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ON BEHALF OF
THE INNOCENCE PROJECT**

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

SEPTEMBER 22, 2009

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

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

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

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

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

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

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

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

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

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

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

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

My testimony today will provide:

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

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

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

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

The Value of Statutory Access to Post-conviction DNA Testing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Retention of Biological Evidence:

The Cornerstone of Settling Claims of Innocence & Solving Cold Cases

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

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

dispositive biological evidence could not be found.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of Alaska, Nevada, Oregon & Washington)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

punishment

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

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

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

Conclusion

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

¹¹ JUSTICE FOR ALL ACT § 411(a)(7).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JANUARY 23, 2008

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

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

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

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

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

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

¹² 150 CONG. REC. S11609-01 (2004)

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

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

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

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

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

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

¹³ Id. at 14.

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

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

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

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

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

II. Executive Subversion of Congressional Intent Regarding Justice for All Act

Sections 412 and 413

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

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

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

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

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

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

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

The reasons leading to this conclusion are that:

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

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

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

These reasons are explained in greater detail below.

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

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

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

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

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

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

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

Congressional "Demonstrate" Requirement Extraordinarily Applied by OJP

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Innocence Claims Hinge on Preserved Evidence: Scott Fappiano

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommended Congressional Action

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

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

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

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

Regarding Innocence Protections Under the Paul Coverdell Forensic Science

Improvement Grant Program

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jimmy Ray Bromgard and Montana

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

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

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

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

Virginia and the Earl Washington Audit

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

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

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

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

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

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

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

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

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

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

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

B. OJP's Failure to Carry Out Congressional Intent

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

C. OJP Fails to Provide Applicants with Guidance

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

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

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

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

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

23 The NIJ incorporated the memo to applicants into the text of the 2006 Coverdell RFP and it remains in the 2007 RFP, available at <http://www.ncjrs.gov/pdffiles1/nij/sl000791.pdf#page=5>.

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

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

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

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

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

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

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

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

Case Example 1: Santa Clara County Internal Affairs Investigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. Other Problems with Coverdell Grant Administration

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

i. Too Few Coverdell Investigations

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

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

²⁵ In the January 2008 report by the Office of the Inspector General, “Review of the Office of Justice Programs’ Paul Coverdell Forensic Science Improvement Grants Program,” available at <http://www.usdoj.gov/oig/reports/OJP/e0801/final.pdf>, the OIG alluded to several other Coverdell investigations. The Innocence Project cannot independently verify whether these are the same investigations about which it has firsthand knowledge, or separate and additional Coverdell investigations.

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

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

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

ii. Certifications Signed Even without Functional Oversight Entities

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

iii. Certifications Signed with Uninformed Oversight Entities

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

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

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

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

iv. Subgrantees Avoid Scrutiny

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

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

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

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

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

v. Many Entities Only Consider Misconduct, Not Negligence

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

vi. No Follow-up on Apparently Insufficient Investigations

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

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

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

vii. The “Process” Requirement Has Been Completely Ignored

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

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

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

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

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

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

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

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

³³ See p. 12 of the the 2007 Coverdell RFP, available at <http://www.ncjrs.gov/pdffiles1/nij/sl000791.pdf>.

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

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

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

Conclusion

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

34 Available at <http://www.whitehouse.gov/omb/mgmt-gpra/gplaw2m.html#h2>.

35 Available at <http://www.ncjrs.gov/pdffiles1/nij/sl000791.pdf#page=5>, p. 16.

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

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

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

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

APRIL 10, 2008

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁶ 150 CONG. REC. S11609-01 (2004).

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

I. Background:

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

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

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

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

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

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

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

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

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

B. The Importance of Preserved Biological Evidence

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

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

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

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

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

Innocence Claims Hinge on Preserved Evidence: Scott Fappiano

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. The Mechanics of Executive Subversion of Congressional Intent Regarding Justice for All Act Sections 412 and 413

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

45 Despite what, based on Innocence Project research, seem to be significant and widespread State shortcomings in meeting this innocence protection prerequisite to State Coverdell funding, OJP has provided the funding to every state applicant with minimal regard for compliance with this requirement. See the two Department of Justice Office of Inspector General Reports criticizing OJP enforcement of this innocence protection requirement at <http://www.usdoj.gov/oig/reports/OJP/e0602/final.pdf> and <http://www.usdoj.gov/oig/reports/OJP/e0801/final.pdf>.

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

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

Recommendation

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation

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

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

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

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

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

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

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

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

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

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

Recommendation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX A
OJP-NIJ 2006 RFPs That Use “Demonstrate”

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2. Forensic Casework DNA Backlog Reduction Program	3
3. Social Science Research on the Role and Impact of Forensic Evidence on the Criminal Justice Process	3
4. Research and Evaluation on the Abuse, Neglect, and Exploitation of Elderly Individuals, Older Women, and Residents of Residential Care Facilities	4
5. Social Science Research on Terrorism	5
6. Process and Outcome Evaluation of G.R.E.A.T.	6
7. Evaluation of Technologies	7
8. Outcome Evaluations of Violence Prevention Programs	8
9. Public Safety Interventions	9
10. Research and Evaluation in Community Corrections: A Multijurisdictional Study of Reduced Caseload and Related Case Supervision Strategies in Managing Medium- and High-Risk Offenders	10
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12. Study of Administration of Justice in Indian Country	12
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1 Data Resources Program 2006: Funding for the Analysis of Existing Data

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

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

Impact of the proposed project

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

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

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

Budget

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

Dissemination strategy

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

2 Forensic Casework DNA Backlog Reduction Program

Required Documents

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

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

Successful **applicants must demonstrate** the following:

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

Successful **applicants must demonstrate** the following:

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5 Social Science Research on Terrorism

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6 Process and Outcome Evaluation of GREAT

Successful **applicants must demonstrate** the following:

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7 Evaluation of Technologies

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8 Outcome Evaluations of Violence Prevention Programs

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

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9 Public Safety Interventions

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

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

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Dissemination strategy

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

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

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

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Dissemination strategy

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11 Research on Sexual Violence and Violent Behavior in Corrections

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

- 1 Awareness of the state of current research or technology

- 2 Soundness of methodology and analytic and technical approach
- 3 Feasibility of proposed project and awareness of pitfalls
- 4 Innovation and creativity (when appropriate)

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12 Study of Administration of Justice in Indian Country

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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- 1 Awareness of the state of current research or technology
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13 Sexual Violence from Adolescence to Late Adulthood: Research, Evaluation, and the Criminal Justice Response

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

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

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

Impact of the proposed project

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

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Quality and technical merit

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

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

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Dissemination strategy

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

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

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

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

Impact of the proposed project

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

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

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

Budget

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

Dissemination strategy

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

17 Research and Development on Impression Evidence

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

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

Impact of the proposed project

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

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

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

Budget

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

Dissemination strategy

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

18 Sensor and Surveillance Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

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

Quality and technical merit

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

Impact of the proposed project

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

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

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

Budget

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

Dissemination strategy

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

19 Biometric Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

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

Quality and technical merit

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

Impact of the proposed project

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

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

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

Budget

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

Dissemination strategy

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

20 Forensic DNA Research and Development

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

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

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

Impact of the proposed project

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

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

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

Budget

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

Dissemination strategy

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

21 Electronic Crime Research and Development

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

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

Impact of the proposed project

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

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

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

Budget

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

Dissemination strategy

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

22 Corrections Technology

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

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

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

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

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

Budget

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

Dissemination strategy

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

23 School Safety Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

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

Impact of the proposed project

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

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

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

Budget

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

Dissemination strategy

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

24 Pursuit Management Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

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

Impact of the proposed project

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

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

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

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

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

Budget

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

Dissemination strategy

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

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

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

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

Impact of the proposed project

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

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

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

Budget

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

Dissemination strategy

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

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

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

Impact of the proposed project

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

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

Capabilities, demonstrated productivity, and experience of applicants

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

Budget

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

Dissemination strategy

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

27 Less Lethal Technologies

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

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

Impact of the proposed project

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

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

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

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

Budget

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

Dissemination strategy

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

28 Communications Technology

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

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

4 Innovation and creativity (when appropriate)

Impact of the proposed project

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

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

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

Budget

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

Dissemination strategy

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

29 Information-Led Policing Research, Technology Development, Testing, and Evaluation

Peer-review panelists will evaluate concept papers using the criteria listed below. Following this assessment, NIJ will then invite selected applicants to submit full proposals. Full proposals will also be peer reviewed. NIJ staff then make recommendations to the NIJ Director. The Director makes final award decisions.

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

Quality and technical merit

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

Impact of the proposed project

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

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

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

Budget

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

Dissemination strategy

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

30 Forensic Science Research and Development Targeting Forensic Engineering, Forensic Pathology, Forensic Odontology, Trace Evidence, Controlled Substances, and Questioned Documents

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

Successful **applicants must demonstrate** the following:

Understanding of the problem and its importance

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

Quality and technical merit

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

Impact of the proposed project

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

Capabilities, demonstrated productivity, and experience of applicants

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

Budget

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

Dissemination strategy

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

APPENDIX E- Case Studies Demonstrating the Reality of the False Confession Phenomenon

Anthony Gray was convicted in Prince George's County, Maryland, and was sentenced to two concurrent life sentences after pleading guilty to rape and murder charges in order to avoid the death penalty. Police officers had coaxed a confession out of Gray, who is borderline retarded, by telling him that two other men arrested in connection with the case had told police that Gray was involved. DNA results generated before Gray entered his plea excluded him and the two other men as the source of the sperm recovered from the victim.

Some years later, the conviction came under intense scrutiny when a man arrested in connection with a burglary reported unpublicized details about the rape and murder for which Mr. Gray had been convicted. While DNA testing of semen recovered from the crime scene had excluded Mr. Gray and the other two men originally arrested for the crime, it did produce a match to the burglary suspect, who eventually pled guilty to the crime for which Mr. Gray had been imprisoned for seven years.

David Vasquez was arrested for the murder of a woman in Arlington, Virginia, who had been sexually assaulted and then hung. Vasquez, who is mentally impaired, confessed to the crime and provided details that were not released to the public. Mr. Vasquez could not provide an alibi and was placed near the scene of the crime by two eyewitnesses. Additionally, investigators found two pubic hairs at the crime scene that resembled those of Vasquez.

Faced with what appeared to be a collection of evidence that pointed to his guilt, Mr. Vasquez entered a guilty plea. DNA testing later proved that the murder was committed by another man, Timothy Spencer. Prosecutors joined with defense attorneys to secure the eventual pardon of Mr. Vasquez.

Christopher Ochoa pled guilty to the rape and murder of an Austin, Texas woman. He confessed to the crime and implicated another man, Richard Danziger. The state offered to give him a life sentence if he agreed to plead guilty and testify against Danziger at trial. Under threat of receiving the death penalty and by the advice of his attorney, Ochoa agreed to their terms.

At trial, however, Mr. Ochoa changed his story and claimed that he, and not Mr. Danziger, had shot the victim. Consequently, prosecutors charged Mr. Danziger with rape instead of the murder. Mr. Danziger could not provide a reason as to why Mr. Ochoa, his friend, might have testified against him.

Both men received life sentences and years later, the police, then-Governor Bush's office, and the District Attorney's Office received letters from a man named Achim Marino, claiming that he was solely responsible for the crime for which Ochoa and Danziger had been convicted. His letter told investigators precisely where to locate items that were stolen from the scene of the crime, which police were able to obtain.

Thirteen years after the commission of the crime, Ochoa and Danziger were exonerated and released from prison. Ochoa, who recently graduated law school and wishes to become a prosecutor, now states that his confession and implication of Danziger were the results of police pressure and fear of the death penalty.

Jerry Frank Townsend, a mentally retarded man in Florida, was convicted of six murders and one rape and sentenced to seven concurrent life sentences. This began when, in 1979, Townsend was arrested for raping a pregnant woman in Miami, Florida. During the investigation, he confessed to other murders. The confessions were largely the consequence of Townsend wanting to please authority figures, a common adaptive practice by someone with his limited mental capacities.

Eventually, Townsend was cleared by DNA evidence following actions in 1998, when a victim's mother asked a Ft. Lauderdale police detective to review the Townsend cases. In 2000, DNA testing of preserved evidence implicated another man, Eddie Lee Mosley, and also cleared Townsend for two of the six murders. This cast substantial doubt on the accuracy of all of Townsend's confessions. In April 2001, further DNA testing cleared Townsend of two additional killings to which he had previously confessed, and ultimately, two months later, he was cleared of all charges and released from prison – after having served twenty-two years for crimes he did not commit.