State*, Okla. Crim. App. No. D-2005-460, Okla. Co. No. CF-1983-137, Findings of Fact and Conclusions of Law filed May 21, 2008.

absence of public defender and/or capital defenders offices), the lack of independence of indigent defense programs, the lack of training for the lawyers who represent the accused, and, the crippling lack of resources for the defense.

III.

The prosecution suffers from none of these problems. Prosecutors are independent and organized by judicial circuit. Most prosecutors have full-time staffs of well trained lawyers and professionals, assisted by local and state law enforcement agencies staffed with full-time employees. They have expert witnesses on call at the state crime laboratories and, if needed, the FBI laboratory. Prosecutors divide their offices into divisions so that complex cases like capital cases and arson cases are tried by attorneys who know what they are doing. But people facing the death penalty or accused of arson may be represented by a lawyer who does not even specialize in criminal law.

Prosecutor's offices also usually have lawyers who specialize in appeals. They don't file 10-page briefs, briefs full of irrelevant information or gibberish, or briefs from old cases. It is unlikely they will abandon their client, the State, but if they do, someone else will step in immediately. This is because they are supervised. If an assistant prosecutor should fail to practice competently, he will get training until his performance improves sufficiently to meet the standards of the office or the person will be dismissed.

Court-appointed lawyers, on the other hand, are free to make the same mistakes over and over. Their clients pay for their mistakes. Joe Frank Canon, known for trying cases like "greased lightning," slept during at least two capital trials, was notoriously incompetent, and yet was appointed over and over by trial judges in Houston. Ten of his clients were sentenced to death; hundreds were sent to prison. A court-appointed lawyer can miss the statute-of-limitations over and over – not even get into court on behalf of his client – and keep right on practicing *and getting paid*³⁴ because no one in a position to do anything about it cares about the quality of representation his clients are receiving. After all, Sharon Keller, the presiding judge of the Texas Court of Criminal Appeals, closed the courthouse at 5 p.m. to prevent

34. Lise Olsen, "Death row lawyers get paid while messing up," *Houston Chronicle*, April 20, 2009.

a petition from being filed on behalf of a man who was to be executed at 6 p.m. that day.³⁵

We should be ashamed the first time it happens. We should be deeply ashamed the second time. And we should be both ashamed and outraged that it happens all the time. But instead, in much of the country, jurisdictions have developed a culture that readily accepts such representation of the poor.

A great chief justice of Georgia, Harold Clarke, once observed in his state of the judiciary address to the state legislature,

[W]e set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question. Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all.

In my efforts to establish and improve indigent defense systems, I have been told over and over in state after state, “We don’t need a Cadillac, we just want a Chevy.” Someone recently said in Georgia that those accused of crimes are not entitled to *zealous* representation; they are only entitled to “adequate” representation. This is a poverty of vision. Why shouldn’t we have a Cadillac? This is the United States of America. This is our Constitution. Life and liberty are at stake. How can we risk the loss of the life or the liberty of an innocent person?

I understand that funding for the defense of people accused of crimes is not the least bit popular. As Attorney General Robert F. Kennedy observed in 1963 after *Gideon* was decided, the poor person accused of a crime has no lobby. Actually, at that time the Attorney General of the United States as well as several state attorneys general, including Walter Mondale, then attorney general of Minnesota and later Senator and Vice President, constituted a powerful lobby for the right to counsel. Under Mondale’s leadership, Minnesota was one of 22 states that an filed *amicus* brief in support of Clarence Earl Gideon’s right to counsel in *Gideon v. Wainwright*.³⁶

35. Chuck Lindell, “Judge says she would do ‘nothing different,’” *Austin American-Statesman*, Aug. 20, 2009; “Keller is unsuited for top court job,” *San Antonio Express News*, Aug. 26, 2009 (editorial); “Judge Keller’s disappointing testimony,” *Dallas Morning News*, Aug. 24, 2009 (editorial); Michael Hall, “Motion to Dismiss,” *Texas Monthly*, Dec. 2007.

36. Only two states filed *amicus* briefs in *Gideon* in support of Florida in opposing providing counsel to those accused of felonies.

We need that kind of leadership in the executive and legislative branches of government today.

Despite its lack of popularity, the defense of poor people accused of crimes is constitutionally required and essential to the proper working of the adversary system. It is essential to protection of the innocent.

IV.

What goes on in the criminal courts – the processing of the poor in vast numbers from the community to death rows and prisons – is out of sight and out of mind for almost everyone except those involved. We have a duty to know about it. Every law student, every lawyer, every elected official, every policy maker should go to a busy criminal court, unannounced, and see the “cattle call” and some of the other proceedings. I just sent my students as a new semester started at Georgetown. They were shocked at how casually human beings were treated, and the vast difference between the professionalism and competence of the prosecutors, who were fully in control, and some of the hapless court-appointed lawyers, who did not seem to know who their clients were and could not answer the most basic questions asked them by the judge.

If we are going to have an adversary system, there must be an independent defense component that has structure and the resources necessary to provide competent representation. Public defender offices need to be organized along the same lines that prosecutors offices are organized – with full-time staffs, specialization in complex cases and appeals, reasonable workloads, and independence so their loyalty is to their clients not to judges, bureaucrats or some other public official.

In states that continue to impose the death penalty with frequency, there must be capital defender programs – programs, like those in Colorado and Connecticut, staffed by full-time lawyers who specialize in capital litigation who employ experienced investigators and mitigation specialists qualified to work on capital cases. Those states do not have capital trials that are travesties of justice. They have minimized the risk of executing innocent people by providing good representation which helps restrict the imposition of the death penalty to the most aggravating cases with the clearest proof.

Virginia, which is second only to Texas in the number of executions in the last 35 years, has improved the representation in capital cases significantly by establishing three regional capital defender offices. The number of death sentence has dropped

dramatically, which suggests that people were previously being sentenced to death because of inadequate representation, not the crimes they committed.

Congress and the Department of Justice share some of the responsibility for the immense disparities between prosecution and defense. The prosecution and law enforcement agencies have receive millions and millions of federal dollars in various grants and programs, while defense programs have received no federal funding and have been woefully underfunded at the state and local level. The prosecution has accumulated an enormous advantage in structure, independence, training, and resources over the years.

Congress and the Department of Justice must recognize the need for indigent defense spending in all of its funding of state and local law enforcement and prosecution. Byrne Grant money, drug task force dollars and all of the dollars that are spent on local law enforcement projects should also have some percentage assigned to the management of those cases for both prosecution and defense. For example, federally-funded drug task force projects result in many arrests. Those people are entitled to defense counsel. The federal funding the states have been receiving for law enforcement projects has contributed to the crushing workloads that make it impossible for public defenders to provide individual representation to their clients.

The Innocence Protection Act has provided funding for training. Some states, like Colorado and Kentucky, have very serious and good training programs, while others are adverse to training and to any change in the way things have always been done. Where there are independent public defender or capital defender programs with sufficient resources and structure, training is essential. However, where there is no system, as in Alabama, Texas, and some other states, or there are structural defects in the systems as in Georgia and some other states, training will have much less impact unless it is very focused. Lawyers assigned to capital cases whose livelihoods depend upon the judge who appointed them will probably not be able to implement lessons learned at a training session. In those states independent, well functioning public defender and capital defender offices must be the first priority. Congress must find a way – probably outside of the Innocence Protection Act – to make the right to counsel a reality in those jurisdictions.

Indiana and North Carolina provide examples of the kind of training that can be provided by capable programs. Indiana has a full-time trainer who meets with lawyers about their cases and gives them one-on-one training about how to handle their cases, how to conduct the mitigation investigation, how to plea bargain, how to

develop a theory for a life sentence, etc. She may even attend some trials. In North Carolina, where capital cases are assigned to lawyers by an independent capital defender, every lawyer who has a capital case must meet with one of two outstanding veteran capital lawyers and go over his or her case point by point before trial. The result of this kind of training is that many cases that would otherwise go to trial, are resolved with plea bargains. The few cases that do go to trial are tried well and appropriate resources are devoted to them.

Any money awarded for grants should go only to programs that are independent and have structure, sufficient resources and excellent training capabilities to provide this kind of training. In the initial appropriation, training was allocated equally between prosecution and defense, but, as I have demonstrated, there is an urgent need to close the immense gap between the capabilities of the defense and prosecution. A broad coalition of groups has stated:

Congress needs to re-authorize the Justice for All/Innocence Protection Act to meet its original intent by eliminating the 50/50 split between defense and prosecution so that all funding goes to the defense and that money be authorized to hire defenders rather than for more limited purposes as currently set out in the Innocence Protection Act.³⁷

I agree with this assessment. The two sides are not evenly matched. Even at 100%, funding for training will not come close to closing the gap. Greater resources and structural change are essential.

CONCLUSION

If we want to protect innocence, we must admit that the representation provided to poor people accused of crimes in much of the country is a disgrace and do something about it.

37. "Briefing Paper: Federal Action to Ensure the Right to Counsel in the United States" issued by the National Indigent Defense Collaboration (NIDC) – made up of the American Civil Liberties Union, the Brennan Center, the Constitution Project, the Innocence Project, the NAACP Legal Defense and Educational Fund, National Association of Criminal Defense Lawyers and National Legal Aid and Defender Association – dated August 2009.

**APPENDIX:
Biographical sketch of Stephen B. Bright**

Stephen B. Bright is president and senior counsel of the Southern Center for Human Rights in Atlanta and teaches at Yale and Georgetown law schools. He served as director of the Center from 1982 through 2005. He has been teaching at Yale since 1993.

His work at the Center has included representation of people facing the death penalty at trials and on appeals in the state and federal courts, class action lawsuits to remedy human rights violations in prisons and jails; and challenges to inadequate representation provided to poor people accused of crimes. Before coming to the Center he was a legal services lawyer in the coal fields of Appalachia, a public defender in Washington, DC, and director of a law school clinical program in Washington, DC.

He has taught at the law schools of Yale, Georgetown, Harvard, Chicago, Emory and other universities; written essays and articles on the right to counsel, racial discrimination in the criminal justice system, judicial independence, and other topics that have appeared in scholarly publications, books, magazines and newspapers; and testified on these subjects before committees of both the U.S. Senate and House of Representatives.

His and the Center's work have been the subject of a documentary film, *Fighting for Life in the Death Belt*, (EM Productions 2005), and two books, *Proximity to Death* by William McFeely (Norton 1999) and *Finding Life on Death Row* by Katya Lezin (Northeastern University Press 1999). He received the American Bar Association's Thurgood Marshall Award in 1998 and the National Association of Criminal Defense Lawyers' Lifetime Achievement Award in 2008. The *Fulton Daily Law Report*, Georgia's legal newspaper, named him "Newsmaker of the Year" in 2003 for his contribution in bringing about creation of a public defender system in Georgia.

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APPENDIX
Articles Regarding Representation in Texas

Lawyers' late filings can be deadly for inmates

Tardy paperwork takes away final appeals for nine men, six of whom have been executed

By LISE OLSEN
Houston Chronicle, March 22, 2009

Three men on Texas' death row – and six others already executed – lost their federal appeals because attorneys failed to meet life-or-death deadlines, essentially waiving the last constitutionally required review before a death sentence is carried out.

Johnny Johnson, executed in February for a Houston murder, was the most recent: His lawyers missed a federally mandated filing deadline by 24 hours.

One of his attorneys made the same mistake in the case of death row inmate Keith Steven Thurmond, a former Montgomery County mechanic now on death row awaiting execution, according to case records.

In both cases, the lawyer waited until after business hours on the last day an appeal could be filed and then blamed a malfunctioning filing machine for his tardiness, according to a 5th Circuit Court of Appeals opinion issued last week. The court chastised the attorney for using the same excuse twice.

The opinion pointed out that based on the problems in the previous capital case, the lawyer already knew the machine was broken and could have easily filed electronically by using his computer.

Most of the late filings came in death row cases overseen by federal judges in the Southern District of Texas. In an interview, U.S. District Judge Hayden Head, the Corpus Christi-based chief judge of the Southern District, said he was unaware of the problem and could not comment.

The Houston Chronicle reviewed records in nine appeals that were filed too late. In some cases, lawyers or judges appear to have miscalculated or misunderstood the dates of the deadlines, which generally fall one year after state appeals are concluded. In others, computer failures or human foibles are blamed, records show.

* * *

One last chance

A federal writ of habeas corpus – a right guaranteed by the Constitution – usually gives an inmate a last chance to have the courts review errors or overlooked evidence that could invalidate a conviction or death sentence.

Jerome Godinich, the attorney in both Johnson and Thurmond's cases, appears to be the only Texas attorney to have filed too late in more than one recent death row appeal, based on the nine cases reviewed. He also filed late in a third Texas death row case, records show.

In the third case, however, a Houston-based U.S. district judge took so long to appoint Godinich that the appellate deadline already had lapsed. Court records show Godinich requested more time but took 162 days to file the appeal. The judge then ruled that it, too, was too late to be considered, records show.

Godinich did not respond to several telephone and e-mail requests for an interview. He has faced no fines or other public penalties from the Houston-based federal judges who both appointed and paid him to represent the three men.

Late appeals not tracked

In the case of Johnson, the inmate executed in February for a 1995 rape and murder, Harris County Assistant District Attorney Roc Wilson said the federal district judge considered other legal arguments, though the appeal ultimately was rejected for being filed too late. She said such mistakes were rare in Harris County cases.

The Texas Attorney General's Office, which handles federal appeals, has moved aggressively in several cases to get late filings dismissed on behalf of the state. But spokesman Jerry Strickland said the office does not keep track of how often or how many federal appeals have been filed too late.

Thurmond, a Montgomery County mechanic on death row for the murders of his estranged wife and his neighbor, said Wednesday he had never been told that his federal appeals had been denied both by the U.S. District Court in Houston last year and by the 5th Circuit last week.

He said he hadn't seen or heard from his attorney in more than a year.

"So what am I supposed to do now?" he asked.

A jury concluded that Thurmond, who had no previous criminal history, shot and killed his wife and neighbor in 2001, the same day that his wife sought a protective order and took their son to live with the neighbor.

Thurmond says he is innocent. But the only issues raised by his lawyer in his appeal, filed too late, were that his trial attorney failed to investigate allegations that Thurmond was abused as a child and a jury might have spared his life because of it.

* * *

Sought new attorney

Quintin Phillippe Jones, another Texas death row inmate who also recently lost his federal appeal because of an attorney's tardiness, said he did everything he could to alert the federal courts to report problems months before his Fort Worth attorney blew his federal deadline. Jones wrote letters to the judge, filed two motions with the help of other prisoners in an attempt to get another attorney, and even sent two separate complaints to the state bar. Nothing worked.

"I heard he didn't file (on time) through another lawyer," Jones said. "I'm the one who pays for his mistake. It cost a lot, and I'm paying for it."

Death row lawyers get paid while messing up

Attorneys who continue to miss appeal dates are still getting cases

By LISE OLSEN
Houston Chronicle, April 20, 2009

Texas lawyers have repeatedly missed deadlines for appeals on behalf of more than a dozen death row inmates in the last two years – yet judges continue to assign life-or-death capital cases and pay hundreds of thousands in fees to those attorneys, a *Chronicle* records review shows.

Missing deadlines means their clients can be automatically denied constitutionally mandated reviews before their execution. Houston lawyer Jerome Godinich missed three recent federal deadlines, the *Chronicle* reported in March. One client was executed in February after the federal appeal was filed too late. In March, the 5th Circuit Court of Appeals chastened Godinich for using the same excuse – a malfunctioning after-hours filing machine – for missing another deadline for a man still on death row.

A recent review of the Harris County Auditor's billing records and district court records shows Godinich remains one of the county's busiest appointed criminal attorneys, billing for \$713,248, including fees for 21 capital cases.

He was appointed to handle 1,638 Harris County cases involving 1,400 different defendants from 2006-March 2009, court records show.

He refused comment.

Godinich is not the only attorney to miss death row deadlines. A San Antonio lawyer failed to file four state appeals on time, according to opinions last year by the Texas Court of Criminal Appeals. A Fort Worth lawyer has missed both state and federal deadlines in at least five recent cases, though he sought and was granted more time to prepare on four of them, according to court records reviewed by the *Chronicle*.

The failure to file such appeals, called writs of habeas corpus, means death row inmates risk

missing their last chance to submit new claims of innocence or evidence that could alter their conviction – or death sentence. State judges can be flexible, but federal judges follow tight and sometimes confusing deadlines.

Only one of three Texas lawyers who repeatedly missed such death row deadlines has faced fines or been forced to forgo fees by judges.

Suzanne Kramer, of San Antonio, was removed in October 2008 from three state appeals she failed to file on time and was fined \$750 by the Texas Court of Criminal Appeals. She is handling a fourth case over protests.

“I know if this lawyer stays on my case I’ll definitely get executed,” death row inmate Juan Castillo wrote the *Chronicle*. “She’s refused to respond to any of my letters. She’s never come to see me to discuss my case (and) my writ was due Dec. 11, 2006 and she never filed it.”

Appeal filed incorrectly

The CCA allowed Kramer to continue representing Castillo after criticizing her claim that she mailed in his appeal on a Saturday to the office of a Bexar County judge. The appeal was never filed with the county clerk, as required.

“Judges don’t file lawsuits. I guess that would go on her credibility as a lawyer,” said Gerry Rickhoff, district court clerk in Bexar County.

Kramer, who did not return phone calls to her office, has been paid \$86,577 in fees by Bexar County since 2007, but went unpaid for the three late appeals by CCA order.

Jack V. Strickland Jr., a Fort Worth lawyer who specializes in capital case law, also has repeatedly missed death row deadlines. However, judges accepted his explanations and allowed late filings for four of five appeals.

Being overwhelmed on capital cases was the excuse for two late 2008 filings.

Strickland told the court that he’d been hospitalized several months before the appeals were due, then “began a new death penalty trial right after his recuperation period, was in the

process of preparing another death penalty writ application which was due mid-September, was preparing for trial in another case, and had presented five lectures and papers in the previous sixty days,” according to a CCA opinion.

In another case, Strickland missed both state and then federal deadlines for the death row inmate, Quintin Jones. Before losing his federal appeal due to lateness, Jones repeatedly tried to get another attorney.

Strickland said he “almost begged the magistrate judge to appoint someone else. Jones and I had a very unpleasant relationship.” He was left on the case anyway.

Strickland blamed the deadline error on miscalculating the due date.

He earned \$428,850.62 in court-appointed fees in Tarrant County from 2006-2009. More than a quarter were bills for late appeals, auditor’s records show.

Attorneys overworked in capital cases About one-third are over recommended limit on felonies

By LISE OLSEN
Houston Chronicle, May 25, 2009

Lawyer Jerome Godinich, chastised by the 5th Circuit Court of Appeals this year for repeatedly failing to meet federal death penalty deadlines, has represented an average of 360 felony clients per year in Harris County – a caseload that surpasses every other similar attorney.

But even among other Harris County attorneys approved for death penalty cases, his heavy workload is no exception.

In all, 10 of 32 Harris County lawyers approved by judges to represent clients facing life or death sentences regularly exceeded the recommended limit of 150 felony clients per year – a standard established in 1973 and adopted by the National Legal Aid and Defender Association, the *Houston Chronicle* found. The lawyers, each assigned anywhere from one to 10 capital cases, simultaneously juggled 160 to 360 other felony

clients each year, according to an analysis of official district court appointments from 2004-2009.

* * *

Some felony cases are resolved in minutes, while death cases can take a year. Heavy caseloads limit the time an attorney can devote to each indigent defendant, a job paid for with tax dollars.

Harris County District Court judges do not monitor caseloads of attorneys they appoint, even for death penalty cases. Through their rules, judges attempt to restrict how frequently felony and capital cases are assigned. Even those rules, adopted after one overloaded capital attorney committed suicide, have been repeatedly violated, the analysis showed.

How rules violated

The Chronicle review found 220 days in which capital-approved attorneys appear to have accepted more than the limit of five assignments per day. Some took as many as 10 cases. It also found a dozen examples where judges violated their own requirement that capital murder case appointments be spaced at least 60 days apart. In some cases, judges knowingly broke their own rule because of unusual circumstances. In others, there were "glitches" in an internal tracking system used to prevent that.

One lawyer twice accepted two capital cases on the same day. The first time, Attorney Laine Lindsey said he accepted two appointments from the same judge to replace a lawyer stricken with cancer. Later, two different judges asked him to take cases on the same day. Lindsey said he didn't know about the rule and no one mentioned it.

Godinich took three capital appointments in less than one 60-day period in 2008. One client was found incompetent to stand trial after drinking toilet water, disrobing and claiming he was Jesus Christ II while in the Harris County jail; another was a 15-year-old who pleaded guilty to felony murder charges and accepted a life sentence without possibility of appeal; the third hired another lawyer.

Godinich has agreed to take as many as 10 simultaneous capital cases over the past five years, though only a few were death penalty cases.

Only one other attorney, Robert Morrow, has recently taken as many simultaneous capital cases, records show. But Morrow uses a team of legal interns and lawyers involved in a mentorship program to help with his assignments and specializes almost exclusively in capital work.

Two of the Harris County judges, Belinda Hill and Shawna Reagin, said it might help judges to receive reports on caseloads before making capital appointments, though both said numbers alone should not govern decisions.

* * *

Godinich, who juggles federal cases and misdemeanors along with his 360 felonies, has refused interview requests. But in a letter to the Chronicle, he defended his indigent defense record, saying he aims to defend his clients "to the best of my ability."

"That entails working seven days a week and investing countless hours in preparation to ensure that my clients receive their rightful due process," Godinich wrote. "It is not an easy job, but it is work that is challenging and has given me enormous personal satisfaction. That is why my clients know who I am and depend on me to stay invested in the process."

One of his hundreds of Harris County clients, Phillip Hernandez, has been awaiting trial for 18 months on child sexual abuse charges and claims Godinich has never visited him in jail to discuss his innocence claim. Hernandez's pre-trial hearing was scheduled earlier this month, but the inmate said he learned it had been postponed at the last minute from a bailiff. Godinich did not attend court that day, records show.

Kyle Johnson, an attorney who shares an office with Godinich, said any criminal defense lawyer gets occasional complaints. Both he and Morrow praised Godinich's work.

"I think he's excellent," Johnson said. "This job is Jerome's life."

Death row inmates share identical appeals
20 pages of death row inmates' appeals are identical, even errors

By Chuck Lindell
Austin American-Statesman, Feb. 28, 2006

Angel Maturino Resendiz, the train-hopping "Railroad Killer" from Mexico, randomly murdered at least nine people in gruesome fashion in the late 1990s.

Robert Gene Will, a young car thief sporting tattoos of a handgun and the Grim Reaper, was convicted of fatally shooting a Harris County deputy in the face.

The two men have little in common beyond an address on Texas' death row — and one other curious detail. The bulk of their legal briefs, filed 1½ years apart by a Houston lawyer appointed to appeal their cases, are word-for-word identical, right down to a capitalization error on page 17.

Labeled "generic" and "lackluster" by another death-penalty defense lawyer in court documents, the relatively brief appeals avoid common death-penalty arguments: questions of mental illness, mitigating circumstances or other specifics designed to show why a defendant should be spared execution.

Instead, the appeals focus primarily on a single technical challenge to Texas law on death-penalty jury instructions, without mentioning Resendiz or Will by name or referring to their trials. Both also list incorrect conviction dates for the men.

What's more, the appeals' author, Leslie Ribnik, missed routine filing deadlines to move Resendiz's case into the federal appeals courts. Deprived of a full federal review of his appeal, Resendiz [was executed June 27, 2006].

Critics call Ribnik's effort, or lack of it, another blot on Texas' capital punishment system, which relies on court-appointed defense lawyers of varying experience, skill and motivation.

Ribnik, 52, defended his duplicate appeals, known as writs of habeas corpus, saying they raise a valid and intriguing constitutional point germane to both cases.

"I do not apologize for it. I think it's a good argument. If I got another habeas case today and had the same issue, I would do it again, because the law has not changed," he said.

Resendiz's 20-page writ is identical to the first 20 pages of Will's writ, except for the inmates' names and legal histories. Will's writ adds eight pages challenging the prosecution's attempt to link his tattoos with gang symbols.

Ribnik said that a thorough review of the cases found no other legitimate issues to pursue.

Even so, Resendiz has new lawyers. Will might follow suit.

'Abdication of duty'

In Texas, a death sentence is followed by a direct appeal, in which lawyers ask the Court of Criminal Appeals to review perceived legal errors in the trial. These limited procedural appeals rarely succeed.

Next is the habeas review, *** where new issues can be introduced, including claims of innocence.

If rejected by the Texas Court of Criminal Appeals, the habeas writ may proceed to the federal courts, then the 5th U.S. Circuit Court of Appeals and the U.S. Supreme Court.

Properly done, a habeas writ requires a lawyer to reinvestigate the case in search of mitigating issues such as mental illness or childhood abuse. From DNA to witness tampering to evidence withheld by the prosecution, it's all fair game.

Ribnik did not represent Resendiz or Will during his trial but was appointed later to pursue appeals. He was replaced as Resendiz's lawyer in

December after a federal judge in Houston deemed his performance poor and ineffective.

Resendiz's new legal team went farther, calling Ribnik's petition generic and his work "an abdication of duty, worse than no representation at all."

* * *

Because Ribnik blew several filing deadlines, Resendiz's federal appeal has been dismissed.

* * *

Ribnik said he apologized directly to Resendiz for his procedural mistakes.

"This is terribly embarrassing, not my usual work," he said. "Mr. Resendiz and the public deserve better."

* * *

[H]is new lawyers * * * contend that Resendiz is mentally ill, a well-established mitigating factor that can lead to reversal of death sentences.

That argument might never be heard by any court, because Ribnik did not include it in his original writ.

* * *

Ribnik said he hired no outside investigators or experts to review Will's case but denied that it indicates a lack of effort. He said his review of the trial record found that potentially mitigating evidence, including childhood sexual abuse, was adequately introduced and considered at trial.

"I will own up to my screw-ups; I'll take my lumps. I certainly deserve them in Resendiz," Ribnik said. As for Will, he said, "I think I did a good job on that one."

Convict's odds today may rest on gibberish

By Maro Robbins
San Antonio Express-News, August 24, 2006

Texas is scheduled to execute a convict today whose lawyer filed an appeal with incoherent repetitions, rambling arguments and language clearly lifted from one of his previous cases, so that at one point it described the wrong crime.

While inmate Justin Chaz Fuller's last hope for a temporary reprieve now waits on the U.S. Supreme Court and the governor, his case is being cited as an example of the state's failure to adequately examine death penalty convictions.

The same lawyer, in another pending capital case, apparently copied his client's letters so that, instead of citing legal cases, the filed documents echo the inmate's unintelligible arguments, flawed grammar and even his complaint that he was about to run out of paper.

For his work in these two appeals, the state paid the attorney Toby C. Wilkinson of Greenville about \$18,000 in each case, for a total of \$36,514. Wilkinson did not return repeated calls.

State law requires that death row inmates receive "competent counsel" for their post-conviction challenges known as applications for writ of habeas corpus. In May 2001, the state's highest criminal court tapped Wilkinson to work for Fuller, a Dallas native convicted of killing a 21-year-old man, Donald Whittington III.

At first glance, Wilkinson's 111-page motion appears unremarkable. But by Page 3, it starts quoting long passages from trial testimony without clearly explaining their relevance. Page 5 spends half a page repeating the exact passages quoted a page earlier. A similar repetition follows on Page 6.

The numbering of arguments doesn't maintain a logical sequence. Typos obscure some quotes, as in, "i & tilde hus, we diseeni no ab & tilde tse of discretion in th i & tilde coul & tilde s denial."

Perhaps most striking, the pleadings for Fuller copied wording from an appeal Wilkinson filed for a different client, Henry Earl Dunn, in an unrelated case. As a result, it complains about testing for blood on a gun used by Dunn's co-defendant seven years earlier.

* * *

About three years after filing Fuller's claim, Wilkinson was chosen by a Hopkins County district judge to file a similar habeas petition on behalf of Daniel Clate Acker.

Wilkinson's legal brief spends 13 pages naming seemingly every document filed in the case. It then makes five claims that are almost word-for-word identical to claims in Fuller's case. The next 24 pages seem copied from his client's letters, so that they seldom if ever cite case law and occasionally lapse into first-person narrative.

Claim No. 36 concludes: "I'm just about out of carbon paper so before I run out I want to try and list everything that was added to and took from me to convict me on the next page then as soon as I get some more typing supplies I have about thirty more errors I want to tell you about and have brought up in my appeal."

* * *

The court of criminal appeals decides which lawyers can handle death penalty appeals. Presiding Judge Sharon Keller said she couldn't comment on individual cases, but the court's staff carefully screens attorneys. Then it relies on trial judges to appoint tried-and-tested counsel.

"If we thought somebody should be taken off the list because he's not doing a good job, we'd take him off the list," she said, "or we'd consider taking him off the list."

Wilkinson isn't known to have been given any more death penalty work since 2003, but his name is still on the list. And though the count might shrink by day's end, six of his clients are still on death row.

Justin Chaz Fuller was executed by Texas on August 24, 2006.

Mr. SCOTT. Thank you. I thank all of our witnesses for your testimony, and now we will begin with panelists asking questions.

First, Ms. Overmann, I think I mentioned 11.8. I added my numbers up again. I think it was 9.8. And is that all of the money available this year has been allocated, as I understand it?

Ms. OVERMANN. Yes. We have—all of the accumulated funds starting in 2006 have now gone out. So we have spent all of the funds that were appropriated.

Mr. SCOTT. Mr. Scheck, you have indicated that we will need to run these cases through the DNA databank if the profile has already been done. What is the cost of running it through the databank after the profile has already been done?

Mr. SCHECK. I would have to consult with the FBI for the exact costs, but I think it is virtually nothing. I mean, it is literally—if it is a CODIS-eligible profile, that is, by a laboratory that has met the standards of the CODIS system, it is literally an issue of somebody in a State or local laboratory putting that into the system and seeing if it hits another offender.

Mr. SCOTT. The cost is doing the profiling to begin with.

Mr. SCHECK. That is right. It costs nothing, I guess you could say.

Mr. SCOTT. Ms. Goodrow, you indicated it took a long time to get these tests. Why did it take so long? And if you had enough money, how soon could those tests have been run for Mr. Ireland and the others?

Ms. GOODROW. Part of the issue with Mr. Ireland's case was that it came to us approximately 2 years prior. So his case came to us prior to us—about 8 or 9 months prior to us getting the State funding. When we applied in 2006, I think at least in theory, had we had those funds, we could have worked on the case full time. I was not able to work full time on the Connecticut Innocence Project cases until we got our funding in the summer of 2007. I had a real job, if you will, a full-time position with the State as a public defender. So this Innocence Project work we were doing, Mr. Carlow and I, part time as we could. That was part of the issue.

Mr. SCOTT. So there are a lot of cases languishing for just lack of staffing?

Ms. GOODROW. There were. Presently, I would echo the comments of Attorney Bright, most of our cases that we are looking at are actually not DNA-determinative cases. I would say that the percentage—we have an ongoing approximately 80 to 100 cases that we are regularly looking at. They are at some phase of the review process. And the large majority of those, I would venture to say more than 90 percent, are nonDNA-determinative cases.

Mr. SCOTT. Mr. Marone, when you went back and looked at all of those cases, I didn't get a good sense of what the percentage of wrongful convictions was, those where you had—you just went and found that there was evidence, and you went to test to see if the right person had been convicted.

Mr. MARONE. Right. If you are going to look at the statistics—and I don't know that it would be a valid jump to make—if we have 800 cases, we are looking at two or three. You know, when we are finished, there may be a few more. But I don't know that that puts the appropriate handle on it. On the other hand, you know, if you have got one, to me that is too many.

Mr. SCOTT. What would be the cost to preserve evidence, as this technician had done, to just preserve evidence in cases so 10, 20 years from now, at least while the person is incarcerated, the evidence is there? How much would that cost your system?

Mr. MARONE. Unfortunately—and I am not trying to evade your answer. Unfortunately, the way she preserved it would not be the way we would preserve it properly. What we are looking at is you would probably have a long-term space paperwork issue. Right now, Virginia has that retention, but the retention of a particular case is only done after the litigation is finished. And all the defendant really has to do is request that it be stored. If they don't request it, we don't store it. But on capital cases it is automatically stored.

And, right now, quite honestly, for us the cost is so low we are just absorbing it. I would think, you know, you are looking at minimal cost. That cost is going to increase, depending upon the volume that you have. But it is a few hundred dollars per case. And, again, as the number goes, then you have to start looking at increased storage and so forth. But it wouldn't be that much. It is more of a logistical issue than a cost issue.

Mr. SCOTT. Then why shouldn't we, as Mr. Scheck has suggested, condition grants on fixing the preservation of evidence?

Mr. MARONE. I don't have a problem with doing that. But like what happened with the post-conviction testing, you put in place a requirement that nobody knows is coming, and you don't have time to prepare for it. Therefore, nobody is eligible for it. So I am saying, if you want to do that, that is fine, but let people know you are going to have to prepare for this. And if you expect to get the funding, you should be prepared to do it in the future. It is like you are trying to do things retroactively, and that is just not right.

Mr. SCHECK. Mr. Marone and I are in complete agreement on this. The proposal we are making about conditioning, I guess it is 305, 308, and 302, if I have the numbers correct. On the 413 evidence preservation requirement, it should be essentially grandfathered in after there is a national working group that can help set up these definitions. Because I think we are in agreement you don't want to have it so strict that people feel I have to preserve everything.

And, on the other hand, we have to have intelligent preservation systems. I mean, in the Virginia case what is amazing is that, as you know, this analyst, Mary Jane Burton—

Mr. MARONE. Mary Jane Burton.

Mr. SCHECK [continuing]. She was just stapling these things on the written serology reports. And we were trying to get Marvin Anderson out of jail; and Paul Ferrara, Mr. Marone's predecessor, was saying, well, I can't find it. I can't find it. And he said, oh, I am going to go back and look. And he looked at the actual written reports, and then we found all this stuff.

Now, if we had Laboratory Improvement Management Systems, LIMS systems, like they have, for example, in North Carolina—they have done a great job in Charlotte, literally bar coding the evidence as it comes in—you would be able to keep track of the evidence in old cases, cold cases. We could tie the evidence to the ac-

tual court cases. Because, you know, what often happens is we have to go back and try to find the cases.

Let's say we had a bad analyst who was doing a bad job and we have to do an audit of their cases. We can't tie the lab cases often to the court cases around the country.

So much can be done now if we give an incentive to the States with Federal assistance to really professionalize—and Mr. Marone can be one of the people to tell you exactly how to do it—the laboratory systems. It is really good for every party in law enforcement and the overall improvement of the system. It is really, in some ways, what the President is doing with laboratory medical records. You know, why not discovery in the criminal justice system? Why not forensic lab data? Why shouldn't all of this essentially be coded, electronic, and easily available? We can do that in this society.

Mr. SCOTT. Thank you.

Judge Gohmert.

Mr. GOHMERT. Thank you again, Chairman.

Well, just following up on that, Mr. Scheck, you and Mr. Marone suggest that there ought to be a couple years anyway to give States a chance if we are going to add the requirements. And in your testimony it was 303, 305, 308, 303 being DNA training and education for law enforcement, correctional personnel, and court officers; 305, DNA research and development; 308, DNA identification of missing persons. Do you see a problem if we gave a couple of years to allow States to be prepared to move into those requirements?

Mr. SCHECK. No, not at all. And I think the way that could be done is if you just reauthorize the Justice for All Act the way it was originally passed, with 413 as the condition precedent to the funding of these other pots of money, so to speak. And you can either do that directly, you know, in the bill, put the moratorium in, or there could really be—Justice Department could help with that just the way they did before in the appropriation language. Because I think everybody agrees on what that process ought to be and how it could work.

And I want to point out, just because it is Texas, I mean, everybody looks at Dallas, because in Dallas we have more DNA exonerations than any State except for New York and Illinois. Just one city. And it is not because the criminal justice system is worse in Dallas. It is because we can find the evidence in Dallas. That is it. And if we were able to find the evidence in other jurisdictions, you know, in the future, this technology improves. So it is really important to do this in a professional and intelligent way.

Mr. GOHMERT. Mr. Bright had mentioned that about 20 percent of the cases have biological evidence that could be tested for DNA, as I understood you to quote the statistics. Is that right, Mr. Bright? Isn't that what you quoted?

Mr. BRIGHT. That was my estimate.

Mr. SCHECK. Actually, I think it is 10 percent.

Mr. GOHMERT. You think it is closer to 10?

Mr. SCHECK. Yeah.

Mr. GOHMERT. Is that because of the fact there just isn't the biological evidence to be found, or would it be more than that if there were additional training for the law enforcement?

Mr. MARONE. No, sir. It is actually 10 percent of all the case work that laboratories get is DNA.

Mr. GOHMERT. Oh, I see.

Mr. MARONE. Ten percent of them are applicable to DNA. And that one particular case might have DNA, it might have latent fingerprint, it might be firearms, whatever.

I would like to take the opportunity, while I have the mike, to clarify a little bit what Mr. Scheck saying. I am not necessarily totally agreeing with a panel to come up with—although I think evidence retention is a good idea, I am saying if you choose to tie it to the other ones, which I can see that going bad—

Mr. GOHMERT. I understand. You are not advocating that. You are saying, if we are going to do that, at least give us—

Mr. MARONE. And the other problem with that is the evidence is retained at localities. There is going to be a significant—at the State level, there is going to be a significant issue with communication as to who is going to store it. Is it going to be stored at the State level or the locality level or so forth.

But, for example, I can see if it goes through, for my purposes, and it ends up with all the evidence at every stage is going to have to be retained by my laboratory, now we are talking about significant numbers. Now we are talking about logistical issues and costs.

Mr. SCHECK. And that shouldn't happen. In other words, as we go across the country and try to enforce this evidence preservation requirement with the States, we completely believe—

Mr. GOHMERT. We might need to spend some of that money on microphones.

Mr. SCHECK [continuing]. We completely believe that what you want with the localities, with the States, because each State has completely different systems—

Mr. GOHMERT. And I know there has been a number of references to lawyers who miss filing deadlines, and that is abominable. When that happens, some lawyer has not met his requirements.

But I also have to say I have heard attorneys talk about if you really believe the death penalty is wrong and you don't have anything else, then why not set up, you know, the blame on yourself and pull it down on yourself in order to give your guy a chance to blame you for bad lawyering. And that gives him another shot. I have heard that discussed.

And I have to state that I have even brought up the issue in court at the bench to attorneys. If you are trying to set up some kind of record for ineffective assistance, then you are headed for trouble yourself. You do the best you can or you are not going to be on this case anymore.

So I have gotten that impression. I have heard people talk about it. And sometimes I wonder. I know most lawyers, they are just going to do the best job they can. But sometimes there are those who feel so strongly against the death penalty that they are willing to commit some type of alleged malpractice just to give their client a chance to raise that on appeal.

Mr. BRIGHT. You know that is interesting, Judge. I have been litigating capital cases since 1979, about 30 years. I have never once encountered that. So that is very interesting.

Mr. GOHMERT. I wouldn't expect that you ever would.

Mr. BRIGHT. Well, I have litigated a lot of ineffective assistance of counsel cases, and I have litigated them against a lot of really bad lawyers. And most of the cases, what I have found is lawyers who have failed to do investigations and who have not known what was going on. I have actually cross-examined lawyers who have not been able to name a single Supreme Court case, for example. But all those lawyers have claimed that they made tactical decisions or strategic decisions, and what their goal was was to defeat the claim of ineffective assistance, even though those assertions were preposterous, because it was clear that they weren't in a position to make a strategic decision because they hadn't done any investigation on which to make a strategic decision on.

And certainly missing the statute of limitations, that kills your client. Those people in Texas that have been executed where they missed the statute of limitations, if those lawyers did that on purpose, I don't know what their point was. In my view, the first time that happened, those lawyers—that lawyer should have been disbarred. And the fact that he—

Mr. GOHMERT. You and I are in complete agreement.

Mr. BRIGHT. The fact that he would be assigned a second case and then a third case and that he is still practicing law right now and has, you know, a huge caseload—

Mr. GOHMERT. You are right. I agree with you. One should have done it.

Mr. BRIGHT. It is just hard to imagine what judge or how the bar association there would tolerate that.

Mr. GOHMERT. Well, I sat in on some—I presided over some disbarment cases, and I was surprised at the deals that got cut, because I took a much harder line on those things than apparently the bar did, those cases that were brought before me. But, anyway, thank you.

Mr. SCOTT. The gentleman from Michigan, the Chairman of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Scott and Judge. We appreciate this hearing and its significance.

I would like to ask unanimous consent that Mr. Ricky Ireland be permitted to respond to a question or two or to say something.

Mr. SCOTT. Without objection.

Mr. CONYERS. Hello, Mr. Ireland.

Mr. IRELAND. How are you?

Mr. CONYERS. Pretty good. This is a pretty important hearing, isn't it?

Mr. IRELAND. Yes, it is a very important hearing. I agree.

Mr. CONYERS. A lot of people being affected by this, aren't they?

Mr. IRELAND. There are. There are a lot of people being affected. A lot of people that are still inside that need a chance to be proven innocent.

Mr. CONYERS. What would you tell a concerned congressional Committee that they ought to do to change what you know about all the people that have suffered miscarriages of justice?

Mr. IRELAND. I believe the funding and the support of the Innocence Project is of the utmost importance. I spent 21 years inside; and prison is a horrible, horrible place. Nobody wants to be there.

And there are people in there that are innocent. And 21 years between the ages of 18 to 40 is what I spent in there.

Are there any more vital years than them years? I don't have a family. I don't have any means for support. I don't have nest egg socked away, no job skills. You know, that was all taken from me.

And so when the Innocence Project contacted me and took my case, it was like a ray of hope for me. And it was like the first ray of hope, you know, in my entire time in. And so I know there is other people in there. Statistically, there has to be other people in there that are innocent. And the fact that had there been funding earlier for the Connecticut Innocence Project then I would have been out earlier, a significant time earlier, you know, it kind of hurts me.

Mr. CONYERS. Well, we thank you for coming out.

Do you have a job?

Mr. IRELAND. Yes, I am employed now.

Mr. CONYERS. Great.

Mr. IRELAND. Thank you.

Mr. CONYERS. I wish you the very best—

Mr. IRELAND. I appreciate it.

Mr. CONYERS [continuing]. In the future. And I hope that you keep working with some of us in the Congress, in the practice of law, in public service, and just citizens in general that all feel very much the same way you do about what is happening to so many other people in America.

Mr. IRELAND. Thank you. I fully support the Innocence Project, and I am here to champion their cause. And in any way—any Innocence Project in any State, any way that they can use me or utilize me, I am willing to help.

Mr. CONYERS. That is great. I will be calling you.

I want to thank all these witnesses, too, Chairman Scott, but I wanted to ask Ms. Overmann a question. You did some kind of work like this as a lawyer yourself in Florida.

Ms. OVERMANN. I was a public defender for 5 years.

Mr. CONYERS. Pretty lousy system there, too, isn't it?

Ms. OVERMANN. We certainly suffered from excessive caseloads.

Mr. CONYERS. And maybe that is why you got in this job, as a matter of fact. That probably stood out in your resume.

Now all the funds are spent. So that means that hundreds of thousands of people are going to be disenfranchised.

Ms. OVERMANN. In some States. I believe it is down to eight States that automatically disenfranchise people with felony convictions. But I believe Florida is one of those that continues that practice.

Mr. CONYERS. Well, I meant the funds that are being used to help remedy the situation that brings us here. If the funds are all spent, there is no more to go around. Most States are mostly in the red anyway.

Ms. OVERMANN. Well, I do believe that we have requested additional funding in the President's budget to continue providing funding under the Bloodsworth program.

And I also wanted to highlight one of our new cases that we have provided \$3 million for, which is specifically geared toward Inno-

cence Projects. It addresses several of the issues that were raised here today by Mr. Bright and also by Mr. Ireland.

This funding is specifically provided to Innocence Projects not based on DNA testing but recognizing that a significant portion of post-conviction cases are cases that don't involve DNA testing, and those cases require extraordinary amounts of time and effort by defenders to reinvestigate. And our goal of the initiative was to provide quality representation to the wrongfully convicted to help alleviate some of the burdens placed on criminal justice systems from these post-conviction litigation efforts and hopefully to help identify, when possible, the actual perpetrator. So we have tried to work as closely as we can with the field to find out their needs and address them where we can.

Mr. CONYERS. Well, that is very sentimental.

May I have unanimous consent for some more time?

Mr. SCOTT. The gentleman is recognized, without objection, for two additional minutes. Is there objection? Two additional minutes.

Mr. COHEN. Three minutes.

Mr. CONYERS. See, here is the problem. Eric Holder, an experienced lawyer, Judge, now Attorney General, there are some that say that this is going to be his biggest challenge, his biggest test as Attorney General. Is he going to let this unchecked system that judges, lawyers, Congressmen, citizens—are we just going to say, well, Congress wouldn't give us any more money, so that is—what can we do? This is the way the system works. When they want more money for wars or military, nobody has any problem getting that. So you have a huge responsibility, because this is going to be on Eric Holder, not on you. Do you put out any reports throughout the year about where we are on this thing that you do?

Ms. OVERMANN. Well, we certainly internally, for our grant management, get progress reports from our grantees.

Mr. CONYERS. No, we want public reports.

Ms. OVERMANN. I don't know if we actually specifically address the Innocence Protection Act. I don't believe that that was part of the legislation, but I can certainly check and get back to you on that.

Mr. CONYERS. Well, we want to get some reports. We want to make up some reports so that we can figure out where we are on this. We may not see you again for the rest of the year.

Ms. OVERMANN. I am always happy to come back when invited. And I do want to stress the Attorney General has made it very clear to all of us in the Department, and he has announced this—

Mr. CONYERS. He hasn't made it clear to the Congress. He hasn't made it clear to me.

Ms. OVERMANN [continuing]. Is a priority for this department.

Mr. CONYERS. He hasn't made it clear to this Committee.

Ms. OVERMANN. We have worked with what we could in this first year of the Administration to provide funding.

Mr. CONYERS. I know. I gave you all the brownie points in the Rayburn Building. But that doesn't get it. Sentiments. We are all as sentimental as we can be. Now, I just want you to understand that this is not just a little afternoon hearing.

Now, Pete Marone, Mr. Marone, I just calculated this, I was practicing law when you were graduating from school.

Mr. MARONE. That is a long time, sir.

Mr. CONYERS. Here is the problem. You said that nobody wants anybody in that shouldn't be in. What are those numbers about police? You said that, didn't you?

Mr. MARONE. Yes, sir.

Mr. CONYERS. How did you know that? What led you to that conclusion?

Mr. MARONE. Well, it is my personal experience, and the folks that we have been involved with, whether they be prosecutors or law enforcement, when we have asked them to cooperate on these issues, nobody has said no. They have done whatever they can do to help us expedite the matter. Now, under that context, that is what I am saying. That has been my experience, that nobody has said, no, we are not going to help.

Mr. CONYERS. That is just you have met a lot of nice people that makes you think that nobody would want this miscarriage of justice to go on.

Mr. MARONE. In my experience, sir, I found nobody to be uncooperative.

Mr. CONYERS. Well, you haven't talked to—how many of the 837,000 law enforcement officers have you talked to about this problem?

Mr. MARONE. I can only say I have talked to those people who have been involved in these cases.

Mr. CONYERS. Okay. How many judges have you talked to about this problem?

Mr. MARONE. A few dozen in Virginia.

Mr. CONYERS. How many lawyers have you talked to about this problem?

Mr. MARONE. Several hundred.

Mr. CONYERS. And everybody feels real bad about this. But she has run out of money. This is the first hearing I can ever remember being held in the Judiciary Committee, and you know how long I have been here, so somebody doesn't give a damn, or there are some somebodies that all feel it is too bad, you know. I don't believe that nobody wants these people to all be set free. And you do.

Mr. MARONE. Again, in my experience—

Mr. CONYERS. Yeah.

Mr. MARONE. I will give you an example.

Mr. CONYERS. Okay.

Mr. MARONE. There has been at least two instances I specifically know where prosecutors, once they determined that that individual was improperly convicted, didn't wait for the process to send it back to the defense counsel. They literally went to the judge and started the process going on their own. I don't see that as somebody being just sentimental.

Mr. CONYERS. Let me ask you this. Have you ever heard of police that framed people and sent them to jail?

Mr. MARONE. I have heard, yes, sir; and I am not arguing that point.

Mr. CONYERS. Oh, Okay.

Mr. MARONE. What I am saying is, in my experience—

Mr. CONYERS. Let me ask you this. Have you ever heard of prosecutors that knew they had the wrong people and they prosecuted? Ireland, have you?

Mr. IRELAND. I know of many cases.

Mr. CONYERS. Have you?

Mr. MARONE. I have heard of them.

Again, I couched my response—

Mr. CONYERS. I know what you couched your response in. All I am saying to you, my friend, is that I have files of cases of police misconduct, prosecutorial misconduct, judicial misconduct, and it wasn't accidental.

So, you know, this let's all get together and say this is a terrible thing and it is too bad we don't have any money and we are in hard times, I just—you know how long I have been here. I have heard all the gasps and the tears and the sympathy and all that, but it still goes on. And, right now, we are only dealing with a small part of it.

Now, what lawyer here doesn't know that the first job a lawyer gets, if he is trying to get started in practice, is you are assigned a criminal case for a hundred bucks, maybe 50. I forgot how—but they know you don't know any criminal law because you just passed the bar. And they want you to plead guilty anyway. They don't even expect you to do a trial. Your job is to talk the defendant into taking a plea. As a matter of fact, if you don't, you might not get any more assignments. Right, Judge?

Mr. GOHMERT. Not in my court.

Mr. CONYERS. No, not in your court, no. But I mean they don't want somebody coming in and playing Clarence Darrow, do they, Attorney Bright? A trial by jury, are you out of your mind, attorney of 6 months?

So, Mr. Chairman and Judge Gohmert, I think we ought to meet with the Attorney General on this subject. And we can determine how we can do that without the presence of all these fine witnesses. And I am sure glad that they are all here and that you held this hearing.

Mr. SCOTT. Thank you. I have just a couple other questions.

Ms. Overmann, did I understand you to say that eight States disenfranchise people upon conviction of a felony?

Ms. OVERMANN. I am speaking out of school, but I know that there are still States when you are talking about voting disenfranchisement and eligibility for certain State contracting licenses. But this is not, obviously, the topic of the hearing.

Mr. SCOTT. Okay. Because I think there may be eight or so that do it permanently, but almost all of them there is certainly disenfranchisement upon conviction.

There is a suggestion that we kind of reinstate the condition, the 413 conditions, evidence preservation as a condition of other grants, and we kind of phase it in. Will you be able to work with Mr. Scheck and Mr. Marone and Mr. Bright and Ms. Goodrow to make a recommendation as to what we should do legislatively?

Ms. OVERMANN. Certainly. We always look forward to working with our partners in the field, and I believe that our OJP works very closely with Mr. Scheck very frequently. And I believe Ms. Goodrow also learned today that she is going to be one of our new

grantees. So we will be working with her in that capacity. I know Mr. Bright has either met with or will be meeting with the Attorney General shortly. So we are very actively engaged in listening to the field to get their input. And, of course, we are always happy to work with Congress.

Mr. SCOTT. Okay. And, Mr. Bright, you indicated that, for purposes of nonpayment, people would drop out of several cases, it sounded like, sequentially—

Mr. BRIGHT. Yes.

Mr. SCOTT [continuing]. After a certain length of time. Have you permanently denied a person the right to a fair trial if their lawyer is coming in so late that the evidence is no longer available?

Mr. BRIGHT. Well, that is the appeal that I have raised. Because I think that if you deny somebody a lawyer during the critical time pretrial, you deny them the ability to prepare, the ability to investigate and all that until the trial is cold.

As I said, what kind of adversary system is this? One side is fully geared up, ready to go, has full-time people, and the other side is completely held back. And then all of a sudden you say, well, here is some money; come try the case in a couple of months. I think that is a violation of any notion of due process, fairness, or an adversary system.

And that is the appeal that I just filed. And I have asked the Justice Department to file an amicus brief just on the question of the denial of the right to counsel. I think the denial of the right to counsel pretrial for over 2 years, it is unprecedented in my experience that somebody would be denied in a death penalty case. You might not have much of a counsel, but usually you at least have some sort of token representation prior to trial.

This is no representation at all. This is none whatsoever. And it is happening. It is basically the pattern in Georgia, because there is not any money there. So it is sort of a shell game that is played in which money is not available.

If I were these lawyers in the Sims case, I wouldn't have moved to withdraw. I would have moved to dismiss the case. Because I think the Utah Supreme Court pointed out here recently that the State should either provide the money to defend the case or it should dismiss the death penalty. If they want the death penalty, then pony up the money to defend the case. Because that is part of the constitutional requirement, is that there has got to be the defense. But, unfortunately, some jurisdictions want to do it on the cheap. And, unfortunately, the judiciary, unfortunately, doesn't always stand up and say, if we are going to do this, we are going to do it as the Constitution requires, with a lawyer and with the expert witnesses and the investigation that is required in order to have a fair trial.

Mr. SCOTT. Thank you.

And, finally, Mr. Scheck, of the people that come to you claiming evidence for which there is DNA available evidence, what portion are found to be, in fact, innocent?

Mr. SCHECK. That is the incredible part. That is the most astonishing statistic at all.

Mr. SCOTT. Can you bring your mike a little closer to you?

Mr. SCHECK. Yeah.

Mr. SCOTT. Okay.

Mr. SCHECK. That is the most remarkable part of all, that by the time we go through the cases and see if there is evidence that we can test—you know, many people claim innocence, but we can't find the evidence. It is lost or destroyed. You know, the numbers change over time. In the last few years, we found half of them the DNA results are favorable. I mean, it changes, but it has been running between 40 and 60 percent. So that is—

Mr. SCOTT. Of people that claim to be innocent, if there is evidence that can be checked, 40 to 60 percent are found to be actually innocent?

Mr. SCHECK. Yeah, between that—in that time period. The results turn out in their favor. And it usually results in either the real perpetrator being found or the case being dismissed.

I would like to address, if I may, just for a minute, you know, we have done all this work proving people innocent with DNA testing. The Innocence Protection Act was passed in part because everybody realized the importance of this technology. But it is, as we have all told you, only 10 percent of the cases. And what about those other 90 percent of the cases? That is what we have really learned from DNA evidence.

And I have to say that I have worked with Mr. Marone and his predecessor, I find lots of prosecutors and law enforcement officials who are really interested in getting to the bottom of it. But I must say over the last 17 years I have met quite a number, Pete, that have resisted this, irrationally, and people who have covered it up. And there have been lots of cases where there have been, you know, documented instances of criminal and ethical misconduct. That happens, as well as horrible, horrible lawyering.

Now, I have seen the Attorney General's statements lately. He has given his talk to the Vera Institute, to the National Legal Aid and Defender Association; and this Attorney General has said some really remarkable and important things about actually dealing with the issue of indigent defense. It is in crisis.

And the problem with the Justice for All Act, you know, it was all passed, and it focuses on DNA, and it is kind of 50-50, and we are working with law enforcement to get to the bottom of this, but that is not addressing the problem that Chairman Conyers has raised and I know you all understand very, very well. And there has to be an initiative. The Administration is indicating that it is going to do it, and we all look forward to it. But there is something significant and large that they have to do, and there is a very appropriate and meaningful Federal role for really doing something about the indigent defense system in this country, which is in crisis.

And it is not an issue of balancing, well, we give some money to the prosecutors and we will give some money to the defense. That just isn't the reality of our system. One side of this has been underfunded for far too long, which is not to say that the prosecutors or law enforcement are getting, you know, all the money that they need or deserve, but one part of this system is in absolute crisis. And if you deal with that, so many of these issues that caused the passage of the Innocence Protection Act and all of these issues we have with forensic science could have been avoided.

I mean, if we had had competent defense lawyers in Texas, we wouldn't have had that problem in the Houston Police Department Crime Lab. If we had had them in West Virginia, where this Fred Zain and all this dry-labbing and these tests that weren't even done, a lot of these things would have been exposed, whether it is Arnold Melnikoff in Montana or Joyce Gilchrist in Oklahoma or even Dr. Erdmann, the forensic pathologist in Texas. The funding of an adequate defense is good for the entire system. It is not just protecting the innocent or the accused. It helps the entire system. And that is the one underfunded area that is in crisis.

And so I am hopeful that we will be coming back here in a few months asking or testifying on behalf of a very, very significant initiative by this Administration to do something about indigent defense. And we hope you will reauthorize the Justice for All Act and take some of these suggestions. But we are really looking forward to the next hearing, where we do something big.

Mr. SCOTT. Thank you.

The gentleman from Texas.

Mr. GOHMERT. Thank you.

Just following along there—and by the way, Mr. Scheck, I see you put the microphone back, and you have witnesses here. If anybody ever accuses you of being a microphone hog, that we have to constantly ask you to pull the microphone and speak into it.

But I sure hope that the majority, the vast majority of the people in law enforcement, judiciary, prosecutors have wanted to get the right guy. I know there are exceptions to that. I have tried law enforcement in my court, because nobody should be above the law, especially law enforcement. But, hopefully, your experience has been that the vast majority do want to get the right guy. Is that fair?

Mr. SCHECK. Well, I think that people have those good intentions, but sometimes, certainly in the early days when we started the Innocence Project, when we would get involved in these cases and you walk in the door and say we want to do a DNA test on a case which could disclose that somebody was wrongly convicted, unfortunately, there was a lot of resistance. Because people make mistakes. Exculpatory evidence is hidden. There has been misconduct on the part of people who tried the case or other law enforcement, or there, frankly, has been misconduct or ineffective assistance on the part of the defense lawyers.

I can't begin to tell you the number of times that I have called defense lawyers and said, guess what? Remember that person you represented 15, 20 years ago? That guy is innocent. And they go, you got to be kidding. You know, and they never even believed for a second what their own client told them about being innocent or did a diligent investigation or did anything to find the evidence of innocence.

So it is a broken system. And it is not that people sit there thinking, gee, I am going to go out and frame somebody tomorrow. It is that when lots of people aren't doing their jobs it breaks down at every stage.

I have no doubt if there were a competent defense attorney in many of these cases that said, oh, I see a mistake by the law enforcement guy here, or something that was missed in the crime lab, and they went to a prosecutor and said, here is the error—you

know, I see this all the time—prosecutor will say, wow, that is a problem. Or the judge will correct it. But the if the defense lawyer's not doing that job, you know, the whole thing can result in a miscarriage of justice. And then it gets real hard to uncover that without people getting defensive and—

Mr. GOHMERT. I understand that. But I guess I was fortunate—but, normally, if a defense attorney came in, we had the prosecutors, and I can think of a number of cases where I said, wow, you are right, must not be the guy. We got to change course here. I mean, that was my experience. The vast majority wanted justice done. But, as a society, we certainly ought to go after those who don't want to see justice done and make sure they get justice.

Mr. SCHECK. What concerns me are the number of cases where the defense attorney was so bad—and, frankly, this happened a lot, happens a lot in Texas, right, because not enough money has been put toward indigent defense.

The Fair Defense Act in Texas is a recent bill that was passed in the legislature. What about all the cases where nobody came forward with the evidence that proved that it was a bad case? You never heard about it as a judge. The prosecutors never heard about it. Because the defense lawyer just never did the job. And we see that too much.

Mr. GOHMERT. I come back to the Chairman, my friend, Chairman Conyers mentioned 837,000 law enforcement. I haven't talked to 837,000 law enforcement, but if I felt like the vast majority of those law enforcement officers or even a significant part of them didn't care about getting the right guy, I would throw up my hands and move. But I just feel like most—my experience is most of the people involved in the justice system still have that still voice that says you don't go after somebody who is innocent. And so I think we all want to get to the same conclusion, where we have a justice system that is just.

I just know how hard some of the law enforcement work. You know how hard. They are really trying to get the right guy. I didn't want them to be painted with a broad brush that is unfair and demeaned the life they have committed to being moral and ethical and trying to do the right thing.

And in those cases where there is just laziness or one problem or another, or lack of funding, then we need to address that so that we continue to move toward a higher and better justice system.

So we appreciate your time. Thank you very much.

Mr. SCOTT. Thank you, and I would like to thank our witnesses for your testimony today.

Members may have additional written questions, which we will forward to you, and ask that you answer as promptly as you can so the answers may be part of the record. The hearing record will remain open for 1 week for the submission of additional materials.

And I would like, without objection, to have written testimony from the Justice Project entered into the record. Any objection?

Without objection, so ordered.

[The information referred to follows:]

THE JUSTICE PROJECT

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Written Statement of
John F. Terzano,
President
Of the
The Justice Project
Submitted to the
Subcommittee on Crime, Terrorism, and Homeland Security
Of the
House Judiciary Committee
September 22, 2009

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to present written testimony on behalf of my organization, The Justice Project, in support of re-authorization of the Innocence Protection Act (IPA). The Justice Project (TJP) is a non-profit, nonpartisan organization dedicated to improving the fairness and accuracy of the criminal justice system. TJP designs and implements national and state-based campaigns involving public education, litigation, and legislation to reform the criminal justice system.

This Subcommittee hearing provides an opportunity to learn about progress and shortfalls in state post-conviction DNA testing laws and procedures since the passage of the IPA. In addition, it provides an opportunity to explain why re-authorization of the IPA is critically important and why the grant program authorized by the legislation needs to be properly administered—to ensure that all individuals wrongfully convicted and incarcerated for crimes they did not commit have the chance to prove their innocence and secure their freedom.

As you know, Mr. Chairman, it took almost five years of hard work by yourself, members of this Subcommittee, respective staffs and a number of interested individuals and organizations, like The Justice Project, to pass the IPA. Passage of the IPA in the closing days of the 108th Congress was a watershed moment because it marked the first time Congress recognized flaws in the administration of capital punishment and the fallibility of the criminal justice system. The Innocent Protection Act created a new chapter in the Federal Criminal Code dealing with post-conviction DNA testing. Among other requirements, the IPA established rules, now codified in the United States Code, for when a court shall order post-conviction DNA testing and when the government can dispose of biological evidence. The IPA also established the Kirk Bloodsworth Post-Conviction DNA Testing Assistance Program, which provides funding to states with post-conviction DNA laws comparable to provisions of the IPA.

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Congress's recognition of the importance of post-conviction DNA testing and the establishment of a mechanism by which federal prisoners could obtain DNA testing spurred a number of states to enact their own post-conviction DNA testing laws. When the IPA was first introduced in 2000, only nine states had post-conviction DNA testing laws.¹ When the IPA passed in October 2004, thirty seven states and the District of Columbia had post-conviction DNA testing laws.² Since then, sixteen of those states have made improvements to the statutes through necessary amendments.³ To date, forty-six states and the District of Columbia now have post-conviction DNA laws.⁴ In Mississippi, legislators recently enacted a post-conviction DNA testing statute with provisions nearly identical to the IPA. The remarkable increase in access to post-conviction DNA testing since the initial introduction and final enactment of the IPA is a testament to the power of Congress and the federal government to influence the states in a very positive way. As a result, the landscape of criminal justice nationwide is vastly improved. By influencing states to adopt their own post-conviction DNA testing laws, passage of the IPA has increased fairness and accuracy in the entire criminal justice system in this country.

Mr. Chairman, while these legislative improvements and the expansion of access to and use of post-conviction DNA testing are remarkable, there is still a critical need to ensure that wrongfully convicted people have access to DNA testing to secure their freedom. Re-authorization of the IPA is important for a host of reasons.

First, the pace of DNA exonerations has not slowed in recent years. At the time the IPA was passed in 2004, approximately 150 people had been exonerated by DNA evidence. To date, that number has risen to 242. It is very likely that innocent people are currently serving time in prison for crimes that took place before the advent of DNA testing or they were denied pre-trial

access to the testing. Re-authorization of the IPA can provide desperately needed funding to help exonerate people who are currently being wrongfully deprived of their livelihoods and liberties.

Second, there are still four states that have not established a right to post-conviction DNA testing⁵ and dozens of states have adopted post-conviction DNA testing laws that fall short of the IPA's original intent. For example, nearly twenty states fail to provide counsel to indigent applicants seeking post-conviction DNA testing as recommended in the IPA.⁶ The complexity of the petition process for DNA testing is quite cumbersome and difficult, even for experienced advocates. Without counsel, most indigent petitioners do not know the full extent of their rights for post-conviction DNA testing and states that do not provide counsel to petitioners create a barrier to seeking truth and achieving justice. Without counsel, indigent petitioners may assume that their time for testing has run out or that DNA samples have been discarded. For an indigent petitioner without counsel, the nominal right to petition for post-conviction DNA testing is practically meaningless.

Third, twelve states still have a statute of limitation in place that precludes innocent people from access to post-conviction DNA testing.⁷ For example, South Carolina limits the time frame for which a petitioner may seek post-conviction DNA testing to "no later than seven years from the date of sentencing."

Fourth, over half the states currently lack evidence preservation requirements that ensure preservation of biological evidence is throughout an incarcerated person's sentence.⁸ The premature loss or destruction of DNA evidence clearly jeopardizes the integrity of the entire criminal justice system. The right to post-conviction DNA testing doesn't exist if states destroy evidence that could prove innocence.

Finally, a handful of states still limit access to post-conviction DNA testing to only certain types of felonies or to individuals facing a sentence of death.⁹ Such a restriction denies access to post-conviction DNA for whole categories of petitioners and contradicts the original intent of the IPA.

States that lack these crucial provisions lack strong post-conviction DNA testing statutes that establish a meaningful access to testing for people trying to prove their innocence. As such, re-authorization of the IPA provides an opportunity to ensure that no person trying to prove their innocence is denied post-conviction DNA access to testing due to a lack of counsel, time limitations, premature destruction of biological evidence, or because they do not carry a sentence of death. Re-authorization of the IPA allows Congress to renew its commitment to a fair and accurate criminal justice system and encourage states to adopt or improve access to post-conviction DNA testing. Historically, the IPA has served as a powerful influence on states and re-authorization of the IPA continues the current momentum.

Through re-authorization of the IPA, Congress must encourage states to establish post-conviction DNA testing statutes that are comparable to Federal procedures by ensuring that the Department of Justice distributes IPA grant funding in the manner Congress originally intended. While states are not required to have statutes that are entirely consistent with Federal procedures to obtain grant funding, it is important to ensure that the original intent of the legislation—which mandates that states have statutes which are “comparable” to federal procedures—is maintained through the proper administration of funding. Historically, there have been inconsistencies between the manner in which funding was distributed by the Department of Justice and the manner in which the IPA mandates that funding be administered. While a number of states with strong post-conviction DNA testing statutes did receive funding from the Department of Justice,

such as Texas, states like Kentucky and Washington also received funding even though both states lack strong evidence preservation requirements. Upon re-authorization of the IPA, Congress must exercise its power and its responsibility to ensure that the Department of Justice provides funding to states for post-conviction DNA testing in a manner consistent with the grant program established by the IPA.

Congress's oversight role is extremely important given the U.S. Supreme Court's recent decision in *District Attorney's Office v. Osborne*, where the Court found that petitioners do not have a constitutional right to post-conviction DNA testing. The Supreme Court's decision means that access to post-conviction DNA testing depends on the willingness of Congress and state legislatures to assure such a right. As noted above, a number of states have statutes that limit access for people seeking post-conviction testing by limiting the time for testing, not requiring preservation of DNA samples, and other obstacles prohibiting access to such testing.

The Supreme Court's decision in *Osborne* may have a negative effect on how states continue to provide for post-conviction DNA testing in that some states may now seek to change their DNA laws to further limit access to testing. By reauthorizing the DNA provisions of the IPA, Congress not only continues to ensure such a right, its positive actions will set the standard for states to follow. Furthermore, ensuring that the Department of Justice provides grants to those states whose post-conviction DNA testing laws are comparable to the requirements of the IPA would fulfill the original intent and the purpose of the Kirk Bloodsworth Post-Conviction DNA Testing Program. Again, Congress' powerful influence over state legislative developments, in addition to the still urgent need for post-conviction DNA testing in every jurisdiction in the nation, requires re-authorization of the IPA. When Congress enacted the IPA in 2004, it demonstrated a strong commitment to a fair and accurate criminal justice system that protects

public safety by convicting the guilty and exonerating the innocent. While our criminal justice system has seen great improvements in the past five years, there is still much work to be done. As such, I urge Congress to reauthorize the DNA testing provisions of this critical piece of legislation.

Mr. Chairman, access to post-conviction DNA testing alone will not eliminate the sources of error in our criminal justice system. The IPA also encourages the need for meaningful reform to target one of the leading causes of wrongful convictions—inadequate defense representation. In *Gideon v. Wainwright* the Supreme Court recognized,

“[T]he assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty... The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’”

Since the enactment of the IPA, the crisis in indigent defense has worsened. In June 2009, Attorney General Eric Holder stated that, “the crisis in indigent defense has not ended.” Already plagued by insufficient funding and resources, the economic crisis has exacerbated the problems with defense representation in both capital and non-capital cases. The problems include excessive caseloads, a debilitating lack of resources and assistance, insufficient compensation for counsel, and unqualified defense attorneys who make critical errors in their representation of indigent defendants facing years of incarceration or a sentence of death.

The history of ineffective legal defense representation has led to a crisis in the accuracy of capital trials. In 2000, a study released by Columbia Law School discovered that 68 percent of death sentences reviewed by state or federal courts over a twenty-three year period were found to have “serious reversible error,” and were sent back for a new guilt or sentencing trial. Of those death sentences that were reversed, seven percent of defendants were found to be innocent of the crime. Incompetent legal defense representation was a leading source of these errors.¹⁰ The

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study documented numerous cases of egregious conduct in which public defense lawyers appeared in court drunk, failed to give opening or closing statements, and even fell asleep during death penalty proceedings.

At the core of this crisis in defense representation is a startling disparity between the resources allocated to the defense and the prosecution in capital cases. Justice Thurgood Marshall wrote in *Wardius v. Oregon* that fairness and reliability in the adversarial system requires a “balance of forces between the accused and the accuser.” For justice to be served, the playing field must be level. While most jurisdictions have qualified and committed public officials such as police officers, detectives, lab analysts, and prosecutors adequately performing their duties to protect public safety, no jurisdiction has a comparable structures and resources in place for the defense. Indeed, Attorney General Holder recently stated,

We know that resources for public defender programs lag far behind other justice system programs – they constitute about three percent of all criminal justice expenditures in our nation’s largest counties.

To have Holder, our country’s top law enforcement official, recognize the extraordinary disparity between the resources afforded to defendants and those to prosecutors and law enforcement is truly remarkable. It demands that a system that allows for such disparity needs to be changed.

The research to date demonstrates that the disparity between indigent defense funding and prosecutor funding is enormous. In 2007, The Justice Project commissioned a study by The Spangenberg Group, a leading research organization on defense representation, to compare indigent defense and prosecution resources in the state of Tennessee. The study found that defense attorneys receive less than half of the financial resources that are available to the prosecution. Even more astonishing is that this disparity does not take into account “in-kind” services provided to the prosecution function from various federal, county, and municipal law

enforcement agencies, and forensic experts. In actual dollars, the defense function in indigent cases received \$56.4 million, while the prosecution function received between \$130 and \$139 million.¹¹ The study also found that in addition to this difference in actual funding, prosecutors received more than four times as many “in-kind” resources from local law enforcement agencies than did indigent defense counsel.¹² The budget shortfalls, excessive caseloads, and cases of egregiously incompetent defense representation in jurisdictions all around the country strongly supports that a funding disparity exists in every state, not just in Tennessee.

This extraordinary disparity between defense and prosecution resources jeopardizes the fairness and accuracy of the criminal justice system. Moreover, this uneven playing field means that even most the most capable and hard-working public defenders and other defense lawyers may not be able to adequately represent and effectively advocate for their clients’ best interest.

The Supreme Court recognized in *Ake vs. Oklahoma* that

A criminal trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Currently, defense attorneys too often lack the basic resources needed to build an effective defense such as the assistance of investigators to find and interview witnesses, the assistance of psychologists and mental health specialists needed to evaluate the defendant, and compensation rates sufficient to cover overhead costs. These same defense attorneys are facing prosecutors who are sufficiently compensated, often have unlimited access to police and investigative assistance, and similar access to state forensic and mental health experts. In an adversarial system of justice that depends on a thorough consideration and questioning of facts by both sides of the case to ensure a reliable verdict, the disparities that exist on this unequal playing field elicits inaccurate verdicts, disproportionate sentences, and wrongful convictions.

When the IPA was first introduced in 2000, the broad bi-partisan sponsors recognized this disparity by establishing a program to provide federal funding for public agencies and non-profit organizations to enhance the availability and competence of counsel in capital cases. The purpose of this program, as originally intended, was to address the structural problems that plague indigent defense—such as lack of independence from the courts, inadequate qualification and performance standards, insufficient resources for investigative and expert assistance, and insufficient training of defense attorneys. Unfortunately, in the time that it took to pass the IPA, the original intent and necessary purpose of these grants was compromised to include providing resources to the prosecution and defense on a fifty-fifty basis.

It makes little sense to authorize funding to assist in the prosecution of capital cases as part of legislation that was designed to increase the fairness and accuracy of the criminal justice system by recognizing and addressing the tremendous disparity between defense and prosecution resources. The spirit and intent of the IPA is to protect innocent individuals from being wrongfully convicted or executed at the hands of a criminal justice system prone to error. One of the leading sources of this error is a disparity between prosecution and defense resources, and this urgent problem can only be addressed through the allocation of additional resources to the defense function. In reauthorizing The Capital Representation Improvement Grant Program, Congress must provide these vital and necessary resources to the defense function, as originally intended, and eliminate the current provisions of the IPA that provide resources for the prosecution in capital cases.

Mr. Chairman, as noted above, passage of the IPA was a watershed moment in Congress's long history of passing laws dealing with the capital punishment system. Not only did Congress recognize flaws in the administration of capital punishment, it provided the means

to take some basic steps to increasing the fairness, accuracy and reliability of the criminal justice system. Re-authorization of the IPA with the necessary and needed improvements and changes recommended will mark another watershed moment and another step toward a fair and just criminal justice system.

¹ Arizona, California, Idaho, Delaware, Illinois, Minnesota, New York, Washington, and Wyoming have post-conviction DNA testing statutes that were established in the year 2000 or earlier.

² Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington, West Virginia, Wyoming have statutes that were enacted prior to enactment of the IPA in October, 2004.

³ Arkansas, Florida, Illinois, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Ohio, Texas, Virginia, Wyoming, Washington made amendments or added provisions to their post-conviction DNA testing statutes after to enactment of the IPA in October, 2004.

⁴ Hawaii, Iowa, Mississippi, North Dakota, Oregon, South Carolina, Utah, Vermont, West Virginia enacted DNA testing laws after to enactment of the IPA in October, 2004.

⁵ Alabama, Alaska, Massachusetts, South Dakota.

⁶ Virginia, Georgia, Idaho, Illinois, Louisiana, Maine, Michigan, Montana, Nevada, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, Delaware have DNA testing statutes that do not provide counsel to indigent applicants seeking testing.

⁷ Delaware, Georgia, Idaho, Maine, Minnesota, New Jersey, Oklahoma, Oregon, Pennsylvania, South Carolina, Vermont, West Virginia place time limits on when petitioners may petition for post-conviction DNA testing.

⁸ Arkansas, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming are lacking provisions that ensure the preservation of biological evidence throughout an incarcerated person's sentence.

⁹ Kentucky and Nevada limit access to post-conviction DNA testing to individuals under a sentence of death.

Georgia, Kansas, Indiana, Maryland, and Oregon limit access to post-conviction DNA testing to crimes or classes of felonies.

¹⁰ James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973 – 1995*, Columbia Law School (June 12, 2000), <http://www2.law.columbia.edu/instructionalservices/liebman/index.html>. (Last visited July 31, 2008).

¹¹ The Spangenberg Group, *Resources of the Prosecution and Indigent Defense Functions in Tennessee* (May 2007) available at http://www.abanet.org/legalservices/sclaid/defender/downloads/TN_CompStudyFINAL_7.30.07.pdf.

¹² *Id.*

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**Resources of the Prosecution and Indigent Defense
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INTRODUCTION

In June 2006, The Spangenberg Group (TSG) contracted with The Justice Project Education Fund and The Tennessee Justice Project to collect data for the creation of a Resource Balance Sheet for a side-by-side comparison of prosecution and defense resources expended in Tennessee. To conduct the comparison, we examined fiscal year 2005 funding information from the District Attorney General's Conference; the Public Defender's Conference; court-appointed counsel fees and expenses maintained by the Director of the Administrative Office of the Courts; additional state government organizations involved in the areas of law, safety and correction; county and local funding for prosecution and defense; federal funds; and in-kind resources available to the prosecution and defense.

The primary source of data used by TSG for calculating fiscal year 2005 expenditures for both prosecution and defense was the *State of Tennessee Budget, Fiscal Year 2006-2007, Volume I: Law, Safety and Corrections*. In addition to containing the 2006-2007 budget, the report contains actual 2004-2005 expenditures for every agency or department in the state relating to law, safety and corrections. The budget report contains two sections. The first section sets out all requests for improvements in the individual agencies' budgets for 2006-2007. The second section sets out the actual expenditures for each agency in 2004-2005, the estimated budget for 2005-2006, the baseline budget for 2006-2007, the requests from the agencies for additional state funds or improvement funds for 2006-2007, and the total recommended budget for each agency for 2006-2007.

In examining the FY 2006-2007 budget of the state of Tennessee, we looked at all expenditures for each agency or sub-agency, but used only the total *actual* expenditures reported from FY 2004-2005 in our calculations.

In Part I of this report, we calculate the actual prosecution expenditures, and then the indigent prosecution expenditures. In doing this, we began with the budget of the District Attorney General Offices and Executive Director for FY 2004-2005. We then looked at the FY 2004-2005 actual expenditures for other law, safety and corrections agencies reported in the budget book. For the purposes of this report, we included those agencies or sub-agencies that devote all or a portion of their work to the prosecution function. The expenditures of most law, safety and corrections line items were reduced according to the estimated percentage of work-related time and expenses pertaining to the prosecution function. However, it was not possible to calculate the precise percentage of actual expenditures devoted to the prosecution or defense function for each agency or sub-agency in 2004-2005. In some instances we were able to estimate the percentage of the line item attributable to the prosecution function after contacting state officials from the agency or sub-agency indicated. In other instances, we assumed a percentage of the actual expenditures for the budget item attributable to the prosecution function based upon information contained in the budget book and our 30 years of experience dealing with other criminal court expenditures in over half of the states in the country.

For purposes of comparing total prosecution and defense resources, we then reduced the grand total of prosecution expenditures according to a percentage that could be fairly attributable to the prosecution of *indigent* cases - that is, cases handled by public defenders or court-

appointed counsel only, excluding those handled by private attorneys. The Administrative Office of the Courts has indicated that it does not track the percentage of all indigent cases in the state, nor is there another source for such data. However, in our knowledge and experience in studying both indigency rates and indigent defense systems across the country, we have found that in a number of jurisdictions, the average rate of indigency frequently ranges between 75% and 80%.

In Part II of this report, we calculate the actual expenditures for the indigent defense function. In doing so, we began with the actual expenditures of the District Public Defender's Conference and the Executive Director for FY 2004-2005. We included the Indigent Defense Fund of the Administrative Office of the Courts which funds assigned counsel in conflict cases as well as expert, investigative and other support services for the defense. To these state expenditures, we added other federal, county and local resources. Because all defense expenditures are attributable to the indigent defense function, 100% was used for comparison with the 75-80% prosecution expenditures.

Finally, in Part III we make the bottom-line comparison between indigent prosecution and defense funding, and we provide additional evidence in support of our conclusion. First, we calculate the attorney unit cost for both the indigent prosecution and indigent defense functions and compare the results. Second, we cite the disparity in need of additional attorney positions between the prosecution and the defense according to the Comptroller's latest updates of the prosecution and defense case-weighting studies.

PART I:

FY 2005 EXPENDITURES FOR THE PROSECUTION FUNCTION

I. State Funds and Expenses for the Prosecution Function

A. District Attorneys General Conference

There are 31 District Attorneys General, elected in each of the state's judicial districts, who serve as the state's prosecutors for all state criminal violations.

In addition, they prosecute all criminal cases in the federal courts that are removed from a state court and give opinions to county officials on criminal law relating to their office. Further, district attorneys and their assistants consult with and advise law enforcement agencies on cases or investigations within their district. In 19 judicial districts, the district attorney has contracted with the Department of Human Services to enforce court-ordered child support obligations through the IV-D Child Support Enforcement Program.¹

Because the function of the District Attorneys General is the prosecution of cases, we have attributed the full line item expenditures to the prosecution function. As with all other prosecution line items, the percentage of indigent cases will be applied later to the grand total of prosecution expenditures.

Table 1:
District Attorney General Conference's Annual Appropriation for 2004-2005

Line Item	Total Expenditure for Line Item	Percent of Expenditure to Prosecution Function	Total Expenditure Allocated for Prosecution Function
304.01 - District Attorney General	\$53,188,200	100%	\$53,188,200
304.05 - District Attorney General Conference	\$361,500	100%	\$361,500
304.10 - Executive Director	\$1,864,500	100%	\$1,864,500
Department Total	\$55,414,200		\$55,414,200

B. Other State Expenditures Attributable to District Attorneys General from the Law, Safety and Corrections Budget for FY 2005

In addition to the direct appropriations set out in Table 1, the District Attorneys General receive additional state funds either directly or indirectly from a number of other state agencies, including the following:

¹ State of Tennessee Budget, Fiscal Year 2006-2007, Volume 1, p. B-197.

1. Attorney General and Reporter

The Attorney General and Reporter is Tennessee's chief legal officer. The responsibilities related to the prosecution function include prosecuting criminal cases in the appellate courts and providing departments, agencies and the General Assembly with legal advice. The Attorney General under Tennessee law represents the state in all criminal appeals whereas the appellate function for indigent defendants is provided by the district public defenders and assigned counsel. The Attorney General also represents the state in criminal appellate matters in federal court.

It is estimated that 14 percent of the Attorney General and Reporter budget statewide in 2004-2005 was attributable to the prosecution function.² The total expenditure amount allocated to the Attorney General and Reporter in FY 2005 was \$24,991,900. Therefore, the funds allocated to the prosecution function from the Attorney General and Reporter totaled **\$3,498,866.**³

2. Board of Probation and Parole

The Board of Probation and Parole manages the release and supervision of adult felons and conducts parole hearings in state and local prisons and jails. The Field Services Division of the board has eight district offices and 37 field offices. This division is responsible for writing pre-sentence investigation reports for use by the court and the board in sentencing considerations. Probation/parole officers in the division "report violations of probation and parole to the court and the Board, and may recommend what action should be imposed." In addition, they are responsible for "presenting facts and evidence to the court and board at revocation hearings as well as other formal hearings, conducting home and employment visits, monitoring community service work, providing intensive supervision... and locating absconders."⁴

It is estimated that 5 percent of the Probation and Parole Services line item is attributable to the prosecution function; this work includes preparing pre-sentence investigation reports, investigating probationers/parolees, and preparing for and testifying at revocation hearings and other hearings. Since the total allocations for the Probation and Parole Services were \$50,759,500, we have estimated that **\$2,537,975** should be charged against the state's prosecution function.

² We were informed by officials in the Attorney General's Office that approximately 25 attorneys are assigned to criminal matters, which amounts to approximately 14% of the office's budget for line item 303.01 in FY 2005.

³ The Attorney General's Office handles all appeals for the prosecutor while the Public Defender's Office handles all of its own appeals. Therefore, we have included the estimated time that attorneys in the Attorney General's Office work on an appeal to the prosecution function.

⁴ Tennessee Board of Probation and Parole, Field Services Division, Statutory Authority and Responsibilities; see http://www2.Tennessee.gov/bop/bop_fs_SAR.htm.

3. Tennessee Bureau of Investigation

“The Tennessee Bureau of Investigation (TBI) is responsible for assisting the District Attorneys General and local law enforcement agencies in the investigation and prosecution of criminal offenses.” Each of the five divisions of TBI are either directly involved in the investigation and prosecution of crime or directly support those efforts. The Criminal Investigation division provides “expertise in investigative support to district attorneys and state and local law enforcement agencies” and conducts independent investigations of misconduct and fraud. “The Drug Investigations division has original jurisdiction to investigate violations of Tennessee’s drug control laws.” The Forensic Services division “provides forensic examinations for the law enforcement community and medical examiners statewide.” “The Information Systems division provides support to investigative activities through records management, systems operations, fingerprint identification, and uniform crime reporting.” Finally, “[t]he Administrative Services division provides overall direction and support for the bureau.”⁵

Given that all divisions of TBI are involved in investigating and prosecuting crime or supporting such work, all **\$50,546,200** of TBI’s budget is attributable to the prosecution function.

4. Department of Safety

The Department of Safety enforces the laws governing the use of state and federal roads, which includes criminal investigation. The department also provides training assistance to local law enforcement officers. The Administrative Support Services division is responsible for overall administration of the department and includes a legal section that provides general legal counsel and administers asset forfeiture cases stemming from the Drug Control Act. The Motor Vehicle Operations unit provides support to the personnel who investigate violations of motor vehicle laws. The Tennessee Highway Patrol enforces all motor vehicle and driver license laws and investigates accidents. The Criminal Investigations Division (CID) investigates and prosecutes violations of Tennessee’s auto theft laws, and provides investigative support in felony cases. The Technical Services division maintains general records and data for the Department of Safety.

Table 2 provides the total FY 2005 expenditures for sub-agencies of the Department of Public Safety and the percentage of each sub-agency to which we have allocated prosecution funding. When taking all of the sub-agencies of the Department of Safety into account, the total amount allocated to the prosecution function from the Department of Safety is **\$18,828,970**.

5. Governor’s Highway Safety Office

The Governor’s Highway Safety Office distributed a total of **\$2,551,651** in grants in FY 2005 to eighteen Judicial District Attorney Generals’ Offices from the National Highway Traffic Safety Administration. The grant awards were made to provide resources that allow drunken driving prosecutors to decrease the number of dismissed or reduced DUI charges. Therefore, all of these funds are attributable to the prosecution function.

⁵ State of Tennessee Budget, Fiscal Year 2006-2007, Volume 1, p. B-221.

On this and the following page, Table 2 sets out the FY 2005 state agency and sub-agency spending with ten line items that we believe provided direct or indirect services to the prosecution function.

Table 2: Other State 2004-2005 Funds Attributable to the Prosecution Function

Attorney General and Reporter 2004-2005 Funds Attributable to the Prosecution Function			
Line Item	Total Expenditure for Line Item	Percent of Expenditure to Prosecution Function	Total Expenditure Allocated for Prosecution Function
303.01 Attorney General and Reporter	\$24,991,900	14%	\$3,498,866
<i>Subtotal</i>			<i>\$3,498,866</i>

Board of Probation and Parole 2004-2005 Funds Attributable to the Prosecution Function			
Line Item	Total Expenditure for Line Item	Percent of Expenditure to Prosecution Function	Total Expenditure Allocated for Prosecution Function
324.02 - Probation and Parole Services	\$50,759,500	5%	\$2,537,975
<i>Subtotal</i>			<i>\$2,537,975</i>

Tennessee Bureau of Investigation 2004-2005 Funds Attributable to the Prosecution Function			
Line Item	Total Expenditure for Line Item	Percent of Expenditure to Prosecution Function	Total Expenditure Allocated for Prosecution Function
348.00 - Tennessee Bureau of Investigation	\$50,546,200	100%	\$50,546,200
<i>Subtotal</i>			<i>\$50,546,200</i>

Table 2 (continued)

Department of Safety 2004-2005 Funds Attributable to the Prosecution Function			
Line Item	Total Expenditure for Line Item	Percent of Expenditure to Prosecution Function	Total Expenditure Allocated for Prosecution Function
Administrative Support Services			
349.01 - Administration	\$6,515,500	10%	\$651,550
349.07 - Motor Vehicle Operations	\$7,382,100	10%	\$738,210
Enforcement			
349.03 - Highway Patrol	\$82,427,600	20%	\$16,485,520
349.06 - Auto Theft Investigations	\$76,700	10%	\$7,670
349.14 - C.I.D. Anti-Theft Unit	\$688,700	10%	\$68,870
Technical Services			
349.13 - Technical Services	\$8,771,500	10%	\$877,150
<i>Subtotal</i>			\$18,828,970
Governor's Highway Safety Office 2004-2005 Funds Attributable to the Prosecution Function			
Line Item	Total Expenditure for Line Item	Percent of Expenditure to Prosecution Function	Total Expenditure Allocated for Prosecution Function
National Highway Traffic Safety Administration Grant Allocation	\$2,551,651		\$2,551,651
<i>Subtotal</i>			\$2,551,651
Grand Total			\$77,963,662

II. Federal, County and City Funds Allocated to the Prosecution Function

In determining the funding set forth in this section, we reviewed reports by the Comptroller. We reviewed the *Study of Funds Outside the State Accounting System Available to the Administrative Office of the Courts, the District Attorneys General, and the District Public Defenders* (Audit of Non-State Funds). This study is conducted annually by the Office of the Comptroller of the Treasury, Division of County Audit and Office of Research and the Office of Legislative Budget Analysis and is reported to the Office of Finance Ways and Means Committee. We also reviewed the Comptroller's *Review of Funds Administered by District Attorneys General and Judicial District Drug Task Forces, First Through Thirty-First Judicial Districts for FY 2005*.

Chapter 464 of the Public Acts of 2001 directs the Office of the Comptroller of the Treasury and the Office of Legislative Budget Analysis to study the issue of any funds maintained by judges, public defenders or district attorneys outside the state accounting system. Specifically, the mandate states:

From funds appropriated to the Office of the Comptroller of the Treasury and the Office of Legislative Budget Analysis, such offices are directed to study the issue of funds maintained outside of the state accounting system that the Administrative Office of the Courts, the District Attorney Generals Conference, and the District Public Defenders Conference, do not report to the Senate House Finance Ways and Means Committee, as to the following matters:

1. The source of any funds maintained outside of the state's public accounting system;
2. The disposition of such funds;
3. The statutory basis for disposition of such funds; and
4. Accountability controls that are in place or are needed with respect to such funds.

For several years, the auditor has raised issues regarding frequent failure to place non-state funds within the state accounting system as required by law.

The recent Audit of Non-State Funds found that "some local governments appropriated and expended general funds of the local government to enhance operation of state court judges, district attorneys general, and district public defenders. District attorneys general also have funds available to spend at their sole discretion for the operation of their offices."

The study also revealed the following key issues:

1. In some instances, state court judges use personal funds to establish petty cash accounts.
2. The salaries of some state employees in the Office of the District Attorney General were supplemented with local funds appropriated by the local legislative body and with funds available locally to the District Attorneys General to be used at their discretion. Also, some employees' salaries in the Office of District Public Defenders were supplemented with local funds appropriated by the local legislative body. These supplements resulted in state employees being compensated at a salary higher than the salary provided by the state for that position. In some instances, local government fully funded employees' salaries, and those employees are considered county employees.
3. Salary supplements paid to state employees with local funds were not uniformly reported to the Tennessee Consolidated Retirement System.
4. Local funds were provided to state employees for travel when state funds were not available for that purpose, and in some instances exceeded state travel regulations.
5. Funds expended locally for the state court judges, district attorneys general, and public defenders were not actively monitored by the Administrative Office of the Courts, the District Attorneys General Conference, and the District Public Defenders Conference, respectively, but are subject to audit by the Comptroller of the Treasury.

Funds available to state court judges, district attorneys general, and district public defenders that are not expended to their administrative bodies and conferences and are not on

that state's accounting system raise serious concerns for accountability. The funds not on the state's accounting system are audited; however, there is no system in place to provide legislators with a clear and total picture of the staffing and operating needs of the courts, the district attorneys and public defenders.

A number of federal, county and city funds are allocated to the prosecution function each year. Below we describe portions of the auditor's report for FY 2005 that provide information on the distribution of federal, county and city funds allocated to prosecution function.

A. Funds Administered by District Attorneys General

1. District Attorney General Fund

The District Attorney General Fund is used primarily to account for fees received from the Fraud and Economic Crimes Prosecution Act of 1984. In addition, this fund is also used to account for other sources of revenues received by the District Attorneys General, such as investment income, miscellaneous refunds, copy fees, contributions, proceeds from confiscated property, and other local revenues. The revenue from the District Attorney General Fund for FY 2005 totaled **\$1,161,040**.

2. Drug Task Force Fund

Some judicial districts have established multi-jurisdictional drug task forces under the leadership of the District Attorneys General. These drug task forces were created by contract between the participating district attorneys general, and city and county governments, and approved by their respective legislative bodies. Drug Task Force funds are to be deposited with the county trustee in each judicial district, and county trustees credit these funds to a Judicial District Drug Fund. The total funding received by the District Attorneys General from the Drug Task Force Fund for FY 2005 was **\$13,295,009**.

3. Federal Asset Forfeiture Fund

Under the United States Department of Justice Comprehensive Crime Control Act of 1984, the Office of the U.S. Attorney General has the authority to share federally forfeited property with cooperating state and local law enforcement agencies. The purpose of this Act is to punish and deter criminal activity by depriving criminals of property used for or acquired through illegal activities; to enhance cooperation among federal, state, and local law enforcement agencies through equitable sharing of assets recovered through the program; and to procure revenues to enhance forfeitures and strengthen law enforcement. The Offices of the District Attorney General in the Thirtieth Judicial District and the Twentieth Judicial District are participating in the forfeiture program. The total revenue received from this fund by the District Attorneys General was **\$127,934** in FY 2005.

4. Metro/County Appropriations Fund

This consists of funds appropriated by the counties and cities in the Twenty-Third Judicial District. The revenue generated from this fund was **\$482,649** in FY 2005.

5. Mediation Services Fund

The Mediation Services Fund consists of funds received from a one dollar litigation tax that is assessed on all cases in the General Sessions and Juvenile Courts in Davidson County and other appropriations received by the Twentieth Judicial District for the support and operation of victim-offender mediation centers. The District Attorneys General received **\$57,820** from the Mediation Services Fund in FY 2005.

Table 3 below summarizes the total funds received by the District Attorneys General from the sources listed above.

Funds	Revenue
General Fund	\$1,161,040
Drug Task Force Fund	\$13,295,009
Federal Asset Forfeiture	\$127,934
Metro/County Appropriations	\$482,649
Mediation Services	\$57,820
Other Funds	\$278,451
Total	\$15,402,903

B. Other Funds Available to District Attorneys General

The District Attorneys General have two additional funds available to them. *The FY 2006-2007 Tennessee State Budget Office of State Comptroller, Audit of Non-State Funds for FY 2005*, shows Attorney General reserve funds (as of 6/30/05) totaling **\$12,026,756**. These reserve funds are end-of-the-year non-state funds that remain available for each of the 31 District Attorneys General Offices. The same Audit of Non-State Funds also shows an additional **\$13,415,159** in non-state (federal, county and local) appropriations and states as follows: In addition to the above-noted revenues, some counties and cities appropriated and "expended funds for the benefit of the judicial districts, primarily for salaries." The total amount of these county/city funds for FY 2005 amounted to **\$25,441,915** statewide.

III. Total FY 2005 Funds for Prosecution in Tennessee

Together, state and non-state funds for the prosecution in Tennessee for FY 2005 are set out in Table 4:

Funds	Revenue
State Appropriations (Table 1)	\$55,414,200
Other State Prosecution Funds (Table 2)	\$77,963,662
Funds Administered by District Attorneys General (Table 3)	\$15,402,903
Non-State Reserve Funds	\$12,026,756
Other Non-State Funds	\$13,415,159
Total	\$174,222,680

The total figure for prosecution funding is a conservative one for two reasons. First, it does not include in-kind resources (discussed below). Second, in some cases, we excluded from Other State Prosecution Funds (Table 2) state agencies for which we were unable to confirm a specific function relevant to the prosecution of cases, although it appears such function may exist. For instance, the Department of Correction (DOC) has a State Prosecutions line item. According to the budget book, State Prosecutions "provides payments to counties for other correctional expenditures, such as witness fees, criminal court costs and transportation, jury boarding, and medical costs for convicted felons."⁶ While the budget item for DOC State Prosecutions is \$108,810,400, no portion of this was used in this report.

Finally, in order to determine the total prosecution funding in indigent cases, Table 5 applies the average range of 75%-80% for the indigency rate to the grand total of prosecution funding in Table 4 from all sources.

Prosecution Funding	Indigency Rate	Indigent Prosecution Funding
\$174,222,680	75%	\$130,667,010
\$174,222,680	80%	\$139,378,144
Total Indigent Prosecution Funding Range: \$130 - \$139 Million		

IV. In-Kind Prosecution Resources

In addition to the state and non-state appropriated funds available to the prosecution function in Tennessee, each District Attorneys General Office in the state has available to it the resources of state, county and local law enforcement agencies to assist in the investigation and preparation of the prosecution's case, including the investigation of witnesses, collection of evidence, and use of state experts. These resources are provided by each law enforcement agency to the District Attorneys General at no direct cost to them. In addition to these state and local resources, all District Attorneys General also have the in-kind resources of the federal

⁶ *Id.* at B-207.

government, including the services of federal law enforcement agencies and federal crime labs. While it is not possible to allocate specific dollar amounts to these federal state, county and local in-kind services, it is safe to state that they raise the FY 2005 appropriated figure to well in excess of the \$174.2 million calculated in Table 4.

PART 2:**FY 2005 EXPENDITURES FOR THE INDIGENT DEFENSE FUNCTION****I. District Public Defenders Conference**

In each of Tennessee's 31 judicial districts, the voters publicly elect a public defender to serve their district. Each of these judicial districts has an independent public defender office. The state funds these public defender offices with the exception of Shelby County (Memphis) and Davidson County (Nashville), which have their own separate public defender offices funded through a combination of state and local monies. Public defenders are appointed in any indigent criminal prosecution or juvenile delinquency proceeding involving the possible deprivation of liberty, or in any habeas corpus or other post-conviction proceeding.

Each elected public defender participates in the Tennessee District Public Defenders Conference. The Conference helps public defenders across the state discharge their official duties and assists with the enactment of laws and rules of procedure necessary for the effective administration of justice. The Executive Committee of the District Public Defenders Conference is the decision-making body of the Conference.

The Office of the Executive Director of the Conference is the central administrative office for all but two of the district public defenders (Nashville and Memphis). The Executive Director is responsible for budgeting, payroll, purchasing, personnel, and administration of all fiscal matters pertaining to the operation of district public defender offices. Other duties include coordinating defense efforts of the various district public defenders, development of training programs, and maintaining liaison with various state government agencies. The Executive Director is elected by the district public defenders for a four-year term.

One hundred percent of the Public Defenders Conference 2004-2005 state budget of \$30,438,300 was attributable to the defense function. These funds also include the budget of the Executive Director of the Conference and state funds provided to the Shelby and Davidson public defender program.

II. Office of the Post-Conviction Defender

In addition to the District Public Defenders Conference, Tennessee has an Office of the Post-Conviction Defender which was established in 1995. The commission oversees the budget for, and appoints the head of, the statewide Post-Conviction Defender Office that is responsible for representing indigent persons convicted and sentenced to death in collateral actions and some direct appeals in state court. "The office also provides continuing legal education and consulting services to attorneys representing indigent defendants in capital cases and recruiting qualified members of the private bar who are willing to provide representation in state death penalty proceedings."⁷

One hundred percent of the 2004-2005 state Office of the Post-Conviction Defender

⁷ State of Tennessee Budget, Fiscal Year 2006-2007, Volume 1, pg. B-201.

budget of \$1,176,600 was attributable to the defense function.

Table 6 sets out the total FY 2005 state appropriation for the District Public Defenders Conference and the Office of the Post-Conviction Defender.

Table 6: FY 2005 District Public Defenders Conference and Post-Conviction Defender Appropriations	
<i>District Public Defenders Conference</i>	
Line Item	Expenditure
306.01 - District Public Defenders	\$25,176,100
306.03 - Executive Director of the Public Defenders Conference	\$939,800
306.10 - Shelby County Public Defender	\$2,840,400
306.12 Davidson County Public Defender	\$1,482,000
306.00 - Department Total	\$30,438,300
<i>Office of the Post-Conviction Defender</i>	
Line Item	Expenditure
308.00 - Office of the Post-Conviction Defender	\$1,176,600
Total	\$31,614,900

III. Assigned Counsel Fees and Expenses

From a fund often referred to as the Indigent Defense Fund (IDF), the Administrative Office of the Courts (AOC) pays for the compensation of court-appointed private counsel and for the costs of necessary supporting defense services, such as investigative and forensic expert services, as authorized by the court. To the extent expenses for the same type of supporting defense services are not covered by their own budget, public defender attorneys also draw from these funds for the same type of supporting defense services. The 2005 Executive Secretary to the Supreme Court's Fees and Expenses for Court-Appointed Counsel amounted to \$18,728,784 in FY 2005; however, \$5,175,940 of these funds involved payments to court-appointed guardian ad litem, termination of parental rights, and abuse and neglect cases. Because the resource comparison in this study is limited to adult criminal and juvenile delinquency cases, the result was an expenditure of \$13,552,844 for criminal cases in FY 2005.

IV. Non-State Public Defender Resources

A. 75 Percent of Prosecution's Local Funding Increase

According to the Tennessee Code Annotated:

From and after July 1, 1992, any increase in local funding for positions or office expense for the district attorney general shall be accompanied by an increase in funding of seventy-five percent (75%) to the office of the public defender in such district for the purpose of indigent criminal defense.⁸

⁸ TENN. CODE ANN. § 16-2-518 (1992).

Each judicial district was required to report a baseline figure for each District Attorney General Office as of 1992 for the purposes of calculating annual increases. It has been reported to us that for public defenders to obtain a funding increase of 75 percent of a district attorney general office's local funding, the public defender must obtain these additional funds from the county by applying to the county legislative body. At the present time, we are only aware of three Public Defender Offices that are receiving these funds: Knox County, which receives \$1,220,502; Hamilton County, which receives \$272,000; and Shelby County, which receives \$304,677, for a total of \$1,797,179.

B. \$12.50 Local Assessment on Criminal Prosecutions

There is an additional statute that provides for non-state general fund appropriation for the district public defender offices. Tennessee Code Annotated § 40-14-210 allows each county to supplement the funds of the district public defender offices by assessing a \$12.50 fee on every misdemeanor and felony prosecution. The money is collected by the courts in the county, and by vote of the county legislature disbursed to the county public defender. However, as Table 7 shows, not all District Public Defender Offices receive these funds. The total amount generated from the assessments is \$1,248,563 for FY 2005.

District	2005 Collection
District 5	\$75,000
District 6	\$220,000
District 7	\$12,000
District 8	\$62,534
District 13	\$118,061
District 15	\$182,492
District 19	\$165,630
District 20	\$151,700
District 22	\$55,645
District 30	\$205,501
Total	\$1,248,563

C. Other District and Local Government Funding

District and local governments can also contribute additional funds to the public defender offices in their jurisdiction, but it is unclear if any public defender offices across the state receive such funds. Again, the Knoxville District Public Defender Office receives local contributions. In addition, both the Davidson and Shelby Public Defender Offices receive a large annual appropriation from their district governments. Davidson County received \$3,352,000 and Shelby County received \$4,834,000 in FY 2005 totaling \$8,186,000.

Total statewide public defender and assigned counsel resources for FY 2005 from state, county and local funds are set out in Table 8.

Funds	Revenue
Total District Public Defender's Conference and Post-Conviction Defender Appropriations	\$31,614,900
Private Assigned Counsel Fees and Expenses (State)	\$13,552,844
75% District Attorney Yearly Increase	\$1,797,179
\$12.50 Local Assessment on Criminal Prosecution	\$1,248,563
Davidson and Shelby District Appropriations	\$8,186,000
Federal Grant Monies ⁹	\$14,230
Total	\$56,413,716

IV. In-Kind Public Defender Resources

There is no comparison between the in-kind services provided to prosecution and indigent defense. The only in-kind resources that we could find for indigent defense programs and court-appointed attorneys were negligible, consisting of some small amount of space, telephone, and other miscellaneous expenses provided by a few counties for indigent defense.

⁹ The Shelby County Public Defender Office received a federal grant in FY 2005.

PART 3:**CONCLUSION AND ADDITIONAL EVIDENCE****I. Bottom-Line Comparison**

In studying the FY 2005 funding from all sources appropriated to both the prosecution and the defense through both direct and indirect appropriations, and comparing that portion that is attributable to indigent cases, we find \$130 – 139 million available to the prosecution function, compared to \$56.4 million available for indigent defense. Therefore, indigent prosecution funding is between two and two-and-a-half times greater than indigent defense funding. In addition, this comparison does not factor in the additional resources that are provided to the prosecution in the form of federal, state, county, and local in-kind services that we believe well exceed the dollar amount cited.

II. Additional Evidence in Support of Findings

In addition to the bottom-line comparison of total FY 2005 budget expenditures, below we cite two additional comparisons that bolster our findings. First, we calculate the indigent unit cost per prosecuting attorney and public defender, using funding from all sources and statewide attorney positions. Second, we cite the great disparity between the prosecution and defense in the need for additional attorney positions, as reported recently by the Comptroller's case-weighting updates.

A. Attorney Unit Cost

The Tennessee General Assembly created the District Public Defenders Conference in 1989. The state legislature relied on several different mechanisms for determining the number of district public defenders needed, but staffing was never based upon the caseload or workload of the public defenders. When the conference was first created, a statutory provision required that public defender offices receive half the number of state-funded staff attorney positions that were allocated in the district attorney offices in their respective districts. This ratio was subsequently modified so that public defender offices would receive attorney positions equivalent to 75 percent of those provided to the district attorney offices. However, the district attorneys successfully lobbied for another change to the statutory scheme with the result that public defenders are now entitled to 75 percent of only *locally* funded positions provided by the district attorneys. As we stated earlier, very few counties provide these additional funds for public defenders throughout the state.

In an effort to determine the workload needs and devise a solid workload standard among public defenders, prosecutors, and judges, the Tennessee legislature provided funds for a quantitative case-weighting study of each of the three agencies in 1998. In 1999, the National Center for State Courts, The Spangenberg Group, and the American Prosecutor's Research Institute (APRI) joined together to conduct the case-weighting study in Tennessee under the direction of the Office of the Comptroller. After completion of the study, in September/October

of 1999, APRI presented a paper that noted the variety of funding sources available to the prosecution in Tennessee:

Many of the offices of the District Attorney General have been successful in securing funding from sources other than the state appropriation such as municipal and county funding, or state and federal grants. Nearly half of the existing assistant positions in three urban districts are funded by non-state funds.

This statement bolsters our findings in the current study (some eight years later) comparing the limited resources of public defenders to those of the prosecutors in Tennessee.

Following the completion of the case-weighting study, the legislature passed a statute that requires courts, public defenders, and district attorneys to determine workload based upon a common definition of case. After accepting the case-weighting study, the legislature required that the Comptroller of the Treasury's Office of Research perform an annual update of the results of the 1999 study to determine what progress had been made and what problems continued to exist.

In February 2007, the Comptroller of the Treasury updated the 1999 reports as mandated by the Tennessee legislature, producing *FY 2005-2006: Tennessee District Attorney Weighted Caseload Study Update* and *FY 2005-2006: Tennessee Weighted Caseload Study Update, District Public Defenders*. At the time that the reports were updated, there were a total of 425 full-time district attorneys and assistant district attorneys in Tennessee among the 31 judicial districts. According to the Comptroller, of these 425 positions, 291 are assistant district attorney (ADA) positions funded by direct state appropriation and 103 full-time ADA positions are locally funded; 31 elected district attorney (DA) positions are state funded. In addition to these 425 positions supported by state and local funds, a footnote in the Comptroller's report indicates that another 34 attorneys are funded by federal grants. Therefore, the total number of district attorneys and assistant district attorneys in Tennessee at the time of the study was **459**.

As we calculated in Table 4 of this report, the total funds from all sources available to the district attorneys in FY 2005 was \$174,222,680. In Table 5, we multiplied this figure by 75 and 80 percent to provide a range of funding for the prosecution of indigent cases only, and this produced a range of \$130,667,010 to \$139,378,144. In Table 9 below, using the total figures of indigent prosecution funding, we calculated an annual cost for each full-time prosecutor in Tennessee handling indigent cases. First, we multiplied the total number of full-time district attorneys and assistant district attorneys from the FY 2005-2006 Comptroller's report, 459, by the indigency rates of 75 percent and 80 percent. This produced figures of 344 attorneys and 367 attorneys, respectively. We then divided these figures into the respective shares of indigent prosecution funding to produce two estimates for the cost of one indigent prosecuting attorney unit – that is, the amount of total funding provided from all sources per single prosecuting attorney position. This produced two figures for indigent prosecution attorney unit cost. As displayed in Table 9, the attorney unit cost is nearly equivalent at 75 percent and 80 percent and produces an approximate cost of **\$379,800**.

		@ 75% Indigency	@ 80% Indigency
Total Prosecution Funding	\$174,222,680	\$130,667,010	\$139,378,144
Total DA/ADA Positions	459	344	367
Positions/Funding =			
Total Attorney Unit Cost		\$379,846	\$379,777

We then examined equivalent Comptroller's FY 2005-2006 case-weighting report for the public defender. The auditor reported a total of 309 full-time public defender attorneys from all funding sources in the state, including those attorneys who filled investigator positions. We divided the 309 full-time attorney positions into the total resources available to public defense from all sources for FY 2005, or \$56,413,716. As displayed in Table 10, this produced a public defender unit cost of **\$182,569**. It should be noted that in order to equally compare the prosecution and defense unit costs, we included assigned counsel (conflict) funding in the total indigent defender figure even though such funds are employed almost entirely for private court-appointed counsel.

Total Indigent Defense Funding	\$56,413,716
Total Public Defender Positions	309
Positions/Funding =	
Total Attorney Unit Cost	\$182,569

Thus, the attorney unit cost for indigent prosecution is just over double that of the attorney unit cost for indigent defense.

B. Attorney Positions Needed

Finally, the Comptroller's latest updates of the case-weighting reports for the prosecution and defense indicate that statewide, in order to meet the standards of the original case-weighting study, district attorneys needed an additional 22 attorney positions while public defenders needed an additional 122.8 attorney positions.

Mr. SCOTT. Without objection, the Subcommittee stands adjourned. Thank you very much.
[Whereupon, at 4:18 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

H.R. 5107, THE "JUSTICE FOR ALL ACT OF 2004"

PUBLIC LAW 108-405—OCT. 30, 2004

JUSTICE FOR ALL ACT OF 2004

Public Law 108-405
108th Congress

An Act

To protect crime victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of Federal, State, and local crime laboratories, to increase research and development of new DNA testing technologies, to develop new training programs regarding the collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in State capital cases, and for other purposes.

Oct. 30, 2004
[H.R. 5107]

Justice for All
Act of 2004.

42 USC 13701
note.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Justice for All Act of 2004”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

**TITLE I—SCOTT CAMPBELL, STEPHANIE ROPER, WENDY PRESTON,
LOUARNA GILLIS, AND NILA LYNN CRIME VICTIMS' RIGHTS ACT**

Sec. 101. Short title.

Sec. 102. Crime victims' rights.

Sec. 103. Increased resources for enforcement of crime victims' rights.

Sec. 104. Reports.

TITLE II—DEBBIE SMITH ACT OF 2004

Sec. 201. Short title.

Sec. 202. Debbie Smith DNA Backlog Grant Program.

Sec. 203. Expansion of Combined DNA Index System.

Sec. 204. Tolling of statute of limitations.

Sec. 205. Legal assistance for victims of violence.

Sec. 206. Ensuring private laboratory assistance in eliminating DNA backlog.

TITLE III—DNA SEXUAL ASSAULT JUSTICE ACT OF 2004

Sec. 301. Short title.

Sec. 302. Ensuring public crime laboratory compliance with Federal standards.

Sec. 303. DNA training and education for law enforcement, correctional personnel, and court officers.

Sec. 304. Sexual assault forensic exam program grants.

Sec. 305. DNA research and development.

Sec. 306. National Forensic Science Commission.

Sec. 307. FBI DNA programs.

Sec. 308. DNA identification of missing persons.

Sec. 309. Enhanced criminal penalties for unauthorized disclosure or use of DNA information.

Sec. 310. Tribal coalition grants.

Sec. 311. Expansion of Paul Coverdell Forensic Sciences Improvement Grant Program.

Sec. 312. Report to Congress.

TITLE IV—INNOCENCE PROTECTION ACT OF 2004

Sec. 401. Short title.

Subtitle A—Exonerating the innocent through DNA testing

- Sec. 411. Federal post-conviction DNA testing.
 Sec. 412. Kirk Bloodsworth Post-Conviction DNA Testing Grant Program.
 Sec. 413. Incentive grants to States to ensure consideration of claims of actual innocence.

Subtitle B—Improving the quality of representation in State capital cases

- Sec. 421. Capital representation improvement grants.
 Sec. 422. Capital prosecution improvement grants.
 Sec. 423. Applications.
 Sec. 424. State reports.
 Sec. 425. Evaluations by Inspector General and administrative remedies.
 Sec. 426. Authorization of appropriations.

Subtitle C—Compensation for the wrongfully convicted

- Sec. 431. Increased compensation in Federal cases for the wrongfully convicted.
 Sec. 432. Sense of Congress regarding compensation in State death penalty cases.

**TITLE I—SCOTT CAMPBELL, STEPHANIE
 ROPER, WENDY PRESTON, LOUARNA
 GILLIS, AND NILA LYNN CRIME VIC-
 TIMS' RIGHTS ACT**

Scott Campbell,
 Stephanie Roper,
 Wendy Preston,
 Louarna Gillis,
 and Nila Lynn
 Crime Victims'
 Rights Act.

SEC. 101. SHORT TITLE.

This title may be cited as the “Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims’ Rights Act”.

18 USC 3771
 note.

SEC. 102. CRIME VICTIMS’ RIGHTS.

(a) AMENDMENT TO TITLE 18.—Part II of title 18, United States Code, is amended by adding at the end the following:

“CHAPTER 237—CRIME VICTIMS’ RIGHTS

“Sec.
 “3771. Crime victims’ rights.

“§ 3771. Crime victims’ rights

“(a) RIGHTS OF CRIME VICTIMS.—A crime victim has the following rights:

- “(1) The right to be reasonably protected from the accused.
 “(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
 “(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
 “(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
 “(5) The reasonable right to confer with the attorney for the Government in the case.
 “(6) The right to full and timely restitution as provided in law.
 “(7) The right to proceedings free from unreasonable delay.
 “(8) The right to be treated with fairness and with respect for the victim’s dignity and privacy.

“(b) RIGHTS AFFORDED.—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

“(c) BEST EFFORTS TO ACCORD RIGHTS.—

Notification.

“(1) GOVERNMENT.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

“(2) ADVICE OF ATTORNEY.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

“(3) NOTICE.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

“(d) ENFORCEMENT AND LIMITATIONS.—

“(1) RIGHTS.—The crime victim or the crime victim’s lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

“(2) MULTIPLE CRIME VICTIMS.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

“(3) MOTION FOR RELIEF AND WRIT OF MANDAMUS.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim’s right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

Deadline.

“(4) ERROR.—In any appeal in a criminal case, the Government may assert as error the district court’s denial of any crime victim’s right in the proceeding to which the appeal relates.

“(5) LIMITATION ON RELIEF.—In no case shall a failure to afford a right under this chapter provide grounds for a

new trial. A victim may make a motion to re-open a plea or sentence only if—

“(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

“(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

“(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim’s right to restitution as provided in title 18, United States Code.”.

“(6) NO CAUSE OF ACTION.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

“(e) DEFINITIONS.—For the purposes of this chapter, the term ‘crime victim’ means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim’s estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim’s rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

“(f) PROCEDURES TO PROMOTE COMPLIANCE.—

“(1) REGULATIONS.—Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

Deadline.

“(2) CONTENTS.—The regulations promulgated under paragraph (1) shall—

“(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

“(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

“(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

“(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.”.

(b) TABLE OF CHAPTERS.—The table of chapters for part II of title 18, United States Code, is amended by inserting at the end the following:

“237. Crime victims’ rights 3771”.

(c) REPEAL.—Section 502 of the Victims’ Rights and Restitution Act of 1990 (42 U.S.C. 10606) is repealed.

SEC. 103. INCREASED RESOURCES FOR ENFORCEMENT OF CRIME VICTIMS’ RIGHTS.

(a) CRIME VICTIMS LEGAL ASSISTANCE GRANTS.—The Victims of Crime Act of 1984 (42 U.S.C. 10601 et seq.) is amended by inserting after section 1404C the following:

42 USC 10603d.

“SEC. 1404D. CRIME VICTIMS LEGAL ASSISTANCE GRANTS.

“(a) IN GENERAL.—The Director may make grants as provided in section 1404(c)(1)(A) to State, tribal, and local prosecutors’ offices, law enforcement agencies, courts, jails, and correctional institutions, and to qualified public and private entities, to develop, establish, and maintain programs for the enforcement of crime victims’ rights as provided in law.

“(b) PROHIBITION.—Grant amounts under this section may not be used to bring a cause of action for damages.

“(c) FALSE CLAIMS ACT.—Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the ‘False Claims Act’), may be used for grants under this section, subject to appropriation.”

(b) AUTHORIZATION OF APPROPRIATIONS.—In addition to funds made available under section 1402(d) of the Victims of Crime Act of 1984, there are authorized to be appropriated to carry out this title—

(1) \$2,000,000 for fiscal year 2005 and \$5,000,000 for each of fiscal years 2006, 2007, 2008, and 2009 to United States Attorneys Offices for Victim/Witnesses Assistance Programs;

(2) \$2,000,000 for fiscal year 2005 and \$5,000,000 in each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice for enhancement of the Victim Notification System;

(3) \$300,000 in fiscal year 2005 and \$500,000 for each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice for staff to administer the appropriation for the support of organizations as designated under paragraph (4);

(4) \$7,000,000 for fiscal year 2005 and \$11,000,000 for each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice, for the support of organizations that provide legal counsel and support services for victims in criminal cases for the enforcement of crime victims’ rights in Federal jurisdictions, and in States and tribal governments that have laws substantially equivalent to the provisions of chapter 237 of title 18, United States Code; and

(5) \$5,000,000 for fiscal year 2005 and \$7,000,000 for each of fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice, for the support of—

(A) training and technical assistance to States and tribal jurisdictions to craft state-of-the-art victims' rights laws; and

(B) training and technical assistance to States and tribal jurisdictions to design a variety of compliance systems, which shall include an evaluation component.

(c) **INCREASED RESOURCES TO DEVELOP STATE-OF-THE-ART SYSTEMS FOR NOTIFYING CRIME VICTIMS OF IMPORTANT DATES AND DEVELOPMENTS.**—The Victims of Crime Act of 1984 (42 U.S.C. 10601 et seq.) is amended by inserting after section 1404D the following:

“SEC. 1404E. CRIME VICTIMS NOTIFICATION GRANTS.

42 USC 10603c.

“(a) **IN GENERAL.**—The Director may make grants as provided in section 1404(c)(1)(A) to State, tribal, and local prosecutors' offices, law enforcement agencies, courts, jails, and correctional institutions, and to qualified public or private entities, to develop and implement state-of-the-art systems for notifying victims of crime of important dates and developments relating to the criminal proceedings at issue in a timely and efficient manner, provided that the jurisdiction has laws substantially equivalent to the provisions of chapter 237 of title 18, United States Code.

“(b) **INTEGRATION OF SYSTEMS.**—Systems developed and implemented under this section may be integrated with existing case management systems operated by the recipient of the grant.

“(c) **AUTHORIZATION OF APPROPRIATIONS.**—In addition to funds made available under section 1402(d), there are authorized to be appropriated to carry out this section—

“(1) \$5,000,000 for fiscal year 2005; and

“(2) \$5,000,000 for each of the fiscal years 2006, 2007, 2008, and 2009.

“(d) **FALSE CLAIMS ACT.**—Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the ‘False Claims Act’), may be used for grants under this section, subject to appropriation.”.

SEC. 104. REPORTS.

(a) **ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS.**—Not later than 1 year after the date of enactment of this Act and annually thereafter, the Administrative Office of the United States Courts, for each Federal court, shall report to Congress the number of times that a right established in chapter 237 of title 18, United States Code, is asserted in a criminal case and the relief requested is denied and, with respect to each such denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to chapter 237 of title 18, and the result reached.

Deadline.
18 USC 3771
note.

(b) **GOVERNMENT ACCOUNTABILITY OFFICE.**—

(1) **STUDY.**—The Comptroller General shall conduct a study that evaluates the effect and efficacy of the implementation of the amendments made by this title on the treatment of crime victims in the Federal system.

(2) **REPORT.**—Not later than 4 years after the date of enactment of this Act, the Comptroller General shall prepare and submit to the appropriate committees a report containing the results of the study conducted under subsection (a).

Deadline.

Debbie Smith Act
of 2004.

42 USC 13701
note.

TITLE II—DEBBIE SMITH ACT OF 2004

SEC. 201. SHORT TITLE.

This title may be cited as the “Debbie Smith Act of 2004”.

SEC. 202. DEBBIE SMITH DNA BACKLOG GRANT PROGRAM.

(a) DESIGNATION OF PROGRAM; ELIGIBILITY OF LOCAL GOVERNMENTS AS GRANTEEES.—Section 2 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135) is amended—

(1) by amending the heading to read as follows:

“SEC. 2. THE DEBBIE SMITH DNA BACKLOG GRANT PROGRAM.”;

(2) in subsection (a)—

(A) in the matter preceding paragraph (1)—

(i) by inserting “or units of local government” after “eligible States”; and

(ii) by inserting “or unit of local government” after “State”;

(B) in paragraph (2), by inserting before the period at the end the following: “, including samples from rape kits, samples from other sexual assault evidence, and samples taken in cases without an identified suspect”; and

(C) in paragraph (3), by striking “within the State”;

(3) in subsection (b)—

(A) in the matter preceding paragraph (1)—

(i) by inserting “or unit of local government” after “State” both places that term appears; and

(ii) by inserting “, as required by the Attorney General” after “application shall”;

(B) in paragraph (1), by inserting “or unit of local government” after “State”;

(C) in paragraph (3), by inserting “or unit of local government” after “State” the first place that term appears;

(D) in paragraph (4)—

(i) by inserting “or unit of local government” after “State”; and

(ii) by striking “and” at the end;

(E) in paragraph (5)—

(i) by inserting “or unit of local government” after “State”; and

(ii) by striking the period at the end and inserting a semicolon; and

(F) by adding at the end the following:

“(6) if submitted by a unit of local government, certify that the unit of local government has taken, or is taking, all necessary steps to ensure that it is eligible to include, directly or through a State law enforcement agency, all analyses of samples for which it has requested funding in the Combined DNA Index System; and”;

(4) in subsection (d)—

(A) in paragraph (1)—

(i) in the matter preceding subparagraph (A), by striking “The plan” and inserting “A plan pursuant to subsection (b)(1)”;

(ii) in subparagraph (A), by striking “within the State”; and

- (iii) in subparagraph (B), by striking “within the State”; and
- (B) in paragraph (2)(A), by inserting “and units of local government” after “States”;
- (5) in subsection (e)—
- (A) in paragraph (1), by inserting “or local government” after “State” both places that term appears; and
- (B) in paragraph (2), by inserting “or unit of local government” after “State”;
- (6) in subsection (f), in the matter preceding paragraph (1), by inserting “or unit of local government” after “State”;
- (7) in subsection (g)—
- (A) in paragraph (1), by inserting “or unit of local government” after “State”; and
- (B) in paragraph (2), by inserting “or units of local government” after “States”; and
- (8) in subsection (h), by inserting “or unit of local government” after “State” both places that term appears.
- (b) REAUTHORIZATION AND EXPANSION OF PROGRAM.—Section 2 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135) is amended—
- (1) in subsection (a)—
- (A) in paragraph (3), by inserting “(1) or” before “(2)”; and
- (B) by inserting at the end the following:
- “(4) To collect DNA samples specified in paragraph (1).
- “(5) To ensure that DNA testing and analysis of samples from crimes, including sexual assault and other serious violent crimes, are carried out in a timely manner.”;
- (2) in subsection (b), as amended by this section, by inserting at the end the following:
- “(7) specify that portion of grant amounts that the State or unit of local government shall use for the purpose specified in subsection (a)(4).”;
- (3) by amending subsection (c) to read as follows:
- “(c) FORMULA FOR DISTRIBUTION OF GRANTS.—
- “(1) IN GENERAL.—The Attorney General shall distribute grant amounts, and establish appropriate grant conditions under this section, in conformity with a formula or formulas that are designed to effectuate a distribution of funds among eligible States and units of local government that—
- “(A) maximizes the effective utilization of DNA technology to solve crimes and protect public safety; and
- “(B) allocates grants among eligible entities fairly and efficiently to address jurisdictions in which significant backlogs exist, by considering—
- “(i) the number of offender and casework samples awaiting DNA analysis in a jurisdiction;
- “(ii) the population in the jurisdiction; and
- “(iii) the number of part 1 violent crimes in the jurisdiction.
- “(2) MINIMUM AMOUNT.—The Attorney General shall allocate to each State not less than 0.50 percent of the total amount appropriated in a fiscal year for grants under this section, except that the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands shall each be allocated 0.125 percent of the total appropriation.

“(3) LIMITATION.—Grant amounts distributed under paragraph (1) shall be awarded to conduct DNA analyses of samples from casework or from victims of crime under subsection (a)(2) in accordance with the following limitations:

“(A) For fiscal year 2005, not less than 50 percent of the grant amounts shall be awarded for purposes under subsection (a)(2).

“(B) For fiscal year 2006, not less than 50 percent of the grant amounts shall be awarded for purposes under subsection (a)(2).

“(C) For fiscal year 2007, not less than 45 percent of the grant amounts shall be awarded for purposes under subsection (a)(2).

“(D) For fiscal year 2008, not less than 40 percent of the grant amounts shall be awarded for purposes under subsection (a)(2).

“(E) For fiscal year 2009, not less than 40 percent of the grant amounts shall be awarded for purposes under subsection (a)(2).”;

(4) in subsection (g)—

(A) in paragraph (1), by striking “and” at the end;

(B) in paragraph (2), by striking the period at the end and inserting “; and”; and

(C) by adding at the end the following:

“(3) a description of the priorities and plan for awarding grants among eligible States and units of local government, and how such plan will ensure the effective use of DNA technology to solve crimes and protect public safety.”;

(5) in subsection (j), by striking paragraphs (1) and (2) and inserting the following:

“(1) \$151,000,000 for fiscal year 2005;

“(2) \$151,000,000 for fiscal year 2006;

“(3) \$151,000,000 for fiscal year 2007;

“(4) \$151,000,000 for fiscal year 2008; and

“(5) \$151,000,000 for fiscal year 2009.”; and

“(6) by adding at the end the following:

“(k) USE OF FUNDS FOR ACCREDITATION AND AUDITS.—The Attorney General may distribute not more than 1 percent of the grant amounts under subsection (j)—

“(1) to States or units of local government to defray the costs incurred by laboratories operated by each such State or unit of local government in preparing for accreditation or reaccreditation;

“(2) in the form of additional grants to States, units of local government, or nonprofit professional organizations of persons actively involved in forensic science and nationally recognized within the forensic science community—

“(A) to defray the costs of external audits of laboratories operated by such State or unit of local government, which participates in the National DNA Index System, to determine whether the laboratory is in compliance with quality assurance standards;

“(B) to assess compliance with any plans submitted to the National Institute of Justice, which detail the use of funds received by States or units of local government under this Act; and

“(C) to support future capacity building efforts; and

“(3) in the form of additional grants to nonprofit professional associations actively involved in forensic science and nationally recognized within the forensic science community to defray the costs of training persons who conduct external audits of laboratories operated by States and units of local government and which participate in the National DNA Index System.

“(1) USE OF FUNDS FOR OTHER FORENSIC SCIENCES.—The Attorney General may award a grant under this section to a State or unit of local government to alleviate a backlog of cases with respect to a forensic science other than DNA analysis if the State or unit of local government—

“(1) certifies to the Attorney General that in such State or unit—

“(A) all of the purposes set forth in subsection (a) have been met;

“(B) a significant backlog of casework is not waiting for DNA analysis; and

“(C) there is no need for significant laboratory equipment, supplies, or additional personnel for timely DNA processing of casework or offender samples; and

“(2) demonstrates to the Attorney General that such State or unit requires assistance in alleviating a backlog of cases involving a forensic science other than DNA analysis.

“(m) EXTERNAL AUDITS AND REMEDIAL EFFORTS.—In the event that a laboratory operated by a State or unit of local government which has received funds under this Act has undergone an external audit conducted to determine whether the laboratory is in compliance with standards established by the Director of the Federal Bureau of Investigation, and, as a result of such audit, identifies measures to remedy deficiencies with respect to the compliance by the laboratory with such standards, the State or unit of local government shall implement any such remediation as soon as practicable.”.

SEC. 203. EXPANSION OF COMBINED DNA INDEX SYSTEM.

(a) INCLUSION OF ALL DNA SAMPLES FROM STATES.—Section 210304 of the DNA Identification Act of 1994 (42 U.S.C. 14132) is amended—

(1) in subsection (a)(1), by striking “of persons convicted of crimes;” and inserting the following: “of—

“(A) persons convicted of crimes;

“(B) persons who have been charged in an indictment or information with a crime; and

“(C) other persons whose DNA samples are collected under applicable legal authorities, provided that DNA profiles from arrestees who have not been charged in an indictment or information with a crime, and DNA samples that are voluntarily submitted solely for elimination purposes shall not be included in the National DNA Index System;”;

(2) in subsection (d)(2)—

(A) by striking “if the responsible agency” and inserting “if—

“(i) the responsible agency”;

(B) by striking the period at the end and inserting “; or”; and

(C) by adding at the end the following:

“(ii) the person has not been convicted of an offense on the basis of which that analysis was or could have been included in the index, and all charges for which the analysis was or could have been included in the index have been dismissed or resulted in acquittal.”

(b) **FELONS CONVICTED OF FEDERAL CRIMES.**—Section 3(d) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a(d)) is amended to read as follows:

“(d) **QUALIFYING FEDERAL OFFENSES.**—The offenses that shall be treated for purposes of this section as qualifying Federal offenses are the following offenses, as determined by the Attorney General:

“(1) Any felony.

“(2) Any offense under chapter 109A of title 18, United States Code.

“(3) Any crime of violence (as that term is defined in section 16 of title 18, United States Code).

“(4) Any attempt or conspiracy to commit any of the offenses in paragraphs (1) through (3).”

(c) **MILITARY OFFENSES.**—Section 1565(d) of title 10, United States Code, is amended to read as follows:

“(d) **QUALIFYING MILITARY OFFENSES.**—The offenses that shall be treated for purposes of this section as qualifying military offenses are the following offenses, as determined by the Secretary of Defense, in consultation with the Attorney General:

“(1) Any offense under the Uniform Code of Military Justice for which a sentence of confinement for more than one year may be imposed.

“(2) Any other offense under the Uniform Code of Military Justice that is comparable to a qualifying Federal offense (as determined under section 3(d) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a(d))).”

(d) **KEYBOARD SEARCHES.**—Section 210304 of the DNA Identification Act of 1994 (42 U.S.C. 14132), as amended by subsection (a), is further amended by adding at the end the following new subsection:

“(e) **AUTHORITY FOR KEYBOARD SEARCHES.**—

“(1) **IN GENERAL.**—The Director shall ensure that any person who is authorized to access the index described in subsection (a) for purposes of including information on DNA identification records or DNA analyses in that index may also access that index for purposes of carrying out a one-time keyboard search on information obtained from any DNA sample lawfully collected for a criminal justice purpose except for a DNA sample voluntarily submitted solely for elimination purposes.

“(2) **DEFINITION.**—For purposes of paragraph (1), the term ‘keyboard search’ means a search under which information obtained from a DNA sample is compared with information in the index without resulting in the information obtained from a DNA sample being included in the index.

“(3) **NO PREEMPTION.**—This subsection shall not be construed to preempt State law.

(e) **INCREASED PENALTIES FOR MISUSE OF DNA ANALYSES.**—(1) Section 210305(c)(2) of the DNA Identification Act of 1994 (42 U.S.C. 14133(c)(2)) is amended by striking “\$100,000” and inserting “\$250,000, or imprisoned for a period of not more than one year, or both”.

(2) Section 10(c) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135e(c)) is amended by striking “\$100,000” and inserting “\$250,000, or imprisoned for a period of not more than one year, or both”.

(f) REPORT TO CONGRESS.—If the Department of Justice plans to modify or supplement the core genetic markers needed for compatibility with the CODIS system, it shall notify the Judiciary Committee of the Senate and the Judiciary Committee of the House of Representatives in writing not later than 180 days before any change is made and explain the reasons for such change.

28 USC 531 note.

SEC. 204. TOLLING OF STATUTE OF LIMITATIONS.

(a) IN GENERAL.—Chapter 213 of title 18, United States Code, is amended by adding at the end the following:

“§ 3297. Cases involving DNA evidence

“In a case in which DNA testing implicates an identified person in the commission of a felony, except for a felony offense under chapter 109A, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period.”.

(b) CLERICAL AMENDMENT.—The table of sections for chapter 213 of title 18, United States Code, is amended by adding at the end the following:

“3297. Cases involving DNA evidence.”.

(c) APPLICATION.—The amendments made by this section shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this section if the applicable limitation period has not yet expired.

18 USC 3297 note.

SEC. 205. LEGAL ASSISTANCE FOR VICTIMS OF VIOLENCE.

Section 1201 of the Violence Against Women Act of 2000 (42 U.S.C. 3796gg-6) is amended—

(1) in subsection (a), by inserting “dating violence,” after “domestic violence.”;

(2) in subsection (b)—

(A) by redesignating paragraphs (1) through (3) as paragraphs (2) through (4), respectively;

(B) by inserting before paragraph (2), as redesignated by subparagraph (A), the following:

“(1) DATING VIOLENCE.—The term ‘dating violence’ means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on a consideration of—

“(A) the length of the relationship;

“(B) the type of relationship; and

“(C) the frequency of interaction between the persons involved in the relationship.”; and

(C) in paragraph (3), as redesignated by subparagraph (A), by inserting “dating violence,” after “domestic violence.”;

(3) in subsection (c)—

(A) in paragraph (1)—

(i) by inserting “, dating violence,” after “between domestic violence”; and

(ii) by inserting “dating violence,” after “victims of domestic violence,”;

(B) in paragraph (2), by inserting “dating violence,” after “domestic violence,”; and

(C) in paragraph (3), by inserting “dating violence,” after “domestic violence,”;

(4) in subsection (d)—

(A) in paragraph (1), by inserting “, dating violence,” after “domestic violence,”;

(B) in paragraph (2), by inserting “, dating violence,” after “domestic violence,”;

(C) in paragraph (3), by inserting “, dating violence,” after “domestic violence,”; and

(D) in paragraph (4), by inserting “dating violence,” after “domestic violence,”;

(5) in subsection (e), by inserting “dating violence,” after “domestic violence,”; and

(6) in subsection (f)(2)(A), by inserting “dating violence,” after “domestic violence.”

SEC. 206. ENSURING PRIVATE LABORATORY ASSISTANCE IN ELIMINATING DNA BACKLOG.

Section 2(d)(3) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135(d)(3)) is amended to read as follows:

“(3) USE OF VOUCHERS OR CONTRACTS FOR CERTAIN PURPOSES.—

“(A) IN GENERAL.—A grant for the purposes specified in paragraph (1), (2), or (5) of subsection (a) may be made in the form of a voucher or contract for laboratory services, even if the laboratory makes a reasonable profit for the services.

“(B) REDEMPTION.—A voucher or contract under subparagraph (A) may be redeemed at a laboratory operated on a nonprofit or for-profit basis, by a private entity that satisfies quality assurance standards and has been approved by the Attorney General.

“(C) PAYMENTS.—The Attorney General may use amounts authorized under subsection (j) to make payments to a laboratory described under subparagraph (B).”

TITLE III—DNA SEXUAL ASSAULT JUSTICE ACT OF 2004

DNA Sexual Assault Justice Act of 2004.

42 USC 13701 note.

SEC. 301. SHORT TITLE.

This title may be cited as the “DNA Sexual Assault Justice Act of 2004”.

SEC. 302. ENSURING PUBLIC CRIME LABORATORY COMPLIANCE WITH FEDERAL STANDARDS.

Section 210304(b)(2) of the DNA Identification Act of 1994 (42 U.S.C. 14132(b)(2)) is amended to read as follows:

“(2) prepared by laboratories that—

“(A) not later than 2 years after the date of enactment of the DNA Sexual Assault Justice Act of 2004, have been accredited by a nonprofit professional association of persons

Deadline.

actively involved in forensic science that is nationally recognized within the forensic science community; and

“(B) undergo external audits, not less than once every 2 years, that demonstrate compliance with standards established by the Director of the Federal Bureau of Investigation; and”.

SEC. 303. DNA TRAINING AND EDUCATION FOR LAW ENFORCEMENT, CORRECTIONAL PERSONNEL, AND COURT OFFICERS. 42 USC 14136.

(a) **IN GENERAL.**—The Attorney General shall make grants to provide training, technical assistance, education, and information relating to the identification, collection, preservation, analysis, and use of DNA samples and DNA evidence by—

(1) law enforcement personnel, including police officers and other first responders, evidence technicians, investigators, and others who collect or examine evidence of crime;

(2) court officers, including State and local prosecutors, defense lawyers, and judges;

(3) forensic science professionals; and

(4) corrections personnel, including prison and jail personnel, and probation, parole, and other officers involved in supervision.

(b) **AUTHORIZATION OF APPROPRIATIONS.**—There are authorized to be appropriated \$12,500,000 for each of fiscal years 2005 through 2009 to carry out this section.

SEC. 304. SEXUAL ASSAULT FORENSIC EXAM PROGRAM GRANTS. 42 USC 14136a.

(a) **IN GENERAL.**—The Attorney General shall make grants to eligible entities to provide training, technical assistance, education, equipment, and information relating to the identification, collection, preservation, analysis, and use of DNA samples and DNA evidence by medical personnel and other personnel, including doctors, medical examiners, coroners, nurses, victim service providers, and other professionals involved in treating victims of sexual assault and sexual assault examination programs, including SANE (Sexual Assault Nurse Examiner), SAFE (Sexual Assault Forensic Examiner), and SART (Sexual Assault Response Team).

(b) **ELIGIBLE ENTITY.**—For purposes of this section, the term “eligible entity” includes—

(1) States;

(2) units of local government; and

(3) sexual assault examination programs, including—

(A) sexual assault nurse examiner (SANE) programs;

(B) sexual assault forensic examiner (SAFE) programs;

(C) sexual assault response team (SART) programs;

(D) State sexual assault coalitions;

(E) medical personnel, including doctors, medical examiners, coroners, and nurses, involved in treating victims of sexual assault; and

(F) victim service providers involved in treating victims of sexual assault.

(c) **AUTHORIZATION OF APPROPRIATIONS.**—There are authorized to be appropriated \$30,000,000 for each of fiscal years 2005 through 2009 to carry out this section.

SEC. 305. DNA RESEARCH AND DEVELOPMENT. 42 USC 14136b.

(a) **IMPROVING DNA TECHNOLOGY.**—The Attorney General shall make grants for research and development to improve forensic

DNA technology, including increasing the identification accuracy and efficiency of DNA analysis, decreasing time and expense, and increasing portability.

Grants.

(b) **DEMONSTRATION PROJECTS.**—The Attorney General shall make grants to appropriate entities under which research is carried out through demonstration projects involving coordinated training and commitment of resources to law enforcement agencies and key criminal justice participants to demonstrate and evaluate the use of forensic DNA technology in conjunction with other forensic tools. The demonstration projects shall include scientific evaluation of the public safety benefits, improvements to law enforcement operations, and cost-effectiveness of increased collection and use of DNA evidence.

(c) **AUTHORIZATION OF APPROPRIATIONS.**—There are authorized to be appropriated \$15,000,000 for each of fiscal years 2005 through 2009 to carry out this section.

42 USC 14136c.

SEC. 306. NATIONAL FORENSIC SCIENCE COMMISSION.

(a) **APPOINTMENT.**—The Attorney General shall appoint a National Forensic Science Commission (in this section referred to as the “Commission”), composed of persons experienced in criminal justice issues, including persons from the forensic science and criminal justice communities, to carry out the responsibilities under subsection (b).

(b) **RESPONSIBILITIES.**—The Commission shall—

(1) assess the present and future resource needs of the forensic science community;

(2) make recommendations to the Attorney General for maximizing the use of forensic technologies and techniques to solve crimes and protect the public;

(3) identify potential scientific advances that may assist law enforcement in using forensic technologies and techniques to protect the public;

(4) make recommendations to the Attorney General for programs that will increase the number of qualified forensic scientists available to work in public crime laboratories;

(5) disseminate, through the National Institute of Justice, best practices concerning the collection and analyses of forensic evidence to help ensure quality and consistency in the use of forensic technologies and techniques to solve crimes and protect the public;

(6) examine additional issues pertaining to forensic science as requested by the Attorney General;

(7) examine Federal, State, and local privacy protection statutes, regulations, and practices relating to access to, or use of, stored DNA samples or DNA analyses, to determine whether such protections are sufficient;

(8) make specific recommendations to the Attorney General, as necessary, to enhance the protections described in paragraph (7) to ensure—

(A) the appropriate use and dissemination of DNA information;

(B) the accuracy, security, and confidentiality of DNA information;

(C) the timely removal and destruction of obsolete, expunged, or inaccurate DNA information; and

- (D) that any other necessary measures are taken to protect privacy; and
- (9) provide a forum for the exchange and dissemination of ideas and information in furtherance of the objectives described in paragraphs (1) through (8).
- (c) PERSONNEL; PROCEDURES.—The Attorney General shall—
- (1) designate the Chair of the Commission from among its members;
 - (2) designate any necessary staff to assist in carrying out the functions of the Commission; and
 - (3) establish procedures and guidelines for the operations of the Commission.
- (d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated \$500,000 for each of fiscal years 2005 through 2009 to carry out this section.

SEC. 307. FBI DNA PROGRAMS.

- (a) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Federal Bureau of Investigation \$42,100,000 for each of fiscal years 2005 through 2009 to carry out the DNA programs and activities described under subsection (b).
- (b) PROGRAMS AND ACTIVITIES.—The Federal Bureau of Investigation may use any amounts appropriated pursuant to subsection (a) for—
- (1) nuclear DNA analysis;
 - (2) mitochondrial DNA analysis;
 - (3) regional mitochondrial DNA laboratories;
 - (4) the Combined DNA Index System;
 - (5) the Federal Convicted Offender DNA Program; and
 - (6) DNA research and development.

SEC. 308. DNA IDENTIFICATION OF MISSING PERSONS.

42 USC 14136d.

- (a) IN GENERAL.—The Attorney General shall make grants to promote the use of forensic DNA technology to identify missing persons and unidentified human remains.
- (b) REQUIREMENT.—Each State or unit of local government that receives funding under this section shall be required to submit the DNA profiles of such missing persons and unidentified human remains to the National Missing Persons DNA Database of the Federal Bureau of Investigation.
- (c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated \$2,000,000 for each of fiscal years 2005 through 2009 to carry out this section.

Grants.

SEC. 309. ENHANCED CRIMINAL PENALTIES FOR UNAUTHORIZED DISCLOSURE OR USE OF DNA INFORMATION.

Section 10(c) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135e(c)) is amended to read as follows:

“(c) CRIMINAL PENALTY.—A person who knowingly discloses a sample or result described in subsection (a) in any manner to any person not authorized to receive it, or obtains or uses, without authorization, such sample or result, shall be fined not more than \$250,000, or imprisoned for a period of not more than one year. Each instance of disclosure, obtaining, or use shall constitute a separate offense under this subsection.”.

SEC. 310. TRIBAL COALITION GRANTS.

(a) IN GENERAL.—Section 2001 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796gg) is amended by adding at the end the following:

“(d) TRIBAL COALITION GRANTS.—

“(1) PURPOSE.—The Attorney General shall award grants to tribal domestic violence and sexual assault coalitions for purposes of—

“(A) increasing awareness of domestic violence and sexual assault against American Indian and Alaska Native women;

“(B) enhancing the response to violence against American Indian and Alaska Native women at the tribal, Federal, and State levels; and

“(C) identifying and providing technical assistance to coalition membership and tribal communities to enhance access to essential services to American Indian women victimized by domestic and sexual violence.

“(2) GRANTS TO TRIBAL COALITIONS.—The Attorney General shall award grants under paragraph (1) to—

“(A) established nonprofit, nongovernmental tribal coalitions addressing domestic violence and sexual assault against American Indian and Alaska Native women; and

“(B) individuals or organizations that propose to incorporate as nonprofit, nongovernmental tribal coalitions to address domestic violence and sexual assault against American Indian and Alaska Native women.

“(3) ELIGIBILITY FOR OTHER GRANTS.—Receipt of an award under this subsection by tribal domestic violence and sexual assault coalitions shall not preclude the coalition from receiving additional grants under this title to carry out the purposes described in subsection (b).”.

(b) TECHNICAL AMENDMENT.—Effective as of November 2, 2002, and as if included therein as enacted, Public Law 107-273 (116 Stat. 1789) is amended in section 402(2) by striking “sections 2006 through 2011” and inserting “sections 2007 through 2011”.

(c) AMOUNTS.—Section 2007 of the Omnibus Crime Control and Safe Streets Act of 1968 (as redesignated by section 402(2) of Public Law 107-273, as amended by subsection (b)) is amended by amending subsection (b)(4) (42 U.S.C. 3796gg-1(b)(4)) to read as follows:

“(4) $\frac{1}{54}$ shall be available for grants under section 2001(d);”.

SEC. 311. EXPANSION OF PAUL COVERDELL FORENSIC SCIENCES IMPROVEMENT GRANT PROGRAM.

(a) FORENSIC BACKLOG ELIMINATION GRANTS.—Section 2804 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797m) is amended—

(1) in subsection (a)—

(A) by striking “shall use the grant to carry out” and inserting “shall use the grant to do any one or more of the following:

“(1) To carry out”; and

(B) by adding at the end the following:

“(2) To eliminate a backlog in the analysis of forensic science evidence, including firearms examination, latent prints,

42 USC
3796gg-1—
3796gg-5,
3796-1 note.

toxicology, controlled substances, forensic pathology, questionable documents, and trace evidence.

(3) To train, assist, and employ forensic laboratory personnel, as needed, to eliminate such a backlog;

(2) in subsection (b), by striking “under this part” and inserting “for the purpose set forth in subsection (a)(1)”; and

(3) by adding at the end the following:

“(e) BACKLOG DEFINED.—For purposes of this section, a backlog in the analysis of forensic science evidence exists if such evidence—

“(1) has been stored in a laboratory, medical examiner’s office, coroner’s office, law enforcement storage facility, or medical facility; and

“(2) has not been subjected to all appropriate forensic testing because of a lack of resources or personnel.”.

(b) EXTERNAL AUDITS.—Section 2802 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797k) is amended—

(1) in paragraph (2), by striking “and” at the end;

(2) in paragraph (3), by striking the period at the end and inserting “; and”; and

(3) by adding at the end the following:

“(4) a certification that a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner’s office, coroner’s office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount.”.

Certification.

(c) THREE-YEAR EXTENSION OF AUTHORIZATION OF APPROPRIATIONS.—Section 1001(a)(24) of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3793(a)(24)) is amended—

(1) in subparagraph (E), by striking “and” at the end;

(2) in subparagraph (F), by striking the period at the end and inserting a semicolon; and

(3) by adding at the end the following:

“(G) \$20,000,000 for fiscal year 2007;

“(H) \$20,000,000 for fiscal year 2008; and

“(I) \$20,000,000 for fiscal year 2009.”.

(d) TECHNICAL AMENDMENT.—Section 1001(a) of such Act, as amended by subsection (c), is further amended by realigning paragraphs (24) and (25) so as to be flush with the left margin.

SEC. 312. REPORT TO CONGRESS.

(a) IN GENERAL.—Not later than 2 years after the date of enactment of this Act, the Attorney General shall submit to Congress a report on the implementation of this title and title II and the amendments made by this title and title II.

(b) CONTENTS.—The report submitted under subsection (a) shall include a description of—

(1) the progress made by Federal, State, and local entities in—

(A) collecting and entering DNA samples from offenders convicted of qualifying offenses for inclusion in the Combined DNA Index System (referred to in this subsection as “CODIS”);

(B) analyzing samples from crime scenes, including evidence collected from sexual assaults and other serious

violent crimes, and entering such DNA analyses in CODIS; and

(C) increasing the capacity of forensic laboratories to conduct DNA analyses;

(2) the priorities and plan for awarding grants among eligible States and units of local government to ensure that the purposes of this title and title II are carried out;

(3) the distribution of grant amounts under this title and title II among eligible States and local governments, and whether the distribution of such funds has served the purposes of the Debbie Smith DNA Backlog Grant Program;

(4) grants awarded and the use of such grants by eligible entities for DNA training and education programs for law enforcement, correctional personnel, court officers, medical personnel, victim service providers, and other personnel authorized under sections 303 and 304;

(5) grants awarded and the use of such grants by eligible entities to conduct DNA research and development programs to improve forensic DNA technology, and implement demonstration projects under section 305;

(6) the steps taken to establish the National Forensic Science Commission, and the activities of the Commission under section 306;

(7) the use of funds by the Federal Bureau of Investigation under section 307;

(8) grants awarded and the use of such grants by eligible entities to promote the use of forensic DNA technology to identify missing persons and unidentified human remains under section 308;

(9) grants awarded and the use of such grants by eligible entities to eliminate forensic science backlogs under the amendments made by section 311;

(10) State compliance with the requirements set forth in section 313; and

(11) any other matters considered relevant by the Attorney General.

Innocence
Protection Act of
2004.

TITLE IV—INNOCECE PROTECTION ACT OF 2004

18 USC 3600
note.

SEC. 401. SHORT TITLE.

This title may be cited as the “Innocence Protection Act of 2004”.

Subtitle A—Exonerating the Innocent Through DNA Testing

SEC. 411. FEDERAL POST-CONVICTION DNA TESTING.

(a) FEDERAL CRIMINAL PROCEDURE.—

(1) IN GENERAL.—Part II of title 18, United States Code, is amended by inserting after chapter 228 the following:

“CHAPTER 228A—POST-CONVICTION DNA TESTING

“Sec.
 “3600. DNA testing.
 “3600A. Preservation of biological evidence.

“§ 3600. DNA testing

“(a) IN GENERAL.—Upon a written motion by an individual under a sentence of imprisonment or death pursuant to a conviction for a Federal offense (referred to in this section as the ‘applicant’), the court that entered the judgment of conviction shall order DNA testing of specific evidence if the court finds that all of the following apply: Applicability.

“(1) The applicant asserts, under penalty of perjury, that the applicant is actually innocent of—

“(A) the Federal offense for which the applicant is under a sentence of imprisonment or death; or

“(B) another Federal or State offense, if—

“(i) evidence of such offense was admitted during a Federal death sentencing hearing and exonerated of such offense would entitle the applicant to a reduced sentence or new sentencing hearing; and

“(ii) in the case of a State offense—

“(I) the applicant demonstrates that there is no adequate remedy under State law to permit DNA testing of the specified evidence relating to the State offense; and

“(II) to the extent available, the applicant has exhausted all remedies available under State law for requesting DNA testing of specified evidence relating to the State offense.

“(2) The specific evidence to be tested was secured in relation to the investigation or prosecution of the Federal or State offense referenced in the applicant’s assertion under paragraph (1).

“(3) The specific evidence to be tested—

“(A) was not previously subjected to DNA testing and the applicant did not—

“(i) knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding after the date of enactment of the Innocence Protection Act of 2004; or

“(ii) knowingly fail to request DNA testing of that evidence in a prior motion for postconviction DNA testing; or

“(B) was previously subjected to DNA testing and the applicant is requesting DNA testing using a new method or technology that is substantially more probative than the prior DNA testing.

“(4) The specific evidence to be tested is in the possession of the Government and has been subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing.

“(5) The proposed DNA testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices.

- “(6) The applicant identifies a theory of defense that—
 “(A) is not inconsistent with an affirmative defense presented at trial; and
 “(B) would establish the actual innocence of the applicant of the Federal or State offense referenced in the applicant’s assertion under paragraph (1).
 “(7) If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial.
 “(8) The proposed DNA testing of the specific evidence may produce new material evidence that would—
 “(A) support the theory of defense referenced in paragraph (6); and
 “(B) raise a reasonable probability that the applicant did not commit the offense.
 “(9) The applicant certifies that the applicant will provide a DNA sample for purposes of comparison.
 “(10) The motion is made in a timely fashion, subject to the following conditions:
 “(A) There shall be a rebuttable presumption of timeliness if the motion is made within 60 months of enactment of the Justice For All Act of 2004 or within 36 months of conviction, whichever comes later. Such presumption may be rebutted upon a showing—
 “(i) that the applicant’s motion for a DNA test is based solely upon information used in a previously denied motion; or
 “(ii) of clear and convincing evidence that the applicant’s filing is done solely to cause delay or harass.
 “(B) There shall be a rebuttable presumption against timeliness for any motion not satisfying subparagraph (A) above. Such presumption may be rebutted upon the court’s finding—
 “(i) that the applicant was or is incompetent and such incompetence substantially contributed to the delay in the applicant’s motion for a DNA test;
 “(ii) the evidence to be tested is newly discovered DNA evidence;
 “(iii) that the applicant’s motion is not based solely upon the applicant’s own assertion of innocence and, after considering all relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice; or
 “(iv) upon good cause shown.
 “(C) For purposes of this paragraph—
 “(i) the term ‘incompetence’ has the meaning as defined in section 4241 of title 18, United States Code;
 “(ii) the term ‘manifest’ means that which is unmistakable, clear, plain, or indisputable and requires that the opposite conclusion be clearly evident.
- “(b) NOTICE TO THE GOVERNMENT; PRESERVATION ORDER; APPOINTMENT OF COUNSEL.—
 “(1) NOTICE.—Upon the receipt of a motion filed under subsection (a), the court shall—
 “(A) notify the Government; and
 “(B) allow the Government a reasonable time period to respond to the motion.

“(2) PRESERVATION ORDER.—To the extent necessary to carry out proceedings under this section, the court shall direct the Government to preserve the specific evidence relating to a motion under subsection (a).

“(3) APPOINTMENT OF COUNSEL.—The court may appoint counsel for an indigent applicant under this section in the same manner as in a proceeding under section 3006A(a)(2)(B).

“(c) TESTING PROCEDURES.—

“(1) IN GENERAL.—The court shall direct that any DNA testing ordered under this section be carried out by the Federal Bureau of Investigation.

“(2) EXCEPTION.—Notwithstanding paragraph (1), the court may order DNA testing by another qualified laboratory if the court makes all necessary orders to ensure the integrity of the specific evidence and the reliability of the testing process and test results.

“(3) COSTS.—The costs of any DNA testing ordered under this section shall be paid—

“(A) by the applicant; or

“(B) in the case of an applicant who is indigent, by the Government.

“(d) TIME LIMITATION IN CAPITAL CASES.—In any case in which the applicant is sentenced to death— Deadlines.

“(1) any DNA testing ordered under this section shall be completed not later than 60 days after the date on which the Government responds to the motion filed under subsection (a); and

“(2) not later than 120 days after the date on which the DNA testing ordered under this section is completed, the court shall order any post-testing procedures under subsection (f) or (g), as appropriate.

“(e) REPORTING OF TEST RESULTS.—

“(1) IN GENERAL.—The results of any DNA testing ordered under this section shall be simultaneously disclosed to the court, the applicant, and the Government.

“(2) NDIS.—The Government shall submit any test results relating to the DNA of the applicant to the National DNA Index System (referred to in this subsection as ‘NDIS’).

“(3) RETENTION OF DNA SAMPLE.—

“(A) ENTRY INTO NDIS.—If the DNA test results obtained under this section are inconclusive or show that the applicant was the source of the DNA evidence, the DNA sample of the applicant may be retained in NDIS.

“(B) MATCH WITH OTHER OFFENSE.—If the DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, and a comparison of the DNA sample of the applicant results in a match between the DNA sample of the applicant and another offense, the Attorney General shall notify the appropriate agency and preserve the DNA sample of the applicant.

“(C) NO MATCH.—If the DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, and a comparison of the DNA sample of the applicant does not result in a match between the DNA sample of the applicant and another offense, the Attorney General shall destroy the DNA sample of the applicant and ensure that such information is not retained

in NDIS if there is no other legal authority to retain the DNA sample of the applicant in NDIS.

“(f) POST-TESTING PROCEDURES; INCONCLUSIVE AND INCULPATORY RESULTS.—

“(1) INCONCLUSIVE RESULTS.—If DNA test results obtained under this section are inconclusive, the court may order further testing, if appropriate, or may deny the applicant relief.

“(2) INCULPATORY RESULTS.—If DNA test results obtained under this section show that the applicant was the source of the DNA evidence, the court shall—

“(A) deny the applicant relief; and

“(B) on motion of the Government—

“(i) make a determination whether the applicant’s assertion of actual innocence was false, and, if the court makes such a finding, the court may hold the applicant in contempt;

“(ii) assess against the applicant the cost of any DNA testing carried out under this section;

“(iii) forward the finding to the Director of the Bureau of Prisons, who, upon receipt of such a finding, may deny, wholly or in part, the good conduct credit authorized under section 3632 on the basis of that finding;

“(iv) if the applicant is subject to the jurisdiction of the United States Parole Commission, forward the finding to the Commission so that the Commission may deny parole on the basis of that finding; and

“(v) if the DNA test results relate to a State offense, forward the finding to any appropriate State official.

“(3) SENTENCE.—In any prosecution of an applicant under chapter 79 for false assertions or other conduct in proceedings under this section, the court, upon conviction of the applicant, shall sentence the applicant to a term of imprisonment of not less than 3 years, which shall run consecutively to any other term of imprisonment the applicant is serving.

“(g) POST-TESTING PROCEDURES; MOTION FOR NEW TRIAL OR RESENTENCING.—

“(1) IN GENERAL.—Notwithstanding any law that would bar a motion under this paragraph as untimely, if DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, the applicant may file a motion for a new trial or resentencing, as appropriate. The court shall establish a reasonable schedule for the applicant to file such a motion and for the Government to respond to the motion.

“(2) STANDARD FOR GRANTING MOTION FOR NEW TRIAL OR RESENTENCING.—The court shall grant the motion of the applicant for a new trial or resentencing, as appropriate, if the DNA test results, when considered with all other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal of—

“(A) in the case of a motion for a new trial, the Federal offense for which the applicant is under a sentence of imprisonment or death; and

“(B) in the case of a motion for resentencing, another Federal or State offense, if evidence of such offense was admitted during a Federal death sentencing hearing and exonerated of such offense would entitle the applicant to a reduced sentence or a new sentencing proceeding.

“(h) OTHER LAWS UNAFFECTED.—

“(1) POST-CONVICTION RELIEF.—Nothing in this section shall affect the circumstances under which a person may obtain DNA testing or post-conviction relief under any other law.

“(2) HABEAS CORPUS.—Nothing in this section shall provide a basis for relief in any Federal habeas corpus proceeding.

“(3) NOT A MOTION UNDER SECTION 2255.—A motion under this section shall not be considered to be a motion under section 2255 for purposes of determining whether the motion or any other motion is a second or successive motion under section 2255.

“§ 3600A. Preservation of biological evidence

“(a) IN GENERAL.—Notwithstanding any other provision of law, the Government shall preserve biological evidence that was secured in the investigation or prosecution of a Federal offense, if a defendant is under a sentence of imprisonment for such offense.

“(b) DEFINED TERM.—For purposes of this section, the term ‘biological evidence’ means—

“(1) a sexual assault forensic examination kit; or

“(2) semen, blood, saliva, hair, skin tissue, or other identified biological material.

“(c) APPLICABILITY.—Subsection (a) shall not apply if—

“(1) a court has denied a request or motion for DNA testing of the biological evidence by the defendant under section 3600, and no appeal is pending;

“(2) the defendant knowingly and voluntarily waived the right to request DNA testing of the biological evidence in a court proceeding conducted after the date of enactment of the Innocence Protection Act of 2004;

“(3) after a conviction becomes final and the defendant has exhausted all opportunities for direct review of the conviction, the defendant is notified that the biological evidence may be destroyed and the defendant does not file a motion under section 3600 within 180 days of receipt of the notice;

“(4)(A) the evidence must be returned to its rightful owner, or is of such a size, bulk, or physical character as to render retention impracticable; and

“(B) the Government takes reasonable measures to remove and preserve portions of the material evidence sufficient to permit future DNA testing; or

“(5) the biological evidence has already been subjected to DNA testing under section 3600 and the results included the defendant as the source of such evidence.

“(d) OTHER PRESERVATION REQUIREMENT.—Nothing in this section shall preempt or supersede any statute, regulation, court order, or other provision of law that may require evidence, including biological evidence, to be preserved.

“(e) REGULATIONS.—Not later than 180 days after the date of enactment of the Innocence Protection Act of 2004, the Attorney General shall promulgate regulations to implement and enforce

Deadline.

this section, including appropriate disciplinary sanctions to ensure that employees comply with such regulations.

“(f) CRIMINAL PENALTY.—Whoever knowingly and intentionally destroys, alters, or tampers with biological evidence that is required to be preserved under this section with the intent to prevent that evidence from being subjected to DNA testing or prevent the production or use of that evidence in an official proceeding, shall be fined under this title, imprisoned for not more than 5 years, or both.

“(g) HABEAS CORPUS.—Nothing in this section shall provide a basis for relief in any Federal habeas corpus proceeding.”

(2) CLERICAL AMENDMENT.—The chapter analysis for part II of title 18, United States Code, is amended by inserting after the item relating to chapter 228 the following:

“228A. Post-conviction DNA testing 3600”.

18 USC 3600
note.

(b) SYSTEM FOR REPORTING MOTIONS.—

(1) ESTABLISHMENT.—The Attorney General shall establish a system for reporting and tracking motions filed in accordance with section 3600 of title 18, United States Code.

(2) OPERATION.—In operating the system established under paragraph (1), the Federal courts shall provide to the Attorney General any requested assistance in operating such a system and in ensuring the accuracy and completeness of information included in that system.

(3) REPORT.—Not later than 2 years after the date of enactment of this Act, the Attorney General shall submit a report to Congress that contains—

(A) a list of motions filed under section 3600 of title 18, United States Code, as added by this title;

(B) whether DNA testing was ordered pursuant to such a motion;

(C) whether the applicant obtained relief on the basis of DNA test results; and

(D) whether further proceedings occurred following a granting of relief and the outcome of such proceedings.

(4) ADDITIONAL INFORMATION.—The report required to be submitted under paragraph (3) may include any other information the Attorney General determines to be relevant in assessing the operation, utility, or costs of section 3600 of title 18, United States Code, as added by this title, and any recommendations the Attorney General may have relating to future legislative action concerning that section.

18 USC 3600
note.

(c) EFFECTIVE DATE; APPLICABILITY.—This section and the amendments made by this section shall take effect on the date of enactment of this Act and shall apply with respect to any offense committed, and to any judgment of conviction entered, before, on, or after that date of enactment.

42 USC 14136e.

SEC. 412. KIRK BLOODSWORTH POST-CONVICTION DNA TESTING GRANT PROGRAM.

(a) IN GENERAL.—The Attorney General shall establish the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program to award grants to States to help defray the costs of post-conviction DNA testing.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated \$5,000,000 for each of fiscal years 2005 through 2009 to carry out this section.

(c) STATE DEFINED.—For purposes of this section, the term “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

SEC. 413. INCENTIVE GRANTS TO STATES TO ENSURE CONSIDERATION OF CLAIMS OF ACTUAL INNOCENCE.

42 USC 14136
note.

For each of fiscal years 2005 through 2009, all funds appropriated to carry out sections 303, 305, 308, and 412 shall be reserved for grants to eligible entities that—

(1) meet the requirements under section 303, 305, 308, or 412, as appropriate; and

(2) demonstrate that the State in which the eligible entity operates—

(A) provides post-conviction DNA testing of specified evidence—

(i) under a State statute enacted before the date of enactment of this Act (or extended or renewed after such date), to persons convicted after trial and under a sentence of imprisonment or death for a State felony offense, in a manner that ensures a reasonable process for resolving claims of actual innocence; or

(ii) under a State statute enacted after the date of enactment of this Act, or under a State rule, regulation, or practice, to persons under a sentence of imprisonment or death for a State felony offense, in a manner comparable to section 3600(a) of title 18, United States Code (provided that the State statute, rule, regulation, or practice may make post-conviction DNA testing available in cases in which such testing is not required by such section), and if the results of such testing exclude the applicant, permits the applicant to apply for post-conviction relief, notwithstanding any provision of law that would otherwise bar such application as untimely; and

(B) preserves biological evidence secured in relation to the investigation or prosecution of a State offense—

(i) under a State statute or a State or local rule, regulation, or practice, enacted or adopted before the date of enactment of this Act (or extended or renewed after such date), in a manner that ensures that reasonable measures are taken by all jurisdictions within the State to preserve such evidence; or

(ii) under a State statute or a State or local rule, regulation, or practice, enacted or adopted after the date of enactment of this Act, in a manner comparable to section 3600A of title 18, United States Code, if—

(I) all jurisdictions within the State comply with this requirement; and

(II) such jurisdictions may preserve such evidence for longer than the period of time that such evidence would be required to be preserved under such section 3600A.

Subtitle B—Improving the Quality of Representation in State Capital Cases

42 USC 14163. **SEC. 421. CAPITAL REPRESENTATION IMPROVEMENT GRANTS.**

(a) **IN GENERAL.**—The Attorney General shall award grants to States for the purpose of improving the quality of legal representation provided to indigent defendants in State capital cases.

(b) **DEFINED TERM.**—In this section, the term “legal representation” means legal counsel and investigative, expert, and other services necessary for competent representation.

(c) **USE OF FUNDS.**—Grants awarded under subsection (a)—
 (1) shall be used to establish, implement, or improve an effective system for providing competent legal representation to—

(A) indigents charged with an offense subject to capital punishment;

(B) indigents who have been sentenced to death and who seek appellate or collateral relief in State court; and

(C) indigents who have been sentenced to death and who seek review in the Supreme Court of the United States; and

(2) shall not be used to fund, directly or indirectly, representation in specific capital cases.

(d) **APPORTIONMENT OF FUNDS.**—

(1) **IN GENERAL.**—Of the funds awarded under subsection (a)—

(A) not less than 75 percent shall be used to carry out the purpose described in subsection (c)(1)(A); and

(B) not more than 25 percent shall be used to carry out the purpose described in subsection (c)(1)(B).

(2) **WAIVER.**—The Attorney General may waive the requirement under this subsection for good cause shown.

(e) **EFFECTIVE SYSTEM.**—As used in subsection (c)(1), an effective system for providing competent legal representation is a system that—

(1) invests the responsibility for appointing qualified attorneys to represent indigents in capital cases—

(A) in a public defender program that relies on staff attorneys, members of the private bar, or both, to provide representation in capital cases;

(B) in an entity established by statute or by the highest State court with jurisdiction in criminal cases, which is composed of individuals with demonstrated knowledge and expertise in capital cases, except for individuals currently employed as prosecutors; or

(C) pursuant to a statutory procedure enacted before the date of the enactment of this Act under which the trial judge is required to appoint qualified attorneys from a roster maintained by a State or regional selection committee or similar entity; and

(2) requires the program described in paragraph (1)(A), the entity described in paragraph (1)(B), or an appropriate entity designated pursuant to the statutory procedure described in paragraph (1)(C), as applicable, to—

(A) establish qualifications for attorneys who may be appointed to represent indigents in capital cases;

(B) establish and maintain a roster of qualified attorneys;

(C) except in the case of a selection committee or similar entity described in paragraph (1)(C), assign 2 attorneys from the roster to represent an indigent in a capital case, or provide the trial judge a list of not more than 2 pairs of attorneys from the roster, from which 1 pair shall be assigned, provided that, in any case in which the State elects not to seek the death penalty, a court may find, subject to any requirement of State law, that a second attorney need not remain assigned to represent the indigent to ensure competent representation;

(D) conduct, sponsor, or approve specialized training programs for attorneys representing defendants in capital cases;

(E)(i) monitor the performance of attorneys who are appointed and their attendance at training programs; and
“(ii) remove from the roster attorneys who—

“(I) fail to deliver effective representation or engage in unethical conduct;

“(II) fail to comply with such requirements as such program, entity, or selection committee or similar entity may establish regarding participation in training programs; or

“(III) during the past 5 years, have been sanctioned by a bar association or court for ethical misconduct relating to the attorney’s conduct as defense counsel in a criminal case in Federal or State court; and

(F) ensure funding for the cost of competent legal representation by the defense team and outside experts selected by counsel, who shall be compensated—

(i) in the case of a State that employs a statutory procedure described in paragraph (1)(C), in accordance with the requirements of that statutory procedure; and
(ii) in all other cases, as follows:

(I) Attorneys employed by a public defender program shall be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.

(II) Appointed attorneys shall be compensated for actual time and service, computed on an hourly basis and at a reasonable hourly rate in light of the qualifications and experience of the attorney and the local market for legal representation in cases reflecting the complexity and responsibility of capital cases.

(III) Non-attorney members of the defense team, including investigators, mitigation specialists, and experts, shall be compensated at a rate that reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.

(IV) Attorney and non-attorney members of the defense team shall be reimbursed for reasonable incidental expenses.

118 STAT. 2288

PUBLIC LAW 108-405—OCT. 30, 2004

42 USC 14163a. **SEC. 422. CAPITAL PROSECUTION IMPROVEMENT GRANTS.**

(a) **IN GENERAL.**—The Attorney General shall award grants to States for the purpose of enhancing the ability of prosecutors to effectively represent the public in State capital cases.

(b) **USE OF FUNDS.**—

(1) **PERMITTED USES.**—Grants awarded under subsection (a) shall be used for one or more of the following:

(A) To design and implement training programs for State and local prosecutors to ensure effective representation in State capital cases.

(B) To develop and implement appropriate standards and qualifications for State and local prosecutors who litigate State capital cases.

(C) To assess the performance of State and local prosecutors who litigate State capital cases, provided that such assessment shall not include participation by the assessor in the trial of any specific capital case.

(D) To identify and implement any potential legal reforms that may be appropriate to minimize the potential for error in the trial of capital cases.

(E) To establish a program under which State and local prosecutors conduct a systematic review of cases in which a death sentence was imposed in order to identify cases in which post-conviction DNA testing may be appropriate.

(F) To provide support and assistance to the families of murder victims.

(2) **PROHIBITED USE.**—Grants awarded under subsection (a) shall not be used to fund, directly or indirectly, the prosecution of specific capital cases.

42 USC 14163b. **SEC. 423. APPLICATIONS.**

Procedures.

(a) **IN GENERAL.**—The Attorney General shall establish a process through which a State may apply for a grant under this subtitle.

(b) **APPLICATION.**—

(1) **IN GENERAL.**—A State desiring a grant under this subtitle shall submit an application to the Attorney General at such time, in such manner, and containing such information as the Attorney General may reasonably require.

(2) **CONTENTS.**—Each application submitted under paragraph (1) shall contain—

Certification.

(A) a certification by an appropriate officer of the State that the State authorizes capital punishment under its laws and conducts, or will conduct, prosecutions in which capital punishment is sought;

(B) a description of the communities to be served by the grant, including the nature of existing capital defender services and capital prosecution programs within such communities;

(C) a long-term statewide strategy and detailed implementation plan that—

(i) reflects consultation with the judiciary, the organized bar, and State and local prosecutor and defender organizations; and

(ii) establishes as a priority improvement in the quality of trial-level representation of indigents

charged with capital crimes and trial-level prosecution of capital crimes;

(D) in the case of a State that employs a statutory procedure described in section 421(e)(1)(C), a certification by an appropriate officer of the State that the State is in substantial compliance with the requirements of the applicable State statute; and

(E) assurances that Federal funds received under this subtitle shall be—

(i) used to supplement and not supplant non-Federal funds that would otherwise be available for activities funded under this subtitle; and

(ii) allocated in accordance with section 426(b).

SEC. 424. STATE REPORTS.

42 USC 14163c.

(a) **IN GENERAL.**—Each State receiving funds under this subtitle shall submit an annual report to the Attorney General that—

(1) identifies the activities carried out with such funds;

and

(2) explains how each activity complies with the terms and conditions of the grant.

(b) **CAPITAL REPRESENTATION IMPROVEMENT GRANTS.**—With respect to the funds provided under section 421, a report under subsection (a) shall include—

(1) an accounting of all amounts expended;

(2) an explanation of the means by which the State—

(A) invests the responsibility for identifying and appointing qualified attorneys to represent indigents in capital cases in a program described in section 421(e)(1)(A), an entity described in section 421(e)(1)(B), or a selection committee or similar entity described in section 421(e)(1)(C); and

(B) requires such program, entity, or selection committee or similar entity, or other appropriate entity designated pursuant to the statutory procedure described in section 421(e)(1)(C), to—

(i) establish qualifications for attorneys who may be appointed to represent indigents in capital cases in accordance with section 421(e)(2)(A);

(ii) establish and maintain a roster of qualified attorneys in accordance with section 421(e)(2)(B);

(iii) assign attorneys from the roster in accordance with section 421(e)(2)(C);

(iv) conduct, sponsor, or approve specialized training programs for attorneys representing defendants in capital cases in accordance with section 421(e)(2)(D);

(v) monitor the performance and training program attendance of appointed attorneys, and remove from the roster attorneys who fail to deliver effective representation or fail to comply with such requirements as such program, entity, or selection committee or similar entity may establish regarding participation in training programs, in accordance with section 421(e)(2)(E); and

(vi) ensure funding for the cost of competent legal representation by the defense team and outside experts

selected by counsel, in accordance with section 421(e)(2)(F), including a statement setting forth—

(I) if the State employs a public defender program under section 421(e)(1)(A), the salaries received by the attorneys employed by such program and the salaries received by attorneys in the prosecutor's office in the jurisdiction;

(II) if the State employs appointed attorneys under section 421(e)(1)(B), the hourly fees received by such attorneys for actual time and service and the basis on which the hourly rate was calculated;

(III) the amounts paid to non-attorney members of the defense team, and the basis on which such amounts were determined; and

(IV) the amounts for which attorney and non-attorney members of the defense team were reimbursed for reasonable incidental expenses;

(3) in the case of a State that employs a statutory procedure described in section 421(e)(1)(C), an assessment of the extent to which the State is in compliance with the requirements of the applicable State statute; and

(4) a statement confirming that the funds have not been used to fund representation in specific capital cases or to supplant non-Federal funds.

(c) CAPITAL PROSECUTION IMPROVEMENT GRANTS.—With respect to the funds provided under section 422, a report under subsection (a) shall include—

(1) an accounting of all amounts expended;

(2) a description of the means by which the State has—

(A) designed and established training programs for State and local prosecutors to ensure effective representation in State capital cases in accordance with section 422(b)(1)(A);

(B) developed and implemented appropriate standards and qualifications for State and local prosecutors who litigate State capital cases in accordance with section 422(b)(1)(B);

(C) assessed the performance of State and local prosecutors who litigate State capital cases in accordance with section 422(b)(1)(C);

(D) identified and implemented any potential legal reforms that may be appropriate to minimize the potential for error in the trial of capital cases in accordance with section 422(b)(1)(D);

(E) established a program under which State and local prosecutors conduct a systematic review of cases in which a death sentence was imposed in order to identify cases in which post-conviction DNA testing may be appropriate in accordance with section 422(b)(1)(E); and

(F) provided support and assistance to the families of murder victims; and

(3) a statement confirming that the funds have not been used to fund the prosecution of specific capital cases or to supplant non-Federal funds.

(d) PUBLIC DISCLOSURE OF ANNUAL STATE REPORTS.—The annual reports to the Attorney General submitted by any State under this section shall be made available to the public.

SEC. 425. EVALUATIONS BY INSPECTOR GENERAL AND ADMINISTRATIVE REMEDIES. 42 USC 14163d.

(a) **EVALUATION BY INSPECTOR GENERAL.**—

(1) **IN GENERAL.**—As soon as practicable after the end of the first fiscal year for which a State receives funds under a grant made under this subtitle, the Inspector General of the Department of Justice (in this section referred to as the “Inspector General”) shall—

(A) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report evaluating the compliance by the State with the terms and conditions of the grant; and Reports.

(B) if the Inspector General concludes that the State is not in compliance with the terms and conditions of the grant, specify any deficiencies and make recommendations to the Attorney General for corrective action.

(2) **PRIORITY.**—In conducting evaluations under this subsection, the Inspector General shall give priority to States that the Inspector General determines, based on information submitted by the State and other comments provided by any other person, to be at the highest risk of noncompliance.

(3) **DETERMINATION FOR STATUTORY PROCEDURE STATES.**— Deadline.
For each State that employs a statutory procedure described in section 421(e)(1)(C), the Inspector General shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate, not later than the end of the first fiscal year for which such State receives funds, a determination as to whether the State is in substantial compliance with the requirements of the applicable State statute.

(4) **COMMENTS FROM PUBLIC.**—The Inspector General shall receive and consider comments from any member of the public regarding any State’s compliance with the terms and conditions of a grant made under this subtitle. To facilitate the receipt of such comments, the Inspector General shall maintain on its website a form that any member of the public may submit, either electronically or otherwise, providing comments. The Inspector General shall give appropriate consideration to all such public comments in reviewing reports submitted under section 424 or in establishing the priority for conducting evaluations under this section.

(b) **ADMINISTRATIVE REVIEW.**—

(1) **COMMENT.**—Upon the submission of a report under subsection (a)(1) or a determination under subsection (a)(3), the Attorney General shall provide the State with an opportunity to comment regarding the findings and conclusions of the report or the determination.

(2) **CORRECTIVE ACTION PLAN.**—If the Attorney General, after reviewing a report under subsection (a)(1) or a determination under subsection (a)(3), determines that a State is not in compliance with the terms and conditions of the grant, the Attorney General shall consult with the appropriate State authorities to enter into a plan for corrective action. If the State does not agree to a plan for corrective action that has been approved by the Attorney General within 90 days after the submission of the report under subsection (a)(1) or the Deadline.

determination under subsection (a)(3), the Attorney General shall, within 30 days, issue guidance to the State regarding corrective action to bring the State into compliance.

(3) **REPORT TO CONGRESS.**—Not later than 90 days after the earlier of the implementation of a corrective action plan or the issuance of guidance under paragraph (2), the Attorney General shall submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate as to whether the State has taken corrective action and is in compliance with the terms and conditions of the grant.

(c) **PENALTIES FOR NONCOMPLIANCE.**—If the State fails to take the prescribed corrective action under subsection (b) and is not in compliance with the terms and conditions of the grant, the Attorney General shall discontinue all further funding under sections 421 and 422 and require the State to return the funds granted under such sections for that fiscal year. Nothing in this paragraph shall prevent a State which has been subject to penalties for non-compliance from reapplying for a grant under this subtitle in another fiscal year.

(d) **PERIODIC REPORTS.**—During the grant period, the Inspector General shall periodically review the compliance of each State with the terms and conditions of the grant.

(e) **ADMINISTRATIVE COSTS.**—Not less than 2.5 percent of the funds appropriated to carry out this subtitle for each of fiscal years 2005 through 2009 shall be made available to the Inspector General for purposes of carrying out this section. Such sums shall remain available until expended.

(f) **SPECIAL RULE FOR “STATUTORY PROCEDURE” STATES NOT IN SUBSTANTIAL COMPLIANCE WITH STATUTORY PROCEDURES.**—

(1) **IN GENERAL.**—In the case of a State that employs a statutory procedure described in section 421(e)(1)(C), if the Inspector General submits a determination under subsection (a)(3) that the State is not in substantial compliance with the requirements of the applicable State statute, then for the period beginning with the date on which that determination was submitted and ending on the date on which the Inspector General determines that the State is in substantial compliance with the requirements of that statute, the funds awarded under this subtitle shall be allocated solely for the uses described in section 421.

(2) **RULE OF CONSTRUCTION.**—The requirements of this subsection apply in addition to, and not instead of, the other requirements of this section.

42 USC 14163e.

SEC. 426. AUTHORIZATION OF APPROPRIATIONS.

(a) **AUTHORIZATION FOR GRANTS.**—There are authorized to be appropriated \$75,000,000 for each of fiscal years 2005 through 2009 to carry out this subtitle.

(b) **RESTRICTION ON USE OF FUNDS TO ENSURE EQUAL ALLOCATION.**—Each State receiving a grant under this subtitle shall allocate the funds equally between the uses described in section 421 and the uses described in section 422, except as provided in section 425(f).

Subtitle C—Compensation for the Wrongfully Convicted

SEC. 431. INCREASED COMPENSATION IN FEDERAL CASES FOR THE WRONGFULLY CONVICTED.

Section 2513(e) of title 28, United States Code, is amended by striking “exceed the sum of \$5,000” and inserting “exceed \$100,000 for each 12-month period of incarceration for any plaintiff who was unjustly sentenced to death and \$50,000 for each 12-month period of incarceration for any other plaintiff”.

SEC. 432. SENSE OF CONGRESS REGARDING COMPENSATION IN STATE DEATH PENALTY CASES.

It is the sense of Congress that States should provide reasonable compensation to any person found to have been unjustly convicted of an offense against the State and sentenced to death.

Approved October 30, 2004.

LEGISLATIVE HISTORY—H.R. 5107 (H.R. 3214):

HOUSE REPORTS: No. 108-711 (Comm. on the Judiciary).

SENATE REPORTS: No. 108-321, Pt. 1 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 150 (2004):

Oct. 6, considered and passed House.

Oct. 9, considered and passed Senate.



[House Appropriations Committee Print]

Consolidated Appropriations Act, 2008

(H.R. 2764; Public Law 110-161)

**DIVISION B—COMMERCE, JUSTICE, SCIENCE,
AND RELATED AGENCIES APPROPRIATIONS
ACT, 2008**

(4) \$11,750,000 is for an offender re-entry program;
 (5) \$9,400,000 is for grants to upgrade criminal records, as authorized under the Crime Identification Technology Act of 1998 (42 U.S.C. 14601);

(6) \$152,272,000 is for DNA related and forensic programs and activities as follows:

(A) \$147,391,000 for a DNA analysis and capacity enhancement program including the purposes of section 2 of the DNA Analysis Backlog Elimination Act of 2000, as amended by the Debbie Smith Act of 2004, and further amended by Public Law 109-162;

(B) \$4,881,000 for the purposes described in the Kirk Bloodsworth Post-Conviction DNA Testing Program (Public Law 108-405, section 412): *Provided*, That unobligated funds appropriated in fiscal years 2006 and 2007 for grants as authorized under sections 412 and 413 of the foregoing public law are hereby made available, instead, for the purposes here specified;

(7) \$15,040,000 is for improving tribal law enforcement, including equipment and training;

(8) \$20,000,000 is for programs to reduce gun crime and gang violence;

(9) \$3,760,000 is for training and technical assistance;

(10) \$18,800,000 is for Paul Coverdell Forensic Sciences Improvement Grants under part BB of title I of the 1968 Act;

(11) not to exceed \$28,200,000 is for program management and administration;

(12) \$20,000,000 is for grants under section 1701 of title I of the 1968 Act (42 U.S.C. 3796dd) for the hiring and rehiring of additional career law enforcement officers under part Q of such title notwithstanding subsection (i) of such section; and

(13) \$15,608,000 is for a national grant program the purpose of which is to assist State and local law enforcement to locate, arrest and prosecute child sexual predators and exploiters, and to enforce State offender registration laws described in section 1701(b) of the 1968 Act, of which:

(A) \$4,162,000 is for sex offender management assistance as authorized by the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-162), and the Violent Crime Control Act of 1994 (Public Law 103-322); and

(B) \$850,000 is for the National Sex Offender Public Registry.

JUVENILE JUSTICE PROGRAMS

For grants, contracts, cooperative agreements, and other assistance authorized by the Juvenile Justice and Delinquency Prevention Act of 1974 ("the 1974 Act"), the Omnibus Crime Control and Safe Streets Act of 1968 ("the 1968 Act"), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109-162), and other juvenile justice programs, including salaries and expenses in connection therewith to be transferred to and merged with the appropriations for Justice Assistance, \$383,513,000, to remain available until expended as follows: