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OVERSIGHT OF THE JUSTICE FOR ALL ACT: HAS THE JUSTICE DEPARTMENT EFFECTIVELY ADMINISTERED THE BLOODSWORTH AND COVERDELL DNA GRANT PROGRAMS?

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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WEDNESDAY, JANUARY 23, 2008

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, Pursuant to notice, at 10 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senator Feingold.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT, CHAIRMAN, U.S. COMMITTEE ON THE JUDICIARY

Chairman LEAHY. Good morning. We will have somewhat limited attendance here this morning. I should explain that the Republicans have a caucus-wide meeting all day long today which will cut down somewhat. But with the schedule that we have ahead of us this year, I did not want to put off this hearing because of its importance.

Now, as many of you know, in the year 2000 I introduced the Innocence Protection Act, a bill that aimed to improve the administration of justice by ensuring that defendants in the most serious cases have access to counsel and, if it's appropriate, have access to post-conviction DNA testing to prove their innocence in those cases where the system got it grievously wrong.

Now, as one who has spent 8 years as a prosecutor, I saw both sides of the crises that DNA testing has illuminated in clearing those wrongfully convicted. The first tragic consequence was what our system of criminal justice is designed to prevent, the conviction of innocent defendants.

The second thing that sometimes we forget about is a criminal justice nightmare, that if you convicted the wrong person, that means the actual wrongdoer remains undiscovered, possibly at large, thinking, I got away with it once, why can't I get away with it again, and ends up committing the same crime. So you have an innocent person behind bars and the criminal is still out there, and the public is not safe.

Now, some of those who inspired the bill, the Innocence Protection bill, are with us today. Kirk Bloodsworth was a young man

just out of the Marines when he was arrested, convicted, and sentenced to death for a heinous crime. The problem is, he didn't commit the crime. DNA evidence ultimately freed him and identified the real killer, and he became the first person in the United States to be exonerated of a death row offense with the use of DNA evidence.

The years he spent in prison were hard, and actually his journey since then, since being vindicated, has not been an easy one. But instead of becoming embittered, he chose to use his experience to help others. He worked hard to get the landmark legislation passed, and the Congress rightly named it after him because he was such a pioneer. And Kirk, I don't mean to embarrass you, but would you please stand so everybody here can see Kirk Bloodsworth?

[Applause].

Of course, as a parent of a young Marine, I also take interest in this.

But also with us is Peter Neufeld, who, along with his partner Barry Scheck, penned the extraordinary book Actual Innocence, and if you haven't read it, you should. Their work in the Innocence Project was fundamental to the changes in the law we have achieved.

Shawn Armbrust was then a young student, and I was just talking with her out back. I mentioned her so many times around the country. She had taken part in a journalism class at Northwestern University and she was assigned to just reinvestigate a capital conviction in Illinois. Now, this was something where the trained professionals, the law enforcement people, the whole criminal justice system, the judges, the defense attorneys, the prosecutors had looked at this.

This young journalism student came in, looked at it, and found, you know, you've got the wrong guy, and she was able to intervene just in time to keep somebody from being wrongfully executed. And, boy, this was a light bulb going off about a young student, even a very bright young student like she is. No matter how well motivated, if they could find what escaped everybody in the system, then the system's wrong. It's not just that the students were bright, but the system was wrong.

She went on to law school. She now heads the Mid-Atlantic Innocence Project at American University.

It took hard work and time, but in 2004 Congress passed the Innocence Protection Act as an important part of the Justice For All Act. We recognized the need for important changes in criminal justice forensics, despite resistance from this administration.

It was an unprecedented bipartisan piece of criminal justice reform legislation. Democrats and Republicans came together on it. It is intended to ensure that law enforcement has all the tools it needs to find and convict those who commit serious crime, because we should do our best to get the people who have committed a crime, but also make sure that innocent people have the means to establish and prove their innocence. It is the most significant step that Congress has taken in many years to improve the quality of justice in this country to restore public confidence in the integrity of the American justice system.

I am very thankful to the Senators of both parties, especially those who are former prosecutors, as I was, who joined me on this legislation. We gave law enforcement resources and training to ensure that forensic testing, particularly DNA testing, could be used to identify those who committed horrendous crimes, as well as establish standards and practices to ensure the accuracy of those findings.

More than 120 people have now been freed from death row, according to the Death Penalty Information Center. It's a truly alarming number, not an alarming number because the innocent have been freed, but an alarming number that 120 people were on death row, and they had the wrong person.

It's in everyone's interests for the guilty parties to be found and punished, and comprehensive and accurate forensic testing, along with adequately trained and funded counsel on both sides, will help to convict the guilty, but also free the innocent. With us today are a few more of those who served many years for crimes they did not commit before being freed based on DNA testing.

Charles Chatman was freed earlier this month by a judge in Dallas, Texas after serving 27 years—27 years—for a crime which DNA evidence now shows he's innocent. Mr. Chatman, would you please stand just so we can see you?

[Applause].

And Marvin Anderson, of Virginia, was exonerated in 2001—he's been here before this committee before—based on DNA evidence. Again, a heinous crime. He served 15 years in prison. It was a crime that the person convicted should serve prison, but he wasn't the one who committed it. I thank you, Mr. Anderson for being here. Please stand so you can be recognized.

[Applause].

Today we're going to focus on the Kirk Bloodsworth and the Paul Coverdell Grant Programs and see how they're being handled. The Kirk Bloodsworth Post-Conviction DNA Testing Grant Program is one of which I am particularly proud. It is intended to provide grants for States to conduct DNA tests in cases in which somebody has been convicted, but key DNA evidence hasn't been tested. It is exactly the kind of testing that ultimately exonerated Kirk Bloodsworth, the person for whom it was named, and has also vindicated many others.

Also, by consent I'll put a statement of Mr. Bloodsworth's in the record at the appropriate point in this record.

[The prepared statement of Mr. Bloodsworth appears as a submission for the record.]

Chairman LEAHY. But when he and I celebrated the passage of the Justice For All Act in 2004, 4 years ago, we hoped that this legislation would spare others the ordeal that he and Mr. Chatman and Mr. Anderson went through. But I am troubled to find that, more than 3 years later, the Congress having appropriated almost $14 million—again, Republicans and Democrats alike having come together to appropriate nearly $14 million to the Bloodsworth program—not a dime has been given out to the States for this worthy purpose. That is wrong. That is scandalous. That is irresponsible.

This money has sat in Department of Justice coffers without any of it going to help innocent people like Kirk secure their freedom

or to help law enforcement to find the real culprits. We shovel billions of dollars to Iraq with no strings attached, open ended. We're talking about $14 million that we've appropriated specifically for this, for Americans, in the American criminal justice system. We've wasted billions on the Iraqi criminal justice system, but this is a tiny amount of money for our own that can be spent.

The problem is, the Department has interpreted the law's reasonable and important evidence preservation requirement so restrictively, that even States like Arizona, which have comprehensively documented their DNA preservation efforts have been rejected. It's not what I intended when I wrote this legislation. It's not what Republicans and Democrats alike intended when we passed it.

So I hope we will hear that the Department now intends to implement the law and to solicit and award the millions of dollars of Bloodsworth grants that have been delayed these past years. I hope we're not going to be disappointed again, because it will be an issue that will be asked about when the Attorney General testifies here next week.

The second program we're considering today is one that Senator Sessions and I worked to pass to establish the Paul Coverdell Forensic Science Improvement Grants Program. It is named for a former Republican Senator from Georgia, somebody I served with. These grants were intended to help States improve the quality of their forensic science.

We're going to hear from Inspector General Glenn Fine and we'll find out why the Department has largely ignored the requirement that States must have a qualified, independent entity to investigate allegations of lab misconduct.

As I said before, I'm not trying to get guilty people off. I just want to make sure guilty people—guilty people—are convicted, not innocent people. Not a single one of us are safer if the wrong person is in jail. Now, Glenn Fine is the United States Department of Justice Inspector General. He's held that position since December of 2000. It probably feels longer, some days.

[Laughter.]

He has served in the Inspector General's Office since 1995, first as Special Counsel to the Inspector General, and subsequently has directed a Special Investigations and Review Unit. He also served in the Department of Justice as Assistant U.S. Attorney for the District of Columbia from 1986 to 1989. He received a bachelor's and master's degree from Oxford as a Rhodes Scholar, a law degree from Harvard Law School. He's highly respected by both Republicans and Democrats.

Mr. Fine, it's over to you.

STATEMENT OF GLENN A. FINE, INSPECTOR GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. FINE. Mr. Chairman, thank you for inviting me to testify about the Department of Justice's oversight of grant programs.

For many years, the Office of the Inspector General has examined the work of the Department's Office of Justice Programs in awarding and monitoring the $2 to $3 billion in grant funds it awards each year. In particular, in two reports, one issued last

week, we assessed OJP's oversight of the Paul Coverdell Grant Program's external investigation certification requirements.

Pursuant to that requirement, Coverdell Grant applicants must certify that a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of forensic results. This requirement was designed to provide an important safeguard to address serious negligence and misconduct in forensic laboratories.

Our first audit report on the Coverdell program, issued in December of 2005, found that OJP had not exercised effective oversight over this external investigation requirement. For example, we found that OJP's 2005 Coverdell program announcement did not give applicants necessary guidance on the certification requirement and did not direct applicants to provide the name of the government entity that could conduct independent external investigations.

In response to our 2005 review, after significant discussion, OJP only reluctantly agreed to implement some of the report's recommendations. Because we were concerned by OJP's response, we decided to conduct a followup review, which we issued last week. This followup review found continued deficiencies in OJP's administration of the Coverdell program.

While OJP has started requiring applicants to provide the name of the government entity, OJP still is not ensuring that the named entities were actually capable of conducting independent investigations. For example, the OIG contacted 231 of the 233 government entities that were identified by the 2006 Coverdell grantees, and we found that at least 34 percent of the named entities did not appear to meet the requirements of the certification.

In fact, OJP could not ensure that the applicants who completed the certification had identified any entity at all. Five certifying officials told the OIG that when they completed the certification they did not have a specific entity in mind and merely signed the document OJP provided.

In addition, we found that OJP did not provide adequate guidance to ensure that grantees actually referred allegations of negligence and misconduct to the certified entities for investigation. In one instance, we found that OJP had advised a grantee, and the grantee had advised the forensic laboratories, that they did not have to refer allegations of serious negligence and misconduct to the government entity.

OJP's response to our recent review was, again, narrow and legalistic. While OJP agreed to implement two of the recommendations, it argued, in essence, that the Coverdell statute required only a certification from the grantee, that OJP had complied with this requirement, and that therefore its oversight of the program was not deficient.

Yet, we believe that OJP's responsibilities extend beyond the bare minimum of compliance with the literal terms of the statute. Rather, OJP has a responsibility to ensure that the required certifications are meaningful and that grantees actually have the means and intentions to follow through on their certifications.

Our concern with OJP's administration of the Coverdell Grant Program is exacerbated by its record of monitoring other grant pro-

grams. In our reviews over the years, we have identified a variety of management concerns regarding OJP's oversight of other grant programs, which are detailed in my written statement. As a result, for the past 6 years the OIG has identified grant management as one of the Department's top management challenges.

Finally, I believe it is important to note that OJP has been slow to staff its own internal office to monitor and assess grants. In January, 2006, as part of the Department of Justice Reauthorization Act, Congress gave OJP the authority to create an Office of Audit, Assessment, and Management to coordinate internal audits of grantees.

The Act provided that OJP could use up to 3 percent of all grant funds each fiscal year to fund that oversight office. Unfortunately, OJP has made slow progress in staffing this office in the last 2 years. While it moved around several existing positions within OJP to create the office, it still has not fully staffed the office and, to date, has not hired a permanent director.

In conclusion, our findings on the Coverdell Grant Program mirror problems we have found over the years with OJP's administration of other grant programs. We believe that OJP must improve its oversight to ensure that the billions of dollars appropriated for important grant programs are effectively administered, overseen, and monitored.

That concludes my statement and I would be pleased to answer any questions.

[The prepared statement of Mr. Fine appears as a submission for the record.]

Chairman LEAHY. Well, thank you, Mr. Fine. Before we go to you, we'll go to John Morgan, who is the Deputy Director for Science and Technology at the National Institute of Justice. He directs a wide range of technology programs for criminal justice, including DNA, less lethal technologies, and body armor programs.

He provides strategic science policy advice for the Director of the National Institute of Justice, and throughout DOJ. Prior to his government service, he conducted research at the Johns Hopkins Applied Physics Laboratory, focusing on the detection and mitigation of weapons of mass destruction. Correct me if I've got any of these facts wrong.

Dr. MORGAN. You're doing fine, Senator.

Chairman LEAHY. You received your Ph.D. from Johns Hopkins University, bachelor's degree from Loyola College in Maryland. Please, go ahead.

STATEMENT OF JOHN MORGAN, DEPUTY DIRECTOR FOR SCIENCE AND TECHNOLOGY, NATIONAL INSTITUTE OF JUSTICE, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Dr. MORGAN. Thank you, Mr. Chairman, for the opportunity to come before you today.

Chairman LEAHY. Is your microphone on?

Dr. MORGAN. Can you hear me? Thank you, Mr. Chairman, for allowing me to come before you today to address these very, very important issues. I am John Morgan, the Deputy Director for Science and Technology. And on a personal note, Mr. Chairman, I

fully share, and I came to the Department of Justice to implement, the kinds of programs and vision that you've talked about today.

Our mission at NIJ is to advance scientific research, development, and evaluation to enhance the administration of justice and public safety. I really am excited to be here today to talk about the programs that we've been able to implement to improve forensic science in this country.

With the funding provided by Congress, NIJ has helped State and local forensic laboratories address backlogs of untested evidence and expand their long-term capacity to process evidence, for example, through the purchase of modern equipment, hiring of more staff, and training of new analysts.

State and local law enforcement agencies have been funded to test nearly 104,000 DNA cases from 2004 to 2007, and 2.5 million convicted offender and arrestee samples for the National DNA Data base, an amazing record of success for the Federal Government. Over 5,000 hits or matches to unknown profiles or other cases have resulted from these efforts.

This past week, in my hometown of Annapolis, Maryland, county police announced five more hits in local murder and rape cases that were funded using these very Federal DNA appropriations, and in 2007 we expect to fund the testing of a further 9,000 backlogged cases, and more than 834,000 backlogged convicted offender and arrestee samples. This is an outstanding record of success for all of us.

We have also sponsored new research and development programs that have dramatically improved high through-put DNA analysis, DNA testing of small or compromised evidence, and testing of sexual assault samples to really take advantage of this revolutionary technology for the criminal justice system.

One NIJ-funded project uses Y chromosome technology to obtain DNA profile from sexual assault evidence collected more than 4 days after a sexual assault occurs. Another study has demonstrated that DNA can be a powerful tool to improve the clearance rate for burglaries by a very large margin, a factor of 4:7. Research in other forensic disciplines, such as impression evidence, toxicology, crime scene investigation, and many more has also been greatly expanded under this funding.

We are developing a method to allow fingerprint examiners to report the statistical uniqueness of latent prints captured from crime scenes and we are doing similar studies for handwriting analysis, ballistics identification, and other forensic disciplines. These research programs will continue to revolutionize the power, speed, and reliability of forensic science methods and will help the post-conviction issue, too, because it will help to resolve those cases more effectively.

Congress has recognized the importance of the full range of the forensic sciences with the Paul Coverdell Forensic Science Improvement Grants Program, through which NIJ has provided over $60 million since 2004 to State and local crime labs and medical examiner/coroners' offices in all 50 States.

Again, this is one of the few sources of funds for medical examiner/coroners' offices that has ever been provided by the Federal Government, a very important set of funding. These funds have

been used to decrease laboratory backlogs and enhance the quality and timeliness of forensic services, purchasing new equipment, training and education, accreditation, certification, personnel renovations. The program has been very successful.

In Pennsylvania, the Commission on Crime and Delinquency reduced its overall forensic casework processing time from 60 to 30 days. Anchorage was able to reduce its 1,200 backlogged cases to 250 with a Coverdell grant from 2006, one of the ones under examination here.

The Department of Justice seeks to ensure that all these funds are spent wisely and that the criminal justice system can rely on the forensic results reported from these crime laboratories. As part of our program management, we actually do many, many other things to—many, many things to enhance the management of these programs. We collect four different certifications, including the one at issue here in the OIG's report under Section 311.

We also subject applicants for competitive Coverdell awards to independent peer review. We monitor each reward to ensure compliance with various Federal statutes, regulations, and policies designed to provide assurance that Federal funds are used appropriately. We review their budgets to ensure they're in keeping with the work promised in the grant application and consistent with the statutory and policy requirements.

We enforce roughly 17 special conditions on each grant and we sent experts into each laboratory. Under our Grants Progress Assessment Program, we assess 100 percent of the grants in the DNA and Coverdell programs over a 2-year cycle. We have made 854 such visits already. This is where independent experts—these are people who have been in the crime laboratory for 10, 20, 30 years, going in and looking at these laboratories in an independent way. It's one of the most important independent reviews of crime labs in the United States, done under the Coverdell program as well as our other DNA programs.

We need to balance these compliance activities with the good things that the Coverdell grants achieve. Many of these grants are for $100,000 or less, especially those for small States or local governments, and we believe that many of these potential grantees would not benefit from the program if we enforced severely restrictive program requirements. In the real world of moving the forensic community forward one step at a time with these programs, we can't afford to make the perfect be the enemy of the good.

We also manage the post-conviction testing grant program, the Kirk Bloodsworth Program, which was established under the Justice For All Act, and requires very specific practices in law regarding the preservation of biological evidence and post-conviction testing procedures. Unfortunately, these restrictions were so difficult that only three States even replied to the solicitation for post-conviction testing.

On review of their applications, it was determined that none were compliant with the legal requirements of the statute and we immediately began working with Congress to address this when it became clear that we would not be able to award grants in conformance with the law, which is our primary requirement.

We appreciate that we were able to work together on this problem, and last month's appropriation bill provides a solution that will permit us to apply the unspent funds from 2006 and 2007, as well as the new money appropriated in 2008, to this need, and we have a grant solicitation on the street today that will do that, and we will keep the committee informed concerning the progress on this. We remain committed to ensuring the exoneration of any wrongfully convicted individual. It will be one of my proudest moments in my career when that money goes out the door to actually do this work.

Chairman LEAHY. Well, let me follow on this. Let me follow on this a little bit. You know, you look at—the need is obvious.

Dr. MORGAN. Yes, sir.

Chairman LEAHY. I mean, the need is demonstrated by the three gentlemen sitting behind you. Look at today's paper. It says, "Man Imprisoned for Nine Years is Released in Wake of DNA Evidence." Again, a heinous crime, Ft. Collins, Colorado. There's no question, if I was a prosecutor, I'd want to put whoever did that behind bars. I think we'd all agree, every one of us. But they got the wrong person.

And I understand what you're saying about the Coverdell program. Paul Coverdell, rest his soul, was a friend of mine. We served together here in the Senate. If he were alive, I'm sure he'd be delighted to see how well that's going.

But I am not quite as sanguine on the reasons why that is doing very well, but the Bloodsworth program, we seem unable to do it. There's been no money under the Bloodsworth DNA program that's been awarded, despite—what, it was about $14 million over the past 3 years we've put into it? It's vitally important.

Again, I'd mention Mr. Anderson, Mr. Chatman, Mr. Bloodsworth. I could name a whole lot of others. We passed an important requirement as part of the Justice For All Act that says in order to qualify for grants under the Bloodsworth program States have to demonstrate they have procedures in place for the preservation of DNA evidence in serious criminal cases. I think we all agreed on that. Funds would do no good if you sent the funds, but they're not preserving the evidence.

But what I worry about, is it looks like the Department has interpreted this so restrictively that even States like Arizona, which have comprehensively documented their preservation efforts, to their credit, they've been rejected.

Can you tell me why? Maybe I've overlooked this. Why isn't the Department working with States seeking that money? I mean, I looked at some of these applications. They were simply rejected with no official explanation. If we're going to really follow the intent of this, wouldn't it be a lot better to say, hey, we've got a problem with this, let's sit down and let's make it work? I mean, if even Arizona can't make it, I'm beginning to wonder if there's any State in the Nation that could make it.

Dr. MORGAN. Senator, I share your frustration and we have worked for some time to try to resolve this. And as I said, we did come to Congress and let you know about this—about this issue and worked with you, and the flexibility we achieved in the Budget

Bill will allow us to get this money out the door. The biggest step is—

Chairman LEAHY. But even getting here—even getting here, in the Coverdell program, you only need a brief certification. The Department is not even allowed to look behind it. But the Bloodsworth program has a demonstration so high, I don't know how you can get around it. It almost looks to me like, OK, if you're under the Coverdell program you're home free, if you're under the Bloodsworth program, even though you may be exonerating innocent people, sorry, there's no way you can get over the hurdles.

I mean, there's got to be some kind of a middle ground here because otherwise there's going to be a feeling around the country that one is a favored child of the Justice Department and the other is kind of the locked-up stepchild, without getting into the Grimm fairy tales.

Dr. MORGAN. Yes. Senator, the biggest difference in the statute between the two, is the Coverdell statute says "certify" and the Kirk Bloodsworth statute says "demonstrate". So in order to get the money in Coverdell, somebody needs to certify. They need to put a certification in. And we rely on the State and local official in each case to make that certification, to sign that form, and say I'm taking responsibility here that this process is in place.

Chairman LEAHY. OK. Now, you started to say something about the new legislation. Are you going to be able to do something similar to that on the Bloodsworth program?

Dr. MORGAN. Yes, sir. Exactly. In the solicitation we put out for Bloodsworth, what we've done is, instead of requiring them to demonstrate, as they had to under the statute as it's written now, we have now replaced that with a certification in this area, so they now need to certify that they have a process in place for post-conviction testing, and that they preserve the biological evidence in the serious felony cases.

That certification must be made by the chief legal officer or, for example, the Attorney General of the State that is applying. Once we have that certification in place and that person signs on saying we have the policies in place that you're talking about, then they will qualify and they will be able to receive the funds.

Chairman LEAHY. Do you agree with me that it's important that the Bloodsworth Act worked?

Dr. MORGAN. Absolutely, Senator. I've made it one of my chief goals in life the last couple of years. I want to get this money out. I don't have any hidden agenda.

Chairman LEAHY. I'm not suggesting—

Dr. MORGAN. We've worked very closely with the three States and we really do want to do this.

Chairman LEAHY. I'm not suggesting you do.

Dr. MORGAN. Thank you.

Chairman LEAHY. I didn't do my usual procedure of swearing in witnesses today. I'm just trying to learn what's happened.

Dr. MORGAN. Yes.

Chairman LEAHY. I went to the National Institute of Justice's website and I didn't do it exhaustively, but there's dozens of instances where States have to demonstrate they met some kind of requirement. But I don't see any of them where they're required to

do all of the exhaustive documentation and the proof that there is in the Bloodsworth program. In other words, it's kind of like, this one sort of stands out.

Dr. MORGAN. Well, in most cases we enforce those kinds of things through certifications, and when the statute gives us the ability to do so, that's what we do, because we're administering over $200 million worth of programs with my Federal staff of about 20 or so. So we can't be going in and requiring this in most of our grant programs. We like to do certifications because it allows us to be able to do more good and still have some benefit with respect to the compliance activities, some ability to say, well, this certification means something that we can rely on. So, we do that in most cases.

There are cases where we have to do more kinds of compliance than that and we have to do more oversight than that. For example, in environmental protection areas, we actually have to—we've actually delayed some Coverdell grants because the labs have had to come back and do environmental assessment work before they're able to draw down funds.

In some cases, that has delayed the funding under Coverdell by over a year because of those environmental assessments. So it depends on what the statute requires and what we feel we have the staff resources to do. It's kind of a tradeoff. It's about cost effectiveness and our ability, with the staff we have available, to enforce what we've got.

Chairman LEAHY. Dr. Morgan, you understand, from what I have said and what others have said, what it is we want to do here in the Congress.

Dr. MORGAN. Yes.

Chairman LEAHY. Can you state to me—probably more importantly, can you state to Mr. Bloodsworth, who's sitting right behind you—

Dr. MORGAN. Yes.

Chairman LEAHY. Can you tell us that you will work in every way possible to make this program work in the way we wanted it to?

Dr. MORGAN. Yes, Senator, I will.

Chairman LEAHY. OK.

Kirk, you heard that.

Mr. Bloodsworth. I did.

Chairman LEAHY. OK.

Mr. Fine, in response to your report, the Justice Department said it has met its legal obligation to enforce the requirement that States receiving Coverdell grants have an independent entity to investigate allegations of serious negligence or misconduct just by making sure there's a piece of paper, or a certification, in their files.

The Department, as I read the letter that responded to your report, suggested that it did not have legal authority to do anything more than receive the certification and it could not make sure the certification was accurate by calling the agency or checking the accuracy of the certification.

Do you think the Justice Department has a legal authority to check on the accuracy of these certifications?

Mr. FINE. Senator, yes, it does. I think that was its initial response, and eventually it acknowledged that it does have the ability to go beyond these certifications. That's what we see as the problem, what you pointed out. In one instance they imposed very onerous requirements, and in this instance, the Coverdell, they simply collected the certifications and said that's their only responsibility; because Congress has not specifically directed them to do more, they weren't going to do more.

We think that is wrong and that they have a responsibility to effectively administer the program, particularly when, apparently on its face, sometimes, the certification seemed deficient. When we pointed out to them there were problems with the certifications, they need to ensure that the certifications have meaning, what we were responded to with was reluctance, hesitation, and unwillingness to go beyond merely collecting a paper without significant prodding from us. Eventually they did agree to do a little more, but we think there's more to be done.

Chairman LEAHY. So if there's misconduct in a crime lab, they don't have to just say, well, we've got a certification, we can't look beyond it. They can look into that misconduct.

Mr. FINE. Well, they could give guidance to the grantee to make sure that when there is an allegation of serious misconduct, that it actually gets referred to the independent external investigation authority. They even, as I stated in my testimony, said, well, we're not required to do that—While it's consonant with the statute to give guidance to do that, it's not required by the statute.

Again, if the statute doesn't specifically tell them to do something, they were reluctant to do it, in our view, and we think that that is narrow, legalistic, and not effectively administering the statute. I recognize they have a limited staff. That's part of the reason I pointed out that it has the ability to beef up its Office of Assessment and Management. It has not done so. It's been very slow to do so, and we think that not only giving out the money expeditiously, but ensuring compliance with the terms of the grant, is an important consideration that needs attention.

Chairman LEAHY. Well, your report that you issued last week, I understand the principal recommendation was for the Justice Department revise its template for the certifications to ensure that the investigating agencies had the authority and the independent resources and process for handling allegations of misconduct or serious negligence. Did the Justice Department accept that recommendation?

Mr. FINE. No, they didn't. They did not want to revise the template. They wanted to simply collect the certification. They did agree in the past to have the entity named, but they did not agree to do more to ensure that the entity actually does have the independence, resources, authority, and ability to conduct independent external investigations.

Chairman LEAHY. How do you react to that response?

Mr. FINE. We asked them to reconsider. We tried to—we don't have the authority to make them do it, but we tried to bring to light the importance of it, the need for it, and the reasons why we think that they should do more to enforce this very important re-

quirement that will uphold and improve the integrity of forensic results.

Chairman LEAHY. When you first did a review of the Coverdell program back in 2005, I believe you found a number of problems. Certifications sometimes didn't even name the agencies responsible for conducting investigations of forensic labs. You asked the Department of Justice to work on correcting that. Did they?

Mr. FINE. Eventually they took action, but it was a struggle, and it is a struggle. We met with them. We pushed them. They were reluctant to even have the entities put on the form the name of the organization that they had in mind when they were certifying it, so they had to have an organization in mind. All we were asking them to do was to revise the form, to write it down. They were unwilling to do that initially. We had to meet with them.

I met with the Director of OJP and argued with them to do it because I thought it was important. Eventually, after much prodding, they've agreed to take that step. But that's sort of the reluctance that we see to enforce compliance with the intent of the statute.

Chairman LEAHY. Well, Dr. Morgan, I listened to what Inspector General Fine has said. I also see the statement that NIJ has fully implemented the statutory requirements of JFAA Section 311. I know that sounds like gobbledygook to some, but it sounds like you haven't.

Dr. MORGAN. Well, it's a very important statement to us because our primary obligation, first, is to make sure we comply with the statute. And so we want to make sure that at least we do that, so that's a very, very important thing to me, that the Inspector General has made that conclusion that we did comply with the statute.

Now, we're in violent agreement with the Inspector General concerning the need to ensure—

Chairman LEAHY. Violent agreement or disagreement?

Dr. MORGAN. Agreement.

Chairman LEAHY. OK. I just want to make sure we get that on the record.

Dr. MORGAN. On the details, we have some issues, but we're in violent agreement with the Inspector General concerning the need to ensure the integrity of forensic results. Our argument really is, looking at this one certification, is only looking at a very small part of an overall effort here, of which there are many, many other elements, and we've made certain management choices about what's the most critical thing to do.

And I'll say again, I'll talk again about the Grants Progress Assessment Program. Eight hundred and fifty-four laboratories actually visited, with experienced forensic scientists, to see what practices are in place, to review whether they're actually accredited, to make sure they're following generally accepted laboratory principles, as required under the law also. There are many, many other things in place here that are very important to enforce, and we need to do a balancing act with respect to putting the good out there in the field and not spending all the money on the compliance—

Chairman LEAHY. Nobody is going to disagree with that, but I'm going to have my staff followup further with you because I worry

that we maybe have a case where we're following the letter of the law, but not the spirit of the law. If we need even more changes, we'll do that. But I think everybody knows what we want to do here.

Dr. MORGAN. Yes, sir.

Chairman LEAHY. And I don't—in many ways, I hope this kind of a headline becomes something we won't see in the future, not because we didn't get people falsely imprisoned out, but because we don't falsely imprison people. And I understand, again, I have the same attitude I had when I was a prosecutor: I want guilty people locked up, especially those involved in violent—we're talking about violent crimes here. We're not talking about minor things. We're talking about violent crimes, we're talking about heinous crimes. I want those people locked up.

But I don't want the State to make the mistake of locking up the wrong person, because that means, somewhere, the guilty person is still out there. We have two terrible miscarriages of justice, one by having an innocent person behind jail—I don't know how somebody could stand 1 day behind jail knowing they're innocent, not 27 years, and 10 years, and 8 years, and 12 years, and 9 years, and others we've seen. But the other part is, as a people, we're not safer. We're not safer locking up the wrong person. We have extended our resources for nothing. We might get a nice headline, but we haven't locked up the right person. So, if I might, I'm going to have my staff followup with both of you gentlemen if we can.

Dr. MORGAN. Yes.

Chairman LEAHY. Let's try to make this thing work.

We'll take a 5-minute recess while we set up for the next panel. Thank you.

[The prepared statement of Dr. Morgan appears as a submission for the record.]

[Whereupon, at 10:48 a.m. the hearing was recessed.]

AFTER RECESS [10:59 a.m.]

Chairman LEAHY. If we could come on back. Sometimes at these hearings when so many people in the audience know each other, there's a good chance to get caught up, which is what I was just doing.

Our witnesses today, the first witness, is Peter Neufeld, who was mentioned already. But Mr. Neufeld is well-known to this committee. He co-founded, and he co-directs, the Innocence Project. It's an independent nonprofit organization affiliated with the Benjamin Cardozo School of Law. He's a partner in the civil rights law firm of Cochran, Neufeld & Scheck. The last 10 years, he served on the New York State Commission on Forensic Science that has the responsibility for regulating all State and local crime laboratories.

Prior to his work with the Innocence Project, Mr. Neufeld taught trial advocacy at Fordham University Law School, and was a staff attorney at the Legal Aid Society of New York. He received his law degree from the New York University School of Law, bachelor's from University of Wisconsin.

Mr. Neufeld, please go ahead.

STATEMENT OF PETER J. NEUFELD, CO–DIRECTOR, THE INNOCENCE PROJECT, CARDOZO SCHOOL OF LAW, NEW YORK, NY

Mr. NEUFELD. Thank you very much, Mr. Chairman. It's a pleasure to be here.

Chairman LEAHY. Is your microphone on?

Mr. NEUFELD. Now it is.

Thank you very much, Mr. Chairman. It is, indeed, a pleasure to be here.

I think the last time I was testifying before this committee was 4 years ago in the work-up to the passage of the Innocence Protection Act and the Justice For All Act. I recall not only the high hopes that everybody that that particularly the innocence provisions that you were the author of would be adopted and change the landscape of wrongful convictions in criminal justice in this country, but there was particular interest, particular bipartisan interest, in the notion that crime lab scandals and problems defied categorization by Republican or Democrat, and that everybody here on both sides of the aisle, without exception, felt that we needed to have rigorous, independent, external audits whenever problems arose in the crime laboratories. So, that and the Bloodsworth provisions were such a wonderful moment of great hope.

And I'm going to not talk as much about the Bloodsworth grant because we have Larry Hammond here from Arizona who will be able to address that point, and I'm going to focus more on Coverdell. But before I do, before I get to Coverdell, the one thing I do want to say here, which is just so upsetting, and you were much too kind, but the absolute clear disparity of treatment between Coverdell, which simply gives out all these—not enough money, by the way, but provides money to crime laboratories to work on non-DNA disciplines, but giving them, you know, free clearance not to really have a rigorous program of internal, external—I'm sorry. Of independent external auditing when things go wrong.

Well, on the other hand, it was so much a part of the legislation to encourage the States to preserve evidence, to encourage the States to pass statutes allowing inmates to have post-conviction DNA testing, to see that part of this marvelous legislative package be rendered toothless, that kind of disparity is just so mean-spirited, quite frankly, Mr. Chairman, I think it's an insult to crime victims, to the wrongly convicted, to Congress because it simply thwarts the goals that Congress had set out, and it undermines the integrity of forensic science and criminal justice in this country. We should all be concerned that it is never too late to get to the truth of a man who was wrongly convicted. It should never be too late to free that person and identify the real perpetrator.

One of the most important things that Congress did in 2004 when it passed the Innocence Protection Act and the Justice For All Act, was it realized that, just as it passed the preservation bill for Federal crimes and a post-conviction testing bill for Federal crimes, they wanted to encourage the States to do the same thing. Well, the States have done that with respect to post-conviction statutes. Almost 43 or 44 States now have meaningful post-conviction DNA statutes, and Congress should be applauded for the role it played in that in the Justice For All Act.

On the other hand, the track record on preservation has not been as good. There are about 5 or 6 States that meet the most rigorous preservation standards, perhaps another 10 or 15 that have some form of preservation rules. But we all know how important preservation is not only to exonerating the innocent, because obviously if the evidence is lost an inmate can't get access to it, and we also know how important it is to good police work. I can't tell you how many dozens of detectives I've spoken to over the years across the country who tell me, you know, darn it, I can't reopen these old, cold cases because the evidence simply hasn't been preserved. So, Congress wanted to encourage both things.

The Virginia experience perhaps is very appropriate because it points out this kind of duality. You introduced, before, Marvin Anderson. Marvin Anderson comes from Virginia. Virginia, at the time that Marvin was convicted, did not have any meaningful preservation standards at all. Indeed, it was the practice that all evidence would be returned from the crime laboratory to the local counties and then be destroyed.

Fortunately for Marvin Anderson, somebody serendipitously made a mistake in the state crime laboratory and, rather than returning it with the rape kit to the submitting sheriff's department, she glued it inside her notebook. So fortunately for Marvin Anderson, even though he had been convicted almost 20 years earlier, we were able to get access to that evidence and prove his innocence.

And then guess what happened? Two more people got access to that same evidence because it serendipitously wasn't destroyed, and proved their innocence. That was a wake-up call to then-Governor Warner. Governor Warner was very, very troubled by this and Governor Warner asked the state crime laboratory to do a random check of old cases, and he did the random check of old cases and he found that, of 18 cases, there were 2 more exonerations. So, he ordered thousands of cases to be reexamined.

The State set about trying to do all that and, in part—in part—they've been stymied by the failure of NIJ to give them the money to do that post-conviction testing. It's outrageous. Compare that to Mr. Chatman, who's here today, who's one of 15 people--15 people—cleared in Dallas, Texas for one reason and one reason only: because the crime laboratory in Dallas saves the evidence in every single case. Compare that to New York. With New York, we have 19 cases where we can't even do testing because New York can't find the evidence. They've lost the evidence. So, preservation is very important and we can't lose contact with it.

On to Coverdell. And I'll be very quick, Your Honor. Your Honor? See, I'm so used to appearing in court. You can appreciate that. You've been there, Senator.

Chairman LEAHY. This is not the first time that someone has done that.

Mr. NEUFELD. All right.

Chairman LEAHY. We always know when lawyers are here testifying.

Mr. NEUFELD. Coverdell.

Chairman LEAHY. But please wrap up, because we are going to have to—

Mr. NEUFELD. The whole point of Coverdell was to make sure that if something goes wrong, there's going to be an investigation into what went wrong, how we can fix it so it won't happen again. I think the most mean-spirited thing that the General Counsel at OJP did was to tell a grantee that, hey, just certify that you got an entity, just certify that you've got a process, but you don't have to use that process. Don't bother with it.

I consider that an obstruction of the will of Congress. To me, Senator, that's no different than if this Congress passed a bill requiring the CIA to preserve videotapes of interrogation and the CIA said, OK, we'll preserve them, we'll keep them in a garbage dump, because no one told us how to preserve them, no one told us where to preserve them. That's in bad faith. The Senate has to do something to make sure that these external audits go forward.

We have presented written testimony which shows examples of good external independent investigations and bad ones, and it has to be fixed. Until it's fixed, Senator, I assure you, no matter what representations are made by NIJ, there will continue to be wrongful convictions and there will continue to be instances where the real bad guy is out there committing more crimes.

[The prepared statement of Mr. Neufeld appears as a submission for the record.]

Chairman LEAHY. Well, we intend to have it fixed. I don't—on a day when the Senate is, in effect, not in session, I can assure you, being here, I'm here because I want to make sure it's fixed. Like all other Senators, there's enough calls on your time and I am—that's why I am here.

I also ask consent that other Senators who have statements, that they be placed in the record, including Senator Biden's.

[The prepared statement of Senator Biden appears as a submission for the record.]

Chairman LEAHY. Peter Marone is the Director of the Virginia Department of Forensic Science. He's served there since 1978. He's a member of various professional organizations, including the American Society of Crime Lab Directors. He's chair of the DNA Credential Review Committee. Most recently, he was elected chair of the Consortium of Forensic Science Organizations. He began his career at the Allegheny County crime lab in Pittsburgh beginning in 1971, and he remained there until 1978. He has both a bachelor's and master's degree from the University of Pittsburgh.

Mr. Marone, please go ahead, sir.

STATEMENT OF PETER M. MARONE, DIRECTOR, VIRGINIA DEPARTMENT OF FORENSIC SCIENCE, RICHMOND, VA

Mr. MARONE. Thank you, Mr. Chairman. It is really an honor to be allowed to speak here. Maybe it would be a good time right now for me to request that I might be able to provide an updated written response, knowing now what we know about the additional grant solicitation.

Chairman LEAHY. Of course. I will keep the record open so that anybody who wants to either add to their testimony or to add something based on the questions asked, can feel free to. Of course, that would include you, Mr. Marone.

Go ahead.

Mr. MARONE. As you said, I'm the Director of the Virginia Department of Forensic Science, but today I'm really speaking as the chair of the Consortium of Forensic Science Organizations. The CFSO is a national organization which represents the American Academy of Forensic Sciences, the American Association of Crime Laboratory Directors, the National Association of Medical Examiners, Forensic Quality Services, which is an accrediting body, the International Association for Identification, and the American Society of Crime Laboratory Directors' Laboratory Accreditation Board. For reference, I'm also a member of the National Academy of Science Committee on Identifying the Needs of the Forensic Science Community.

The field of forensic science has received a tremendous amount of visibility and attention in recent years, particularly in the television media. As a result of this attention—or as many refer to it, the CSI effect—the perceived capabilities of our laboratories have grown, and along with them our caseloads have increased dramatically. We find that both law enforcement agencies, as well as attorneys, both sides, prosecution and defense, seem to be affected by the CSI effect and tend to request much more testing and analysis of crime scene evidence than has ever been required before.

As a result, we've seen our case backlogs grow at a most alarming rate. Add to that the policy changes and enforcement issues that continue to add on, for example, enhanced penalties for possession of a firearm with a drug arrest and an increase in the use of the National Integration Ballistic Information Network, NIBIN, have increased the number of firearms cases almost exponentially. In addition, increased emphasis on anti-child exploitation and Internet pornography has increased the need for digital evidence, computer forensics capabilities far beyond existing resources.

Concurrently, the laws regarding DNA data banks are also expanding rapidly on a nationwide basis. This fact has, as well, caused an increased caseload for data banks and data bank laboratories and casework laboratories. Unfortunately, the increase in backlog and caseload has not been accompanied by a commensurate increase in funding for our laboratories. It's difficult to obtain funding to cover both the large number of new cases that are being presented to our labs daily and the backlog of cases from the past that require a timely review.

While the crime labs clearly understand and concur with some cases from the past needing to be reviewed promptly, to address both issues is time-consuming, costly, and logistically problematic. We have also found that, as science progresses and crime labs expand their services, older methods previously used by these laboratories are called into question. This, along with some deserved criticism, caused scrutiny regarding the capability of the labs, as well as the integrity of the crime lab system.

Cable news coverage, including specialized programs or segments featuring expert witnesses, have given even a louder voice in the public arena which also leads to increased visibility. Scrutiny is welcome when it assists in laboratory-improving services and the methodologies that are being employed. There is always a way to improve and any chance to do so should be welcomed. However, one must be careful that change is not done merely for the sake

of change and does not become necessarily cumbersome and time-consuming without specific valid purpose and useful results.

One of the issues I wish to address is the requirements established in order for a laboratory to receive Federal funds to conduct post-conviction testing, specifically what is being discussed here today, the Bloodsworth amendment to the Justice For All Act. Mr. Neufeld stole a little bit of my thunder there. I was going to ad lib a little bit and certainly recognize Mr. Anderson here. He told you the story of how he got started, but he didn't tell you the volume of what we're dealing with. Virginia looked at, and the Governor then agreed after those first 31 cases were reviewed, that we look at all the cases.

That evidence, or should I say, analysis ends, weren't done by mistake. The analyst had a particular habit of taping down what was left over from her original observation in the case record, not a general practice, but she did it because she wanted to be able to tell the jury, this is where I took this from, these are the genes that I took it from, and so forth. That's why she kept them.

Well, let me make a long story short: 534,000 case files later—we reviewed them all—there are 2,215 cases that meet the criteria that Governor Warner gave us to look at. We have looked at about 26 percent of those, and the other 74 percent are in the process of being worked through. We got State funding to do that first batch, but obviously the amount of money we're looking at can't be handled all with State funds. Those were unbudgeted funds. The governor took them out of unknown sources, but they made a bill for it.

Chairman LEAHY. I discussed that with Governor Warner at the time. I was very proud of him in making that effort.

Mr. MARONE. Some of the issues. Please bear in mind that the time permitted to respond to these solicitations from the Department of Justice has been 4 weeks. Unfortunately, the solicitation requirements aren't available to any of the laboratories prior to the announcement and, therefore, 4 weeks means 4 weeks. Compliance with these requirements has required implementation of new legislation, or at least amendment of existing statutes for each one of the States.

The State of Virginia was able to comply with this because it had statutes already in place, in some part because of Mr. Anderson, for evidence retention. The policies were in place. All the sign-offs by the head law enforcement agency, our Attorney General, were in place. I submitted all of those for the record. We were confident that this provision made the solicitation, and we were frustrated that we were advised that we did not meet the requirements to obtain the funding. A one-page letter told us that.

If we had had this funding in the time we anticipated, it would be a significant help in completing this, what we call the Post-Conviction Project. Ironically, Mr. Chairman, my State has been criticized, for many in the State, for not processing these cases more expeditiously. I look forward to reviewing a new solicitation when I get a chance to look at it.

The second issue I wish to address is the oversight boards for forensic laboratories. Many laboratories, if you ask them, will state their oversight is provided by the accrediting body under which

they operate. Some people will say that this is a fox guarding the henhouse and there is something inherently wrong about the process. But when you look at it, other oversight boards, whether it be commercial, medical, legislative, or legal, have oversight bodies which are comprised of the practitioners in that profession. It makes sense that the most knowledgeable about a particular topic would come from that discipline, but that does not seem to meet the current needs.

The key to appropriate and proper oversight is to have individuals representing stakeholders, but these individuals must be there for the right reason—to provide the best possible scientific analysis. There can't be any room for preconceived positions, agenda-driven positions, and unfortunately we have seen this in some other States when they're beginning to put these committees or boards together. As a result, many States have taken it upon themselves to create their own commissions, and unfortunately what this means is no two States have the same criteria.

The Virginia Department of Forensics—OK.

Chairman LEAHY. Your statement will be a part of the record, Mr. Marone.

Mr. MARONE. OK.

Chairman LEAHY. I understand what you're saying on this. Again—

Mr. MARONE. Let me finish up then.

Chairman LEAHY. Go ahead.

Mr. MARONE. OK. The laboratories, nationally, are staffed by truly dedicated individuals who are committed to finding the truth, whether exonerating wrongfully accused or uncovering the guilty. However, they are woefully underfunded and with increasing caseloads. We are looking forward to the recommendations of the National Academy of Sciences study, and are confident Congress will review those recommendations and act accordingly.

I thank you for your consideration for the opportunity to address this issue.

Chairman LEAHY. And you would agree with me, I'm sure, that in a competently, professionally run laboratory, they're not advocates. They're just there to find the facts. Is that correct?

Mr. MARONE. Absolutely.

Chairman LEAHY. Thank you.

[The prepared statement of Mr. Marone appears as a submission for the record.]

Chairman LEAHY. Mr. Hammond. Larry Hammond is a partner in the Phoenix law firm of Osborn and Maledon. Did I pronounce that correctly?

Mr. HAMMOND. You did.

Chairman LEAHY. He focuses on criminal defense and litigation. He has published numerous articles on criminal justice and death penalty issues. Some have been used in this committee. He currently serves as chair of the American Adjudicators Society's Criminal Justice Reform Committee. He previously worked as Assistant Watergate Special Prosecutor from 1973 to 1974.

He joined the Justice Department under President Carter as First Deputy Attorney General and the Office of Legal Counsel. He received both his law and bachelor's degree from the University of

Texas. We've heard a lot today about the difficulties of Arizona and attempts to come under the Bloodsworth law.

Mr. Hammond, the microphone is yours. Make sure it's turned on.

STATEMENT OF LARRY A. HAMMOND, PARTNER, OSBORN MALEDON, PHOENIX, AZ

Mr. HAMMOND. It is on. Thank you, Mr. Chairman. Thank you, Senator Feingold, for joining us this morning.

As you indicated, I am the chair of what's known as the Arizona Justice Project. Our project has been in existence for 10 years. It looks for cases of actual innocence or manifest injustice. We have looked at many DNA cases, and other kinds of cases as well.

Historically, our organization, like many around the country, has been largely dependent upon volunteer contributions by lawyers, by experts, by investigators, and by others. We have survived for a decade based primarily upon volunteer contributions. The Bloodsworth Grant Program afforded us an opportunity that, in our history, we had never had.

Let me pause, Mr. Chairman, for just a moment to say a word about the people I've associated with over the last decade. I've been on many programs and attended many meetings with Peter Neufeld and Barry Scheck, but I've never had the opportunity to say in a hearing like this what has been on my mind for a long time.

I do not know two lawyers in America who have done more for the public interest than Barry Scheck and Peter Neufeld. What they have accomplished in their lifetimes, and the leadership that they have provided to others in the creation of their own project and in the creation of the Innocence Network, which now comprehension about 40 projects, is truly stunning. I am very proud that our project could be a small part of a very large undertaking that has changed the face of criminal justice in America.

The Bloodsworth Grant Program could have, and still should, take us to a new level. We came to NIJ with an idea and in the early stages of the development of that idea, I must say we got terrific help from their staff people. They improved our project in lots and lots of ways. By the time we had worked with them for several months, we were absolutely convinced that we had something that would be of tremendous value to the State of Arizona. We would have been, and I hope someday still will be, one of the first States, if not the first State, to do an absolutely comprehensive review of all open DNA homicide and sexual assault cases that could be proved one way or the other by DNA evidence.

And we had a partnership with our Attorney General, Terry Goddard. I don't know of another State whose Attorney General has said, I will help you find the files. I will help you find the biological evidence. I will take away the road block that so often stands in the place of projects like ours around the country. And they also had the idea at NIJ of us doing a post-mortem on every successful DNA exoneration, for exactly the reason, Mr. Chairman, that you said this morning.

In our experience, every time someone is exonerated, the first thing you ought to be looking at is: who was the guilty person? We

have done a post-mortem of one of our most famous Arizona cases involving Ray Krone, the 100th DNA exoneree in this country who has testified many times, I think, in this committee. What we found in his case was that the real perpetrator, left unguarded, left unapprehended, raped a 7-year-old child after he should have been arrested. It's that kind of post-mortem that we think can help change the face of criminal justice in America. So we went through this great process. We were extremely pleased.

Then at the last moment, we got a one-paragraph letter that simply said "you are ineligible". Not that our grant wasn't good enough, not that anything else was wrong with it, but they didn't even tell us why. They didn't even tell us why we were ineligible.

We later found out orally—Dr. Morgan was very helpful, as helpful as I guess he could be under the circumstances, in simply telling us, I'm sorry, you were deemed ineligible. We had a certification, which you mentioned earlier, from Terry Goddard, our Attorney General, that he worked very hard on and he signed his name to, detailing the efforts in the State of Arizona to preserve evidence. That was deemed, for reasons never explained to us, to be inadequate.

As a result of that, we have now waited for another—it's been what, now, almost 2 years. We've started out with 3 DNA cases that we didn't have the funds to deal with. Mr. Chairman, we now have 18 and we have to deal with those families, and we have to deal with those inmates. Frankly, as far as I can tell, nobody at NIJ has cared about that.

[The prepared statement of Mr. Hammond appears as a submission for the record.]

Chairman LEAHY. Well, Mr. Hammond, as you heard me say, I'm worried that we are losing sight of the intent of the Bloodsworth Act. Again, this was something passed by both Republicans and Democrats. On this committee we have several former prosecutors, but there are several others throughout both the House and the Senate who have joined us on this who worked very hard, and they range across the political spectrum.

I don't want to get into a case of telling war stories, but I recall a heinous murder case in my jurisdiction when I was prosecutor, so heinous that I went to the scene about 2:00 in the morning and, within a month, at three different times came to my desk, we've got the person who did it and here's the evidence.

I worried about it because it didn't look substantial enough. They went back and said, oops, wrong guy, but now we've got the right guy, three different times. Entirely different people. When they got the third person, he had an iron-clad alibi, at a school reunion on the West Coast. This was in Burlington, Vermont, we were. You know, we could have arrested any one of those, created headlines. The public is not safer.

We've been joined by Senator Feingold. Did you want to add anything, Senator, before we go to questions?

Senator FEINGOLD. If I could, Mr. Chairman, I'd appreciate it.

Chairman LEAHY. Sure.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. I want to commend you for holding this hearing. I'm very pleased to see this committee once again address the need to improve the tools for seeking the truth in our criminal justice system. In addition, Members of Congress know all too well that we must follow up on the implementation of legislation we pass when it appears that our intent is being thwarted. So, Mr. Chairman, I appreciate that you are conducting the oversight that is critically needed with respect to these grant programs, as we have learned from the Inspector General and others today.

DNA testing has played an incredibly important role in the pursuit of truth and justice. DNA testing has identified perpetrators or provided other important probative value to the police and prosecutors investigating a crime.

But DNA testing has also exposed a piece of the dark underbelly of our criminal justice system, the conviction and sentencing of innocent people for crimes they did not commit. Americans have become all too familiar with the stories of people wrongfully convicted, sentenced, and sent to prison who finally walk free as a result of DNA testing.

Several of the people in attendance here today know all too well that this can happen. Nationwide, scores of innocent people have been released and, according to the innocence project, 65 percent of those wrongful convictions were caused, at least in part, by limited, unreliable, or even fraudulent forensics, highlighting the importance of improving our Nation's crime labs.

Mr. Chairman, this is a particularly appropriate moment to be taking stock of Congress' efforts to improve access to DNA testing and to increase oversight of forensic laboratories around the country. As a result of the Supreme Court's consideration of challenges to the lethal injection method of execution, we are basically experiencing a national moratorium on executions of death row inmates.

I am pleased that the committee is taking this opportunity to consider these issues, which are even more poignant for those sitting on death row. Since the reinstatement of the modern death penalty, 15 death row inmates have been exonerated as a result of DNA testing, including one in Oklahoma just this past year.

But it is important to remember that the flaws in the criminal justice system are not limited to forensics. Inadequate defense counsel, racial and geographic disparities, police and prosecutorial misconduct, and wrongful convictions based solely on the testimony of a jailhouse snitch or a single mistaken eyewitness identification all taint this country's criminal justice system and, in particular, its use of the death penalty. And all of these factors have led to the wrongful convictions of individuals later exonerated by DNA evidence.

So, again, I thank you, Mr. Chairman, for your leadership on this and for allowing me to make some remarks.

Chairman LEAHY. Well, thank you. I would note that Senator Feingold was one of the strongest backers of getting this bill through. It was helpful, again. You know, I'm frustrated as I listen to all the testimony. Everybody knows what we want to do, and the frustration is that it's not being done.

In the few minutes we have left, Mr. Neufeld, do we need to change the law yet again or can the Justice Department fix the problem under the Justice For All Act as it exists today?

Mr. NEUFELD. Well, let me address, particularly on the Coverdell issue, Your Honor. It is so obvious that when you have a plane crash, the National Transportation Safety Board, an external, independent entity, does the investigation. I'm on the board of a medical center. When we have an unexpected death, the New York State Department of Health conducts an independent external investigation.

Everybody on the Senate four years ago said that's what we want, because when there is a wrongful conviction, that's a catastrophe. You want to find out what went wrong. We have learned, at least in ourselves, that the second greatest cause of wrongful convictions, after misidentifications, are missteps in the crime labs, unfortunately.

Chairman LEAHY. But can we fix this under the law without changing the law? If the law if followed, can the law be followed the way Congress intended?

Mr. NEUFELD. Absolutely. As Glenn Fine said, the Department of Justice, OJP, and NIJ has the duty to communicate the will of Congress, and they can do that by managing these programs and not just giving a rubber stamp when someone says "I certify", but making sure that they are external, independent entities that will be doing the investigations. Check up on them to see if they're doing it.

Chairman LEAHY. Because that goes back to what Mr. Hammond—when he tells about the application being made, obviously thought out, you have a well-respected Attorney General in your State. The Attorney General, you said, signed the application personally, so he obviously put his reputation on the line, and you get back a one-paragraph, sorry, it ain't enough, it's denied. Did you ever get an official—I realize you said Dr. Morgan was very helpful and all that. But did you ever get an official explanation from the Department, or a legal opinion, why they just said no?

Mr. HAMMOND. No. I asked for it and was told that, for reasons that weren't explained to me, that it could not be made available to me and that it was not reviewable. There was no place that we could go to ask for reconsideration. And, Mr. Chairman, let me just contrast this very, very quickly with the Coverdell Grant Program. If you look at the appendix from Mr. Fine's last IG audit that came out last week—

Chairman LEAHY. I did.

Mr. HAMMOND. If you look at the Arizona page—I'm searching for the right word—it's embarrassing. We say, and apparently it's enough, that our medical examiner's offices are supervised by the Superior Court. Well, you know, that, in some respects, might not be entirely false. I guess somebody can always go to court. But that's not independent oversight. It's not even—it's a joke.

Chairman LEAHY. And I don't know of any court that is going to be spending a whole lot of time supervising a medical examiner.

Mr. HAMMOND. And our poor Attorney General, who I deeply respect for his commitment, is identified as the oversight agency for

all of our crime labs. He doesn't have any oversight power over those crime labs.

Chairman LEAHY. Do you think, as you listened to all the testimony here today and you think back to your application, do you feel it fit the bill?

Mr. HAMMOND. Absolutely. I don't think there was a question about it. I believe, now that the legislation has been clarified, I believe—I pray—that we will find ourselves funded very promptly.

Chairman LEAHY. Now, I think I know what we have to do. As I said, one of the reasons I'm holding this hearing today is because a week from now the Attorney General is going to be here and I'd like to be able to ask some of the questions. Roy Krone. He was—I know this case very well because we dealt with it. But for those who don't, could you just give us a real thumbnail of what happened in the Roy Krone—

Mr. HAMMOND. Certainly. Certainly, I can. In 1991, a woman named Kim Ancona was found dead in a bar early in the morning in downtown Phoenix. She was nude. She had been sexually assaulted and stabbed to death. Ray Krone was immediately arrested as the perpetrator of that crime. He denied culpability from the very beginning. He went to trial. He was convicted, he was sentenced to death. His case went up on appeal. His conviction was reversed. He came back, was tried a second time and was found guilty again, and went off to serve a life sentence. Luckily, DNA, several years later, proved him to be absolutely innocent.

In the meantime, we began to look at the reasons why it happened. Very quickly, it turns out there are two. One, was bogus bite mark information.

Chairman LEAHY. Bogus?

Mr. HAMMOND. Bite mark comparison information.

Chairman LEAHY. Yes.

Mr. HAMMOND. There was a bite mark on the victim's left breast that was matched by someone who passed himself off as a forensic odontologist, who testified that in fact there was a unique dentition. Ray became known as the Snaggle-Toothed Killer because his dentition was not perfect, and the imperfections seemed to match the mark on the breast. We now know that's utter nonsense, because we now know who the real perpetrator was. He has been apprehended, he is in prison, and he has perfect teeth.

By the way, so does Ray because of the Great American Makeover, which got more publicity than his exoneration. But that was one. But most importantly, was the crime lab. The City of Phoenix crime lab overlooked 11 pieces of important biological evidence—hair, saliva—that were not compared to anybody. When they eventually were, they found out that it really belonged to Ken Phillips, and now the story is over. Ray, with all—I think he deserves a lot of credit. He's been traveling around the country now for a couple of years.

Chairman LEAHY. I know he is.

Mr. HAMMOND. He testifies whenever he can.

Chairman LEAHY. I appreciate the fact that he has. He is very compelling in his testimony, as are you.

Mr. Marone, the last question from me. You said you were frustrated by the Justice Department in the application. You thought

you had filled out what you were supposed to. Did they offer to help you and work with you in any way to change your application or improve it so that you could get the—

Mr. MARONE. After hearing Larry, I think we got the same form letter.

Chairman LEAHY. Hit your microphone. Hit your microphone, Mr. Marone.

Mr. MARONE. After listening to Larry, I think we got the same form letter and the same response.

Chairman LEAHY. Yes. Well, I can tell you, as the author of the Bloodsworth law, this was not what was intended. I sat here through all these hearings. I was on the floor, shepherding that bill through. Mr. Neufeld, you have spent countless hours also on it. You know this is not what was intended.

I have no other questions, but Senator Feingold, please.

Senator FEINGOLD. Thank you, Mr. Chairman.

Mr. Neufeld, let me join with what Mr. Hammond said about you and your career.

Mr. NEUFELD. Thank you.

Senator FEINGOLD. Tell us about the case of Curtis McCarty, the Oklahoma death row inmate who was finally exonerated this past year, after more than two decades in prison, with the help of the Innocence Project. What lessons can be learned from his situation?

Mr. NEUFELD. Well, sure. Mr. McCarty was convicted, again, because of missteps by the Oklahoma State crime laboratory, to wit, one Joyce Gilchrist, who was the hair examiner and did serological work in that laboratory. She testified in a way that was inconsistent with the prevailing science.

Unfortunately, you know, people would say in the community, oh, the Joyce Gilchrists, the Zains, these are outliers, these things only happen in one or two places. What we have discovered, Senator Feingold, is that in more than half the States—in more than half the States, crime laboratory hair microscopists were making the same missteps.

In more than half the States, crime laboratory serologists were testifying—were either distorting the testimony, distorting the evidence, exaggerating the probative value of the evidence to allow innocent people to be wrongly convicted. So what we're talking about here is very, very simple, in Mr. McCarty's case, or anybody else's case. Unless we go back and do these independent external investigations, there's no remedial action. There's no reexamination of old cases. We at one time had a case in Virginia where another man came within nine days of execution, and in that case the internal laboratory did its own internal review and they said nothing was wrong, we did nothing wrong.

It wasn't until, again, Governor Warner ordered an external audit. That ASCLAB Lab did so and said, no, the internal audit in Virginia was faulty. It didn't get to the right answers, and indeed it didn't indicate the need for remedial action. We, as an external entity, are calling for remedial action. We, as an external entity, are calling for reexamination of old cases. It's not in the interest of any laboratory, or any group of lawyers or doctors, if they do their own investigation, to come out with a very negative report and go back and look at all those other cases. It's a huge burden

for them. They shouldn't have to do it. It should be internal—external and independent.

And if NIJ doesn't enforce that requirement that Congress made very specific details about, then you're going to have to change the statute. But to the rest of us in the public, it's absolutely clear what you meant. It's absolutely clear that when you said there has to be an entity in place and a process, that the process had to be implemented. Just to have a process sitting up there on a shelf and not being used isn't any good to the public, isn't any good to the exonerated, and isn't any good to crime victims.

Senator FEINGOLD. You've been a leader in educating the American people about the value of modern DNA testing as a key to proving the innocence of people who have been wrongfully convicted. Of course, modern DNA testing is especially critical in capital cases where a person's innocence or guilt is literally a matter of life and death.

But I'm concerned a little bit that sometimes we forget that DNA testing is not the be-all, end-all solution for all capital cases, because in many cases no biological evidence is available to test.

Do you agree, as valuable as DNA testing is to the integrity of the justice system and to ensuring that innocent people are not executed, it is a factor in only a fraction of all capital cases, and could you discuss the other problems that can result in wrongful convictions that must be addressed in order to ensure the fair and just administration of the death penalty?

Mr. NEUFELD. You wouldn't have to take my word for that. The hearings were held in this room. In fact, they were called by your colleague, Senator Sessions. Mr. Marone's predecessor, Barry Fisher, came in from California. He was the head of the consortium. He said it was his opinion that only in 10 percent of the violent crimes would you have biological evidence amenable to DNA testing. So if you don't fix all the other causes of wrongful conviction that DNA will be, unfortunately, unable to address, you will continue to have innocent people sent to death row. And that's just a no-brainer if you will. Everybody in criminal justice knows that. This is a limited opportunity, though, to start dealing with those other causes, like misidentifications, false confessions, and jailhouse informants. But one of the other causes, one of the biggest causes, is other forensic science, not DNA, but all those other disciplines that they do in the crime laboratory that are the meat and potatoes of crime laboratories. Mr. Hammond mentioned bite marks. We have five other cases where people were wrongly convicted based on bite marks, yet people are still plying that trade. We have 40 some-odd cases where people were wrongly convicted based on crime lab people coming and saying the hairs matched, yet there are folks still plying that trade. There has to be the external entity there to fix it, make the remedial action, and prevent these things from happening again, and again, and again.

Senator FEINGOLD. Thank you, Mr. Neufeld.

Mr. NEUFELD. Thank you.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, gentlemen. Thank you. We will keep the record open for any additions you want to make, and questions others might want to make.

We stand in recess.
[Whereupon, at 11:42 a.m. the Committee was adjourned.]
[Questions and answers and submission for the record follow.]

QUESTIONS AND ANSWERS

Questions of Senator Patrick Leahy, Chairman,
Senate Judiciary Committee
For Inspector General Glenn Fine, Department of Justice

Hearing on "Oversight of the Justice for All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs?"

Question: In your testimony, you noted that over the years of the Office of Justice Program's "spotty record of monitoring approximately $2-$3 billion of grants it awards each year" and said you had "encountered a troubling attitude from OJP that it need only impose the minimum standards required by statute or regulation, and that, in and of itself, discharges its responsibilities to ensure effective grant oversight." As a result, you have identified OJP as one of your highest priorities for oversight at the Department of Justice.

a. Beyond their implementation of the Coverdell and Bloodsworth grant programs, what programs concern you the most in terms of OJP's administration?

Answer: The Office of Justice Programs (OJP) manages the majority of the Department of Justice's (Department) grant programs. In various reviews over the years, the Office of the Inspector General (OIG) has identified significant problems throughout OJP's oversight of the Department's grant programs. These include problems in the grant closeout process, improper use of grant funds by grantees, difficulties in meeting grant objectives, and poor performance measurement of grant effectiveness. In our opinion, OJP has taken an unnecessarily narrow view of its responsibilities and has placed greater emphasis on awarding grant money than administering and monitoring the grant programs and individual grants. As a result, we believe that OJP does not exercise adequate financial and programmatic oversight over the grant programs that it administers, and does not have a consistent mechanism to assess the effectiveness of those grant programs.

For example, in FY 2007 the OIG issued a comprehensive report on the Grant Closeout Process used by OJP and two other Department grant-making agencies to determine whether component activities were adequate to ensure that: (1) expired grants were closed in a timely manner; (2) grant funds were drawn down in accordance with federal regulations, Department policy, and the terms and conditions of the grant; and (3) unused grant funds were deobligated prior to closeout. Our review included 60,933 expired grants totaling $25.02 billion.

Our audit concluded that OJP substantially failed to ensure that grants were closed in a timely manner. We reviewed over 25,000 closed grants and found that only 18 percent were closed within 6 months after the grant end date. We

also identified a backlog of over 2,000 expired grants more than 6 months past the grant end date that had not been closed. Additionally, because the OJP did not close grants in a timely manner, grantees were allowed to draw down funds on expired grants more than 90 days past the grant end date. This resulted in questioned costs of $290 million and funds put to better use of $61 million that could have been used to provide the Department with additional resources to fund other programs.

In another audit, in 2006 the OIG examined OJP's No Suspect Casework DNA Backlog Reduction Program and, among other things, determined that grantees had not utilized almost 60 percent of the funds awarded nearly 2 years after awards were made. We concluded that this untimely use of funds significantly hindered the program's ability to achieve its intended goals.

Also in 2006, the OIG examined the administration of the Department's grants awarded to Native American and Alaska Native Tribal governments. For each tribal-specific grant, we reviewed the grant payment history to determine whether grant funds were made available to the grantee in a timely manner. Specifically, we found that grant funds were not obligated until more than 6 months after the award start date for 128 OJP grants totaling $29.5 million. As a result, grantees could not receive reimbursement for grant expenditures, which could result in significant delays in the implementation of tribal-specific grant programs designed to provide essential criminal justice services in Indian country.

In sum, through these and other audits, our concern about OJP's monitoring of grants extends throughout its many grant programs.

Question: What steps should the Justice Department and OJP take to correct these problems?

Answer: One of the most important steps OJP could take to correct these deficiencies is to adopt a less narrow view of its responsibilities. While awarding grant money is important, it is equally important that OJP adequately monitor grantees to ensure that the money awarded is used appropriately.

Although Congress has given OJP tools and resources to address grant monitoring issues, we have found that OJP has not effectively used those resources. For example, in January 2006 Congress authorized OJP to create an Office of Audit, Assessment, and Management (OAAM) to ensure financial grant compliance, conduct programmatic assessments of DOJ grant programs, and act as a central source for grant management policy.

However, OJP's efforts to date to establish this office have been disappointing. We believe fully implementing the OAAM – now 2 years after Congress

authorized its creation – would be a critical step in improving OJP's monitoring of Department grantees.

Question: Is your office currently auditing, inspecting, or investigating any other programs at OJP, and are the findings from those reviews consistent with your review of the Coverdell grant program?

Answer: As discussed below, the OIG is currently reviewing several OJP grant programs, including OJP's management of the grant program for Human Trafficking, Southwest Border Prosecution Initiative, and Hometown Heroes Survivors Benefits.

Human Trafficking. OJP, through the Office of Victims of Crime, provides grants to support victim service programs for alien victims trafficked into or within the United States who require emergency services. The OIG is examining the extent to which the grant program has achieved its objective to provide effective assistance for victims of trafficking.

Southwest Border Prosecution Initiative. Administered by OJP, the Southwest Border Prosecution Initiative (SWBPI) reimburses eligible jurisdictions in the four southwest border states for costs associated with the prosecution of criminal cases declined or referred by local United States Attorney Offices. The OIG is auditing the effectiveness of OJP's administration and oversight of SWBPI reimbursements, and whether SWBPI reimbursements are allowable and supported in accordance with applicable laws, rules, and regulations.

Hometown Heroes Survivors Benefits. The OIG is reviewing OJP's implementation of the "Hometown Heroes Survivors Benefits Act of 2003," which allows payment of public safety officer survivor benefits for fatal heart attacks or strokes suffered in the line of duty. Our review is examining whether OJP is processing death claims for heart attacks and strokes in a timely manner and in accordance with the intent of the Act.

In addition to these ongoing reviews, the OIG is planning an audit of the Convicted Offender DNA Backlog Reduction Program. The National Institute of Justice (a component of OJP) has administered this program since its inception in fiscal year 2000. The program is designed to help states reduce their backlog of convicted offender DNA samples.

Question: What follow up steps will you take to determine whether the Office of Justice Programs follows your recommendations with regard to the Coverdell program and whether problems persist in the implementation of that program?

Answer: As is our regular practice, the OIG is monitoring the actions that OJP has stated it will take to address our recommendations. OJP concurred with

two of our three recommendations in the Coverdell report and indicated that it was taking corrective action. To implement one of those recommendations, OJP agreed to provide applicants with guidance that encourages referrals of allegations of serious negligence or misconduct to the certified government entities.[1] OJP promised to provide the OIG with a copy of the guidance for fiscal year 2008 Coverdell Program applicants by May 15, 2008, and the OIG will review that guidance.

To implement the other agreed-upon recommendation, OJP will require applicants to provide complete external investigation certifications prior to receiving grant funds.[2] In addition, OJP agreed to provide the OIG with written program management guidelines for the Coverdell Program that will encompass the review of applications for the external investigation certification as well as other requirements of the program. Similarly, OJP promised to provide the OIG with a copy of the guidelines by May 15, 2008, and the OIG will assess that guidance.

OJP did not concur with our third recommendation.[3] The OIG has requested that OJP reconsider its decision not to implement the recommendation and inform the OIG of its determination and proposed corrective action by March 1, 2008. The OIG will follow up with OJP to determine whether it will adequately reconsider its decision not to implement this recommendation.

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[1] The OIG's Recommendation 2 was: Provide applicants with guidance that allegations of serious negligence or misconduct substantially affecting the integrity of forensic results are to be referred to the certified government entities.

[2] The OIG's Recommendation 3 was: Revise and document the Coverdell Program application review process so that only applicants that submit complete external investigation certifications are awarded grants.

[3] The OIG's Recommendation 1 was: Revise the certification template to require that applicants name the government entities and confirm that the government entities have:

a. the authority,
b. the independence,
c. a process in place that excludes laboratory management, and
d. the resources

to conduct independent external investigations into allegations of serious negligence or misconduct by the forensic laboratories that will receive Coverdell Program funds.

Question: In your review of the Coverdell grant program, you noted that a number of the investigative entities that were certified to receive allegations of misconduct or serious negligence by forensic laboratories were supervised by the same officials as the forensic laboratories themselves. Do you have a concern that these certified entities may have a potential conflict of interest in conducting investigations of these federally-funded forensic laboratories? What steps should OJP take to ensure that these investigative entities are truly independent and do not have inherent conflicts of interest?

Answer: The OIG is concerned that investigations are not independent when laboratory management or employees are involved in or control the investigative process. For example, in one of the cases we identified a clear conflict of interest because the forensic laboratory itself was responsible for investigating allegations of serious negligence or misconduct within the laboratory. We have a concern that this does not satisfy the independent external certification requirement and constitutes a clear conflict of interest.

To better ensure that identified government entities are independent and have no inherent conflicts of interest, OJP should continue to require that applicants name the government entities on their Coverdell certifications, and OJP should assess whether the named entities appear to have the independence, resources, and ability to conduct the required external investigations. Furthermore, OJP should require a more explicit certification, as outlined in the OIG's Recommendation 1, to ensure that applicants have accurately assessed the qualifications and independence of the identified government entities. As mentioned previously, OJP currently is reconsidering its non-concurrence with Recommendation 1 and is to provide the OIG with its final decision by March 1, 2008.

Senator Edward M. Kennedy
Questions for the Record
Senate Judiciary Committee Hearing on "Oversight of the Justice for All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs?"
Held on January 23, 2008

In your written testimony, you discuss the Office of the Inspector General investigations in awarding and monitoring the grant funds the Office of Justice Programs awards, particularly two recent reports on the Office of Justice Programs' role in administering Coverdell grant funds.

Both reports detail the inability of the Office of Justice Programs to effectively administer the requirements of the Coverdell Program in distributing grant funds to states. The first report, issued in December 2005, addressed the external investigation certification requirement, enacted as part of the Justice for All Act, to deal with negligence and misconduct in forensic laboratories. The Inspector General concluded that the Office of Justice Programs "had not effectively enforced or exercised effective oversight over this external investigation certification" and that the Office of Justice Programs "only reluctantly agreed to implement some of the report's recommendations."

The report issued in January 2008 identified continuing deficiencies in the Office of Justice Programs' administration of the Coverdell program with regard to the external investigation certification requirement, and concluded that the Office of Justice Programs has yet to ensure that applicants identify entities that can conduct independent investigations and that allegations of serious negligence or misconduct are actually referred for investigation. These reports obviously enhance the Committee's concerns about the effective administration of both the Bloodsworth and the Coverdell grant programs.

Question: How can the Office of Justice Programs improve its past record of distributing grant funds, particularly the $15 million dollars set aside in 2004 which have yet to be allocated?

Answer: One of the most important steps OJP could take is to adopt a less narrow view of its responsibilities. While awarding grant money is important, it is equally important that OJP adequately monitor grantees to ensure that the money awarded is used appropriately. As discussed in response to questions from Chairman Leahy, OJP should fully establish and fund its Office of Audit, Assessment, and Management, which could be an important step towards OJP fulfilling its responsibilities for more effectively monitoring the grants it awards.

Question: Will the new grant solicitation and the certification of the Bloodsworth requirements be meaningful in making these finds available to the states?

Answer: The OIG's recent review focused exclusively on the Coverdell grant program and did not analyze the Bloodsworth program. Consequently, I believe that other hearing witnesses are better positioned to answer this question about the Bloodsworth program.

Question: Would you recommend that OJP consult with state applicants to allow them to amend their applications before final determinations are made on applications for funding?

Answer: OJP may consult with state applicants regarding their applications and may accept amended applications for statutory formula grant programs. For this type of program, eligibility and the amount of funds designated for each state are defined in legislation. The OIG believes that consultation between OJP and state formula grant applicants can help ensure that states implement programs and utilize grant funds effectively and consistent with congressional intent. For discretionary grant programs, which are awarded on a competitive basis, OJP would need to consult with applicants or allow amendments to applications in a manner that preserves the integrity of the competitive award process.

Question: Will your office conduct further reviews to monitor OJP's response and progress on compliance with the statutory provisions of both the Bloodsworth and the Coverdell grant programs?

Answer: The OIG's resolution process is designed to ensure that our recommendations to Department officials are adequately considered and operational areas needing improvement are appropriately addressed. In accordance with this process, the OIG will follow up on OJP's response to our Coverdell report recommendations. As discussed previously, OJP agreed to implement two of the three recommendations we made in our Coverdell report.

In addition, because the OIG consistently has identified grant management as one of the Department's top management challenges, we plan to continue to review OJP's oversight of its varied grant programs.

JUSTICEPROJECT
www.azjusticeproject.org
LARRY A. HAMMOND
Arizona Attorneys for Criminal Justice

February 11, 2008

Senator Edward M. Kennedy
317 Russell Senate Building
Washington, DC 20510

RE: Senate Judiciary Committee Hearing on "Oversight of the Justice for All Act" held on January 23, 2008

Dear Senator Kennedy:

This responds on behalf of the Arizona Justice Project to your questions for the record related to the above-mentioned Senate Judiciary Committee Oversight Hearing.

Question A

As you worked with the National Institute of Justice to refine your application for the Bloodsworth grant, did you receive any indication that the application might be rejected or that you did not meet the eligibility requirements?

Answer:

I believe the answer is no. Most of the direct communications between Arizona and NIJ passed through the Arizona Criminal Justice Commission (ACJC), the party that actually served as the administrative hub for this grant application. I think it is safe to say that the Attorney General's certification was understood by all of us in Arizona to be an important part of the application process, but I do not believe that we were told at any point that our application was in any way in jeopardy. Certainly, after the application was filed (which included the Attorney General's certification), no one suggested to us that the certification might in any way be deemed insufficient.

Question B

How critical is the Bloodsworth program grant to the existence and continuing work of the Arizona Justice Program in its advocacy for the clients it serves?

Sandra Day O'Connor College of Law
P. O. Box 877906, Tempe, AZ 85287-7906

Answer:

The Bloodsworth grant is critical to our ability to do one important phase of our Project's mission. The Arizona Justice Project, as I indicated in my testimony, has been in existence for ten years. We have survived on a very modest budget and have depended almost entirely on volunteers. While that approach has allowed us to accomplish a great deal, we have really never been able to do the work that we strongly believe should be done with respect to DNA cases. When we began the application process with NIJ, we had three cases that we believed deserved further attention. Those cases were ones that we simply could not address with the resources available to us. During the application process, however, we continued to look at and to set aside for further review the cases involving homicides or sexual assaults in which inmates raised what we believed were significant questions that might be subject to analysis with the aid of DNA evidence. By the time we testified in January of this year our list of such cases had risen to 18. Without the aid of this grant we simply have no way to approach a thoughtful evaluation of those cases in the foreseeable future.

Question C

How much can the $15 million that has yet to be allocated for the Bloodsworth grants by the Office of Justice Programs do to improve preservation of biological evidence and post-conviction testing procedures?

Answer:

We believe that the $15 million authorized and appropriated for the Bloodsworth grant program can accomplish tremendous things. In particular it can be a catalyst to improving every state's – and particularly Arizona's – systems for the preservation of biological evidence and for post-conviction testing. We have become firm believers that every DNA-based exoneration is a tremendous learning experience. The grant application contemplates that for every exoneration there will be a post-mortem. We have already done two post-mortems – one of which (Ray Krone) you referred to in your letter. These post-mortems help us focus on ways in which the preservation and testing of evidence can be enhanced. We have little doubt that, certainly in the State of Arizona, the work done under this grant will help us work toward the improvement of testing and preservation of biological evidence. The cooperation our grant contemplates between the Attorney General, the crime labs and the Arizona Justice Project cannot help but address these goals.

CONCLUDING OBSERVATION

I wish to close with one observation that I believe is important. This hearing has caused many of us in Arizona to think carefully about our relationship with NIJ during the grant application process and in its aftermath. In response to a question during the January 23 hearing, I observed that after our application had been deemed "ineligible" I felt that no one at NIJ seemed really to care about the inmates, the victims, and others here in Arizona. While this certainly was a very accurate reflection of how I and others in this State felt, I do not think it fairly reflects on many of the people at NIJ. To the contrary, many of the people with whom we have communicated at NIJ have indicated an extremely sincere interest in the goals of the Bloodsworth grant program. We have little doubt that our grant was deemed to be important by many people at NIJ and that those people did care about what happened here in Arizona. I do not want my testimony to be read as indicating otherwise. The level of our frustration, disappointment and confusion is reflected in my testimony, but at bottom we continue to believe that we can work with people at NIJ who are of good will and who have every hope that our proposed program here in Arizona will succeed.

On behalf of the Arizona Justice Project I want to thank you and the other members of the Senate Judiciary Committee for your strong expression of interest in this subject.

Sincerely,

Larry A. Hammond

Larry A. Hammond

LAH:djt
1925224

Questions from Senator Kennedy

When you were advised that the State of Virginia did not meet the requirements for federal funding to conduct post-conviction testing, were you given any reason for this outcome? Were you consulted beforehand about any deficiencies in the application?

In 2006, the Virginia Department of Forensic Science (DFS) applied for this grant and submitted the required documentation. On several occasions DFS inquired as to the status of the grant process and was told by NIJ there were some questions or issues in general. Some time later, DFS was told that further directions about the application would be forthcoming. There were never any discussions about deficiencies in the application. Without receiving any further directions, the attached denial letter was received. No indication was given as to any further action until immediately before the January 23, 2008 hearing before the Senate Judiciary Committee.

How important are the Bloodsworth and Coverdell grant programs to the existence and continuing work of Virginia in improving its forensic science laboratories?

The Bloodsworth grant program is an extremely helpful program for the Commonwealth of Virginia. DFS is a laboratory system independent of any law enforcement agency that conducts testing for both governmental agencies and defendants (by court order). By state statute, improperly convicted persons are entitled to testing as are subjects of criminal investigations if the statutory scheme is followed.

Post-conviction cases can be problematic due to the detrimental effect they have on current casework. The post-conviction cases are primarily outsourced to private laboratories in an effort to minimize the impact on current casework. Outsourcing is extremely costly to DFS and the Bloodsworth grant program would help to alleviate the costs and allow for all casework / post-conviction testing to be completed in a timely manner.

The Coverdell grant program has been successful in allowing DFS to purchase equipment. At this point in time, however, since Coverdell funds are the only federal funds available not only to forensic laboratories but also medical examiners, DFS has worked with the Office of the Chief Medical Examiner to coordinate these funds between the two agencies. Since DFS has had access to funds through the President's DNA Initiative, the forensic biology section has been able to significantly improve the efficiency of forensic biology testing. The DNA funding has allowed for the hiring of personnel, expansion of laboratory space and the purchase of new instrumentation. Because of the availability of funds for DNA, a large portion of the Coverdell funds have been directed towards training of forensic pathologists in the Medical Examiner's Office. If the Coverdell funds are increased, DFS will be able to

utilize them to help build capacity in the other forensic disciplines such as drug analysis, toxicology, firearms identification, fingerprint comparisons, and trace evidence.

Can the $15 million yet to be allocated by the Office of Justice Programs for Bloodsworth grants be used effectively to improve the preservation of biological evidence and improve post-conviction testing?

Yes, with access to these funds, the post-conviction testing cases can be expeditiously completed in a manner that has less impact on the laboratory's current case backlog. In addition, these funds can be used to improve upon the current storage standards and guidelines, and to make renovations of current laboratory space to comply with the Virginia statute requiring DFS to preserve human biological evidence.

Currently, DFS conducts training to law enforcement officers regarding the preservation of human biological evidence. In conjunction with this training, an evidence handling and laboratory capabilities guide is published and disseminated to law enforcement as well as on the DFS website.

Questions from Senator Sessions

Mr. Marone, can you please provide to this committee an overview of what a typical backlog and case log of work for forensics looks like. How many drug cases do you have a month? How many DNA cases? Where is your biggest problem? How do you think the federal government could help the States?

Below is DFS' workload summary for the month of January, 2008. Table 1 illustrates the backlog for the scientific disciplines which are of specific interest entering the month of January ("previous backlog"), the cases received during the month, cases completed during January and the ending backlog for the month.

Section	Previous Backlog	Cases Received	Cases Completed	Average Turn Around Time	Ending Backlog	Backlog Over 30 Days	Backlog Over 60 Days	Backlog Over 90 Days
Drugs	1280	2261	2835	18	1106	0	0	0
Firearms	1201	558	510	85	1249	773	566	343
Forensic Biology	1148	367	276	184	1239	889	669	440
Latent Prints	504	424	485	45	443	164	82	32

Table 1

Virginia's drug backlog reduction (see Figure 1) is the result of 11positions being added over the last three years along with an infusion of 1.4 million dollars in overtime pay. Three years ago, the drug backlog stood at 14,500 and had an average turn around time of 99 days. The turn around time now stands at 18 days with none over 30 days.

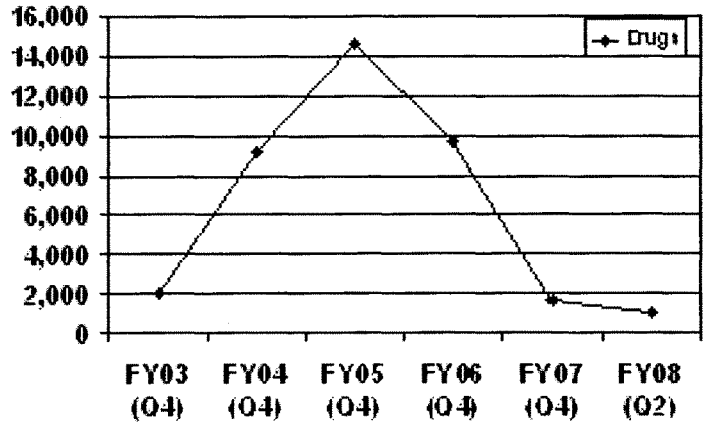

Figure 1

While it may not be apparent, the scientific discipline that is the most problematic is firearms. A position for a qualified firearms examiner has been posted for over one year in Virginia and there have been no qualified applicants identified. This shortage of qualified examiners requires DFS to train firearms examiners internally, which takes two full years and has an impact on casework. Currently, DFS has 6 employees in firearms training and an additional 2 scheduled to begin this summer. In addition, the trend towards blind verification which addresses the question of contextual bias will have a negative impact on turnaround time and require more staff and laboratory facilities. Additionally, the National Integrated Ballistic Information Network (NIBIN) has been very successful in Virginia in helping to solve crimes that would have gone unsolved in the past. As a result of Virginia's success, an increased number of cases have to be resubmitted to perform verification of the NIBIN hit, which also affects case backlog and turnaround times.

If funding is available for the firearms discipline in a manner similar to DNA, there would be a significant positive impact. The money could be used to purchase additional equipment to improve efficiency, hire grant funded employees to undergo training to become qualified firearms examiners and to renovate existing laboratory areas to accommodate additional firearms examiners and equipment.

Similarly, over the last 3 years, 6 latent print examiners have been trained and added to the staff. This has served to reduce the backlog and turn around time for this discipline. As with firearms, blind verification will negatively impact the backlogcase load.

Numerous success stories from Virginia have come out of the DNA funding provided under other NIJ grants. The establishment of many of the training positions and the funds for the training programs were the result of federal grants. The positions have since been converted to full time, state funded positions. Much of the justification for the establishment of state positions was based on the existence of grant funded positions already in place and productive. Please note the significant backlog reduction in DNA cases from 2004 to 2008. Currently there are 8 DNA examiners being trained. Because of the time involved in working each DNA case, which tends to be more complex than some of the other disciplines, the response to adding more staff is slower. Figure 2 demonstrates the trends of case backlogs in the DNA, Firearms, and Latent Print sections.

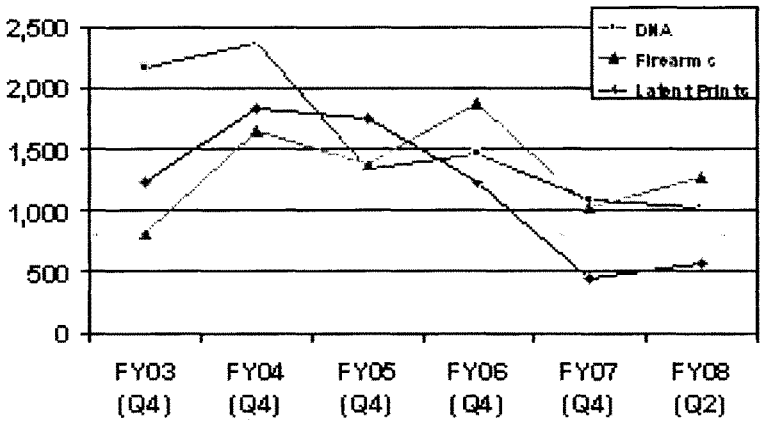

Figure 2

Similar success can be achieved in the allocation of funds to improve these scientific disciplines. Funding that is directed toward a specific goal is extremely effective and assists a laboratory in focusing on improving a particular area, acting as a catalyst to improving quality, timeliness, and effectiveness.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 15, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed a response to questions arising from the appearance of Deputy Director John Morgan before the Committee on January 23, 2008, at a hearing entitled "Oversight of the Justice for all Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs?".

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Member

"Oversight of the Justice for All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs?"

January 23, 2008

Questions for the Hearing Record
for
John Morgan
Deputy Director for Science and Technology
National Institute of Justice
Department of Justice

QUESTION FROM SENATOR LEAHY:

1. **At the hearing, you pledged that the Justice Department would work with applicants to the Bloodsworth grant program to make sure the Department honored the spirit of the Justice For All Act, not just the letter of that law. You indicated that this was one of the most important programs you administer, and you consider the successful awarding of these grants to be a core part of your mission.**

   a. **Will you agree to revise the guidance and requirements set out in this year's solicitation for these grants as necessary to make sure that no unnecessary burdens are placed on applicants related to the preservation of evidence requirements and other components of these grants? If so, will you provide us with a copy of the revised guidance and/or requirements?**

RESPONSE:

In the FY 2007 postconviction DNA testing solicitation, in accordance with section 413 of the Justice for All Act and the FY 2006 and FY 2007 appropriations, applicants were required to demonstrate compliance with certain stringent eligibility requirements set by section 413. Language in the FY 2008 appropriation has the effect of allowing the National Institute of Justice (NIJ) to ease the section 413 requirements with respect to funds appropriated for FY 2006 - FY 2008. The FY 2008 solicitation – which was posted on January 22, 2008 – accordingly eased the requirements of section 413, in a manner that we believe remains consonant with the policy objectives of section 413.

Generally speaking, the updated FY 2008 postconviction DNA testing solicitation replaced the section 413 (FY 2007 solicitation) requirements with a requirement for a certification from the chief legal officer of the State that, with respect to the offenses of forcible rape, murder, and nonnegligent manslaughter – the offenses that are the subject of the solicitation – the State provides for postconviction DNA testing pursuant to a State statute, or State rules, regulations, or practices; and provides for preservation of biological evidence pursuant to a State statute, local ordinances, or State or local rules, regulations, or practices. This updated certification requirement represented an easing of the requirement included in the FY 2008 solicitation as posted on January 22, 2008, which itself significantly eased the requirements of

section 413. (The specific language of the certification appears on page 4 of the updated FY 2008 solicitation, a copy of which is attached.) The closing date of the FY 2008 solicitation was March 24, 2008; applicants had an additional four weeks to submit the certification after the closing date of the solicitation. In addition, a template for the certification was provided to facilitate fair and timely review of this requirement.

NIJ staff conducted extensive outreach to ensure that key State and local government officials as well as forensics professionals were aware of the solicitation. Five States submitted applications under the updated FY 2008 solicitation; all five received awards.

b. Will you work to ensure that applicants do meaningfully certify that their states are taking appropriate steps to preserve evidence, as intended by Congress, without using this requirement to effectively shut down the award of grants under this program?

RESPONSE:

Under the updated FY 2008 solicitation, in order to establish eligibility, the chief legal officer of the State must certify that the State "[p]reserves biological evidence secured in relation to the investigation or prosecution of a State offense of forcible rape, murder, or nonnegligent manslaughter under a State statute, local ordinances, or State or local rules, regulations, or practices, in a manner intended to ensure that reasonable measures are taken by all jurisdictions within the State to preserve such evidence." We believe that this requirement, which includes language derived generally from section 413 of the Justice for All Act itself, calls for a meaningful certification. We relied on the chief legal officer of each State accurately to assess whether the certification properly could be made based on the State's particular circumstances. (We note that the FY 2008 certification template explicitly stated that "I am aware that a false statement in this certification may be subject to criminal prosecution, including under 18 U.S.C. § 1001.")

Moreover, the FY 2008 solicitation for these funds put States on notice that funding in future fiscal years may be contingent on the more stringent requirements regarding evidence retention established by section 413 of the Justice for All Act. In addition, through the DNA and Coverdell programs, NIJ provides significant assistance to States and units of local government to purchase equipment and other resources to provide for retention of biological evidence. Finally, NIJ is studying the extent of evidence preservation in DNA laboratories generally to identify ways to improve evidence storage practices.

c. Will you agree to work with applicants in order to help them to comply with this guidance and requirements, rather than denying grant applications summarily without providing the basis for the denial and an opportunity for applicants to seek reconsideration within reasonable time frames, as has happened in the past?

RESPONSE:

All applicants under the updated FY 2008 solicitation were favorably reviewed by the independent peer review panel and received awards. Accordingly, there was no need to provide an opportunity for reconsideration (or reasons for denials). NIJ did work with applicants as appropriate to improve their submissions in light of solicitation requirements.

d. What steps has the Office of Justice Programs taken to encourage and solicit applicants for this grant program, and what further steps will you take to ensure that more applicants are encouraged to apply for this program?

RESPONSE:

The Office of Justice Programs (OJP) has eased the eligibility requirements as described above. In addition, the FY 2008 solicitation was open for significantly longer than was the FY 2007 solicitation, and applicants had an additional four weeks beyond the closing date to provide the certification regarding postconviction testing availability and evidence preservation. Potential applicants were notified of the availability of these funds through grants.gov, the NIJ web site, email announcements, and other means.

Following the closing date of the updated FY 2008 solicitation, NIJ has taken additional steps to inform States of the postconviction DNA testing assistance program, and has contacted States that did not apply in FY 2008 to identify reasons that they did not apply. Efforts to inform potential applicants about the program are continuing in FY 2009. Among other things, NIJ will be providing information about the program at a January 2009 NIJ-funded Postconviction DNA Case Management Symposium that will bring together criminal justice practitioners from each State.

2. On the day before the Judiciary Committee hearing to review your office's administration of the Bloodsworth grant program, the Office of Justice Programs issued a new solicitation for applications to the program. This new solicitation still appears to have some burdensome requirements that may have contributed to your office denying all prior applications for this money. Specifically, this new solicitation includes the requirement that "to be eligible for an award, a State must submit an express certification from the chief legal officer of the State (typically the Attorney General)" in order to comply with the Justice For All Act requirement that states "demonstrate" their procedures for preserving biological evidence for post-conviction DNA testing.

a. If the statute does not require that this certification be done by the "chief legal officer of the state," why has the Office of Justice Programs imposed this absolute requirement? Will you allow alternate ways for applicants to meet this demonstration of procedures for the preservation of evidence? If not, why not?

RESPONSE:

By specifying the chief legal officer of the State, OJP intended to ensure that there be no confusion in the States, or question within the Department of Justice, as to the person with the appropriate authority to sign the certification. Since the substance of the certification deals with State law and practices, the chief legal officer (typically the Attorney General) is in a position to gather any necessary information from throughout the State, and is the appropriate official to evaluate whether the State satisfies the requirement and to advise NIJ accordingly. We believe that our approach enabled us to achieve the desired balance you indicate in your question 1-b.

b. Can you identify how this January 23, 2008 solicitation differs from earlier solicitations for the same grant program, and if it does not differ, please explain why you decided to not modify the solicitation after failing to award any grants in previous years?

RESPONSE:

As indicated above, because the FY 2008 appropriation permitted us to ease the requirements of section 413 of the Justice for All Act, the updated FY 2008 solicitation differed significantly from the FY 2007 solicitation. Please refer to the responses to the preceding questions.

c. Please advise how many applicants you have received in response to the January 23, 2008 solicitation to the Bloodsworth grant program, and when appropriate, how many have been awarded, how many were denied, and what, if any, funds were expended to those awarded grants.

RESPONSE:

Five States submitted applications under the updated FY 2008 postconviction DNA testing solicitation – Arizona, Kentucky, Texas, Virginia, and Washington. All five received awards. The total amount awarded exceeded $7.8 million.

3. Inspector General Glenn Fine reported that the Justice Department has taken the legal position in administering the Coverdell grant program that, while agencies must certify they have an independent entity where they can refer allegations of misconduct or serious negligence by forensic labs, the agencies have no obligation to actually refer such allegations for investigation. Basically, the Justice Department has taken the view that grant recipients need to have a process, but they do not need to use it. This is clearly contrary the bi-partisan intent of Congress in the Justice for All Act.

a. Please provide any documentation of the Justice Department's legal position(s) on referrals of allegations of misconduct or serious negligence under the Coverdell grant program.

RESPONSE:

Although the reporting of allegations of serious negligence or misconduct substantially affecting the integrity of forensic results is certainly consonant with the statutory certification requirement set forth in section 311(b)(3) of the Justice for All Act (42 U.S.C. § 3797k(4)), nothing in the statute itself (which is very specific as to the certification in question) requires that allegations be referred, either as a condition of eligibility or otherwise. I am not aware of any formal written statement regarding this position, except perhaps the memorandum of Jeffrey L. Sedgwick, then-Acting Attorney General for OJP, to Glenn A. Fine, Inspector General (dated January 14, 2008), a copy of which is attached.

b. What office came up with this legal position, and when?

RESPONSE:

The legal conclusion described immediately above (in response to your question 3-a) has been the consistent legal position of OJP since the inception of the program.

c. Do you agree that the Justice Department must encourage the reporting of serious allegations of lab misconduct for investigation in order to ensure that any federally-funded forensic laboratories have the highest level of integrity?

RESPONSE:

The Justice Department certainly agrees that allegations of serious negligence or misconduct should be appropriately investigated. OJP has proposed – and has taken or is taking – steps consistent with the Coverdell Act to encourage reporting of such allegations. The Office of the Inspector General (the OIG) has agreed to OJP's proposal, and recently has indicated that all of its recommendations with respect to the Coverdell program review (OIG Report I-2008-001) now are considered "Resolved – Closed."

The FY 2008 Coverdell program solicitation included the following language: "The highest standards of integrity in the practice of forensic science are critical to enhance the administration of justice. We strongly encourage recipients (and subrecipients) of Coverdell funds to make use of the process referenced in their certification as to external investigations and refer allegations of serious negligence or misconduct substantially affecting the integrity of forensic results to government entities with an appropriate process in place to conduct independent external investigations."

In the FY 2009 Coverdell Program solicitation, under the heading "**Important Note on on Referrals in Connection with Allegations of Serious Negligence or Misconduct,**" OJP will include the following statement:

> The highest standards of integrity in the practice of forensic science are critical to the enhancement of the administration of justice. We assume

that recipients (and subrecipients) of Coverdell funds will make use of the process referenced in their certification as to external investigations and will refer allegations of serious negligence or misconduct substantially affecting the integrity of forensic results to government entities with an appropriate process in place to conduct independent external investigations, such as the government entities identified in the grant application.

For each fiscal year of an award, recipients will be required to report to the National Institute of Justice on an annual basis---

(1) the number and nature of any such allegations;
(2) information on the referrals of such allegations (*e.g.*, the government entity or entities to which referred, the date of referral);
(3) the outcome of such referrals (if known as of the date of the report); and
(4) if any such allegations were not referred, the reason(s) for the non-referral.

Payments to recipients (including payments under future awards) may be withheld if the required information is not submitted on a timely basis.

So that prospective grant recipients may prepare to implement mechanisms to gather the information necessary to make the report on the FY 2009 awards (and future awards), NIJ has sent an email to all recipients of FY 2008 Coverdell Program awards and posted an announcement on the NIJ website.

d. Will the Justice Department provide guidance to grant applicants advising them that referrals of allegations of misconduct or serious negligence should and must be made to the independent investigative entities identified in the grant application? If not, why not?

RESPONSE:

The Justice Department certainly agrees that allegations of serious negligence or misconduct should be appropriately investigated. OJP has proposed – and has taken or is taking – steps consistent with the Coverdell Act to encourage reporting of such allegations. The Office of the Inspector General (the OIG) has agreed to OJP's proposal, and recently has indicated that all of its recommendations with respect to the Coverdell program review (OIG Report I-2008-001) now are considered "Resolved – Closed." Please refer to the response immediately above.

In this connection, please note that although the referral of allegations of serious negligence or misconduct is certainly consonant with the statutory certification requirement set forth in section 311(b)(3) of the Justice for All Act (42 U.S.C. § 3797k(4)), nothing in the statute itself (which is very specific as to the certification in

question) requires that allegations be referred, either as a condition of eligibility or otherwise.

4. **The Inspector General's report examining the Coverdell grant program made clear that independent investigative entities responsible for reviewing allegations of misconduct or serious negligence in federally-funded forensic laboratories simply do not exist or are not equipped to perform those functions in many cases. Creating effective, independent oversight of these forensic labs was clearly Congress's intent when it included the certification process in the Justice For All Act.**

   a. **Will Department of Justice accept the Inspector General's principle recommendation that the certifications be improved and that the Office of Justice Programs take some measures to ensure the certifications are accurate and that the investigative entities identified in the certifications have the means and expertise to oversight functions? If so, what steps will you take? If not, why not?**

RESPONSE:

With respect to the OIG's recommendation, OJP has proposed – and has taken or is taking – steps consistent with the Coverdell Act to modify the certification template. The OIG has agreed to OJP's proposal, and recently has indicated that all of its recommendations with respect to the Coverdell program review (OIG Report I-2008-001) now are considered "Resolved – Closed."

As proposed to (and agreed to by) the OIG, in FY 2009, as it did in FY 2008, OJP will require Coverdell grant applicants, prior to receiving funds, to provide the name of the government entity (or entities) with a process in place to conduct independent external investigations into allegations of serious negligence or misconduct. In its FY 2008 solicitation, OJP reinforced the serious legal implications of the certification by modifying the certification form to include these statements: "I personally read and reviewed the section entitled "Eligibility" in the FY 2008 program announcement for the Coverdell Forensic Science Improvement Grants Program," and "I acknowledge that a false statement in this certification or in the grant application that it supports may be subject to criminal prosecution, including under 18 U.S.C. § 1001."

In its FY 2009 Coverdell program solicitation, as agreed to with the OIG, OJP will further modify the certification form to include the sentence: "I also acknowledge that Office of Justice Programs grants, including certifications provided in connection with such grants, are subject to review by the Office of Justice Programs and/or by the Department of Justice's Office of the Inspector General."

Speaking more broadly, however, OJP believes that improvements to forensic science capabilities in State and local law enforcement should be a priority. In connection with a Congressional recommendation, OJP has funded the National Academy of Sciences (NAS) to undertake a fundamental review of forensic practice in the United States. The NAS is expected

to issue its report in early 2009. OJP believes that this report will address the important issues identified by Congress in forensic laboratory oversight, which extend beyond investigation into misconduct and negligence to include professional and laboratory standards, governance of forensic disciplines, training and certification, validation of forensic disciplines, and related matters.

b. Will Office of Justice Programs conduct a review of existing certifications to identify any investigative entities that do not have the means or expertise to perform their oversight functions? If not, why not? If so, please identify any grants that are deficient in this way, and what steps you have taken to correct the deficiency.

RESPONSE:

For a Coverdell external investigation certification properly to be made, it goes without saying that the Coverdell Act requires that a "government entity" (or entities) actually exist and that an "appropriate process" (or processes) actually be in place. Any false certifications are a matter of grave concern to OJP. Although the certification regime established by the Coverdell Act authorizes OJP to rely on applicants' certifications as prima facie evidence of what they certify, OJP is, of course, prepared to take appropriate oversight action – for example, if it were to receive credible information that suggests that a certification were false. (Under such a circumstance, OJP's policy is to ask the Inspector General to conduct an appropriate inquiry or investigation into the matter.) OJP has referred similar matters in the forensic programs and other OJP grant programs to the Inspector General in the past. Please refer to the memorandum of Jeffrey L. Sedgwick, then-Acting Assistant Attorney General for OJP, to Glenn A. Fine, Inspector General (dated January 14, 2008), a copy of which is attached.

More generally, it bears noting that the OJP Office of Audit, Assessment, and Management (OAAM) recently completed a review of NIJ's Grant Progress Assessment (GPA) program, which is the primary oversight mechanism for Coverdell and other forensic grant programs. The OAAM review resulted in a number of recommendations for overall improvement of the GPA program. NIJ is working to implement those recommendations.

5. The examples of the Bloodsworth and Coverdell programs suggest that a statutory requirement that grantees "demonstrate" adherence to a condition is interpreted very stringently, while a requirement that they "certify" adherence is interpreted in a very lax way.

a. What does the Office of Justice Programs specifically require when a statute mandates that grant applicants "demonstrate" compliance with a condition?

RESPONSE:

It is OJP's duty to implement statutes as enacted. In general terms, a statute that requires a "demonstration" to OJP from an applicant gives considerable responsibility to OJP for determining whether satisfaction of the requirements has been established. The nature of OJP's

requirements will depend on the specific requirements set by the statute, that is, those things as to which the statute requires a demonstration.

For example, with respect to the Bloodsworth grant program, **what** was required to be demonstrated was particularly difficult. Under the law as enacted, the Bloodsworth program is subject to stringent eligibility requirements established by section 413 of the Justice for All Act, which concerns provision of postconviction DNA testing and the preservation of biological evidence. One example of the stringency of the section 413 requirements (which were reflected in the FY 2007 solicitation) is that, under one scenario, an applicant State must demonstrate that the every single jurisdiction in the State in fact always does certain things.

As indicated earlier, language in the FY 2008 appropriations act has the effect of allowing OJP to ease the section 413 eligibility requirements for FY 2006 – FY 2008 funds, and the FY 2008 solicitation reflected this.

b. What does the Office of Justice Programs specifically require when a statute mandates that grant applicants "certify" compliance with a condition?

RESPONSE:

It is OJP's duty to implement statutes as enacted. In general terms, a statute that requires a certification to OJP as to certain requirements makes the applicants themselves primarily responsible for the determination, and allows OJP to accept certifications as prima facie evidence of what they certify. The nature of OJP's requirements will depend on the specific requirements set by the statute, that is, those things as to which the statute requires a certification.

With respect to the Coverdell program, OJP has carefully considered the certification requirements and other provisions of the Coverdell Act, as well as the recommendations of the OIG. Pursuant to that consideration, and consistent with the requirements of the Act, OJP has proposed – and has taken or is taking – certain steps related to the Coverdell program and the OIG's recommendations. The OIG has agreed to OJP's proposal, and recently has indicated that all of its recommendations with respect to the Coverdell program review (OIG Report I-2008-001) now are considered "Resolved – Closed."

QUESTION FROM SENATOR KENNEDY:

In your written testimony, you assert that the Office of Justice Programs has successfully implemented the Coverdell Program and statutory requirements in section 311 of the Justice For All Act, which requires the applicant to certify that a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct by forensic laboratories that receive Coverdell funds.

The Bloodsworth Post Conviction Testing grant program in section 314 of the Justice For All Act requires specific practices in states in preservation of biological evidence and post-conviction testing. In your testimony you concede that the "restrictions were so difficult that only three states replied to the NIJ's 2007 solicitation for Post Conviction Testing grants... [and] none were compliant with the legal requirements of the statute."

Although you maintain that the forensic programs for the Department of Justice have made important progress in the improvement of forensic practices under the DNA assistance programs, which help in investigations of violent crimes, the administration of the Coverdell and Bloodsworth grant programs continues to be a major concern of the Committee.

1. **Considering the reluctance of the Office of Justice Programs to implement all the recommendations made by the Inspector General in both reports, what more can be done to improve the implementation and oversight of the Coverdell Grant Program in order to use these funds most effectively?**

RESPONSE:

As discussed further below, after extensive discussion with the Office of the Inspector General (the OIG) concerning its recommendations and the provisions of the Coverdell Act, OJP has proposed – and has taken or is taking – several additional steps consistent with the Coverdell Act with respect to its administration of the Coverdell program. The OIG has agreed to OJP's proposal, and recently indicated that all of its recommendations with respect to the Coverdell program review (OIG Report I-2008-001) now are considered "Resolved – Closed."

As part of its management of the Coverdell grant program, OJP collects four different certifications from the Coverdell grant applicants, including the external investigation certification. Since FY 2007, OJP has required Coverdell grant applicants, prior to receiving funds, to provide the name of the government entity (or entities) with an appropriate process in place to conduct independent external investigations into allegations of serious negligence or misconduct. OJP forwards Coverdell applications that have a competitive component to independent peer review to help ensure that competitive funds are awarded to agencies where the funding will have the most benefit. OJP attaches special conditions to each Coverdell award to help ensure compliance with various federal statutes, regulations, and policies designed to

provide assurance that federal funds are used appropriately. In FY 2008, as many as 15 special conditions were attached to individual grant awards. OJP reviews Coverdell applicants' budgets to ensure they are in keeping with the work promised in the grant application and consistent with the Coverdell program statutory and policy requirements. OJP monitors grantees through the Grant Progress Assessment program to review laboratory practices and grant compliance. OJP collects performance data for each grant. OJP views the management controls outlined here as critical for effectively managing the Coverdell program.

In addition to the foregoing, partly in connection with the recommendations of the OIG, in FY 2008, in order to further reinforce the serious legal implications of the external investigation certification, OJP modified the certification form included in the FY 2008 Coverdell solicitation to include these statements: "I personally read and reviewed the section entitled "Eligibility" in the Fiscal Year 2008 program announcement for the Coverdell Forensic Science Improvement Grants Program," and "I acknowledge that a false statement in this certification or in the grant application that it supports may be subject to criminal prosecution, including under 18 U.S.C. § 1001." Moreover, OJP has provided written program guidelines for the Coverdell program to the OIG – guidelines that encompass review of applications for the external investigation certification as well as other requirements of the program.

Also in FY 2008, the Coverdell program solicitation included the following language: "The highest standards of integrity in the practice of forensic science are critical to enhance the administration of justice. We strongly encourage recipients (and subrecipients) of Coverdell funds to make use of the process referenced in their certifications as to external investigations and refer allegations of serious negligence or misconduct substantially affecting the integrity of forensic results to government entities with an appropriate process in place to conduct independent external investigations."

As proposed to (and agreed to by) the OIG, OJP will make additional improvements in its FY 2009 Coverdell program. In its FY 2009 Coverdell program solicitation, OJP will further modify the certification form to include the sentence: "I also acknowledge that Office of Justice Programs grants, including certifications provided in connection with such grants, are subject to review by the Office of Justice Programs and/or by the Department of Justice's Office of the Inspector General." Also, with respect to referral of allegations of serious negligence or misconduct, OJP will include the following statement under the heading "**Important Note on Referrals in Connection with Allegations of Serious Negligence or Misconduct**":

> The highest standards of integrity in the practice of forensic science are critical to the enhancement of the administration of justice. We assume that recipients (and subrecipients) of Coverdell funds will make use of the process referenced in their certification as to external investigations and will refer allegations of serious negligence or misconduct substantially affecting the integrity of forensic results to government entities with an appropriate process in place to conduct independent external investigations, such as the government entities identified in the grant application.

> For each fiscal year of an award, recipients will be required to report to the National Institute of Justice on an annual basis---
>
> (1) the number and nature of any such allegations;
> (2) information on the referrals of such allegations (*e.g.*, the government entity or entities to which referred, the date of referral);
> (3) the outcome of such referrals (if known as of the date of the report); and
> (4) if any such allegations were not referred, the reason(s) for the non-referral.
>
> Payments to recipients (including payments under future awards) may be withheld if the required information is not submitted on a timely basis.

So that prospective grant recipients may prepare to implement mechanisms to gather the information necessary to make the report on the FY 2009 awards (and future awards), NIJ has sent an email to all recipients of FY 2008 Coverdell Program awards and posted an announcement on the NIJ website.

More generally, it bears noting that the OJP Office of Audit, Assessment, and Management (OAAM) recently completed a review of NIJ's Grant Progress Assessment (GPA) program, which is the primary oversight mechanism for Coverdell and other forensic grant programs. The OAAM review resulted in a number of recommendations for overall improvement of the GPA program. NIJ is working to implement those recommendations.

2. How can the Office of Justice Programs ensure that the Bloodsworth grants do not encounter the same problems as the Coverdell grants with respect to the submission of certifications by the states?

RESPONSE:

In the FY 2007 postconviction DNA testing solicitation, in accordance with section 413 of the Justice for All Act and the FY 2006 and FY 2007 appropriations, applicants were required to demonstrate compliance with certain stringent eligibility requirements set by section 413. Language in the FY 2008 appropriation has the effect of allowing the National Institute of Justice (NIJ) to ease the section 413 requirements with respect to funds appropriated for FY 2006 - FY 2008. The FY 2008 postconviction DNA testing solicitation – which was posted on January 22, 2008 – accordingly eased the requirements of section 413, in a manner that we believe remains consonant with the policy objectives of section 413.

Generally speaking, the updated FY 2008 postconviction DNA testing solicitation replaced the section 413 (FY 2007 solicitation) requirements with a requirement for a certification from the chief legal officer of the State that, with respect to the offenses of forcible rape, murder, and nonnegligent manslaughter – the offenses that are the subject of the solicitation – the State provides for postconviction DNA testing pursuant to a State statute, or State rules, regulations, or practices; and provides for preservation of biological evidence pursuant to a State

statute, local ordinances, or State or local rules, regulations, or practices. This updated certification requirement represented an easing of the requirement included in the FY 2008 solicitation as posted on January 22, 2008, which itself significantly eased the requirements of section 413. (The specific language of the certification appears on page 4 of the updated FY 2008 solicitation, a copy of which is attached.) The closing date of the FY 2008 solicitation was March 24, 2008; applicants had an additional four weeks to submit the certification after the closing date of the solicitation. In addition, a template for the certification was provided to facilitate fair and timely review of this requirement.

By specifying the chief legal officer of the State, OJP intended to ensure that there be no confusion in the States, or question within the Department of Justice, as to the person with the appropriate authority to sign the certification. Since the substance of the certification deals with State law and practices, the chief legal officer (usually the Attorney General) is in a position to gather any necessary information from throughout the State, and is the appropriate official to evaluate whether the State satisfies the requirement and to advise NIJ accordingly. We believe this approach enabled us to implement the program fairly and efficiently. We also plan to evaluate the effectiveness of our approach.

3. How can the Office of Justice Programs improve its past record of distributing grant funds?

RESPONSE:

Please refer to the response immediately above. Also, please note that in FY 2008, OJP made awards totaling over $7.8 million to applicants under its FY 2008 postconviction DNA testing solicitation.

Speaking more broadly, OJP remains committed to providing federal leadership in the improvement of forensic practice and enhancing the administration of justice through the expansion of forensic science capacity. OJP's forensic programs have made great progress in the improvement of forensic practices through the Coverdell program, DNA assistance programs, research and development, training activities, and many related efforts. These award-winning programs have assisted in the investigation of thousands of cases of violent crime and provided historic levels of support to the forensic laboratories.

Over $340 million and over 700 awards total were provided under the DNA Initiative during FY 2006 - FY 2008 for purposes such as reducing backlogs of untested DNA evidence, building DNA laboratory capacity, solving missing persons and cold cases, providing training and technical assistance to the forensic community, and development of cutting edge technologies which will advance the tools available for analyzing crime scene evidence.

Over $47.8 million and 274 total awards were provided under the Coverdell program during FY 2006 - FY 2008 to improve the quality and timeliness of forensic science and medical examiner services, including services provided by laboratories operated by States and units of local government.

4. Will the new certification provisions added to the Bloodsworth application requirements be meaningful?

RESPONSE:

Under the updated FY 2008 postconviction DNA testing solicitation, in order to establish eligibility, the chief legal officer of the State must certify that the State "[p]reserves biological evidence secured in relation to the investigation or prosecution of a State offense of forcible rape, murder, or nonnegligent manslaughter under a State statute, local ordinances, or State or local rules, regulations, or practices, in a manner intended to ensure that reasonable measures are taken by all jurisdictions within the State to preserve such evidence." We believe that this requirement, which includes language derived generally from section 413 of the Justice for All Act itself, calls for a meaningful certification. We relied on the chief legal officer of each State accurately to assess whether the certification properly could be made based on the State's particular circumstances. (We note that the FY 2008 certification template explicitly stated that "I am aware that a false statement in this certification may be subject to criminal prosecution, including under 18 U.S.C. § 1001.")

Moreover, the FY 2008 solicitation for these funds put States on notice that funding in future fiscal years may be contingent on the more stringent requirements established by section 413 of the Justice for All Act. In addition, through the DNA and Coverdell programs, NIJ provides significant assistance to States and units of local government to purchase equipment and other resources to provide for retention of biological evidence. Finally, NIJ is studying the extent of evidence preservation in DNA laboratories generally to identify ways to improve evidence storage practices.

5. Will there be consultations with state applicants to allow them to amend their applications, in response to any concerns raised by OJP, before final decisions are rendered on applications for funding?

RESPONSE:

All applicants under the FY 2008 postconviction DNA testing solicitation were favorably reviewed by the independent peer review panel and received awards. NIJ did work with applicants as appropriate to improve their submissions in light of solicitation requirements.

QUESTION FROM SENATOR SESSIONS:

1. **Mr. Morgan, in 2000 I introduced and this Senate passed the Paul Coverdell National Forensic Science Improvement Act. It was my belief then and it is now that we need to approach the funding of these Crime Labs in a fashion that allows them to address the problems that their particular lab has rather than just focus on 1 discipline. As you know from the 180 day study there are 11 disciplines in forensics. While DNA is extraordinarily important it is only one of those disciplines and in fact not the largest backlog or caselog in a lab. You have advised this committee of how important all these disciplines are to NIJ and that you are doing a tremendous amount of research on disciplines such as fingerprints yet you only fund the labs to deal with the backlog in DNA. Can you advise this Committee as to your rationale behind budgeting like that?**

RESPONSE:

To the extent that the applicable authorization and appropriations statutes constrain or prioritize the use of appropriated funds, the Office of Justice Programs (OJP) legally is bound to follow those statutes. Funds appropriated for the Coverdell program legally may be used for reduction of backlogs in the analysis of forensic science evidence, and our solicitations (including the Coverdell solicitation for FY 2008) make this clear. Unlike FY 2006 and FY 2007, separate and apart from Coverdell funds, the FY 2008 appropriations act did not provide OJP general funds for ". . . State, local and Federal forensic activities . . ."

OJP believes that improvements to forensic science capabilities in State and local law enforcement should be a priority at all levels of government. In connection with a Congressional recommendation, and in keeping with the applicable statutory authorities, the National Academy of Sciences (NAS) is undertaking a fundamental review of forensic science in the United States. The NAS is expected to issue its report in early 2009. OJP believes that this report will address the important issues identified by Congress in forensic science improvement, including backlog reduction, professional and laboratory standards, governance of forensic disciplines, training and certification, validation of forensic disciplines, and related matters.

2. **Mr. Morgan, I have reviewed the NIJ charter and see that your focus is Research and Development by law. Yet you are being put in a position to fund Crime Labs for operational needs. Do you believe that there is a problem with that and should the Congress change your charter?**

RESPONSE:

There is a standard procedure within the Executive Branch for recommending statutory amendments to the Congress. To the extent that needs should be perceived, the Justice Department will recommend amendments as appropriate to address them. To date, NIJ's activities relating to DNA and forensics have been conducted pursuant to existing authorizing statutes (e.g., the Coverdell statute) and legal authority conferred by appropriations acts. With

respect to forensic programs in particular, the upcoming NAS report may be helpful in determining an advisable course of action to improve federal programs to assist forensic practitioners inside and outside of the crime laboratory.

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MEMORDANDUM

To: Senator Patrick Leahy, Chair, Senate Judiciary Committee
From: Peter Neufeld
Date: February 14, 2008
RE: Answers to follow up questions from Public Hearing held on 1/23/08

Below please find answers to the follow up questions presented to me by Committee members after the 1/23/08 Senate Judiciary Committee hearing about OJP implementation of the innocence protections created through the Justice for All Act. If you have any questions or concerns, please do not hesitate to contact our policy director, Stephen Saloom, at 212.364.55394.

QUESTION FROM SENATOR SESSIONS
Mr Neufeld, you have discussed in your testimony that you would like more oversight on the Crime Labs and believe that it should be tied to the funding. Could you please provide the Committee with specifics of how you believe this committee should be structured?

Crime lab oversight – as required of Coverdell grant program recipients under Section 311(b) of the Justice for All Act – could come from entities structured in a variety of ways. The essential qualities of any such structure, however, are that it is *independent of* and *external to* the entity being investigated, and that any investigation conducted under the authority of such a structure possess those same qualities vis a vis the entity being investigated. In short, there should be no conflict of interest, nor even the appearance thereof, between the oversight entity or investigative arm thereof and the entity being investigated.

Such a clear separation from the entity being investigated provides all concerned parties – the court system, potential jurors, and the public at large – with faith that the work conducted under authority of the investigative entity, and the conclusions thereof, represents nothing but the objective truth as discerned by the investigation. If persons involved with the investigative entity have any meaningful personal stake in the outcome of the investigation, not only might the actual investigation be compromised, but it undermines public faith in that investigation.

Benjamin N. Cardozo School of Law, Yeshiva University

Section 311(b) of the Justice for All Act was enacted in order to provide the judicial system, jurors and the public at large with faith in the integrity of forensic evidence. When conflicts of interest exist between the structures (and/or the individuals involved in those structures) envisioned under Section 311(b) and the entities to be investigated, public confidence in the results of the investigation are undermined, and we have no more reason to have faith that the problems requiring the investigation have been properly addressed. That would present a result opposite of that intended by Congress when the Justice for All Act was enacted into law.

Let me provide you with an example from the Innocence Project's experience about the need for independent, external examination of forensic negligence or misconduct. On October 1, 2002, Jimmy Ray Bromgard of Montana became the 111th person exonerated by post-conviction DNA testing. The testimony of the state's Department of Justice crime lab director Arnold Melnikoff played a crucial role in sending Bromgard to prison for a young girl's rape. Although he lacked a scientific basis for asserting so, Melnikoff testified that microscopic comparisons of hair evidence demonstrated a one-in-ten-thousand chance that two hairs found on the child's bedding belonged to someone other than Bromgard.

At the request of the Innocence Project, a peer review committee of the nation's top hair examiners reviewed Melnikoff's testimony, issued a report concluding that his use of statistical evidence was junk science and urged Montana's Attorney General, which ran the lab, to set up an independent audit of Melnikoff's work in other cases. Two more Montana inmates were exonerated by DNA in two other criminal cases where Melnikoff had offered the same fabricated statistics he offered against Bromgard. Thus, in the first three cases in Montana in which an inmate secured post conviction DNA testing, the testing cleared the inmate and in all three cases, the state's lab director and "hair expert" most likely engaged in misconduct.

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

The Coverdell mandate of external independent investigations was designed, in part, to overcome these types of situations in which key players in an investigation process have a conflict of interest. For the fact is that to this day, we cannot know if there are other innocent people who had been convicted based on wrongful testimony by Mr. Melnikoff, nor how systemic problems within Mr. Melnikoff's lab may continue to undermine the integrity of forensic evidence that flows therefrom, and upon which Montana jurors continue to depend in their efforts to convict the true perpetrators of crimes.

QUESTION FROM SENATOR KENNEDY

A. *In your opinion, how can the OJP more effectively distribute funds that have been set aside for the Bloodsworth grant program to achieve its goals?*

The primary goal of the Bloodsworth Grant Program is to allow for the post-conviction testing of biological evidence that has the potential to prove credible claims of innocence. To date, not one dime of the $14 million to effect this goal has been provided to the states. OJP has indicated that it was unable to disburse the funds because it was obliged to adhere to the preservation of evidence requirements outlined in Justice For All Act section 3600A, which it concluded were too onerous.

OJP indicated at the Senate Judiciary hearing that the newly unveiled Bloodsworth solicitation has been rewritten in such a way to allow the accumulated Bloodsworth funds to flow. While some aspects of the original eligibility criteria framework have been relaxed, it still seems structured in such a way that it will either dissuade potential applicants from applying and/or allow for the rejection of grant applicants on the following bases:

1. *The requirement of express certification of an adequate post-conviction testing scheme and a reasonable preservation of evidence scheme by a third party.* States who apply for Bloodsworth funding must submit an "express certification from the chief legal officer of the State (typically the Attorney General)." (Bloodsworth 2008 RFP) As detailed in my submitted written testimony to the Senate Judiciary Committee, there are a range of reasons why the chief legal officer of a state may not prioritize post-conviction DNA testing of evidence for his state's prisoners. These reasons, combined with the requirement that he attest to the fact that his state has taken reasonable measures to preserve all relevant evidence – when it is clear from our work that such an assertion would be difficult for any state to make under the present state of evidence preservation across the country – is simply setting the stage for a reduction in grant applications.

2. *The removal of the possibility of demonstrating a reasonable evidence preservation scheme through practice, rather than by law, regulation or rule, coupled with the removal of the ability to demonstrate a preservation scheme through local practice.* The original Bloodsworth solicitation allowed applicants to prove that they preserved biological evidence either "under a State statute or a State or local rule, regulation, or practice." The current solicitation has removed the possibility that a state can demonstrate its eligibility through "practice" and also removes all references to meeting the eligibility criteria through "local" rule, regulation or practice. Considering that only approximately half the states have statewide preservation laws on the books, many of which are limited, and that many states define their preservation practices through local imperatives, most states will not even be eligible for this funding, in clear violation of Congressional intent.

Because the preservation of evidence requirements, as intended through the passage of the

JFAA, have been eviscerated by Executive maneuvering – via de-funding of the other three grant programs that were intended to provide incentives to states to adequately preserve its biological evidence – we no longer believe the preservation of evidence requirement should be attached to this grant program, and this grant program alone. If the preservation of evidence is not tied to enough grant programs to incentivize the states to address their lackluster preservation schema, then it should not be tied to the only grant program that has the capability of settling innocence claims, which motivated Congress to seek the requirement that states preserve evidence in the first place.

Quite simply, in order to assure that states adequately preserve evidence, the issue will have to be revisited by Congress. At present, there are practically no incentives to states to properly preserve biological evidence, nor will there be until such a requirement is attached to sizable quantities of money. We believe the proper way to honor Congressional intent with respect to the preservation of biological evidence is to revisit the federal approach to encouraging states to make changes to their statewide preservation schema. To similarly honor Congress's intent regarding post-conviction DNA testing assistance, the removal of the preservation requirement is the only way to assure that at least some of the nation's innocent can be proven innocent and the Bloodsworth grant program can be salvaged.

B. *How critical are the Bloodsworth and Coverdell grant programs to the existence and continued work of the state's Innocence Project in its advocacy on behalf of the clients it serves?*

Given that there are 44 organizational members of the national Innocence Network that pursue post-conviction claims of innocence through DNA testing; the discovery of other, non-DNA evidence of innocence; or journalistic inquiries, and that not one dime of Bloodsworth grant monies have ever been released by OJP, these innocence organizations clearly (and thankfully) do not depend on the Bloodsworth funds for their existence. These organizations serve critical functions in their states, though, as their independent work has proven, time and again, the reality of wrongful convictions and the need for the state to pay close attention to viable post-conviction claims of innocence. The Bloodsworth funds would provide critical support, however, to those projects efforts to require their states to act when presented with viable claims of innocence that could be proven through post-conviction DNA testing. Costs and backlogs are too often an obstacle to evidence identification and testing despite such viable claims, however, and it is clear that if states could access the federal Bloodsworth funds dedicated to precisely these endeavors, the quality of justice can be more assured and swift in those states.

Beyond the Bloodsworth program itself, particular note should be made of the value of JFAA Section 413, which governs the Bloodsworth program applicants. By requiring that applicant states preserve biological evidence and provide access to post-conviction DNA testing, Section 413 serves as an incentive for states to properly address these practices which strongly facilitate justice in light of credible post-conviction claims of innocence. The major shortcoming of the Section 413 provisions is that they have been authorized to apply to a small handful of programs, and only one of those programs, the Bloodsworth program, has ever been funded – and that to

the tune of only about $5M per year, an amount hardly sufficient when potentially applied to states nationwide. Thus the very valuable incentives established under JFAA Section 413 have not served as the true stimuli to innocence protection originally intended, and unless the Section is applied to signiificant additional grant programs, it may never have the effect that Congress intended.

The Coverdell program, in its own way, has been tremendously important to serving the Innocence Project's advocacy as pertains to the critical need to appropriately address forensic errors in states across the nation. Simply put, there is no mechanism other than the Coverdell grant program forensic oversight requirements that require states to perform the kind of investigation needed to ensure the integrity of forensic results in the wake of a credible allegation of serious forensic negligence or misconduct. While OJP has been loathe to enforce that requirement, its simple existence – combined with dogged pursuit of evidence of compliance by the Innocence Project, despite OJP's history of refusal to meaningfully enforce that provision – has spurred states across the country to begin to take seriously their responsibility to properly investigate and address such serious forensic concerns when they arise.

C. *Can the $15million that has yet to be allocated by the OJP be used significantly to improve the preservation of biological evidence and post-conviction testing?*

The $15million that has yet to be allocated by OJP under the Bloodsworth program can provide meaningful assistance to those cases where a viable claim of innocence has been identified, yet the biological evidence cannot be found and/or the DNA testing sought cannot readily otherwise be funded. Inasmuch as every wrongful conviction is significant, this money is a tremendous help. But at a structural or systemic level, the Bloodsworth monies are of limited use as the funds can process the location and testing of such evidence, but cannot be used to purchase equipment, nor for existing, trained staff to conduct case reviews.

Properly administered (and as possibly amended), however, the Bloodsworth program could be used as more of a tool to improve states' structural or systemic approaches to properly preserving and DNA testing biological evidence post-conviction. By enabling grantees to use a proportion of their Bloodsworth funding to convene key entities participation in workgroups to research the most appropriate practices for properly preserving biological evidence statewide, to receive training in proper preservation, cataloging ,and retrieval techniques, etc. these funds could be used to significantly improve state preservation practice overall.

D. *Is Section 311(b), as it is being administered currently and interpreted by the recipient organizations, effective in meeting the goal of independent investigations of forensic errors?*

Shortcomings in the administration and interpretation of the 311 (b) requirements have undermined Congress's efforts to facilitate independent investigations of forensic errors. The Office of Justice Programs has provided recipients of Coverdell grants with wholly insufficient guidance, and most grantees, absent that guidance, have failed to establish external and independent oversight entities and processes capable of fulfilling Congressional intent.

Although the NIJ could have provided grantees with guidance on comporting with the external investigations requirement, it opted not to. During 2005, the first year the NIJ administered Coverdell grants with the new precondition. After some prodding, the NIJ sent all grant applicants a memo that sketched three government entities and attendant processes that it deemed to be in keeping with the spirit of the JFAA, five that did not. Still, as I noted in my testimony, the NIJ approved every applicant – without scrutinizing whether the applicant adhered to the memo. In fact, the NIJ expressly stated in the memo that it was up to the applicant – rather than the NIJ – to determine whether the applicant complied with the JFAA. That approach continued into the next funding cycle, as the NIJ funded every FY06 application that included a signed certification. (The Innocence Project currently is reviewing FY07 applications.) Yet even if the NIJ had enforced the memo, we remain unconvinced that it provides potential applicants for Coverdell monies with worthwhile advice to comport with Congress's vision. In fact, it seems the memo has given many applicants carte blanche to assert that inadequate oversight mechanisms pass muster.

Even though an *internal* affairs investigation cannot be "external," by definition, the NIJ suggested in the memo that a law enforcement agency receiving Coverdell monies could use an internal affairs division for Coverdell investigations. Our surveys have revealed that scores of Coverdell funding recipients assigned IADs to oversight duty – even though an IAD cannot conduct a crime lab investigation absent influence, if not supervision, by its upper laboratory management.

Laboratory employees – those who witness laboratory activities on a daily basis and may be in best position to report on them – need to know that the Coverdell oversight entities are there for them to raise issues safely, as whistleblowers, outside their chains of command. But allegations rising in this posture have been rare. The Innocence Project knows of only 10 allegations filed nationally – and most have resulted after media reports led parties outside of crime labs to file complaints.

The Innocence Project, in its canvassing of Coverdell funding recipients, determined that numerous grant recipients signed their external investigations certifications without first considering which entity would conduct such investigations, and what process the entity would use in those investigations. The Innocence Project also discovered that some oversight entities named in applications for Coverdell monies never were informed that they had been selected for oversight duties, and this is confirmed in the 2008 Inspector General report on the issue.

Although in many states Coverdell grants are awarded to state offices that administer federal grants and then disburse monies to numerous subgrantees, the Innocence Project has found that many of the actual funding recipients were not similarly pressed for documentation and thus circumvented the certification requirements.

We would hope that the OJP would take some responsibility to monitor the thoroughness and independence of an investigation requested under the Coverdell requirement, but to this point, such follow-up has been absent. The Justice for All Act clearly requires not only the presence of

an oversight entity in a grant recipient's jurisdiction, but also the establishment of a process that entity would use to vet a Coverdell allegation. Shockingly, and without exception, the Innocence Project has found no applicant for Coverdell monies that specifically articulated the process its oversight entity would rely upon. The Office of the Inspector General also noted in its January 2008 report that the "process" requirement had been circumvented in a number of places. In particular, the OIG noted that "process" was lacking in instances when a mechanism had not been established to transmit an allegation automatically from a crime lab to an oversight entity. Although we concur that such matters require remedy, we're focused here on the actual investigatory process an entity utilizes once that entity actually receives an allegation. As such, on this fact alone, it seems that no Coverdell applicant should have been funded since the certification requirement became law in 2004.

It seems an investigation will be thorough, independent and productive if an oversight entity can:

(1) identify the source(s) and the root cause(s) of the alleged problems;
(2) identify whether there was serious negligence or misconduct;
(3) describe the method used and steps taken to reach the conclusions in parts 1 and 2;
(4) identify corrective action to be taken;
(5) where appropriate, conduct retrospective re-examination of other cases which could involve the same problem;
(6) conduct follow-up evaluation of the implementation of the corrective action, and where appropriate, the results of any retrospective re-examination;
(7) evaluate the efficacy and completeness of any internal investigation conducted to date;
(8) determine whether any remedial action should be adopted by other forensic systems; and
(9) present the results of Parts 1-8 in a public report.

This proposed process derives from a 2007 document of the U.S. Government Accountability Office – "Government Auditing Standards: January 2007 Revision."

E. *Governor Deval Patrick has recently proposed a $106 million increase in the state budget for Massachusetts' State Police Crime Lab and other agencies. Would distribution of the Bloodsworth grant program funds assist in improving the crime labs in Massachusetts and other states? What other steps would you recommend?*

Governor Patrick is to be commended for seeking to properly support the Massachusetts forensic analysis communities with his proposed $106 million increase. The Bloodsworth funds could complement this effort by providing funds to help ensure that resources are devoted to post-conviction DNA testing needs. Those funds could play a similar role in other states as well.

The Coverdell program, however, seems to be an even more direct complement to these funds, as the Coverdell program is intended to help states improve their forensic delivery services. That is why the JFAA Section 311(b) Coverdell forensic investigation requirement is so appropriate, for if states are to seek and receive significant federal support for their forensic services, the federal government – on behalf of the public – is right to ensure that such monies are going toward systems with quality assurances in place.

SUBMISSIONS FOR THE RECORD

Statement of Senator Biden

"Oversight of the Justice for All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs?"

Wednesday, January 23, 2008
Dirksen Senate Office Building Room 226
10:00 A.M.

Mr. Chairman, thank you for holding this important hearing. Like you, I believe that the advancement of forensic sciences is of paramount importance to our criminal justice system. By properly utilizing forensic sciences we can help narrow the focus of investigations, convict the guilty, and exonerate the innocent.

Because of its critical importance to our system, I have long advocated for increased federal assistance to local forensic laboratories and law enforcement. Just a few years go we worked together on a bi-partisan basis to craft the Justice for All Act. That far-reaching legislation included the Debbie Smith DNA Backlog Grant Program that provides $700 million in federal funding to states and police agencies to help eliminate the backlog of untested DNA rape kits – kits that were tragically sitting on shelves in police warehouses and crime labs. While the backlogs are reduced, the fact remains that resources are not keeping pace with the needs.

And, it's only getting worse. The so-called "CSI" effect has focused great attention on the power of forensic science, and as a result, prosecutors are ordering more forensic analysis. In fact, many prosecutors begin there opening statements by reminding the jury

that this is "real-life" not a television show and that many cases do not have the forensic analysis that is typical on many entertainment crime dramas.

The bottom line is that we are expecting more from our forensic labs than ever before. It is my view that we need to do more to assist our local labs to eliminate the current backlogs and to take the forward looking steps to ensure that we can continue to harness the power of forensic science. After all, it is dedicated men and women who do the work. We need to make sure that we have enough trained personnel, adequate lab capacity, and the right accreditation standards to ensure consistency and quality testing around the nation.

Undoubtedly, the most powerful of the forensic tools is DNA technology. DNA technology has greatly expanded the capacity of law enforcement to prosecute criminals and for defense attorneys to exonerate the wrongly accused and convicted. Just this morning, the New York Times reports that a Colorado man wrongly imprisoned for nine years for murder was exonerated by DNA evidence. Prosecutors are now trying to use that evidence to identify and bring to justice the actual murderer. Similar stories have been repeated over and over, and there can be no stronger testament to the need for the widespread availability of DNA evidence than the freeing of a man wrongly convicted and the investigation and prosecution of one who has escaped justice for years. Indeed, this is the goal of the Innocence Protection provisions that we passed in the Justice for All Act.

We need to expand the use of DNA and dedicate significant resources to DNA; however, we must remain mindful that there are other forensic disciplines that are critical as well. Firearm ballistics, drug analysis, and, ever expanding, computer forensics are critical crime-fighting tools. And, as we have shifted focus and resources to DNA, the backlog for some of the other forensic sciences has grown more rapidly. The forensic lab operators will tell you just how big the problem has become, and we simply cannot continue to neglect this problem.

We also need to make sure that the Department of Justice is a full-partner in the effort to convict the guilty AND to exonerate the innocent. Despite the fact that Congress has provided funding for post-conviction testing grants under the Kirk Bloodsworth provisions of the Justice for All Act, the Department of Justice has failed to provide any of the grant funding to local crime labs. Many argue that the Department has taken an overly narrow view of the requirements of the law to justify this action. Mr. Chairman, we certainly need appropriate oversight, but I am concerned by the actions of the Department and am interested in the explanation from the Department of Justice about this issue.

Mr. Chairman, thank you for your long-standing commitment to advancing forensic sciences and its promise of fair convictions and exonerations. I hope that today's hearing will help get to the bottom issued raised with the Department's implementation of the Justice for all Act in short order. Forensic analysis is a powerful tool. We need to move full speed ahead to harness this technology to the benefit of

our criminal justice system, and it is critical that we have the Department of Justice as a full partner in the effort to advance all forensic sciences.

Finally, as you know, many of the programs that we authorized in Justice for All Act will be expiring next year. Leading experts and interest groups are compiling the data and research that we will need to thoroughly assess the legislation and identify the provisions ripe for reform. Preliminarily analysis, in my view, speaks to the need for increased federal assistance when we reauthorize the Paul Coverdell grants and the Debbie Smith grants. Mr. Chairman, I look forward to working with you to find a bipartisan consensus for increased federal support for these important programs and a careful reexamination of the Justice for All Act.

THE JUSTICE PROJECT

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Testimony of

Kirk Noble Bloodworth

Of The Justice Project

Submitted to

The Senate Judiciary Committee

January 23, 2008

Mr. Chairman and members of the Committee, I appreciate the opportunity to present written testimony regarding The Justice for All Act and in particular Title IV, The Innocence Protection Act (IPA). One of the provisions in this groundbreaking legislation bears my name, The Kirk Bloodsworth Post-Conviction DNA Testing Program. Eight years ago, when the IPA was first introduced, I testified before this committee about the importance of DNA technology as it applied to my case and strongly urged this Committee to pass a law to allow others like me an opportunity to prove their innocence through DNA testing. I am deeply appreciative of your efforts, Mr. Chairman and those of two former Chairman of this Committee, Senators Specter and Hatch in ensuring that this important legislation was signed into law.

As you know, Mr. Chairman, it took almost five years of hard work by yourself, members of this Committee, respective staffs and a number of interested individuals and organizations like mine, The Justice Project, to pass this legislation. Passage of the IPA marked a dramatic departure from decades of congressional debate regarding the death penalty for the legislation was designed to strengthen – not weaken – procedural protections for death row inmates. The day President Bush signed The Justice for All Act into law was one of the proudest days in my life, and I believed was a fitting end to a chapter in my life—my 20 year struggle—from convicted murderer, to the first death row inmate exonerated based on DNA evidence, to finding the real killer and to having a law passed in my name that would greatly assist others in proving their innocence.

The truth be known, Mr. Chairman, I expected that the next time I appeared before this Committee would be in support of the IPA's reauthorization. That I would be able to testify to the tremendous success in implementing the provisions of the IPA. However, Mr. Chairman, given my life experience I should have known that the struggle for justice never ends. I should have known that success is not measured in mere passage of legislation. Success is measured in ensuring that a law is fully funded and most importantly that the law is properly implemented. I also should have known that this Administration and the Department of Justice (DOJ) has quite a history in ignoring Congressional directives.

Make no mistake about it, Mr. Chairman, the failure of this Department of Justice to grant states money under the Bloodsworth program is not accidental, nor is it the result of the states failure to comply with the grant's provisions. The DOJ has been against this program from the very beginning. They opposed it when it was introduced, opposed it when the legislation passed this committee, opposed it when the House passed the legislation in a resounding vote of 393 to 14, opposed it when it passed the full Senate, opposed it when the bill was signed into law, and now they continue to oppose the program by holding its funding hostage. The DOJ has sent $0 of the $14 million appropriated to the states filing requests. The bottom line: DOJ is denying people with claims of innocence with the chance to prove it.

Post-conviction DNA testing has not only led to the exoneration of over 200 wrongfully convicted individuals, it has also confirmed many a suspect's guilt. It is a powerful means for ensuring public safety and serves as a vehicle for truth. When states are denied funding for post-conviction DNA testing they are being denied the truth. I feel a personal responsibility to each state that has been denied this grant money for post-conviction DNA testing. As this program bears my name I feel it is my obligation to ensure that this program is funded and implemented as it was meant to be.

The Innocence Protection Act under which the Bloodsworth program falls is a landmark piece of legislation that holds the potential to correct serious errors in our criminal justice system. Not only does the law provide for post-conviction DNA testing but the IPA also authorized a federal grant program to improve the quality of legal representation provided to indigent defendants in state capital cases. These two programs fully funded and properly implemented would greatly increase the fairness and accuracy of our system of justice. I deeply appreciate your efforts, Mr. Chairman and those of Senator Specter in ensuring funding for the Bloodworth program. I wish I could say the same for the funding for the counsel provisions in the IPA. Despite your extraordinary efforts and those of Senator Specter, the Congress and the Administration have not only blocked significant and meaningful funding, it was only in this year's Omnibus Bill that funding for the Capital Litigation Grant Program was finally tied to the provisions of the IPA as

Congress intended it to be. Again, I appreciate your efforts, Mr. Chairman and those of your staff in making this happen.

Given the Department of Justice's history of opposition to this law, I strongly implore you, Mr. Chairman, and the Members of this Committee to make sure that the DOJ regulations regarding this grant program are in line with the provisions of the IPA. Unless these programs are fully funded and properly implemented, serious injustices in our criminal justice system will continue to occur.

I know first-hand about the injustices of our criminal justice system. I also know that if a program like the Bloodsworth program had been in place at the time of my arrest I would not have spent nearly 20 years trying to prove my innocence. Mr. Chairman, you and the Members of this Committee know the vital role post-conviction DNA testing plays in the criminal justice system. In my case it was not only a means to prove my innocence but also a way to find the true perpetrator of the crime for which I was accused, convicted, and sentenced to death.

On July 25, 1984 nine-year-old Dawn Hamilton was brutally raped and murdered in the woods near her home. I had never met Dawn or the Hamilton family. I did not know where they lived, and I did not know anything about the crime. At that time I was a 23-year-old, newly married, former Marine, who had never been arrested for anything in my life. I never envisioned the nightmare I was about to enter into.

A composite sketch of the perpetrator was distributed among Dawn Hamilton's neighbors. An anonymous tip led the police to my door. The police arrived in the middle the night on August 9, 1984. I would not see my home again until my release in 1993.

I knew I did not resemble the composite sketch. The suspect was described as having dirty blonde hair and a slim build. At the time I had fiery red hair with long sideburns and I was not slim. Still, I spoke with the police, asserted my innocence, allowed them to

take my photograph, and offered hair samples. Later, my picture would be selected by several witnesses claiming I was the last person seen with Dawn Hamilton that morning.

At the time of my first trial, DNA testing was not very advanced. It was not an option. My only option was to proclaim my innocence and hope justice would prevail. I told anyone who would listen that I was innocent of this crime. Despite my alibi witnesses claiming I was with them at the time of the murder I was convicted and sentenced to death. My conviction was overturned because of prosecutorial misconduct but a second jury would again find me guilty and a judge would sentence me to two consecutive life sentences. By 1992, DNA technology had advanced significantly and my attorneys requested that the evidence from my case be released for testing. Had it not been for those tests, I would have died an innocent man in prison.

In trying to prove my innocence luck was definitely on my side a lot of the time. I was lucky to have a lawyer who was interested in my case and worked hard for me even though I was not paying him. I was lucky that the judge from my second trial kept Dawn Hamilton's clothing and the blanket in which she was wrapped in a cardboard box in his chambers, lest it be destroyed. To this day I am grateful to Judge James T. Smith for saving the evidence that would prove my innocence. And I was lucky that the laboratory was able to find a small sample of semen – a sixteenth of an inch in size – which was large enough to test.

All of the years since my release can not make up for the time I lost while wrongfully incarcerated. I lost a lot while I was in prison, including time with loved ones which can never be replaced. My life was taken from me and destroyed. I was separated from my family and friends. My mother and father – who loved me and always believed in my innocence – spent their entire retirement savings on my defense. My mother never heard the DNA results. She died five months before my release. I was only allowed to view her body before the funeral for five minutes – in handcuffs and shackles.

I do not have all the answers to the problems facing our criminal justice system, but I do know there are other cases like mine out there. Our criminal justice system is not perfect but no one should have to wait 20 years for justice. The Kirk Bloodsworth Post-Conviction DNA Testing Program was meant to prevent innocent people from ending up on death row and ensure that the truly guilty were caught. One would think that this simple principle would be enough to convince reasonable individuals to allow states immediate access to these important funds. However, Mr. Chairman, it is clear that the Department of Justice does not agree with that simple notion.

Mistakes in the criminal justice system are not a new concept. The organization I work for, The Justice Project has been studying the leading factors of wrongful convictions and advocating for meaningful reform to prevent further miscarriages of justice. Even the United States government has acknowledged that serious imperfections in our system of justice exist by including these programs in the Innocence Protection Act. Post-conviction DNA testing offers the unique opportunity to correct the mistakes of our criminal justice system while helping it to become more fair and reliable. Offering quality legal representation to indigent defendants helps prevent mistakes before they happen. Why aren't these principles of fairness, justice and accuracy in our criminal justice system at the top of every lawmaker's list of priorities? With states being denied access to the appropriated millions for these programs errors will likely go uncorrected and further mistakes are certain.

I know it takes time to effectively implement and get important programs like the Kirk Bloodsworth Post-Conviction DNA Testing Program up and running. But I also know what its like to wait. I waited 8 years, 11 months, and 19 days in prison before DNA testing proved my innocence. I waited another 10 years for the prosecution to run the DNA profile of the perpetrator in state and federal databases. I waited those 10 years to find out that the real rapist and murderer of Dawn Hamilton was man in my cell block who was in prison for another assault. I waited almost 20 years for justice to be done in my case.

But I am done waiting. The Kirk Bloodsworth Post-Conviction DNA Testing Program needs to be implemented as Congress directed it to be. States need access to the millions of appropriated dollars they were promised. Moreover, the Capital Litigation Program needs to be fully funded and implemented as directed by the Innocence Protection Act. The United States Congress and the Department of Justice need to eliminate the bureaucratic hurdles and follow through on their promises – they need to follow the law.

Thank you.

Statement
United States Senate Committee on the Judiciary
Oversight of the Justice for All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs?
January 23, 2008

The Honorable Russ Feingold
United States Senator , Wisconsin

Opening Statement of U.S. Senator Russ Feingold

Senate Judiciary Committee Hearing

On "Oversight of the Justice for All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs?"

I am very pleased to see this Committee once again address the need to improve the tools for seeking the truth in our criminal justice system. In addition, members of Congress know all too well that we must follow up on the implementation of legislation we pass when it appears that our intent is being thwarted. So Mr. Chairman, I appreciate that you are conducting the oversight that is critically needed with respect to these grant programs, as we have learned from the Inspector General and others today.

DNA testing has played an incredibly important role in the pursuit of truth and justice. DNA testing has identified perpetrators or provided other important probative value to the police and prosecutors investigating a crime. But DNA testing has also exposed a piece of the dark under-belly of our criminal justice system: the conviction and sentencing of innocent people for crimes they did not commit.

Americans have become all too familiar with the stories of people wrongfully convicted, sentenced and sent to prison, who finally walk free as a result of DNA testing. Several of the people in attendance here today know all too well that this can happen. Nationwide, scores of innocent people have been released. And according to the Innocence Project, 65 percent of those wrongful convictions were caused, at least in part, by limited, unreliable or even fraudulent forensics, highlighting the importance of improving our nation's crime labs.

Mr. Chairman, this is a particularly appropriate moment to be taking stock of Congress' efforts to improve access to DNA testing and to increase oversight of forensic laboratories around the country. As a result of the Supreme Court's consideration of challenges to the lethal injection method of execution, we are experiencing a national moratorium on executions of death row inmates. I am pleased that the Committee is taking this opportunity to consider these issues, which are even more poignant for those sitting on death row. Since the reinstatement of the modern death penalty, 15 death row inmates have been exonerated as a result of DNA testing, including one in Oklahoma just this past year.

But it is important to remember that flaws in the criminal justice system are not limited to forensics. Inadequate defense counsel, racial and geographic disparities, police and prosecutorial misconduct, and wrongful convictions based solely on the testimony of a jailhouse snitch or a single mistaken eyewitness identification all taint this country's criminal justice system, and in particular its use of the death penalty. And all of these factors have led to the wrongful convictions of individuals later exonerated by DNA evidence.

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Statement of Glenn A. Fine
Inspector General, U.S. Department of Justice
before the
Senate Committee on the Judiciary
concerning
Oversight of the Department of Justice's Forensic Grant Programs

I. Introduction

Mr. Chairman, Senator Specter, and Members of the Committee on the Judiciary:

I appreciate the opportunity to testify before the Committee as you examine the Department of Justice's (Department or DOJ) oversight of grant programs funded by the "Justice for All Act." Among other provisions, this Act established the Paul Coverdell Forensic Science Improvement Grants Program, which provides grants to state and local governments to improve the timeliness and quality of their forensic science and medical examiner services and to eliminate backlogs in the analysis of DNA and other forensic evidence. The Department's Office of Justice Programs (OJP), through one of its bureaus, the National Institute of Justice (NIJ), distributed almost $15 million in fiscal year (FY) 2006 Coverdell program grants and almost $16.5 million in FY 2007.

For many years, the Office of the Inspector General (OIG) has examined the work of OJP in awarding and monitoring the $2 to $3 billion in grant funds it awarded each year. In two recent reports, the OIG examined in particular OJP's role in administering the Coverdell grant program. Our first report, issued in December 2005, focused on the external investigation certification requirement enacted as part of the Justice for All Act. Pursuant to this requirement, Coverdell grant applicants must certify that a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of forensic results.

This certification requirement was designed to address negligence and misconduct in forensic laboratories, including false testimony by some forensic laboratory staff, which has led to wrongful convictions in several states. Independent external investigations of allegations of laboratory wrongdoing can provide an important safeguard to reduce problems created by inadequate forensic analysis.

Our December 2005 report found that OJP had not effectively enforced or exercised effective oversight over this external investigation certification. For example, we found that OJP's 2005 Coverdell grant program announcement did not give applicants necessary guidance on the certification requirement, did not provide examples of the types of government entities and processes that

could meet the certification requirement until after we began our review, and did not direct applicants to provide the name of the government entity that could conduct investigations into allegations of serious negligence or misconduct.

In our view, OJP's response to our 2005 review was not encouraging or appropriate. After significant discussion, OJP only reluctantly agreed to implement some of the report's recommendations, including providing examples in the program announcement of types of government entities that could meet the certification requirement and requiring that the applicant name the government entity in future grants. OJP did not agree to require each applicant to submit a letter from the government entity acknowledging that it had the authority and process to conduct independent external investigations.

Because we were concerned by OJP's response, and because of the importance of having qualified entities in place to investigate serious negligence or misconduct in forensic laboratories funded by these grants, we decided to conduct a follow-up review, which was issued last week. This follow-up review examined the effectiveness of OJP's administration of the external investigation certification requirement for FY 2006 Coverdell program grant recipients.

Our follow-up review found continued deficiencies in OJP's administration of the Coverdell program. We found that although OJP has complied with the minimum terms of the statute to obtain certifications from grant applicants, OJP is still not effectively administering the external investigation certification requirement. For example, we determined that despite the certifications, not all forensic laboratories that received Coverdell program grant funds have identified a government entity with the authority and capability to independently investigate allegations of serious negligence or misconduct. Further, OJP's guidance does not require that allegations of serious negligence and misconduct be referred to the government entities for independent investigation.

In sum, after two reviews we remain concerned about OJP's administration of the Coverdell grant program. Equally troubling is OJP's narrow, legalistic responses to our reviews. These responses, however, mirror OJP's position when other OIG audits identified deficiencies in its administration of other grant programs. Moreover, this attitude is consistent with OJP's slow response to a 2006 congressional directive to establish an office to monitor grantees who received the more than $2 billion in total grant funds awarded by OJP each year. For these and other reasons, in our view OJP has not taken sufficient responsibility to ensure that its grant programs are effectively administered and monitored.

The remainder of my written statement provides further details on these conclusions. First, it summarizes the findings of the OIG's two reviews of the

Coverdell grant program. It then briefly discusses other OIG audits that address OJP's monitoring of grant funds.

II. OIG Reviews of Coverdell Grant Program

A. Background

OJP is responsible for developing programs to increase the nation's capacity to prevent and control crime, improve criminal and juvenile justice systems, increase knowledge about crime, and assist crime victims. OJP is divided into five bureaus that provide training, collect and disseminate crime statistics, support technology development and research, and administer DOJ grants.

The National Institute of Justice (NIJ), one of OJP's five bureaus, is the Department's primary research, development, and evaluation agency. NIJ awards grants to state and local governments, nonprofit organizations, individuals, and certain for-profit organizations. One of these grant programs is the Coverdell program.

The Paul Coverdell Forensic Science Improvement Grants Program, administered by OJP through NIJ's Investigative and Forensic Science Division in the Office of Science and Technology, provides funds to state and local governments to:

> (1) improve the quality and timeliness of forensic science and medical examiner services, and
>
> (2) eliminate backlogs in the analysis of forensic evidence, including controlled substances, firearms examination, forensic pathology, latent prints, questioned documents, toxicology, and trace evidence.

To request a Coverdell program grant, an applicant must submit, in addition to all other required documents:

> 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 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.

This external investigation certification became a requirement on October 30, 2004, as a result of the Justice for All Act of 2004, which amended the Omnibus Crime Control and Safe Streets Act of 1968.

Negligence and misconduct in forensic laboratories can undermine the criminal justice system, and have led to wrongful convictions in several states. For example, in 2006 Marlon Pendleton was exonerated after serving 10 years for rape and robbery. The faulty analysis of DNA evidence by a Chicago Police Department Crime Laboratory analyst contributed to his conviction. In 2007, Curtis Edward McCarty was exonerated after serving 21 years for murder. McCarty was convicted and sentenced to death based on the false testimony of an Oklahoma City Police chemist, whose misconduct contributed to at least two other convictions later overturned by DNA testing.

B. OIG December 2005 Review

The OIG first evaluated OJP's implementation of the Coverdell program's external investigation certification requirement in 2005.[1] The OIG report concluded that OJP did not adequately enforce the certification requirement during the application process or exercise effective oversight of this aspect of the program. Specifically, the OIG found that NIJ did not provide necessary guidance to applicants and did not require applicants to submit the information necessary to permit OJP to evaluate their certifications.

For example, the FY 2005 Coverdell grant program announcement did not provide examples of the types of government entities and processes that could meet the certification, or specify a particular format for submitting the certification, such as a standard form, template letter, or narrative description. Rather, OJP simply informed potential applicants that a certification was required by statute. The announcement also did not require applicants to provide a statement naming the government entity that would conduct the independent external investigations. In evaluating these certifications, we found it important that the applicants' grant applications contain enough information to evaluate the validity of the certification and to support sanctions if applicants' certifications were later determined to be false.

Yet, when we asked OJP why the announcement did not require applicants to provide the name of the government entity that would conduct any external investigation, OJP responded that it was the applicants' responsibility to determine whether it met the certification requirement. Moreover, OJP told us that it would accept the applicants' certifications without requiring them to provide the name or other information identifying the government entity responsible for conducting independent external investigations. However, our review determined that the certifications submitted by many applicants for FY 2005 Coverdell grants were missing or incomplete, and that OJP did not adequately review the certifications.

[1] See U.S. Department of Justice Office of the Inspector General, *Review of the Office of Justice Programs' Forensic Science Improvement Grant Program*, Evaluation and Inspections Report I-2006-002 (December 2005).

As a result of the deficiencies that our review uncovered, the OIG's 2005 report recommended that OJP:

> (1) provide guidance to applicants regarding the external investigation certification;
>
> (2) require that each applicant provide the name of the government entity that could conduct independent external investigations of serious negligence or misconduct related to forensic laboratories; and
>
> (3) consider requiring each applicant to submit a letter from that government entity acknowledging that it had the authority and process to conduct independent external investigations.

In response, OJP initially suggested that it did not have the legal authority to implement the OIG's recommendations to require the applicant to submit the name and a letter from the government entity. However, the OIG pointed out that the plain language of the statute granted OJP the authority to enforce the certification requirement. Moreover, OJP's actions on other grant programs demonstrated that it had the authority to implement our recommendations.

Eventually, OJP agreed with the first recommendation to provide guidance to applicants on independent external processes and did so in the FY 2006 Coverdell program announcement. However, OJP continued to resist implementing the second recommendation to require each applicant to provide the name of the government entity that could conduct independent external investigations. After much discussion with the OIG on this issue, OJP agreed to implement this recommendation for FY 2007. However, OJP still declined to implement the third recommendation that would require a letter from the government entity identified in the grant application signifying that it was prepared to conduct independent external investigations if needed.

C. OIG January 2008 Follow-up Review

Because of the importance of the issue, and because of OJP's resistance to taking action to ensure the validity of the certifications, the OIG decided to conduct a follow-up review to further examine the effectiveness of OJP's administration of the external investigation certification requirement. The OIG's follow-up review was completed and released last week.[2]

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[2] See U.S. Department of Justice Office of the Inspector General, *Review of the Office of Justice Programs' Paul Coverdell Forensic Science Improvement Grants Program*, Evaluations and Inspections Report I-2008-001 (January 2008).

For this review, we obtained from OJP the names of all 87 agencies that had received Coverdell grants in FY 2006, and we conducted telephone interviews with officials regarding the external investigation certifications for all 87 agencies to determine whether they had identified a government entity with a process in place and the capabilities and resources to conduct independent investigations of negligence or misconduct in forensic laboratories as their certifications attested. Some grantees submitted a single certification that applied to the grantee and its sub-grantees, other grantees submitted multiple certifications for themselves and each of their sub-grantees, and one grantee failed to submit any certification.

The OIG then conducted telephone interviews with officials regarding the external investigation certifications from all 87 grantees. These officials identified 233 government entities in response to the external investigation certification requirement (some officials referred to more than one investigative entity). The OIG then conducted telephone interviews with representatives from 231 of the 233 government entities to assess whether these entities had the authority and ability to conduct independent external investigations as indicated by the certifications.

The OIG found that at least 78 of these entities (34 percent) did not meet the external investigation certification requirement because they lacked either the authority, the capabilities and resources, or an appropriate process to conduct independent external investigations into allegations of serious negligence or misconduct by forensic laboratories that received FY 2006 Coverdell program funds.

For example, one entity named by a certifying official told us that it conducted financial audits and had no authority to conduct investigations of negligence or misconduct in forensic laboratory work. An official from another entity told us that his entity did not have the capabilities and resources to conduct investigations involving DNA analysis and would have to request funds from the state legislature to contract for DNA expertise if it received such an allegation. More than half of all entity officials we contacted told us that they had not even been previously informed that their entities had been named to conduct independent external investigations as required by the Coverdell program.

The OIG identified other shortcomings in OJP's administration of the FY 2006 external investigation certification that allowed the deficiencies with the certifications to occur. First, OJP still did not require applicants to confirm to OJP that they had identified an entity with the capabilities and authorities to conduct independent external investigations of forensic laboratories. In fact, OJP could not ensure that the applicants had identified an entity at all. For example, five certifying officials told the OIG that when they completed the certification they did not have a specific entity in mind – they merely signed the template certification that OJP provided.

Second, we found that OJP did not adequately review the information it obtained to assess whether the certifications submitted by the grantees were properly completed and sufficient. For example, each certification must contain specific statements and be signed by a knowledgeable official authorized to make certifications on behalf of the applicant agency. Our review identified certifications from 38 grantees that were signed by individuals who did not appear to be from the applicant agency. Yet, OJP still awarded grants to these agencies without further inquiry to the grantees.

Third, during our review we examined whether OJP's guidance directed grantees and forensic laboratories to refer allegations of negligence and misconduct to the certified entities for investigation. When we asked OJP about its guidance regarding handling allegations of negligence and misconduct by grantees who received Coverdell grant money, we found that OJP has advised one grantee (and the grantee advised forensic laboratories) that it did not have to refer allegations of serious negligence and misconduct to the entity it had certified to conduct independent investigations. Moreover, OJP's General Counsel stated to the OIG his belief that, while the reporting of allegations is "consonant" with the statute, the statute does not "require" that allegations actually be referred to the entity certified to conduct such investigations.

Overall, we concluded that OJP needs to improve its administration of the Coverdell grant program. Although OJP has complied with the basic statutory requirement to obtain certifications from applicants, in our view OJP has failed to take the additional steps necessary to ensure that the external investigation certification requirement has the intended effect of ensuring that applicants identify entities that can conduct independent investigations, and that allegations of serious negligence or misconduct are actually referred for investigation.

Beginning with the FY 2007 Coverdell program, OJP has agreed – after significant prodding by the OIG – to require grant applicants prior to receiving grant funds to provide the name of the government entity on which the certification is relying. Obtaining the names of the entities is a step forward and will ensure that applicants do not submit certifications when they have not actually identified an entity to independently investigate misconduct or negligence. In addition, having the name can also help support sanctions if a certification is later found to be false. However, as our review demonstrated, requiring only that an applicant provide the name of an entity is insufficient to ensure the entity has the resources or expertise to conduct the independent investigations of forensic laboratories. In addition, we are still concerned that current guidance and procedures do not ensure that allegations of serious negligence or misconduct will actually be referred for an independent investigation by the certified entity. We believe that OJP can further enhance the effectiveness of the Coverdell program for ensuring the integrity of forensic

analysis by requiring that allegations of wrongdoing at forensic laboratories be referred to the certified entities for independent investigation. We believe that OJP's minimal actions to date undermine and diminish the utility of the Coverdell program for improving the oversight of forensic laboratories.

As a result, in our follow-up review we made three additional recommendations to OJP. First, we recommended that OJP revise the certification template to require that applicants name the government entities and confirm that the government entities have the authority, independence, a process in place, and the resources to conduct independent external investigations into allegations of serious negligence or misconduct by the forensic laboratories that will receive Coverdell program funds. Second, we recommended that OJP provide applicants with specific guidance that allegations of serious negligence or misconduct substantially affecting the integrity of forensic results are to be referred to the certified government entities. Third, we recommended that OJP revise and document the Coverdell program application review process so that only applicants that submit complete external investigation certifications are awarded Coverdell grants.

OJP's response to our follow-up review was again narrow and legalistic. While OJP agreed to implement two of the recommendations, it argued that its actions were consistent with the terms of the statute. OJP's position, in essence, was that the Coverdell statute required only a certification from the grantee, that OJP had complied with this requirement, and that therefore its oversight of the program was not deficient.

We are again troubled by OJP's narrow view of its responsibilities. We believe that OJP's responsibility extends beyond the bare minimum of compliance with the literal terms of the statute. Rather, OJP has a responsibility to ensure that the required certifications are meaningful and that grantees actually have the means and intention to follow through on their certifications. This is especially true when, as our reviews have identified, the certifications from current grant recipients are incomplete and inaccurate, and when the entities certified by the grantees report that they do not meet the certification requirement. In short, OJP has a responsibility to effectively monitor and oversee the grant program, which includes ensuring that the grantees' certifications are accurate and meaningful.

In response to our report, OJP has agreed to provide grantees with guidance to refer allegations to the certified government entities, and to prepare Coverdell program management guidelines to improve the application review process. However, based on its past actions, we do not have great confidence that OJP will effectively ensure that grantees who receive Coverdell funds actually have an entity in place to investigate allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results, or that such allegations are referred to these entities for investigation.

III. Other Concerns Related to OJP's Oversight of Grant Programs

Our concern with OJP's administration of the Coverdell grant program is exacerbated by OJP's spotty record of monitoring the approximately $2 – $3 billion of grants it awards each year. In our reviews, we repeatedly have found that OJP lacks adequate financial and programmatic oversight of its varied grant programs. Moreover, OJP has yet to develop consistent mechanisms to assess the success of its grant programs, raising questions about how effectively taxpayer grant funds are being spent.

OIG audits continue to identify a variety of management concerns regarding the OJP's oversight of grant programs, including problems in the grant closeout process, improper use of grant funds, difficulties in meeting grant objectives, and poor measurement of grant effectiveness. While these are well known problems, we have not seen significant improvement over the past several years in how the Department manages these programs.

For example, our audits have found:

- A significant number of grantees either do not submit required financial and progress reports or do not submit them in a timely manner.

- Numerous deficiencies continue to be found in OJP's monitoring of grantee activities, such as not sufficiently reviewing supporting documentation for grant expenditures, not establishing performance goals for its programs, not ensuring that grantees submit performance data to demonstrate that grant monies are being used effectively and as intended, and not properly closing grants in a timely manner.

- Grant funds were not regularly awarded in a timely manner and grantees were slow to spend available monies.

- OIG audits of grants have also resulted in significant dollar-related findings.

Therefore, the OIG has identified grant management as one of the Department's top management challenges for the past 6 years. While it is important to efficiently award the billions of dollars in grant funds appropriated by Congress annually, it is equally important that the Department maintains proper oversight over the grantees' use of these funds to ensure accountability and to ensure that these funds are effective and used as intended.

Yet, like with the review of the Coverdell grant program, the OIG has encountered a troubling attitude from OJP that it need only impose the minimum standards required by statute or regulation and that, in and of itself, discharges its responsibilities to ensure effective grant oversight. Moreover, too

often the OIG has observed a misplaced emphasis by OJP on awarding grants and a lack of a commensurate emphasis on monitoring the grants awarded.

For example, in addition to the Coverdell reviews, another concern about OJP's grant monitoring practices was identified by our December 2006 audit of the Department's grant closeout process. This audit found that the OJP substantially had failed to ensure that grants were closed appropriately and in a timely manner, thereby tying up hundreds of millions of dollars that could have been used to fund other programs or returned to the federal government's general fund.

In particular, our audit found that OJP, as well as the Office of Community Oriented Policing Services and the Office of Violence Against Women, failed to ensure that grants were closed in a timely manner. We found that only 13 percent of the Department grants we tested were closed within 6 months after the grant end date, as required by federal regulation and agency policy. Our audit also identified over 12,000 expired grants more than 6 months past the grant end date that had not been closed. Of these grants, 67 percent had been expired for more than 2 years. We also found that 41 percent of the expired grants we sampled did not comply with grant requirements, including financial and programmatic reporting requirements and local matching fund requirements. We recommended that the Department improve the timeliness of grant closeouts, drawdowns on expired grants, and management of unused grant funds on expired grants.

OJP disagreed with our finding that its practice of allowing grantees to draw down grant funds long after the end date of the grant period violated federal regulations as well as prudent grant management practices. Rather, OJP's position was that as long as the expense was incurred during the grant period, it would continue to pay the grantee even if the request for funds was made years after the end date of the grant. We disagreed with that position as a matter of law and as a matter of sound grant management. From our perspective, the timely closeout of grants is an essential financial management practice to identify any excess and unallowable funds that should be returned by the grantee, as well as unused funds that should be deobligated and put to better use.

Since its initial response, OJP has made progress in its grant closeout practices. However, we believe it needs to focus additional significant attention on this and other grant monitoring issues.

Finally, in this regard we note that OJP has been slow to staff an internal office intended to monitor and assess its thousands of grants. In January 2006, as part of the Department of Justice Reauthorization Act of 2005, Congress gave OJP the authority to create an Office of Audit, Assessment, and Management (OAAM). The purpose of the office was to coordinate internal performance audits of grantees and to ensure compliance with the terms of the

grant. The office was envisioned as an effective internal auditing entity that would complement the external auditing provided by the OIG. The Act provided that OJP could use up to 3 percent of all grant funds each fiscal year to fund this oversight office.

Unfortunately, OJP has made slow progress in staffing this new office and in ensuring that its efforts were effective in the 2 years since passage of the Reauthorization Act. While it moved around several existing positions within OJP to create the office, it has not fully staffed the office and to date has not hired a permanent director. OAAM is comprised of three divisions, each managed by a deputy director. Only one OAAM division, the Audit and Review Division, is close to fully staffed. As of last week, according to OJP, 15 of that Division's 18 planned positions are filled. The Program Assessment Division has vacancies in 6 of its 13 positions. In addition, OJP has not hired any of the three staff positions for the Grants Management Division.

Our assessment is that OJP has devoted insufficient effort to ensuring that this office is adequately staffed to oversee and monitor OJP grants, despite the congressional directive and the importance of OAMM's mission.

IV. Conclusion

In sum, our reviews of the Coverdell grant program's external investigation certification requirement found that OJP has not effectively administered this requirement. While complying with the minimum requirements of the statute – to obtain a written certification from applicants that a government entity is in place to investigate allegations of serious misconduct or negligence affecting forensic results – OJP has been reluctant to do more to exercise effective oversight over this important external investigation certification requirement. These deficiencies mirror other problems we have found over the years with OJP's administration of other grant programs, including inadequate monitoring of grantees and failure to adequately staff its office that is intended to monitor and assess recipients' use of OJP grant funds. We believe that OJP must improve its oversight of grant programs to ensure that the billions of dollars appropriated for important grant programs are effectively administered and monitored.

That concludes my statement and I would be pleased to answer any questions.

Testimony Before the Senate Judiciary Committee

January 23, 2008

Larry A. Hammond

Chair, Arizona Justice Project

I am pleased to be afforded this opportunity to appear before this Committee to offer the perspective of the Arizona Justice Project (AzJP) on the two subjects relevant to this hearing. I will first provide a very brief background of the AzJP and its work with respect to the evaluation of DNA cases. I will then summarize our Project's experience with the National Institute of Justice (NIJ) in applying for a grant under what has become known as the Bloodsworth Grant Program. Finally, I will address our Project's efforts to encourage greater independent oversight of Arizona's crime laboratories.

I. The Arizona Justice Project

The AzJP has been in existence for 10 years. We were founded in 1998 by Arizona Attorneys for Criminal Justice (AACJ). Our mission is to seek out and address cases of actual innocence or other manifest injustice. From inception, we have relied almost exclusively on volunteer assistance from lawyers, investigators, experts and consultants. We have developed very substantial relationships with Arizona's law schools – the Sandra Day O'Connor College of Law at Arizona State University (ASU) and the James E. Rogers College of Law at the University of Arizona (UofA). We have screened over 2500 inmate cases and have, at any given time, approximately 50 cases either in court or in an advanced state of evaluation. Operating on an almost entirely pro bono basis, the Project has enjoyed some notable successes, some of which are detailed on the AzJP website at www.azjusticeproject.org.

The general topic of the forensic sciences employed by crime laboratories and the more specific subject of DNA testing, have been of importance to the Project from its inception. As an adjunct to the work of the AzJP, we have offered a course at the ASU College of Law (I have co-taught the course along with our ASU faculty coordinator and tireless AzJP case supervisor, Professor Bob Bartels). One aspect of the course has focused on biological evidence and the work of Arizona's crime laboratories. Our students have been given DNA tutorials and have toured crime labs. In addition, as discussed in more detail below, post-mortems of exonerations have been an important part of the Project's work, and in that connection we have encountered some of the more glaring defects in at least one of Arizona's crime labs.

Until very recently the Project survived on occasional donations and a small annual grant from the Arizona Bar Foundation ($20,000). As a consequence, when we have needed the particular expertise of consultants in the DNA field, we have been constrained to seek volunteer aid. In truth, resource limitations have been a prevailing reality for our Project. The administrative hub of the Project has been located within the law firm of Osborn Maledon. The firm, which I helped found 13 years ago, has generously provided most of the Project's administrative support (coordinated by my legal secretary, Donna Toland). The firm has borne most of the Project's day-to-day out-of-pocket expenses. Within the last few weeks, thanks to a very substantial grant from the Arizona Bar Foundation ($150,000), we have now relocated the administration of the Project to ASU where we have a newly selected Executive Director, Professor Carrie Sperling, a new part-time administrative assistant, and a development director, as well as new offices and other support. These have been very exciting days for everyone associated with the Project.

II. The NIJ Postconviction DNA Testing Assistance Program (the Bloodsworth Grant Program)

I am sorry to say that our excitement about the work of the AzJP has been tempered by the frustrations that have marked our efforts to obtain a grant from the National Institute of Justice – frustrations that have been made all the more unsettling when seen in contrast with the often quite creative and helpful relationship we have enjoyed with NIJ's reviewing personnel. At the same time, our cooperative relationship with the other members of the Arizona grant application team could not have been more positive. A brief chronology may help illuminate the ups and downs of our experience with this grant application.

The AzJP is not exclusively focused on DNA cases, but as with each of the now more than 40 wrongful conviction projects in America, these cases form an important part of our work. Sadly, the DNA cases often have proven to be among the most difficult cases our Project encounters. Locating and securing the files in these cases – some of which are quite old – has often been an almost insuperable first hurdle. The inmate, his/her family, and the former defense lawyers often cannot locate and assemble the trial, appeal and post-conviction file. In many cases, the prosecutors have been uncooperative in helping our volunteers find the relevant files. The same was true of the biological evidence. In those cases in which we have succeeded in assembling the file, the cost of obtaining consulting assistance from experts on DNA analysis has further slowed our evaluations. Indeed, in many cases, we simply found it necessary to tell inmates that we lacked the resources and time to help them.

All of that seemed to change two years ago when the idea for this grant application began to emerge. The essence of our application (a copy of which is submitted with this testimony) called for a unique partnership between our Project, the Arizona Attorney General, and the umbrella organization for Arizona's law enforcement and crime lab community (the Arizona

Criminal Justice Commission – ACJC). Three essential ideas emerged that animated this application:

(1) Together we would develop a means of identifying and addressing virtually every homicide and sexual assault case in which an Arizona inmate had a serious claim of actual innocence that might be confirmed by DNA evidence. The first goal of this grant team was to work toward the day when Arizona might be among the first States – if not the first State – to be able to say that we had identified and fairly assessed every conviction where DNA might allow us to exonerate an innocent person or capture the real perpetrator. All innocence projects, and ours was no exception, have relied on word of mouth and inmate self-identification to locate the relevant cases. The more systematic approach to these cases envisioned by this grant would establish an important precedent.

(2) The application also contemplated what we believe is an almost unprecedented partnership between a project like ours and the State's chief law enforcement arm. Here the grant contemplated that the Attorney General's Office would actively aid in the location of records and the discovery of DNA materials. The grant also contemplated the cooperation on an as-needed basis of the State's crime labs in evaluating evidence and in expediting database searches for matching DNA profiles. This cooperation would remove our Project's greatest single impediment – getting the files and materials foundational to determining the existence of a wrongful conviction.

(3) Finally, each successful exoneration would become the subject of a thorough retrospective assessment so that, hopefully, we could jointly identify the underlying causes of any erroneous conviction as a foundation for considering possible reforms. The Office of the Attorney General and the Justice Project had already begun to do this with

respect to two DNA exonerations in our State, and we had all become convinced of the utility of these post-mortems as teaching tools for the criminal justice community.

It would be inaccurate and fundamentally misleading to suggest that these goals, and the ideas for how to realize them, materialized in any fully developed way at the outset of the grant-seeking process. To the contrary, one of the most positive aspects of our experience with NIJ occurred during the early stages of the process. The reviewers at NIJ took sincere interest in our application from the very outset. Many of the important details that appear in the final application are the result of suggestions made by these reviewers. For example, the suggestion that the DNA work be handled out of offices at the ASU College of Law was one that germinated during the evaluation process. The idea of generating as a "deliverable" a post mortem after every exoneration also matured as we worked with NIJ's staff. The final application owes much to the creative and constructive suggestions from the staff at NIJ.

This makes all the more confusing the sudden decision by NIJ in the summer of 2007 to announce to us that our grant application had been rejected – rejected not because of any deficiency in the merits of our proposal, but instead because we had been found not to be an "eligible" applicant. Not only was the rejection letter from NIJ a great surprise, it was also uninformative. It afforded no hint as to why we had suddenly been deemed not to be "eligible." It was not until considerably later in the summer of last year that we learned that the in-house lawyers for NIJ had determined insufficient Attorney General Terry Goddard's certification that Arizona had in place "practices" that addressed the preservation of biological evidence. The certification is an attachment to the application and to our knowledge it had not been questioned prior to the final rejection. If there was a written opinion supporting this determination of ineligibility, we were not given it. If there was a further analysis that might explain the sudden

about-face, we were not made aware of it. All we were told was that no applicant from any State had been deemed eligible and that the decision was not subject to reconsideration.

This then led to the efforts to amend the Justice Department's appropriation to clarify the eligibility of our application. This too has proved to be both a confusing and disappointing process. When the legislation first was signed by the President late in 2007, we were told that the legislative change would satisfy the statutory requirements so that our application could be funded. The only question was whether the funding would occur immediately or whether it might take a few months. Within the last few days, however, we have been told that NIJ now expects the grant application process to commence anew. This is another great disappointment for our Project. As one might expect, we have been holding a growing collection of inmate cases that should be reviewed under the grant. The inmates, their families, the victims and their families, are all powerless to do anything to accelerate this process. (At the time of our original application we had identified three such cases; there are now 18.) Our Project is equally powerless. There have been no changes in Arizona law and practice with respect to evidence preservation. The Attorney General's good faith certification remains in place. Nothing has occurred that would call it into question.

We can say this. The concepts underlying this grant application are good ones. They will serve well the public and the criminal justice community. This is a more than worthy subject for the Justice Department and Congress to embrace in a nonpartisan manner. If and when funded, we are convinced that it will lay the foundation for a unique law enforcement and innocence project joint program -- one that will realize accomplishments that have yet to be achieved in any State of which we are aware. We submit that the grant will also help shed

additional light on the issue of evidence preservation. We should know at the end of this grant cycle a great deal more whether the "practices" in this area require improvement.

III. Independent Crime Lab Oversight

Our Project is also intimately informed about and interested in the subject of crime laboratory oversight. We are aware of, and have followed closely, the crime lab funding decisions made by NIJ under the Justice for All Act (JFAA). We are familiar with the Inspector General's Reports on this subject. We are also more than mindful of the irony of NIJ's apparently rigorous approach to the eligibility requirements of the Bloodsworth Grant Program as contrasted with the less than demanding approvals of crime lab funding under the JFAA. Our perspective on the crime lab oversight topic may be worth this Committee's consideration.

As we have explained, one of the Arizona Justice Project's areas of special interest has been the retrospective assessment of DNA exonerations to determine root causes of wrongful convictions with the hope of encouraging corrective actions that will improve the criminal justice system in our State. This is an undertaking we have approached in cooperation with the Office of the Arizona Attorney General.

Our most recent port-mortem has focused on the now famous exoneration of Ray Krone. Mr. Krone was the 100th DNA exoneree, and as such, his case received considerable national attention. Mr. Krone was convicted and sentenced to death for the murder of a young female bartender in Central Phoenix more than 15 years ago. His sentence and conviction were reversed by the Arizona Supreme Court; he was tried a second time; convicted again and sentenced to life in prison. After serving ten years in prison, three years of it on Death Row, Mr. Krone was exonerated by DNA evidence. Most accounts of the case have focused on the flawed use of bite-mark evidence and the questions of junk science raised by the State's reliance on that evidence at

Mr. Krone's trials. Our examination of the case after Mr. Krone's release from prison, however, has caused our volunteers to examine another important aspect of Mr. Krone's case – the handling and evaluation of biological evidence by the City of Phoenix Crime Laboratory.

This is not the place to undertake a detailed explication of this phase of Mr. Krone's case. It is, we believe, relevant and important to observe, however, that there were in this case a number of items of biological evidence retrieved from the murder scene that (1) were never compared by the crime lab, (2) were largely ignored for many years during which Ray Krone remained on Death Row and in prison, but which (3) eventually proved to be matches to the DNA of a man who lived near the bar. His identity undetected, the real perpetrator continued to commit acts of sexual misconduct. There is at least one victim – a 7-year old girl – and possibly more victims who might have been spared this man's criminal behavior had the crime lab properly evaluated the hair, blood and saliva left at the crime scene.

Once the reality of these discoveries became known, the Office of the City of Phoenix Auditor recommended that an audit of the Phoenix Crime Lab be undertaken. Arizona had no existing agency capable of conducting such an audit, and therefore an ad hoc team of specialists in various fields was assembled for this purpose. That group of experts eventually produced a report looking at a range of activities of the lab. As one might expect, the examiners were most critical of the biological evidence unit. The lab examiner who was involved in the Krone case had been dismissed. In several respects relevant to the JFAA, however, the audit of this case has ended in a most disappointing way: (1) the results of the audit have never been made public; (2) the auditors' recommendations have been deemed advisory only; and (3) possibly the most relevant original recommendation has been ignored. The auditors thought it important at the outset to identify and to re-examine other cases in which this particular examiner might have

been involved. In fact, a list of at least some of his cases was culled from the lab's records for that purpose. That recommendation was never carried out. In the absence of a public airing of the auditors' conclusions, it is not possible to determine why, apparently, no remedial action was taken.

It is with this history in mind that we have repeatedly urged the State to develop a system of greater and more enforceable control and oversight of crime labs. In 2004, the Attorney General's Office established a DNA Forensic Science and Technology Task Force. In the summer of 2006 the AzJP met with several members of that Task Force, including leaders from the Arizona Criminal Justice Commission, the Arizona Department of Public Safety's crime laboratory, and the Attorney General's Office. The central purpose of our meeting was to convey our concerns regarding the lack of independent oversight of the State's crime labs. The Justice Department's Inspector General's first JFAA Compliance Report had been issued and, therefore, the subject of independent oversight was a topic of obvious importance. Our discussion sought to highlight the role that laboratory misconduct or negligence plays in wrongful convictions. In that connection, we talked about some of the notable cases such as the Houston Crime Lab debacle. We also provided examples of legislation pending at that time in other states. We urged these Arizona criminal justice leaders to consider legislative proposals that would establish independent oversight and increase the likelihood of detection of misconduct and negligence.

Although it was the intent of the Attorney General to have some defense community involvement in the Task Force, by the time the Task Force issued its recommendations in late 2007 there was no participation from any source other than the law enforcement community. The recommendations we suggested are not discussed in the Task Force report. Instead, the

principal recommendation of the Task Force called for the creation of an Advisory Committee to oversee the State's crime laboratories. While the Advisory Committee has no enforcement powers and plainly falls short of the independent oversight expectations of Congress in the JFAA, it is a step in the right direction.

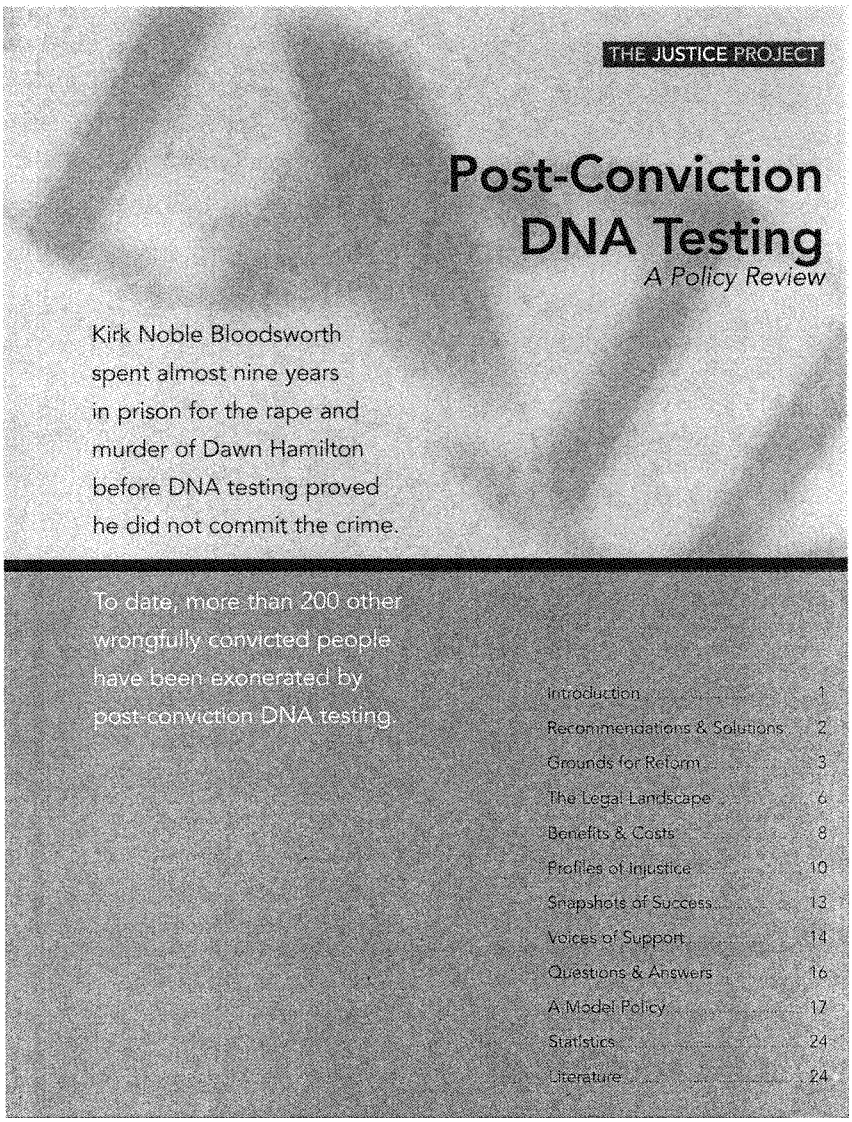
The composition of that Committee is one of the most obvious issues. It simply does not reflect the breadth and diversity of informed perspectives one might hope to bring to any serious oversight undertaking. Although no innocence project or criminal defense representative was appointed to that Advisory Committee, the AzJP has been invited to participate as an observer. In that capacity, we will continue to urge wider participation by those interested in the performance of our crime labs. We expect to continue to suggest that the composition of the Committee be expanded to include knowledgeable members of the academic community both within and outside of Arizona as well as at least one representative of a private DNA laboratory in Arizona.

IV. Concluding Observations

We wish to end on a largely optimistic note. We have every reason to expect that the DNA post-conviction grant will be funded and that our Project will eventually be able to move forward in cooperation with the Attorney General and the Arizona crime labs. We hope that within a few months the frustrations and disappointments described in our testimony will be in the past and NIJ's confidence in our grant content will be proven well-founded and beneficial to defendants, victims, and justice system participants alike in Arizona.

We also have every confidence in the good faith and cooperative intentions of ACJC and the Arizona Attorney General's Office. Most with whom we have spoken in Arizona do not fear the kind of independent oversight contemplated by Congress in the JFAA. Indeed, they would

welcome it. Most good forensic scientists want to enjoy both the reputation and the reality of independence. They also do not fear oversight. It is our hope that these hearings will help us all to realize that goal.


THE JUSTICE PROJECT
Post-Conviction DNA Testing
A Policy Review
Kirk Noble Bloodsworth spent almost nine years in prison for the rape and murder of Dawn Hamilton before DNA testing proved he did not commit the crime.
To date, more than 200 other wrongfully convicted people have been exonerated by post-conviction DNA testing.
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INTRODUCTION

Few methods are as beneficial to determining guilt and innocence as the forensic analysis of deoxyribonucleic acid, or DNA. DNA testing allows courts to render more accurate and reliable decisions at the trial phase of criminal proceedings. It also creates opportunities to prove innocence. Post-conviction DNA testing—testing performed to examine claims of innocence while an inmate is incarcerated—has been used to exonerate over 200 innocent individuals in the United States. Its benefits go beyond being a powerful tool to prove the guilt or innocence of those claiming wrongful conviction. DNA testing also allows the criminal justice system to prosecute "cold" cases and many states are expanding or establishing DNA databanks for convicted felons to find new leads in old cases. Post-conviction DNA testing contributes to a more accurate criminal justice system by enhancing the reliability of convictions and allowing wrongfully convicted persons opportunities to prove their claims of innocence.

By diligently testing DNA-based innocence claims, state judicial systems restore public confidence in the ability of the system to correct its own errors and restore freedom to those who never should have lost it.

In the United States, over 200 wrongfully convicted persons have been exonerated through the use of post-conviction DNA testing. The vast majority of these exonerations have taken place since the late 1990s. More than a dozen of those exonerated have served time on death row. A majority were convicted before DNA testing could have proven their innocence. Post-conviction DNA testing gives those who have been wrongfully convicted an opportunity for relief where there previously has not been such an opportunity. Furthermore, by diligently testing DNA-based innocence claims, state judicial systems restore public confidence in the ability of the system to correct its own errors and restore freedom to those who never should have lost it.

The federal government recognized the importance of post-conviction DNA testing with the passage and signing into law of the Innocence Protection Act on October 30, 2004.[1] Included in the Innocence Protection Act (IPA) is a post-conviction DNA testing program that authorizes $25 million over five years to help states defray the costs of post-conviction DNA testing. The program is named after Kirk Bloodsworth, the first death row inmate whose innocence was proven by DNA.[2]

While the Innocence Protection Act put the federal government at the forefront of post-conviction DNA testing, there is great room for improvement at the state level. In some states, innocent people remain imprisoned due to legal and bureaucratic hurdles that prevent post-conviction DNA testing. There are eight states that do not have post-conviction DNA statutes, and of the states with post-conviction statutes, many limit the conditions under which defendants can petition for DNA testing.[3] Many state statutes limit access to post-conviction DNA testing by designating only a short period of time after sentencing during which post-conviction DNA testing can be performed, or by allowing the destruction of evidence. In Idaho, for example, a defendant only has one year to file a post-conviction DNA petition.[4] Historically, courts have limited the amount of time one can petition for relief because "new evidence" has traditionally become less reliable as time lapses. DNA testing is different. In fact, DNA evidence can last for decades, and can be used to prove guilt or innocence long after cases close, with great accuracy. Statutes that limit accessibility to such accurate evidence threaten the fairness and accuracy of our criminal justice system.

As DNA testing techniques become increasingly sophisticated, they allow for the testing of more kinds of biological evidence and increased accuracy within each test. While earlier DNA testing may have produced two samples that appeared consistent, more recent tests may reveal differences in the two genomes. Further, many cases in which the evidence was too degraded to analyze can now be evaluated using better techniques. Ronald Jones, for example,

was convicted in 1989 after Restriction Fragment Length Polymorphism (RFLP) DNA testing could not exclude his DNA profile as inconsistent with the perpetrator's DNA. A newer and more accurate Polymerase Chain Reaction (PCR) DNA test conclusively excluded Jones as the murderer.[5]

The time is right for states to follow the federal government's lead in passing comprehensive post-conviction DNA testing laws. States with post-conviction DNA statutes that provide barriers to accessibility of such evidence should revise their laws. Robust post-conviction DNA testing statutes ensure our justice system will be more fair and accurate.

While DNA testing has become the new gold standard for determining guilt or innocence, it does not alone solve the problems of wrongful convictions. The vast majority of criminal cases do not include biological evidence that could definitively determine the identity of the perpetrator. Still, where such evidence is available and can provide compelling information about a criminal offense, justice demands that DNA testing be conducted.

RECOMMENDATIONS & SOLUTIONS

DNA testing is a remarkable technology that has developed rapidly since the first accurate description of DNA in 1953 by scientists James Watson and Francis Crick. DNA has since emerged as a highly reliable source of information in criminal trials. It is now so trusted that consistency or inconsistency between DNA samples from a crime scene and a suspect can convince a jury of guilt or innocence.

In order to create a more fair and accurate criminal justice system, states should enact legislation requiring the most expansive use of DNA evidence possible. Without post-conviction DNA testing, it is likely that the more than 200 DNA exonerees would still be in prison today. Some of them would still be awaiting execution, if not already executed, for crimes they did not commit. The mounting recognition of the fallibility of the criminal justice system has led most states to pass legislation standardizing procedures for post-conviction DNA testing. At the beginning of 2008, all but eight states have laws addressing post-conviction DNA testing.

Many states' laws, however, are either too restrictive in granting DNA testing or too lax in their standards for preserving evidence. Evidence from a crime is too often lost or destroyed, and the windows in which a defendant can introduce "new evidence" are often unduly narrow. Furthermore, most state laws fail to provide adequate access to counsel for post-conviction DNA testing petitioners. Without adequate counsel, many prisoners cannot navigate the complex system for requesting testing, are not adequately assisted in meeting deadlines and standards, or are simply left unaware of opportunities for proving their innocence through DNA testing. The National Institute of Justice issued a lengthy report designed to help the legal system handle requests for post-conviction DNA testing. The chapter entitled "Recommendations for Defense Counsel," outlines appropriate steps in filing a petition for post-conviction DNA testing, which include but are not limited to: (1) gather trial transcripts, laboratory reports, police reports, appellate briefs, post-conviction briefs, and evidence collection lists; (2) investigate and search for evidence; (3) send letters to ask custodial authorities to preserve evidence; (4) consult with prosecutors; (5) obtain executive clemency; (6) decide on a laboratory and method of testing; establish a chain of custody; (7) and learn the law in the relevant state.[6]

The following reforms will substantially improve fairness and accuracy in our criminal justice system. Wrongful convictions stem from a host of flaws in the system, but post-conviction DNA testing allows states to remedy many of their failures to do justice.

PRESERVE EVIDENCE

In order to have a fair and accurate criminal justice system, a jurisdiction must not allow premature destruction of DNA evidence. Biological evidence should be preserved and catalogued by the state during the entirety of a defendant's sentence. Such evidence should not be destroyed until after the duration of the sentence and even then only upon written permission from the defendant (or the defendant's

attorney if the defendant is unable to give informed consent). The loss or destruction of DNA evidence makes any post-conviction relief for the wrongfully convicted extraordinarily difficult, if not impossible, and jeopardizes the integrity of the criminal justice system. The prospect of technological innovation also warrants evidence preservation, as the state cannot guarantee that improvements in DNA analysis will not lead to evidence of innocence in the future.

EXPANDING ACCESS TO TESTING

When test results could be probative of guilt or innocence, or are relevant to a sentencing determination, a defendant must have access to DNA tests that were not previously available, regardless of his or her plea. There should be no time limitation on the petition. If new technology develops that might change the outcome of a test, it is necessary to perform a new test. As testing technology improves, innocent prisoners should not be "timed out" of their freedom.

CREATING STANDARD PROCEDURES

States should enact statutes specifying procedures overseen by a court when a defendant files a petition for DNA testing. This necessary reform will reduce administrative mistakes, increase efficiency, and codify this essential process. In determining whether to permit DNA testing, a judge should consider two standards. The judge should consider whether testing is 1) materially relevant to a claim of innocence; or 2) whether the results of DNA testing might lead to a lesser sentence. If either of these standards is met, post-conviction DNA testing should be performed.

ENSURING ACCURACY AND TIMELINESS

DNA testing should be performed within a reasonable time frame at a laboratory agreed upon by both the defendant and the prosecutor. If the parties cannot agree on a laboratory, the court should designate a testing facility and provide parties with a reasonable opportunity to show cause for the court to allow testing to be performed at their preferred facility. A defendant should have access to independent forensic experts of his or her choosing, subject to judicial approval. An evidence tracking system should be implemented to allow easy access to evidence at all times.

PROVIDING ASSISTANCE TO THE INDIGENT

The legal maze of petitioning for post-conviction DNA testing is cumbersome and difficult to manage. Indigent defendants petitioning for post-conviction DNA testing should have access to an attorney. As one scholar notes, "It is difficult to assemble police reports, lab reports, and transcripts of testimony that are necessary to show that a DNA test would demonstrate innocence. Indigent inmates serving hard time may not have the resources or access to counsel to gather the necessary materials expeditiously."[7] Legal counsel should be made available to indigent defendants during the petitioning process. Indigent defendants should have laboratory and testing fees paid by the state so that financial circumstances do not play a role in prolonging wrongful incarceration.

GROUNDS FOR REFORM

The number of states with statutes providing for post-conviction DNA testing continues to increase, even as many existing statutes fail to create procedures that make for a fair and accurate post-conviction DNA testing program. As of early 2008, all but eight states have laws on the books. In 2004, passage of the Innocence Protection Act represented federal-level recognition of the importance of post-conviction DNA testing. The Innocence Protection Act (IPA) allows for the allocation of federal funding to states whose programs comply with certain requirements, as set forth in the IPA and as set out in this policy review. The passage of post-conviction DNA testing statutes acknowledges the serious flaws in our system of justice while providing an opportunity to increase the credibility and quality of the system.

PRESERVING EVIDENCE

While DNA testing is a powerful tool for establishing guilt or innocence, key evidence is often lost

or discarded after a conviction.

The Supreme Court has ruled that loss or destruction of evidence is not a violation of due process unless it is done in an act of bad faith. The "bad faith" standard set by the court is very difficult to prove, meaning that it is equally unlikely that the destruction of evidence will be censured. In some states, the destruction of evidence is explicitly sanctioned in law.

After spending twelve years in prison, Kevin Byrd was exonerated based on DNA evidence. At the time of his exoneration and pardon, then-Governor George W. Bush said he expected Byrd's exoneration to be the first of what would be many re-examinations of old cases using preserved DNA evidence in Harris County. Within a week of Mr. Byrd's pardon, evidence custodians at the Harris County Clerk's office willfully destroyed at least fifty old rape kits in storage.[8] The destruction of these kits was legal under Texas and federal law, making it almost impossible to prove that the destruction was an act of "bad faith." Mr. Byrd's own evidence was slated to be destroyed before it was tested. Whether due to a filing error or an unknown party's intentional intervention, his evidence was saved, and it proved his innocence. In October 2007, the Denver (Colorado) Police Department admitted to destroying *ninety percent* of all evidence in sexual assault cases before 1995.[9] Statutes requiring preservation of evidence would significantly expand opportunities to correct otherwise irreversible errors.

The Innocence Protection Act, passed by Congress in 2004, mandates that biological evidence be preserved in all federal cases. State cases outnumber federal cases fifteen to one, and the vast majority of federal cases do not include DNA evidence at all. Currently, all but seventeen states (and the District of Columbia) lack statutes requiring the preservation of evidence throughout an inmate's incarceration.[10] Even in many states with evidence preservation statutes on the books, the situation could be improved. Rules regarding the preservation of evidence are often ignored. In New York City, for example, despite the support of prosecutors for post-conviction DNA testing, such testing did not happen in several cases because evidence had been lost.[11] States must enact a system requiring that evidence be preserved throughout an inmate's sentence.

States should also require that the chain of custody over DNA evidence be documented as long as evidence is preserved. It is essential to preserve DNA evidence, but it is also essential to ensure that DNA evidence is readily available and has not been tampered with or otherwise altered. Requiring careful documentation of the chain of custody provides an audit trail to prosecutors, defense counsel, and law enforcement and ensures that evidence is accessible to inmates wishing to test their claim of innocence.

EXPANDING ACCESS TO TESTING

Limiting access to post-conviction DNA testing by excluding defendants who confessed or pled guilty undermines the fairness and accuracy of the criminal justice system. Evidence has shown that many false confessions and even some plea bargains are obtained from innocent people.[12] Nearly a dozen of the more than 200 wrongfully convicted people in the United States initially pled guilty, and a full quarter of those persons exonerated by DNA evidence confessed to crimes that they did not commit.[13] Defendants must be permitted to petition for post-conviction DNA testing regardless of their pre-trial plea or confession.

Because DNA testing technology continues to improve, there must also be no time limitations on when defendants can request testing. There are many reasons not to impose such limitations. Without proper preservation requirements, exculpatory DNA evidence might only be found after many years have elapsed.[14] Technological developments have also led to more accurate DNA tests that can exclude suspects where previous tests could not. The original method used to test DNA, Restriction Fragment Length Polymorphism (RFLP) analysis, matched a suspect to DNA at the rate of one in many millions, but required relatively large and well-preserved samples and took up to six weeks to analyze.

Later developments led to tests that could be performed on much smaller samples; the short tandem repeat (STR) test, which is now the most common type of DNA testing, was developed in the late 1990s. STR tests are both very sensitive (*i.e.* they can be used with small samples) and, with match rates of up to one in a trillion, are even more accurate than the older RFLP tests. STR tests have proven the innocence of wrongfully incarcerated individuals who could not be excluded as the source of crime-scene DNA by previous types of testing.[15] Time limitations on when wrongfully convicted persons can petition for DNA testing do not reflect technological changes that

have already occurred. They can also deny justice for wrongfully convicted persons whose DNA evidence can only be tested after a time limitation has passed.

CREATING STANDARDIZED PROCEDURES

The post-conviction DNA petitioning process must be clear and manageable. In many states, the requirements to initiate testing are extraordinarily complex. In states without testing statutes, the decision to give a defendant access to DNA testing lies in the sole discretion of the judge. Because DNA testing is relatively new, there is often little precedent for judges to rely on in determining whether to grant petitions for DNA testing.[16] Judges oftentimes will look to the prosecution for guidance. Because prosecutors regularly oppose post-conviction DNA testing, judges are likely to oppose it as well.[17] Even though the prosecution and the defense may disagree about the meaning or value of DNA evidence in particular cases, our system of justice should provide access to reliable evidence as rapidly as possible.

The Innocence Protection Act specifies that post-conviction testing should be performed "if it may produce new material evidence that would raise a reasonable probability that the applicant did not commit the offense."[18] Senator Patrick Leahy, sponsor of the IPA, commented that the standard reflects "the principle that the criminal justice system should err on the side of permitting testing, in light of the low cost of DNA testing and the high cost of keeping the wrong person locked up."[19]

While there are a number of states that require defendants to simply show that post-conviction DNA testing could provide new, relevant evidence, there are also many that require defendants to prove that DNA testing would provide a favorable outcome that would show conclusively that the defendant is innocent. Standards such as the latter make it difficult for individuals to successfully petition for testing because few courts or juries rely entirely on one piece of biological evidence for a conviction. Such statutes create an unreasonable burden for wrongfully convicted people who need DNA testing to prove their innocence. States should follow the federal model for allowing DNA testing, which is less cumbersome and allows more wrongfully convicted persons opportunities to prove their innocence.

ENSURING ACCURACY AND TIMELINESS

Laboratories should be subject to substantive independent oversight and accreditation requirements to ensure that their work is fair and accurate. Ideally, a laboratory would be approved by a state-run oversight board. A good oversight program should take steps to ensure that testing and analysis practices are conducted effectively, reliably, and accurately, in accordance with the highest scientific standards. To best ensure the objectivity of forensic analysis, laboratories should be independent from the jurisdiction or control of law enforcement or any prosecutorial body. Some states have already adopted this particular reform.[20] Furthermore, defendants should have access to independent, private labs if they wish, subject to judicial approval.[21]

Timeliness requirements are an essential component of any comprehensive post-conviction statute. Statutes that require DNA testing to be done "as soon as practicable," such as North Carolina's, are good models.[22] States can ensure that rapid testing is practicable by eliminating any backlog of evidence waiting to be tested.

PROVIDING ASSISTANCE TO THE INDIGENT

The complexity of the petitioning process in many states requires that legal counsel be provided to defendants. The task of uncovering what evidence is still in existence—let alone what could be used to help prove a person's guilt or innocence—is difficult for experienced advocates. Relegating this job to defendants reduces the possibility of exoneration for innocent individuals. Without a lawyer, many defendants may not know the full extent of their rights for post-conviction DNA testing. They may assume that their time for testing has run out, or that their DNA samples have been discarded. For a defendant without a lawyer, the nominal ability to petition for post-conviction DNA testing will be practically meaningless.

The state should pay for DNA testing if the defendant is indigent. Generally, states that have post-conviction DNA laws have been reasonable about providing testing to all inmates deemed eligible regardless of financial circumstances, but some state statutes are silent on the matter. If an individual cannot pay for DNA testing themselves, the state has an obligation to cover the costs.

THE LEGAL LANDSCAPE

When DNA evidence was first introduced into the criminal justice system, many regarded it as a powerful tool to assist prosecutors in convicting and incarcerating the guilty. DNA evidence has also gained attention as a remarkable method of proving the innocence of the wrongfully convicted. DNA plays a vital role in exonerations, thus it is important to understand how this issue has developed in the legal field and the consequent impact of the judicial debate on post-conviction DNA testing.

FEDERAL APPROACH TO POST-CONVICTION DNA TESTING

By 1996, post-conviction DNA testing had become a prominent issue in the legal community. As a result, the U.S. Department of Justice published a report detailing the stories of twenty-eight men who were exonerated based on post-conviction DNA testing.[23] The report drew serious attention from both the scientific and the criminal justice communities. Consequently, Attorney General Janet Reno established the National Commission on the Future of DNA Evidence "to identify ways to maximize the value of DNA in our criminal justice system" and to provide recommendations for prosecutors, defense attorneys, and judges on how to handle requests for post-conviction DNA testing.[24] While these standards were only recommendations and not law, they provided guidance that ultimately shaped some state legislation and, when not mandated by state law itself, were adopted by many prosecutors' offices.[25]

In 2000, Senator Patrick Leahy introduced the Innocence Protection Act (IPA) in Congress. While the IPA incorporated many of the recommendations promulgated by the Justice Department Commission, it also put forth unique standards aimed at addressing weaknesses in the Commission's recommendations. Most notably, the IPA proposed a uniform national standard for access to DNA testing and for procedures that courts should follow when confronted with exculpatory post-conviction DNA evidence.[26] On October 30, 2004 the IPA was signed into law as part of the Justice for All Act. Among other provisions, the IPA provides access to post-conviction DNA testing in federal cases and, with some exceptions, prohibits the destruction of DNA evidence in a federal case while a defendant remains incarcerated.[27] The IPA also established the Kirk Bloodsworth Post-Conviction DNA Testing Program, which awards grants to states in order to help defray the costs of post-conviction DNA testing.[28]

COURTS' APPROACH TO POST-CONVICTION DNA TESTING

Supreme Court

Lower courts have looked to the Supreme Court for guidance over the issue of DNA preservation, specifically in *California v. Trombetta* and *Arizona v. Youngblood*.[29] While both cases present doctrines that define when due process mandates evidence preservation, the cases differ on how to determine when the destruction of evidence constitutes a violation of a defendant's right to due process. In *Trombetta*, the Supreme Court formulated a test that focuses on the probative value of the destroyed evidence and whether apparent exculpatory value existed in that evidence before it was destroyed. On the other hand, in *Youngblood*, the test is not centered on the probative value of the destroyed evidence but rather on the government's actions and the circumstances surrounding the destruction of the evidence. The *Youngblood* ruling held that due process is not violated unless the defendant can show that the loss or destruction of evidence is an act of "bad faith." The bad faith standard is nearly impossible to prove; the three dissenting Justices in the case pointed out that the line between good faith and bad faith is often difficult to judge. Proof that the party responsible for the destruction of evidence acted in bad faith has been elusive for most defendants. In the twelve years following the ruling, only three decisions were published in which a judge ruled that bad faith was a factor, thus violating the defendant's right to due process.[30]

Federal Circuits

Although circuit courts have been reluctant to address the issue of requests for post-conviction DNA testing, one case in particular demonstrates the need for legislative action to ensure proper procedural safeguards. In *Harvey v. Horan*, petitioner Harvey requested access to the biological evidence in his case.[31] Although the evidence had been previously tested using the procedures that were available at the time of his trial in 1990, Harvey sought access to the evidence in order to have it retested using more advanced tech-

nology. The Fairfax County Commonwealth Attorney refused to turn over the evidence. The Fourth Circuit upheld the Commonwealth's Attorney's action, holding that Harvey's request for post-conviction DNA testing did not apply to the limited purposes of section 1983 claims under U.S. Code, which are intended to redress constitutional and federal statute violations, neither of which Harvey claimed were violated.[32] While the Fourth Circuit denied Harvey's request, the court noted that criminal defendants should not be precluded from "avail[ing] themselves of advances in technology."[33] The court further stated that "if this entitlement is to be conferred, it should be accomplished by legislative action rather than by a federal court as a matter of constitutional right."[34]

State Courts

New York State courts were among the first to deal with the issue of how to classify requests by inmates for post-conviction testing and to provide post-conviction DNA testing by statute. In 1990, the New York Court of Appeals held in *Dabbs v. Vergari* that petitioner Dabbs was allowed to conduct post-conviction DNA testing, finding that Dabbs' request should be treated as a post-conviction motion for discovery.[35] The court pointed to *Brady v. Maryland* noting that "notwithstanding the absence of a statutory right to post-conviction discovery, a defendant has a constitutional right to be informed of exculpatory information known by the state."[36] Based on the DNA evidence, which rendered exculpatory results, Dabbs was exonerated nine years after his trial conviction.[37] Following *Dabbs* the New York Court of Appeals held in *People v. Callace* that while *Brady* was not applicable to Callace's case, post-conviction DNA testing could be classified as "newly discovered evidence" since DNA analysis was not available for the defendant at the time of trial.[38]

After *Dabbs*, other states began dealing with the issue of requests for post-conviction DNA testing. In 1991, the New Jersey Superior Court Appellate Division granted the defendant in *State v. Thomas* the chance to conduct post-conviction DNA testing based on recent developments in the scientific and judicial community.[39] In 1992, Indiana's Appellate Court held in *Sewell v. State*[40] that the defendant was entitled to post-conviction DNA testing based on the fact that the defendant did not have access to the testing at trial, and in *Commonwealth v. Brison*,[41] Pennsylvania's Superior Court vacated the defendant's conviction, and ordered the state to conduct DNA analysis. In 1995, in *Mebane v. State*, the Kansas Court of Appeals followed similar reasoning as the court in *Callace*, holding that the defendant was entitled to post-conviction DNA testing since the evidence was "new."[42]

Requests for post-conviction DNA testing initially proceeded on a case-by-case basis. Some courts classified the post-conviction DNA testing as newly discovered evidence while others did not, especially in cases in which the defendant could have had access to testing at the time of trial. For example, in 1995 the Iowa Supreme Court held in *Whitsel v. State* that post-conviction DNA testing was not newly discovered evidence since some form of testing existed at trial but the defense failed to use it.[43] The court noted that in order for evidence to be considered newly discovered, the evidence must not only be relevant but also likely to change the case's outcome. Even courts which had previously held that requests for post-conviction DNA testing constituted "newly discovered evidence," such as the New York Court of Appeals held in 1993 in *People v. Kellar*, ruled that it was not new evidence when some form of testing existed at the time of trial, but the defense did not use it.[44]

Illinois, the second state to provide post-conviction DNA testing by statute, also contributed significantly to case law in favor of a defendant's right to post-conviction testing. In 1996, in the case of *People v. Washington*, the Illinois Supreme Court found that evidence that is newly discovered which shows a defendant is actually innocent is within the jurisdiction of the court as a matter of due process.[45]

In 1999, the South Dakota Supreme Court was also confronted with the issue of requests for post-conviction DNA testing in *Jenner v. Dooley*.[46] The petitioner, who was convicted of murder and sentenced to life in prison, moved for post-conviction discovery in order to obtain access to evidence that had been microscopically examined during his trial, but had not been tested using DNA analysis. Because South Dakota lacked a statute which established a procedural right to post-conviction testing, the court had to promulgate a judicial rule. The court denied Jenner's petition for post conviction DNA testing, finding "no likelihood that a favorable DNA test result of the hair and blood evidence would produce an acquittal were Debra [Jenner] granted a new trial."[47]

BENEFITS & COSTS

As with any good policy, the benefits of post-conviction DNA testing statutes outweigh the costs. While post-conviction DNA statutes require states to incur initial costs, the costs are minimal and could end up saving money in the long run.

COSTS OF WRONGFUL CONVICTION

The most obvious cost of a judicial system without post-conviction DNA testing is the denial of justice for innocent prisoners. Many exonerees lose more than years of their life behind bars; they also lose their sense of security. Anthony Robinson, who served ten years in prison for a crime he did not commit, carefully records his location and activities throughout the day, and he believes that dressing well might help prevent a second false identification: "Since the incident occurred, I've taken on the affectation of making sure I'm presentable when I go somewhere. ...Very rarely is somebody going to say: 'He was wearing a shirt, a tie, a pair of slacks, and some hard-soled shoes.' That's not the description they're going to use to grab you."[48] Tim Durhan, another wrongfully convicted man exonerated by DNA, fantasizes about wearing a global positioning device at all times so he can prove his innocence if he is wrongly accused again.[49] Roy Criner, who served ten years in jail before DNA testing proved his innocence, worries that if he spits on the ground "they'll scrape that up and put it on a crime scene."[50] Such stories make clear that the damage of wrongful conviction does not disappear upon release, but continues to affect the well-being of those who have suffered injustice long afterward.

Families of the wrongfully convicted also bear an intense burden. While Clarence Elkins spent seven years in prison after being wrongfully convicted, his wife, Melinda, led a public campaign to uncover the truth, and his two sons assigned themselves night watchmen duties at their home because they were afraid that the real killer might come to silence their mother.[51] Wrongful convictions also prolong and exacerbate the suffering of crime victims and their families. Jennifer Thompson, who was raped when she was twenty-two years old, was absolutely certain that her rapist was Ronald Cotton, who spent more than ten years in jail before being exonerated by DNA testing. Thompson, who identified Cotton in several lineups, suffers from a deep sense of guilt for her part in Cotton's lost years: "Ronald Cotton and I are the same age," she now says, "so I knew what he had missed during those eleven years. ...I live with constant anguish that my profound mistake cost him so dearly."[52]

Each time a person is wrongfully convicted, the actual perpetrator remains free to commit more crimes. Peter Neufeld, co-founder of The Innocence Project, reports that in forty percent of the cases handled by The Innocence Project, DNA testing both exonerates the innocent and identifies the actual perpetrator. Furthermore, he says that "[i]n every single one of those cases, that perpetrator had committed violent crimes in the intervening years."[53] Every wrongful conviction undermines the justice and fairness that citizens expect from the American judicial system.

Wrongful convictions undermine the public's faith in law enforcement. Trust in the criminal justice system is vital to the rule of law and democratic governance. Enabling those who were wrongfully convicted to bring their DNA-based claims to the court restores confidence to the justice system.

BENEFITS OF REFORM

Post-conviction DNA testing provides an outlet—often the only outlet—through which defendants can prove their innocence. If a piece of retested evidence reveals a new DNA profile that does not match the petitioner's, not only can the defendant be released or at least re-tried, but the new profile can be run through the FBI's nationwide DNA database, the Combined DNA Index System (or CODIS). If the true perpetrator has been arrested since 1994, when the DNA Identification Act passed, his DNA may be in the database, enabling police officers to identify him with a so-called "cold hit." Conversely, if a defendant was convicted before 1994 and has a piece of evidence retested, his DNA will be added to the database. Even if the results are in his favor and he is exonerated of the crime for which he was sentenced, his DNA can be tested for other unsolved crimes. This system not only achieves further cold hits, but it also deters defendants who have committed crimes from wasting state resources by frivolously petitioning for testing.

Additionally, a record of the cases in which defendants have been wrongfully convicted, incarcerated, and finally exonerated provides law enforcement officials with invaluable data that can aid in the prevention of further wrongful convictions. Interested members of the prosecution and police can analyze verdicts that post-conviction DNA testing have overturned after conviction to recognize trends that pinpoint weaknesses in their investigation strategies. Correcting these weaknesses can create a more fair and accurate criminal justice system, but also raises the credibility of law enforcement officers. Readily available post-conviction DNA testing will increase the fairness of the justice system, as well as public faith in the fairness of the justice system.

Wrongful convictions undermine the public's faith in law enforcement.

Each DNA exoneration demonstrates that at some earlier point, our criminal justice system failed another individual. However, it is even more important to public confidence in the criminal justice system that the wrongfully convicted be able to make their DNA-based case. When we fail to make post-conviction DNA testing widely and readily available, we signal that we are not interested in providing justice to those who previously were denied it. When we invest in readily available and effective post-conviction DNA testing, we can revoke the unjust seizure of liberty in wrongful convictions. Each exoneration that enables those who were wrongfully convicted to bring their DNA-based claims to the court restores some measure of public confidence—and some measure of trustworthiness—to our justice system.

COSTS OF REFORM

The main costs of post-conviction DNA testing reform are threefold: the costs accrued by the time judges and clerks spend in court, the laboratory testing fees, and the physical space to store forensic evidence.

In the first category, it is worth mentioning that some defendants petition for DNA testing regardless of whether or not a law specifically provides for it. Due to the lack of clear procedure, these post-conviction testing petitions require a good deal of time and resources. A strong post-conviction statute provides courts and petitioners with a list of guidelines to streamline and simplify the process. Thus, the cost of compensating judges and clerks for their time is more manageable than it might at first appear.

DNA testing costs range widely, depending on the method used. On average, the costs are surprisingly low. A representative of the Iowa Division of Criminal Investigation said that the average test, including personnel costs, comes out to $50.[54] The Virginia Department of Planning and Budget estimated that each test would cost $35 in their fiscal analysis of a proposed post-conviction DNA testing bill.[55]

Most of the expense from post-conviction testing will be front-heavy for two reasons. First, as pre-conviction DNA testing becomes standard procedure, there will be fewer defendants petitioning for relief. Because of continued technological innovation, those more recently incarcerated will certainly still petition—as they should have the right to—but once the backlog is cleared, the influx of petitions will slow. In New York, for example, the state received petitions from only 100 inmates during the first seven years of its post-conviction DNA statute.[56] Second, as with most technology, even the most expensive DNA tests are becoming cheaper as the technology matures and becomes more widely used.

Finally, securing proper facilities and space for storing evidence during the length of a defendant's incarceration will incur costs as well. The price of expanding the storage of forensic evidence will vary from state to state, depending on how inclusive their current procedures of retaining evidence are. The state of Texas determined that the increased costs of an identical program would "not have any significant fiscal impact on [Department of Criminal Justice] agency operations."[57] Contrary to popular belief, not all DNA evidence requires expensive refrigeration units. Rather, most DNA evidence can be safely stored at room temperature, as long as the temperature is constant and the air is dry.[58] Furthermore, because scientists can conduct DNA tests on microscopic pieces of evidence, evidence custodians only need preserve the parts of evidence that contain DNA matter. Strands of hair, swabs of fluid, and clippings from garments do not take up nearly as much room as the pounds of narcotics that many jurisdictions retain.

PROFILES OF INJUSTICE

Kirk Bloodsworth's Story

Although no physical evidence linked him to the crime, Kirk Noble Bloodsworth was convicted of raping and murdering Dawn Hamilton in 1984, and he was sentenced to death in Maryland's gas chamber. In 1993, DNA testing proved Bloodsworth's innocence. A decade after Bloodsworth's exoneration, the state attorney's office finally compared DNA from the victim's clothes to DNA in state and federal databases of convicted felons. They found a match and the real killer confessed.

Detectives William Ramsey and Robert Capel were in charge of investigating the rape and murder of nine-year-old Dawn Hamilton. Two boys, a ten-year-old and a seven-year-old, saw Dawn walk into the woods with a white, tall, thin, blonde, mustachioed man. Capel interviewed each boy on the evening the crime occurred. Using templates of facial features, a severely limited and unreliable method, the ten-year-old boy helped Capel create a composite of the man. The boy asked to change several features, but Capel did not call in a freelance artist because his office wanted to release the composite to the public immediately.[59] When they released the sketch, the detectives were inundated with tips from people claiming to know men resembling the suspect. Most leads were never adequately pursued, including one linking the man in the sketch to a man wanted for a series of rapes in the Fells Point area of Baltimore.[60]

Two weeks into their search, with public pressure mounting to find the assailant, Ramsey and Capel had targeted Kirk Bloodsworth. Bloodsworth was a former marine with no criminal background. While he lived near the crime scene and had left the Baltimore area shortly after the crime was committed, he was shorter, stockier, and ruddier than the description of the suspect. Ramsey and Capel questioned and photographed Bloodsworth, who maintained his innocence. When detectives presented a photo spread to the two boys, the ten-year-old identified Bloodsworth, but said that Bloodsworth had more red in his hair than the man he saw with Dawn Hamilton. The seven-year-old did not identify any of the men.[61] The identification by the ten-year-old witness was enough for Bloodsworth to be arrested and brought to trial in February of 1985.

Despite extensive investigation, no physical evidence tied Bloodsworth to the crime.

The FBI also tested the rape kit from the crime. Although the medical examiner performing the autopsy identified spermatozoa on the cotton swabs, the FBI forensic laboratory determined that no semen was present. The FBI's serology expert made markings on the victim's underwear circling and pointing to various stains, but he was unable to detect any semen on the underwear or shorts. One of the markings on the underwear, a black arrow, pointed directly to the stain that exonerated Bloodsworth nine years later.[62]

Bloodsworth was convicted of first degree murder, sexual assault, and rape on March 8, 1985, largely due to eyewitness testimony. The judge sentenced him to death, and Bloodsworth lived on death row for more than a year.

But on July 29, 1986, the Maryland Court of Appeals reversed Bloodsworth's conviction, citing the failure of the prosecution to fully comply with pretrial discovery laws. The prosecutors failed to disclose information about several suspects in the case, one of whom was eventually charged with the crime. Bloodsworth was retried, and again convicted of the crime he did not commit. Bob Morin, the attorney ultimately responsible for Bloodsworth's exoneration, said that the investigation "was not a flawless investigation. But a lot of the flaws in the investigation got played out in front of the jury, not once but twice."[63] The judge in Bloodsworth's second trial sentenced him to two consecutive life sentences.

Bob Morin agreed to take Bloodsworth's case in 1989, even though he knew it would be difficult to get another trial. In April of 1992, Bloodsworth, who worked in the prison library and had read about DNA solving crimes in England, urged Morin to have the evidence from the crime scene tested. Although the physical evidence could have been legally destroyed after Bloodsworth's conviction, the judge from Bloodsworth's first trial had kept the evidence in a cardboard box in his chambers.[64] Morin sent the evidence to a highly renowned DNA scientist and paid for the test from his own pocket.[65]

In April of 1993, DNA testing proved that the

semen on Dawn Hamilton's underwear did not come from Kirk Bloodsworth. Morin informed the state attorney's office of the test results, but the prosecutors insisted on performing their own DNA test to confirm the results. Bloodsworth spent two additional months in prison waiting for the state's results.

Bloodsworth was released from prison on June 28, 1993. Even after his release, the state attorney's office did not apologize or acknowledge Bloodsworth's innocence. Sandra A. O'Connor, Baltimore County State's Attorney, told reporters: "I'm not prepared to say he's innocent. Only the people who were there know what happened."[66]

The state's reservations about Bloodsworth's innocence lingered until September 2003. Although Maryland State Police established a state database containing DNA samples of convicted felons from both state and federal records in 1994, the Baltimore county state's attorney's office failed to submit the data from Dawn Hamilton's case despite pressure from Kirk Bloodsworth and the public.[67] When they finally did, nearly 20 years after the crime and 10 years after Bloodsworth's exoneration, they found a match. The real killer, Kimberly Ruffner, pled guilty to the crime.

Ruffner was, in fact, the man who had been wanted for a series of rapes near Baltimore in the summer of 1984. He was also one of Kirk Bloodsworth's fellow inmates in the Maryland state penitentiary. Ann Brobst, the attorney who prosecuted Bloodsworth in both trials, delivered the news to Bloodsworth.

In 2000, Senator Patrick Leahy of Vermont invited Kirk Bloodsworth to speak before the Senate about the Innocence Protection Act. Part of the IPA, the Kirk Bloodsworth Post-Conviction DNA Testing Program, authorizes $25 million over five years to help states pay the costs of post-conviction DNA testing.

As part of his testimony before the Senate, Kirk Bloodsworth gave voice to the grief that comes from wrongful conviction:

> "Did the system work? I was released, but only after eight years, eleven months, and nineteen days, all that time not knowing whether I would be executed or whether I would spend the rest of my life in prison. My life had been taken from me and destroyed. I was separated from my family and branded the worst thing possible—a child killer. I cannot put into words what it is like to live under these circumstances... Did the system work? My family lived through this nightmare with me. My father spent his entire retirement savings. As a result, he cannot retire and must work on and on. My mother, whom I loved and stood up for me—stood right beside me the entire time—died before I was released. ...I was not allowed to go to her funeral."[68]

Kirk Bloodsworth now works as a program officer for The Justice Project, and spends his time traveling around the country to speak about the need for expanded post-conviction DNA testing and the dangers of wrongful conviction.

Clarence Elkins' Story

Clarence Elkins served seven years of a life sentence for a crime he did not commit. In spite of exculpatory post-conviction DNA tests, the court denied his motion for a new trial. Elkins was finally exonerated after he mailed a cigarette butt from a fellow prisoner to his lawyer. The DNA from the cigarette matched DNA found on both victims.

In June 1998, an intruder raped Clarence Elkins' six-year-old niece, Brooke Sutton, and raped and murdered her grandmother (Elkins' mother-in-law), Judith Johnson. When Sutton regained consciousness hours after the crime, she ran to a neighbor's house for help. The neighbor, Tonia Brasiel, who later became part of the investigation, was slow to respond, leaving the traumatized child out on her porch before driving her home. Despite the child's report of the murder, Brasiel failed to call the police or an ambulance.[69] When Elkins' niece finally did speak to investigators, she identified the murderer as "Uncle Clarence."

Detectives collected strands of hair from the crime scene, but mitochondrial DNA testing proved that the hairs were not from Elkins. Vaginal swabs from Johnson and traces of DNA from Sutton's underwear also failed to link Elkins to the crime.

But Sutton's eyewitness testimony was enough for investigators to pursue Clarence Elkins. Four days

after the attack, he was arrested and charged with murder, attempted aggravated murder, rape, and felonious assault. In May 1999, Elkins stood trial with the possibility of receiving the death penalty.

Due to the lack of any physical evidence connecting Clarence Elkins to the crime, prosecutors relied heavily upon the testimony of Elkins' young niece. Elkins' attorney, Lawrence Whitney, contended that nineteen witnesses placed Elkins an hour away from the crime on the evening of the murder. The jury was not convinced, and on June 4, 1999, Elkins was convicted. He was sentenced to life in prison. Melinda Elkins, whose belief in her husband's innocence estranged her from her sister and her niece, told reporters, "It was a triple tragedy for me. I lost my mother, my husband, and my sister in one instance."[70]

In 2002, Elkins and his attorneys filed a motion for a new trial. Brooke Sutton, Elkins' niece, had recanted her testimony that led to Elkins' conviction. The court denied Elkins' motion for a new trial, Elkins appealed, and in 2003, the state upheld the denial for a new trial, claiming that Sutton's initial testimony was "afforded more credibility" than her recantation.[71]

But with the help of Martin Yant, a private investigator who specializes in wrongful convictions, Melinda Elkins continued to investigate the case. When national news media directed its attention to her cause, individuals moved by her story donated tens of thousands of dollars to help pay for DNA testing.[72]

In 2004, the Ohio Innocence Project sent evidence from the crime scene, including a vaginal swab from the rape kit, hair and skin cells from underneath Johnson's fingernails, and DNA from Sutton's nightgown, to a laboratory for DNA testing. The results confirmed that Elkins' DNA was not found in any of the material tested.

In March 2005, Elkins and the Ohio Innocence Project were granted a hearing on their request for a new trial based on the new DNA evidence. Michael Carroll, the Summit County assistant prosecutor, told reporters that "the public sentiment is that [the DNA evidence] is significant, but I don't think it is. So, I think it's best we have a hearing and just air things out."[73]

In spite of the exculpatory DNA results, in July 2005 the court denied Elkins' motion for a new trial.

But Martin Yant and Melinda Elkins had developed suspicions about another man who was eventually charged with the crime: Earl Gene Mann.

At the time of the crime, Mann was living with Tonia Brasiel, the neighbor to whom Elkins' niece fled for help. And in May 2002, Earl Mann was sentenced to prison for raping his and Brasiel's three daughters. Melinda Elkins wondered if Brasiel's odd response to Brooke Sutton's plea for help on the morning after the crime was due to her boyfriend's involvement in the murder; Melinda suspected that Brasiel had even coached the six-year-old victim to name "Uncle Clarence" as her attacker.[74]

In order to prove that he committed the crime, Melinda Elkins needed a DNA sample from Mann. She even "sent some letters to Earl Mann under a fictitious name as a pen pal, hoping he would write back to me. I had even included the envelopes,"[75] which she hoped Mann would lick, leaving DNA traces. He never responded. The state of Ohio had Mann's DNA profile in its massive database, but laws prohibited her from accessing it.[76]

Clarence Elkins had moral qualms about going to extreme lengths to take DNA from Mann: "I didn't want to point any fingers like those that had been pointed at me."[77] But one day in the summer of 2005, Elkins saw fellow inmate Mann flick away his cigarette butt. Elkins kept the butt inside his *Strong's Bible Concordance* and mailed the evidence to his attorney in a plastic bag.[78]

The suspicions of Melina Elkins were confirmed when test results identified Mann's DNA as the same as that found on the victim. Still, the Summit County Prosecutor's Office was not interested in hearing about the case. This led Mark Godsey, co-founder of the Ohio Innocence Project, to ask state Attorney General Jim Petro to help. Petro took the unusual step of intervening via press conference, where he urged the county to release Elkins in time for Christmas.[79] Petro told reporters: "Our experience with Summit County is they didn't really know what DNA meant. They didn't think of it as conclusive as we did. And I was kind of surprised at that."[80]

Elkins was released on December 15, 2005. In March of the following year, he agreed to accept $1.075 million from the state as compensation for his wrongful conviction.[81]

Earl Mann pled not guilty, in spite of two DNA tests showing that the chances that someone else committed the murder are nineteen million to one. He is in jail awaiting trial.

SNAPSHOTS OF SUCCESS

CALIFORNIA

In September of 2000, the California State Senate and Assembly unanimously passed, and then-Governor Gray Davis signed into law, a model post-conviction DNA testing statute. The law requires the state to preserve DNA evidence for the duration of a defendant's time in prison. The petition for post-conviction DNA testing is considered regardless of the initial plea before trial, and the law stipulates that the testing should be performed at a laboratory that is "mutually agreed upon" by the district attorney and the petitioner. Finally, indigent defendants can request legal counsel, and the court may provide state-funded tests when the defendant cannot afford them.

California's statute was only the seventh in the United States providing for post-conviction DNA testing. At the time of the law's passage, most states with post-conviction statutes limited the opportunity to petition to defendants on death row. California's law allows anyone convicted of a felony to petition. Furthermore, the language used to determine the standard is appropriately broad: a successful petition for DNA testing would "raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction."[82]

FLORIDA

Florida's post-conviction DNA testing statute passed in 2001, after two separate high-profile exonerations. The law included a strict statute of limitations: a defendant only had two years from the date of his or her conviction, or until October 1, 2003 (whichever was later) to submit a petition for DNA testing. Evidence preservation standards were subject to the same statute of limitations. In September 2003, as the filing deadline approached, the Florida Bar issued an emergency request to the Florida Supreme Court asking for a one year extension. The Court extended the deadline, and on May 20, 2004, the Florida Legislature passed a bill to amend the statute giving defendants four years after a conviction, or until October 1, 2005 (whichever was later) to petition for testing.

But as the 2005 deadline approached, defense lawyers and petitioners were once again rushing to submit motions for DNA testing. *The Miami Herald* interviewed Senator Alex Villalobos, the Republican who sponsored the original DNA law: "'I don't want to just extend the deadline for two years again. We'll just be back here again in two years.' In the past, opponents of testing in old cases have argued that leaving the window open robs victims and their families of finality. Villalobos, a former prosecutor, disagrees. 'If I'm a victim or the family member of a victim, I don't have finality if the wrong person is in prison. That's not justice for anyone.'"[83]

On August 8, 2005, Governor Jeb Bush issued an executive order to prevent evidence custodians from destroying evidence that could contain DNA material. Unfortunately, the order allowed disposal of evidence if defendants failed to request testing within 90 days after the state sent written notices of pending destruction to defendants, their lawyers, prosecutors and the attorney general.

Finally, on June 23, 2006, Governor Bush approved the Legislature's amendment to the post-conviction DNA testing law. The amended law imposes no time limitations for petitioners, and requires preservation of evidence throughout a defendant's sentence. The law includes other model provisions: defendants may petition for testing regardless of their initial plea, and the state appoints counsel and pays for DNA testing if the applicant is indigent.

NEBRASKA

In 2001, Nebraska passed legislation allowing any person in state custody to petition for post-conviction DNA testing. Nebraska's law places no statute of limitations on petitioners. The court must appoint counsel for indigent petitioners, and the cost of DNA testing may also be provided by the state. Furthermore, evidence that could be used for DNA analysis must be preserved throughout a defendant's sentence.

The bill includes model language establishing the importance of post-conviction DNA testing:

> "Over the past decade, DNA testing has emerged as the most reliable forensic technique... Because of its scientific precision and reliability, DNA testing can, in some cases, conclusively establish the guilt or inno-

cence of a criminal defendant. In other cases, DNA may not conclusively establish guilt or innocence but may have significant probative value to a finder of fact. DNA evidence produced even decades after a conviction can provide a more reliable basis for establishing a correct verdict than any evidence proffered at the original trial. DNA testing responds to serious concerns regarding wrongful convictions, especially those arising out of mistaken eyewitness identification testimony; and there is a compelling need to ensure the preservation of biological material for post-conviction DNA testing..."[84]

The bill's sponsor, Senator Ernie Chambers, introduced another bill into the Nebraska Legislature on May 21, 2007 "to express support of all efforts to learn from DNA exonerations to increase the accuracy and reliability of criminal investigations, strengthen prosecutions, protect the innocent, and enhance public safety."[85] The bill, expressing the sense of the legislature that learning from DNA exonerations was important, was adopted on May 31, 2007.

VOICES OF SUPPORT

"In America, we must make doubly sure no person is held to account for a crime he or she did not commit, so we are dramatically expanding the use of DNA evidence to prevent wrongful conviction."[86]

George W. Bush
President of the United States

"Post-conviction DNA testing is an essential safeguard that can save innocent lives when the trial process has failed to uncover the truth. But it would be neither just nor sensible to enact a law that merely expanded access to DNA testing. It would not be just because innocent people should not have to wait for years after trial to be exonerated and freed. It would not be sensible because society should not have to wait for years to know the truth. When innocent people are convicted and the guilty are permitted to walk free, any meaningful reform effort must consider the root causes of these wrongful convictions and take steps to address them."[87]

Patrick Leahy
Senior Senator from Vermont

"Advanced DNA testing improves the just and fair implementation of the death penalty. ...[I]t is indisputable that advanced DNA testing lends support and credibility to the accuracy and integrity of capital verdicts. ...All Americans—supporters and opponents of the death penalty alike—should recognize that DNA testing provides a powerful safeguard in capital cases. We should be thankful for this amazing technological development. I believe that post-conviction DNA testing should be allowed in any case in which the testing has the potential to exonerate the defendant of the crime."[88]

Orrin Hatch
Senior Senator from Utah

"The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial," from his dissenting opinion in *Arizona v. Youngblood*, the U.S. Supreme Court case which held that destruction of evidence does not violate due process unless the defendant can prove that the police acted in "bad faith."[89]

Justice Harry Blackmun
United States Supreme Court

"*[Youngblood]* is the Dred Scott decision of modern times."[90]

Dr. Edward T. Blake
DNA scientist

"DNA testing is too important to allow some states to offer no remedy to those incarcerated who may be innocent of the crimes for which they were convicted."[91]

Eliot Spitzer
Governor, New York State

"Our system of justice . . . is capable of producing erroneous determinations of both guilt and innocence. A right of access to evidence for tests which . . . could prove beyond any doubt that the individual in fact did not commit the crime, is constitutionally required, I believe, as a matter of basic fairness."[92]

Hon. J. Michael Luttig
4th U.S. Circuit Court of Appeals

"Using DNA technology fairly and judiciously in post-conviction proceedings will help those of us responsible for the administration of justice do all we can to ensure a fair process and a just result."[93]

Janet Reno
Former Attorney General of the United States

"Prosecutors have nothing to lose—unless they put their pride before their professionalism—in allowing post-conviction DNA requests to go forward. If the DNA test proves the defendant is guilty, then all doubts will be resolved. If it exonerates the defendant, then there is an opportunity to correct a tragic mistake and begin the search for the real criminal."[94]

William Sessions
former Director of the FBI and former prosecutor

"What should govern on these questions is not legal precedent, not factual loopholes, but the fundamental obligation of everyone in the criminal justice system to ensure that only the factually guilty suffer in prison."[95]

Peter Neufeld
Co-Founder of The Innocence Project

"The [Massachusetts] DA's office has recognized the importance, both morally and ethically, of providing a defendant some kind of meaningful access to DNA technology that could serve to exonerate him—especially when the government now relies on that very science to convict him."[96]

Mark T. Lee
Asst. District Attorney, Suffolk County, Massachusetts

"Prosecutors have a strong incentive to preserve their convictions to get elected or re-elected. That leads to an institutional pressure to get samples destroyed while the destroying is good."[97]

Eric Freedman
Hofstra University law professor

"Nobody should have to wait for justice. ...I struggled for nearly twenty years to clear my name. This legislation [The Innocence Protection Act] will prevent innocent people from ending up on death row, and it will ensure that the truly guilty are caught."[98]

Kirk Bloodsworth
Death row exoneree

QUESTIONS & ANSWERS

Once a statute is enacted, will the judiciary be flooded with petitions for DNA testing?

This has not been the case in states with post-conviction DNA testing laws. For example, New York, which has quite liberal standards for post-conviction DNA testing, only received a total of 100 applications during the first seven years that its statutes were in effect.[99] Furthermore, a number of different factors—the length of time evidence is preserved, and which defendants are eligible for testing, to name just two—could lead to different results. By and large, states with post-conviction DNA statutes did not experience an overwhelming deluge of applications after the passage of these laws. While there should be an initial increase in applications, the increasingly widespread use of pre-trial DNA analysis will likely contribute to a tapering off of demand after the initial backlog of cases is processed.

Won't post-conviction DNA testing undermine the finality of our legal system?

Finality does offer closure to victims of a crime and the victims' families. Still, the benefits to justice that post-conviction DNA tests bring are too great to ignore. DNA testing also has the benefit of increasing finality by adding a degree of certainty to the judicial process. Finally, there is widespread support for DNA testing in the American public. As of 2000, more than ninety percent of Americans agreed that DNA testing should be made available to defendants and inmates in all cases in which it has the potential to establish guilt or innocence.[100]

Will the cost of DNA testing be too burdensome for states to achieve?

The cost of a DNA test can be as little as $35, and even the most expensive testing still costs less than housing an inmate in prison for a year.[101] It's the cost of storing evidence that contributes most of the related expenditure, and this cost can vary widely from state to state, depending on the state's size as well as how advanced its current evidence storage system is. California estimated it would cost about $1 million a year, but Texas said it would not pose a "significant fiscal impact."[102]

Why should defendants who plead guilty or confessed to a crime be allowed access to DNA testing?

Documented false confessions leading to wrongful convictions occur more than anyone suspected prior to DNA testing. Likewise, nearly a dozen of the over 200 DNA exonerees pled guilty to crimes we now know that they did not commit.

While it might be difficult to accept that an innocent person might confess to a crime they did not commit, many of the reasons are well known. Intense and often extreme pressure from police interrogators, youth and vulnerability, and mental illness or handicap all leave an innocent suspect likely to confess to a crime they have not committed. Often, innocent suspects will believe that by confessing to a crime, they will be able to escape the extremes of an interrogation and then prove their innocence at trial.

Take for example the case of Jeff Deskovic, who falsely confessed to murder, rape, and possession of a weapon. Deskovic, then sixteen years old, believed that by telling interrogators what they wanted to hear he would not be jailed. Jurors believed his false confession despite DNA evidence presented at trial that proved he was not guilty. Deskovic spent fifteen years in prison for a crime he did not commit before subsequent DNA tests matched the murder to another man already serving time in prison for murder.[103]

Given the relatively low cost of DNA testing, there is no compelling reason to deny testing, regardless of a defendant's pre-trial plea or confession.

Is it necessary for defendants sentenced today, whose forensic evidence has already been tested, to be able to perform more DNA testing during their sentence?

The number of samples analyzed should certainly decrease in the coming years, but because technology is constantly advancing, evidence that could not be previously tested can now be analyzed, and evidence that could not reveal conclusive results can often now exonerate or further inculpate the defendant.[104] Likewise, some exonerees (such as the above mentioned Jeff Deskovic) were wrongfully convicted on other grounds despite the presence of exculpatory DNA evidence at trial. We should plan for future technological breakthroughs or positive matches to other persons on DNA databases now, ensuring that when DNA technology improves, we are prepared to accommodate its impact.

A MODEL POLICY

AN ACT CONCERNING POST-CONVICTION DNA TESTING

I. Purpose

The purpose of this Act is to ensure that the innocent are protected by providing post-conviction DNA testing as a means of exonerating the wrongfully convicted. Because post-conviction DNA testing is a scientifically reliable method of proving a wrongfully convicted person's innocence, all biological evidence related to a defendant's criminal case should be preserved, a defendant should have the right to petition for post-conviction DNA testing, courts should have procedures in place to oversee the petitioning process and order testing, counsel should be provided to indigent defendants throughout the petitioning process, discovery related to the testing of biological evidence should be disclosed, and a Task Force should be established to devise standards regarding the proper collection and retention of biological evidence.

II. Scope

These standards should be applied in all criminal cases where biological evidence exists.

III. Definitions

A. When used in this Act, "biological evidence" means the contents of a sexual assault examination kit; and/or any item that could contain blood, semen, hair, saliva, skin tissue or other identifiable biological material from a victim of the offense that was the subject of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies whether that material is catalogued separately (*e.g.*, on a slide, swab or in a test tube) or is present on other evidence (including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups, cigarettes, etc.).

B. When used in this Act, "DNA" means deoxyribonucleic acid.

C. When used in this Act, "custody" means actual custody of a person under a sentence of imprisonment, custody of a probationer, parolee, or person on extended supervision by the department of corrections, actual or constructive custody of a person pursuant to a dispositional order, in institutional care, on conditional release, or on supervised release pursuant to a commitment order.

D. When used in this Act, "profile" means a unique identifier of an individual, derived from DNA.

E. When used in this Act, "state" refers to any governmental or public entity within [State] (including all entities within any city, county, or other locality) and its officials or employees, including but not limited to law enforcement agencies, prosecutors' offices, courts, public hospitals, crime laboratories, and any other entity or individual charged with the collection, storage and/or retrieval of biological evidence.

IV. Petition for Post-conviction DNA Testing

Notwithstanding any other provisions of law governing post-conviction relief, a person convicted of a crime and who asserts he did not commit that crime may at any time file a petition requesting forensic DNA testing of any biological evidence secured in relation to the investigation or prosecution attendant to the conviction. Persons eligible for testing include the following:

A. Persons currently incarcerated, serving a sentence of probation or who have already been released on parole;
B. Persons convicted on a plea of not guilty, guilty (including "Alford" pleas) or *nolo contendere*; or
C. Persons who have finished serving their sentences.

V. Proceedings

The petitioner shall be granted full, fair and prompt proceedings upon the filing of a motion under the IPA. The petitioner shall serve a copy of such a motion upon the attorney for the state. The state shall file its response to the motion within 30 days of the receipt of service. The court shall hear the motion no sooner than 30 and no later than 90 days after its filing. Once the court hears the motion, and if the court grants petitioner's request, testing should be performed as soon as is practicable.

VI. Order for Post-conviction Testing

The court shall order testing upon the filing of a motion for post-conviction DNA testing, but only after the court provides the state with notice and an opportunity to respond and it holds a hearing on the motion in which it finds:

A. A reasonable probability that DNA evidence is materially relevant to a claim of innocence or reduced culpability;
B. One or more of the item(s) of evidence that the petitioner seeks to have tested still exists;
C. The evidence to be tested was secured in relation to the offense underlying the challenged conviction and:
    1. Was not previously subjected to DNA testing; or
    2. Was previously subjected to DNA testing and can now be subjected to additional testing using new methods or technologies
D. DNA testing that provides a reasonable likelihood of more probative results; and
E. The chain of custody of the evidence to be tested establishes that the evidence has not been tampered with, replaced or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself has the potential to establish the integrity of the evidence. For purposes of this Act, evidence that has been in the custody of law enforcement, other government officials, or a public or private hospital shall be presumed to satisfy the chain-of-custody requirement of this subsection, absent specific evidence of material tampering, replacement, or alteration; and
F. The application for testing is made to demonstrate innocence or the appropriateness of a lesser sentence and not solely to unreasonably delay the execution of sentence or the administration of justice.

VII. Order for Post-conviction Comparison of Crime Scene Evidence to Forensic DNA Databases

Upon motion by a petitioner, and after the state has been provided with notice and an opportunity to respond and a hearing is held;

A. If the court finds that comparison of the crime scene DNA profile to:
   1. The State and/or National DNA Index System,
   2. Other suspects in the case, and
   3. Evidence from other cases
      a. Is materially relevant to a claim of innocence;
      b. Or a match between the crime scene evidence and any DNA from items 1-3 may lead to a lesser sentence;

B. The court shall order that the state crime laboratory:
   1. Generate a DNA profile from specified crime scene evidence, and compare the generated DNA profile to:
      a. Profiles in the [State] Designated Offender DNA Database (or other appropriate state name of offender database);
      b. [State] crime scene evidence database;
      c. The National DNA Index System;
      d. DNA samples from other suspects in the case; and
      e. DNA evidence from other cases; and
   2. Promptly report back to the court the results of all such DNA comparisons.

VIII. Counsel

The court may appoint counsel for an indigent petitioner at any time during proceedings under this Act.

A. If the petitioner has filed *pro se*, the court shall appoint counsel for the petitioner upon a showing that DNA testing may be material to the petitioner's claim of wrongful conviction.

B. The court, in its discretion, may refer *pro se* requests for DNA testing to qualified parties for further review, without appointing the parties as counsel at that time. Such qualified parties may include, but shall not be limited to, indigent defense organizations or clinical legal education programs.

C. If the petitioner has retained private *pro bono* counsel that may include, but shall not be limited to, counsel from a nonprofit organization that represents indigent persons, the court may, in its discretion, award reasonable attorney's fees and costs at the conclusion of litigation.

D. Counsel must be appointed not later than the 45th day after the date the court finds reasonable grounds or the date the court determines that the person is indigent, whichever is later.

IX. Discovery

A. At any time after a petition has been filed under this Act, the court may order:
   1. The state to locate and provide the petitioner with any documents,

notes, logs or reports relating to items of physical evidence collected in connection with the case or otherwise assist the petitioner in locating items of biological evidence that the state contends have been lost or destroyed;

2. The state to take reasonable measures to locate biological evidence that may be in its custody;
3. The state to assist the petitioner in locating evidence that may be in the custody of a public or private hospital, public or private laboratory or other facility; and/or
4. The production of laboratory reports prepared in connection with the DNA testing, as well as the underlying data and the laboratory notes, if evidence had previously been subjected to DNA testing.

B. If the prosecution or the petitioner previously conducted any DNA or other biological-evidence testing without knowledge of the other party, such testing shall be revealed in the motion for testing or response.

C. If the court orders new post-conviction DNA testing in connection with a proceeding brought under this Act, the court shall order the production of any laboratory reports prepared in connection with the DNA testing. The court may, in its discretion, also order production of the underlying data, bench notes or other laboratory notes.

D. The results of any post-conviction DNA testing conducted under this Act shall be disclosed to the prosecution, the petitioner and the court.

E. Upon receipt of a motion for post-conviction DNA testing, the state shall prepare an inventory of the evidence related to the case and issue a copy of the inventory to the prosecution, the petitioner and the court.

X. Choice of Laboratory

A. If the court orders DNA testing, such testing shall be conducted by a facility mutually agreed upon by the petitioner and the state and approved by the court.

B. If the parties cannot agree, the court shall designate the testing facility and provide parties with a reasonable opportunity to show cause for the court to allow testing to be performed at their preferred facility.

C. The court shall impose reasonable conditions on the testing to protect the parties' interests in the integrity of the evidence and the testing process.

XI. Payment

A. If a state or county crime laboratory conducts post-conviction DNA testing under this Act, the state shall bear the costs of such testing.

B. If testing is performed at a private laboratory, the court may require either the petitioner or the state to pay for the testing if cause be shown by the defense and as the interests of justice require.

C. If the state or county crime laboratory does not have the ability or resources to conduct the type of DNA testing to be performed, the state shall bear the costs of testing at a private laboratory that has such capabilities and is mutu-

ally agreeable to the petitioner and to the state.

D. If, under the above subsection (C), parties are not able to agree on a laboratory, then the court shall designate the testing facility and provide parties with a reasonable opportunity to show cause for the court to pay for testing at their preferred facility.

XII. Appeal

The petitioner shall have the right to appeal a decision denying post-conviction DNA testing.

XIII. Successive Petitions

A. If the petitioner has filed a prior petition for DNA testing under this Act or any other provision of law, the petitioner may file and the court shall adjudicate a successive petition or petitions under this Act, provided the petitioner asserts new or different grounds for relief, including, but not limited to, factual, scientific or legal arguments not previously presented or the availability of more advanced DNA technology.

B. The court may also, in its discretion, adjudicate any successive petition of the interests of justice so require.

XIV. Additional Orders

A. The court may in its discretion make such other orders as may be appropriate. This includes, but is not limited to, designating:

1. The type of DNA analysis to be used;
2. The testing procedures to be followed;
3. The preservation of some portion of the sample for testing replication;
4. Additional DNA testing, if the results of the initial testing are inconclusive or otherwise merit additional scientific analysis; and/or
5. The collection and DNA testing of elimination samples from third parties.

B. DNA profile information from biological samples taken from any person pursuant to a motion for post-conviction DNA testing shall be exempt from any law requiring disclosure of information to the public.

XV. Procedure Following Test Results

A. If the results of forensic DNA testing ordered under this Act are favorable to the petitioner, the court shall schedule a hearing to determine the appropriate relief to be granted. Based on the results of the testing and any evidence or other matter presented at the hearing, the court shall thereafter enter any order that serves the interests of justice, including any of the following:

1. An order setting aside or vacating the petitioner's judgment of conviction, judgment of not guilty by reason of mental disease or defect or adjudication of delinquency;
2. An order granting the petitioner a new trial or fact-finding hearing;

3. An order granting the petitioner a new sentencing hearing, commitment hearing or dispositional hearing;
4. An order discharging the petitioner from custody;
5. An order specifying the disposition of any evidence that remains after the completion of the testing;
6. An order granting the petitioner additional discovery on matters related to DNA test results or the conviction or sentence under attack, including, but not limited to, documents pertaining to the original criminal investigation or the identities of other suspects; and/or
7. An order directing the state to place any unidentified DNA profile(s) obtained from post-conviction DNA testing into state and/or federal databases.

A. If the results of the tests are not favorable to the petitioner, the court:
   1. Shall dismiss the petition; and
   2. May make any further orders that are appropriate, including those that:
      a. Provide that the parole board or a probation department be notified of the test results;
      b. Request that the petitioner's DNA profile be added to the state's convicted offender database;
      c. Provide that the victims be notified of both the application for DNA testing and the results.

XVI. Consent

A. Nothing in this Act shall prohibit a convicted person and the state from consenting to and conducting post-conviction DNA testing by agreement of the parties, without filing a motion for post-conviction DNA testing under this Act.
B. Notwithstanding any other provision of law governing post-conviction relief, if DNA test results are obtained under testing conducted upon consent of the parties which are favorable to the petitioner, the petitioner may file and the court shall adjudicate, a motion for post-conviction relief based on the DNA test results under section XVI of this Act.

XVII. Standards and Training of Evidence Custodians

A. From appropriations made for that purpose, a statewide Task Force comprised of members appointed by the Governor; the Attorney General; the state's District and County Attorneys Association; the state's Criminal Defense Lawyers Association; the state's Bar Association; the Judiciary/Criminal Justice Committee of the [State] Senate; the Judiciary/Criminal Justice Committee of the [State] House of Representatives; the Chief Justice of the Supreme Court; the chancellor of the State University system; the [state] property clerk's association; and the State Police, shall devise standards regarding the proper collection and retention of biological evidence; and

B. The Division of Criminal Justice Services shall administer and conduct training programs for law enforcement officers and other relevant employees that are charged with preserving biological evidence regarding the methods and procedures referenced in this Act.

XVIII. Preservation of Evidence

A. Notwithstanding any other provision of law, every appropriate governmental entity shall retain each item of physical evidence that may contain biological material secured in connection with a criminal case in the amount and manner sufficient to develop a DNA profile from the biological material contained in or included on the evidence for the period of time that any person connected to that case, including any co-defendant(s) convicted of the same crime, remains incarcerated, on probation or parole, civilly committed, or subject to registration as a sex offender.

B. This Act applies to evidence that:
   1. Was in the possession of the state during the investigation and prosecution of the case; and
   2. At the time of conviction was likely to contain biological material.

C. This requirement shall apply with or without the filing of a petition for post-conviction DNA testing, and to pleas of not guilty, guilty, or *nolo contendere*.

D. In cases where a petition for post-conviction DNA testing has been filed under this Act, the state shall prepare an inventory of the evidence related to the case and submit a copy of the inventory to the petitioner and the court.
   1. If evidence is intentionally destroyed after the filing of a petition under this Act, the court may impose appropriate sanctions on the responsible party or parties.
   2. If the court finds that evidence was intentionally destroyed in violation of the provisions of this statute, it shall consider appropriate remedies.
   3. If the court determines that evidence was destroyed in violation of any of the provisions of this statute, the court may impose appropriate sanctions and/or remedies for noncompliance such as contempt; granting a new trial; dismissal of charges; and/or sentence reduction or modification.

E. Should the state be called upon to produce biological evidence that could not be located and whose preservation was required under the provisions of this statute, the evidence custodian assigned to the entity charged with the preservation of said evidence shall provide an affidavit in which he describes, under penalty of perjury, the efforts taken to locate that evidence and that the evidence could not be located.

XIX. Development of Centralized Tracking System

The statewide Task Force shall also make recommendations for a statewide centralized tracking system for all biological evidence in the state's possession. The system shall allow evidence connected to both open cases and post-conviction DNA testing cases to be located expeditiously.

STATISTICS

At the end of 2007, over 200 people have been exonerated with DNA evidence. Brandon L. Garrett, author of "Judging Innocence," published in *Columbia Law Review* in January 2008, conducted the first in-depth study of the first two hundred individuals exonerated by DNA testing. He found that "[m]ore than one quarter of all post-conviction DNA exonerations (fifty-three) occurred in cases where DNA was available at the time of the criminal trial" (after 1990).[105] Reasons for these wrongful convictions include advances in DNA technology since the time of trial, forensic fraud, the failure of defense counsel to request DNA testing, conviction despite DNA exclusion, and court denial of the DNA request.

In appeals processes, "courts denied at least twelve exonerees relief despite at least preliminary DNA test results excluding them; each was later exonerated after an executive or higher court granted relief. Forty-one (twenty-one percent) received a pardon from their state executive, often because they lacked any available judicial forum for relief."[106]

Garrett notes that "[t]he demographics of the group are not representative of the prison population, much less of the general population."[107] He describes the group as all male save one, with twenty-two juveniles, twelve mentally handicapped people, one-hundred twenty-four black, and seventeen Hispanic exonerees. Seventy-three percent of those proven innocent of rape are black or Hispanic, while only about "thirty-seven percent of all rape convicts are minorities."[108]

According to The Innocence Project, forty-percent of all exonerations have resulted in the indictment of the actual perpetrator, and the average time exonerees served in prison is twelve years.

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The following materials are recommended reading for individuals interested in enhancing their knowledge of post-conviction DNA testing.

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ENDNOTES

[1] The Kirk Bloodsworth Innocence Protection Act, S. 486, 107th Cong. (2001) is a part of the larger and broader Justice for All Act of 2004, PUB. L. NO. 108-405, 118 STAT. 2260 (2004).H.R. 5107, 108th Cong. (2004)

[2] Funding for this program has not been distributed to the states as of yet. The Department of Justice and Congress are currently reviewing the program to ensure that funding is made readily available when appropriate.

[3] Solomon Moore, "Exoneration Leads to Change in Legal System," *The New York Times*, October 1, 2007. Alabama, Alaska, Massachusetts, Mississippi, South Carolina, South Dakota, and Wyoming lack statutes allowing post-conviction DNA testing. Oklahoma's statue expired in 2005.

[4] IDAHO CODE ANN. § 19-4901 (2004)

[5] *See, for example*, Locke E. Bowman and Sally A. Moyer, "Ronald Jones: Request for Clemency," http://www.law.northwestern.edu/macarthur/documents/compensation/JonesClemencyPet.pdf

[6] National Commission on the Future of DNA Evidence, U.S. Department of Justice, *Post-conviction DNA Testing: Recommendations for Handling Requests*, Washington: Government Printing Office, 1999: 43.

[7] Senate Judiciary Committee, Barry Scheck speaking at the *Hearing on Preventing the Execution of the Innocent*, 106th Cong. 2nd sess., 2000.

[8] Cynthia Jones, *Evidence Destroyed, Innocence Lost*," 42 AM. CRIM. L. REV. 1239, 1266 (2005): 1239.

[9] Christopher N. Osher, "City police admit evidence purge," *The Denver Post*, October 11, 2007.

[10] States that require preservation of evidence throughout a person's incarceration are Alaska, California, Connecticut, Florida, Hawaii, Illinois, Kentucky, Maine, Maryland, Michigan, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, Texas, and Washington, DC.

[11] Peter Neufeld. *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG L. REV. 639, 641 (2001)

[12] *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM L. REV. (January 2008).

[13] *See Id.* and The Innocence Project, "Facts on Post-Conviction DNA Access," http://www.innocenceproject.org/Content/351.php.

[14] *See, for example*, Kirk Bloodsworth's story, *infra* pp 10-11.

[15] Bowman and Moyer, "Ronald Jones: Request for Clemency".

[16] Karen Christian, "*And the DNA Shall Set You Free*": *Issues Surrounding Post-conviction DNA Evidence and the Pursuit of Innocence*, 62 OHIO ST. L. J. 1195, 1214 (2001), citing *Developments in the Law: Confronting the New Challenges of Scientific Evidence*, 108 HARVARD L. REV. 1481 (1995).

[17] *Id.* at 1214.

[18] Justice for All Act of 2004, 118.

[19] Senator Patrick Leahy of Vermont, speaking on the floor of the United States Senate, 108th Cong., 2nd sess., November 19, 2004

[20] Forensics laboratories in Arkansas are supervised by an appointee of the governor, while Maryland's forensics laboratories are under the Maryland Department of Health and Mental Hygiene. Virginia also utilizes independent laboratories. Alabama utilizes an autonomous Department of Forensic Services, but its head is appointed by the Attorney General rather than the governor. See ARK CODE ANN. § 12-12-304 (WEST 1979), MD. CODE ANN., HEALTH-GEN § 17-2A-02 (WEST 2007), Va. Code Ann. § 9.1-1100 (2005), and Ala. Code § 16-18-1 (1975).

[21] *See* "Forensic Evidence: A Policy Review" by The Justice Project (forthcoming).

[22] N.C. GEN. STAT. § 15A-269 (2001),

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[25] Seth F. Kreimer and David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Post-conviction DNA Testing*, 151 U. Pa. L. Rev. 547, 557 (December 2002).

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[28] *Id.*

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[30] Susan Greene and Miles Moffeit, "Trashing the Truth: Destruction of Evidence," *The Denver Post*, July 22, 2007.

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[40] *Sewell v. State*, 592 N.E.2d 705 (Ind. Ct. App. 1992).

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[44] *People v. Kellar*, 605 N.Y.S.2d 486 (1993).
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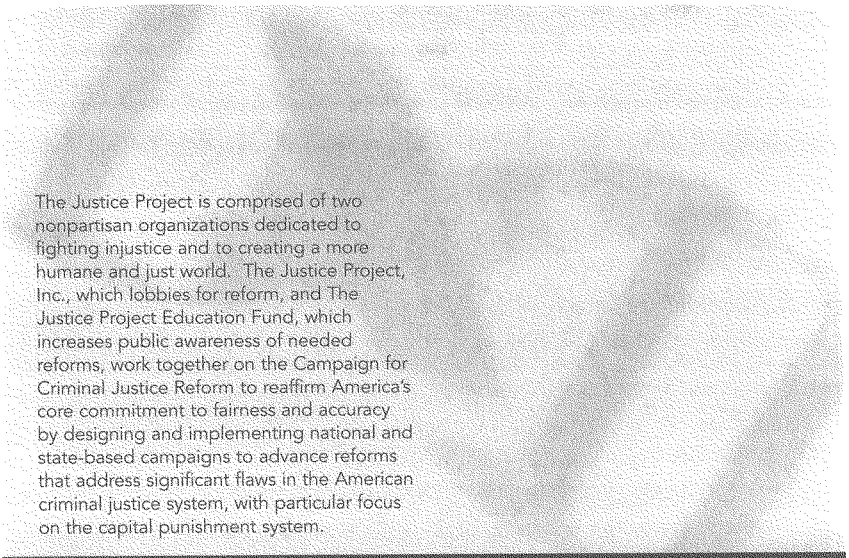

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Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
On "Oversight of the Justice for All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs?"
January 23, 2007

In 2000, I introduced the Innocence Protection Act , which aimed to improve the administration of justice by ensuring that defendants in the most serious cases have access to counsel and, where appropriate, access to post-conviction DNA testing necessary to prove their innocence in those cases where the system got it grievously wrong. As a former prosecutor, I saw both sides of the crisis that DNA testing had illuminated in clearing those wrongfully convicted. The first tragic consequence was what our system of criminal justice is designed to prevent—the conviction of innocent defendants. The second was the criminal justice nightmare that the actual wrongdoer remains undiscovered, and possibly at large, committing additional crimes.

Some of those who inspired that bill are with us today. Kirk Bloodsworth was a young man just out of the Marines when he was arrested, convicted, and sentenced to death for a heinous crime that he did not commit. DNA evidence ultimately freed him and identified the real killer. He became the first person in the United States to be exonerated from a death row crime through the use of DNA evidence. The years he spent in prison were hard, as has been his journey since his vindication. But instead of becoming embittered, Kirk chose to use his experience to help others, including working hard to get the landmark legislation passed that rightly bears his name and whose implementation is the subject before us today.

Also with us is Peter Neufeld, who, with his partner Barry Scheck, penned the extraordinary book *Actual Innocence*. Their work at the Innocence Project was fundamental to the changes in law we have achieved. Shawn Armbrust was then a young student who had taken part in a journalism class at Northwestern University and successfully reinvestigated a capital conviction in Illinois. She was able to intervene in the nick of time to save someone from being wrongfully executed. Ms. Armbrust went on to law school and now heads the Mid-Atlantic Innocence Project at American University.

It took hard work and time, but in 2004, Congress passed the Innocence Protection Act as an important part of the Justice for All Act. Congress recognized the need for important changes in criminal justice forensics despite resistance from the current Administration. It was an unprecedented bipartisan piece of criminal justice reform legislation intended to ensure that law enforcement has all the tools it needs to find and convict those who commit serious crimes, but also that innocent people have the means to establish and prove their innocence. It was the most significant step Congress had taken in many years to improve the quality of justice in this country and to restore public confidence in the integrity of the American justice system.

We provided law enforcement with resources and training to ensure that forensic testing, and particularly DNA testing, could be used to identify the perpetrators of horrendous crimes, as well as to establish standards and practices to ensure the accuracy of those findings. More than 120 innocent people have now been freed from death row according to the Death Penalty Information Center – a truly alarming number. And it is in everyone's interest for the guilty parties to be

found and punished. Comprehensive and accurate forensic testing, along with adequately trained and funded counsel on all sides, will help to convict the guilty and free the innocent.

With us today are a few more of those who served many years for crimes they did not commit before being freed based on DNA testing. Charles Chatman was freed earlier this month by a judge in Dallas, Texas, after serving 27 years – 27 years – for a crime for which DNA evidence now shows he was innocent. Marvin Anderson of Virginia was exonerated in 2001 based on DNA evidence in a heinous case for which he wrongfully served 15 years in prison. I thank Mr. Chatman and Mr. Anderson for being here and for working to prevent others from having to endure the kinds of ordeals they went through.

DNA evidence is as timely and vital as this morning's news. Today we examine the Justice Department's handling of important programs included in that legislation more than three years ago. We focus on the Kirk Bloodsworth and Paul Coverdell grant programs. The Kirk Bloodsworth Post-Conviction DNA Testing grant program is one of which I am particularly proud. It was intended to provide grants for states to conduct DNA tests in cases in which someone has already been convicted – but key DNA evidence was not tested.
It is exactly this kind of testing that ultimately exonerated Kirk Bloodsworth, for whom the program was named, and has vindicated so many others.

When Kirk and I celebrated the passage of the Justice for All Act in 2004, it was our hope that this legislation would help spare others the kind of ordeal that he and Mr. Chatman and Mr. Anderson went through, and that it would lead law enforcement to find the true perpetrators of horrific crimes. I am troubled to find that more than three years later, with Congress having appropriated almost $14 million to the Bloodsworth program, not a dime has been given out to the states for this worthy purpose. This money has sat in DOJ's coffers without any of it going to help innocent people like Kirk secure their freedom, or to help law enforcement to find the real culprits. The problem is that the Department has interpreted the law's reasonable and important evidence preservation requirement so restrictively that even states like Arizona, which have comprehensively documented their DNA preservation efforts, have been rejected. That is not what I intended when I wrote and we passed this legislation.

Today, because of this hearing and because of our follow-up efforts in the appropriations process, I expect to hear that the Department now intends to implement the law and to solicit and award the millions of dollars of Bloodsworth grants that have been delayed these past years.
I trust we will not be disappointed, again.

The second program we are considering today is one that Senator Sessions and I worked to pass to establish the Paul Coverdell Forensic Science Improvement Grants Program. Named for a former Republican Senator from Georgia, these grants were intended to help states improve the quality of their forensic science and medical examiner services and reduce their crime lab backlogs. The Justice for All Act of 2004 expanded this program and added a key requirement that states must have independent entities available to investigate allegations of serious negligence or misconduct by forensic labs in their jurisdiction.

We will hear from Inspector General Glenn Fine that he has found the Department has largely ignored this requirement and that many states did not have a qualified independent entity to investigate allegations of lab misconduct. So while the Department interpreted the Bloodsworth requirements so strictly as to effectively shut down the program, it essentially disregarded entirely the important requirements we created for the Coverdell program. It is passed time for the executive to fulfill its constitutional duty and faithfully execute the law and implement these vital programs reasonably and meaningfully as Congress intended.

There is little that the executive branch does that is more important than working to catch and convict those responsible for serious crimes. As a former prosecutor, I am committed to creating a system of justice that is just and fair. I hope this hearing will bring us one step closer to seeing that goal realized.

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United States Senate Committee on the Judiciary Oversignt of the Justice for All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs?

January 23, 2008

Peter M. Marone
Chairman
Consortium of Forensic Science Organizations

Mr. Chairman and Members of the Committee:

Thank you for inviting me to speak. I am Peter Marone, Director of the Virginia Department of Forensic Science, but today I am speaking as the Chairman of the Consortium of Forensic Science Organizations. The CFSO is the national organization which represents the American Academy of Forensic Sciences, American Association of Crime Laboratory Directors, National Association of Medical Examiners, Forensic Quality Services, International Association for Identification, and the American Association of Crime Laboratory Directors Laboratory Accreditation Board. For reference, I also am a member of the National Academies of Science Committee on Identifying the Needs of the Forensic Sciences Community.

The field of forensic science has received a tremendous amount of visibility and attention in the recent years, particularly in the television media. As a result of this attention, or as many refer to it as the "CSI" effect, the perceived capabilities of our laboratories have

grown and along with them, our caseloads have increased dramatically. We find that both law enforcement agencies as well as attorneys - both prosecution and defense, seem to be affected by this "CSI effect" and tend to request much more testing and analysis of crime scene evidence than has been required before. As a result, we have seen our case backlogs grow at a most alarming rate. For example, enhanced penalties for possession of a firearm with a drug arrest and the increased use of the National Integrated Ballistic Information Network (**NIBIN**) have increased the number of firearms cases almost exponentially. In addition, increased emphasis on anti child-exploitation has increased the need for digital evidence (computer forensics) capabilities far beyond existing resources.

Concurrently, the laws regarding DNA data banks are also expanding rapidly on a nationwide basis. This fact has, as well, caused an increased caseload for the data banks and the laboratories.

Unfortunately, this increase in backlog and caseload has not been accompanied by a commensurate increase in funding for our labs. It is difficult to obtain funding to cover both the large numbers of new cases that are being presented to our labs daily and the backlog of cases from the past that require a timely review. While the crime labs clearly understand and concur that some cases from the past need to be reviewed promptly, to address both issues is both time consuming, costly, and logistically problematic.

We have also found that, as science progresses and crime labs expand their services, older methods previously used by these labs are called into question. This, along with some deserved criticism, cause scrutiny regarding the capability of the labs as well as the integrity of the crime lab system. Cable news coverage, including specialized programs or segments featuring expert witnesses have given a louder voice in the public arena which also leads to increased visibility. Scrutiny is welcomed when it assists a lab in improving services and the methodologies that are being employed. There is always a way to improve and any chance to do so is welcomed. However, one must be careful that change is not done merely for the sake of change and does not become unnecessarily cumbersome and time consuming, without a specific, valid purpose and useful result.

One of the issues I wish to address is the requirements established in order for a laboratory to receive federal funds to conduct post-conviction testing, specifically what is being discussed here today, the Bloodsworth Amendment in the Justice for All Act.

Please bear in mind that the time permitted to respond to these solicitations from the Department of Justice has been just four weeks. Unfortunately, the solicitation requirements were not available to any of the laboratories prior to the solicitation announcement; therefore four weeks meant four weeks. Further, Compliance with these requirements has required implementation of new legislation or at least an amendment of existing statutes at the State level. The State of Virginia was able to comply with this because it had statutes in place already, which I have submitted for the record. We were confident that this provision met the solicitation and were frustrated when advised that

we did not meet the requirement to obtain this funding. If we had had this funding in the timeline we had anticipated, it would be a significant help in completing the project. Ironically, Mr. Chairman, my State has been criticized by some in the State for not processing these cases more expeditiously.

The other issue I wish to address is Oversight Boards for forensic laboratories. Many laboratories, if asked, will state that their oversight is provided by the accrediting body under which they operate. Some people would say that this is the fox guarding the hen house and there is something inherently wrong with this process. However every other oversight board, whether it be commercial, medical, legislative or the legal has oversight bodies which are comprised of the practitioners in that profession. It makes sense that the most knowledgeable about a particular topic would come from that discipline. But that does not seem to meet the current needs. The key to appropriate and proper oversight is to have individuals representing the stakeholders, but that these individuals must be there for the right reason, **to provide the best possible scientific analysis**. There cannot be any room for preconceived positions and agenda driven positions. Unfortunately, we have seen this occur in some States. As a result, many States have taken it upon themselves to create their own commissions. Unfortunately, this means that no two States are following the same criteria.

The Virginia Department of Forensic Science has both a Scientific Advisory Board and a Forensic Science Board. These entities are created by statute with members appointed by the Governor.

The Forensic Science Board is created (under §9.1-1109) as a policy board which is charged with the adjudication of violations of policies or regulations, reviewing and commenting on the budget, adopting regulations, monitoring the activities of the Department of Forensic Science and its effectiveness in implementing standards and goals of the Forensic Science Board. In addition, they approve all applications for grants.

The Scientific Advisory Committee is created (under §9.1-1113) as an advisory board which provides advice and comment to the Forensic Science Board, the Department and the public. In addition, it is the formal liaison between the Department of Forensic Science and the public. Further duties of the Scientific Advisory Committee include reviewing new scientific programs, reviewing analytical work, reports and conclusions of scientists, and providing the Forensic Science Board a review process for allegations of misidentification or other testing errors.

These two entities are comprised of persons that are appointed by the Governor and include scientists from all over the United States as well as stakeholders within the Commonwealth. Of note we are also aware of several other States that are in the process of establishing these Boards: such as California and Missouri. If the Committee would like we can gladly provide the information from these other States.

Mr. Chairman, labs are staffed by truly dedicated individuals who are committed to finding the truth, whether exonerating wrongfully accused or uncovering the guilty.

However, they are woefully under funded with an ever increasing caseload. We are looking forward to the recommendations from the National Academies of Science study and are confident that Congress will review those recommendations and act accordingly.

Thank you again for your consideration and for the opportunity to address the Committee. I will be pleased to answer any of your questions.

Below is the specific language from Innocence Protection Act of 2004 and applicable Virginia CODE Sections, regulations or practice (*In Italics*).

SEC. 413. INCENTIVE GRANTS TO STATES TO ENSURE CONSIDERATION OF CLAIMS OF ACTUAL INNOCENCE.
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

19.2-327.1 under the Code of Virginia allows for Scientific Analysis of Newly Discovered or Untested Evidence

requirements are that the petitioner (defendant) must show:
1 – They were convicted of a crime
2 – There is evidence subject to a chain of custody, which has preserved the integrity of the evidence
3 – This evidence has not been previously subject to this type of testing
4 – This evidence is relevant and necessary prove the actual innocence of the defendant
5 –There was no unreasonable delay after the defendant either discovered the evidence or the testing became available at the Department of Forensic Science.

(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

§ 19.2-270.4:1. Storage, preservation and retention of human biological evidence in felony cases.

This Virginia statute upon a sentence of death requires that the court order all human biological evidence or representative samples be stored at the Virginia Department of Forensic Science until execution of the sentence or until the sentence is reduced.

This statute further allows upon conviction of a felony that either party request that the court order preservation of the human biological evidence or representative samples for a period of fifteen years.

This statute would allow a defendant to petition the court at a later date for if a new method of testing become available and they meet the requirements of §19.2-327.1 (prove innocence, new type of testing, timely, etc.)

(B) preserves biological evidence secured in relation to the investigation or prosecution of a State offense--

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

The Virginia Department of Forensic Science continually trains law enforcement regarding evidence handling and preservation. In addition the Department of Forensic Science has issues standards and guidelines for the preservation of human biological evidence.
This has been a practice of the Department of Forensic Science prior to the Justice for All Act and acts to ensure that reasonable measures are taken by all jurisdictions in Virginia to preserve evidence.

(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.

Sec. 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.

§ 19.2-270.4:1. Storage, preservation and retention of human biological evidence in felony cases.

This Virginia statute upon a sentence of death requires that the court order all human biological evidence or representative samples be stored at the Virginia Department of Forensic Science until execution of the sentence or until the sentence is reduced.

This statute further allows upon conviction of a felony that either party request that the court order preservation of the human biological evidence or representative samples for a period of fifteen years.

This statute would allow a defendant to petition the court at a later date for if a new method of testing become available and they meet the requirements of §19.2-327.1 (prove innocence, new type of testing, timely, etc.)

Department of Justice

STATEMENT OF

DR. JOHN MORGAN
DEPUTY DIRECTOR
NATIONAL INSTITUTE OF JUSTICE
OFFICE OF JUSTICE PROGRAMS
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

CONCERNING

"OVERSIGHT OF THE JUSTICE FOR ALL ACT: HAS THE JUSTICE DEPARTMENT EFFECTIVELY ADMINISTERED THE BLOODSWORTH AND COVERDELL DNA GRANT PROGRAMS?"

PRESENTED

JANUARY 23, 2008

Chairman Leahy, Ranking Member Specter, and distinguished Members of the Committee, thank you for the opportunity to appear today on behalf of the Department of Justice's Office of Justice Programs (OJP) and National Institute of Justice (NIJ). Our mission is to advance scientific research, development, and evaluation to enhance the administration of justice and public safety. NIJ provides objective, independent, evidence-based knowledge and tools to meet the challenges of crime and justice, particularly at the state and local levels. I am pleased to be here to discuss the Department of Justice's efforts to improve the forensic capacity of state and local criminal justice agencies, particularly with regard to harnessing the power of DNA technology.

From the crime scene to the courtroom, forensic science plays a vital role in the criminal justice system in solving crime, protecting the innocent, and identifying the missing. One of the most powerful tools in the forensic arsenal is DNA technology. The use of DNA technologies to solve cold cases, identify missing persons, and protect the innocent has been long documented through independent evaluation and performance measurement.

DNA technology is becoming a routine investigative tool to identify links to violent criminals rapidly and exonerate the innocent before charges are filed. With the funding provided by Congress, NIJ funds State and local forensic laboratories to eliminate the current—and growing—backlog of untested evidence, to perform DNA testing in cases in which a person may have been wrongly convicted, and to identify missing persons. NIJ is committed to continuing its efforts to build the capacity of State

and local forensic laboratories to the point where Federal assistance will no longer be required.

The highly successful President's DNA Initiative has provided our nation's criminal justice system with a tremendous increase in state and local crime laboratories' capacity to use DNA technology to solve crimes and provide exculpatory evidence for the wrongly accused. Through the Initiative, state and local law enforcement agencies have been funded to test nearly 104,000 DNA cases from 2004 to 2007 and funded 2,500,000 convicted offender and arrestee samples which will be added to the national DNA database. Over 5,000 "hits", or matches to unknown profiles or other cases, have resulted from these efforts. This past week, in my hometown of Annapolis, Maryland, county police announced five more hits in local murder and rape cases that were funded using federal DNA appropriations. In 2008, we expect to fund the testing of a further 9,000 backlogged cases and more that 834,000 backlogged convicted offender and arrestee samples.

NIJ has also provided funding to expand the long-term capacity of criminal justice agencies to process DNA evidence on their own, for example through the purchase of modern equipment, hiring of more staff, and training of new analysts. Training is a critical component of these programs because of the continuing shortage of analysts to meet the increasing demand for DNA testing and the need to ensure the integrity and validity of results reported from the crime laboratory. NIJ is delivering basic and advanced cold case and missing person training for law enforcement so that police and forensic scientists can work together better on these cases.

NIJ also produced an interactive resource tool titled "Principles of DNA for Officers of the Court" to help lawyers and judges understand DNA and its implications in different situations. Multi-site studies are examining how often forensic evidence helps identify suspects, whether forensic evidence influences a suspect's decision to confess, and whether jurors are more likely to convict in cases where DNA forensics testimony is given. These studies have shown that DNA can be a powerful tool to improve the clearance rate for burglaries by a very large margin. NIJ sponsored six Technology Transition Workshops during FY 2007 to help crime laboratory practitioners evaluate and gain experience with cutting-edge technologies from NIJ's forensic research and development programs.

One NIJ-funded DNA technology allows DNA profiles to be obtained from skeletal remains (for example, from missing persons investigations) and other severely damaged or degraded samples. In 2007, NIJ launched the National Missing and Unidentified Persons System (NamUS). The National Missing and Unidentified Persons System, NamUs, is the first national online repository designed to help medical examiners and coroners share information about missing persons and the unidentified dead.

Under the President's DNA Initiative, high-throughput DNA analysis, DNA testing of small or compromised evidence, and testing of sexual assault samples have all been improved dramatically. Another NIJ-funded project uses Y-chromosome technology to obtain DNA profiles from sexual assault evidence collected four or more days after a sexual assault occurs. Research in other forensic disciplines (such as impression evidence, toxicology, crime scene and other non-DNA areas) has also been

greatly expanded under this funding. For example, NIJ is developing a method to allow fingerprint examiners to report the statistical uniqueness of latent prints captured from crime scenes, and we are doing similar studies for handwriting analysis, ballistics identification and other forensic disciplines. These research programs promise to revolutionize the power, speed and reliability of forensic science methods in coming years.

The practice of DNA forensics is well-regulated and courts and the public have to have a great deal of confidence in results reported from DNA forensic laboratories. The Department of Justice is committed to improving the practice of forensic science across all of the disciplines. Congress has provided over $61.75 million since 2004 to State and local crime laboratories and medical examiners/coroners officers in all 50 states and territories. Funds have been used to decrease laboratory backlogs and enhance the quality and timeliness of forensic services. Funds are used for purchasing new equipment, training and education, accreditation and certification, personnel, and renovations.

The Department of Justice seeks to ensure that all federal funds are spent wisely and that the criminal justice system can rely on validity of the forensic results reported from crime laboratories. One major step in this direction is the Grant Progress Assessment (GPA) Program, through which NIJ assesses 100 percent of grants over a two year cycle. Since implementing the GPA Program, 854 GPA reports have been generated, thousands of forensic results have been reviewed by independent experts, and many important improvements have been instituted in federally-funded labs. The Department of Justice has taken many other steps, such as ensuring accreditation of

laboratories, monitoring financial compliance, educating grantees about best practices, and mandating timely expenditure of federal funds for maximum impact.

We are aware that the Committee is concerned with the administration of the Paul Coverdell and Post-Conviction Testing grant programs. The issues with both programs concern interpretation of legislation contained in the Justice for All Act of 2004 (JFAA).

The issue with the Paul Coverdell grant program is with the requirement in section 311 of the JFAA. This section requires the applicant to certify that a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct. Prior to 2007, NIJ required that the grantee simply certify that such an entity existed. Since 2007, NIJ has required that prior to receiving funds, the grantee must identify that entity in its certification. In this way, NIJ ensures that it has managed the program in a way that is consistent with the actual language of the statute passed by Congress. This approach is consistent with the Coverdell Program statutory and policy requirements.

With very limited staff, the Department of Justice has successfully administered the Coverdell Program for several years. As part of our program management, we collect four different certifications from the Coverdell grant applicants, including the one mandated by section 311 of the JFAA. We also subject applicants for competitive Coverdell awards to independent peer review. We monitor each award to help ensure compliance with various federal statutes, regulations, and policies designed to provide assurance that federal funds are used appropriately. We review Coverdell applicants' budgets to ensure they are in keeping with the work promised in the grant application and consistent with Coverdell Program statutory and policy requirements. We monitor

grantees through the Grants Progress Assessments program to review laboratory practices and grant compliance. We collect performance data for each grant.

All of these items, including the section 311 JFAA certification, are critical for effectively managing the Coverdell Program. As stated in the recent report from Department of Justice's Office of Inspector General, NIJ has fully implemented the statutory requirements of JFAA Section 311. We will continue to work to improve the management of the Coverdell Program and ensure, to the extent feasible, that allegations of misconduct or serious negligence are appropriately investigated and acted upon.

The issue with the Post Conviction Testing grant program (Kirk Bloodsworth) is with Section 413 of the JFAA, which requires specific practices in the states regarding preservation of biological evidence and post-conviction testing procedures. Under the statute, a state grantee is required to demonstrate that all jurisdictions within the state comply in practice with the requirements of the Kirk Bloodsworth provisions. These restrictions were so difficult that only three states replied to NIJ's 2007 solicitation for Post Conviction Testing grants. On review of their applications, it was determined that none were compliant with the legal requirements of the statute.

The Consolidated Appropriations Act of 2008 will make the Kirk Bloodsworth tools more widely available, by providing the language NIJ needs to apply unobligated funds appropriated in fiscal years 2006 and 2007 for this purpose, as well as those appropriated in 2008. NIJ is expeditiously developing a grant solicitation that will make those funds available to states. We expect to release that solicitation very soon, and to make the awards this fiscal year. We will keep the committee informed concerning our

progress, since the Department of Justice remains committed to ensuring the exoneration of any wrongly convicted individual.

The Department of Justice's forensic programs have made great progress in the improvement of forensic practices through the DNA assistance and other programs, research and development, training activities, and the many related efforts. NIJ was recognized this past year with the prestigious Service to America medal for our accomplishments in the management of these forensic programs, which have assisted in the investigation of thousands of cases of violent crime and provided historic levels of support to the forensic laboratories. However, even with these successes, much remains to be done.

According to the Bureau of Justice Statistics' census of public crime laboratories, backlogs of DNA and other forensic evidence continue to expand because of increasing demand from law enforcement. More law enforcement officers are realizing the importance of collecting, preserving, and submitting forensic evidence from both violent and nonviolent crime scenes, resulting in sharp increases of submissions of DNA evidence to the nation's crime laboratories. The passage of state statutes expanding DNA sample collections from offenders of violent crimes to all felons, and in many jurisdictions, to all arrestees, has further increased the workload of forensic science laboratories.

As the Committee is aware, a substantial number of convicted individuals have been exonerated using DNA evidence. This has led to concerns about eyewitness testimony, the reliability of other forensic methods, and the investigation of crime. In addition, NIJ research shows that most latent print (e.g., fingerprint) examiners work

outside the crime laboratory and lack professional certification. Unlike DNA analysts, forensic practitioners in other disciplines are not required to conform to national standards or work in accredited facilities.

Scientific research and development is critical to improvement of the forensic sciences. First, new technologies must be developed and transferred into practice in crime laboratories. The scientific and jurisprudence communities are increasingly concerned about the scientific basis for latent print examination and the other "qualitative" forensic sciences that depend on the judgment of experienced examiners to obtain accepted results. Under Congressional direction and with NIJ funding, the National Academy of Sciences (NAS) is studying the needs of the forensic science community, especially with respect to the gaps in the scientific underpinnings of the disciplines and national standards. The Department of Justice has already begun to examine ways to respond in a positive and proactive way to the anticipated recommendations of the NAS panel, whose report is expected in coming months.

We look forward to continuing to work with Congress to ensure that State and local criminal justice professionals have the tools and resources needed.

Thank you again for the opportunity to testify before the Committee on this important issue. I am happy to answer any questions you or other Members may have.

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

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Testimony of Peter Neufeld

On Behalf of the Innocence Project

Before the Senate Judiciary Committee

January 23, 2008

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

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

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

> Post-conviction DNA testing does not merely exonerate the innocent, it can also solve crimes and lead to the incarceration of very dangerous criminals. In case after case, DNA testing that exculpates a wrongfully convicted individual also inculpates the real criminal."1 ...The Justice for All Act is the most significant step we have taken in many years to

1 150 CONG. REC. S11609-01 (2004)

> improve the quality of justice in this country. The reforms it enacts will create a fairer system of justice, where the problems that have sent innocent people to death row are less likely to occur, where the American people can be more certain that violent criminals are caught and convicted instead of the innocent people who have been wrongly put behind bars for their crimes, and where victims and their families can be more certain of the accuracy, and finality, of the results.2

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

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

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

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

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

2 Id. at 14.

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

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

- 303, DNA Training and Education for Law Enforcement, Correctional Personnel, and Court Officers;
- Section 305, DNA Research and Development;
- Section 308, DNA Identification of Missing Persons; and

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

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

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

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

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

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

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

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

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

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

The reason that States did not apply for this much-needed federal DNA support - and OJP's potential3 justification for denying all funding for Bloodsworth applicants - seems likely to stem from the extraordinary hurdle that OJP set for applicants regarding how they were to "demonstrate" that they met the preservation of biological evidence requirements as presented in the RFP. The OJP demonstration requirement, when closely scrutinized, seems to have been misinterpreted, or exceedingly severely interpreted, in a manner that thwarted disbursement of any Bloodsworth funds to date.

The reasons leading to this conclusion are that:

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

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

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

These reasons are explained in greater detail below.

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

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

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

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

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

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

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

Congressional "Demonstrate" Requirement Extraordinarily Applied by OJP

JFAA Section 413, in relevant part, requires that "For each of fiscal years 2005 through 2009, all funds appropriated to carry out sections 303, 305, 308, and 412 shall be reserved for grants to *eligible entities that*...(2) demonstrate that the State in which the eligible entity operates (preserve biological evidence and provide access to post-conviction DNA testing)."4

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

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

officer of the State (typically the Attorney General), as described below. All opinions must be personally signed by the Attorney General."5

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

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

On this question one must consider the only other recent OJP grant program identified by the Innocence Project that requires such verification from a similarly high-placed State legal officer: the Office on Violence Against Women FY 2008 Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program.6 Notably, this program requires that certification of compliance with the laws specified by Congress come from such officials, *yet the requirement that such officer provide the certification is*

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

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

*specified within the statute authorizing that grant program.*7 Neither JFAA Sections 413 nor 412 specify the participation of these legal officers, and certainly not "certification" from any party.

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

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

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

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

7 42 U.S.C.A. § 3796hh-1 (Westlaw 2007).

One could readily understand that of all people, States Attorneys General or chief legal officers might not be particularly interested in efforts to prove (additional) wrongful convictions in their states (as doing so would obviously prove error by the state, and could likely expose the state to liability for such wrongful convictions).8 Particularly when one considers that OJP required the personal signature of that Attorney General or chief legal officer on a legal memorandum (as opposed to a simple narrative submitted by the applicant, which is the case for other OJP grant programs where "demonstration" is required9), one can understand that this requirement might have presented for some an insurmountable obstacle to successfully submitting an application. It is impossible to know whether this did in fact occur, or if the requirement itself simply chilled a potential applicant's assessment of the return on investment of pursuing a grant application. But we submit this concern – particularly in light of the fact that such signatures may not have been legally necessary (see previous subsection) – for the Committee's consideration.

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

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8 We cite this possibility, and the potential factors therefor, not to suggest any ill-intent by any such state official, but to suggest that requiring their work and personal signature on the grant application may simply have impeded realization of Congressional intent to disburse such funds to qualified applicants.
9 Not one of the 30 other grant programs identified as having been offered by OJP in the same year, 2006, requires the applicant to "demonstrate" that they meet requirements through anything other than a narrative by the applicant. Please see Exhibit A for a detailed list of those grant programs.

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

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

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

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

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

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

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

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

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

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

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

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

Innocence Claims Hinge on Preserved Evidence: Scott Fappiano

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommended Congressional Action

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

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

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

III. Leaving the Public Unprotected: OJP Enforcement of Congressional Intent Regarding Innocence Protections Under the Paul Coverdell Forensic Science Improvement Grant Program

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

> A government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount.10

The Innocence Project views the Congressional mandate under Section 311(b) as a crucial step toward ensuring the integrity of forensic evidence, because we know that lab errors, both inadvertent and calculated, contribute significantly to wrongful convictions. In fact, according to a recent study by University of Virginia professor Brandon Garrett, problems with forensic evidence such as blood evidence, a fingerprint match or a hair comparison contributed to 55 percent of the convictions of the first 200 DNA exonerees in the United States.[11]

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

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10 JUSTICE FOR ALL ACT § 311(b), 42 U.S.C. § 14136 (2004)
11 Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. (forthcoming 2008).

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

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

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

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

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

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

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

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

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

Jimmy Ray Bromgard and Montana

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

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

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

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

Virginia and the Earl Washington Audit

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

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

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

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

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

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

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

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

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

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

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

B. OJP's Failure to Carry Out Congressional Intent

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

C. OJP Fails to Provide Applicants with Guidance

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

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

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

Although, in light of the serious questions raised, the NIJ could have amended its RFP – and provided grantees with guidance that could help them determine how they might comport with the external investigations requirement – it opted not to. The NIJ told the OIG that it would respond to specific questions by applicants on case-by-case bases – yet never did. Instead, upon further prodding from the OIG, it sent all grant applicants a memo that sketched three government entities and attendant processes that it deemed to be in keeping with the spirit of the JFAA, five that did not, and – while expressly stating that it was up to the applicant, rather than OJP, to determine whether the applicant complied with the JFAA[12] - required that all applicants recertify their compliance with Coverdell program requirements after reviewing the memo. (The memo is attached as EXHIBIT B.)

OJP ultimately approved every applicant that recertified – seemingly without reference to whether each applicant adhered to the memo. That approach continued into the next funding cycle, as the NIJ funded every FY06 application that included a signed certification,[13] despite what seem to be shortcomings on this count on many 2006 applications. (The Innocence Project currently is reviewing FY07 applications.)

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12 The NIJ incorporated the memo to applicants into the text of the 2006 Coverdell RFP and it remains in the 2007 RFP, available at http://www.ncjrs.gov/pdffiles1/nij/sl000791.pdf#page=5.
13 For a list of 2005 grantees, http://www.ojp.usdoj.gov/nij/awards/2005_topic.htm#paul_coverdell. The 2006 list of grantees is available at http://www.ojp.usdoj.gov/nij/awards/2006_topic.htm#paul-coverdell.

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

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

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

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

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

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

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

Case Example 1: Santa Clara County Internal Affairs Investigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Other Problems with Coverdell Grant Administration

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

i. Too Few Coverdell Investigations

Nationally, the adoption and utilization of the external investigatory Coverdell requirements has been glacial. In New York, where two Innocence Project co-directors sit on the New York Commission of Forensic Science -- established more than 10 years ago to oversee the state's forensic laboratories -- four Coverdell investigations already have unfolded. Clearly, the New York Commission has taken to heart the importance of Coverdell investigations. By comparison, we are aware of only six other Coverdell investigations requested nationally.[14] It's inconceivable that outside of New York there have only been six instances of serious forensic negligence and misconduct nationwide in the past three years that deserve investigation. Common sense, experience, and tracking of news reports nationwide tell us the number of incidents deserving of such investigations must be far larger.

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

14 In the January 2008 report by the Office of the Inspector General, "Review of the Office of Justice Programs' Paul Coverdell Forensic Science Improvement Grants Program," available at http://www.usdoj.gov/oig/reports/OJP/e0801/final.pdf, the OIG alluded to several other Coverdell investigations. The Innocence Project cannot independently verify whether these are the same investigations about which it has firsthand knowledge, or separate and additional Coverdell investigations.

dramatically fewer Coverdell allegations than we otherwise would expect. The typical Coverdell allegation has arisen after a media report – such as in a newspaper – that serious negligence or misconduct might have occurred at a lab. The media, in their watchdog role, have informed the public of concerns that others have then brought to the attention of Coverdell oversight entities. But in this arrangement, it is likely that only a handful of the instances of serious negligence or misconduct ever see the light of day. Laboratory employees – those who witness laboratory activities on a daily basis and may be in best position to report on them – need to know that the Coverdell oversight entities are there for them to raise issues safely, as whistleblowers, outside their chains of command. As such, state laboratories should inform their staff members of the Coverdell requirements. New York State took on such an effort via its Commission on Forensic Science, but other states must follow suit.[15]

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

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

ii. Certifications Signed Even without Functional Oversight Entities

The Innocence Project, in its canvassing of Coverdell funding recipients, determined that numerous grant recipients signed their Section 311(b) Coverdell certifications without first considering which entity would conduct such investigations, and what process the entity would use in those investigations. Several states admitted this openly to the Innocence Project, (yet still received federal monies that, ostensibly, should have been denied in the absence of a supportable certification.)[16] Without a clear plan for Coverdell compliance, many states have been playing catch-up when they've been faced with allegations – if they receive allegations at all.

iii. Certifications Signed with Uninformed Oversight Entities

The Innocence Project's national canvassing also revealed the troubling fact that some oversight entities named in applications for Coverdell monies never were informed that they had been selected for oversight duties. [17] In Massachusetts, for example, in 2007 the New England Innocence Project filed an allegation with the state Inspector General's office because the state's Coverdell application indicated that the IG was the office fielding the state's Coverdell allegations. The IG, however, indicated that it never had been informed of this designation, which by definition meant it was unprepared to vet the allegation immediately upon its receipt. While the IG has endeavored to undertake the task responsibly, the IG, which has required time to get up to speed on the Coverdell

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

requirement, still is investigating the allegation a full year later.[18] Similarly, the Innocence Project learned that the Inspector General in Illinois, named along with the Illinois State Police's internal investigatory arm to handle Coverdell allegations in Illinois, also had no notice of its designation.

iv. Subgrantees Avoid Scrutinty

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

In 2007 OJP also noted in its RFP that any submitted certification applies not only with respect to an applicant itself, but also with respect to any subgrantee that receives a portion of the grant.[19] But it did not mandate that the applicant list the oversight

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

19 See EXHIBIT B, also available at http://www.ncjrs.gov/pdffiles1/nij/sl000791.pdf#page=5. In the RFP potential applicants found the following: "**Note:** In making this certification, the certifying official is certifying that these requirements are satisfied not only with respect to the applicant itself, but also with

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

v. Many Entities Only Consider Misconduct, Not Negligence

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

vi. No Follow-up on Apparently Insufficient Investigations

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

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

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

vii. The "Process" Requirement Has Been Completely Ignored

The JFAA clearly requires not only the presence of an oversight entity in a grant recipient's jurisdiction, but also the establishment of a process that entity would use to vet a Coverdell allegation. Shockingly, and without exception, the Innocence Project has found no applicant for Coverdell monies that specifically articulated the process its oversight entity would rely upon.[20] Given the clear Congressional mandate that an investigatory process be in place upon certification of the JFAA Section 311(b) requirements, one could argue that no Coverdell applicant should have been funded since the certification requirement became law in 2004.

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

(1) identify the source(s) and the root cause(s) of the alleged problems;

(2) identify whether there was serious negligence or misconduct;

(3) describe the method used and steps taken to reach the conclusions in parts 1 and 2;

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

(4) identify corrective action to be taken;

(5) where appropriate, conduct retrospective re-examination of other cases which could involve the same problem;

(6) conduct follow-up evaluation of the implementation of the corrective action, and where appropriate, the results of any retrospective re-examination;

(7) evaluate the efficacy and completeness of any internal investigation conducted to date;

(8) determine whether any remedial action should be adopted by other forensic systems; and

(9) present the results of Parts 1-8 in a public report.[21]

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

It seems unquestioned that OJP's authority allows it to examine the oversight entities more thoroughly than it has. Presently OJP applies similar scrutiny to a number of other elements of the Coverdell program. Specifically, in the 2007 Coverdell RFP, the NIJ notes that the Government Performance and Results Act (GPRA), P.L. 103-62, requires applicants who receive Coverdell funding "to provide data that measure the results of their work."[22] That requirement derives in turn from the GPRA, in which Congress recognized that "congressional policymaking, spending decisions and program oversight are seriously handicapped by insufficient attention to program performance and

21 This proposed process derives from a 2007 document of the U.S. Government Accountability Office – "Government Auditing Standards: January 2007 Revision," available at http://www.gao.gov/govaud/d07162g.pdf (last visited July 6, 2007). See sections 3.01-3.39.
22 See p. 12 of the the 2007 Coverdell RFP, available at http://www.ncjrs.gov/pdffiles1/nij/sl000791.pdf.

results."[23] As such, states and even local agencies receiving Coverdell funding must "submit semiannual progress reports" and "quarterly financial status reports" during the award's duration. Moreover, their final reports must:

> (1) include a summary and assessment of the program carried out with FY2007 grant funds,
>
> (2) identify the number and type of cases accepted during the FY2007 award period by the forensic laboratory or laboratories that received FY2007 grant funds, and
>
> (3) cite the specific improvements in the quality and/or timeliness of forensic science and medical examiner services (including any reduction in forensic analysis backlog) that occurred as a direct result of the FY2007 grant award.24

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

Conclusion

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

23 Available at http://www.whitehouse.gov/omb/mgmt-gpra/gplaw2m.html#h2.
24 Available at http://www.ncjrs.gov/pdffiles1/nij/sl000791.pdf#page=5, p. 16.

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

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

OJP-NIJ 2006 RFPs That Use "Demonstrate"

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

2 Forensic Casework DNA Backlog Reduction Program

Required Documents

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

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

1 Awareness of the state of current research or technology

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3 Feasibility of proposed project and awareness of pitfalls

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

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2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

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Impact of the proposed project

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5 Social Science Research on Terrorism

Successful applicants **must demonstrate** the following:

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6 Process and Outcome Evaluation of GREAT

Successful **applicants must demonstrate** the following:

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7 Evaluation of Technologies

Successful **applicants must demonstrate** the following:

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8 Outcome Evaluations of Violence Prevention Programs

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

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9 Public Safety Interventions

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

Displacement and diffusion analyses

Cost analysis

Longer follow-up periods (most are 6-12 months)

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

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3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

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Dissemination strategy

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

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

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

1 Awareness of the state of current research or technology

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

1 Qualifications and experience of proposed staff

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4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

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11 Research on Sexual Violence and Violent Behavior in Corrections

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

1 Awareness of the state of current research or technology

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3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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12 Study of Administration of Justice in Indian Country

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

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3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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1 Awareness of the state of current research or technology

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Budget

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14 Transnational Crime

Successful **applicants must demonstrate** the following:

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

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

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

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

17 Research and Development on Impression Evidence

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

18 Sensor and Surveillance Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

2 Description of the operational environment in which the technology will function

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

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

19 Biometric Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

2 Description of the operational environment in which the technology will function

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

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

20 Forensic DNA Research and Development

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

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

Successful **applicants must demonstrate** the following:

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

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

21 Electronic Crime Research and Development

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

22 Corrections Technology

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

23 School Safety Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

1 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

24 Pursuit Management Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable

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

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

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

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

Capabilities, demonstrated productivity, and experience of applicants

1 Qualifications and experience of proposed staff

2 Demonstrated ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

27 Less Lethal Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

2 Description of the operational environment in which the technology will function

3 Description of the specific benefit anticipated and how the technology will produce that benefit

4 Scientific references concerning the effect that will be produced by the device Key supporting references should be included in the concept paper's attachment

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

1 Potential for significant advances in the field Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

2 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

28 Communications Technology

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

29 Information-Led Policing Research, Technology Development, Testing, and Evaluation

Peer-review panelists will evaluate concept papers using the criteria listed below Following this assessment, NIJ will then invite selected applicants to submit full proposals Full proposals will also be peer reviewed NIJ staff then make recommendations to the NIJ Director The Director makes final award decisions

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

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

1 Qualifications and experience of proposed staff

2 **Demonstrated** ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

30 Forensic Science Research and Development Targeting Forensic Engineering, Forensic Pathology, Forensic Odontology, Trace Evidence, Controlled Substances, and Questioned Documents

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

1 Awareness of the state of current research or technology

2 Soundness of methodology and analytic and technical approach

3 Feasibility of proposed project and awareness of pitfalls

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

2 Potential for significant advances in the field

3 Relevance for improving the policy and practice of criminal justice and related agencies and improving public safety, security, and quality of life

4 Affordability and cost-effectiveness of proposed end products, when applicable (eg, purchase price and maintenance costs for a new technology or cost of training to use the technology)

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

Capabilities, demonstrated productivity, and experience of applicants

1 Qualifications and experience of proposed staff

2 Demonstrated ability of proposed staff and organization to manage the effort

3 Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used

4 Successful past performance on NIJ grants and contracts (when applicable)

Budget

1 Total cost of the project relative to the perceived benefit

2 Appropriateness of the budget relative to the level of effort

3 Use of existing resources to conserve costs

Dissemination strategy

1 Well-defined plan for the grant recipient to disseminate results to appropriate audiences, including researchers, practitioners, and policymakers

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

Paul Coverdell Forensic Science Improvement Grant Program Guidance/Examples

The following guidance, provided by way of examples for applicants' review, is designed to illustrate elements of the certification that an applicant must take into account in determining whether it can certify that "a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount." 42 U.S.C. § 3797k(4).

Since it is not possible for the National Institute of Justice (NIJ) to provide examples relating to every type of government entity with an appropriate process in place to conduct independent, external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of forensic results committed by employees or contractors, necessarily, this guidance should not be viewed as all inclusive. In addition, this guidance is not intended to constitute legal advice from NIJ on the question of whether any applicant properly may make the required certification. Such a determination must be made by an appropriate official of the applicant entity based on the statutory requirements of the certification after review of the guidance.

Statutory Elements of the Certification

In order for an applicant properly to make the certification, quoted above, each required element of the certification must be satisfied. Therefore, the certifying official, on behalf of the applicant entity, must determine whether:

A government entity exists

With an appropriate process 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.

Please note: In making this certification, the certifying official is certifying that these requirements are satisfied not only with respect to the applicant itself, but also with respect to each entity that will receive a portion of the grant amount.

Illustrative Examples:

1. The only government entity that will receive Coverdell award funds is a forensic laboratory that is a unit of a local law enforcement agency, i.e., a Police Department. The law enforcement agency has an Internal Affairs Division (IAD) that reports directly to the head of the law enforcement agency (the Police Chief), and the head of the unit of local government (the Mayor/City Commissioner). The IAD has the authority to conduct investigations into allegations of serious negligence or misconduct by laboratory employees and contractors.

Execution of the certification might be appropriate under these facts. However, even with this factual situation, the applicant must be satisfied that the IAD at issue has the requisite authority to conduct independent investigations – for example, whether the IAD is completely free from influence or supervision by laboratory management officials – into allegations relating to employees or contractors of the laboratory.

2. A State intends to distribute Coverdell award funds to State and local forensic laboratories and medical examiners' offices. There is an Office of Inspector General (OIG) in the State with authority to conduct investigations into allegations of serious negligence or misconduct by employees and contractors of forensic laboratories and medical examiners' offices, both at the State and local levels.

Execution of the certification might be appropriate under these facts. However, even under this factual situation, the applicant must be satisfied that the State IG's authority in this regard is not circumscribed in such a way (for example, through a reporting hierarchy that does not provide for the IG to report directly to the chief executive officer or another equally independent State official or office) that the IG's ability to conduct independent investigations is limited.

3. A city has applied for a Coverdell award and all funds will go to the city's forensic laboratory. There is a process whereby the city's District Attorney (DA) may appoint an independent investigator to conduct an investigation into allegations concerning the city's forensic laboratory. If the DA appoints an independent investigator, the investigator will

have authority to investigate allegations of serious negligence or misconduct by both laboratory employees and contractors.

Execution of the certification might be appropriate under these facts. In this regard, however, the applicant needs to be satisfied that the process at issue (appointment of an independent investigator by the city DA) includes procedures under which allegations involving the laboratory are submitted to or are made known to the DA, and that the DA's authority and responsibility to appoint an independent investigator to conduct investigations of such allegations is sufficiently delineated in city policy and/or regulation so that the "appropriate process" in place is defined and clear.

4. An applicant agency determines that the forensics laboratory director (or some other individual in the chain of command at the laboratory) has sole responsibility to conduct investigations into allegations of serious negligence or misconduct committed by laboratory employees.

Under these facts, it would not be appropriate for the applicant to execute a certification because there is no process in place to conduct independent, external investigations into allegations of serious negligence or misconduct committed by laboratory employees and contractors.

5. A State applicant intends to distribute Coverdell award funds to forensic laboratories at both the State and local level. An independent commission established by the Governor has authority to investigate allegations of serious negligence or misconduct by employees, including employees of units of local government within the State.

Under these facts, the existence of this commission is not itself a sufficient basis for the State applicant to execute the certification. In this regard, the commission does not have authority to investigate allegations of serious negligence or misconduct by contractors of State and local government forensic laboratories that receive Coverdell funds. (However, if some other government entity, distinct from the commission, has a process in place to conduct independent external investigations of allegations of serious negligence or misconduct by such contractors, execution of the certification might be appropriate depending on all the facts.)

6. A local forensic laboratory, which is intended to receive a portion of the funds from a Coverdell award to a State, notifies the State applicant that a quality assurance official is responsible for investigating allegations of serious negligence or misconduct by employees and contractors of the local forensic laboratory. The quality assurance official reports to the director of the forensic laboratory.

Under these facts, it would not be appropriate for the State to execute a certification because the quality assurance official reports to the director of the forensic laboratory and, therefore, there is no process in place to conduct independent, external investigations of allegations against the forensics laboratory as required in order to make the certification.

7. An applicant agency (a forensics laboratory) intends to enlist (employ) a contractor or a non-governmental organization to conduct investigations into allegations of serious negligence or misconduct committed by laboratory employees.

Under these facts, it would not be appropriate for the applicant to execute a certification, as there is neither a government entity nor an appropriate process in place to conduct independent, external investigations of allegations against the laboratory – whether alleged to be committed by laboratory employees and/or contractors – since the contractor or non-governmental entity is employed by and responsible to the forensics laboratory.

8. An applicant agency is accredited by an independent accrediting or certifying organization such as CALEA, ASCLD-LAB, NAME, FQS, etc.

Under this factual situation, it would not be appropriate for the applicant to execute a certification. The fact of accreditation or certification by an outside entity on its own does not demonstrate that the agency has a process in place to investigate allegations of serious negligence or misconduct committed by employees or contractors. There is not sufficient information for the applicant properly to make the required certification in this situation.

Paul Coverdell Forensic Science Improvement Grant Program Certification

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

Signature of Certifying Official

Date

Applicant

Telephone Number

JAIME A. LEAÑOS [SBN159471]
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San José, CA 95113
Telephone: (408) 294-6800

Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, -vs- JEFFREY RODRIGUEZ, Defendant.	No. CC131089 **FINDING FACTUAL INNOCENCE AND FOR RELIEF PURSUANT TO PC SECTION 851.8(c) AND FOR DESTRUCTION OF/AND SEALING OF RECORDS** Date: November 9 , 2007 Dept.: 27 Hon.: Andrea Bryan, Presiding

TO: THE SANTA CLARA COUNTY DISTRICT ATTORNEY, THE SAN JOSE POLICE DEPARTMENT, THE CALIFORNIA DEPARTMENT OF JUSTICE, AND TO ANY OTHER LAW ENFORCEMENT AGENCIES INVOLVED:

The defendant, JEFFREY RODRIGUEZ, having been exonerated of the offenses for which he was arrested in this case, this court finds the defendant factually innocent of said charges.

IT IS ORDERED that the Santa Clara County District Attorney, the San Jose Police Department, the Department of Justice, and any other law enforcement agencies involved

in this case, seal their records of the arrest of said, JEFFREY RODRIGUEZ, and also seal this order for a period of three years from the date of said arrest, and thereafter destroy their records of this arrest and this court order.

IT IS FURTHER ORDERED that the Santa Clara County District Attorney, the San Jose Police Department, and the Department of Justice request the destruction of any records of the arrest they have given to any local, state or federal agency, person or entity.

IT IS FURTHER ORDERED that each state or local agency or person or entity in California receiving such a request destroy its records of the arrest and the request to destroy such records.

IT IS FURTHER ORDERED that documentation of arrest records destroyed pursuant to this order which are contained in investigative police reports shall bear the notation "EXONERATED" whenever reference is made to the arrestee.

IT IS FURTHER ORDERED that the San Jose Police Department notify JEFFREY RODRIGUEZ, through his attorney, JAIME A. LEAÑOS, in writing of the sealing and destruction of the arrest records pursuant to this order.

IT IS FURTHER ORDERED that the destruction of records shall be accomplished by permanent obliteration of all entries or notations upon such records pertaining to the arrest and the records shall be prepared again so that it appears that the arrest never occurred. However, where the only entries on the record pertain to the arrest and the record can be destroyed without necessarily effecting the destruction of other records, then the document constituting the record shall be physically destroyed.

Dated: ~~November~~ December 19, 2007

THE HONORABLE ANDREA BRYAN
JUDGE OF THE SUPERIOR COURT

THE FOREGOING INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE
ATTEST: KIRI TORRE
DEC 19 2007
CLERK OF THE SUPERIOR COURT
BY DEPUTY