

ADVANCING JUSTICE THROUGH FORENSIC DNA TECHNOLOGY

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

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THURSDAY, JULY 17, 2003

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

The Subcommittee met, pursuant to call, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble (Chair of the Subcommittee) presiding.

Mr. COBLE. Good morning, ladies and gentlemen. There is one witness who is not here, but I am advised she will be here imminently.

Now, this morning, opening statements will be limited to the Chairman and the Ranking Member. In the event that the Chairman and or the Ranking Member of the full Committee appears before the testimony commences, they will be allowed opening statements as well, but opening statements for all other Members of the Subcommittee will be inserted into the record.

Very seldom do we find a law enforcement tool that benefits everyone involved in the criminal justice system equally. DNA appears to be that tool. Prosecutors, defendants and victims all benefit from the fact that DNA provides unquestionable evidence of guilt and innocence. DNA can also provide closure to families who have lost loved ones. Forensic DNA technology is the future of investigations, and Congress must ensure that the criminal justice system has the necessary resources so that this technology can keep pace with the future demands and eliminate any backlog that may delay or slow its progress.

New stories extolling the successful use of DNA to solve crimes abound. For example, in 1999, New York authorities linked a man through DNA evidence to at least 22 sexual assaults and robberies that had terrorized that city.

In 2002, authorities in Philadelphia and Fort Collins, Colorado, used DNA evidence to link and solve a series of rapes and a murder perpetrated by the same individual. In the 2001 "Green River" killings, DNA evidence provided the major breakthrough in a series of crimes that had remained unsolved for years despite a law enforcement task force and a \$15 million investigation.

There are many more examples of DNA having been used to solve crime, and there is also no question that the current Federal and State DNA collection and analysis system needs improvement. In many instances, public crime labs are overwhelmed by backlogs

of unanalyzed DNA samples. In addition, these labs may be ill-equipped to handle the increasing influx of DNA samples and evidence. More research is needed to develop faster methods for analyzing DNA evidence. Professionals involved in the criminal justice system need additional training and assistance to solve these crimes. Furthermore, the criminal justice system needs the means to provide DNA testing in appropriate circumstances for individuals who assert that they have been wrongly convicted.

When an innocent person is convicted, lives are ruined and society remains at risk while the real perpetrator remains at large. Greater access to DNA testing is essential, but DNA alone will not eliminate the problem of wrongful convictions. Steps must be taken to prevent wrongful convictions in the first place. Innocent people have been wrongfully convicted because their attorneys failed to inquire into the facts or failed to present or challenge evidence at trial. We need to ensure that every indigent defendant in a capital case has a competent attorney who can conduct a thorough investigation, consult with experts and carry out an effective examination of the evidence at trial.

Having competent counsel benefits the prosecution as well as the defense. This is the best way, it seems to me, to reduce the chance of reversible error and to ensure that verdicts for the Government are upheld on appeal.

The President and many Members of Congress have offered legislative proposals that address the issues that we will examine today, and I look forward to the testimony from the witnesses and their views on the various proposals.

I am now pleased to recognize the distinguished gentleman from Virginia, the Ranking Member, Mr. Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I would like to thank you for scheduling the hearing on advancing justice through forensic DNA technology.

DNA technology has revolutionized the criminal justice system. Effectiveness has increased exponentially by DNA technology not only for investigating and prosecuting crime, but also for exonerating innocent suspects, many of whom were wrongly convicted because the technology was not available or otherwise wasn't applied at the time of their trial.

The DNA technology has proven so successful and so much in demand, that one of the problems we have been struggling with is providing the funding and expertise and structural support necessary to take advantage of it. Not only have we seen a huge backlog in DNA samples of already-convicted offenders waiting to be processed for additional—for addition to our CODIS, C-O-D-I-S, data bank for convicted offenders, but we have also incurred huge backlogs in rape kits and other crime scene samples waiting to be processed in order to take dangerous offenders off the street.

This is something we must not only prioritize, but must adequately fund as a matter of immediate public safety. There can be no greater calling to this Subcommittee than the call to protect innocent people from unjust convictions or even execution. Our system of criminal law and procedure is premised upon the golden thread of criminal justice of the presumption of innocence.

Now, in recent years, the advent of DNA evidence has shown that we have been violating that presumption of innocence. Just in a few years there have been at least 108 convicted and sentenced individuals who have been subsequently exonerated by DNA evidence, including 13 who were on death row. And the number is even greater on the exclusions at the onset of criminal investigations. The FBI reveals that about 25 percent of the suspects who are tested by DNA—for DNA are actually exonerated.

While DNA is uncontrovertible proof that innocent people are sentenced to death in this country despite our reverence for presumption of innocence, DNA evidence is simply one way of revealing that there are fatal flaws in our system. The real question we have to answer, Mr. Chairman, is, what is wrong with the system, where but for subsequent DNA evidence outside of the normal system, innocent people might have been put to death.

A 23-year study by Professor James Liebman from Columbia University of over 4,500 capital cases in 34 States reveals the court found serious reversible error in 68 percent of capital cases. Of these, 82 percent were not sentenced to death upon retrial, including 7 percent who were found to be factually innocent of the capital charge. I understand that the Innocence Project finds that in a third of the cases it handles, in which DNA evidence is still available, convicted defendants are found to be outright innocent.

When we consider that the reason they were convicted is due to flaws in our criminal justice system, there is every reason to believe the percentage of erroneous convictions is the same where DNA evidence is not available.

The notion that flaws in the system can be addressed through a governor's clemency powers is clearly an inadequate response to the serious problem. Our criminal justice principles are designed to ensure a fair trial for all accused persons. Ultimate questions of life, death or freedom should not depend upon the politics of the moment or the popularity of the defendant or whether the governor happens to be in an election campaign or other such things.

Furthermore, the governor's office is an inappropriate forum to decide such cases. The governor has no subpoena power, no right or opportunity to cross-examine key witnesses or to observe witnesses subject to cross-examination by advocates familiar with the case. Nor does the governor have other investigatory powers necessary to ensure fairness. The forum for testing the reliability of evidence is the trial, not the political forum of the governor's office.

So, Mr. Chairman, I believe that it is our responsibility to ensure that crime is efficiently and accurately investigated and prosecuted, and that people are not mistakenly convicted and deprived of their freedom on account of preventable errors or flaws in our system of the administration of justice. We can do a lot to prevent and address such errors and flaws.

In the last Congress, the Innocence Protection Act, which provides for funding and standards for DNA testing, safeguards to ensure adequate counsel and other supports crucial to protecting innocents, was cosponsored by 250 Members. The Debbie Smith Act, which provides for funding and system supports to address the DNA sample processing backlog also has broad bipartisan support. So these would be good efforts to start with, Mr. Chairman. And

I understand that you and the gentleman from Massachusetts, Mr. Delahunt, Chairman Sensenbrenner and others have been working to craft bills that we can all support to accomplish these ends, and I applaud you for your efforts and look forward to working with you as we move forward to marking up this historic legislation in this Congress.

I look forward to the witnesses, two of whom I would like the privilege of introducing.

Mr. COBLE. I was about to yield to you, and I will in just a minute, Mr. Scott.

We are pleased, as well, to have the distinguished gentleman from Wisconsin, Mr. Green; the distinguished gentleman from Massachusetts, Mr. Delahunt, although he has abandoned this Subcommittee, we are still glad to have him back. And I am at this point pleased to yield to my good friend from Virginia, who has requested to introduce Dr. Ferrara and Mrs. Smith.

Mr. SCOTT. Thank you, Mr. Chairman.

Dr. Ferrara is the Director of the Virginia Division of Forensic Science, Co-director of the Virginia Institute for Forensic Science and Medicine, and Distinguished Professor of Forensic Science at the Virginia Commonwealth University.

He has been active in forensic legislation and has crafted the country's most comprehensive DNA data bank laws, as well as laws defining the admissibility of forensic evidence in Virginia's courts.

In 1989, the Virginia Division of Forensic Science, under his leadership, became the first State, say, laboratory in the country, to provide DNA testing in criminal cases. He holds a Ph.D. in Organic Chemistry from Syracuse and another Ph.D. from the State University of New York College of Science and Forestry.

And, Mr. Chairman, I just wonder—as a point of personal privilege, just want to point out that I served in the State Senate prior to serving in Congress; and he has provided excellent leadership in forensic science for the Commonwealth of Virginia, and we have been a national leader in DNA technology and other areas.

And I just am very proud to welcome him as a witness.

Mr. COBLE. Thank you.

Mr. SCOTT. And, Mr. Chairman, one of our other witnesses is Debbie Smith, who is from Williamsburg, VA.

In March 2003, Representative Green introduced a bill entitled the Debbie Smith Act of 2003. It was named after Mrs. Smith, who was a victim of rape, who has fought courageously to spread awareness regarding the importance of collecting DNA samples and eliminating the DNA evidence backlog. She is using her experience to help others so that they won't have to suffer in the future, and we are just delighted to have her here today.

Mr. COBLE. I thank the gentleman, and we have been joined by the distinguished gentlemen from Florida and Ohio, Mr. Feeny and Mr. Chabot, respectively; and Mr. Schiff from California.

I thank you, Mr. Scott. I will recognize the other two witnesses.

We are pleased to have all of you. Good to see you again, Mrs. Smith; I remember visiting with you earlier. And Dr. Ferrara, if you are a basketball fan, one of your alma maters made you proud earlier this year.

Our first witness today is the Honorable Sarah V. Hart. On August the 7 of 2001, Ms. Hart was sworn in as Director of the National Institute of Justice in the U.S. Department of Justice. From 1995 to August 2001, Ms. Hart was Chief Counselor for the Pennsylvania Department of Corrections. Prior to assuming that position, she was prosecutor in the Philadelphia district attorney's office for 16 years. Miss Hart is a graduate of the Rutgers School of Law, and she received her Bachelor of Science Degree in Criminal Justice from the University of Delaware.

Our third witness today is Mr. Peter J. Neufeld. Mr. Neufeld is a civil rights attorney and Cofounder and Director of the Innocence Project at the Benjamin N. Cardozo School of Law at—is that pronounced Yeshiva—Yeshiva University in New York City. The project currently represents hundreds of inmates seeking post-conviction release through DNA testing. He is the co-author of *Actual Innocence, Five Days Till Execution and Other Dispatches From the Wrongly Convicted*. A 1972 graduate of the University of Wisconsin, Mr. Neufeld received his law degree in 1975 from the New York University School of Law.

We are pleased to have each of you with us today. And, folks, as you all know, on this Hill we all operate under short leashes. Our time is of great essence, as I am sure your time is. So if you all will be ever-alert when that red light illuminates into your eyes, that is your warning that your 5 minutes have elapsed.

The amber light will come on first to give you a warning that the ice is becoming thin. So if you could confine your testimony to the 5 minutes, we would be appreciative.

And, Ms. Hart, we will start with you.

Mr. SCOTT. Mr. Chairman, before she starts, I made a misstatement. I said there were 108 convicted and sentenced individuals who had been exonerated by DNA. It is actually 132. So I would like to make that correction.

And I was wondering if you would indulge a very brief statement from one of the Members on our side, Mr. Schiff.

Mr. COBLE. Well, does anyone on my right want to speak? I am afraid if we do that, Bobby, I—Mr. Schiff, if you would suspend, and when it comes time for your question, I think in the interest of time, because otherwise everybody is going to want to make that statement.

Ms. Hart, if you will commence.

STATEMENT OF SARAH V. HART, DIRECTOR, NATIONAL INSTITUTE OF JUSTICE, U.S. DEPARTMENT OF JUSTICE

Ms. HART. Mr. Chairman, Congressman Scott and Members of the Subcommittee, I am very pleased to appear here today to—

Mr. COBLE. Ms. Hart, pull that mike a little closer to you, if you will.

Ms. HART. Mr. Chairman, Congressman Scott and Members of the Subcommittee, I am very pleased to appear here today to discuss the President's DNA initiative, advancing justice through DNA technology. As you know, Mr. Chairman, I am the Director of the National Institute of Justice, the Department of Justice's research, development and evaluation agency.

During my 24 years as a criminal justice professional, I have followed closely the advances of DNA technology in the criminal justice system. The President's DNA initiative shows us a vision of how this Nation can use DNA technology as a routine criminal justice tool to make the public safer and protect the innocent. Every day we read of how DNA technology has solved previously unsolvable crimes and brought violent criminals to justice. Just last week, in my hometown of Philadelphia, police used DNA evidence to solve the 1987 rape and murder of 10-year-old Heather Coffin. However, even though the police identified evidence for DNA testing over 3 years ago, casework delays resulting from inadequate laboratory capacity prevented immediate testing to solve this crime. DNA testing can also link seemingly unrelated crimes and identify serial predators.

Mr. Chairman, in your opening remarks, you mentioned another Philadelphia case known as the "center city rapist," who murdered a Wharton graduate student and committed several rapes in center city. Although he had no criminal record, the FBI DNA data bank linked it to Fort Collins, Colorado, rapes. This led to a key investigative lead. Police now knew they were looking for somebody who lived in Philadelphia at a particular time and Fort Collins at another time. They were able to identify a suspect. DNA confirmed his guilt and he pled guilty, and not one rape victim had to go through the trauma of the trial.

Unfortunately, the power of this technology to advance justice has been limited due to insufficient funding, insufficient laboratory capacity, outdated information systems, overwhelming case loads and a lack of training. There are hundreds of thousands of DNA samples awaiting analysis in labs and on police shelves. The situation is unacceptable and just plain wrong.

The President's initiative is a 5-year billion-dollar plan that addresses the immediate backlog problems and prevents them from occurring in the future. I would note, in connection with this, that we strongly support the objectives of the Debbie Smith Act, which are consistent with the President's initiative.

The six key components of the President's initiative are as follows:

First, backlog reduction: The President's initiative calls for \$92 million in the first year and similar funding thereafter to eliminate the DNA sample backlog for the most serious violent offenses.

Second, capacity building: The initiative calls for \$60 million in the first year and similar funding for the following 4 years to improve our Nation's crime lab infrastructure. Some public labs still need basic equipment and materials. Most labs need to automate evidence handling and casework management. They need to use robotics to handle repetitive function, and they need automated quality assurance systems.

Third, research and technology development: The President's initiative calls for \$25 million approximately annual funding to stimulate DNA research and development. The Justice Department, with the support of Congress, has funded cutting-edge research on DNA testing technologies. Scientists are working on the DNA chip I am holding here, which uses nanotechnology to reduce the time for DNA testing to a matter of minutes instead of hours. The goal is

to make DNA testing faster, better and more economical to conduct DNA analysis.

The President's initiative also calls for \$17.5 million annually for training for key criminal justice stakeholders on evidence collection, storage and analysis, and \$2 million to enhance the use of the FBI's missing persons data bank.

Finally, the President's initiative calls for post-conviction DNA testing. Under this, the Attorney General will create \$5 million in annual grant program funds to help States defray the cost of post-conviction testing.

I have also been asked to address the relationship between the President's DNA initiative and the various proposals under the Innocence Protection Act.

We oppose linking the President's DNA initiative with the specific Innocence Protection Act's post-conviction and capital counsel provisions. Conditioning the DNA assistance fund on the State's submission to Federal post-conviction testing standards would threaten our ability to strengthen DNA systems.

In addition, post-conviction testing procedures should discourage frivolous applications that can needlessly inflict additional harms on crime victims. Likewise, the Government should not attempt to force new counsel requirements on the States by changing rules for habeas corpus review, which serve important public interests, nor should we attempt to force compliance by proposing to deny States essential Federal funding, proposing to create new avenues for costly post—excuse me, unnecessary and costly Federal civil litigation or by proposing to provide one-sided funding to defense entities or advocacy groups.

If new counsel provisions are advanced, they should focus on affirmative assistance to the States to provide improved trial representation by both prosecutors and defense counsel. It is essential that we ensure that DNA technology is available early on in the criminal investigation process, not just post-conviction proceedings, so that police can exclude innocent suspects and prevent them from being charged with crimes in the first place.

Mr. COBLE. Ms. Hart, are you about ready to wrap up?

Ms. HART. Yes. Thank you, Mr. Chairman.

Mr. COBLE. I hate to cut you off in the middle.

Ms. HART. I apologize for taking too long. Thank you very much.

Mr. COBLE. And for the benefit of the people in the audience, we do alert the witnesses that we try to comply with the 5-minute rule. So we will not hit them from the blind side.

Thank you, Ms. Hart.

[The prepared statement of Ms. Hart follows:]

PREPARED STATEMENT OF SARAH V. HART

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to inform this Subcommittee concerning the activities of the Administration and the Department of Justice relating to the use of DNA technology to solve crimes and promote public safety.

The promise and importance of the DNA technology are so great that the President has endorsed a major initiative, totaling more than \$1 billion over five years, to fully realize its potential in the criminal justice process. My testimony today will focus on the proposals in the President's initiative. I will also discuss needed DNA-related reforms in Federal law which we have already recommended to Congress in previous testimony and statements. In addition, as requested by the Subcommittee

staff, I will comment on the proposed Debbie Smith Act (H.R. 1046) and the Innocence Protection Act bills, including capital counsel and habeas corpus issues that have been linked to DNA reforms in some legislative proposals.

Before turning to these issues in detail, allow me to summarize our views and proposals:

The President's DNA initiative, which was announced by the Attorney General on March 11 of this year, proposes the commitment of \$232.6 million for DNA-related purposes in FY 2004, and continuation of this level of funding in successive years through FY 2008. The funding will be administered through various components of the Department of Justice including, in FY 2004, \$177 million through the National Institute of Justice, \$13.5 million through existing programs of other Office of Justice Programs components, and \$42.1 million for activities of the FBI. The topical elements of the President's initiative, and their funding allocations for FY 2004, are as follows:¹

- (i) **DNA BACKLOG ELIMINATION**—\$92.9 million to assist in clearing backlogs of unanalyzed crime scene DNA samples (such as rape kits) and offender DNA samples. Nationwide, there is an unacceptably high number of unanalyzed crime scene DNA samples in sexual assault, homicide, and kidnapping cases. If analysis of these backlogged samples results in DNA "hits" in even a fraction of these cases, the result will be the solution of thousands or tens of thousands of the most serious violent crimes. The President's initiative proposes the critical funding needed to clear these backlogs.
- (ii) **STRENGTHENING CRIME LABORATORY CAPACITY**—\$90.4 million to increase forensic laboratory capacity at the State and local levels for DNA analysis, for Federal DNA laboratory programs, and to operate and improve the Combined DNA Index System. The existence of DNA sample backlogs has resulted from the failure of public laboratory capacity for DNA analysis to keep pace with the growth of the DNA identification system. The proposed funding aims to upgrade State and local forensic laboratory capacity so that these laboratories will be able to keep abreast of incoming DNA work in the future—thereby avoiding the development of new DNA backlogs—and will no longer require Federal assistance for this purpose.
- (iii) **RESEARCH AND DEVELOPMENT**—\$24.8 million for DNA-related research and development. This commitment of funding will result in smaller, faster, and less expensive tools for DNA analysis which will reduce capital investments for crime laboratories while increasing their capacity to process cases.
- (iv) **TRAINING**—\$17.5 million for training in the collection, handling, and use of DNA evidence, including training for both law enforcement and medical personnel. Adequate training can greatly increase the number of cases in which usable DNA evidence is obtained, as well as ensuring appropriate sensitivity to and treatment of crime victims in obtaining biological material.
- (v) **POSTCONVICTION DNA TESTING**—\$5 million to defray costs of postconviction DNA testing in the State systems. The historically recent emergence of the DNA technology means that new evidence may be generated from retained biological material in cases that predate the availability of DNA testing. Most States have accordingly adopted provisions authorizing postconviction DNA testing in recent years. The funding proposed in the President's initiative will encourage and support these State efforts.
- (vi) **MISSING PERSONS IDENTIFICATION**—\$2 million to promote the use of the DNA technology to identify missing persons. This funding is needed to realize the full potential of the Missing Persons DNA Database Program, which can provide closure to the families of missing persons by identifying human remains.

In addition to the critical need for adequate funding, which the President's initiative proposes, the efficacy of the DNA system depends on having adequate laws gov-

¹See Presidential Document, *Advancing Justice Through DNA Technology* (March 2003); U.S. Department of Justice, Fact Sheet, *The President's Initiative to Advance Justice Through DNA Technology* (March 11, 2003); Prepared Remarks of Attorney General John Ashcroft: DNA Initiative (March 11, 2003).

erning the system's operation and related procedural matters. To this end, we have proposed the following Federal law reforms:²

- (i) **ALL-FELONS SAMPLE COLLECTION**—The existing categories of convicted Federal offenders from whom the collection of DNA samples is authorized are too narrow, and should be expanded to include all convicted felons. Twenty-nine States have already adopted this reform.
- (ii) **COMPREHENSIVENESS OF THE NATIONAL DNA INDEX**—The statute governing the national DNA index should be amended to allow submitting jurisdictions to include the DNA profiles of all persons from whom they lawfully collect DNA samples. Currently, the national index statute only allows the inclusion of DNA profiles from convicted offenders, though many States collect DNA samples from some categories of non-convicts (such as adjudicated delinquents) and include the resulting profiles in their own DNA databases.
- (iii) **STATUTE OF LIMITATIONS REFORM**—Existing time rules can confer effective immunity from prosecution on persons whose identity as the perpetrators of rapes and other serious crimes is conclusively established through DNA matching. Congress should permit the statute of limitations to be tolled where DNA evidence identifies the perpetrator.
- (iv) **POSTCONVICTION DNA TESTING**—While most States have made provision for postconviction DNA testing in appropriate cases, the Federal government has yet to do so. We look forward to working with Congress to establish postconviction DNA testing standards and procedures for Federal convicts who could not have obtained such testing at the time of their trials.

We have also been asked to comment on DNA legislation that has been introduced by members of Congress—particularly, the proposed Debbie Smith Act (H.R. 1046), and the “Innocence Protection Act” bills that have been introduced in varying formulations over the past few Congresses—and the related capital counsel and habeas corpus reform issue.

We strongly support the objectives of the proposed Debbie Smith Act, which include continuing Federal support for DNA sample backlog elimination, increasing public laboratory capacity for DNA analysis, and enhanced DNA-related training for medical and law enforcement personnel. We believe that the Federal effort to realize the full potential of the DNA technology should be more comprehensive in some respects, and that the overall funding for this purpose should be higher, as proposed in the President's initiative. There are a few provisions in H.R. 1046 which are unnecessary or would have unintended negative effects, as discussed in my detailed testimony below.

The Innocence Protection Act (IPA) bills—such as S. 486 and H.R. 912 of the 107th Congress—have generally involved a combination of postconviction DNA testing provisions and provisions, unrelated to DNA, concerning the representation of indigents in State capital cases. As noted, we believe that postconviction DNA testing is a significant element in a general program for the improvement of the DNA identification system.

It should be clearly understood, however, that DNA exonerations overwhelmingly do not take place through postconviction testing, but through DNA testing at the investigative stages of criminal cases which clears individuals who might otherwise be wrongly suspected, accused, or convicted of crimes. If DNA testing is regularly carried out as warranted at the pretrial stages of criminal cases, there will be little or no need for postconviction testing. Needed resources for DNA testing should be provided at the critical earlier stages of criminal cases, which guards against innocent people being convicted in the first place.

Hence, the effective protection of the innocent requires the comprehensive program proposed by the President to realize fully the potential of the DNA technology at all stages of the criminal justice process. Proposals to address postconviction DNA testing alone are by their nature incomplete. Without more, they cannot be adequate either in protecting the innocent from miscarriages of justice or in protecting the public from the predations of rapists, murderers, and other violent criminals.

²See U.S. Department of Justice, Fact Sheet, *Legislation to Advance Justice Through DNA Technology* (March 11, 2003); Prepared Remarks of Attorney General John Ashcroft: DNA Initiative, *supra* note 1, at 4; Letter of Assistant Attorney General Daniel J. Bryant to Honorable Joseph R. Biden, Jr., concerning S. 2513, at 2–3, 8–10 (Nov. 25, 2002); Statement of Sarah V. Hart, Director, National Institute of Justice before the Senate Judiciary Subcommittee on Crime and Drugs regarding DNA Initiatives, at 6–8 (May 14, 2002).

In positive terms, postconviction DNA testing should be promoted through affirmative assistance and encouragement to the States, rather than through the attempted imposition by the Federal government of new unfunded mandates. Most of the States have already adopted post-conviction DNA testing provisions;³ their discretion to explore different approaches and establish postconviction testing procedures suited to their own systems should be respected. We do not believe that the Federal government should attempt to prescribe a one-size-fits-all set of postconviction testing standards and procedures for the States. With respect to postconviction DNA testing in Federal cases, we look forward to working with Congress to devise appropriate procedures which protect the actually innocent, while providing adequate safeguards against abuse of the judicial system and further abuse of crime victims by the actually guilty.

With respect to the capital counsel provisions of the IPA bills, we believe, of course, that defendants in capital cases must receive effective representation. However, we do not believe that such provisions should be included in legislation to authorize or implement the President's DNA initiative.

If capital counsel provisions are nevertheless advanced, it is essential that such provisions be carefully formulated so as to mitigate adverse consequences. This could be accomplished by: (i) providing affirmative assistance to the States that respects State discretion to tailor measures that exceed constitutional requirements to the specific needs and procedures of the State, (ii) providing any funding that might be authorized for this purpose directly to the States, rather than to defense entities or advocacy groups, (iii) providing that any funding for State capital defense be matched by equal funding for State capital prosecution, and (iv) providing that funding for these purposes be committed to the improvement of defense and prosecution representation at the trial stage of capital cases.

Finally, we have been asked to comment on proposed habeas corpus legislation, which has also sometimes been included in legislative proposals that are partially concerned with DNA reforms. For example, some versions of the IPA have included provisions that would alter the procedural default doctrine, and the presumption of correctness for State court fact-finding, if States failed to adopt federally prescribed counsel standards and requirements.

We oppose such controversial proposals because they are not necessary to ensure constitutional representation. If habeas corpus provisions were nevertheless advanced, their appropriate orientation should encourage the prompt assertion and consideration of legal claims in the State system. This would permit prompt remediation of errors when they arise.

Our detailed testimony is as follows:

I. THE PRESIDENT'S DNA INITIATIVE

The operation of the DNA identification system is similar to that of the fingerprint identification system. For the past century, fingerprint technology has been an important tool in solving crimes. Fingerprints left on objects touched by the perpetrator of a crime may be compared to those of persons who may have committed the crime, thereby inculpatting them or excluding them as the guilty party. Moreover, even where there is no known suspect, fingerprints may be instrumental in bringing the guilty to justice. Matching of crime scene prints to fingerprint records which are available in State and national databases—reflecting the routine collection and maintenance of fingerprints from arrestees and convicts in criminal cases—may identify the perpetrators of crimes which would be unsolvable by other investigative methods.

Beginning in the late 1980s, working groups associated with the FBI laid the groundwork for a comparable system of DNA identification. Around the same time, some States began to collect DNA samples routinely from certain categories of convicted offenders, and Congress subsequently provided the statutory basis for a nationwide DNA identification system through the enactment of the DNA Identification Act of 1994. The standards developed for the system include the convention of using 13 DNA loci which do not designate any overt trait or characteristic of an individual, but which in the aggregate identify him or her uniquely. The effect is to produce, through the analysis of DNA samples taken from crime scenes and offenders, DNA profiles which amount to genetic fingerprints.

Comparing the DNA profile derived from biological material left by the perpetrator at a crime scene—e.g., semen in a sexual assault examination kit—to that of a known suspect may confirm or refute the suspect's identity as the perpetrator.

³See *Advancing Justice Through DNA Technology*, *supra* note 1, at 11–12; S. Rep. No. 315, 107th Cong., 2d Sess. 75–78, 187–207 (2002).

In cases where there are no known suspects, matching of crime scene DNA to DNA profiles of convicted offenders which are maintained in State and national databases can promptly solve crimes that would otherwise be unsolvable. Even where an individual is not specifically identified, common DNA profiles at multiple crime scenes may show a common perpetrator, thereby allowing the pooling of critical investigative information.

Under the current development of the system, all States collect DNA samples from some categories of convicted offenders, and many collect DNA samples from some persons in non-convict categories, such as adjudicated juvenile delinquents. At this point in time, a substantial majority of the States have enacted legislation authorizing the collection of DNA samples from all convicted felons, and the strong trend in State law reform is towards broader sample collection. The States maintain databases which include the profiles derived from the crime scene and offender DNA samples they collect, and the FBI maintains a national DNA identification index which makes the DNA profiles obtained under the State systems available on a nationwide basis for law enforcement identification purposes. The FBI also operates the Combined DNA Index System (CODIS) which links the State and national databases and enables them to communicate with each other.

The results of this system have been remarkable, even though many States are only beginning to use DNA's full crime solving potential, and the nation's DNA databases contain only a fraction of the DNA profiles that they will eventually include as the system develops further. For example:

- In December 1998, a 21-year-old pediatric nursing student was kidnapped, sexually assaulted, and murdered in Broward County, Florida. Three months later a DNA sample from Lucious Boyd was matched to semen found on the victim's body. Boyd was convicted of sexually assaulting and murdering the nursing student and sentenced to death in June 2002.
- In 1983, a boy was raped and murdered in Virginia while walking on a path. Investigators resubmitted the case in 1999 for DNA analysis. In August 1999, they matched the profile to Willie Butler, who was in the database due to a previous conviction for burglary. Butler was convicted of this crime.
- In 1977, a six-year-old girl disappeared while vacationing with her family in Reno, Nevada. Her remains were found two months later. DNA testing was not available in 1977, and the case remained unsolved for twenty-three years. In 2000, renewed investigative efforts resulted in a DNA test of the victim's clothing and entry of the resulting DNA profile into the Nevada State DNA database. A database search revealed a match to a man who had been on parole since 1976 for a previous sexual assault of a minor. The man pled guilty to the murder in October 2000.

Given the extraordinary potential of the DNA technology, both Congress and the Department of Justice have endeavored for a number of years to further the system's development. For example, in 2000, Congress enacted the DNA Analysis Backlog Elimination Act, which authorized funding assistance to the States to clear DNA backlogs, and provided the initial authorization for the collection of DNA samples from convicted Federal offenders. The Department's activities have included extensive DNA programs of the National Institute of Justice and the FBI. For example, by the end of last year, the National Institute of Justice had disbursed funds supporting the analysis of more than 470,000 DNA samples collected from convicted offenders by the States, and had awarded Federal funds to support the analysis of more than 24,000 crime scene DNA samples in State cases involving no known suspects.

This year, based on the recommendations of a national panel of forensic and criminal justice experts, the President proposed a comprehensive national strategy that addresses a wide range of issues currently impeding the nation's ability to maximize the use of DNA technology. This strategy promises immediate and long term solutions of backlog, delay, and underutilization that now impede the system's operation. As noted, this includes the commitment of over \$1 billion for this purpose over the next five years, the first installment of which is reflected in the President's budget request for FY 2004.

The President's DNA initiative, which the Attorney General announced on March 11, proposes the following measures:⁴

⁴The documents setting forth the President's initiative are cited in notes 1–2 *supra*. A chart summarizing the principal elements of the initiative and funding for those elements appears in *Advancing Justice Through DNA Technology*, *supra* note 1, at 15.

A. DNA BACKLOG ELIMINATION (FY 04 amount: \$92.9 million)

The backlogs of DNA samples in the State and Federal systems represent rapes, murders, and other serious crimes which are waiting to be solved, but will not be solved until the needed resources are made available to analyze these samples. The backlog problem has two basic components:

First, there is the backlog of “casework” samples, which consist of DNA samples obtained from crime scenes, victims, and suspects in criminal cases. We estimate that there are hundreds of thousand of casework samples awaiting testing. The President’s initiative calls for \$76 million in FY 2004, with continued funding over the five years of the initiative, to help clear this backlog.

Second, there is a backlog of “convicted offender” samples, which consists of DNA samples obtained from convicted offenders who are incarcerated or under supervision. At the time of the announcement of the President’s initiative in March, we estimated the number of collected but untested convicted offender samples at between 200,000 and 300,000. We further estimated that there were between 500,000 and 1,000,000 such samples which were “owed” under State sample collection standards, but not yet collected. The volume of convicted offender samples to be collected and tested will increase as the States continue to enlarge the categories of offenders from whom they collect DNA samples. The President’s initiative calls for \$15 million in FY 2004 to help eliminate the convicted offender sample backlog over five years.

In addition to the States’ backlog of convicted offender samples, the Federal Bureau of Prisons, the Federal probation offices, and the Court Services and Offender Supervision Agency for the District of Columbia began to collect DNA samples from Federal and District of Columbia offenders following the authorization of such sample collection by the DNA Analysis Backlog Elimination Act of 2000. The FBI’s Federal Convicted Offender Program (FCOP) is responsible for processing and analyzing these samples. At the time of the announcement of the President’s initiative, approximately 18,000 DNA samples from Federal and D.C. offenders had been collected and submitted to the FBI. The President’s initiative calls for \$1.9 million in FY 2004 to fund FCOP, which includes funding for analysis of the collected samples.

B. STRENGTHENING CRIME LABORATORY CAPACITY (FY 04 amount: \$90.4 million)

In addition to providing immediate assistance to clear the backlogs of casework and convicted offender samples, the President’s initiative seeks to remedy the underlying problem of inadequate public laboratory capacity for the timely analysis of DNA samples. Many laboratories currently have limited equipment resources, outdated information systems, and overwhelming case management demands. The initiative proposes Federal funding to further automate and improve the infrastructure of forensic laboratories so they can process DNA samples efficiently and cost effectively. These improvements will prevent future DNA backlogs, and enable the criminal justice system to realize the full potential of DNA technology on a permanent basis.

\$60 million is budgeted for this purpose in FY 2004. Specific uses of the funding will include providing basic infrastructure support to public crime laboratories for DNA analysis; acquisition of Laboratory Information Management Systems to automate evidence handling and casework management—now available in only an estimated 10% of public DNA laboratories; providing automation tools to streamline aspects of the DNA analysis procedure that are labor and time-intensive, such as robotic DNA extraction units; and providing support for the retention and storage of forensic evidence.

This component of the President’s DNA initiative also includes \$20.5 million in funding in FY 2004 for the FBI’s laboratory programs. The FBI’s Laboratory Division handles the regular DNA casework in Federal criminal cases, and provides support and technical assistance to the DNA programs of State, local, and international law enforcement agencies. This includes the Nuclear DNA Program (“DNA Unit 1”), which handles nuclear DNA analysis, and the Mitochondrial DNA Analysis Program (“DNA Unit 2”), which is responsible for performing mitochondrial DNA analysis of forensic evidence containing small or degraded quantities of DNA. In addition to providing funds to these two existing programs—\$13,902,645 for nuclear DNA and \$6,009,137 for mitochondrial DNA—the initiative budgets \$661,693 in FY 2004 for regional mitochondrial DNA laboratories, to provide an alternative source for mitochondrial DNA analysis to State and local law enforcement and allow the FBI laboratory to concentrate more of its efforts on Federal cases.

In addition, the FBI administers the Combined DNA Index System (CODIS) which effectively integrates the DNA information obtained under the various State and Federal DNA systems, and makes it available on a nationwide basis for law enforcement identification purposes. The initiative budgets \$9.9 million for the oper-

ation and improvement of CODIS in FY 2004. This includes completing a general redesign and upgrade of CODIS, which will increase the system's capacity to 50 million DNA profiles, reduce the search time from hours to microseconds for matching DNA profiles, and enable instant, real-time (as opposed to weekly) searches of the database by participating forensic laboratories.

C. RESEARCH AND DEVELOPMENT (FY 04 amount: \$24.8 million)

The President's initiative includes substantial funds for DNA-related research and development including, for FY 2004, \$10 million to be administered by the National Institute of Justice, and \$9.8 million for the FBI's DNA research and development program. Areas of emphasis over the next several years will include, for example, the development of "DNA chip technology" to improve the speed and resolution of DNA analysis—which will reduce analysis time from several hours to several minutes and provide cost-effective miniaturized components—and development of robust methods to enable more crime laboratories to analyze degraded, old, or compromised biological evidence.

Another element in this area is DNA demonstration projects, for which \$4.5 million is budgeted in FY 2004. This will involve the funding of research projects in several jurisdictions to determine the scope of public safety benefits when police are trained to more effectively collect DNA and other forensic evidence, evidence is timely tested, and prosecutors are trained to enhance their ability to present this evidence in court. The information obtained will allow State and local governments to make more informed decisions regarding investment in forensic DNA as a crime-fighting tool.

A final element in this category is \$5 million in FY 2004 to establish a National Forensic Science Commission. The Commission would both develop recommendations for maximizing the use of current forensic technologies to solve crimes and protect the public, and identify potential scientific breakthroughs that may be used to assist law enforcement.

D. TRAINING (FY 04 amount: \$17.5 million)

Adequate training concerning the collection and use of DNA evidence is essential to maximize the benefits of the DNA technology. Police officers and investigators, for example, must have the knowledge to identify biological material at crime scenes that may contain usable DNA evidence, and must know how to collect such evidence properly. Prosecutors and defense attorneys need to know how to introduce DNA evidence and use it successfully in court, and judges must be able to rule correctly on its admissibility. Medical personnel and victim service providers likewise need to understand DNA technology to promote successful evidence collection, and to be fully responsive to the needs of victims. The President's initiative proposes \$17.5 million for these purposes, including training and education for police officers and investigators, prosecutors, defense attorneys, judges, offender supervision and corrections personnel, forensic scientists, medical personnel, and victim service providers.

E. POSTCONVICTION DNA TESTING (FY 04 amount: \$5 million)

The President's initiative proposes \$5 million in FY 2004 to help States defray the costs of postconviction DNA testing. We believe that this will adequately cover the costs of tests done nationwide under the criteria that the States have established.

The DNA technology has its principal impact at the pretrial investigative stages, both in securing evidence of guilt, and in clearing innocent persons who might otherwise be wrongly suspected, accused, or convicted of crimes. In light of the recent emergence of this technology, however, there is also a need for DNA testing in the postconviction context. If a person is imprisoned for a rape for which he was convicted in the 1980s, for example, DNA testing could not have been sought by the defendant before trial, because it did not exist at the time. But it may now be possible to determine whether the defendant's DNA matches to that of the apparent perpetrator in a rape kit or other retained evidence. There have in fact been a number of cases in which postconviction DNA testing has cleared persons convicted for crimes they did not commit, and in some instances, matching of the retained evidence to DNA databases has implicated other persons as the actual perpetrators. For example:

- A Maryland man served 20 years of a 30-year sentence after being convicted of a 1982 home invasion rape of a schoolteacher. Through postconviction DNA testing, the man was exonerated in 2002. When the crime scene profile was uploaded to CODIS, it was preliminarily linked to a felon whose DNA profile was maintained in the DNA database. This man has subsequently been ar-

rested and charged for the 1982 crime. The original defendant was pardoned in January 2003.

While this experience points to the need for postconviction DNA testing in appropriate cases, it also underscores the urgent need to bring the nation to a point where DNA analyses can be routinely performed early in the investigation, thus precluding the possibility of an innocent person being convicted in the first instance. No one in 21st Century America should be charged with or imprisoned for a crime he did not commit, and DNA technology is available to help prevent that from occurring.

Further, while post-conviction DNA testing is necessary to correct erroneous convictions imposed prior to the ready availability of DNA technology, experience also points to the need to ensure that postconviction DNA testing is appropriately designed so as to benefit actually innocent persons, rather than actually guilty criminals who wish to game the system or retaliate against the victims of their crimes. Frequently, the results of postconviction DNA testing sought by prisoners confirm guilt, rather than establishing innocence. In such cases, justice system resources are squandered and the system has been misused to inflict further harm on the crime victim. The recent experience of a local jurisdiction is instructive:

Twice last month, DNA tests at the police crime lab in St. Louis confirmed the guilt of convicted rapists. Two other tests, last year and in 2001, also showed the right men were behind bars for brutal rapes committed a decade or more earlier.

[The St. Louis circuit attorney's] staff spent scores of hours and thousands of dollars on those tests. She personally counseled shaking, sobbing victims who were distraught to learn that their traumas were being aired again.

One victim, she said, became suicidal and then vanished; her family has not heard from her for months. Another, a deaf elderly woman, grew so despondent that her son has not been able to tell her the results of the DNA tests. Every time he raises the issue, she squeezes her eyes shut so that she will not be able to read his lips. "She finally seemed to have some peace about the rape, and now she's gone back to being angry," the woman's son said.

DNA tests confirmed that she was raped by Kenneth Charron in 1985, when she was 59. To get that confirmation, however, investigators had to collect a swab of saliva from her so that they could analyze her DNA. They also had to inquire about her sexual past, so they could be sure the semen found in her home was not that of a consensual partner.

The questioning sent the woman into such depression that she's now on medication. "None of this needed to happen," her son said. . . .

The Innocence Project screens inmate petitions, selecting only the cases that seem to offer the best shot at exoneration. Still, [an Innocence Project attorney] said, 60% of the inmates represented . . . prove to be guilty when the results come in.⁵

Currently, over 30 States have enacted special statutory provisions for postconviction DNA testing, and additional States make postconviction testing available through other procedures.⁶ In adopting postconviction DNA testing procedures, the States have sought to balance these important interests—using postconviction DNA testing appropriately to clear innocent persons, while maintaining appropriate protections against abuse of the system by criminals. The funding committed for this purpose under the President's initiative will assist and encourage States in these efforts.

F. MISSING PERSONS IDENTIFICATION (FY 04 amount: \$2 million)

The FBI's Missing Persons DNA Database makes it possible to determine the fate of missing persons who have died, by comparing DNA profiles contributed by relatives of missing persons with the DNA profiles of unidentified human remains. This database is not being used to its full potential for a number of reasons: States have only recently begun to conduct DNA analysis on human remains and to submit the results to the database; unidentified human remains continue to be disposed of without the collection of DNA samples; and many crime laboratories lack the capacity to conduct timely analysis, especially where the biological sample is old or degraded. In addition, many law enforcement officials and family members lack sufficient information about the existence of the program and how to participate.

A number of elements of the President's DNA initiative discussed above will contribute to the solution of this problem. These include the general strengthening of

⁵ Los Angeles Times, "DNA Tests for Inmates Debated," A10 (Feb. 10, 2003).

⁶ See note 3 *supra*.

crime laboratory capacity which will facilitate timely analysis of biological samples from unidentified human remains; assistance in the analysis of degraded and old biological samples through the FBI's Mitochondrial DNA Analysis Program; and research and development of more robust methods for analyzing degraded, old, or compromised biological samples.

In addition, the President's initiative will include: (i) providing outreach and education to medical examiners, coroners, and law enforcement officers about using DNA to identify human remains and aid in missing person cases, (ii) make DNA reference collection kits available to these State and local officials, (iii) support the development of educational materials and outreach programs for families of missing children and adults, (iv) encourage States to collect DNA samples before any unidentified remains are disposed of, and (v) provide technical assistance to State and local crime laboratories and medical examiners on the collection and analysis of degraded remains through the FBI and the National Institute of Justice. The \$2 million budgeted specifically for missing persons identification under the President's initiative will be used for these outreach programs and the development of educational materials and reference collection kits.

II. FEDERAL LAW REFORMS

Maximizing the use and benefits of the DNA technology requires the right law, as well as the right resources. To this end, we have proposed a number of Federal law reforms affecting the operation of the DNA identification system and the use of DNA evidence:⁷

A. ALL-FELONS SAMPLE COLLECTION

The efficacy of the DNA identification system depends entirely on the profiles entered into it. Experience demonstrates that broad collection and indexing of DNA samples is critical to the effective use of the DNA technology to solve rapes, murders, and other serious crimes.

The DNA sample that enables law enforcement to identify the perpetrator of a rape, for example, often was not collected in connection with an earlier rape. Rather, in a large proportion of such cases, the sample was taken as a result of the perpetrator's prior conviction for a non-violent crime (such as a burglary, theft, or drug offense).

For example, in Virginia, which has authorized the collection of DNA samples from all felons since 1991, a review of cases in which offenders were linked to sex crimes through DNA matching found that almost 40% of the offenders had no prior convictions for sexual or violent offenses. Most serious offenders do not confine themselves to violent crimes. The experience of States with broad DNA collection regimes demonstrates that DNA databases that include all felons dramatically increase law enforcement's ability to solve serious crimes.

As a result of the proven value and importance of broad DNA sample collection in solving rapes, murders, and other serious crimes, the States have been moving towards the collection of DNA samples from all felons. At this time, at least 29 States have enacted legislation authorizing the collection of DNA samples from all persons convicted of felonies, and the number is increasing rapidly.

However, the specification of sample collection categories for Federal offenders remains narrower than that currently authorized in most State systems. The DNA sample collection categories in the DNA Analysis Backlog Elimination Act of 2000, as originally enacted, were relatively narrow and fragmentary. These categories were recently expanded to include Federal offenders convicted of terrorism offenses and of crimes of violence generally.⁸ While this was an improvement over the original law, the Federal DNA sample collection provisions continue to exclude many Federal offenders whose inclusion in the DNA system would predictably be of significant value in solving rapes, murders, and other crimes.

This omission should be corrected by extending the DNA sample collection categories for Federal offenders to include all felons, as most of the States have already done.⁹

⁷ Previous statements concerning these proposals are cited in note 2 *supra*.

⁸ A proposed rule to implement this extension has been published, *see* 68 FR 11481 (March 11, 2003), and a final rule will be issued shortly.

⁹ Legislation to effect such an extension should preserve the current unrestricted coverage of crimes of violence, and of sexual abuse offenses under chapter 109A of the criminal code, regardless of penalty grading. Suitable legislative language for this purpose appears in § 3(b)-(c) of S. 149, 108th Cong., 1st Sess. (2003).

B. COMPREHENSIVENESS OF THE NATIONAL DNA INDEX

The statute governing the national DNA index currently authorizes inclusion in the index of the DNA profiles of “persons convicted of crimes.” 42 U.S.C. 14132(a)(1). This is narrower than the scope of DNA sample collection under existing legal authorities in most United States jurisdictions. For example, most States collect DNA samples from some categories of adjudicated juvenile delinquents, and some States—including Virginia, Louisiana, and Texas—have authorized DNA sample collection from certain arrestees on a categorical basis. The States can collect these samples and include the resulting DNA profiles in their own DNA databases, but cannot enter this information into the national DNA index because of the wording of the Federal database statute.

This limitation undermines the utility of the national index as a means of making nationally available for law enforcement identification purposes the information collected under the State systems, and hence works against the effective solution of rapes, murders, and other crimes through DNA matching. This problem should be corrected by allowing inclusion in the national index of DNA profiles of other persons whose DNA samples are lawfully collected under applicable legal authorities, as well as those of convicted offenders. By way of comparison, the States regularly include fingerprint information for arrestees, as well as convicts, in the national criminal history records system, and are free to include prints for juvenile delinquents as well as adult offenders.

This proposed change is essential to conserve limited law enforcement and laboratory resources. Knowledgeable law enforcement officials are often aware that many States and local jurisdictions maintain DNA profiles (from juveniles and arrestees) that are not uploaded into the national database. As a result, police often use an informal search mechanism that relies on faxed search requests to all jurisdictions to investigate cases. The lawful search mechanism wastes valuable law enforcement resources as each laboratory must input an individualized search and then respond to the requesting jurisdiction. The proposed statutory change would conserve these valuable law enforcement and laboratory resources by permitting a single search of the national database instead of the current individualized fax/search process.

C. STATUTE OF LIMITATIONS REFORM

A statute of limitations usually reflects a legislative judgment that the burden of prosecuting an old crime may outweigh its benefits. It balances the need to prosecute serious crimes with concerns that a delayed prosecution may be unreliable given the passage of time and faded memories. A statute of limitations may also encourage law enforcement officials to investigate promptly suspected criminal activity. For serious crimes, such as murder, where the public interest in holding an offender accountable is particularly compelling, there is usually no statute of limitations.

Where, however, a prosecution is supported by DNA evidence, imposing a statute of limitations does not serve these public interests. The dependability of DNA evidence does not diminish over time and it produces reliable verdicts years after the crime was committed. Likewise, the mechanical application of a fixed statute of limitations can bar a trial even where law enforcement officials have promptly investigated the crime and sought to use DNA evidence. For these reasons, we have recommended that the provisions governing the time period for commencing prosecution in Federal cases be amended so as to toll the limitation period for prosecution in felony cases in which the perpetrator is identified through DNA testing. This reform is necessary to realize the full value of the DNA technology in solving crimes and protecting the public from rapists, killers, and other serious offenders.

The DNA identification system solves crimes by collecting DNA samples from offenders and matching the resulting DNA profiles to DNA found in crime scene evidence. However, this process proves to be futile where the sample taken from an offender matches, for example, rape kit DNA from a rape committed some years previously, but prosecution is impossible because it is time-barred. For example, in Federal law, the limitation period for the prosecution of most offenses is five years, *see* 18 U.S.C. 3282. So if a person who commits a rape avoids identification for five years, he has quite likely acquired permanent immunity from prosecution—even if DNA matching conclusively identifies him as the perpetrator five years and one day after the commission of the crime. Rape cases involving DNA matches which occur after the expiration of a restrictive statute of limitations have already been seen in the current operation of the DNA identification system,¹⁰ and their number will increase as the DNA databases grow and the use of the DNA technology expands.

¹⁰*See, e.g.,* <http://www.townhall.com/columnists/stevechapman/sc000312.shtml> (regarding California case involving rape of Jeri Elster in 1992 and solution of the case through DNA test-

Nor is the problem confined to the area of sexually violent offenses. For example, consider a case in which a person commits a murder in violation of the interstate domestic violence or interstate stalking provisions of Federal law, 18 U.S.C. 2261 and 2261A. Since these provisions include no death penalty authorizations, the no-limitation rule for capital cases under 18 U.S.C. 3281 is inapplicable, and they must normally be prosecuted within five years under the general limitation rule of 18 U.S.C. 3282. Thus, if the offender is not identified and indicted within five years, prosecution under these provisions is thereafter likely to be impossible, even if DNA matching establishes the identity of the perpetrator following the expiration of the limitation period.

Currently, State systems vary considerably in their statutes of limitations for prosecution. A number of States have no limitation period for the prosecution of felonies generally, or for other broadly defined classes of serious crimes. *See, e.g.*, Ala. Code § 15-3-5 (no limitation period for prosecution of felonies involving violence, drug trafficking, or other specified conduct); Ky. Rev. Stat. § 500.050 (generally no limitation period for prosecution of felonies); Md. Cts. & Jud. Proc. Code § 5-106 (same); N.C. Gen. Stat. § 15-1 (same); Va. Code § 19.2-8 (same); *see also* Ariz. Rev. Stat. § 13-107(E) (limitation period for prosecution of serious offenses tolled during any time when identity of perpetrator is unknown). Other States have amended their statutes of limitations in light of the development of the DNA technology and its ability to make conclusive identifications of offenders even after long lapses of time. Common reforms include extending or eliminating the limitation period for prosecution in sexual assault cases or cases that may be solvable through DNA testing. *See, e.g.*, Ark. Code § 5-1-109(b)(1); Del. Code tit. 11 § 205(i); Ga. Code § 17-3-1(b), (c.1); Idaho Code § 19-401; Ind. Code § 35-41-4-2(b); Kan. Stat. § 21-3106(7); La. Crim. Proc. Code art. 571; Mich. Comp. Laws § 767.24(2)(b); Minn. Stat. § 628.26(m); Or. Rev. Stat. § 131.125(8); Tex. Crim. Proc. Code art. 12.01(1)(B).

Federal law, however, has not yet adequately addressed this problem in Federal criminal cases. As noted, we have recommended remedial legislation to provide that, in felony cases in which the defendant is implicated through DNA testing, the statute of limitations does not begin to run until the DNA identification occurs. Even where crime scene DNA evidence is available, unavoidable delay may occur before the offender can be identified through DNA matching, if he is not convicted until years later for some other offense which results in a DNA sample being taken and entry of his DNA profile into CODIS. The proposed tolling provision will help to ensure that prosecution will not be barred by an arbitrary time limit in such cases.¹¹

We also recommend that this reform be made retroactively applicable to offenses committed before its enactment, to the full extent permitted by the Constitution. The Supreme Court recently considered this issue in *Stogner v. California*, 2003 WL 21467073, and held that legislation extending a statute of limitations cannot be given fully retroactive effect, to revive prosecutions that were already time-barred when the legislation was enacted. The Court emphasized, however, that this does not impugn the validity of giving such reforms partially retroactive effect, to extend the limitation period for prosecuting an offense that is not yet time-barred when the statute of limitations reform is enacted. *See* 2003 WL 21467073, at *4, 7, 16. Affording the statute of limitations reforms we have recommended retroactive effect to the

ing in 1999, following expiration of six-year statute of limitations); New York Times, Aug. 29, 2001, at A12, "In Rape Case Gone Awry, New Suspect—DNA Freed a Man, Now Implicates a 2nd" (regarding Oklahoma case in which DNA testing exonerated individual imprisoned for 15 years for a rape he did not commit, and implicated a second person following the expiration of the statute of limitations); Tulsa World, Dec. 22, 2002, at A4, "Statutes of limitations get look" (regarding prosecution of Edward Alberti for 1987 sexual assault, based on DNA evidence that had exonerated another man imprisoned for 14 years for the crime).

¹¹We have also proposed a reform to allow prosecution without limitation of time of felonies under the principal sex offense chapters of the Federal criminal code, and of kidnapping of children in violation of Federal law. *See, e.g.*, Letter of Assistant Attorney General Daniel J. Bryant to Honorable Joseph R. Biden, Jr., *supra* note 2, at 2, 8-10 (Nov. 25, 2002). Considerations supporting this reform include the frequent availability of DNA evidence in sex offense cases, which may lead to conclusive identification of the perpetrator even after the passage of many years; the seriousness of these crimes; the likelihood that sex offenders will reoffend if not restrained by prosecution and conviction; and the delay in the reporting of these crimes which may occur because of the dependence, intimidation, or traumatization of the victim. The House of Representatives has already passed this reform. *See* H.R. 5422, § 202, 107th Cong., 2d Sess. (2002). The statute of limitations reform that Congress recently enacted in the PROTECT Act (P.L. 108-21, § 202, amending 18 U.S.C. 3283), while beneficial, does not obviate the need for the proposed general reform for sex offense cases because: (i) the PROTECT Act reform only applies in cases involving child victims, and hence does not help in adult victim rape cases or any other cases involving adult victims, and (ii) it only suspends the statute of limitations during the life of the child victim, and hence does not help in cases in which the child is killed or dies.

full extent that the Constitution allows will maximize their value in older cases which will be solved through DNA testing, but in which the DNA identification would come too late under the previously applicable limitation rules.

We are aware that the PROTECT Act (P.L. 108–21) enacted an amendment to 18 U.S.C. 3282 which authorizes the use of indictments identifying the defendant by DNA profile in cases under chapter 109A of the criminal code. However, this change does not help with the statute of limitations problems in cases involving DNA identification, but rather aggravates those problems, for reasons discussed later in this statement.

D. POSTCONVICTION DNA TESTING

As noted above, most of the States have made provision for postconviction DNA testing, but the Federal government has yet to adopt standards and procedures for the conduct of such testing in Federal cases. We look forward to working with Congress to develop appropriate statutory provisions for this purpose. As in the State systems, the need is to develop procedures which appropriately make postconviction DNA testing available to convicts whose factual innocence may now be provable by such testing, while maintaining adequate safeguards against abuse of such a remedy and retaliatory traumatization of victims by criminals.

III. THE DEBBIE SMITH ACT (H.R. 1046)

The general objective of the proposed Debbie Smith Act is to improve the investigation and prosecution of sexual assault cases with DNA evidence. The bill includes proposals which aim to authorize funding for the DNA analysis backlog elimination programs; to ensure adequate training of medical personnel, law enforcement personnel, and prosecutors in obtaining, handling, and using DNA evidence; to ensure that statutes of limitations do not bar the prosecution of sex offenders identified through DNA testing; and to strengthen the administration of the DNA identification system at the national level.

We strongly support these objectives, which are shared with the President's DNA initiative and related legislative reforms we have proposed. As noted, we believe that these objectives should in some respects be pursued in a more comprehensive fashion, and with higher overall funding, as proposed in the President's initiative. There are a few provisions in the bill which would not achieve their intended objectives, or would have unintended negative effects, as discussed below.

H.R. 1046 is the same as S. 2513, which the Senate passed last year. We have previously provided detailed comments on the bill's provisions in our views letter on S. 2513.¹² In brief, our specific comments are as follows:

Section 2 (unanalyzed rape kits assessment)

This section directs the National Institute of Justice to assess the amount of unanalyzed DNA evidence in sexual assault cases. This provision is unnecessary because the National Institute of Justice is already carrying out such an assessment.

Sections 3–6 (backlog elimination grants amendments)

These sections propose amendments to the grant provisions of the DNA Analysis Backlog Elimination Act. We support the proposal in section 3 to name the grant program after Debbie Smith, whose efforts in support of the use of DNA evidence to bring sexually violent criminals to justice amply justify the designation. The language changes in this section, which would add references to analysis of rape kit samples and samples in cases without identified suspects, are not necessary. The current language of the grant provisions encompasses these objectives, and analysis of such samples is in fact a central focus of the existing program.

Section 4 would extend the authorizations of funding for grants under the program. The section specifically proposes aggregate amounts of \$90 million annually from FY 2004 through 2007, and \$40 million in FY 2008. The program should be funded at the higher levels proposed in the President's initiative, which involves aggregate amounts of \$151 million annually from FY 2004 through FY 2008 for crime scene ("casework") backlog elimination, convicted offender backlog elimination, and increasing public laboratory capacity for DNA analysis.

We support the proposal in section 5 to extend the class of eligible grantees to include local governments, as opposed to channeling all backlog reduction funding through the State governments. The current system, in which local governments can participate only through their States, has prevented several local jurisdictions from receiving essential funds. In a number of cases, these jurisdictions have backlogs

¹² See Letter from Assistant Attorney General Daniel J. Bryant to Honorable Joseph R. Biden, Jr., *supra* note 2.

larger than those of many States. However, including Indian tribes as grantees—as section 5 proposes—would serve no purpose, because the Federal government prosecutes rapes and other major crimes committed in Indian country, and is responsible for the analysis of DNA samples (both casework samples and convicted offender samples) in Indian country cases. Since the tribal governments do not analyze DNA samples, they would not be appropriate grantees under a program to assist State and local governments in clearing their backlogs of unanalyzed DNA samples and in increasing their public laboratory capacity for DNA analysis.

We recommend against adding the priority language in section 6 to the grant program, for reasons explained in our statement of views on the corresponding provision in S. 2513.¹³

Section 7 (quality assurance for DNA evidence)

We recommend against including this section's requirement that the Attorney General develop a recommended national protocol for DNA evidence collection. Such a requirement would likely have unintended negative effects, and its objectives can be better accomplished by other means. See our statement of views on S. 2513.¹⁴

Sections 8–9 (training programs)

We support these sections' objectives, which are shared with the President's DNA initiative, of improved training for medical personnel, law enforcement personnel, and prosecutors in the collection and use of DNA evidence.

Section 10 (John Doe indictments)

The provisions in this section, which have been enacted by the PROTECT Act (P.L. 108–21, §610), authorize the use of indictments identifying the defendant by DNA profile in prosecutions under chapter 109A of the criminal code. As explained in our statement of views on S. 2513, these provisions cannot deal adequately with the statute of limitations problem in cases involving sexually violent crimes or DNA identification. They do not eliminate the need to race the clock in order to identify and analyze retained evidence in unsolved sexual assault cases and file indictments within whatever time is allowed by the statute of limitations.

Moreover, these provisions represent no advance over prior law, because indictments identifying defendants by DNA profile were already allowed before the PROTECT Act amendment. The enacted amendment actually leaves the prosecution in a worse position than prior law, because it only expressly authorizes the use of DNA profile indictments in cases under chapter 109A of the criminal code. But sexually violent crimes are often prosecuted under other provisions of the criminal code, such as chapter 117, and nonsexual crimes under other chapters of the code also can involve DNA evidence. Given the enacted amendment's limitation to chapter 109A offenses, defendants will hereafter argue that the use of DNA profile indictments is no longer permitted, by negative implication, in prosecutions for offenses outside of chapter 109A.¹⁵

Hence, the enactment of the provisions in section 10 does not reduce, but rather increases, the need for enactment of the effective statute of limitations reforms described earlier in this statement.

Sections 11–12 (FBI funding)

These sections contain authorizations for some of the FBI DNA programs which are incomplete and outdated. Section 11 authorizes \$9.7 million in FY 2003 for upgrading CODIS, and \$500,000 in FY 2003 for the Federal Convicted Offender Program (FCOP). Current authorization language should relate to FY 2004. The correct FY 2004 figures for CODIS and FCOP are \$9,867,000 and \$1,881,691 respectively. In addition, authorization language should cover the other FBI programs—nuclear DNA analysis, mitochondrial DNA analysis, regional mitochondrial DNA laboratories, and DNA research and development. The aggregate funding that should be authorized for the FBI DNA programs is \$42.1 million in FY 2004. The same level of funding should also be authorized for the remainder of the period covered by the President's initiative (through FY 2008).

Section 13 (privacy requirements)

This section directs the Attorney General to issue regulations limiting access to or use of stored DNA samples or DNA analyses. However, the DNA identification system is already subject to strict statutory privacy rules—which generally preclude the use of DNA samples and analyses for purposes other than law enforcement iden-

¹³See *id.* at 6.

¹⁴See *id.* at 6–7.

¹⁵See *id.* at 7–8, 10–12.

tification—and is already subject to quality control standards required by statute. See 42 USC §§ 14131, 14132(b), 14133(a)-(b). Violation of these rules and standards would result in ineligibility to participate in CODIS, ineligibility for Federal DNA backlog reduction funding, and other sanctions. See 42 USC §§ 14132(c), 14133(c), 14135(b)(2), 14135e.

IV. INNOCENCE PROTECTION ACT (INCLUDING CAPITAL COUNSEL AND HABEAS CORPUS)

The Innocence Protection Act (IPA) proposal has been introduced in varying formulations over the past few Congresses. For example, the Senate Judiciary Committee reported a version of this proposal as S. 486 last year, and a parallel House bill was introduced as H.R. 912. The central features of all versions of the proposal have been provisions designed to impose on the States detailed, federally prescribed standards and requirements for postconviction DNA testing and representation of indigent defendants in capital cases. In some versions, the effort to impose the prescribed capital counsel requirements on the States has included proposed modifications of the rules governing Federal habeas corpus review of State judgments.

A. POSTCONVICTION DNA TESTING

The IPA bills have included proposed postconviction DNA testing provisions for Federal cases, and provisions designed to impose the same postconviction DNA testing standards on the States through a combination of funding cut-off conditions and direct mandates. This includes ineligibility for funding under the Federal DNA grant programs for States that fail to adopt the federally prescribed postconviction testing standards.

In substance, the specific standards the IPA bills have proposed for postconviction DNA testing have generally been inconsistent with the standards that the States have already adopted under their own laws. Most States have established procedures for postconviction DNA testing, which reflect judgments about the balance of various interests that must be considered in the design of postconviction remedies, and which do not automatically order postconviction DNA testing merely because a prisoner says that he wants it.¹⁶ Common limitations in State postconviction DNA testing provisions include, for example, conditioning postconviction DNA testing on the unavailability of the requested testing at the time of trial, requiring a sufficient chain of custody to establish the integrity of the evidence to be tested, or requiring that some likelihood be shown that DNA testing will establish the applicant's innocence before testing is ordered.

In contrast, the postconviction testing standards in the IPA bills have not included such limitations. The practical effect is that the IPA would require the States to abrogate their existing postconviction DNA testing procedures, and to adopt instead federally prescribed procedures which are contrary to the reasoned judgments the States have already made about the appropriate scope and operation of postconviction DNA testing in their systems. These judgments take into account in a meaningful way the likelihood that the test will establish the defendant's innocence, as well as the effect on the victim.

The penalties imposed on States that failed to submit to this new regime of Federal prescription would include ineligibility for Federal DNA assistance funding. However, the affected DNA assistance programs provide the critical support needed by States to clear their backlogs of unanalyzed rape kits and other crime scene DNA samples, clear their backlogs of convicted offender DNA samples, increase public forensic laboratories' capacity for DNA analysis, and otherwise strengthen the use of the DNA identification technology in the nation's criminal justice systems. As a practical matter, the principal impact of the DNA technology—both in bringing the guilty to justice and in clearing innocent persons who might otherwise be wrongly suspected, accused, or convicted of crimes—occurs overwhelmingly at the pretrial investigative stages, rather than through postconviction DNA testing. By potentially denying States Federal funding assistance to strengthen the use of the DNA technology at the most critical stages, the IPA bills' funding ineligibility provisions inadvertently threaten the effective use of this technology at the earliest stages to exonerate innocent persons. This proposal, if adopted, would actually impede one of the major expressed purposes of the IPA.

The appropriate approach to this issue is that proposed in the President's DNA initiative. The States have demonstrated leadership in enacting post-conviction DNA testing provisions. The President's initiative seeks to ensure that testing is not denied for financial reasons, and to encourage and assist the States in providing appropriate postconviction DNA testing in their systems. We believe that the \$5 mil-

¹⁶See the sources cited in note 3 *supra*.

lion budgeted annually for this purpose will be adequate. The States should not be subject to new Federal mandates concerning the specific standards and procedures for such testing, and certainly should not be denied Federal DNA funding assistance because they make their own reasonable judgments on these issues.

B. CAPITAL COUNSEL PROVISIONS

In all versions, the IPA bills attempt to make States submit to new Federal capital counsel requirements which conflict with existing law and practice in both Federal and State jurisdictions. These requirements include, for example, the creation of independent authorities to establish qualifications for, appoint, and monitor the performance of attorneys who represent indigent defendants in capital cases.

These new requirements would be enforced by various means. For example, the version of the IPA reported by the Senate Judiciary Committee last year (S. 486) proposes a \$450 million grant program as an inducement to States to adopt its capital counsel system. If the appropriation for the proposed capital defense grant program did not fully cover the authorized amount, then funds would be diverted to the capital defense program from the Byrne Grant program, thereby reducing the critically-needed funding provided to the States by the Byrne Grant program to protect the public from drug crimes and violent crimes. States that accepted the funding for capital defense representation would consent to having their officials sued in Federal court by anyone, based on alleged failures to comply with the IPA's capital counsel provisions. In theory, a State could decline the grant funding—but then Federal funding would be directly channeled to public or private defense organizations in the State.

Other versions of the IPA, such as H.R. 912 in the last Congress, have proposed other measures to the same end. For example, proposals include limiting well-established and well-based habeas corpus review standards in States that fail to submit to the counsel standards (see discussion below); cutting Federal funding to which such States would otherwise be entitled under existing programs; and creating new one-sided Federal funding programs that could channel large amounts of Federal cash to defense entities and advocacy groups that engage in anti-death penalty litigation.

The penalties prescribed by the IPA bills for States that failed to submit to their new requirements regarding capital case representation would apply regardless of how exemplary a State's existing system is in assuring effective representation to capital defendants.¹⁷ It is noteworthy that Congress has prescribed standards for Federal capital cases which assure experienced counsel with adequate resources, and that these standards have resulted in defendants receiving effective representation in Federal capital cases—but the standards for Federal capital cases would not satisfy the requirements that the IPA bills attempt to impose on the States.¹⁸

We do not believe that legislation embodying the important proposals in the President's DNA initiative should be joined to these controversial measures, which intrinsically are unrelated to DNA. If capital counsel provisions were nevertheless advanced, they should be carefully crafted to meet legitimate State concerns, and to avoid justified opposition by the States that would predictably be fatal to the possibility of enacting such legislation. Any such program should embody the following principles:

First, any program of this type should consist of affirmative funding assistance, which encourages and helps States to strengthen their systems of capital case litigation, and respects their discretion concerning the adoption of measures that go beyond those required by the Constitution. Funding to which States are currently entitled should not be cut based on failure to comply with new Federal prescriptions, and no effort should be made to coerce States to submit to such prescriptions by subjecting them to ill advised revisions of habeas corpus law.

Second, the grantees under any such program of affirmative funding should be the States themselves, as opposed to defense agencies or entities within the States, or private organizations. This would enable the States to use any available grant funding most effectively to meet their actual needs.

Third, the bulk of any funding provided under such a program should be committed to capital case representation at trial, as opposed to representation in postconviction proceedings. The trial is the critical event in which society's resources are marshaled to the maximum extent possible to provide a full presentation of evidence and arguments in order to achieve an accurate verdict and a just sentence.

¹⁷ See generally S. Rep. No. 315, 107th Cong., 2d Sess. 91–95 (regarding existing State capital counsel systems).

¹⁸ For example, the Federal provisions lodge the authority to appoint counsel in the courts, which the IPA would not allow. See 18 USC 3005; 21 USC 848(q)(4)–(10).

To the extent that the trial performs its functions adequately, there is a reduced need for postconviction proceedings. Thus, funding incentives should seek to preserve and enhance the central role of the trial.¹⁹

Fourth, any funding provided under such a program should be evenly divided between support for capital case prosecution and support for capital case defense. There are two essential elements of effective representation in capital cases—effective representation of the public interest by the prosecution, and effective representation of the defendant’s interest by the defense. No less than the critical defense interest in cases in which the defendant is on trial for his life, the public interest on the prosecution side of these cases is of the highest order, implicating the States’ ability to protect the public from, and impose just punishment for, the most heinous crimes of aggravated murder.

Effective representation depends upon adequate resources for both sides. For example, in a capital case, a State attorney general or district attorney office with limited staff and resources may face a private law firm with immense resources which is representing the defendant on a pro bono basis, and lawyers provided through large-scale capital defense programs carried out by advocacy groups and bar associations. In addition, the Federal government already commits large amounts of Federal funds to the defense side in State capital cases through the Administrative Office of the United States Courts, which funding exceeded \$20 million in FY 2001. Federal funding or assistance programs for state capital cases should consider the needs of the prosecution and the defense.

C. HABEAS CORPUS PROPOSALS

Some versions of the IPA have included an additional measure to force States to adopt the prescribed capital counsel systems. In Federal habeas corpus review of capital cases from States that failed to adopt such systems, the normal rules which limit raising claims that were not properly raised before the State courts, and the presumption of correctness for State court fact-finding, would be inapplicable.

Current habeas corpus law seeks to encourage criminal defendants to raise promptly claims at the earliest stages of criminal proceedings. This serves important public interests—if errors occur and are immediately identified, the State court judge can take prompt remedial action that cures the error. For example, if improper evidence is admitted, the court may be able to provide curative instructions that remove any prejudice to the defendant. Alternatively, where errors cannot be cured at trial, the State judge can order an immediate retrial. The new trial can proceed promptly while witness recollections are still fresh and the likelihood of a reliable verdict is increased. This proposal to eliminate these requirements in some jurisdictions would undermine the important public interest in identifying and correcting legal errors as soon as they occur.

We believe that legislation to implement the President’s DNA initiative should not be burdened with the habeas reform proposals that have appeared in the IPA, just as it should not be burdened with the capital counsel provisions of that proposal. If habeas corpus reform provisions are nevertheless advanced, their proper orientation should not be to increase even further the opportunities for dilatory and repetitive litigation, but rather to establish appropriate safeguards to encourage prompt resolution of legal claims.

By way of background, in all jurisdictions, once a criminal case is commenced, the law prescribes various requirements to ensure that the litigation progresses in an orderly manner from one stage to the next, and that claims are raised and issues resolved in a timely manner. For example, in the Federal jurisdiction, the making of an arrest or filing of an indictment sets the clock running under the Speedy Trial Act, which provides timing rules for subsequent proceedings. *See* 18 USC 3161. Following conviction, a notice of appeal must be filed promptly if further proceedings are desired, and any ensuing appeal is briefed and heard in conformity with a schedule set by the court. In addition to the global time rules set for advancing to subsequent stages of litigation, rules exist which require that particular claims and issues must be raised at the appropriate point in the proceedings, and are generally deemed to be forfeited thereafter if not raised in a timely manner.

In Federal habeas corpus proceedings, as in earlier stages of litigation, rules of this sort exist, which were considerably strengthened by the habeas corpus reforms adopted as part of the Antiterrorism and Effective Death Penalty Act in 1996. However, significant gaps remain which can result in highly protracted litigation, and

¹⁹ *See* Bureau of Justice Statistics, *Capital Punishment 2001*, at 1 (Dec. 2002) (average delay of 11 years and 10 months between imposition of sentence and execution in 2001, an increase of five months in comparison with 2000).

some of the reforms that Congress did adopt in 1996 have been substantially undermined in judicial application.

One area that may merit legislative attention is the operation of the time limitation rule for Federal habeas filing under 28 USC 2244(d). The statute sets a one year limit for Federal habeas filing after the judgment becomes final in the State courts, subject to tolling in appropriate circumstances, including situations in which the legal or factual basis of the claim presented was not reasonably available at an earlier point, or in which the State unlawfully prevented the petitioner from filing at an earlier point. The limitation period is also tolled under the statute while the petitioner is pursuing State collateral review.

While 28 USC 2244(d) appears clear on its face about the amount of time allowed for filing, and the exceptions thereto, some courts have had other ideas about how the system should operate. One avenue of circumvention has been reliance on the doctrine of “equitable tolling”—i.e., failing to comply with the time limitation rule of 28 USC 2244(d), and instead allowing Federal habeas petitions to be filed beyond the time limit prescribed in the statute on judicially created grounds that the statute does not authorize. Another stratagem may come into play where a petitioner presents a “mixed” petition, which includes some claims for which he has properly exhausted State remedies, but also other claims which he has not pursued in the State courts prior to the expiration of the time limit for Federal habeas filing under 28 USC 2244(d). In such a case, the Federal habeas court may hold the petition in abeyance, send the petitioner back to State court to exhaust State remedies on the unexhausted claims, and then allow the petitioner to rejoin these claims to the original petition later on. This can result in the litigation of habeas petitions years beyond the expiration of the time limit for Federal habeas filing prescribed in the statute, including claims that the petitioner failed to present in any cognizable form within that time limit.²⁰

Another area that may merit legislative attention is the operation of the “procedural default” doctrine, which generally bars raising claims at later litigative stages if they were not properly raised at earlier stages. In some contexts, Congress has prescribed definite rules which adequately constrain the belated presentation of claims that were not raised in a timely manner. In general terms, these statutory provisions limit the consideration of such claims to circumstances in which the legal or factual basis of the claim was not reasonably available at an earlier point, and the claim in question is an “actual innocence” claim in a defined sense. Examples include 28 USC 2244(b)(2), which limits raising claims in successive Federal habeas petitions that were not raised in earlier Federal habeas petitions, and 28 USC 2254(e)(2), which limits evidentiary hearings concerning claims whose factual basis was not adequately developed in State court proceedings.

No generally applicable statutory rule of this type has been enacted, however, for the situation in which a petitioner fails to raise a claim properly before the State courts, and then attempts to secure the litigation of the claim—which the State courts never had an opportunity to address—in Federal habeas proceedings. As a result, such claims are considered by Federal habeas courts under caselaw rules governing the excuse of “procedural defaults” which are generally laxer than the statutory rules Congress has enacted in analogous contexts, and which may be further liberalized in judicial application by the refusal of some Federal courts to respect State procedural default rules if the State courts apply them with some flexibility (such as recognizing an “interests of justice” exception). This is a significant loophole in the existing rules, which could be addressed through the enactment of a provision similar to 28 USC 2244(b)(2) and 2254(e)(2) to govern the general determination concerning the excuse of procedural defaults. This change would help ensure that defendants promptly alert State court judges to trial errors so that they can be cured immediately.

Attention may also be warranted concerning the time for concluding the litigation of Federal habeas petitions. While most Federal judges are diligent in disposing of the business before them, cases can also be found in which habeas petitions languish for years with little or no action by the court. While the adverse effect of such delay may be most obvious in capital cases—in which the sentence cannot be carried out while litigation continues—it can also be felt in non-capital cases, in which the possibility of a successful retrial diminishes as time goes by, in the event that the petitioner ultimately obtains relief. A statutory specification of time rules for concluding the litigation of Federal habeas petitions may be appropriate, which allows adequate time for the ordinary conduct of such proceedings, while guarding against

²⁰ See, e.g., *Ford v. Hubbard*, 305 F.3d 875 (9th Cir. 2002).

inexcusable tardiness in completing the litigation.²¹ This proposal would help promote confidence in Federal judicial proceedings.

In closing, I wish to thank the Subcommittee again for the opportunity to explain the proposals in the President's DNA initiative, and their importance for bringing the guilty to justice, protecting the innocent, and promoting the safety of the public from crime.

I would be pleased to answer any questions the Subcommittee may have.

Mr. COBLE. Dr. Ferrara.

STATEMENT OF PAUL B. FERRARA, Ph.D., DIRECTOR, VIRGINIA DIVISION OF FORENSIC SCIENCE, CO-DIRECTOR, VIRGINIA INSTITUTE OF FORENSIC SCIENCE AND MEDICINE, AND DISTINGUISHED PROFESSOR OF FORENSIC SCIENCE, VIRGINIA COMMONWEALTH UNIVERSITY

Mr. FERRARA. Mr. Chairman, Members of the Committee, as the director of a large State forensic science laboratory, it has been my privilege over the last almost 20 years to witness the development and to implement a DNA program for the Commonwealth of Virginia that—it should be clear to us now that we are dealing with one of the most powerful investigative technologies to come along in the last 100 years.

When we consider how these DNA data banks work, if we consider it as consisting of really three elements—a database of an appropriate population, high recidivist criminals; a database of crime scene DNA profiles that are developed by the laboratories; and the third element, of course, is an information system, a computer system that allows searching between these databases and the crime scene profiles.

I think it is important to note that when we refer to DNA profiles in the context of forensic databases, we are talking about not a complete elucidation of the human genome. Instead, we take snippets of DNA from various genetic markers that come from non-coding regions of the DNA, so that these DNA profiles are very individualistic, but at the same time provide no medical information with respect to the individuals.

A hit occurs when a DNA profile developed at a crime scene, absent any suspects, any leads, is searched against the data bank of convicted felons or, in the case of Virginia since this January, arrestees for violent crimes, when a match occurs and we can give the law enforcement agency an investigative lead to say, this person was at this crime scene, go from there for your investigative purpose.

In Virginia, our data bank started in 1989, first sex offenders; in 1990, it was expanded to all felons; in 1996, juveniles age 14 or older who were convicted of what would be a felony as an adult; and most recently, in January of this year, the Virginia law regarding a person arrested for a violent felony is required after a finding

²¹ Time rules for concluding Federal habeas litigation appear in chapter 154 of title 28, United States Code, but the chapter 154 provisions are only optional alternative procedures that may be used in States that satisfy certain conditions, and even in such States only apply to capital cases. Federal habeas litigation generally continues to be conducted under the standards of chapter 153, which has no generally applicable time rules for disposing of habeas applications and no generally applicable provision governing the excuse of procedural defaults.

of probable cause to provide a sample. The samples are minimally invasive; we use a saliva swab currently.

Now, with respect to the three elements necessary, we have in place the FBI, that has provided the States a combined DNA index system, which is an excellent system that allows us searching within States and between States. Clearly, as the data banks have grown, the FBI has responded by increasing the needs to increase—by increasing the capacity of that particular data bank.

It is important to note that the FBI does all of these samples, in CODIS, are only identified by a bar code. It is the States who control the information, the personal information, as to who that sample is. It is the States who are responsible for maintaining the data banks and the confidentiality and privacy of those individuals.

Now, the reduction in backlogs of convicted felon samples and the reduction in backlogs of crime scene evidence are the two real problematic areas. The use of private laboratories are expanding—we have ever-expanding statutes. So keeping up with reducing that backlog of convicted felon samples is problematic, but has been proceeding very well, particularly with funding through the National Institute of Justice.

The problem we face and the long-term problem we face, and are going to be facing is, how do we process all of the DNA evidence from all of the possible crime scenes from all pieces of evidence. That, indeed, is a very difficult problem from the standpoint of the forensic laboratories, and I think that is the crisis that we face.

I thank you very much for your attention.

Mr. COBLE. Thank you, Dr. Ferrara.

[The prepared statement of Mr. Ferrara follows:]

PREPARED STATEMENT OF PAUL B. FERRARA

Mr. Chairman, Members of this Subcommittee on Crime, Terrorism, and Homeland Security.

As the director of a relatively large and comprehensive state forensic laboratory system, I have closely witnessed the burgeoning application of DNA technology to forensic science from its infancy to its present day adolescent stage. I use the term “adolescent” because we are far from a mature, fully utilized technology. Since its development less than two short decades ago, we have seen the influence of the DNA technology for identification purposes dramatically expand into all phases of our criminal justice system; from the initial stages of the investigative phase, through arrest and prosecution and finally into the post conviction arena. We have seen its successful application in all types of contemporary crimes as well as in “cold cases” dating back decades and, in a few cases, even centuries.

The technology has been refined again and again until it now provides an unparalleled degree of individualization, robustness and sensitivity without compromising personal medical information and privacy. Today, the courts, prosecutors and indeed the general public can feel more confident in our legal system because critical decisions of guilt or innocence are based, in large part, upon reliable, unbiased scientific evidence.

Yet for all of this promise, our forensic science laboratories today face a crisis of increasing demands and reduced resources that threatens the full potential of this marvelous technology. Physical evidence that potentially can quickly establish the identity and guilt or innocence of a suspect languishes in a police property room or in forensic laboratory evidence storage for months or years waiting until a highly trained and qualified analyst even opens the evidence containers. The old adage of “better late than never” does not provide much solace to Raymond Holder.

Raymond Holder was spotted on the street by a 12-year-old girl who identified him as the man who had held a jagged bottle to her neck as he raped and sodomized her. From the time Raymond Holder was arrested on August 25th, 1993, 10 days after the alleged rape, he claimed his innocence and asked for a DNA test while he remained in custody. Absent any knowledge of any special circumstances or a re-

quest for prioritization of this case, on April 30, 1994, almost 9 months after his arrest, our DNA tests exonerated Raymond Holder and he was finally released. Better late than never? Perhaps for Mr. Holder, but not for Jemma Saunders.

Following a rape/stabbing of a Virginia woman on August 31, 1998, the laboratories of the Virginia Division of Forensic Science received a victim's rape kit, physical evidence, and, by November 13, 1998, a suspect's blood sample. That suspect's name was Christopher Banks and on November 19, 1998 police told the laboratory that Banks could not be held on the rape charge and would probably be released after his upcoming court appearance on an unrelated shoplifting charge. Despite attempts to expedite this case, the analysis on this case was still not complete when Banks showed up in court on January 6, 1999 on the shoplifting charge; no police officer or prosecutor was present and Banks was released. Eleven days after he was released, Banks raped and killed 22-year-old Jemma Saunders. When the results from the August 31, 1998 rape finally were completed by February 3, 1999 the results showed a match between the semen from the victim and Christopher Banks.

While we are not proud of these failings, it is critical to underscore the power of this technology and, conversely, the cost of incomplete or delayed implementation. These cases, and countless others like these which you may never hear of, point out the costs, in human terms, of individuals who should never have been victimized and innocent persons wrongfully accused or even convicted, all due to severely limited usage of the most remarkable forensic technology to come along in a century.

Recognizing this simple principle years ago, the Commonwealth of Virginia embraced this technology early and enthusiastically. In 1989, the Virginia General Assembly passed the nation's first DNA databank law, requiring convicted sex offenders to provide a blood sample upon conviction. Upon studying the very high recidivism rate across the whole gamut of felony criminal offenses, the State of Virginia expanded this statute to include all convicted felons in 1990, and in 1996, added juveniles age 14 or older convicted of a felony. During this period, the Virginia Division of Forensic Science worked closely with the FBI, primarily as a beta-test site for CODIS (Combined DNA Index System) software. Also, during this period, the backlogs of convicted felon samples grew as did the volume, variety and type of crime scene evidence being submitted.

CRITICAL ELEMENTS FOR SUCCESSFUL IMPLEMENTATION

The key to a successful use of DNA databanks, particularly in the critical early stages of a criminal investigation, is three-fold:

- a) the presence of a very sophisticated and secure data/processing system that allows searching of DNA profiles within a state or locality and between states and localities (and the FBI);
- b) large databases of DNA profiles from persons previously convicted (or arrested) for certain crimes, and
- c) having the capability and capacity to process all crime scene evidence from all types of criminal cases and develop any foreign DNA profiles present.

Without all three of these elements in place, the huge investigative value of a DNA databank program will be lost.

A. CODIS

Fortunately for the forensic science community (and the criminal justice system as a whole), the FBI has developed and provided states and localities with a most effective system (CODIS) which allows accurate and rapid searching of DNA profiles between convicted offenders and crime scenes. A "hit" (or match) occurs when the DNA profile, e.g. of a seminal fluid donor developed from the vaginal swab of a rape victim, matches the DNA profile of a convicted offender, even if the person was convicted in another state. Thus, even absent any suspects, leads or eye-witness identifications, the name of the putative perpetrator of this rape can be given to the investigating agency as soon as the laboratory has processed the evidence. But therein lies the rub. When it takes a laboratory months or years to enter convicted offender DNA profiles or process evidence from a rape kit (because a thousand other cases are already in the queue), then that rapist has that much larger of a window of opportunity during which he may commit additional rapes. By the same token, the police will be unnecessarily expending six man-months of investigative resources on this case, during which investigation, innocent persons may become suspects.

Recognizing that additional months or years may lapse from the time of an arrest until conviction and sentencing, on January 1, 2003, a new Virginia law went into effect which requires persons arrested for a violent crime to be included in Virginia's DNA databank, but only after a finding of probable cause and issuance of an arrest

warrant by a magistrate. In only the first 6+ months of this new law, some 23 additional DNA databank “hits” have been made against these arrestees, four of them for unsolved rape cases and three related to unsolved homicides. This translates to 23 investigations assisted/solved months or years earlier than if we waited until these individuals were convicted and sentenced and then sampled.

But unfortunately, due to the language of the DNA Identification Act of 1994, the DNA profiles of these arrestees and those of juveniles juvenile cannot be searched outside of Virginia. Furthermore, Virginia cannot have these juvenile juveniles and arrestee samples tested and funded under NIJ grants for convicted felons. The irony is that as Virginia tests samples from persons upon arrest, there is no need to retest these individuals upon their conviction, under which circumstance we *would* be eligible for these federal grants—all because the existing and out-dated federal law limits CODIS to “convicted offenders.” Arguably, if a state chose to sample convicted misdemeanants, it would be eligible to receive federal money to test them and enter the profiles into CODIS. Clearly CODIS should be able to allow any sample taken legally by state law to be entered into CODIS for searching nationally and these samples should also be eligible for federal funding. To do so will significantly increase the number of inter-state “hits” and the overall performance of CODIS.

B. REDUCTION OF CONVICTED OFFENDER BACKLOG

The elimination of backlogs of convicted offenders and crime scene evidence nationally is more problematic. The reduction of convicted offender samples is well on its way, thanks to federal funding to the states administered through NIJ. In 1998, when Virginia’s backlog of convicted felons reached 160,000 samples, Virginia took the unusual step (at that time) of contracting with a private laboratory (The Bode Technology Group, Inc., Springfield, Virginia) to process these samples by the same rigorous standards established by the FBI’s DNA Advisory Board and followed by our laboratory. The State of Virginia committed over \$9,000,000 of state funds over a four-year period for this purpose supplemented by federal funds since 2001. Thus, by 2002, the Virginia Division of Forensic Science had a DNA database of approximately 190,000 convicted felons. Since then, the proliferation of private, accredited DNA laboratories adhering to FBI Quality Assurance Standards has provided an invaluable resource to supplement the public forensic laboratories. Automated and dedicated to the processing of large volumes of relatively uniform and pristine known samples of convicted offenders, the private sector laboratories have provided sufficient capacity to reduce or eliminate the backlogs of convicted offender samples in a few short years. This vastly improved capacity in the private sector laboratories is critical as states inexorably move toward expanding the qualifying offenses for inclusion in a databank. Most importantly, the “DNA Analysis Backlog Elimination Act of 2000” provided the federal funds to pay the private labs for their work. The National Institute of Justice has worked tirelessly to administer the equitable distribution of these funds to the states while requiring strict compliance of the labs receiving this funding to national standards. Thus, we can see now a light at the end of the tunnel with respect to the backlog elimination of convicted offender samples. That now leaves the hardest nut to crack, i.e., the reduction of backlogs of crime scene evidence.

C. REDUCTION OF CRIME SCENE EVIDENCE BACKLOGS

The ability to develop DNA profiles from an infinite variety of objects (cigarette butts, chewing gum, hat bands, telephones, half-eaten bagels, breast swabs, etc.) containing minute amounts of various body fluids and tissue, is both a blessing and a curse; the properly trained, DNA-savvy crime scene investigator will collect many more items of evidence from more crime scenes which may potentially contain some probative biological material. It should be noted here that the term “crime scene investigator” in reality refers to all types of specialists including, but not limited to, criminal investigators, forensic pathologists and medical investigators, forensic nurses, EMTs, ER physicians, first responders and forensic technicians. With all these well trained experts, the effective use of DNA technology in criminal investigations will continue to give rise to increased case submissions consisting of dozens or hundreds of individual items of evidence from a single crime scene. In the Virginia Division of Forensic Science, we have seen an average increase of 30% per year in requests for DNA testing. Furthermore, the DNA technology has been found to be very effective in solving or assisting in the investigation of property crimes as well as violent crime. Thus, efforts to reduce the backlogs of physical evidence (all kinds of physical evidence, not just DNA) will continue to pre-occupy forensic science laboratories for years to come. The only long term solution to backlogs of crime scene evidence is to fund the education, training and employment of the estimated 5,000 to 10,000 new forensic scientists that will be needed in the coming

years to meet this growing demand. While our focus here is understandably on the use of DNA technology, we must also consider that analysis of crime scene evidence often crosses many of the other forensic disciplines, each of them not without the same issues we face with DNA. DNA evidence does not exist in a vacuum and many different forensic disciplines with their own databases can be brought to bear on a single or multiple pieces of evidence. For latent fingerprints we have the FBI's IAFIS (Integrated Automated Fingerprint Identification System); for firearms we have ATF's NIBIN (National Integrated Ballistic Information Network); for paints we have the RCMP's (Royal Canadian Mounted Police) PDQ (Paint Data Query); for footwear we have a proprietary database, "SoleMate;" for tires we have another proprietary database called "Tread Assistant." This list is not all inclusive, but is presented to illustrate that new technologies impact other forensic science disciplines in much the same way as does the DNA technology, i.e., as a valuable source of investigative information for the criminal justice agencies we serve.

As a member of former Attorney General Reno's Commission on the use of DNA technology in Forensic Science, and most recently as a member of Attorney General Ashcroft's Initiative on DNA Backlog Reduction, we grappled with this issue of the backlog build-up of crime scene evidence at length. In assessing possible strategies to cope with this situation, it is important to point out that forensic science laboratories are very unlike analytical and clinical laboratories where high volumes of identical samples are tested for some analyte(s) of interest. Instead, each forensic science case presents a unique set of circumstances, forms, amounts and conditions of physical evidence and testing methods. The public forensic science laboratories have no control over the form, quality, amount or condition of the physical evidence. Therefore, the forensic scientist must carefully and laboriously scrutinize every piece of evidence to determine the appropriate type and order of testing so as to provide the most useful information without compromising the integrity of the evidence for other forms of forensic testing. While automation and robotics can and do assist in facilitating the intermediate stages of testing, ultimately it is the individual scientist(s) who must assess the evidence, isolate a probative portion, conduct an analysis, interpret the results and provide an accurate report and unbiased testimony. Thus, any solution to the backlogs of physical evidence in forensic laboratories must include growth in the education, training and staffing of public, and for that matter, private forensic laboratories.

I mention private DNA laboratories because they too play an important role in assisting the reduction of backlogs of crime scene evidence, particularly rape kits. They have already demonstrated their ability to screen large numbers of old unworked rape kits for foreign DNA profiles. They have assisted the NYC OCME in identifying the remains from the WTC. They are a valuable resource for independent examinations or re-examinations of DNA evidence for the defense. However, the private sector cannot, in my opinion, have as dramatic an impact on crime scene evidence in general as they have had on convicted offender samples.

For this reason, Virginia elected to outsource convicted felon samples and to train additional DNA examiners (forensic biologists) in-house through the Virginia Institute of Forensic Science and Medicine and then hire them in the Division of Forensic Science. Thus, we concentrated all our forensic biologists efforts on crime scene evidence in-house while the Bode Technology Group, Inc. tested the convicted felon samples. This strategy resulted in a greater amount of crime scene evidence being processed and the resultant profiles entered into CODIS.

The number of DNA cases processed went from 37 in 1989 to 2,284 in 2002.

As a result of these steps, on November 21, 2002, the Virginia Division of Forensic Science "scored" its 1000th "hit," 894 of which identified the putative perpetrator and the remaining 106 associated crimes committed by the same (still unidentified) perpetrators.

The types of crimes assisted or solved by these first 1000 "hits" include:

244	rape/sodomy
111	homicide
12	rape/homicide
58	robbery
14	car jacking
9	malicious wounding
1	abduction/kidnapping
1	arson (occupied dwelling)
471	property crimes (B&Es, burglary, etc.)
85	Miscellaneous (indecent exposure, aggravated assault, eluding police, peeping toms, Project Exile case, etc.)

In considering other strategies for backlog reductions of crime scene evidence, some may look at Virginia's "hit" data and question why so many property crime cases are processed in Virginia. It is tempting to suggest limiting use of DNA testing to violent crimes and only collect samples from violent felons. That is an approach used in other states. While on the surface this seems like a reasonable strategy, I submit to you that to do so is short-sighted and will dramatically reduce the efficacy of DNA databanks. By analyzing carefully these first 1000 "hits," our research has revealed the following:

- Of the 894 case to offender "hits," i.e., where a match between crime scene evidence and a convicted offender occurred, 344 "hits" (38.5%) were to offenders in our database for prior felony property crime convictions. The crimes assisted/solved by these 344 "hits" included 54 sex offenses, 27 homicides, 6 assaults, 10 robberies, one rape/homicide, 2 abduction/car jackings and 214 burglaries/B&Es/larcenies.
- Another 172 of the 894 case to offender "hits" (19.2%) were to offenders in our database for prior felony drug convictions. The crimes assisted/solved by these 172 "hits" include 35 sex offenses, 42 homicides (including two double homicides), 3 assaults, 18 robberies, 13 abduction/car jackings and 41 property crimes.
- Even 47 "hits" were to offenders in our database for prior felony forgery/uttering convictions. The crimes assisted/solved by these 47 "hits" include 12 sex offenses, 8 homicides, 4 other violent crimes against persons and 22 B&Es/burglaries/larcenies.
- Our data shows similar trends with respect to juveniles. Eighty (80) of the 894 case to offender "hits" were to juveniles in our database. The crimes assisted/solved by these 80 "hits" include 12 sex offenses, 8 homicides, 2 assaults, 7 robberies, one rape/homicide, 3 abduction/car jackings and 41 property crimes.

To summarize, 37% of violent crimes solved or assisted by a DNA databank hit were perpetrated by individuals with only prior felony property crime convictions as their most serious qualifying offense. Looked at in another way, 82% of these case to offender "hits" would have been completely missed if our databank was limited to only violent offenders. Clearly, DNA databanks are most effective with inclusion of all felons and DNA technology applied to all forms of criminal cases.

IMPROVING THE DNA IDENTIFICATION SYSTEM

We have in place today a very well established quality assurance (QA) program promulgated by the FBI's DNA Advisory Board as required by the DNA Identification Act of 1994. All CODIS laboratories, including the FBI, must adhere to these standards and must be accredited. The Office of the Inspector General oversees the FBI and, by extension, audits all CODIS labs as well as contract labs.

The ASCLD-LAB accreditation process (which includes a committee review of mandatory proficiency tests) combined with the FBI QA Standards audits and the OIG oversight is more than sufficient to assure, to the extent ever possible, quality forensic work. No additional federal oversight is going to eliminate these statistically rare problems we hear of from time to time. Forensic science is unlike any other type of analytical/clinical testing. We have no control over the form, quality, amount, or condition of the physical evidence and have to do the best we can with whatever materials present themselves. The important factor is that QA mechanisms are in place allow us to determine when a deviant or discrepant result is obtained (usually due to human error), document and correct it. Fortunately, our technologies and the criminal justice system provide opportunities for complete disclosure and review of all laboratory work and sufficient sample for re-testing by the defense. To quote the 1996 NRC report, "[n]o amount of attention to detail, auditing and proficiency testing can completely eliminate the risk of error. There is a better approach, one that is in general agreement with the 1992 NRC Report: wherever feasible, evidence material should be separated into two or more portions, with one or more portions reserved for possible duplicate tests." Any further layer of governmental regulation is only going to exacerbate an already complex oversight process and increase the backlog situation.

The National Academy of Sciences, National Research Council, Committee on DNA Technology in Forensic Science, addressed this issue in its two reports (1992 and 1996) which provided that "[o]ne of the best guarantees of high quality is the presence of an active professional-organization committee that is able to enforce standards. Although professional societies in forensic science have historically not played an active role, the American Society of Crime Laboratory Directors (ASCLD)

and the American Society of Crime Laboratory Directors-Laboratory Accreditation Board (ASCLD-LAB) recently have shown substantial interest in enforcing quality by expanding mandatory proficiency testing . . . Because private professional organizations lack the regulatory authority to require accreditation, further means are needed to ensure compliance with appropriate standards." Since that was written, of course, the 1994 DNA ID Act which I referenced earlier resulted in the promulgation of mandatory FBI QA standards, which were in turn endorsed by ASCLD-LAB. I should point out also that the FBI lab is also accredited by ASCLD-LAB.

We have always recognized that a major shortcoming of ASCLD-LAB was its voluntary nature (except as noted previously). Perhaps a federal mandate for this accreditation by ASCLD-LAB is an alternative worth consideration. Some of these labs with recent problems are neither ASCLD-LAB accredited nor, therefore, CODIS labs. It is also worth emphasizing that ASCLD-LAB accreditation covers all forensic disciplines and not just DNA. Like the ABA and AMA regulate their respective professions, forensic science must regulate its own.

Mr. COBLE. Mr. Neufeld.

STATEMENT OF PETER J. NEUFELD, CO-DIRECTOR, THE INNOCENCE PROJECT, AND MEMBER, NEW YORK STATE FORENSIC SCIENCE REVIEW BOARD

Mr. NEUFELD. Mr. Chairman, if I don't push the talk button, does the clock not start running?

Mr. COBLE. Get out of here.

Just kidding, Peter. Good to have you with us.

Mr. NEUFELD. Thank you very much, Mr. Chairman. And thank you, Members of the Committee, for inviting me today. It is an honor and certainly a privilege to comment on this extraordinary initiative by our President to welcome us to this new era of DNA technology.

I think I can say that Dr. Ferrara and I in fact were at the beginning of all this, and neither of us had any idea frankly—and I am sure he is going to agree with me—that it would have this kind of impact on the criminal justice system, both the power to identify and convict the guilty and the power to very rapidly clear those who have been wrongly arrested, prosecuted or convicted.

On June 5, 1982, a young white housewife in Culpepper, Virginia, was viciously attacked in her home. She was stabbed multiple times and raped on the marital bed. She stumbled to the front door, where she collapsed and shortly thereafter died. It was one of those cases which people in Virginia and all over the country called "heater cases," cases which the press takes a great interest in solving rapidly. Unfortunately, in this case, they couldn't get a solution very quickly; 11 months passed and no one had been arrested.

Finally, in the neighboring county, a man named Earl Washington, a young African American male who lived with his tenant farmer family, with an IQ of 69, got into a drunken fight one night, and the police came. And when they started questioning Mr. Washington, he immediately confessed to four unsolved rapes in that county. And after he confessed to those four unsolved rapes, they began to ask him about this old rape murder in Culpepper, and shortly thereafter he confessed to that as well.

Well, his lawyer in Fauquier County, where he lived, was anal to bring the victims into those first four rapes, who said that was not the guy, and so those charges were all dismissed. But unfortunately for Mr. Washington, the fifth victim was dead, and she couldn't say that his confession had been false, and so they went

ahead and prosecuted him for that case. They assigned a local attorney to represent Mr. Washington because he was indigent.

That local attorney had never tried a capital case before. That local attorney could not get funds from the court to hire a psychiatrist to examine Mr. Washington, who had an IQ of 69 and may not have had all of what it takes to give a knowing and voluntary confession. And this counsel, who had no prior experience in capital cases, didn't understand science very well, and so he never appreciated that there was a lab report from Dr. Ferrara's laboratory that said that the ABO type on the semen stains found on the marital bed excluded Mr. Washington and excluded the victim's husband, and so that evidence was never brought out at trial.

Needless to say, in a 2-day trial this unprepared, inexperienced lawyer did not do very much. Mr. Washington was convicted and sentenced to death. He remained on death row for a number of years until finally DNA technology completely exonerated him a couple of years ago when he received a full, unconditional pardon from then Governor Gilmore.

As of now, there have been 132 people who have been exonerated through post-conviction DNA testing; about a dozen of them have been on death row. In fact, that number of death row exonerations would be much higher, because 40 of these exonerations involved murder cases, but murder cases in jurisdictions where they did not have capital punishment.

Indeed, in one case, Eddy Joel Lloyd, who was exonerated this past year in Michigan, the judge commented when he was convicted of a terribly heinous murder, and he wished his hands were not tied by the ending of capital punishment in Michigan, because he really wanted to see this man hanged. That individual was eventually exonerated through DNA testing.

The Innocence Project has been involved in approximately half or more of these 132 exonerations, and we are very pleased that we have been able to contribute to the literature and to the evolution of this technology in the modern criminal justice system.

Indeed, in 34 of those 132 cases, not only did the DNA technology exonerate people who had been wrongly convicted, but they were able to take those profiles, put them into the CODIS database and get hits on the real perpetrators and then prosecute those people as well. So there is no question that this technology is a win-win, a win for law enforcement, a win for crime victims and certainly a win for those people who have been wrongly charged or wrongly convicted.

This statute, if passed with the inclusion of the Innocence Protection Act elements, there is no question that the rate at which people are exonerated will increase appreciably. In 1993, when we started our Innocence Project, there were three post-conviction DNA exonerations; last year there were 20. So far this year, we have had 11 exonerations, and there is no question that the main reason that has occurred is that many of the States have enacted statutes permitting post-conviction DNA testing. With the passage of this statute by Congress, that number will surely double on an annual basis.

But let's not forget that DNA is not a panacea for all the ills of the criminal justice system. Most of the problems have nothing to

do with DNA, because there is no DNA in about 80 percent of the violent crimes according to our experts who work in law enforcement agencies. And the only way we can deal with all those other cases and all those other problems is if we have competent counsel.

I see that the stoplight is on. I would ask for one more minute, if I could, only to deal with the counsel issue.

Mr. COBLE. Well, I feel like I have penalized the first two witnesses. Why don't we—

Mr. NEUFELD. I will come back to it later.

Mr. COBLE. I will let you address it during the examination period.

Mr. NEUFELD. Certainly. Thank you very much.

[The prepared statement of Mr. Neufeld follows:]

PREPARED STATEMENT OF PETER J. NEUFELD

There are now at least one-hundred and thirty-two Americans who have been exonerated by post-conviction DNA testing. Twelve of the exonerated were at one time on death row. Almost all of them had exhausted their appeals and post-conviction remedies. But for the serendipitous rescue by DNA, there is little doubt they would have been executed. Over forty of the exonerated were convicted of murder and many of them would have almost certainly faced execution if the death penalty had been applicable in the jurisdictions where they were tried.

Collectively, these one-hundred and thirty-two individuals have served 1,397 years in prison. With every wrongful conviction, not only does an innocent person suffer unconscionably in prison or on death row but the real perpetrator remains free to commit serious crimes. In thirty-four of the post-conviction DNA exonerations in the United States, the actual perpetrator was identified through that same DNA, preventing more crime and protecting potential victims.

The pace of post-conviction DNA exonerations has accelerated because states have begun to pass statutes that permit those claiming innocence a chance to gain their freedom through access to post-conviction DNA testing. In 1993 there were three DNA exonerations. Last year there were twenty; to date this year, eleven innocent individuals, previously convicted by juries, have been exonerated by DNA.

In 1993, our nation had one innocence project manned by a staff of two; today more than forty law schools, journalism schools and independent entities comprise the beginnings of an "innocence project network." Most "projects" survive on shoe-string budgets struggling as best they can to prevent these DNA statutes from remaining unfunded mandates. But only half of the states have post-conviction DNA access laws, far fewer require the preservation of biological evidence, and many of the existing statutes are problematic and do not offer all the relief they should.

Approximately thirty states have laws providing convicted persons with some access to DNA testing to support their claims of innocence. These testing laws, however, vary widely in scope and substance. Some are comprehensive, state-funded testing programs open to all convicted persons with reasonable claims of innocence. Yet in others, the right to DNA testing is sharply limited by, for example, leaving decisions about testing to the sole discretion of prosecutors, or allowing testing only in a limited class of cases or under strict time limits. The states with sunset provisions provide such a narrow window of time in which to prepare and file DNA testing petitions that few convicted persons will be able to take advantage of them. Indeed, five of the post-conviction DNA access laws have *already* expired, within a year or two after their enactment, with no more than a handful of petitions filed in each state.

The current crisis in Florida is illustrative. In 2001, after the DNA exoneration of a death-row inmate who had died before his execution, Florida passed a law giving inmates the right to apply for post-conviction DNA testing if they could show that the test results were likely to exonerate them. The right was available only to those who had pleaded not guilty—and only to those who could make their case within two years. The right to DNA testing in Florida expires October 1, 2003. The approaching deadline has left the Innocence Project overwhelmed with more than 1,000 potentially eligible Florida inmates and too few lawyers who can carefully evaluate each case.

In states without sunset provisions, inmate requests trickle in—perhaps no more than a dozen or two petitions a year actually filed with the courts. But faced with

sunset provision deadlines such as Florida's, now just a few months away, we cannot wait for innocent inmates to contact us.

We must identify them. The people we represent are the lost and forgotten. They no longer have post-conviction counsel and many have mental health disabilities caused by their imprisonment for crimes they did not commit.

For the few volunteer lawyers and staff, it's a daunting task: combing through old transcripts and police and laboratory reports, assessing appropriateness, locating critical evidence and drafting compelling petitions to secure testing. During the ten years our project has been in existence, it took, on average, almost four years to complete the steps from initial client intake to testing. The Florida statute mandates compliance in a time frame that simply cannot be met.

Although Florida leads the country in the number of wrongfully convicted persons released from death row, there have been only two DNA exonerations. Illinois, by comparison, has had twenty-one cases of DNA exoneration; New York has had four-teen; Texas thirteen. Massachusetts has had seven.

One reason for this disparity is that before the new law was passed Florida courts set very high hurdles for granting post-conviction DNA testing. But the new law will not be on the books long enough to ensure that all actually innocent inmates whose cases have existing biological evidence will be freed. There can be no doubt that the number of wrongfully convicted innocents freed by DNA testing will dramatically increase if the post-conviction DNA legislation is passed by this Congress. The number of exonerations could at least double within five years. Likewise, the apprehension of the real perpetrators through DNA databank hits will also increase. DNA testing is a win-win proposition for all Americans who believe in the ideals of justice and fairness. As Attorney General Ashcroft has said, forensic DNA operates as a truth machine with the power to convict the guilty and protect the innocent in a way that will improve dramatically the efficacy of the criminal justice system. It not only enhances the ability of law enforcement to apprehend and punish the guilty and free the innocent who languish in America's prisons, it also insulates innocent suspects from prosecution, protects potential crime victims and brings a measure of certainty and finality to crime victims and their loved ones. In this way, DNA testing injects a measure of truth into the criminal justice system's search for true justice.

Greater access to DNA testing is vital, but it is not a panacea for what ails the administration of the death penalty and the rest of criminal justice in America. DNA testing's ability to right wrongs is limited to the relatively few individual cases for which biological evidence is available, can be tested, and is relevant to the crime. Law enforcement experts estimate that DNA testing is useful in fewer than one in five violent crimes. Nevertheless, innocent people have been, can, and will continue to be wrongly accused or wrongfully convicted in cases in which there is no biological evidence to get to the truth.

That is why we must apply the lessons we've learned from DNA exonerations to the majority of cases that *lack* DNA evidence. The DNA exonerations have provided a window into this aspect of the justice system, through which we all can see what went wrong. In case after case, we find the same flaws that have lead to wrongful convictions: witness mis-identification, false confessions, misuse of forensic science disciplines not as valid or reliable as DNA technology, police and prosecutorial misconduct, and last but hardly least, poor defense lawyers.

Some of the causes of wrongful conviction can be mitigated through institutional reforms such as sequential double-blind lineups which reduce mistaken eyewitness identifications; video recording of the entire custodial interrogation which prevent false confessions, and independent external audits of state and local crime laboratories to remedy the misapplication of forensic science.

But aside from these systemic reforms, on any individual case there is simply no better way to prevent wrongful convictions than to provide competent defense counsel. It is the obligation of every defense lawyer to scrutinize the prosecution's case, consult with the client, conduct a thorough and independent investigation, consult with experts, and take all other steps to determine the truth.¹ Competent counsel can uncover police practices responsible for mis-identifications, coerced or false confessions, and fraudulent forensic science.

Wealthy defendants expect and receive this kind of representation. But 90 percent of those accused of crimes are poor.

Had Jimmy Ray Bromgard competent counsel with access to funds for investigators and experts, he would not have spent fifteen years in a Montana prison before being cleared by DNA testing. In the early morning hours of March 20, 1987, a stranger snuck into a family home in Billings, Montana and raped an eight-year-

¹I thank Stephen B. Bright, Director of the Southern Center for Human Rights in Atlanta, Georgia for providing material for and assisting me with the "counsel" portion of my testimony.

old girl in her bed. The police recovered her semen-stained underpants and, from the bedding, a head hair and pubic hair that did not belong to the young victim.

Unfortunately, given the state of conventional serology in 1987, the serologist could not determine a blood type from the semen stains. Fifteen years later, DNA testing on those semen stains provided dispositive evidence of Mr. Bromgard's innocence. In the absence of serology, the only scientific evidence offered at trial was the testimony of Arnold Melnikoff, the manager of the Montana state crime laboratory.

Melnikoff testified that he had compared the head hair and pubic hair recovered from the child's bedding with reference head and pubic hairs taken from Mr. Bromgard. He stated that the hairs from the crime scene were microscopically indistinguishable from Bromgard's. He further testified that there was less than a one-in-10,000 chance that the pubic and head hair found at the crime scene did not belong to Jimmy Bromgard.

When I read this testimony, I was stunned: I knew that Melnikoff's statistical conclusions were false, without any basis in science. In 2002, a peer review committee comprised of the nation's top forensic hair examiners confirmed that Melnikoff's statistics were a fraud; a microscopic re-examination of the hairs by the FBI revealed that Bromgard was excluded.

But back in 1987, the unfortunate Mr. Bromgard was assigned an attorney from a county contract system. The lawyer was a drunk and met with his client only once before trial. He hired no investigator; he retained no expert to challenge or re-examine the patently false "scientific" evidence; and he failed to conduct any investigation. He filed no pre-trial motions, even though had he filed a motion *in limine* on the hair statistical evidence, he most likely would have prevailed.

A few states such as Colorado and New York not only have robust public defenders but also maintain specialized capital defender offices. From time to time, an outstanding private attorney will step forward and take on a financially and emotionally draining capital case. But the defense norm for the rest of the country is substantially less excellent. On average, the poor find themselves represented by defense attorneys who lack the skill, resources and inclination to defend a case adequately. At worst, poor defendants find themselves with court-appointed attorneys who are drunk at trial, asleep during critical moments in the courtroom and who refer to their clients in terms laced with racial slurs. Unfortunately, several of the states that implement the death penalty most often—Texas, Mississippi and Alabama—rely almost entirely upon a court-appointed attorney system to defend clients who are literally fighting for their lives.

When it comes to court-appointed attorneys, some paid as little as \$1,000 per capital case (and this fee includes pre-trial and trial), clients get what they pay for. Common threads of incompetence run through the credentials of court-appointed attorneys: in Kentucky, one third of those sentenced to death had been represented by lawyers who were later disbarred, suspended or convicted of crimes; in Illinois, in thirty-three of the two-hundred eighty-five cases in which death was imposed, the defense lawyers were later disbarred or suspended; and in Texas, forty-three of the last one-hundred thirty-one people executed were represented by attorneys who were later disbarred, suspended or otherwise sanctioned. If this is what passes for adequate representation, then we have some serious explaining to do to all Americans who believe that our system is based on equal justice before the law, especially when we are going to sentence someone to die.

There is no greater sign that the court-appointed attorney system is not working than the post-conviction DNA exonerations—objective evidence that we are convicting the innocent and, in some cases, sentencing them to death. We should be able to depend on a working adversary system to sort the guilty from the innocent. But the post-conviction death row exonerees were not saved *by* the system. They were saved *despite* it—long after prosecutors, juries and courts had declared them guilty.

In life, we might call the circumstances of such exonerations serendipitous. Imbedded within the context of our administration of the death penalty, they represent nothing less than a devastating breakdown in the meaning of justice.

The case of Earl Washington illustrates these points. In June of 1982, Rebecca Lynn Williams, a nineteen-year-old mother, was raped and murdered in her Culpeper, Virginia apartment. Almost a year later, Earl Washington, a twenty-two year old black man with an I.Q. in the range of 69, was arrested in neighboring Fauquier County for an alleged burglary and assault with a chair. From that moment on, Washington remained in police custody. After two days of interrogating him, police claimed Washington had "confessed" to a total of five different crimes, including the murder of Rebecca Lynn Williams.

Of the five “confessions,” the first four were dismissed by the Commonwealth, in part because of the inconsistencies of the testimony and the fact that the victims declined to identify Washington. But the fifth victim was no longer alive to prove his confession false. Although Washington reportedly “confessed” that he raped and killed Rebecca Lynn Williams, subsequent questioning revealed that Washington did not know the race of his victim, the address of the apartment where she was killed or that he had sexually assaulted her. Washington described Ms. Williams as short when, in fact, she was 5’8”, that he had stabbed her two or three times although the stab wounds on the victim’s body numbered thirty-eight, and that there was no one else in the apartment when it was known that Ms. Williams’ young children were in the apartment with her on the day of the crime. Only on the fourth attempt at a rehearsed confession did authorities accept Washington’s statement and have it recorded in writing with Washington’s signature.

Washington was able to pick out the scene of the crime only after being taken there *three times* in one afternoon by the police who, in the end, had to help him pick out Williams’ apartment. The confession proved to be the prosecution’s only evidence linking Washington to the crime.

Long after the conviction, psychological analysis of Washington described how, to compensate for his disability, Washington would politely defer to any authority figure with whom he came into contact.

At the guilt phase of the trial, the prosecution’s case hinged on Washington’s statements as well as his identification of a shirt found at the crime scene. Defense counsel failed to obtain or offer available evidence which would have seriously undermined the prosecutor’s case, including: the Commonwealth’s own serology report of the seminal fluid found on the blood-stained blanket where the victim was raped and stabbed, which excluded both Washington and the victim’s husband; hairs found in the pocket of the shirt purportedly worn by Washington but had these hairs been compared to Washington’s, would not have matched; inconsistencies between the details in his confession and the details of the crime; and Washington’s substantial mental disability.

Instead, defense counsel put Mr. Washington, unprepared and perhaps unrepentant, on the stand to testify that although he did sign the confession, its contents were false. Confused and without any guidance from counsel, Mr. Washington, who cannot name the colors of the American flag or the function of a thermometer, instead testified that he had never made the confession.

At the penalty phase of the trial, the defense failed to offer testimony or any argument in opposition to a death sentence. On January 20, 1984, the jury returned with their verdict: death.

Mr. Washington’s direct appeal failed. In August 1985, with a September execution date imminent, another death row inmate, Joseph Giarrantano, alerted a prison volunteer and a lawyer visiting the prison on another matter of Earl Washington’s story. The lawyer brought Mr. Washington’s case to her New York law firm, where it was picked up *pro bono*. These attorneys filed a state *habeas corpus* petition and secured a stay of execution for Mr. Washington nine days before he was scheduled to die.

In 1993, the United States Court of Appeals for the Fourth Circuit ruled that, although Washington had been denied his constitutional right to effective assistance of counsel at trial because of the defense’s failure to introduce exculpatory biological evidence, this failure was “harmless” in light of the other evidence, namely the “confession.” At this desperate point, the parties involved in the case agreed to conduct DNA testing on the biological evidence.

In October 1993, the test results revealed that Washington was excluded as a contributor of the seminal stain. Even with this conclusive proof of innocence, Washington was time-barred by Virginia law from introducing new evidence (the law then had a time limit of 21 days after the original conviction but in response to Washington’s exoneration, recent changes in Virginia law carve out an exception to the 21-day rule for DNA testing). Instead, on January 14, 1994, then-Governor Wilder commuted Washington’s sentence to life imprisonment.

Washington remained in prison for six more years before his counsel persuaded the newly elected Governor Gilmore to seek additional DNA testing. On October 2, 2000, Governor Gilmore announced the exonerating results of the STR-based DNA test and granted Earl Washington an absolute pardon for the capital murder conviction.

Earl Washington’s case is a perfect example of the very real consequences of not adopting the provisions of the Innocence Protection Act. For the vast majority of those sentenced to death, there are no volunteer lawyers or advocates who dedicate the necessary vast amounts of time to their *pro bono* cases. If Mr. Washington had

been left without any post-conviction representation or denied post-conviction DNA testing, he would be dead.

We cannot rely on luck to discover the innocent. We do not know how many innocent people like Earl Washington have been sentenced to death. But we do know that innocent people will continue to be convicted and sentenced to death so long as the accused receive inadequate representation at trial and equally inadequate representation during post-conviction review. Unless Congress takes action and passes the Innocence Protection Act, hundreds of other factually innocent people, currently languishing in prison or awaiting execution, will never get the chance to prove their innocence, nor will the state have the chance to identify the real perpetrators. A system that ultimately depends upon the advocacy of a fellow inmate and a visiting lawyer to uncover actual innocence is not a working system, much less a system of justice. We are gravely naive if we perpetuate the belief that our system serves the ideals of justice. But we are fatalistically cynical if we believe that we do not have the power to make it better. The Innocence Protection Act brings us many steps closer to ensuring that we harness that power to ensure that all Americans receive the justice we deserve.

While I have the opportunity, I would like to address a few key issues surrounding the broader legislation contemplated for use of DNA technology and support of crime labs. The President's proposals do much to promote DNA testing's ability to identify and apprehend the guilty and protect the innocent before they are tried. In an effort to ensure the integrity of DNA test results, the President's proposal correctly requires quality assurance standards from participating DNA units within existing state and local crime labs.

But although the proposal would require a rigor for the DNA units, it requires nothing for the many other so called "forensic science" disciplines utilized routinely by state and local law enforcement agencies but which, by their nature, lack the validity, reliability and internal controls inherent in DNA technology. Since most serious crimes lack relevant biological evidence, law enforcement investigations rely more on the crime lab's non-DNA disciplines such as ballistics, handwriting comparison, hair and fiber analysis, tool marks and fingerprints to decide whether or not to prosecute. None of these forensic disciplines enjoys the heightened scientific dimension of DNA. That is why post-conviction DNA testing has had unparalleled success in correcting miscarriages of justice. The genetic results are often simply indisputable.

Indeed, one of the essential lessons from the wave of post-conviction DNA exonerations is just how often other forensic sciences produce erroneous results. For instance, in the trials of twenty-one defendants later exonerated, crime scene hair was wrongly attributed to the accused. The current scandal involving the Houston Police Department crime lab reveals that their ballistics and drug units may have produced erroneous results or at least failed to comply with community wide standards. If anything, Congress should be more concerned, more vigilant, with respect to these other forensic sciences.

One way vigilance can be achieved is by utilizing some of the same quality assurance measures we employ in other institutions where health, safety, and security are at stake. When the Challenger crashed and NASA initially suggested an internal audit, Congress would not allow it. When the Enron scandal broke, the nation would not accept yet another audit from Arthur Anderson. In fact, whenever there is evidence of serious misconduct affecting the public, an independent external audit is obligatory. One of the few notable exceptions to this fundamental principle, I am afraid, has been the state and local criminal justice system.

The United States Department of Justice Inspector General should be applauded for bringing the kind of independent oversight to the FBI crime laboratory sorely lacking in its state counterparts. When it was revealed earlier this year that a FBI crime lab scientist failed to follow a required control in casework, instead of relying on the Bureau's internal affairs mechanism, the Inspector General opened an independent investigation to assess the scope of the failure, the potential impact on prosecutions, the reason existing quality controls failed and to recommend remedial action to reduce the risk of recurrence. Indeed, at the insistence of the Inspector General, the Bureau is re-testing evidence in more than one-hundred cases assigned to the reckless scientist.

Compare the responsible federal approach with the ongoing Houston Police Department and Montana state crime lab scandals in which prosecutors, with a personal stake in the outcome of the audit, refuse to give up control to independent experts. In Montana, the state's laboratory director and long time hair expert, Arnold Melnikoff, engaged in a pattern of misconduct over many years. In the first

three Montana convictions to be re-examined at the insistence of the Innocence Project and local defense counsel, cases in which Melnikoff had testified about hair “matches,” the defendants were exonerated. Thus, Melnikoff enjoys—at least so far—a 100 percent error rate. Nevertheless, Montana’s Attorney General, who himself relied on Melnikoff when he was a local prosecutor, refuses to appoint an independent audit committee and refuses to order the re-examination of Melnikoff’s other casework.

Finally, the proliferation of forensic DNA databanks warrants your immediate attention. There is no question that the appropriate expansion of convicted-offender databanks has contributed to hundreds of “cold hits” across the country. Most of these crimes would have perhaps remained unsolved but for the successful comparison of crime scene evidence with convicted-offender profiles compiled in national and state-authorized databanks. In addition to convicted-offender databanks, some states are considering including arrestee profiles in their state databanks and a few have even included elimination samples from people who are not arrested, much less convicted.

When the federal law authorizing CODIS and a network of state databanks was enacted, Congress deliberately struck a balance between the need for public safety and civil liberties. Even without extending CODIS to arrestee profiles, under current constitutional law a prosecutor can legally secure a DNA profile from a suspect and compare it with the crime scene evidence. Furthermore, there is no legal impediment and, in the right case, it is sound law enforcement to ask volunteers to provide specimens for elimination purposes to narrow the focus of a criminal investigation for a serial killer or rapist. But for the arrestee once the criminal charges are dismissed or he is acquitted, or for the volunteer once his DNA is compared and he is excluded, striking a proper balance with privacy and equal protection requires the destruction of his sample and the expungement of his profile.

The very recent case of Jorge Garcia, an innocent person who voluntarily gave a DNA sample during a DNA dragnet for a serial rapist in Miami but ended up being falsely charged with rape and landing in jail, serves as a cautionary tale.

At the time I was preparing these remarks, the city of Miami was searching for a serial rapist whose DNA links him to assaults on at least six women. As part of the investigation, police have taken more than one-hundred twenty samples from “volunteers” who either resemble the description of the serial rapist or have been the subjects of a tip police received. As part of the search, investigators stopped Jorge Garcia on June 14 of this year because he resembled the description of the perpetrator. Mr. Garcia voluntarily gave a DNA sample which did not match the profile of the rapist.

But instead of destroying the sample once Mr. Garcia was excluded, the crime lab ran it through the State DNA databank. To Mr. Garcia’s surprise, there was a cold hit—his profile matched that of a profile extracted from evidence collected from the victim of an unrelated 1996 rape. Garcia was arrested and charged with rape. Officials cited it as an example of how DNA databanks help authorities catch rapists. “Had we not had this massive search for this other offender,” according to the executive assistant to the Police Chief, “we wouldn’t have gotten this guy.”

The day after Mr. Garcia’s arrest, the victim of the 1996 rape came forward to proclaim Mr. Garcia’s innocence. She explained that she and Mr. Garcia has been involved in a long-term relationship, and that the crime lab found his DNA because the couple had consensual sex shortly before she was raped by a stranger. Three days after his arrest, the police dismissed the charges against Mr. Garcia and released him from jail. But what would have happened to Mr. Garcia had the victim died or become incompetent in the intervening years? The price to clear your name shouldn’t be surrendering your personal biological information to the government for any and all purposes.

There is no national consensus, at present, for a universal DNA databank. For a variety of reasons, many citizens are less than eager to have their genetic code on file in Washington. It is fundamentally unfair, on the one hand, to recognize that concern but nevertheless retain profiles in perpetuity of persons suspected but cleared of wrongdoing.

Thank you.

Mr. COBLE. Mrs. Smith, good to have you with us.

STATEMENT OF DEBBIE SMITH, RAPE VICTIM

Mrs. SMITH. I want to begin by saying how very honored I am to have been included in the panel before you today. And I don’t take this opportunity lightly and, in fact, have left my daughter

today, with her permission, knowing that I could be absent from the birth of her first child, my first grandson, that is due at any moment now. But as a surviving victim of sexual assault, my family and I understand the importance of the work that is being done here today.

I can bring no professional perspective to the table today, as I am seated with some of the top professionals in their field, but what I can offer you is first-hand knowledge of the importance of timely testing of DNA evidence and the elimination of the current backlog.

For the next few moments, I would like to ask each of you to take off your political hats and to take your place as a husband, a father or a brother, as a mother, a sister or a friend. You have just received the news that your loved one was just abducted from her home and taken to the woods where she was robbed and raped. He entered her home in the middle of the afternoon through a door that was unlocked for just a matter of moments. This masked man said that he would return and kill her if she told anyone. She believes him. She cries hysterically and pleads with you not to call the police, but in your heart you know it is the right thing to do.

The police are called and your loved one sits in shock as she is asked countless questions. Your heart is breaking as you watch her trying to hold on to what is left of her sanity, but there is nothing that you can do to help her. Watching her struggle to make sense of what has just changed her life so completely hurts beyond measure. You feel helpless, wanting to take away the pain that is so evident in her eyes, within your heart and mind.

A search begins, for surely there has to be something that you can do to make it better or somehow easier. But the search is in vain, for there is nothing that you can do. You convince her that she needs to go to the hospital to collect the only real physical evidence. As you walk into the hospital, trying to make her understand that this is necessary, the only way to stop this man from hurting anyone else, she walks like a frightened child, terrified and confused. She hears you tell the receptionist that she was raped, and her mind begins to reel, no, because it just can't be true. Rape just doesn't happen to people like me.

The nurse leads the two of you to a room where the questions begin all over again. Three different nurses are going in and out, as well as a doctor, questions and questions and still more questions. You begin to wonder if this was the right thing to do after all. The look in her eyes conveys the sheer desperation she is feeling, needing to know that someone is on her side, that someone believes her, but her nightmare continues as she is asked to lie down on the table, put her feet in the stirrups and to spread her legs where a male doctor can then begin the invasive procedure by plucking, probing, combing and swabbing her just hours after having been attacked by another man. She is humiliated, crushed and feeling even more vulnerable.

What was left of her self-esteem has now completely vanished. She feels violated all over again. You hope that you have not put her through this for nothing.

As you leave the hospital, you trust things will be better for her now, but it doesn't take very long before the vacant stares give away that she has been robbed of any joy in her life. She is alive

physically, but inside she is dead. Her fear is apparent as you watch her struggle to leave the house or even allow her children to leave the house, as she cannot forget her rapist's threats, "Remember, I know where you live, and I will return to kill you if you tell anyone."

Because you know her so very well, you fear that one day you will find that she has taken her own life. All she wants is her freedom. She craves peace of mind and she wants to be safe. She wants justice. She waits. My husband and I lived this nightmare, and the feelings are as present with us now as they were then.

When a rape victim submits to the very intrusive evidence collection process, she at least knows that she has done her part. She has done everything that has been asked of her to keep this man from hurting anyone else. Unfortunately, there is a good chance that her evidence will sit on a shelf. Each of those kits that sits on a shelf holds within it vital evidence that is crucial to the safety of women everywhere. Every day that passes without the identity of these rapists being known allows them to claim more victims, and statistics prove that they will.

I merely existed for 6½ years waiting for my rapist to be identified, trying to deafen the sound of his voice in my ears, but fear for myself and my family held my heart and my soul within its grip, choking out any joy of life. I became suicidal, seeking peace and rest from the pictures that played in my mind constantly.

But finally DNA revealed the identity of my rapist, giving me the sweet breath of validation and promised justice, and I think that every victim of sexual assault deserves to experience this gift of renewed life; and I am here today on behalf of those thousands of victims whose cases continue to sit on shelves and to prevent others from becoming future victims.

I am present here today on behalf of those wonderful nurses who now, through the same program, use their own personal money and time to learn how to best help a victim of sexual assault. And I am here for the scientists who are overworked and underpaid, but continue to labor feeling overwhelmed by what seems to be an endless task.

I would ask you now to put your political hats back on, empowering you with the ability to make a difference. When someone is robbed, everything possible is done to find this person who has taken what does not belong to him. Prosecution is pursued, and he is made to return what is stolen to its rightful owner.

You are powerless to return to rape victims what was taken from her, for how can you restore her dignity, her innocence, or her peace of mind? Can you remove the pictures that play in her mind without warning? You simply cannot. But what you can do is, you can give her justice by making sure that her rapist pays for his crime. You can do something.

Lady Liberty stands proudly in the New York Harbor offering freedom for all within her borders. Equal justice under law is etched in stone across our Supreme Court Building, and flags are raised high, symbolic of our pledge of liberty and justice for all. Sexual assault victims across our country wait for that pledged freedom from the chains of fear and guilt her attacker would have to constrain her. She anticipates the promised justice to be im-

parted for the crime committed against her. I ask that you use your power to award her what is promised to all Americans, and that is liberty and justice for all.

Thank you.

[The prepared statement of Mrs. Smith follows:]

PREPARED STATEMENT OF DEBBIE SMITH

Let me begin by saying how very honored I am to have been included in this panel before you today. I do not take this opportunity lightly and in fact, have left my daughter, with her permission today, knowing that I could be absent from the birth of her first child, my first grandson, due at any moment. But as a surviving victim of sexual assault I understand the importance of the work that is to be done here today, though I may look at this discussion from a much different view point from many of you. I can bring no professional perspective to this table seated with some the top professionals in their field . . . but what I can offer you is firsthand knowledge of the importance of timely testing of DNA evidence and elimination of the current backlog of both suspect and victim kits. My personal experience attests to how imperative it is that the Sexual Assault Nurse Examiner Program (SANE) be strengthened and that the establishment of minimum standards of collecting, preserving and processing evidence be mandated.

For the next few minutes, I would like for each of you to take off your political hats and take your place as a husband, father or brother; or as a mother, sister or friend. You have just received the news that your loved one was just abducted from her home and taken to the woods, where she was robbed and raped. He entered her home in the middle of the afternoon through a door that was left unlocked for a matter of moments. This masked man said that he would return and kill her if she told anyone and she believes him. She cries hysterically, pleading with you not to call the police. But in your heart you know it is the right thing to do. The police are called and your loved one sits in shock as she is asked countless questions. Your heart is breaking as you watch her trying to hold on to her sanity . . . but there is nothing you can do to help her. Watching her struggle to make sense out of what has just changed her life so completely hurts beyond measure. You feel helpless wanting to take away the pain that is so evident in her eyes. Within your heart and mind a search begins for surely there must be something you can do to make it better, or somehow easier . . . but the search is in vain for there truly is nothing that you can do.

You convince her that she needs to go to the hospital to collect the only real physical evidence. This person you love is begging you not to make her go to the hospital, but you know you have to deny these pleas, just as you had to deny her cries not to call the police. Your prayer is that you are helping her to make the right decisions . . . ones that she would make herself, if she could. It is what you've been taught is the next step . . . the right thing to do.

As you walk her into the hospital you try to make her understand that this is necessary . . . the only way to catch this man and prevent him from hurting anyone else. She walks like a frightened child, terrified and confused. She hears you tell the receptionist that she was RAPED! Her mind begins to reel, "NO! It just can't be true! Rape doesn't happen to people like me!" The nurse leads the two of you to a room where the questions begin all over again. Three different nurses are going in and out, as well as a doctor . . . questions, questions and still more questions. You begin to wonder if this was the right thing to do after all. The look in her eyes conveys the sheer desperation she is feeling . . . needing to know that someone is on her side and that someone believes her.

But her nightmare continues as she is asked to lie down on the table, put her feet in the stirrups and to spread her legs. A male doctor then begins the invasive procedure by plucking, probing, combing and swabbing her just hours after being attacked by another man. She is humiliated, crushed and feeling even more vulnerable. What was left of her self esteem has now completely vanished. Simply put, she feels violated all over again. You hope you have not put her through this for nothing.

As you leave the hospital, you trust things will be better for her now. But it doesn't take long before the vacant stares give away that she has been robbed of any joy in life. She is alive physically, but she has died inside. Her fear is apparent as you watch her struggle to leave the house or even let the children leave the house, as her rapist's threats will not leave her mind. "Remember I know where you live and I will come back and kill you if you tell anyone." Because you know her so very well, you fear that one day you'll find that she has taken her own life. All

she wants is her freedom. She craves peace of mind. She wants to feel safe. She wants justice. She waits. My husband and I lived this nightmare and the feelings are as present with us now as they were then.

When a rape victim submits to the very intrusive evidence collection process she at least knows that she has done her part . . . she has done all that has been asked of her . . . to keep this man from hurting anyone else. Unfortunately, there is a very good chance that this vital evidence will sit on a shelf with another estimated 350,000 rape kits. Each holding within it vital evidence that is crucial to the safety of women everywhere. Each day that passes without the identity of these rapists being known, allows them to continue to claim victims . . . and they will. Statistics prove that the average rapist claims eight to twelve victims before he is caught. How many of them could have been prevented? I merely existed for 6½ years waiting for my rapist to be identified, trying my best to deafen the sound of his voice in my ears, "Remember I know where you live and I will come back to kill you if you tell anyone." But fear for myself and my family held my heart and soul within it's grip, choking out any joy of life. I became suicidal seeking peace and rest from the pictures that played constantly in my mind. But finally DNA revealed the identity of my rapist, giving me the sweet breath of validation and promised justice. I want every victim of sexual assault to experience this gift of renewed life, and I am here today on behalf of those thousands of victims whose cases continue to sit on the shelves and to help prevent some future victims. I am present today on behalf of those wonderful nurses who give up their own personal money and time to learn how to best help a victim of sexual assault, and I am here for the scientists who are overworked and under paid, but continue to labor feeling overwhelmed by what seems to be an endless task.

I would like to ask that you put your political hats back on, empowering you with the ability to make a difference.

It is within your capacity as a legislator to mandate that grants be available to train sexual assault nurse examiners, making evidence collection less traumatic for the victim and more likely to be taken properly. This program has been instituted in hospitals in many states and the amount of reported rapes has continued to increase since it's inception. If we cannot get victim's to report this crime, we cannot get these men off the streets. You can also determine national minimum standards for rape kits, insuring proper collection and preservation of DNA evidence. Can you imagine going through this process only to be told that the evidence collected was of no value in court? Many hospitals do not have any rape kit at all. We met with some staff of a rape crisis center in one state that steals products from their local hospital to make up their own kit.

When someone is robbed, everything possible is done to find this person who has taken what does not belong to him. Prosecution is pursued and he is made to return what was stolen to it's rightful owner. You are powerless to return to rape victims what was taken from her. For how can you restore her dignity, innocence, or peace of mind? Can you remove the pictures that play in her mind without warning? YOU CANNOT! But you can give her justice by making her rapist pay for his crime. You can DO something !

Lady Liberty stands proudly in the New York harbor offering freedom for all within our borders. Equal justice under law is etched in stone across our Supreme Court Building and our flags are raised high symbolic of our pledge of liberty and justice for all. Sexual assault victims across our country wait for that pledged freedom from the chains of fear and guilt her attacker would have constrain her. She anticipates the promised justice to be imparted for the crime committed against her. I ask that you use your power to award her what is promised to all Americans . . . liberty and justice for all.

Mr. COBLE. Thank you, Mrs. Smith. And speaking for the entire Subcommittee, we appreciate each of you for being with us today. And I suspect we will probably have a second round questioning; I think, as evidenced by the capacity crowd in the audience, there is great interest in this subject.

Now, I am going to depart from our normal routine—and by the way, we impose the 5-minute rule against ourselves as well—but since Mr. Delahunt does not sit on the Subcommittee, we normally don't permit non-Members of the Subcommittee to question unless they can get time from other Members.

So I am going—and I think you may have to leave before this hearing is over, Mr. Delahunt, so I am going to yield my first round of 5 minutes to Mr. Delahunt. And then we will go back in regular order after he completes his examination.

The gentleman from Massachusetts.

Mr. DELAHUNT. I thank the Chair, and rather than pose questions, Mr. Chairman, I—I would prefer to make a statement, but before I make a statement, let me share what I know is a unanimous sentiment here on this side of the dais.

And that is, Mrs. Smith, you are a woman of great courage. Your testimony was extremely powerful, and in terms of myself, as the father of two daughters, it is a fear that we all share. So I want to thank you, especially, for being here today and giving us your testimony.

And also, if I may, Mr. Chairman, ask unanimous consent to introduce two letters from the cosponsors of the Innocence Protection Act in the Senate, Senator Gordon Smith and Senator Patrick Leahy. I would like to submit those into the record.

[The information referred to follows:]

PREPARED STATEMENT OF SENATOR GORDON H. SMITH

Good morning. I would like to thank Chairman Coble and the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security for holding this important hearing on the issue of forensic DNA testing in our criminal justice system.

Post-conviction DNA testing is an idea whose time has come. The number of news stories on prisoners exonerated based on post-conviction DNA testing is troubling. The worst thing we can do for our criminal justice system, no matter its proscribed punishments, is to undermine its integrity. Unfortunately, the number of innocent Americans freed from prison—some even from death row—has done just that. Post-conviction DNA testing has demonstrated that our criminal justice system is not always fair. Innocent people have been wrongly convicted.

If we are to have a system that is fair and just—true to the principles our country was founded on—we must make absolutely certain that every person who is behind bars deserves to be there. One of the best ways to do this is to ensure that the fingerprint of the 21st century—an individual's DNA—is integral to our criminal justice system. To protect the fairness and integrity of our system, we must protect the innocent and ensure that only the guilty are punished. DNA testing is a proven method.

This is why I have supported and will continue to support federal legislation—such as the Innocence Protection Act—that would allow prisoners in this country to have access to post-conviction DNA testing. Innocent lives should not be spent behind bars or awaiting execution.

My view is this: if you support the death penalty, you should also support every measure to make sure that the innocent are not being unjustly executed. It's that simple. When an American's life is at stake, no step should be considered too onerous. Setting federal standards on access to post-conviction DNA testing are reasonable steps to make sure that our criminal justice system is fair regardless of where one lives.

For these reasons, I urge members of the House Subcommittee on Crime, Terrorism, and Homeland Security to work with both the House and the Senate to help produce the best possible legislation on post-conviction DNA testing.

PREPARED STATEMENT OF SENATOR PATRICK LEAHY

It has been a year since the Senate Judiciary Committee approved a version of the Innocence Protection Act by a bipartisan vote of 12 to 7. I am delighted that this subcommittee is carrying on where we left off.

I want to thank and commend Chairman Coble and Chairman Sensenbrenner, as well as the House leaders on this legislation, Bill Delahunt and Ray LaHood, for convening this hearing. Working together, we can finally begin to address the many problems facing our capital punishment system.

The Innocence Protection Act is a modest and practical package of reforms aimed at reducing the risk of error in capital cases. The reforms it proposes are designed to create a fairer system of justice, where the problems that have sent innocent people to death row would not occur, and where victims and their families could be more certain of the accuracy, and finality, of the results.

The Act would do two things to realize these vital objectives. First, it would ensure that post-conviction DNA testing is available in appropriate cases, where it can help expose wrongful convictions, and that DNA evidence is adequately preserved throughout the country. Second, the bill addresses what all the statistics and evidence show is the single most frequent cause of wrongful convictions— inadequate defense representation at trial. By far the most important reform we can undertake is to help states establish minimum standards of competency and funding for capital defense.

I would like to take a moment to elaborate on the capital defense representation provisions, both because they are the more important provisions and because they have been the principal subject of revisions to the bill. As reported by the Senate Judiciary Committee, the Innocence Protection Act establishes a grant program for States to improve the systems by which they appoint and compensate lawyers in death cases. States that authorize capital punishment may apply for these grants or not, as they wish.

If a State chooses to accept the money, it must open itself up to a set of requirements, which are designed to ensure that its system truly meets basic standards. After all, the point of the bill is not to throw money at the problem of inadequate representation; the point is to fix it.

If, on the other hand, a State chooses not to participate in this program, then the money will be awarded to the non-governmental organizations in that State, to be used for capital defense work. One way or another, the bill will improve the level of representation in State capital cases.

Earlier versions of the Innocence Protection Act took more of a “carrot and stick” approach to the counsel issue. The “carrot” was the same as in the current version: millions of dollars in Federal grants to help achieve adequate representation in capital cases. The “stick”—which is no longer in the bill—was that States that failed to meet these standards would have their death sentences given less deference and subjected to more rigorous Federal court review. In some versions of the bill, non-complying States would also have forfeited some Federal prison grant funding over time. While these enforcement mechanisms would have helped ensure cooperation on the part of the States, I believe that the formulation approved by the Senate Judiciary Committee—without the “stick”—will still be effective, provided that the grant program is fully funded. Given the tremendous support for this legislation in both houses, and on both sides of the aisle, I am confident that Congress will speak with one voice in ensuring that our years of effort are not undermined by a failure to appropriate the money needed to make this legislation effective.

Once again, I thank the Chairman and the Ranking Member for holding this hearing and for their good work and good will on this timely and important reform initiative.

Mr. DELAHUNT. And also a letter from a coalition of groups regarding this particular issue. The coalition involves a number of various organizations; I will read just a few of them: The Traditional Values Coalition, the Ethics and Religious Liberty Commission of the Southern Baptist Convention, Saviors Alliance for Truth, and the Christian Coalition. And I think it is important that I read just one paragraph as I submit this:

“we join with prosecutors, crime victims and their survivors, judges and defense lawyers, those who know the system best in calling for changes to improve the surety and quality of justice in America. For those whose lives have been touched by crime and for society, true justice requires that those guilty of crimes be held accountable for their actions.

“we wish to express our support for two key policy provisions: First, we support making DNA testing available to eligible prisoners. DNA testing offers the most effective methods known today to prove unequivocal guilt or innocence.

“second, we also believe that States should be required to enforce standards for effective assistance of counsel in capital cases to ensure a fair trial and to reduce the reversal of convictions and—to reverse, rather, the reversal of convictions. Clearly, a defendant cannot be properly defended by counsel with little or no criminal law experience. Such unprofessionalism leads to appeals, reversals, retrials, mistakes and seemingly endless delays in delivering justice.”

And on behalf of the Christian Coalition and the Traditional Values Coalition and other groups, I would like to submit this into the record.

Mr. COBLE. Without objection.
[The information referred to follows:]

KIDS FIRST COALITION

BOX 168•BRADLEE CENTER•3683 KING STREET•ALEXANDRIA, VA 22302

April 15, 2003

The Honorable F. James Sensenbrenner, Jr.
The Honorable John Conyers, Jr.
U.S. Congress
Washington D.C 20510

Dear Mr. Chairman and Ranking Member Conyers:

President George W. Bush said on May 11, 2001, “Any time we’re preparing to carry out the death penalty we have a solemn obligation to make sure that the case has been handled in full accordance with all the guarantees of our Constitution. The very foundations of our democracy depend on our ability to assure our citizens that in all criminal cases, and especially in the death penalty, defendants have been treated fairly.”

Although most of the following organizations take no position on the death penalty, we all have a high regard for the sanctity and dignity of human life and therefore, like the President, want to insure all “defendants have been treated fairly”. Because of our deep reverence for human life, our profound respect for rights of individuals, and our respect for the law we call for vigilance, justice and equity in the criminal justice system. We urge that capital punishment be applied as justly and as fairly as possible without undue delay, without reference to the race, class, or status of the guilty.

We join with prosecutors, crime victims and their survivors, judges, and defense lawyers - those who know the system the best - in calling for changes to improve the surety and quality of justice in America. For those whose lives have been touched by crime and for society, true justice requires that those guilty of crimes be held accountable for their actions.

We wish to express our support for two key policy provisions. First, we support making DNA testing available to eligible prisoners. DNA testing offers the most effective methods known today to prove unequivocal guilt or innocence. Second, we also believe that states should be required to enforce standards for effective assistance of counsel in capital cases to insure a fair trial and to reduce the reversal of convictions. Clearly, a defendant cannot be properly defended by counsel with little or no criminal law experience, or who sleeps through portions of the trial. Such unprofessionalism leads to appeals, reversals, retrials, mistakes, and seemingly endless delays in delivering justice.

Respectfully,

Kids First Coalition
Christian Coalition
The Ethics and Religious Liberty Commission of the Southern Baptist Convention
Craig L. Parshall, J.D.
Traditional Values Coalition
Prison Fellowship Ministries
Justice Fellowship
Savior’s Alliance for Truth (SALT)

Mr. DELAHUNT. Mr. Coble, I want to thank you and Chairman Sensenbrenner for holding this hearing today, and for your courtesy in permitting me to rejoin the Committee for the purposes of today's proceedings.

The hearing is entitled "Advancing Justice," and surely if justice means anything, it means making sure that we punish the guilty and protect the innocent. But if that is what we mean, then our justice system has a long way to go.

Since the death penalty was reinstated in 1976 in the United States, 864 people have been executed. During the same period, 108 people have been exonerated after spending years on death row for crimes they did not commit. Some came within days or hours of being put to death. It is cases like these that cause conservative judges like Sandra Day O'Connor to express concern that the system, and I quote the Supreme Court justice, "may well be allowing some innocent defendants to be executed."

Most of these miscarriages of justice are preventable, and the two best ways to prevent them are by giving eligible inmates access to post-conviction DNA testing and making sure that every defendant has access to a competent lawyer at trial.

DNA was responsible for exonerating 12 of the people freed from death row and another 120 who were wrongly convicted of serious crimes. In at least 34 of these cases, the same tests that exonerated an innocent person led to the apprehension of the real perpetrator.

But DNA is not a magic bullet that will eliminate the problem of wrongful convictions. Biological evidence is available in fewer than 20 percent of violent crimes, and even where such evidence exists, post-conviction testing only tells us that the system failed. It doesn't prevent the failures from taking place. The best way to do that is to make sure that every indigent defendant who is facing the death penalty has access to a competent lawyer.

I was a prosecutor for over 20 years, and I know that the adversarial process can find the truth only when both the prosecution and the defense are up to the job. Our system of justice depends on it. We can't tolerate a system that leaves a capital defendant at the mercy of lawyers who are poorly trained and poorly compensated, who fail to conduct a proper investigation and examine the evidence, or worse, who drink or sleep their way through the trial; and tragically, that has occurred.

We can't tolerate a system that relies on reporters and journalism students to develop new evidence that was never presented to the court in the first place; and tragically, that has occurred.

We cannot tolerate a system in which chance plays such a profound role in determining whether a defendant lives or dies.

In the last Congress I joined with Congressman LaHood in introducing the Innocence Protection Act which seeks to ensure access to post-conviction DNA testing in meritorious cases and to assist States in providing a competent lawyer to every indigent defendant who is facing the death penalty. This bill isn't about the death penalty, however. It is about advancing justice in the most immediate and profound sense, and that is why 250 Members of the House co-sponsored the bill in the last Congress and why it continues to gather bipartisan support from both proponents and opponents of the death penalty.

Mr. COBLE. The gentleman's time is about to expire.

Mr. DELAHUNT. Let me conclude by saying, thank you, Mr. Chairman. And I want to publicly thank the Chair of the full Committee, Mr. Sensenbrenner, for working with me over the course of this past year to perfect that measure. I am hopeful that we will soon be able to introduce a bill that can pass the House and be enacted into law.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

You know, when you start recognizing individuals, inevitably someone is going to be omitted, but I would be remiss if I did not mention Mr. Weiner, the distinguished gentleman from New York; Mr. Delahunt, who just spoke; and Mr. Green, the distinguished gentleman from Wisconsin. These three have done yeoman work on this issue, and there have been others as well, but these three particularly stand out.

We have been joined by the gentlelady from Texas. Good to have you with us, Ms. Jackson Lee.

And now I am pleased to recognize the distinguished gentleman from California, Mr. Schiff, for 5 minutes.

Mr. SCHIFF. I want to thank the Chairman and Ranking Member Scott for the hearing today. I think it is extraordinarily important.

I want to thank Mr. Delahunt for his superb work on this issue. I first became familiar with the issue as a prosecutor in Los Angeles and, later, as a State legislator when I introduced legislation trying to expand the use of DNA in California and found that, in many respects, what I consider the most powerful tool in law enforcement both to find those who are guilty of crimes, but also with the power to exonerate, is terribly underutilized—and underutilized, I think, for a very poor reason.

There have been concerns expressed about the use of DNA evidence owing to privacy concerns, and while the nature of those concerns is very much legitimate, I think when you explore into the realities of the use of DNA—as Dr. Ferrara pointed out, in fact, the DNA evidence that is used provides no information about the genetic composition, hair color, propensity for colon cancer or any other information about the individual—my understanding, even beyond Dr. Ferrara's testimony, is that it is converted into a unique identifier that can be compared with others in the database. And the intangible interest, privacy interest in that unique number compared with a very tangible privacy intrusive—women not to be raped, men, women and children not to be murdered—seems to pale in comparison to that privacy interest.

I reached out to the Justice Department a couple years ago and had discussions with them on how we could strengthen the system. I have subsequently introduced legislation, a few months ago.

The DNA Database Enhancement Act does a few things. It includes DNA samples from all persons convicted of violent felonies. It authorizes States to upload DNA samples collected in a lawful manner.

Some of these issues, I know, are also being proposed now by the Justice Department. In one area, though, the bill that I propose goes beyond what I have seen in the Justice Department proposal, and I wanted to ask about that; and that is, section 4 of my bill

ensures that law enforcement can compare collected DNA samples with the national database. Some States, in fact, my own home State, have posed limitations on what law enforcement can do with DNA samples that are gathered on a lawful basis. These are those either taken voluntarily or pursuant to court order.

It seems to me if law enforcement has a sample that has been obtained in a lawful manner and wants to run it against the database and doing so may help solve unsolved rape or murder cases, they should have the ability to do it. And I wanted to pose the question to Ms. Hart, if I could, whether that is something the Justice Department would consider including in their proposal, so that States cannot artificially limit the ability of law enforcement to use this tool.

And while I certainly recognize the right of States to want to make their own judgments about how to weigh the privacy interests involved, the reality is that States are not powerful enough to keep rapists and murders within their borders, and these laws have an impact on all of us in all the 50 States. And as we are talking about unique serial numbers and not useful genetic information, it seems to me the interest in solving these unsolved murders and rapes is the most compelling interest.

So if I could ask for your thoughts on that.

Ms. HART. The Department of Justice hasn't taken an official position on your bill, Congressman Schiff. However, we have taken the position generally that the States should be making the decision, these very difficult calls about what is lawful and what is not, what should go into the data bank and what should not.

In terms of policy questions, is it wise on the State level to tie the hands of law enforcement officers in that manner if they have something lawfully collected? I tend to think that most people would look at that and think that the compelling interests of solving rapes and presenting them from occurring take precedence.

Mr. SCHIFF. Well, I would welcome the opportunity to work with you further, and want to again extend that invitation to the Justice Department.

I think this is an incredibly important tool, and the fact that we don't utilize it, that we allow these unsolved cases to remain unsolved, that we allow people that have committed these violent crimes to remain at large, I think is irresponsible for a Government whose primary occupation is to protect the public.

So I look forward to working with you on it.

Dr. Ferrara, did I describe it very correctly? Is it not only not useful genetic information, but also converted into what looks like a Social Security number?

Mr. FERRARA. You are correct on both points, Mr. Schiff.

And I might also add to your concerns about the limitations with respect to which samples can be included in the data bank according to the 1994 Federal DNA Identification Act. I mentioned, in Virginia, in 1996, we added juveniles; and in January of this year, persons arrested for violent felonies. In just the first 6 months of the arrestee law, we have collected some 2,500 to 3,000 arrestees and made 25 hits assisting or solving 4 rapes and 3 homicides. The samples from those individuals are not searchable by the California

Department of Justice laboratory, which is extremely limiting in terms of the power of this technology.

The same is true with our juveniles. The law will allow juveniles who are convicted as adults, but Virginia law requires any juvenile convicted over 14. So we can't—if we can't distinguish them, then none of them are in and none of them are searchable, and those juveniles are responsible for—in our data bank for solving many rapes, homicides, violent crimes and nonviolent crimes.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. COBLE. The gentleman's time has expired.

The gentleman from Wisconsin, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman.

Let me begin by seconding the comments made by my friend and colleague, Congressman Delahunt, about the great courage of Debbie Smith; and also, so that everyone understands, that her courage has already had great results.

Her willingness to come forward with her story and to talk about her terrible ordeal has raised the profile of the issues involved in the DNA evidence collection to an extent that Lifetime television has, as you know, focused upon this. They had an online petition, and over 90,000 viewers signed a petition in favor of the legislation that emerged from her terrible ordeal, the Debbie Smith Act, which was drafted and introduced by myself and Carolyn Maloney, Congresswoman Carolyn Maloney.

So rest assured that you are having a great effect, and I suspect—I hope I am not overly optimistic, but I suspect that this fall you will genuinely see the fruits of your labor when this legislation in some form is signed by the President. So your courage has already had a great result. You are making a difference in the lives of so many—so many people. It is a wondrous thing.

And Mr. Chair, if I might, I would like to submit for the record a letter from Lifetime Television supporting the Debbie Smith Act and also making reference to those 90,000 signatures on the petition. Mrs. Smith, in your case, you had to wait for justice for 6 years as you testified to. What could have been done differently that would have shortened that time that would have brought justice to you more quickly?

[The information referred to follows:]

July 17, 2003

Lifetime

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism and Homeland Security
207 Cannon House Office Building
Washington, DC 20515-3306

Dear Chairman Coble:

On behalf of women in the over 86 million homes around the country we reach, on behalf of the 90,000 viewers who already have signed our petition at Lifetimetv.com in support of the Debbie Smith Act, we would like to commend you for holding this critically important hearing, "Advancing Justice Through Forensic DNA Technology."

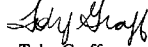
We also want to acknowledge Chairman Sensenbrenner and the Administration for their commitment to eliminating the staggering backlog of rape kits across the country. In addition, we want to thank Representatives Mark Green and Carolyn Maloney, who brought this legislation to our attention in the 107th Congress. We are honored to stand with all of you as you work to pass momentous legislation that would use DNA evidence to help put more rapists behind bars. Women and men, survivors and advocates, and all of us at Lifetime owe you a debt of gratitude and praise.

Lifetime is dedicated to using the power of television and the Internet to raise awareness of the vast problems of sexual assault and domestic abuse and the great need to use DNA evidence more effectively so that we can put more rapists in jail.

We look forward to continuing to work with you to champion this legislation until it becomes law. Please do not hesitate to have your staff contact me at 212-424-7298 at any time if we can be helpful.

Thank you again for your ongoing dedication to this issue.

Sincerely,



Toby Graff
Vice President
Public Affairs

Cc: The Honorable Mark Green
The Honorable F. James Sensenbrenner, Jr
The Honorable John Conyers, Jr
The Honorable Bobby Scott

LIFETIME Entertainment Services worldwide plaza 309 west 49th street new york, ny 10019 T 212.424.7000 www.lifetime.com

Mrs. SMITH. I think that if we could have eliminated the current backlogs, not only the rape kits, but also the offender samples that are sitting there waiting to be tested, it would have definitely shortened the time span. I think that it would be a good idea to look at maybe outsourcing some of this work so that—to certified private labs—so that victims could get their answers as soon as possible, and the thing of it is is that as long as those kits—they are not just kits. They are people's lives that are on hold. I would, one day, would really love to know how many of those women didn't wait, couldn't wait to hear the answer from that kit.

Mr. GREEN. You know, I agree. And Mr. Chairman, a comment. As Congresswoman Maloney and I and others, Congressman

Weiner, outlined the Debbie Smith Act last session, when we first introduced it, everyone that was there seemed to say, well, gee, this just makes so much sense. You know, this is—why isn't this law already? And I think the problem is that there is a basic assumption on the part of the public that things work well. And I think that when you begin to tell people about the backlog, the fact that there are thousands of DNA evidence kits, samples out there that have not been processed, at first people don't believe you. I mean, they have this basic assumption that things work well and that we are all proceeding along. And then when they begin to realize sadly that it is true, there is outrage that develops.

This is a tremendous opportunity for us to fulfill the good faith that the public has in our basic system of security in this country, to protect women and families, so I am excited about the progress that I see here. But if you haven't—I say to the Members of the panel if you haven't been hearing from your constituents about this problem, I submit to you it is only because they can't believe that it is really this bad. I guess my next question would be to Ms. Hart. Do you have any numbers for us that would quantify just how bad the backlog is?

Ms. HART. At this point it is very difficult to quantify the backlog because most of the backlog is in police departments, not in crime labs. Most crime labs have limited storage capacity and so they are not even letting the samples come in the door. And we believe it is hundreds of thousands for casework samples, we believe.

Mr. GREEN. Hundreds of thousands.

Ms. HART. Hundreds of thousands of case work samples. We also believe it is similar for convicted offender samples and also there are owed samples, probably a half million to a million of them where State law has required them to be collected, but they have not been collected. It has gotten so bad, Congressman Green, that out in Los Angeles, for example, there were thousands of crime scene samples that were thrown out because detectives believed that the statute of limitations had expired. I cannot imagine what those thousands of rape victims who went through the same things that Debbie Smith had to go through must be feeling about the system failing them, having those rape kits tossed. It is just so wrong. We can do something about it and we must.

Mr. GREEN. Thank you. And thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman. I thank you, Mr. Green, for the diligent effort you have put into this issue. The gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I thank the Chairman very much and I add my appreciation to the witnesses. This is something that many of us from the public policy perspective live with every day. Mrs. Smith, none of us can equate to the experience and emotion and the need to help victims that you have articulated and we thank you very much. Many times Members will say we cry with you, but only because we empathize. You have come to tell us the real truth, and we thank you so very much. I think that there are several initiatives that all of us have found a great interest in, legislation named after you, and certainly the innocence project. I come from a city that has experienced its own share of consternation over the last couple of weeks and months, and maybe almost a year in the

city of Houston we have confronted the question dealing with the accuracy of the laboratory work, and certainly I believe the backlog issue is of great importance.

To even suggest that you would have to wait one moment for the kit to be utilized appropriately and the perpetrator to be brought to justice or at least arrested, what a double tragedy when the lab where the testing has to occur. And you mentioned outsourcing and maybe privatization is inadequate. And so let me raise two questions with the panel. First of all, Mrs. Smith, I would hope that we want a partnership of moving the testing along, but making sure that there is trained expertise and a quality lab that is engaged in the testing. Is that—would that have been the welcome partner to this?

Mrs. SMITH. Yes, absolutely.

Ms. JACKSON LEE. The other issue that I would ask, I have legislation that talks about the utilization of holding of DNA for certain perpetrators who have been already convicted and proven guilty as relates to child molesters, so that law enforcement might find a certain data bank that has the DNA of child molesters, which would make it easier for a police, law enforcement to go directly to that data bank. It does not preclude the overall search but it says for example that these are known and convicted child molesters. This is the DNA and if you have a case like that, you can quickly go to that bank to be able to pursue it. Would that seem reasonable to you, Mrs. Smith?

Mrs. SMITH. Seems great to me. Sounds like a good idea.

Ms. JACKSON LEE. And we appreciate that you are not trying to act as a lawyer today.

Mrs. SMITH. I am sorry. I can't do that.

Ms. JACKSON LEE. Appreciate that. Let me go to Mr. Neufeld and Mr. Ferrara. On the President's Initiative, there is an element of crime laboratory capacity. Having gone through what we have gone through presently in Houston, which results in the great work for the innocence project, because what happened is there were a number of convicted individuals that now were proven innocent because of the misuse of the DNA testing and the inadequacy, inaccuracy and outright unfortunately possibly malfeasance.

The President's Initiative has about \$90.4 million. My perspective is that this is an enormous challenge to make sure our laboratories are accurate, to make sure we have the expertise, to make sure they are working, that goes in the question of backlogs. Your comment on trying to enhance the laboratories around the Nation. So many of them are at different levels and standards. So many of them work and some don't work. What would be your thoughts on that?

Mr. FERRARA. Ms. Lee, with respect to—the simple answer, I believe, is that all the laboratories performing this work be in accredited laboratories, and there is a very well established accreditation program for Forensic Science laboratories.

However it is voluntary and approximately 225 out of 400 and 45 forensic—public Forensic Science laboratories in the country are not accredited for a variety of reasons, Houston's being one of those. Now, I am not—I don't mean to suggest that if you are accredited, you automatically produce perfect work. That is, I think

realistically we have to understand that whenever we are dealing with human beings working in a particular environment, mistakes can and will happen. What we do have in place, and particularly in accredited laboratories and in CODIS laboratories which have to meet those same standards are mechanisms to minimize the likelihood of those errors occurring, or more importantly, recognizing them when they do occur, and taking corrective action.

Ms. JACKSON LEE. So would you think a focus, you say the accreditation, but a focus on making sure that we have expert DNA labs is important.

Mr. FERRARA. That is correct and that is what accreditation and the CODIS standards will do. A laboratory has to meet very high standards in order to achieve that level.

Mr. COBLE. The lady's time has expired.

Ms. JACKSON LEE. Would you allow the gentleman to—

Mr. COBLE. I will.

Ms. JACKSON LEE. I thank the distinguished Chairman and I thank the Chairman and I thank the Ranking Member very much for their kindness.

Mr. NEUFELD. Congresswoman, the great irony of the Initiative is it talks about the requirement that all the DNA units across the country and various crime laboratories be accredited, but says nothing about all the other forensic disciplines. As you know from the Houston crime laboratory scandal, it went way beyond the DNA problem. There are concerns that ballistic experts were testifying improperly; that drug experts were testifying incompetently. The great irony is that DNA is the most scientific of all the forensic disciplines that Dr. Ferrara and his colleagues have at their disposal.

But there is not a word in this bill or any other bill requiring accreditation or quality assurance for the other disciplines. And as we have already heard from Congressman Delahunt that only about 20 percent of the violent crimes are amenable to DNA testing. But the other 80 percent may be amenable to these other forensic disciplines where there is not an ounce of concern right now for making sure that they are accredited, that they have quality assurance, that they have audits. None of those things exist. And it would be a great thing if this Committee took it upon themselves to expand what it is doing for DNA units to the other forensic disciplines.

Ms. JACKSON LEE. Very helpful. Thank you very much, Mr. Chairman. Thank you.

Mr. COBLE. I thank the lady. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman, and there is no one on the Judiciary Committee that has been more active in this because of the situation in his home State than the gentleman from New York where they have an abysmal problem and need the funding to deal with the backlog. And I will yield such time as he may consume to the gentleman from New York, Mr. Weiner.

Mr. COBLE. The gentleman from New York.

Mr. WEINER. Thank you. I will be brief and I won't take the full 5 minutes. I just wanted to thank the panel. I think this demonstrates and Mr. Delahunt's testimony, and Mr. Chairman and

Mr. Green, that DNA testing is one of those issues that everyone sees through the lens of their own experience, but just about everyone agrees we need to do more of. Civil libertarians and those concerned about those wrongfully accused see DNA as a ticket, a prosecutorial safeguard. Those of us who are concerned about prosecuting these violent crimes, DNA is seen as a way to crack long since cold cases.

And we in New York City, in 1998, did a survey and it showed that we had 16,000 rape kits sitting on shelves in Long Island City in giant room-sized refrigerators. Each of these boxes had a number identifying them. The first two digits was the year and the last four digits was the case number. Each one of those boxes, about half the size of a shoe box, represented a woman who had been the victim of a crime. Thousands and thousands of them. Well, New York City itself, as part of its efforts to cut down on crime of all levels, went and tested these 16,000 cases. They have now almost entirely cleared out the backlog, and the result is that 154 cold cases have been solved and they have leads in another 205 cases.

That's our one city. Ms. Hart said that there is an estimate—and this is just an estimate. Shortly the results of congressional legislation, which require the Justice Department to try to get a handle on this, came back with preliminary numbers that she articulated of 350,000 samples, and it's easy for us to lose sight of the fact that each one of these is a human being who has been the victim of a crime. You know, we have this perception because we see it on television all the time. Yellow tape going around the crime scene, experts dusting and taking fingerprints and collecting evidence.

What many Americans don't realize is very often that evidence is quite simply warehoused while a family, a woman, very often a community awaits justice in those cases. It is very important that we help cities and States to continue to clear out this backlog. It is also very important that we recognize that there are problems like the ones we experienced in Los Angeles, where there are quite literally cases are knocking on the door of the statute of limitations. We have to make it such that it is—there are some standards and ability for prosecutors to do these indictments frankly of John Doe evidence of just indicting DNA evidence, if necessary, to keep the statute of limitations clock from ticking these cases shut.

I want to thank the Chairman of the Subcommittee and the Chairman of the full Committee and so many of my colleagues on both sides of the aisle who have taken an interest in this issue. But it is also very important that we recognize that we cannot focus, as Mr. Neufeld said, simply on DNA evidence and forget the fact that we are doing some downright dumb things in our Federal budgets this year. The idea of zeroing out the CEDA program makes no sense to me. A \$79 million cut—I am sorry—a reduction of \$79 million in the CEDA and zeroing out the Crime Lab Improvement Program, a \$35 million cut.

We have to recognize that collecting, processing, warehousing, sharing information from crime scenes around the country is a Federal priority. Individual States are going to have limit the ability to do what New York City did with its \$12 million of municipal taxes. And I think this Committee is at the forefront of trying to make sure we have a comprehensive way that we make sure that

victim finds justice, that those who do not commit crimes are not caught up in the net, and that we in the Federal Government do a better job articulating standards, funding laboratories, where they are necessary and not simply leaving each city, State, locality and at the end of the day, each individual victim to fend for themselves.

And I thank the Chairman. I particularly want to thank Mr. Scott for yielding his time.

Mr. SCOTT. Thank you. And I thank the gentleman for his passion. I feel confident that we are going to take some action in this Congress.

Dr. Ferrara, can you describe what exactly we are talking about in terms of taking a sample? Do you have—I understand you have a sample kit with you or something you can show us what we mean. I think most people think you are talking about taking a blood sample.

Mr. FERRARA. That is right. That is a popular perception and that is how the practice began back in 1989 when the technology required those larger samples. Well, today we have progressed to the point where a simple buccal swab—this is a kit that we use in Virginia that is used to take samples from all convicted felons and persons arrested. And the kit really consists of a swab that goes between the inside of the cheeks of an individual, a couple of swabs, and in fact, you then have a complete sample that is totally non invasive. I am breaking the seal on this. When it is sent out to all agencies it has to be sealed. But inside this kit, the heart of it is this particular collector which an individual, by himself, will simply open this kit, hopefully they have an easier time of opening it than I do. Open this particular sampling device—

Mr. WEINER. We are going to have the DNA Kit Opening Act of 2003.

Mr. FERRARA. We are going to have to make that a little simpler. It is covered. But all the person would simply do is take this particular kit, put it inside the cheek in the mouth, three or four times, put this cap back on, put it into the envelope and send it to the laboratory. That is all that it is invasive as the sample is.

Mr. SCOTT. Now, what is—if you—we get the data, get the profile, what is uploaded to the national data bank?

Mr. FERRARA. The—once these samples arrive in the laboratory, the personal information, the information from whom the person that sample was taken is entered into a computer and then a bar code is assigned to that sample. From that point the sample, this collector that I just showed you has only the bar code and no other information. So from the point that that sample is entered into the system, it continues through the process without any personal information attached to it. It is simply a bar code.

So, if an individual were to steal a sample, they would not know the identity of the individual. When the DNA profile is developed and entered into CODIS, it is only identified by the number assigned by the State. So when a—let's say an interstate hit occurs between Virginia and North Carolina or New York State, as is often the case, we have had, we are approaching almost a hundred interstate hits alone between Virginia and somewhere else, the laboratories are informed that hey, you have a match.

But no one except the laboratory who maintains that database sample knows who that sample is from. And it is not until full and complete authorization that that information is released.

Mr. SCOTT. So you up load essentially just a number to the national data bank?

Mr. FERRARA. That is correct.

Mr. SCOTT. If someone were to look at that number, would there be any genetic information that they would be able to glean from the number?

Mr. FERRARA. With the exception of the sex of the person, no, sir, there is no other genetic information that can be gleaned from that.

Mr. SCOTT. Why do you need to keep the sample in—after the sample has been taken and profiled? Why do you need to keep the sample?

Mr. FERRARA. For several reasons. One, when we make a hit against a DNA data bank, all—an electronic search, to make double sure that you are identifying the right individual, we go back to that original sample and recheck it directly to make sure that, in fact, we have a hit to this individual. Secondly, and most importantly, as Ms. Hart indicated, in the near future, we have got to come up with a faster, better technology, one that is as good as what we have got now, in terms of sensitivity, specificity, but is faster.

Now, if we come to that technology and it becomes available to us, we have got to be ready to start all over again with respect to the database. Well, if we have 101.7 million people, I think collectively in CODIS right now, we don't want to have to go out and re sample them or start all over again.

So we retain those samples so that we can apply a new technology with a minimal loss of time.

Mr. SCOTT. My time has expired, Mr. Chairman.

Mr. COBLE. I thank the gentleman. Mr. Feeney, I think you said you had no questions. Again, I want to thank all of you for being here. We will have another round. I just wanted to thank them before I forgot it. And before I forget it, with unanimous consent I want to insert in the record a statement from the Consortium of Forensic Science Organizations that will be made a part of the record.

[The information referred to follows:]

PREPARED STATEMENT OF MR. JOSEPH POLSKI, PRESIDENT, THE CONSORTIUM OF
FORENSIC SCIENCE ORGANIZATIONS

Mr. Chairman and Members of the Committee:

Thank you for allowing us the opportunity to submit this statement. Let me first introduce you to the Consortium of Forensic Science Organizations. We were formed in 2000 with the purpose of providing one voice from the forensics community to Congress and the Administration. I believe we have successfully achieved that over the past several years. Our organization is a multi-disciplinary group of more than 11,000 forensic scientists and medical examiners including, the American Academy of Forensic Sciences, the American Society of Crime Laboratory Directors, the International Association for Identification, and the National Association of Medical Examiners.

Ironically, we appear to be a victim of our own success and publicity. The forensic community, despite all the press and television shows about our profession, continues to suffer from a significant and dangerous shortfall of funding. While the general public is now aware of the highly skilled individuals we have working in our crime labs and medical examiner offices, the perception is that we have available

to us the same equipment as does the television show CSI and that the primary tool we use in investigations is DNA. In fact, DNA is only one of the many scientific tools available to us.

That is not to say that the success and potential of forensic DNA analysis has not been and is not impressive. DNA has served as the scientific basis for overturning more than 100 wrongful convictions and has linked over 5,400 cases to offenders. Due to the nature of the cases solved, i.e. murder and rape, there has understandably been a great deal of media attention given to the power of DNA evidence. Regrettably, other valuable forensic tools, although much more often used, have largely been overlooked in tangible terms - that is to say, the funding which has been quite inadequate. The truly remarkable record of success in the DNA area is impressive and should be emulated in other areas of forensics. This will obviously require a significant amount of new funding for our nation's forensic system.

The Administration's FY04 budget request is a good example of the overall difficulty we face in helping the public to understand what happens in an actual crime lab. The President has proposed \$177m (+) to fund a DNA Initiative within the State and local Crime Lab system. Much less publicized, however, is the fact that the federal funds targeted exclusively to DNA continue to go unspent. The Administration's DNA initiative is based on the premise that the DNA system could do even more if more resources were available. So too could all the other forensic disciplines do more with more funding. We would cite, for example, the fact that Medical Examiners and Coroners are the sole authority to classify cases as homicide yet are not included in current federal forensic funding.

While we believe the substance and intent of the initiative is worthy and well intentioned, we cannot support 100% of federal funding being limited to an area that comprises less than 5% of our total case backlog. Regrettably, due to lack of adequate funding, other types of evidence and autopsies are collecting in our nation's medical examiner and forensic science system. In some instances, attorneys, law enforcement agencies, and even surviving family members have paid significant sums of money to have samples processed by outside labs. The reason: no one can afford the wait.

Recently we conducted an informal survey of our crime labs and indeed found that, of the total backlog the labs have, about 5% of it resides in DNA. By comparison, drug analysis represents 44%, fingerprints are approximately 24%, firearms are 10%, and toxicology is 5% of our overall backlog. Further, the American Society of Crime Laboratories, in 2001, also conducted a survey of state and local forensic laboratories and concluded that 9,000 more forensic scientists are needed, that \$1.3 billion is needed for facility modernization and construction, \$285 million is needed in equipment by the laboratories and 26% of our nation's crime labs do not have basic computer systems to track evidence OF ANY TYPE.

What has further exacerbated our funding shortfall is the fiscal crisis within our States' budgets. Our funding has traditionally come from states and local government as well as the federal government. With most States and local governments suffering extreme budget shortfalls, the result has been that some of our labs are being closed and our medical examiners and crime labs are forced to cut services. In fact in some states, law enforcement agencies are being told they will have to pay for forensic services. The end result is a delay in the judicial process. If we do not have the infrastructure, equipment and personnel to support the criminal justice community, then cases will backlog and the judicial process will back up.

Mr. Chairman I'd like to take this opportunity to describe to you what we do in a crime lab. Modern crime labs are divided into functional areas which mirror the educational and training requirements needed to conduct analyses in those operational units. The following divisions are a typical of most labs in the United States:

- **Narcotics.** Drug testing of controlled substances is a major area that most crime labs are engaged in. Drug submissions may include cocaine, heroin, methamphetamine, marijuana, PCP, LSD, plus a wide range of prescription drugs. Crime labs may also be responsible for assisting police in clandestine drug lab investigations. Clandestine drug labs manufacture illicit substances such as methamphetamine, as well as other illegal substances. The very hazardous nature of these crime scenes requires forensic chemists to wear protective clothing and breathing devices.
- **Toxicology.** Toxicology is the analysis of biological tissues for drugs of abuse and their metabolites, lawful drugs, poisons, and other agents which may be important in death investigations including those cases involving driving under the influence of alcohol or drugs even though DUI cases are generally classified as misdemeanor crimes. Post mortem toxicology is important in all death investigation cases. Some labs combine narcotics, drug testing and

other chemistry related lab tests together under the classification of forensic chemistry. Other areas in forensic chemistry would include arson, explosive testing, gunshot residue testing, serology, photo analysis, and so on.

- **Trace evidence.** Trace evidence is a term that generally refers to minute items of evidence such as hairs, fibers, glass, soil, and other miscellaneous substances that a perpetrator and or victim might encounter and which could link people together with one another or with a crime scene. Trace evidence examiners require wide ranging skills and a broad knowledge of microscopy, material science, chemistry plus the ability to synthesize unrelated items of evidence and determine how the evidence relates to the case. Trace evidence examiners undergo a lengthy mentor-based training program. It is not uncommon for a trace evidence examiner to train under an experienced forensic scientist(s) for 3 or 4 years.
- **Firearms Identification.** Firearms identification, sometimes inaccurately called ballistics, involves evidence associated with firearms. The firing mechanism in firearms that causes bullets and shotgun shells to discharge also produces distinct markings on bullets and shell casings which can be directly associated to a specific weapon. In addition, the ATF operates a national firearms database called NIBIN, the National Integrated Ballistic Identification Network. NIBIN is capable of associating expended bullets for seemingly unrelated investigations. Firearms units in crime labs are often backlogged with unexamined cases. The problem is further exasperated by the length of time needed to training examiners - approximately 2 years. The ATF has a highly sought after training program, however the demand for the training far outstrips the ability to satisfy the national demand.
- **Forensic Biology.** Forensic Biology, which encompasses DNA typing, is perhaps the most popularly known of the forensic science disciplines. One would be hard pressed to turn on the television and not see a show involving this area of forensic science. The national DNA database, known as CODIS, has resulted in "cold hits" in scores of cases and is an important tool in the arsenal of police crime labs. Federal and state funding is making a dent in backlogs and many states report that DNA is no longer their most pressing need. As mentioned previously, experts report that DNA represents about 5% of the total cases examined in state and local public crime labs.
- **Question Documents.** Question document examination consists of hand writing analysis, examination of documents, paper, ink, indented writing, rubber stamps, obliterated writing, etc. It is a highly specialized discipline practiced in crime labs. Training is based on mentorship and typically takes two years of intensive supervised training. While some have suggested that the Internet and digital communications may cause QD examination to become passé it is unlikely that this will happen soon, if ever.
- **Fingerprints.** Fingerprint evidence represents one of the most common varieties of physical evidence and, on a daily basis, accounts for the identification of hundreds of suspects and the identification of unknown assailants. In fact, the number of subject identified through fingerprint examination is many, many times greater than DNA testing. Fingerprint, like DNA and firearms evidence, has its own data base (AFIS - Automated Fingerprint Identification System) which assists in the solution of cold cases. Fingerprint examiners often face large backlogs of cases due to inadequate resources for personnel and training.
- **Crime Scene Investigation.** Many crime labs respond with technical staffs to crime scenes as near-first responders whose job is to collect evidence in criminal investigations. Forensic specialists respond to a wide variety of criminal investigations including homicides, rapes, arsons, bombings, clandestine drug laboratory investigations, as well as just straightforward burglary cases.
- **Digital Evidence.** Digital evidence (DE) can be developed from computers, cell phones, pagers, PDA's and the internet. DE is one of the newest forensic disciplines. DE examination is generally found in crime labs but is often included in police investigative units as well. Experts advocate that the Digital Evidence units should be administratively part of crime labs since forensic science has a better understanding of the evidentiary issues likely to be addressed by this new discipline.

What then is the solution to the under funding of forensic sciences? The more than 11,000 forensic scientists and medical examiners represented by our organiza-

tion support full funding for the Paul Coverdell National Forensic Science Improvement Act of 2000 because it would allow crime labs and medical examiner offices, with the help of police and prosecutors to determine how to best use the funding *in their own* states. We trust forensic scientists and medical examiners to determine scientific truths on which a defendant's life and liberty literally hang in the balance. Why not heed their advice when it comes to strategic planning for the labs' needs?

Mr. Chairman and Members of the Committee, on behalf of the forensic community I urge you to recognize the needs of the ENTIRE forensic community and to provide the necessary level of funding to our labs and medical examiner offices. Our community continues to support the valuable legislation that the Congress passed in 2001, the Paul Coverdell National Forensic Science Improvement Act. This legislation provides us the flexibility to use the funding where we need it most, as demand shifts from lab to lab. It also provides for funding to the very vital medical examiner community.

Every person who has been touched by a forensics issue has a fervent belief that theirs is the issue. The sad reality is that rape, murder, drug overdoses, child deaths, car crashes, infanticide, elder abuse, adverse medicinal reactions, firearms deaths, arson fatalities, child abuse, spousal abuse, epidemics, and now terrorism are and forevermore will be a part of our lives. They are all-important issues and should be dealt with. If we ignore funding for forensics, the losers will include: truth, justice, victims, families, communities, suspects, courts, investigators, and ultimately, our society.

Again, thank you for this opportunity.

Mr. COBLE. Ms. Hart, some legislative proposals related to imposing post conviction DNA testing standards on States would penalize these States by denying them existing DNA funding if they failed to satisfy certain criteria. A, what is your opinion of this approach? And B, if you don't like it, what is a more desirable way?

Ms. HART. We have concerns about some of the proposals that have gone before Congress in the various versions of the Innocence Protection Act. And I think that there are a number of competing interests that must be considered here. One, you want to make sure that the technology is available for people who are innocent. You want to make sure you can test them promptly and they can be exonerated. But at the same time, we must recognize that the vast majority of people in prison, the vast majorities of rapists, in fact, committed those crimes.

We have seen a huge history in this country of prisoners filing frivolous litigation. And also we have statutes out there that are designed to protect victims and witnesses from retaliation by the people who have committed crimes against them. We have victim retaliation statutes. We have witness protection statutes. The one thing that we must be very careful to ensure is that we don't set up a system that allows convicted guilty rapists to recruit our justice system to inflict further harm on their victims.

So we think it is very essential that there will be the sensitivity here to those kind of competing interests. When it comes to State post conviction matters, we believe that those kind of interests can be balanced best at the State. And so instead of having a Federal statute that mandates specific provisions, we think those things should be decided on the State level.

Mr. COBLE. I thank you. Dr. Ferrara, what is your position on the use of private laboratories to help eliminate the DNA backlog?

Mr. FERRARA. The success that we have enjoyed in Virginia, we stand now at some 1,280 cold hits as of yesterday afternoon. Most of those are due to, in a great extent, due to the efforts of a private laboratory. In 1998, we had a backlog of convicted felon samples of approximately 180,000.

So we made a decision to engage a highly qualified private laboratory to run those samples so that our scientists could dedicate their time and efforts to the crime scene evidence. I think that combination, Mr. Chairman, is the main reason why Virginia's two hits per day rate of cold hits is happening today as we speak. While I have been in here, I am sure that we have solved two to three more cases just in these—this morning.

Mr. COBLE. Thank you, Dr. Ferrara. Mr. Neufeld, from your testimony, you indicate that you are opposed to retaining DNA profiles of arrestees in the combined DNA index system after charges have been dismissed. Now, you indicated, and I concur that DNA probably is foolproof. What would be the harm in retaining this information?

Mr. NEUFELD. Well, you know what? The best person to perhaps ask this question is the gentleman sitting to my right, Dr. Ferrara. In Virginia, it is the law that they can collect arrestee samples. But if the case ends in a dismissal or acquittal at that point the sample is destroyed and not retained in the database. They have made a decision that the proper balance to be struck between privacy and civil liberties interests and public safety is to use those samples when that person is arrested, exploit it as much as you can, but if the charge ends with a full acquittal or dismissal or exoneration of the accused then his sample should not be in the database.

If this Nation decides, and it has the perfect power to do so, by a consensus that we wish to have a universal database, then so be it. But until such time that that decision is made, and it is a philosophical, it is a political decision and it may be made soon. It may not be made soon. Until that decision is made, then people who either provide those samples when they are arrested, or, as the other congressman said before, through volunteerism, provide samples to help law enforcement properly solve a serious serial crime. Then when those people are cleared, then certainly the proper balance is struck in having the destruction of those samples.

You know, there may be lots of reasons why citizens in this country do not want to have their DNA on file. Yes, it is true right now that the profile itself has limited other values, but we just learned from an investigation in Louisiana that they are starting to look at DNA types that code for particular regions, physical traits, other issues. In Britain, they want to look at DNA forensically, they are codes for diseases, because it can help solve crimes. So there are real concerns. They will get balanced. They will get worked out. But until such time, once a person has been completely exonerated, it doesn't seem to be a public safety reason to keep that profile.

Mr. COBLE. Well, my time has expired. Mrs. Smith, I have a question for you but I will do that subsequently. Mr. Schiff, the gentleman from California.

Mr. SCHIFF. Mr. Chairman, I will yield back my time.

Mr. COBLE. I thank the gentleman. Mr. Scott, the gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman. I would like to follow up on that last comment. Mr. Ferrara, if you are taking a sample, what are the chances that that kind of information that Mr. Neufeld just articulated might be gleaned from the samples in your laboratory?

Mr. FERRARA. No genetic information would be generated from any of the information in our—in my laboratory. Mr. Neufeld is correct in saying that there are laboratories, private laboratories, who are—have the capability of determining certain physical characteristics, or what they refer to as biogeographical ancestry. By Virginia law, that is, that we would not be allowed to do that. And I know no public forensic science laboratory that would or could do that.

Mr. SCOTT. Well, you are not supposed to. What are the chances that someone in your laboratory might actually glean some information from a sample?

Mr. FERRARA. No chance at all. One, we are not geneticists.

Mr. SCOTT. What does that mean? What difference does it make.

Mr. FERRARA. Well, you have a completely different type of analytical methodology for determining these particular racial characteristics, physical characteristics, medical characteristics. Forensic science laboratories and forensic scientists do a standard battery of DNA tests called short tandem repeat testing, and that is all we can do. That and mitochondrial DNA analysis. So there is no way that would happen, could happen.

Mr. SCOTT. Because your professionals in your office aren't qualified to figure that out.

Mr. FERRARA. They are not qualified. They are prohibited by State law. And with the backlogs and everything else we have, the last thing we need to be doing is going around doing genetic testing of some other sort.

Mr. SCOTT. Now, if you wanted to figure out some genetic information for Mr. Neufeld, would you go to a crime lab or try to get it some other kind of way?

Mr. FERRARA. No, I wouldn't go to a crime lab and steal it. I would take his drinking glass right here home with me, put it in my pocket.

Mr. NEUFELD. Notice why mine is still empty, Congressman.

Mr. FERRARA. He knows me too well.

Mr. SCOTT. Peter, are there any procedural barriers to introduction of DNA evidence at this time? If someone is claiming innocence and wants a DNA test and can pay for it, are there any procedural reasons why they can't get that evidence into court right now?

Mr. NEUFELD. Unfortunately, there are congressman, in about half of the States right now. First of all there is no bill on the books to authorize post conviction DNA testing. Regrettably, it has been our experience over the last decade that the Innocence Project has been in existence. Whereas approximately 50 percent of the prosecutors who we deal with immediately consent to DNA testing because they realize that there is no substitute for truth; regrettably, in the other 50 percent of the cases, prosecutors oppose post conviction applications for DNA testing.

Although as Dr. Ferrara has pointed out, it is a quick, relatively inexpensive test, so inexpensive that certainly whatever it costs is less than the \$25,000 a year it costs right now for a State to house an inmate, particularly one who is innocent of a crime. We need to eliminate those barriers. If this bill is passed, it will do that.

And it will certainly, certainly, double the number of post conviction DNA exonerations on an annual basis.

Mr. SCOTT. Well, how is the—where does the victim come in in this process? You have the DNA sample from the crime. Ms. Hart indicated that frivolous cases would be an aggravation to victims. Are they involved in that process.

Mr. NEUFELD. No, they are not. In fact, in almost every case that we have dealt with—you have to understand, we are dealing with cases where biological evidence was collected during the original investigation. Unfortunately, they didn't have DNA testing then. They used conventional serology. But it would have been the practice even in 1985 to collect a reference sample from the victim, to collect a reference sample from a husband, for elimination purposes, and to collect a biological specimen from the defendant.

In most of the cases that we have been involved in, the testing was able to be conducted without even contacting the victim. It was only if there was an exclusion that it may be then necessary to ask the victim for a second reference sample that she would even be contacted and made aware of this. So the victim is rarely, if ever, involved in the whole process, unless there is an exoneration. Number two, you know, this notion that there is going to be a floodgate of frivolous petitions simply was not borne out by the record so far.

In the States that have had the statutes on the books the longest—New York and Illinois—we are talking about 8, 10, 12 petitions a year. Most of the people in prison are guilty and I would certainly agree with that. They know they are guilty and they don't want to go near a DNA test.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman. Mrs. Smith, I have not intentionally ignored you. I am working my way down the line here. Mrs. Smith, I know you have done extensive speaking engagements around the country on this issue. What do you hear most frequently as to the greatest impediment or the cause for delay in a timely analysis of the rape kit?

Mrs. SMITH. One of the biggest things I usually hear about are three things, money, manpower and time. And I think that funding is the key because that will certainly alleviate the other two. One of the things that I keep hearing from labs are that the money that, even when it is appropriated, doesn't seem to trickle down to where the actual work is getting done. Somehow it gets lost somewhere, and the lab doesn't see that money. And so I think that that is probably one of the biggest things that I hear in my traveling that seems to be the problem, which doesn't do anything to alleviate the backlog.

Mr. COBLE. Mrs. Smith, you have spoken in depth and in detail elsewhere and here this morning, about the ordeal that you encountered when you had to undergo the physical examination at the hospital. I think you said almost like you were being assaulted again. Do you have any suggestions as to what—how that can be assuaged or prevented and to what can be done to help victims to get through this process, necessary though it may be, as painless as possible?

Mrs. SMITH. There is a very good answer to that question. And that is the SANE, or sexual assault nurse examiner. These nurses

to me are key to helping victims get through the ordeal. It has been proven that when these nurses are made available to victims, they are more likely to report their crime when they know that they can go into a hospital and that they can have a one-on-one with a nurse, a forensic nurse who is trained to collect that evidence.

She has the assurance that that evidence is not only going to be collected properly; it's going to be preserved properly. I have spoken to victims that have not had the availability of SANEs and they go to court only to find that their evidence wasn't collected properly, which means they have gone through that for nothing, for absolutely no reason. And a SANE nurse is also trained to go and testify in court and she is—my husband being a police officer, came home and told me one day that a judge said that the forensic nurse's testimony was—far out weighed any other testimony that he had heard in a child molestation case. So I think that they are key to helping a rape victim get through her ordeal.

Mr. COBLE. Well, I thank you, Mrs. Smith. Mr. Scott and I and all Members of the Subcommittee again express our thanks to you all for being with us. And—do you want another round? All right. Well, Mr. Scott wants another round. I thought we had had two rounds. Well let me thank them before I forget. I thank those in the audience as well for the interest that you have shown. So I will recognize Mr. Scott for another round of questioning.

Mr. SCOTT. Thank you Mr. Chairman. I did have a couple of other questions, but on that point, Dr. Ferrara, in reference to the forensic nurses, are there any barriers in having those available in Virginia?

Mr. FERRARA. No, sir. As a matter of fact, we have taken a great interest in taking every opportunity to work with sexual assault nurse examiners, forensic nurses in order to train them how to use our kit. But Virginia is much more fortunate than many other parts of the country. We have been at it longer. The State has supported our program. The training of the sexual assault nurse examiners must continue. There is a great demand for it on a national level, as well as training of all persons who are going to be responsible for collecting physical and biological evidence at crime scenes.

Mr. SCOTT. In terms of the—what ought to go into the data bank, could you say a word about on your cold hits, how many are for violent felony, prior felonies, how many are out of State? Can you give us an idea of what we get with what we enter?

Mr. FERRARA. That is one—that has been one of the most fascinating results that we have seen. We do—we collect and enter samples from all felons, including property crimes. In summary, what we have found is that 37 percent of the violent crimes that we have—that helped or assisted or helped solve with a data bank hit were perpetrated by individuals with only prior property crime as their qualifying conviction. 82 percent—we calculate that 82 percent of our hits to offenders, we would have completely missed if our data bank was only limited to the inclusion of violent felons.

And as an example of that, I have just some data, very briefly. In terms of cold hits that were associated with persons in our data bank, for property crime as their highest qualifying offense, those hits resulted in the solution or assisting of 54 rapes, 27 homicide,

six assault malicious woundings, 19 robberies, one rape homicide and two carjacking abductions.

Individuals with just a felony drug conviction in our data bank as their highest prior qualifying offense were responsible for 35 rapes, 42 homicides, two of them double homicide, three assaults and malicious woundings, 18 robberies and 13 abduction/carjackings. So as you can see, there is a very strong relationship between a person's prior conviction for a property crime and then somehow escalating to violent crime.

Mr. SCOTT. Thank you. Mr. Neufeld, I have two questions. One is should there be Federal standards or should we leave it to the States? Do we need Federal standards? And after you have answered that, I think we cut you off when you were going to talk something about counsel.

Mr. NEUFELD. Federal standards on DNA? Or Federal standards on counsel?

Mr. SCOTT. Well—

Mr. NEUFELD. Which one do you want to ask me first.

Mr. SCOTT. I want to ask you about the—we cut you off on counsel, so I want you to finish your comment on that. But Federal standards on a DNA data bank.

Mr. NEUFELD. The reason we are talking about the need for some Federal legislation here for the States to comply with is simply this: There are a number of States right now, for instance, there are five that had sunset provisions. Three of those States, Delaware, Idaho and what is the third? It escapes me for the moment. But those three States, their sunset provisions already lapsed. And guess what, they had no exonerations. That doesn't mean there aren't innocent people within their borders. It meant that we learned from our experience that it can take 3 or 4 years to work these cases up, by finding the evidence, by not making a frivolous petition, by doing a good investigation before we burden the court with an inappropriate petition.

And if you have a 1-year or 2-year statute of limitations, you will leave innocent people in jail. You will leave innocent people on death row. So that's why there has to be some Federal involvement in setting some standards here for the States, or you won't have all the innocent people exonerated.

With respect to counsel, it is actually quite simple. As Congressman Delahunt mentioned before, in about 80 percent of the cases there simply isn't biological evidence for DNA testing. But what we have learned from these DNA exonerations is what causes wrongful convictions. Take three of the most common causes where certain police practices result in a misidentification by a witness, where there is a false confession, where there has been either sloppy or fraudulent forensic science involved, as Congresswoman Lee pointed out, responsible for the false conviction.

Well, if there is no DNA, we can't fix it. But if a person has a competent lawyer and a competent lawyer has money for experts, a competent lawyer that has money for an investigator, you can discover what kind of bad practices were utilized for the mis-identification. You can discover what happened during the interrogation that led to a coerced confession. You can hire an expert who can review the scientific data from the forensic laboratory and find the

mistake or misconduct. So there is no substitute for a competent well-funded attorney to find those mistakes early on in the investigation before trial and that way avoid wrongful convictions and avoid putting innocent people on death row.

Mr. COBLE. The gentleman's time has expired. The gentleman from California.

Mr. SCHIFF. Thank you, Mr. Chairman. I just wanted again to thank Mrs. Smith for coming today for her testimony, which I agree with Mr. Delahunt and my colleagues, was very powerful and very important for us to hear. So thank you for your candor and for your work on this issue. And I would be delighted, if the gentleman from Massachusetts would like, to yield him the balance of my time.

Mr. DELAHUNT. I thank my friend from California.

Mr. COBLE. Without objection.

Mr. DELAHUNT. And I would like to address an idea to Mrs. Smith and maybe I can pursue this later with Representatives Green and Weiner. You know, I am very familiar with the SANE program. In my previous life, I happened to be a prosecutor. I was the elected DA up in the metropolitan Boston area. And I am proud of the fact that 1977 we created a first in the nation sexual assault unit within the prosecutors office. And while I am very supportive of the SANE effort, I think that in terms of victims of sexual assault, as well as the need to increase the conviction rate of those that commit that sexual assault, a particularly heinous crime, we have to—we should be doing more.

Let me describe to you the sexual assault unit. It is comprised of specialized investigators, prosecutors that focused all of their time and effort on sexual assault cases. We had counselors which empowered, if you will, victims. I have this memory of a room in my old office that was devoted exclusively for victims to come together and under the supervision of a clinical psychologist, to work through a lot of those kind of issues, and an advocate to assist them all the way through the court process. I think that should be available in every jurisdiction in this country.

Now, whether it is properly posited in a prosecutors office, I think that's a legitimate question. But the conviction rate—first of all, the reporting rate—I was elected in 1975. And the number of rapes that were reported in that year were about 30. Five years later, there were 500. Because again, another component of that sexual assault unit was public education and working with forensic nurses whom we trained in the various hospitals that later became that SANE program.

So maybe, along with Congressman Green, we could flesh out something that maybe this Subcommittee would consider making part of hopefully a bill that can achieve a certain consensus. And I would be interested in just your response to my observation.

Mrs. SMITH. I think it is a great idea. I have been in areas that have what they call SART teams, sexual assault response teams. And I think that it is very important for anyone, any first responder, especially, to an assault victim, to have extensive training and is—because the problem is that whoever responds first to that victim, that is where she is going to start taking on how she is going to process her ordeal. If she gets a very negative response

from, say, a police officer or an advocate who has their own agenda, then her thought process about what she has gone through is going to begin in a very negative way.

So I am very much for sexual assault teams. I think it is very important that they are all trained, and that they all learn to work together, and that they communicate. This is something that was lacking and Williamsburg is getting better but is not completely resolved. But I believe that one of the things about sexual assault is that it affects a woman for the rest of her life. Unlike, you know, too many other crimes other than maybe murder. She has to learn to live with what has happened to her. She cannot get rid of it. She just simply learns how to live with it and I think that having trained people from the very beginning to the end would go a long way in helping her with her healing process.

Mr. COBLE. The gentleman's time has expired. The gentleman—Mark, did you have anything you wanted to add?

Mr. GREEN. No. Just that I would be happy to work with the gentleman. I think it is an idea that obviously merits consideration. We should look at it.

Mr. COBLE. Thank you, Mark. The gentleman from Virginia has one more question.

Mr. SCOTT. I had one more question just for the record. Dr. Ferrara, when you get a cold hit, and you know therefore who the culprit is and he is arrested, when you go into court, do you use the CODIS system information or do you get a fresh sample from the defendant to compare in court, thereby avoiding all the chain of custody and all the other kinds of questions that could arise?

Mr. FERRARA. Our practice is that when an individual is identified by comparison of a crime scene DNA profile to the data bank, we provide that identification information to the law enforcement agency, with the language saying this is provided to you as an investigative lead. In order to verify this association, we ask that you provide a new known sample from that individual. Before we even do that, we go back to our original data bank and run that sample again just to make sure that there might not have been some sample switch up in our data bank.

So we have several checks and balances including of course that direct comparison of the suspect with a new sample armed with probable cause now to get that sample and compare it directly to the crime scene sample. The statistics are applied and the report is issued.

Mr. SCOTT. And so, if the evidence presented in court is that is the new sample from the person is compared to the crime scene sample, and you don't have to get into the question of whether there was a mix-up in the lab or anything like that over the last 20 years or 10 years, or however long it has been.

Mr. FERRARA. That's exactly correct, Mr. Scott.

Mr. COBLE. Well, let me reiterate that Mr. Scott and I and other Members of the Subcommittee and our staffs appreciate you all being here. Mrs. Smith, particularly you because you brought great emphasis on this issue. We thank you again. And this concludes the hearing on advancing justice through forensic DNA technology. The record will remain open for 1 week. And I will say to the witnesses that in the event that other questions arise, we may contact

you all in writing and if you would respond. But the record will remain open for 1 week. The Subcommittee stands adjourned.
[Whereupon, at 11:55 a.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NORTH CAROLINA

Very seldom do we find a law enforcement tool that benefits everyone involved in the criminal justice system equally. DNA is that tool. Prosecutors, defendants, and victims all benefit from the fact that DNA provides unquestionable evidence of guilt and innocence. DNA can also provide closure to families who have lost loved ones. Forensic DNA technology is the future of investigations and Congress must ensure that the criminal justice system has the necessary resources so that this technology can keep pace with the future demands and eliminate any backlog that may slow its progress.

News stories extolling the successful use of DNA to solve crimes abound. For example, in 1999, New York authorities linked a man through DNA evidence to at least 22 sexual assaults and robberies that had terrorized the city. In 2002, authorities in Philadelphia, Pennsylvania, and Fort Collins, Colorado, used DNA evidence to link and solve a series of rapes and a murder perpetrated by the same individual. In the 2001 "Green River" killings, DNA evidence provided a major breakthrough in a series of crimes that had remained unsolved for years despite a large law enforcement task force and a \$15 million investigation.

There are many more examples of DNA being used to solve crimes but there is also no question that the current federal and state DNA collection and analysis system needs improvement. In many instances, public crime labs are overwhelmed by backlogs of unanalyzed DNA samples. In addition, these labs may be ill-equipped to handle the increasing influx of DNA samples and evidence. More research is needed to develop faster methods for analyzing DNA evidence. Professionals involved in the criminal justice system need additional training and assistance to solve crimes.

Furthermore, the criminal justice system needs the means to provide DNA testing in appropriate circumstances for individuals who assert that they have been wrongfully convicted. When an innocent person is convicted, lives are ruined and society remains at risk while the real perpetrator remains at large.

Greater access to DNA testing is essential, but DNA alone will not eliminate the problem of wrongful convictions. Steps must be taken to prevent wrongful convictions in the first place. Innocent people have been wrongfully convicted because their attorneys failed to inquire into the facts, or failed to present or challenge evidence at trial. We need to ensure that every indigent defendant in a capital case has a competent attorney who can conduct a thorough investigation, consult with experts, and carry out an effective examination of the evidence at trial.

Having competent counsel benefits the prosecution as well as the defense. This is the best way to reduce the chance of reversible error and ensure that verdicts for the government are upheld on appeal.

The President and many Members of Congress have offered legislative proposals that address the issues that we will examine today. I look forward to the testimony from the witnesses and their views on the various proposals.

**Oversight Hearing:
Advancing Justice Through Forensic DNA Technology
Statement by Mr. Mark Green**

Thank you Chairman Coble and Ranking Member Scott for holding this hearing on Advancing Justice Through Forensic DNA Technology.

DNA technology is a truly amazing tool for the modern day investigator and prosecutor. We can identify a perpetrator by one drop of blood or a single hair. We can now indict a person by their DNA and match that code to a name at a later time. This is justice through DNA.

However, justice is not always timely, in fact, some people wait years for justice. They wait in fear as their rape kits sit on a shelf and their attacker goes free. Debbie Smith, who has graciously agreed to testify today, went through this battle. I have worked with Mrs. Smith and heard her story numerous times. Each time, I hear the passion in her voice on this topic it encourages me to fight a little harder to do what I can to help the hundreds of thousands of victims that have DNA samples taken, but have not yet found justice.

It is estimated that someone the victim knows perpetrates 60 to 80 percent of sexual assaults. That means that anywhere from 20 to 40 percent are perpetrated by strangers. Strangers that will commit multiple sexual assaults unless we find them and put them in prison.

DNA testing and analysis can help prevent recidivism.

The fact that hundreds of thousands of pieces of vital evidence essentially sit unused is simply outrageous, we need to get these rape kits off the shelves so they can be put to work getting rapists off the streets.

I have introduced legislation, The Debbie Smith Act, which will help crime labs across the country eliminate this backlog and provide training for nurses and law enforcement to gather DNA evidence.

Specifically the bill:

1. Creates grants to help eliminate the rape kit backlog in crime labs across the nation.
2. Calls for training nurses to take evidence with consideration of the victims they are working with.
3. Calls for training law enforcement and first responders to collect data carefully and not “mess up” evidence when they first arrive at a crime scene.
4. Creates national standards to collect evidence to be used for prosecution.

The Debbie Smith Act is about justice being done. It’s about rapists being caught, convicted with irrefutable DNA evidence and put away for a long time. It is about helping thousands of victims receive justice by utilizing DNA technology.

PREPARED STATEMENT OF CONGRESSWOMAN SHEILA JACKSON LEE

Chairman Coble and Ranking Member Scott, thank you for convening today’s oversight hearing on this matter. Once this tool is improved as to the areas that I discuss below, it will play such a key role in streamlining and expediting our criminal justice system. As evidenced by the testimony today, our law enforcement agencies are becoming increasingly more adept to analyzing deoxyribonucleic acid (DNA) to verify or rule out the identity of a suspect or a charged individual in processing a criminal case. The more adept we become, the closer we get to having a fair and accurate system. We must, however, significantly raise the bar of our standards of review for DNA and ballistics crime lab accreditation.

The certification of our crime labs for conformance to our accepted standards is done by groups such as the American Society of Crime Laboratory Directors (ASCLD). The Crime Laboratory Accreditation Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) is a voluntary program in which any crime laboratory may participate to demonstrate that its management, operations, personnel, procedures, equipment, physical plant, security, and personnel safety procedures meet established standards. The accreditation process is part of a laboratory's quality assurance program that should also include proficiency testing, continuing education and other programs to help the laboratory give better overall service to the criminal justice system. Certification and accreditation are done via a process of self-evaluation led by individual crime laboratory directors. Our labs are not functioning at optimum levels, and this sub-par performance translates to the potential miscarriage of justice and prosecution of innocent people. Improvement of lab performance begins with tighter employment policies for the lab staff. For example, the ASCLD's Credential Review Committee has a DNA Advisory Board and codified standards for its technical staff. The following was taken from its website:

DNA Advisory Board Standard 5.2.1.1 provides a mechanism for waiving the educational requirements for current technical leaders / technical managers who do not meet the degree requirements of section 5.2.1 but who otherwise qualify based on knowledge and experience. Consequently ASCLD has established this procedure for obtaining a waiver.

One waiver is available per laboratory if the current technical leader / technical manager does not meet the degree requirements of DAB Standard 5.2.1. Waivers are available only to current technical leaders / technical managers. Waivers are permanent and portable for the recipient individual. A laboratory may request a second waiver if the first recipient leaves the employ of the laboratory.

Although experience is quite important in selecting staff, formal education is vital when it comes to technical performance and the legal implications of that performance. We are in desperate need of appropriate legislation to set forth and maintain the standards of DNA/ballistics lab accreditation. The Texas House passed a bill in April of this year requiring crime laboratories that test DNA to meet accreditation standards, a law designed to prevent future scandals like the one engrossing the Houston Police Department. State Rep. Kevin Bailey and other members of the House Committee on General Investigating wrote State HB 2703, which would require the Department of Public Safety to develop accreditation standards and a timetable for police labs to meet them. It also would ban the use of forensic evidence from unaccredited laboratories. Our work ethic in establishing and maintaining high standards of performance in the labs must be as technical and tenacious as we would like the overall performance.

In Texas, polls have shown strong public support for DNA testing. In June a 2000 Scripps-Howard Texas Poll, 87 percent of Texans surveyed supported giving inmates the right to free DNA testing to try to prove their innocence if the genetic evidence exists, and 76 percent supported a moratorium on death sentences for inmates whose cases might be affected by DNA testing. Ninety-two percent of Americans surveyed for a March 2000 Gallup Poll said that prisoners convicted before the availability of DNA tests should be allowed to obtain the tests now if they were innocent.

However, oftentimes the hoopla of new technology causes our work ethic and our sense of duty to fall by the wayside to the detriment of innocent individuals. In fact, one of the panelists featured in today's Oversight Hearing, Peter Neufeld, Esquire of Innocent Project at the Cardozo School of Law, spoke out regarding the case of Josiah Sutton in my Houston District, Harris County. The Houston Court convicted Sutton in 1998 for the rape of a woman whose body was dumped in a Fort Bend County field. But the Court eventually granted him bail in March after an independent lab determined that he was sentenced to 25 years in prison for a rape he didn't commit. An audit and an ongoing series of retesting of DNA samples by the Texas Department of Public Safety and a crime lab professional from Tarrant County revealed potential contamination problems at the subject lab as well as poor working conditions and inadequate training. Attorney Neufeld remarked that "[t]he most important question for the people of Houston and the people of Texas is, 'What went wrong that allowed this young man to be convicted for a crime he didn't commit?'" "And it is absolutely clear that what you have going on is a system of malpractice by the Houston crime laboratory that allows its criminalists to distort and

conceal evidence.” What I fear about the dangers of poor training and placement of checks may be summed up by what Neufeld added,

One of the biggest problems of . . . [crime labs] is that they [are] much more concerned with being a servant to the police and prosecutors than they [are] to science . . . [a]nd if people want to pursue a career in science, the word science has to come before law enforcement.

The objectivity that is required to make forensic science effective must be divorced from the latitude exercised by some of our law enforcement personnel. Therefore, in fashioning and considering a bill that proposes the implementation of a comprehensive and aggressive DNA forensic criminal justice plan, we must include adequate control mechanisms to prevent injustice and the ruination of young lives like the young Houston man, Josiah Sutton.

Furthermore, other problems with DNA testing in criminal cases affect the inmate directly. The discretion with which the decision whether to use DNA testing leaves room for inconsistent adjudication and differential treatment of convicted persons. Statutory guidelines regarding when to order the test would exclude some cases that might not meet the standards but still might deserve testing. Moreover, some inmates who seek exoneration may request executive clemency. In addition to requiring very difficult measures to achieve justice, some argue that the tests administered are inadequate because they do not provide specific, clear, and fair procedures for inmates to bring claim of innocence.

In addition to negligent handling or unskilled analysis of DNA evidence, the backlog of cases causes our criminal justice system to crumble despite the level of sophistication of our technology. Houston police have turned over about 525 case files involving DNA testing to the Harris County district attorney’s office, which has said that at least 25 cases warrant re-testing, including those of seven people on Death Row. The numbers will grow significantly as more files are collected and analyzed, according to the assistant district attorney supervising the project.

The Fort Worth police crime lab’s serology/DNA unit has been criticized recently for a backlog that was slowing down court cases. The unit is understaffed and overworked, police officials, prosecutors and defense attorneys have said.

My concern as to the prospect of using these DNA tests is that the inmates’ civil liberties and rights to due process will be in jeopardy or subject to excessive discretion. Furthermore, our own human error threatens to undermine the boons of technology. Mr. Chairman and Mr. Ranking Member, I advocate the use of DNA tests in criminal procedure; however, the use of these tests must achieve justice for *all*.

PREPARED STATEMENT OF THE HONORABLE WILLIAM D. DELAHUNT OF
MASSACHUSETTS

Mr. Chairman,

I want to thank you and Chairman Sensenbrenner for holding this hearing. And also for your courtesy in permitting me to rejoin my old subcommittee for purposes of today’s proceedings.

This hearing is about “advancing justice.” Surely if justice means anything it means making sure that we punish the guilty and protect the innocent. But if that is the goal, then our justice system has a long way to go.

Since the death penalty was reinstated in 1976, 864 people have been executed in the United States, including 44 this year alone. During the same period, 108 have been exonerated after spending years on death row for crimes they did not commit. Some came within days or hours of being put to death.

It’s cases like these that have caused conservative judges like Justice O’Connor to express concern that the system, and I quote, “may well be allowing some innocent defendants to be executed.” It’s cases like these that convinced former Governor George Ryan—a longtime supporter of the death penalty—to suspend executions in Illinois.

Most of these miscarriages of justice are preventable. And the two best ways to prevent them are by giving eligible inmates access to post-conviction DNA testing and making sure that every defendant has access to a competent lawyer at trial.

DNA has exonerated 12 of the people freed from death row, and another 120 who were wrongfully convicted of serious crimes. In at least 34 of these cases, the same test that exonerated an innocent person has led to the apprehension of the real perpetrator.

Yet access to testing is often opposed by prosecutors and must be litigated, sometimes for years. Evidence that might have established innocence has been misplaced

or destroyed. If we are to advance justice, we must ensure that biological material is preserved and DNA testing is made available in every appropriate case.

But DNA is not a “magic bullet” that will eliminate the problem of wrongful convictions. Biological evidence is available in fewer than 20 percent of violent crimes. And even where such evidence exists, post-conviction testing only tells us that the system failed—it doesn’t prevent such failures from taking place.

The best way to do that is to make sure that every indigent defendant who is facing the death penalty has access to a competent lawyer. I was a prosecutor for over 20 years. And I know that the adversarial process can find the truth only when both the prosecution and the defense are up to the job. Our system of justice depends on it.

We cannot tolerate a system that leaves capital defendants at the mercy of lawyers who are poorly trained and poorly compensated, who fail to conduct a proper investigation and examine the evidence, or worse—who drink or sleep their way through the trial.

We cannot tolerate a system that relies on reporters and journalism students to develop new evidence that was never presented in court.

We cannot tolerate a system in which chance plays such a profound role in determining whether a defendant lives or dies.

Last Congress, I joined with Congressman LaHood in introducing the Innocence Protection Act, which seeks to ensure access to post-conviction DNA testing in meritorious cases, and to assist states in providing a competent lawyer to every indigent defendant who is facing the death penalty.

Our bill is not about the death penalty. It is about advancing justice in the most immediate and profound sense. That is why 250 members of the House cosponsored the bill in the last Congress, and why it continues to gather bipartisan support from both supporters and opponents of the death penalty.

I want to thank you, Mr. Chairman, and Chairman Sensenbrenner, for working with me over the course of this past year to perfect that legislation. I am hopeful that we will soon be able to introduce innocence protection legislation that can pass the House and be enacted into law.

Finally, Mr. Chairman, I had understood that today’s hearing was to be an oversight hearing rather than a hearing on any particular bill. But I do note that the Justice Department has included in its testimony an analysis of several pieces of legislation, including H.R. 912, the Innocence Protection Act. As the principal House sponsor of that bill, I do want to note for the record some factual inaccuracies in the Justice Department testimony.

To give but one example, the statement notes that states that provide by statute for post-conviction testing include various requirements to ensure that testing is available only in appropriate cases. The statement then claims that such limitations are not included in the Innocence Protection Act. This is plainly untrue, as anyone who reads the Act would discover. In fact, its DNA testing provisions incorporate many of the most stringent requirements adopted by the states.

Notwithstanding such misstatements, I welcome the Department’s interest in the issue and the legislation, and I look forward to working with the Administration and with you, Mr. Chairman, to enact a bill that deals with the problem of wrongful convictions in a thoughtful and comprehensive way.

In closing, Mr. Chairman, I ask unanimous consent to include in the record statements by Senator Leahy and Senator Smith, who are the lead Senate sponsors of the Innocence Protection Act, and a letter from a number of leading conservative groups in support of legislation to prevent wrongful convictions.

July 21, 2003

Sarah V. Hart
Director
National Institute of Justice
U.S. Department of Justice
935 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Director Hart:

On behalf of the Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security I want to express our sincere appreciation for your participation in the July 17, 2003 oversight hearing on “Advancing Justice Through the Use of Forensic DNA Technology.” Your testimony was informative and will assist

us in future deliberations on the important issues addressed during the hearing. I am enclosing follow-up questions to which I would appreciate your responses.

Please have your responses to the post hearing questions to the Subcommittee by July 24, 2003. Please send them to the Subcommittee on Crime, Terrorism, and Homeland Security attention: Sharon Atkinson, 207 Cannon House Office Building, Washington, DC, 20515 . If you have any further questions or concerns, please contact Sharon Atkinson at (202) 225-3926.

Thank you again for your testimony.

Sincerely,

Howard Coble

Chairman

Subcommittee on Crime, Terrorism, and Homeland Security

Enclosure

HC/sa

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

U.S. HOUSE OF REPRESENTATIVES

OVERSIGHT HEARING

ON

“ADVANCING JUSTICE THROUGH FORENSIC DNA TECHNOLOGY”

JULY 17, 2003

POST-HEARING QUESTIONS SUBMITTED TO SARAH V. HART, DIRECTOR, NATIONAL
INSTITUTE OF JUSTICE

POST-HEARING QUESTIONS SUBMITTED BY CHAIRMAN HOWARD COBLE

1. With regard to the issue of imposing post-conviction DNA testing standards on the States, some legislative proposals would penalize States that fail to adopt such standards by denying them existing DNA funding if they fail to meet certain criteria. Other legislative proposals attempt to encourage States to adopt post-conviction DNA testing standards by authorizing new grant funds which the States can use to implement such standards. In your opinion, what is the better approach and why?
2. What is the Department of Justice's position on using the DNA funding proposed by the President not only for DNA, but for “other forensic sciences” as well, such as fingerprint identification, toxicology, and narcotics testing? Why?

