FACT PATTERN

Phase 1 - Manufacturing

TaserPro is a national manufacturer of tasers. Tasers are weapons that administer a brief electrical current to momentarily stimulate a subject's sensory and motor nerves, resulting in involuntary muscle contractions. TaserPro has introduced and marketed its products to law enforcement and the public at large as non-lethal weapons to be used to pacify or restrain potentially dangerous individuals in threatening situations.

In 2008, TaserPro designed the ShockMaster Deluxe (SMD), capable of subduing up to three subjects without reload. Prior to initiating the manufacturing process, TaserPro's engineers ran thirty (30) tests on the SMD to ensure it complied with federal and industry standards, administered a non-lethal amount of electrical current, and was safe for use. The SMD passed all but five (5) of the tests, which the TaserPro's in-house engineers described as flukes. TaserPro initiated mass manufacturing and distribution of the SMD in January 2010.

Phase 2 – Contrary Evidence

In March 2010, the NYPD contracted with an independent third party, ShockTesters (ST), to run ten (10) safety tests on the SMD. In four (4) of the tests, the SMD caused sufficient electrical currents to cause serious bodily harm and possibly even death. NYPD issued a recall of all of the SMDs it had purchased.

NYPD's Chief mailed all the SMDs to TaserPro's CEO with a letter enclosing ST's test results and warning of the danger the SMD posed to subjects. TaserPro's CEO did not believe the warning and destroyed the NYPD letter, ST's test results, and the returned SMDs.

A few weeks later, TaserPro's in-house counsel called a friend, a NYPD Sergeant who worked in the Chief's office, just to catch up. The Sergeant casually mentioned the NYPD recall during the conversation. After communicating the Sergeant's comment to TaserPro's CEO, the CEO told in-house counsel what had been done to the NYPD package.

Phase 3 – Precipitating Event & Litigation

In May 2010, Hillsborough County Sheriff's Office (HCSO) received its shipment of the SMD and held TaserPro-recommended training classes for all its deputies. HCSO issued an SMD to each of its deputies after they attended the class.

In July 2010, HCSO Deputy Ima Officer was off-duty and enjoying a much-needed girl's night out. On her way back to her car, Wiley Bandit confronted her with a gun, demanding all of her money. After a brief struggle, Officer shocked Wiley with the SMD. After convulsing, Wiley's body went limp and Officer called for backup. Wiley was later pronounced dead at the scene.

After a thorough investigation, the County Coroner pronounced Wiley's cause of death to be myocardial infarction, which may have been triggered or exacerbated by electrical shock.

Wiley's family contacted Attorneys-R-Us (ARU) who learned of the NYPD recall. ARU obtained a copy of ST's test results. Through ARU, Wiley's family filed a products liability lawsuit against TaserPro claiming the SMD is unsafe because it delivers an inconsistent – and potentially lethal – amount of electrical current with each use.

ARU's expert taser witness is an NYPD taser trainer with 15 years' experience who has used hundreds of tasers – including the SMD – countless times and is prepared to present anecdotal evidence of the SMD's unreliability.

TaserPro is prepared to offer two expert witnesses: (1) Ernie Einstein (EE) who holds a Master's degree in electrical engineering and has worked in taser manufacturing for 30 years. EE is prepared to present the SMD's schematics and results of laboratory testing showing SMD's reliability; and (2) Doctor Q (DQ), who is a general medical practitioner with two years' experience. DQ is prepared to testify to general medical knowledge that the amount of electricity that the SMD is designed to deliver could not be lethal.

Phase 4 – Criminal Charges

In August 2012, the Wileys' products liability suit was settled out of court for $5,000,000.

Amnesty International actively monitored the SMD since its initial production, compiling numerous reports on a national level of the SMD allegedly causing the deaths of over 100 people. Amnesty International also learned that, instead of issuing a recall of the SMD after being alerted to the SMD's possible lethality, TaserPro contracted with an outside company to buy the SMD from distributors to keep additional units from being used. In October 2012, TaserPro issued a recall of the SMD. Shortly thereafter, Amnesty International turned over all its research to the Attorney General's office.

The Attorney General's office filed criminal charges against TaserPro for criminally negligent homicide and conspiracy claiming failure to report the SMD defects to federal regulators sooner, failure to disclose all requested information during the investigation, and causing the deaths of over 100 people.

Scientific Evidence and Related Ethical Issues

January 2011

APPLICABLE EVIDENTIARY RULES

Federal Rule of Evidence 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Section 90.702, *Fla. Stat.*

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Daubert Test

Federal courts must act as gatekeeper and permit only reliable and relevant expert testimony to be presented to the jury. *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579 (1993). The requirements of *Daubert* are not limited to scientific expert testimony, but apply to all expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 1174 (1999).

To fulfill its obligation under *Daubert*, "District Courts must engage in a rigorous inquiry to determine whether: '(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.'" *Rink v. Cheminova, Inc.*, 400 F. 3d 1286, 1291 (11th Cir. 2005).

In performing its role as gatekeeper, the Court can take into consideration a number of "reliability" factors including: (1) whether the scientific principle or technique has been or can be empirically tested; (2) whether the scientific principle or technique has been subjected to publication or peer review; (3) whether there is a known or potential error rate; and (4) whether the principle or technique is generally accepted in the scientific community.

Frye Test

In order to be admissible, the scientific evidence must be "generally accepted within the relevant scientific community." *See Frye v. United States,* 293 F. 1013, 1014 (D.C. Cir. 1923). The Florida Supreme Court has stated that "despite the federal adoption of a more lenient standard in *Daubert*…we have maintained the higher standard of reliability as dictated by *Frye*." *See Brim v. State*, 695 So. 2d 268 (Fla. 1997).

In Ramirez v. State, 651 So. 2d 1164 (Fla. 1995), the Florida Supreme Court outlined a four step process for determining the admissibility of expert opinion testimony concerning a new or novel scientific principle: (1) the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue; (2) the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs;" (3) The trial judge must determine whether a particular witness is qualified as a expert to present opinion testimony on the subject; and (4) the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of expert's opinion, which it may either accept or reject.

Party offering the evidence bears the burden of satisfying each test's elements by a preponderance of the evidence. *See Murray v. State*, 692 So. 2d 157, 161 (Fla. 1997), *see also Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291 (11th Cir. 2005)

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Printed on page BN1

No second chances in old DUI cases

By Todd Ruger

Published: Sunday, September 20, 2009 at 1:00 a.m.

The breath-alcohol tests used for years to help convict tens of thousands of DUI defendants across the state might not have been as reliable as prosecutors portrayed.

Two top experts have said that the Intoxilyzer 5000 breath-test machines -- used for about two decades before the state changed to updated machines in 2006 -- could not meet today's scientific requirements for ensuring accurate results.

The Intoxilyzer 5000 was only checked once a month to see if the machine was working properly. The state's newest machine, the Intoxilyzer 8000, runs two control tests during every alcohol breath test -- one right before and one right after.

The testimony of those experts means prosecutors cannot present the Intoxilyzer 5000 breath tests in court in the small number of remaining cases where that older machine was used.

As a result, dozens of DUI defendants in Sarasota and Manatee counties have had charges dropped or reduced to reckless driving.

But it is too late for anyone already convicted with results from the Intoxilyzer 5000 to benefit from the situation.

Prosecutors say the Intoxilyzer 5000 machines were reliable, even if the scientific community now calls for better safeguards to make sure the machine is accurate.

But defense attorneys say it is scary to think people might have been convinced to plead guilty, or lost their driver's licenses, based on a test whose reliability is now in question.

"Those machines were paraded into court as the gospel, and we now know it wasn't," said Venice attorney Robert Harrison, who has led the fight for years against the machines. "It's sad it came to this in the sunset of its life."

About 70 times each month in Florida, the new Intoxilyzer 8000 rejects a breath test because the control tests were not acceptable, Sarasota defense attorney Derek Byrd said.

"If that happens 70 times a month on a newer, better machine, just by sheer logic you know on the 5000 it was happening there too," Byrd said. "You know people were blowing into a machine that there were problems with the results."

In depositions in DUI cases this year, two state experts say the currently accepted practice is that a control test must be performed during each actual test to ensure accurate results.

Scientists used to believe control tests once a month were sufficient, but the scientific community changed its opinion in the past few years.

"Just because the process doesn't meet the ideas of the general scientific community doesn't mean it's not reliable," said Assistant State Attorney Cliff Ramey, the supervisor of the misdemeanor division in Sarasota County.

But Ramey said the expert opinions now prevent them from introducing the Intoxilyzer 5000 breath test results in court.

Prosecutors can still pursue DUI charges without breath tests. Without a test, however, they must depend on testimony from officers or videos of the driver.

Ramey said his office is still prosecuting cases where they cannot use the results from Intoxilyzer 5000, but had to dismiss some of the cases since they date back to 2003 and officers have no memory of the case.

The question about whether the results of the Intoxilyzer 5000 were scientifically credible came up during the ongoing battle about the computer code that runs the machines.

Defense attorneys in about 450 DUI cases questioned the reliability of the machines, and judges have ruled that the defendants should have access to the computer code inside the Intoxilyzer 5000 and 8000.

After the manufacturer declined to disclose the code, county judges ruled prosecutors would only be able to introduce the results if they proved it was scientifically accurate.

They brought in Laura Barfield, alcohol testing program manager at the Florida Department of Law Enforcement, and Bruce Goldberger from the University of Florida, long considered top experts on the breath tests.

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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]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Justice for All Act of 2004.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

42 USC 13701 note.

(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:

TITLE I—SCOTT CAMPBELL, STEPHANIE ROPER, WENDY PRESTON, LOUARNA GILLIS, AND NILA LYNN CRIME VICTIMS' RIGHTS ACT

Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act.

SEC. 101. SHORT TITLE.

18 USC 3771 note.

This title may be cited as the "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act".

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

"§ 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 10603e.

"(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.

TITLE II—DEBBIE SMITH ACT OF 2004

42 USC 13701 note.

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 GRANTEES.—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.

"(l) 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;"; and

(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).".

DNA Sexual Assault Justice Act of 2004.

TITLE III—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—

Deadline.

"(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

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— Grants.

(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— Definition.

(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 Grants.

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.

Grants.

(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.

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".

42 USC 3796gg–1—3796gg–5, 3796–1 note.

(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) 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,

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—INNOCENCE 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

"§ 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 exoneration 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 exoneration 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.

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 noncompliance 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.

○

The Florida Senate

Interim Report 2011-112 *October 2010*

Committee on Criminal Justice

EVIDENCE PRESERVATION FOR POSTSENTENCING DNA TESTING - REASSESSING CURRENT STATUTORY *REQUIREMENTS IN SECTION 925.11, F.S.*

Issue Description

The normal course of affairs in a law enforcement agency's evidence section can be described as a natural flow. Physical evidence, having been gathered during criminal investigations, comes in for preservation and retention while evidence that is no longer needed because the criminal case has "ended" is disposed of by the agency. This natural progression of the retention and disposition of evidence is inextricably linked to the flow of criminal cases through the justice system.

Some governmental entities responsible for retaining and preserving physical evidence gathered from crime scenes are experiencing an overflow of evidence in their safekeeping. They have physical evidence accumulating at unprecedented levels because they are keeping more of it, and they are keeping it for longer periods of time. The reason for keeping more physical evidence for longer periods of time, according to agency representatives, is because of the possibility that the evidence contains DNA. As a result of the overflow, the entities (primarily law enforcement agencies) have been forced to acquire costly additional secure storage space and refrigeration units, and expend more employee hours maintaining the evidence.

The agencies' physical evidence accumulation problem was brought to Senate staff's attention during the 2010 legislative session when Senate Bill 2522 was filed. In part, the bill was an attempt to ease the physical evidence accumulation problem in cases involving DNA evidence. Because the bill brought the problem to light, Senate staff initiated discussions about the issue with the stakeholders. Staff and the stakeholders decided to work together to find options for elected officials before the 2011 Legislative Session begins.

Background

It is safe to say that ten years ago, when Florida was debating its 2001 postsentencing DNA testing law, people had a certain amount of skepticism about, and perhaps resistance to the idea of DNA testing in cases where it was being used as evidence in postsentencing claims of innocence. Although the Innocence Project, the organization that relies upon DNA testing to assist people who claim their innocence after being convicted of a crime, had been founded in New York in 1992, and was having success in cases around the country, the Florida Innocence Initiative was just beginning to make its presence known in Florida.

During that time period, The Innocence Protection Act of 2000 was being debated in Congress. A few other state legislatures had passed or were considering postsentencing DNA testing bills. Convictions were being challenged in Florida courts based upon DNA testing, under the appellate legal theory of "newly discovered evidence." The Florida Supreme Court had received an Emergency Petition requesting that the Court adopt a Rule of Criminal Procedure that would clarify a statewide procedure by which challenges based upon DNA could be brought.

The Florida Legislature took up the matter of postsentencing DNA testing in 2001 and passed a law creating a statutory right to raise legal challenges claiming innocence.[1] The law has been amended twice since its passage, in 2003 and 2006. In order to fully understand the current physical evidence overflow problem some law

[1] Ch. 2001-97, Laws of Florida.

enforcement agencies are contending with, it is helpful to consider postconviction proceedings in cases where a plea is entered and the evolution of the postsentencing DNA testing law.[2]

Appellate Review of Criminal Cases Resolved by a Plea

A defendant who has been convicted of a crime has certain rights to appeal on direct appeal or on matters that are collateral to the conviction. Article V, Section 4(b) of the Florida Constitution has been construed to convey a constitutional protection of this right.[3]

Appeal or Review After a Plea of Guilty or Nolo Contendere
When a defendant pleads guilty or nolo contendere (no contest) having elected not to take his or her case to trial, appeal rights are limited. Section 924.06(3), F.S., states: "A defendant who pleads guilty with no express reservation of the right to appeal a legally dispositive issue, or a defendant who pleads nolo contendere with no express reservation of the right to appeal a legally dispositive issue, shall have no right to direct appeal."

In *Robinson v. State*, 373 So.2d 898 (Fla. 1979), the Court was asked to review the constitutionality of the foregoing statutory language. The Court upheld the statute as applied in the Robinson case, making it clear that once a defendant pleads guilty the only issues that may be *directly* appealed are actions that took place contemporaneous with the plea. The Court stated: "There is an exclusive and limited class of issues which occur contemporaneously with the entry of the plea that may be the proper subject of an appeal. To our knowledge, they would include only the following: (1) subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea."

Postconviction proceedings, also known as collateral review, usually involve claims that the defendant's trial counsel was ineffective, claims of newly discovered evidence or evidence that could not have been discovered through the exercise of due diligence, and claims that the prosecution failed to disclose exculpatory evidence. Procedurally, collateral review is generally governed by Florida Rule of Criminal Procedure 3.850. A rule 3.850 motion must be filed and considered in the trial court where the defendant was sentenced.

A defendant who enters a plea may file a motion for postconviction relief, based on collateral matters, within two years of the judgment and sentence becoming final in the case. Generally, the judgment and sentence in a plea case do not become final until the thirty days within which a direct appeal could be filed have passed and no direct appeal is filed. However, if there is a direct appeal, the judgment and sentence do not become final until the last appellate court to hear the direct appeal has upheld the judgment and sentence and issued its mandate.

As previously stated, a Rule 3.850 motion must be filed within two years of the defendant's judgment and sentence becoming final *unless* the motion alleges that the facts on which the claim is based were unknown to the defendant and could not have been ascertained by the exercise of due diligence.[4] This basis for collateral review is known as the "newly discovered evidence" theory. In order to grant a new trial, in addition to making the finding that the evidence was unknown and could not have been known at the time of trial through due diligence, the trial court must also find that the evidence is of such a nature that it would probably produce an acquittal on retrial.[5]

Motions for postconviction relief based on newly discovered evidence must be raised *within two years of the discovery* of such evidence.[6] The Florida Supreme Court has held that the two year time limit for filing a 3.850 motion based on newly discovered evidence begins to run on a defendant's postconviction request for DNA testing when the testing method became available. For example, in *Sireci v. State*, 773 So.2d 34 (Fla. 2000), the

[2] This Report omits discussion of the application of the law or evidence retention in capital cases because evidence in cases in which the defendant is sentenced to death is retained for sixty days after the execution has been carried out. See s. 925.11(4)(b), F.S.
[3] *Amendments to the Florida Rules of Appellate Procedure*, 696 So.2d 1103 (Fla. 1996).
[4] *Fla. R. Crim. P. 3.850(b)*.
[5] *Torres-Arboleda v. Dugger*, 636 So.2d 1321 (Fla. 1994); *Jones v. State*, 709 So.2d 512 (Fla. 1998).
[6] *Adams v. State*, 543 So.2d 1244 (Fla.1989).

Florida Supreme Court held that the defendant's postconviction claim filed on his 1976 conviction, which was filed in 1993, was *time barred* because "DNA typing was recognized in this state as a valid test as early as 1988."[7]

Regardless, a claim based upon newly discovered evidence can be brought at a time that is not precisely "calendar-driven," but rather, within two years of having made the discovery whenever that may be.[8]

An Overview of the 2001 Postsentencing DNA Testing Law

The postsentencing DNA testing law in Florida, as it existed from October 1, 2001 to October 1, 2003, applied in *all* criminal cases in which the defendant had been convicted and sentenced subsequent to a *trial*.[9] It provided for testing, if granted by the court, of physical evidence collected at the time of the crime investigation which would exonerate the person or mitigate the sentence.

The statute set forth a time limit within which a petition seeking testing had to be filed with the trial court. The time limitation was *either* two years from the date the judgment and sentence became final where no direct appeal was filed, within two years of the conviction being affirmed on direct appeal, within two years of collateral counsel being appointed in a capital case, *or* by October 1, 2003, whichever applicable date occurred later.[10] The petition could be filed *at any time* under the newly discovered evidence theory.[11]

Among other facts, the sworn petition was required to contain a statement that "*identification* of the defendant is a *genuinely disputed issue* in the case."[12]

Subsection (4) of s. 925.11, F.S., provided requirements for the *preservation of evidence* as follows:

> (4) Preservation of evidence.—
>
> (a) Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement shall maintain any physical evidence collected at the time of the crime *for which a postsentencing testing of DNA may be requested*.
>
> (b) Except for a case in which the death penalty is imposed, the evidence shall be maintained *for at least the period of time set forth in subparagraph (1)(b)1* [time limits for filing petition]. In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence.
>
> (c) A governmental entity may dispose of the physical evidence *before* the expiration of the period of time set forth in paragraph (1)(b) *if* all of the conditions set forth below are met.
>
> 1. The governmental entity *notifies* all of the following individuals of its intent to dispose of the evidence: the sentenced defendant, any counsel of record, the prosecuting authority, and the Attorney General.
>
> 2. The *notifying entity does not receive*, within 90 days after sending the notification, either a copy of a petition for postsentencing DNA testing filed pursuant to this section or a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the time for filing it has expired.

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[7] See also, *Ziegler v. State*, 654 So.2d 1162 (Fla. 1995).
[8] *Sireci v. State*, 773 So.2d 34 (Fla. 2000); *Ziegler v. State*, 654 So.2d 1162 (Fla. 1995).
[9] Section 925.11(1)(a), F.S. (2001).
[10] Section 925.11(1)(b)1., F.S. (2001.
[11] Section 925.11(1)(b)2., F.S. (2001).
[12] Section 925.11(2)(a), F.S. (2001).

> 3. No other provision of law or rule requires that the physical evidence be preserved or retained. [emphasis added and clarification noted]

Briefly stated, an agency could dispose of physical evidence for which postsentencing DNA testing may be requested *prior to* the time limitations for a petition for testing to have been filed with the court *if* the notification provision set forth above was followed.

2003 Amendment

During the 2004 Legislative Session, the Legislature amended s. 925.11, F.S., to extend the original two-year time limitation during which time a person convicted at trial and sentenced must file a petition for post-conviction DNA testing of evidence to a four-year time limitation.[13] The effect of the law was made retroactive to October 1, 2003. This extended the previous deadline of October 1, 2003, to October 1, 2005, for any petition that would otherwise be time- barred. The Florida Supreme Court adopted this new deadline in Rule 3.853, Florida Rules of Criminal Procedure, the rule that governs postconviction DNA court procedure.[14]

By virtue of the Legislature extending the petition filing deadline to allow petitioners four years to request testing, the requirements related to preservation of evidence were similarly extended.[15] The possibility of disposing of physical evidence by use of the notice provision of the original statute remained intact.

2006 Amendment

Again in 2006, the Legislature addressed issues related to postsentencing DNA testing.[16] This amendment *eliminated the time limitations* within which a person had to file a petition seeking postsentencing DNA testing, allowing the filing or consideration of a petition "at any time following the date that the judgment and sentence in the case becomes final."[17]

It also *did away with the Notice provisions* whereby a governmental entity could dispose of physical evidence in a case after giving proper notice to interested parties. Subsection (4)(a) now simply states that a governmental entity "shall maintain any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested" (see testing may be requested "at any time following the date that the judgment and sentence in the case becomes final" in the paragraph above).[18]

Reading subsection (4)(a) together with subsection (4)(b) of s. 925.11, F.S., which states: "…a governmental entity may dispose of the physical evidence if the term of the sentence imposed in the case has expired…", it now appears as if the loss of the notice provision means that a governmental entity is required to maintain physical evidence until the end of a person's sentence. This view is certainly the conservative view. For an agency to construe the statute otherwise, it would have to somehow determine whether DNA testing "may be requested…at any time" on a particular piece of evidence.

The 2006 amendment also *expanded the pool* of people who could take advantage of postsentencing DNA testing to include those who enter a plea of guilty or nolo contendere to felony charges. However, in plea cases, the petition for DNA testing can only be filed if the facts upon which the petition is based were unknown at the time of the entry of the plea and could not have been ascertained by due diligence, or the physical evidence was not disclosed by the prosecutor.[19]

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[13] Chapter 2004-67, L.O.F.
[14] *Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A)(Postconviction DNA Testing)*, 884 So. 2d 934 (Fla. 2004).
[15] Chapter 2004-67, L.O.F.; *see also*, *Amendments to Florida Rule of Criminal Procedure 3.853(d)(1)(A)(Postconviction DNA Testing)*, 884 So. 2d 934 (Fla. 2004) (approving similar extension language to rules of procedure for the court system).
[16] Chapter 2006-292, L.O.F.
[17] Section 925.11(1)(b).
[18] Section 925.11(4)(a), F.S.
[19] Section 925.12(1), F.S.

The 2006 amendment seems to *foreclose the likelihood of* not only *postsentencing DNA testing petitions* being filed but also many collateral challenges, in plea cases. This is because the 2006 amendment requires that an *inquiry* be made of the prosecutor, defense counsel and the defendant as to the disclosure and review of physical evidence in the case that contains DNA that may exonerate the defendant, before the court accepts the plea.[20] If such evidence exists but has not been tested, the statute provides for a postponement of the plea proceedings so that testing may occur.

The Florida Supreme Court also adopted a Rule that requires the judge to make the *inquiry before accepting a plea*.[21] The Rule, which mirrors the 2006 statute, states:

> (d) DNA Evidence Inquiry. Before accepting a defendant's plea of guilty or nolo contendere to a felony, the judge must inquire whether counsel for the defense has reviewed the discovery disclosed by the state, whether such discovery included a listing or description of physical items of evidence, and whether counsel has reviewed the nature of the evidence with the defendant. The judge must then inquire of the defendant and counsel for the defendant and the state whether physical evidence containing DNA is known to exist that could exonerate the defendant. If no such physical evidence is known to exist, the court may accept the defendant's plea and impose sentence. If such physical evidence is known to exist, upon defendant's motion specifying the physical evidence to be tested, the court may postpone the proceeding and order DNA testing.

Plainly stated, the court's inquiry should weed out cases where the issue of mistaken identity could later be raised. In practice, the court's inquiry leaves only "newly discovered evidence" or "undisclosed evidence" as a basis for filing a petition for DNA testing after a plea, as provided in s. 925.12, F.S.[22] By definition "newly discovered" or "undisclosed" evidence is not evidence that has been gathered during the investigation of the crime to which the defendant is entering a plea, and which is being retained by a governmental entity.

In theory, therefore, it could be said that the pre-plea inquiry by the court should have provided governmental entities approval for the disposition of physical evidence in plea cases, but it has not done so. Subsequent to the passage of the 2006 amendment, many law enforcement agencies are unsure about their authority to dispose of such evidence, or whether the agency is under a statutory obligation to maintain it, and if so, for how long. They are apparently also uncomfortable with any view of the meaning of the statute other than the conservative view, which avoids confronting questions about whether DNA testing "may be requested…at any time."[23] As a result, problems of both a fiscal and a physical (space) nature have begun to arise.

Findings and/or Conclusions

Physical Evidence Accumulation: Is There a Problem that Requires Legislative Action?

During the 2010 Legislative Session, Senate Bill 2522 was filed. It was a collaboration between the Florida Association of Police Chiefs and the Innocence Project of Florida. The bill was, in part, an attempt to amend s. 925.11, F.S., the postsentencing DNA testing statute to address physical evidence overflow issues being experienced by law enforcement agencies. Had the bill passed it would have drastically redefined current statutory requirements for governmental entities' preservation of physical evidence that may contain DNA.[24]

As a result of the physical evidence overflow issue coming to light, Senate staff met with stakeholders to discuss the problem in March 2010. It was decided that, together, the stakeholders would more thoroughly examine the issue during the 2010 Interim, to determine if an identifiable problem exists and, if so, to try to reach a consensus recommendation on how to fix the problem.

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[20] Section 925.12(2), F.S.
[21] Fla. R. Crim. P. 3.172(d).
[22] Section 925.12(2), F.S.
[23] Ss. 425.11(1)(b) and (4), F.S.
[24] In brief, the bill would have required retention of portions of bulky items likely to contain DNA in "serious crimes" cases. See Senate Bill 2522, 2010 Legislative Session.

A simple questionnaire was sent to the Clerks of Court and law enforcement agencies asking whether the preservation of evidence requirements as they appear in s. 925.11(4), F.S. (2006) – that the evidence be retained for as long as a sentenced defendant could file a petition seeking postsentencing DNA testing – has created demonstrable storage space or fiscal issues.[25] A summary of the results is as follows:

- 300 local police departments were surveyed by the Florida Police Chiefs Association and 280 responses were summarized by the Association in memo form. According to the memo, local police departments have seen at least a 30% increase in the volume of evidence being retained which the Association's memo directly attributes to the postsentencing DNA testing statute. This has created not only storage space and method problems but fiscal issues due to the amount of staff time spent researching the legal status of defendant's cases in order to determine if evidence disposal is statutorily permitted.
- Of the 26 Clerks of Courts that responded, 8 are currently experiencing evidence storage space or related fiscal issues (although some Clerks could predict that a problem may be on the horizon).
- Of the 11 County Sheriffs that responded, 7 reported storage or fiscal issues because of evidence accumulation much the same as police departments.
- Although the Florida Department of Law Enforcement does not normally retain evidence due to the nature of the agency's role in criminal investigations and therefore has not experienced the same problems as local agencies, when s. 925.11, F.S., was amended in 2006, FDLE's analysis of the bill mentioned a concern about the bill's likely problematic effect on local agencies' with regard to evidence retention.[26]

The accumulation of evidence appears to be attributable to two systemic factors: One, a 2006 statutory amendment to the postsentencing DNA testing statutes that eliminated the procedure by which agencies had been able to lawfully dispose of evidence prior to the end of a person's sentence, with confidence that it would not be needed for DNA testing at a later time; and two, the 2006 amendment provided for postsentencing DNA testing in felony cases where the defendant enters a plea, significantly increasing the pool of cases in which evidence has to be secured and preserved where, before, the evidence could be disposed of. Although the Legislature created a "safety-valve" judicial inquiry that should have provided authority for the disposition of evidence in the plea cases, it is not working.

Having determined that local governmental entities are experiencing a demonstrable problem due to DNA evidence retention, Senate staff began discussions with stakeholders in the criminal justice system to determine if some agreement could be reached about how to solve the problem.

How Can We Fix the Problem?

There are five major variables (and many combinations thereof) to consider in deciding how to approach the issue. These variables are shown below with the Florida approach indicated in parentheses. They are:

1) *Trial case or plea entered.* (Florida keeps evidence in trial and plea cases)
2) *Duration of preservation, event or calendar-driven.* (Florida keeps evidence for the length of sentence in all felony cases)
3) *Automatic retention or affirmative action required.* (Florida provides for automatic retention)
4) *Bulk evidence or sample.* (Florida provides for retention of "any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested")
5) *Enumerated types of cases treated differently than other types of cases.* (Florida keeps evidence in all felony cases)

[25] Responses on file with the Florida Senate Criminal Justice Committee.
[26] FDLE Fiscal Impact Statement dated October 26, 2005.

Conclusions from Meetings with Stakeholders

During the 2010 Interim, Senate staff conducted two meetings with stakeholders to discuss the variables listed above with a focus on how the state legislature might address the overflow of evidence currently being retained by local law enforcement agencies and Clerks of the Court. Included in the meetings and post-meeting discussions were representatives of The Florida Police Chiefs Association, the Innocence Project of Florida, the Florida Sheriff's Association, the State Attorneys, the Public Defenders, Capital Collateral Regional Counsel, the Florida Association of County Clerks, the Attorney General's Criminal Appeals Division, the Florida Department of Law Enforcement, the Regional Conflict Counsels, and the Florida Association of Criminal Defense Attorneys.

Focus on Science, Inter-Agency Communication and Training. The work began with some guidance from FDLE on scientifically-acceptable alternatives to preserving bulky items such as furniture. It was determined that there are methods of preserving potential DNA evidence from bulky items while being mindful of the expanding testing methods like extracting DNA from transferred skin cells. For example, it is perfectly acceptable for an agency to remove and retain the upholstered parts of a sofa ("skin") and discard the frame ("skeleton").

This topic reinforced the value of communication between agencies, particularly between the law enforcement agencies and the case prosecutors, in deciding what items are of evidentiary value and which are not. Some cases are simply not "DNA cases." Identity is not a contested issue in every criminal case. Communication between agencies on that question could help eliminate at least a portion of the overflow. It does not seem advisable to set forth in statute when and how a particular type of evidence should or could be preserved in a particular way. This is an arena where latitude should be given for professionals to exercise their judgment. However, along with the survey responses, the group discussion on this particular topic indicated there may be a need for on-going statewide training on handling evidence as it relates to current and future DNA science.

County Clerk Evidence Overflow Directly Related to Judge, Prosecutor Preference. The county clerks' representatives mentioned that it would be helpful to them if, after hearings and trials, the party that enters items into evidence would reclaim those items for preservation purposes. This would not only ease the burden of the clerks' evidence overflow but make it easier for the evidence to be located and reviewed in cases where litigation continues after a hearing or trial. The practice of reclaiming evidence or leaving evidence for the clerk to preserve seems to be a matter that varies from courtroom to courtroom, depending upon the judge or prosecutor's preference. Some practitioners believe that the physical evidence should remain with the official record of the hearing or trial, and so as a matter of course, the evidence in the courtroom for the clerk to retain.

The Notice Provision as a Mechanism for Evidence Disposition. The workgroup seemed to agree that local law enforcement agencies and the county Clerks do in fact have a problem with evidence accumulation. It was also assumed that the cause of the overflow of physical evidence must be related to the 2006 amendment of the postsentencing DNA testing law because that was the only recent change in the criminal law that addressed evidence disposition.

Since the 2006 amendment deleted the notice provision (see the discussion on pages 3-4 of this Report), staff presented draft notice provision language as a jumping-off point for discussion. Objections from the law enforcement perspective were related to the amount of employee time it requires to ascertain the identities and current addresses of the parties who need to be noticed of the pending disposition of evidence. Other concerns centered around whether extra effort should be made to see to it that incarcerated persons actually receive the Notice. There was discussion about enlisting the aid of the Department of Corrections in either perfecting personal service of the Notice or at least verifying the inmate's whereabouts.

Date-Certain Mechanism for Evidence Disposition Legally Problematic and Somewhat Confusing. Discussion then turned to the possibility of evidence retention until some date-certain directly related to the case becoming "final."

At the second meeting of the workgroup, it quickly became apparent that although there was a desire among the group members for the certainty element, determining the date upon which a case becomes "final" is not a simple matter, even among practitioners. Based upon the number of direct appeals and then collateral matters that might

be raised in a given case, "finality" can be a moving target. Law enforcement asserted that this approach might require more dedicated employee time than the notice provision and create even less certainty. However, they supported the idea of date-certain evidence disposition if appropriate language could be created.

State attorneys mentioned that this particular date-certain method of evidence disposal could lead to litigation that they advised should be avoided if possible. They also expressed the opinion that a person who truly contests criminal charges by arguing that improper identification has occurred is more likely to go to trial in the case, and therefore the evidence will automatically be preserved.

Although staff and other group members continued to try to perfect the date-certain language for several days after the second meeting, the potential legal pitfalls could not be overcome to such a degree that we were entirely certain of the viability of that approach.

Affirmative Action by Defendant for Retention of Evidence. The state attorneys suggested that the few defendants who enter a plea in order to avoid the risk of a trial, but who contend that they have been mis-identified, could make an official request that the evidence in the case be retained by the agency.

Discussion followed about the option of requiring that a defendant who contests the identity issue filing a request that the evidence be retained by a date certain. Objections to this idea centered around the difficulty incarcerated persons have in getting such documents filed, particularly without legal representation.

Linking Retention Schedule with Type of Crime, A Policy Shift. An option that did not seem agreeable to enough of the group members included tying the length of time evidence is retained to the type of crime the person pleads to having committed. Although this seems like a convenient way for agencies to determine a date upon which evidence can be disposed of, it raises the issue of the "value" of a person's incarcerative time. In other words, if Person A has a second-degree felony 10-year sentence, should that evidence be kept for a shorter period of time than Person B's evidence if he is serving a first-degree felony 15-year sentence? This approach was a big policy-shift and went beyond what was required to solve the evidence overflow problem.

Tackling policy issues upon which the Legislature seems settled, for example allowing postsentencing DNA testing in plea cases, and providing that all felony crimes be included in the postsentencing DNA testing law, seemed ill-advised and unnecessary in view of the particular problem the workgroup met to consider.

Ancillary Issue: Compliance by Judiciary in Making DNA Evidence Inquiry at Plea Hearing. The practitioners in the workgroup shared that judges on the criminal bench are not reliably making the inquiry suggested in statute and required by court rule, about the existence of DNA evidence in plea cases before the court accepts a plea.[27] This inquiry is designed to make postsentencing DNA testing in cases in which identity is truly an issue unnecessary by requiring full disclosure prior to the plea being entered. The inquiry reinforces the apparent intent of the Legislature by the very enactment of s. 925.12, F.S. Including plea cases in the postsentencing DNA testing statute (previously limited to trial cases only) was not intended to open the floodgates to postsentencing litigation, and the inquiry itself is a method by which the opening of the floodgates can be prevented.

The workgroup decided to pursue at least one of two approaches for improving this critical part of the postsentencing DNA testing system. First, the group members are seeking the aid of the Criminal Court Steering Committee and asking that the DNA evidence inquiry be included in all felony plea forms. The second approach discussed was the possibility of seeking a mandate from the Supreme Court of Florida that requires the trial courts to make the inquiry in all felony pleas. These particular judiciary-related endeavors may be further pursued by the workgroup members.

[27] Section 925.12(2)-(3), F.S. and Fla. R. Crim. P. 3.172(d).

Options and/or Recommendations

Senate staff recommends a two-pronged legislative approach toward alleviating the overflow of physical evidence in the safekeeping of law enforcement agencies and Clerk's offices throughout the state. Neither approach involves a policy shift but, rather a nuts-and-bolts solution to a nuts-and-bolts problem.

1) *Recommend Amending Statute to Provide Notice Prior to Disposal of Evidence for 2006-2010 Plea Cases.* In order to provide for the disposition of physical evidence in felony cases in which a defendant entered a plea of guilty or nolo contendere on or after July 1, 2006 but before October 1, 2011 (presumptive effective date), the governmental entity may dispose of the evidence if the governmental entity notifies all of the following individuals of its intent to dispose of the evidence: the sentenced defendant, any defense counsel of record and the prosecuting authority in the case. The sentenced person shall be given notice by personal service. The notice shall include the statutory language that sets forth the sentenced person's options.

   Within 90 days after serving the notification, if the governmental entity has not received either a copy of a petition for postsentencing DNA testing filed pursuant to s. 925.11, F.S., a request that the evidence not be destroyed because the sentenced defendant will be filing the petition before the time for filing it has expired, or an objection from the prosecuting authority, and no other provision of law or rule requires that the physical evidence be preserved or retained, it may then be disposed of.

   This first part of the two-pronged approach will enable agencies to dispose of physical evidence that has accumulated in plea cases since the 2006 amendment to the postsentencing DNA testing law. Although it creates a modified version of the notice provision that was deleted in that amendment, this is not viewed as a policy shift. This first prong simply solves a problem that is the result of unforeseen consequences that were outside the control of lawmakers.

   It is believed that the plea inquiry regarding DNA evidence, enacted in that 2006 amendment, was expected to be done by the courts and therefore, that agencies would be comfortable disposing of the physical evidence in plea cases. The court's inquiry was to be the "safety-valve" that allowed disposition of physical evidence without the agency giving notice. However, reliance on the inquiry provision is not proving to be a sure bet. The planned safety-valve is not effective because: 1) the inquiry is not always being made and, even if it is being made, agencies are not privy to it; and 2) agencies are simply not comfortable disposing of evidence that may contain DNA in forms that are more readily available than they were even 5 years ago, without a greater degree of certainty that the evidence will not be needed in the future.

   It will be within the local agency's prerogative to determine whether utilizing this first prong is a cost-effective measure for the agency. It will also ensure that proper and reliable notice is given to the sentenced person, thereby providing due process and bolstering the agency's confidence in the decision to dispose of the evidence.

2) *Recommend Defendant File Written Request for Evidence Retention in Plea Cases Going Forward.* In felony cases in which a defendant enters a plea on or after October 1, 2011, in order to have evidence retained by an agency he or she must file a written request that physical evidence collected at the time of the crime be retained by the governmental entity in possession of the evidence, because it contains DNA that could exonerate him or her, with the Clerk of the Court who shall forthwith provide a copy to the governmental entity in possession of the evidence and the prosecuting authority.

   The request must be filed no later than 30 days after the plea has been entered. Absent such a written request being filed, the governmental entity may dispose of the physical evidence in the case upon or after the 90th day after the plea was entered and the sentence imposed provided the governmental entity has received the written approval of the prosecuting authority in the case. The prosecuting authority may

challenge the request if it does not allege that the evidence sought to be retained contains DNA that could exonerate the sentenced person.

Prong two puts the responsibility on the party in whose interest it may be to have the evidence retained. It should not raise any issue about hardship on the sentenced person because the defense attorney is under an obligation to be available to him or her for thirty days after sentencing in order to file a Notice of Appeal if one will be filed in the case. The clerk is responsible for distributing copies of a request that evidence be held. It also protects the interest of the prosecutor by requiring his or her approval prior to evidence destruction.

The defense attorney may elect to have the client complete a written waiver with regard to any evidence retention issues, for the court file and for the agency in possession of the physical evidence, at the time of the plea. The waiver would be a natural part of the plea hearing, particularly if the DNA evidence inquiry is being made by the court, or if the inquiry has been incorporated into the county's plea form. Likewise, if the defendant is entering a plea in order to avoid a trial, and identity is truly an issue, the request for evidence retention could be filed during the plea hearing. These suggestions are obviously local issues that can be decided and implemented by the local authorities as they deem appropriate.

Although the interim workgroup did not reach a consensus on a solution for the local agency's issues with evidence overflow, the solution recommended in this report is a workable compromise and a reflection of the workgroup members' practical expertise.

Crime Lab Oversight

Forensic science errors – both inadvertent and calculated – are a leading cause of wrongful convictions.

Despite several lab scandals across the country in recent years which show that innocent people were convicted because of crime lab errors, and notwithstanding the important efforts undertaken by some accrediting entities to address this issue, states have historically done little to investigate or remedy these problems and ensure the integrity of forensic evidence.

For more information on the long history of crime lab negligence and scandal in the U.S., visit the Forensic Science Misconduct section.

The 2004 Justice For All Act, which was passed by Congress and signed into law by President Bush, requires states seeking federal funding for crime labs to have an appropriate process to conduct independent, external investigations into allegations of negligence or misconduct affecting forensic results. Still, a number of states lack the independence and/or process necessary to ensure the integrity of results from forensic crime labs.

Fixing labs today with proper oversight

The Innocence Project supports the forensic community in its ongoing fight for the funding it deserves as caseloads grow and the public becomes more demanding. Crime victims, police, prosecutors and courts all gain from an efficient system that minimizes errors and focuses resources on the punishment of the guilty. The

following recommendations, developed by the Innocence Project during years of research and experience, can substantively address laboratory fraud and error:

- Create an accreditation system: All laboratories testing forensic evidence for use in courtrooms must be reviewed regularly by an external agency. All technicians should be licensed.
- Form oversight commissions: Independent panels should be created in each state to review the forensic methods that are accepted in state courtrooms and to investigate allegations of misconduct, negligence or error in labs.
- Enforce requirements that are already in place: Many states receive federal grant money under the Paul Coverdell Forensic Science Improvement Grant program. This grant money comes with the requirement that the state conduct independent investigations into any allegations of misconduct. Many states have accepted the grants but have not complied with this requirement.

For more information on the long history of crime lab negligence and scandal in the U.S., visit the Innocence Project's Forensic Science Misconduct section.

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Special master urged for HPD crime lab review

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The man hired by the city to investigate Houston Police Department's crime lab scandal told state legislators today that an independent investigator is needed to determine what role faulty evidence analysis played in hundreds of convictions.

"The appointment of a special master may not be the exclusive remedy," said former U.S. Justice Department Inspector General Michael Bromwich. "However, after extensive discussion with our team of investigators, it was the best solution we could offer."

Bromwich's statement came during hearings by a joint session of the House's urban affairs and general investigating and ethics committees concerning the recommendations Bromwich and his team issued in June at the conclusion of a $5.3 million investigation into widespread problems at the lab.

That final report cited almost 600 cases where the role of DNA and serology, or blood-typing, evidence in convictions needed to be reviewed. At today's hearing, Bromwich said he envisioned that task falling to a special master, such as a retired judge or a lawyer with both prosecutorial and defense expertise.

During the two months since the Bromwich report was issued, Mayor Bill White, Police Chief Harold Hurt and Harris County District Attorney Chuck Rosenthal have all rejected Bromwich's call for a special master. However, during his testimony today, Bromwich said the pattern and credibility of an independent investigation that began with his probe should be continued. He called his probe of the HPD lab the most comprehensive in the history of forensic review in this country, and probably the world.

The idea of a special master is supported by State Rep. Kevin Bailey, D-Houston, chairman of the urban affairs committee, who initiated the hearings. He rejected the notion that local authorities should handle any subsequent review of the lab.

"No one really cared about the (crime lab) until it became a public embarrassment, " Bailey said.

Problems at the crime lab first surfaced in November 2002 when an outside audit revealed poorly trained analysts, bad science and substandard facilities, including a leaky roof that contaminated evidence. Two men have since been exonerated of sexual assault convictions based on faulty lab work.

Hurtt said today the police department is attempting to go through Bromwich's recommendations and see which ones fit.

``We understand the urgency of getting this done,'' Hurtt said. "We're committed to getting it done.''

Hurtt and Rosenthal again rejected the idea of appointing a special master.

Rosenthal said his office has already contacted the judges in almost 200 cases where problems with evidence analysis may have affected the outcome.

He said those judges will appoint attorneys for defendants who want one, and they will go through the evidence.

Patrick McCann, president of the Harris County Criminal Lawyers Association, suggested to the legislators that the city, the district attorney and the council of judges in the region should consult each other and decide on the appointment of a special master.

``Right now, HPD gives its information to the DA. The DA gives its information to the judges and the judges only know the cases they have,'' said McCann. ``I think the committee today has discovered that there is no central tracking.''

Rep. Bailey added that as long as the city rejects the idea of the special master, some members of the public will always feel that the department ``is hiding something.''

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The New York Times

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December 18, 2009

Report Condemns Police Lab Oversight

By JEREMY W. PETERS

The New York State Police's supervision of a major crime laboratory was so poor that it overlooked evidence of pervasively shoddy forensics work, allowing an analyst to go undetected for 15 years as he falsified test results and compromised nearly one-third of his cases, an investigation by the state's inspector general has found.

The analyst's training was so substandard that at one point last year, investigators discovered he could not properly operate a microscope essential to performing his job, the report released on Thursday said.

And when the State Police became aware of the analyst's misconduct, an internal review by superiors in the Albany lab deliberately omitted information implicating other analysts and suggesting systemic problems with the way evidence was handled, the report said. Instead, the review focused blame mostly on the analyst, Garry Veeder, who committed suicide in May 2008 during the internal inquiry.

"Cutting corners in a crime lab is serious and intolerable," said the state's inspector general, Joseph Fisch. "Forensic laboratories must adhere to the highest standards of competence, independence and integrity. Anything less undermines public confidence in our criminal justice system."

Several lab workers whose actions were criticized in the report remain in their jobs pending an internal review of the inspector general's findings, the State Police said.

The State Police superintendent, Harry J. Corbitt, said that the agency planned to hire an outside consultant. "Appropriate remedial measures will be taken with respect to any conduct falling below the highest standards," said Mr. Corbitt, whose

nomination last year by Gov. David A. Paterson was meant to help rehabilitate the scandal-tainted agency.

After the State Police began its internal investigation last year, it notified district attorneys across the state that evidence in criminal cases examined by Mr. Veeder might have been compromised. Mr. Veeder worked in the crime lab analyzing so-called trace evidence, like fibers, hair, impressions and other physical material found at scenes of crimes, including homicides.

But on Thursday, police officials said that none of the district attorneys had found that Mr. Veeder's work had cast doubt on any of their convictions.

"We are satisfied that there were no wrongful convictions, nor any miscarriages of justice which resulted from these improper procedures," Mr. Corbitt said, stating a viewpoint also shared by Mr. Fisch.

Still, forensic science experts and advocates for those wrongfully convicted said the case pointed to longstanding problems in police behavior and underlined the need to hold law enforcement agencies accountable.

"It is a wake-up call to the forensic community," said Barry Scheck, director of the Innocence Project and a member of the New York State Commission on Forensic Science, which monitors all the state's crime labs. "What's alarming about this report and others that we've seen like it is it's not so much the bad actors, it's the fact that the system didn't detect them earlier."

There have been several high-profile cases in recent years in which police labs mishandled crime scene evidence, casting doubt on convictions. A convicted rapist was released in 2003 after an examination of the Houston Police Department's lab found widespread deficiencies. Detroit shut down its police crime lab last year after an outside audit found errors in 10 percent of cases surveyed.

In Mr. Veeder's case, supervisors discovered during an internal inquiry that he had routinely skipped a preliminary fiber analysis and then created data "to give the appearance of having conducted an analysis not actually performed," the inspector general's report stated.

The State Police have disputed the effectiveness of the preliminary test and said there was no evidence that Mr. Veeder's work resulted in a piece of trace evidence's being misidentified.

The report said Mr. Veeder used a "crib sheet" provided to him by a former supervisor to falsify the test results. At one point, Mr. Veeder told investigators, "They told me from the past, you go to this and plug it in," the report said. "This is how I was trained to, how we've always done it."

But Mr. Veeder's allegations involving other lab workers were never part of the final report to the State Police's internal affairs division. State Police investigators and the lab's management "minimized and precipitously discarded the seriousness and extent of problems" at the lab, the inspector general's report said.

It said that one State Police investigator, Keith Coonrod, mischaracterized Mr. Veeder's responses implicating other lab scientists and skewed Mr. Veeder's statements to give the impression that it was his incompetence — not widespread misconduct — that led to the problems.

Mr. Coonrod has been temporarily reassigned to a State Police job outside of the lab pending the outcome of the internal review.

Despite Mr. Coonrod's omissions, the inspector general also faulted Mr. Coonrod's superiors. "There exists no doubt that laboratory management possessed sufficient information that Veeder's individual misconduct implicated potentially broader systemic issues, but failed to take appropriate action," the report said.

The report named a number of lab supervisors at the time — including the director, Gerald Zeosky, and assistant director Richard Nuzzo — and describes them as unfazed by the inquiry and dismissive of Mr. Veeder's broader claims. Mr. Zeosky remains in charge of the lab. Mr. Nuzzo was promoted and given a new job in the internal affairs division, but police officials said he would have had no involvement in the investigation of the lab.

Another section of the report stated that Mr. Nuzzo was also found to have intimidated a lab technician who was working on a case unrelated to Mr. Veeder.

Problems with Mr. Veeder's work were first detected in 2008 during an accreditation review by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board. The State Police then did an internal investigation and alerted the inspector general's office, which began its own review.

On May 23, 2008, Mr. Veeder hanged himself in the garage of his home outside Albany.

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The Examiner

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Tainted DNA adds to SFPD's crime lab issues

By: Brent Begin
Examiner Staff Writer
March 22, 2010

SAN FRANCISCO — As the San Francisco Police Department was investigating the disappearance of cocaine from its crime lab last year, other problems were surfacing that may be part of the wide-reaching audit currently under way.

Poor handling: Two DNA samples at the San Francisco Police Department's crime lab were found to contain the DNA of technicians. (Examiner file photo)

Two tainted DNA samples were revealed in late 2009, around the same time that police began an investigation into Deborah Madden, a criminalist who allegedly skimmed cocaine from evidence. In an e-mail from Assistant District Attorney Braden Woods, who heads the office's cold-case unit, it was revealed that the control sample for two DNA samples contained the DNA of the lab technicians themselves.

In December, Deputy Public Defender Bicka Barlow, a former geneticist, went to Superior Court Judge Charles Haines for the documents in the two cases because the lab would not provide them. The judge has since granted the request, she said.

"It kills their credibility," Barlow said of the crime lab after the corrupted samples were discovered. "When they discover the corruption, they don't do anything about it."

Now, the state attorney general and an accrediting body will not only be auditing the drug-testing lab but will be looking at the entire lab itself, which has been plagued by underfunding and low staffing for more than a decade. Police Chief George Gascón ordered the audits after he learned one of the lab techs was suspected of taking cocaine from the lab.

By Friday, more than 200 cases had been dismissed or discharged since the closure of the drug-testing portion of the crime lab, according to the District Attorney's Office. Gascón also

announced a shake-up in leadership at the crime lab.

Madden, a 60-year-old civilian criminalist, took a leave of absence Dec. 8 after a crime lab audit revealed drug evidence was missing. She has not been charged with anything regarding the crime lab cocaine samples.

The Madden case is not the first time a crime lab has dealt with improprieties, according to William C. Thompson, professor of criminology, law and society at UC Irvine.

Thompson has written dozens of papers on crime lab evidence, and he was part of a 2002 exposé on Houston's crime lab. That review unearthed hundreds of cases of sloppiness, inadequate training and outright bias on the part of a crime lab.

"It is not an uncommon thing, and it really highlights the need for transparency and a statewide regulatory body," Thompson said.

Currently, crime labs across the nation are accredited through the American Society of Crime Laboratory Directors, a nonprofit organization of experienced crime lab workers that inspects facilities.

When contacted by The Examiner in December, the society's director, Ralph Keaton, said it would not release its audit of the SFPD crime lab that was completed in November. In January, police rejected an Examiner public records request for the audit.

The audit was finally released this month after allegations about Madden surfaced. The audit noted the San Francisco crime lab lacks proper chains of evidence custody, has poor record keeping and a lack of cleanliness.

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Drug bust

The Police Department's crime lab was shut down this month after a lab technician was alleged to have tampered with drug samples.

2 DNA samples tainted at crime lab
6 Cocaine samples tainted at crime lab
6,000 Approximate felony drug cases in Superior Court per year
48 Hours before trial that evidence must be submitted
March 1 Date crime lab technician Deborah Madden retired
29 Years Madden had been with Police Department

Sources: District Attorney's Office, Public Defender's Office, Police Department

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Our History

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The Innocence Project of Florida (IPF) began in January of 2003 in response to an October 1, 2003, filing deadline for post-conviction DNA motions. Beginning with two advocates (Jennifer Greenberg and Sheila Meehan) working out of a hallway at the FSU College of Law, IPF has been screening, investigating, placing and litigating innocence cases ever since. We have to date received thousands of inquiries and/or requests for assistance.

IPF has also spent four legislative sessions at the Capitol, advocating on behalf of the innocent, so far concentrating our efforts primarily on the issues of filing deadlines and compensation for exonerees. We were quite pleased when the 2006 legislature voted to remove the deadline for filing petitions for DNA testing and the governor signed the bill into law. In 2007, legislators passed a global compensation bill that will pay $50,000 for each year of wrongful incarceration. Unfortunately, the bill also includes a so-called “clean hands” provision that excludes from payment anyone with a prior felony conviction or a felony conviction received while wrongfully incarcerated. No other state with a compensation law has such a provision, and we will attempt to have it removed during the upcoming legislative sessions. We also plan to begin addressing remedies for the ongoing problem of wrongful incarceration.

Our Mission

Through the use of DNA testing, IPF helps innocent prisoners in Florida obtain their freedom and rebuild their lives. Our mission has not changed since our inception in 2003:

- Screen and investigate cases in which meritorious innocence claims are identified;
- Secure DNA testing when biological evidence exists;
- Advocate for the release of each inmate excluded from criminal responsibility by this highly critical analysis;
- Provide transitional and aftercare services to exonerees; and
- Advocate for necessary criminal justice reform to avoid wrongful incarcerations in the future.

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Post-Conviction DNA Testing

Despite the widespread acceptance of DNA testing as a powerful and reliable form of forensic evidence that can conclusively reveal guilt or innocence, many prisoners do not have the legal means to secure testing on evidence in their case.

Barriers to the truth

As of June 2008, 47 states have some form of law permitting inmates access to DNA testing. The other three states have no law granting such access.

Even in many of the states that grant access to DNA testing, the laws are limited in scope and substance. Motions for testing are often denied, even when a DNA test would undoubtedly confirm guilt or prove innocence and an inmate offers to pay for testing.

Federal incentives for granting access to DNA testing

Federal law, the 2004 Justice For All Act, grants access to DNA testing for federal inmates claiming innocence and also allocates various justice-related funding to any state that grants DNA testing access to inmates claiming innocence. To meet the requirements of the federal law, states should pass or strengthen laws granting access to DNA testing.

Clear and comprehensive laws can ensure justice

Some states have passed statutes that include barriers to testing that are insurmountable for most prisoners. These include restrictions against inmates who pled guilty or whose lawyers failed to request DNA testing at trial. In many cases, the questionable evidence used to convict a defendant at trial – like eyewitness identification or snitch testimony – is used by judges as grounds to deny a DNA test. These barriers keep innocent people from securing DNA tests that could prove their innocence.

An effective post-conviction DNA access statute must:

- Allow testing in cases where DNA testing can establish innocence – including cases where the inmate pled guilty
- Not include a “sunset provision” or expiration date for post-conviction DNA access
- Require states to preserve and account for biological evidence
- Eliminate procedural bars to DNA testing (allow people to appeal orders denying DNA testing; explicitly exempt DNA-related motions from the restrictions that govern other post-conviction cases; mandate full, fair and prompt proceedings once a motion seeking testing is filed)
- Avoid creating an unfunded mandate, and instead provide the money to back up the new statute
- Provide flexibility in where and how DNA testing is conducted

For more on this issue, view the Innocence Project’s DNA access fact sheet or review model legislation on post-conviction DNA access.

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Evidence Preservation

Despite laws enabling inmates to seek DNA testing in many states, performing a test is often impossible years after a conviction because the evidence has been lost, destroyed or contaminated due to improper storage.

The Innocence Project recommends that all physical evidence in all criminal cases be properly maintained as long as the defendant is incarcerated, under supervision or in civil litigation. Laws and policies on proper evidence preservation help police and prosecutors solve cold cases, and they give inmates a chance – often the only real chance – to prove their innocence.

Solving cold cases

There are thousands of unsolved cases in the United States, and many of these involve physical or biological evidence that could one day be matched to a perpetrator. DNA evidence has helped police solve hundreds of cold cases in recent years, and will continue to do so as law enforcement agencies improve the way they store and catalogue evidence.

An innocent inmate's last hope

In some cases, evidence has been lost or destroyed prior to trial. Whenever a case goes to trial without sufficient evidence, the chances are greatly increased that an innocent person will be convicted or that a guilty person will be acquitted. When evidence is destroyed, justice is not served.

Criminal appeals after a conviction are a difficult road, even for the innocent. The resources of the justice system are stacked against the inmate, and once a conviction is secured there is no longer a presumption of innocence. In cases with DNA evidence, this process can take years and can hit roadblocks at any stage. Appeals are even more difficult in cases without any evidence to test because they become a web of witness statements and costly investigations

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