# United States House Subcommittee on Crime, Terrorism, and Homeland Security

# Reauthorization and Improvement of DNA Initiatives of the Justice For All Act of 2004

## April 10, 2008


## Peter M. Marone
## Chairman
## Consortium of Forensic Science Organizations


Mr. Chairman and Members of the Committee:

Thank you for inviting me to speak. I am Peter Marone, Director of the Virginia Department of Forensic Science, but today I am also speaking as the Chairman of the Consortium of Forensic Science Organizations. The CFSO is the national organization which represents the American Academy of Forensic Sciences, American Association of Crime Laboratory Directors, National Association of Medical Examiners, Forensic Quality Services, International Association for Identification, and the American Association of Crime Laboratory Directors Laboratory Accreditation Board. For reference, I also am a member of the National Academies of Science Committee on Identifying the Needs of the Forensic Sciences Community.

The field of forensic science has received a tremendous amount of visibility and attention in the recent years, particularly in the television media. As a result of this attention, or as many refer to it as the "CSI" effect, the perceived capabilities of our laboratories have

grown and along with them, our caseloads have increased dramatically. We find that both law enforcement agencies as well as attorneys - both prosecution and defense, seem to be affected by this “CSI effect” and tend to request much more testing and analysis of crime scene evidence than has been required before. As a result, we have seen our case backlogs grow at a most alarming rate. For example, enhanced penalties for possession of a firearm with a drug arrest and the increased use of the National Integrated Ballistic Information Network (**NIBIN**) have increased the number of firearms cases almost exponentially. In addition, increased emphasis on anti child-exploitation has increased the need for digital evidence (computer forensics) capabilities far beyond existing resources.

Concurrently, the laws regarding DNA data banks are also expanding rapidly on a nationwide basis. This fact has, as well, caused an increased caseload for the data banks and the casework laboratories.

Unfortunately, this increase in backlog and caseload has not been accompanied by a commensurate increase in funding for our labs. It is difficult to obtain funding to cover both the large numbers of new cases that are being presented to our labs daily and the backlog of cases from the past that require a timely review. While the crime labs clearly understand and concur that post-conviction and cold cases from the past need to be reviewed promptly, to address both these and current cases is time consuming, costly, and logistically problematic.

We have also found that, as science progresses and crime labs expand their services to include Y STR, mitochondrial typing, and “mini STR” methods, “older” methods used by these labs are sometimes called into question. This, along with some deserved criticism, cause scrutiny regarding the capability of the labs as well as the integrity of the crime lab system. News coverage, including specialized programs or segments featuring expert witnesses have given a louder voice in the public arena which also leads to increased visibility. Scrutiny is welcomed when it assists a lab in improving services and the methodologies that are being employed. There is always a way to improve and any chance to do so is welcomed. However, one must be careful that change is not done merely for the sake of change and does not become unnecessarily cumbersome and time consuming, without a specific, valid purpose and useful result.

Mr. Chairman, the forensics community supports the re-authorization of the Debbie Smith Act and encourages the Committee to continue the funding for DNA backlogs, casework, and research/development. It would be impossible for us to keep up with this issue if not for that funding. While the Commonwealth of Virginia is fortunate in that our administrations and legislature have been willing to provide us support, other States are not so lucky.

Another issue I wish to address is the requirements established in order for a laboratory to receive federal funds to conduct post-conviction testing, specifically the Bloodsworth Amendment in the Justice for All Act.

Please bear in mind that the time permitted to respond to solicitations from the Department of Justice has been just four weeks. Unfortunately, the solicitation requirements were not available to any of the laboratories prior to the solicitation announcement; therefore four weeks meant four weeks. Further, compliance with these requirements many times has required implementation of new legislation or at least an amendment of existing statutes at the State level. The State of Virginia was able to comply with this because it had statutes in place already, which I have submitted for the record. We are confident that this provision meets the solicitation. If we had this funding in the timeline we had anticipated, it would have been a significant help in completing the project.

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

Post-conviction cases can be problematic due to the detrimental effect they have on current casework. The post-conviction cases are primarily outsourced to private laboratories in an effort to minimize the impact on current casework. Outsourcing is extremely costly to DFS and the Bloodsworth grant program would help to alleviate the costs and allow for all casework / post-conviction testing to be completed in a timely manner. Ironically, Mr. Chairman, my State has been criticized by some in the State for not processing these cases more expeditiously.

The following is an excerpt from the fact sheet - The Presidents Initiative to Advance Justice Through DNA Technology - 2004 information. Issue #1:

"One of the issues facing the criminal justice system today is the backlog of unanalyzed DNA samples and biological evidence from crime scenes, especially in sexual assault and murder cases. Casework Sample Backlogs consist of DNA samples obtained from crime scenes, victims, and suspects in criminal cases. The National Institute of Justice (NIJ) estimates that the current backlog of rape and homicide cases - alone - is approximately 350,000.

Convicted Offender Backlogs consist of DNA samples obtained from convicted offenders who are incarcerated or under supervision. Currently, 23 states require all convicted felons to provide DNA samples. Preliminary estimates by NIJ place the number of collected, untested convicted offender samples at between 200,000 and 300,000. NIJ also estimates that there are between 500,000 and 1,000,000 convicted offender samples, which are required under law but not yet collected."

A study was conducted by WSU Department of Political Science /Criminal Justice. It was based on survey data taken from a scientific sampling of law enforcement agencies in all 50 states, as well as information reported directly by the 50 state and 70 local forensic laboratories across the country.

The findings reveal a growing backlog of unsolved felony cases nationally – including roughly 400,000 unsolved rapes and homicides going back two decades. More than half

those cases, researchers found, provide some amount of as-yet-untested biological evidence that could potentially reveal important DNA information.

Data from a CODIS Presentation by Doug Hares from the FBI (Oct 2007) noted, "Based upon the recent information in CODIS the statement that the NIJ funding is not doing anything is not totally true. When the NIJ funds originally became available in the early 2000-01 timeframe, CODIS has approximately 460,000 offenders in the Data Bank and 22,000 Forensic cases in the CODIS. As of Oct 2007 CODIS now contains 5 million offenders, 78,000 arrestees and 200,000 Forensic Cases profiles."

Numerous success stories from Virginia have come out of the DNA funding provided under other DNA Initiatives of the Justice For All Act of 2004. The establishment of many of the training positions and the funds for the training programs were the result of federal grants. The positions have since been converted to full time, state funded positions. Much of the justification for the establishment of state positions was based on the existence of grant funded positions already in place and productive. Please note the significant backlog reduction in DNA cases from 2004 to 2008. Currently there are 8 DNA examiners being trained. Because of the time involved in working each DNA case, which tends to be more complex than some of the other disciplines, the response to adding more staff is slower. Table 1 demonstrates the trend of case backlogs in the DNA Section, which should continue downward.

| Year | Cases Received | Cases Completed | Ending Backlog |
|---|---|---|---|
| 2007 | 4035 | 4593 | 1125 |
| 2006 | 3690 | 3561 | 1627 |
| 2005 | 3695 | 4315 | 1413 |
| 2004 | 4168 | 4447 | 1974 |
| 2003 | 4042 | 3697 | 2074 |

**Table 2**

In addition to the reduction in backlog, there is a significant decrease in the overall turn around time for DNA cases. **And yet, DNA analysis constitutes only about 10% of the casework of forensic laboratories.**

Another issue I wish to address is Oversight Boards for forensic laboratories. Many laboratories, if asked, will state that their oversight is provided by the accrediting body under which they operate. Some people would say that this is the fox guarding the hen house and there is something inherently wrong with this process. However every other oversight board, whether it be commercial, medical, legislative or the legal, has oversight bodies which are comprised of the practitioners in that profession. It makes sense that the most knowledgeable individuals about a particular topic would come from that discipline. But that does not seem to meet the current needs. The key to appropriate and proper oversight is to have individuals representing the stakeholders, but that these individuals must be there for the right reason, **to provide the best possible scientific analysis**. There cannot be any room for preconceived positions and agenda

driven positions. Unfortunately, we have seen this occur in some States. As a result, many States have taken it upon themselves to create their own commissions. Unfortunately, this means that no two States are following the same criteria.

Mr. Chairman, labs are staffed by truly dedicated individuals who are committed to finding the truth, whether exonerating wrongfully accused or uncovering the guilty. However, they are woefully under funded with an ever increasing caseload. We are looking forward to the recommendations from the National Academies of Science study and are confident that Congress will review those recommendations and act accordingly.

Thank you again for your consideration and for the opportunity to address the Committee. I will be pleased to answer any of your questions.

**Below is the specific language from Innocence Protection Act of 2004 and applicable Virginia CODE Sections, regulations or practice (*In Italics*).**

SEC. 413. INCENTIVE GRANTS TO STATES TO ENSURE CONSIDERATION OF CLAIMS OF ACTUAL INNOCENCE.
For each of fiscal years 2005 through 2009, all funds appropriated to carry out sections 303, 305, 308, and 412 shall be reserved for grants to eligible entities that--

(1) meet the requirements under section 303, 305, 308, or 412, as appropriate; and

(2) demonstrate that the State in which the eligible entity operates--

(A) provides post-conviction DNA testing of specified evidence--

(i) under a State statute enacted before the date of enactment of this Act (or extended or renewed after such date), to persons convicted after trial and under a sentence of imprisonment or death for a State felony offense, in a manner that ensures a reasonable process for resolving claims of actual innocence; or

*19.2-327.1 under the Code of Virginia allows for Scientific Analysis of Newly Discovered or Untested Evidence*

*requirements are that the petitioner (defendant) must show:*
*1 – They were convicted of a crime*
*2 – There is evidence subject to a chain of custody, which has preserved the integrity of the evidence*
*3 – This evidence has not been previously subject to this type of testing*
*4 – This evidence is relevant and necessary prove the actual innocence of the defendant*
*5 –There was no unreasonable delay after the defendant either discovered the evidence or the testing became available at the Department of Forensic Science.*

(ii) under a State statute enacted after the date of enactment of this Act, or under a State rule, regulation, or practice, to persons under a sentence of imprisonment or death for a State felony offense, in a manner comparable to section 3600(a) of title 18, United States Code (provided that the State statute, rule, regulation, or practice may make post-conviction DNA testing available in cases in which such testing is not required by such section), and if the results of such testing exclude

the applicant, permits the applicant to apply for post-conviction relief, notwithstanding any provision of law that would otherwise bar such application as untimely; and

*§ 19.2-270.4:1. Storage, preservation and retention of human biological evidence in felony cases.*

*This Virginia statute upon a sentence of death requires that the court order all human biological evidence or representative samples be stored at the Virginia Department of Forensic Science until execution of the sentence or until the sentence is reduced.*

*This statute further allows upon conviction of a felony that either party request that the court order preservation of the human biological evidence or representative samples for a period of fifteen years.*

*This statute would allow a defendant to petition the court at a later date for if a new method of testing become available and they meet the requirements of §19.2-327.1 (prove innocence, new type of testing, timely, etc.)*

(B) preserves biological evidence secured in relation to the investigation or prosecution of a State offense--

under a State statute or a State or local rule, regulation, or practice, enacted or adopted before the date of enactment of this Act (or extended or renewed after such date), in a manner that ensures that reasonable measures are taken by all jurisdictions within the State to preserve such evidence; or

*The Virginia Department of Forensic Science continually trains law enforcement regarding evidence handling and preservation. In addition the Department of Forensic Science has issues standards and guidelines for the preservation of human biological evidence.*
*This has been a practice of the Department of Forensic Science prior to the Justice for All Act and acts to ensure that reasonable measures are taken by all jurisdictions in Virginia to preserve evidence.*

(ii) under a State statute or a State or local rule, regulation, or practice, enacted or adopted after the date of enactment of this Act, in a manner comparable to section 3600A of title 18, United States Code, if--

(I) all jurisdictions within the State comply with this requirement; and

(II) such jurisdictions may preserve such evidence for longer than the period of time that such evidence would be required to be preserved under such section 3600A.

**Sec. 3600A. Preservation of biological evidence** (a) IN GENERAL- Notwithstanding any other provision of law, the Government shall preserve biological evidence that was secured in the investigation or prosecution of a Federal offense, if a defendant is under a sentence of imprisonment for such offense.

(b) DEFINED TERM- For purposes of this section, the term 'biological evidence' means--

(1) a sexual assault forensic examination kit; or

(2) semen, blood, saliva, hair, skin tissue, or other identified biological material.

(c) APPLICABILITY- Subsection (a) shall not apply if--

(1) a court has denied a request or motion for DNA testing of the biological evidence by the defendant under section 3600, and no appeal is pending;

(2) the defendant knowingly and voluntarily waived the right to request DNA testing of the biological evidence in a court proceeding conducted after the date of enactment of the Innocence Protection Act of 2004;

(3) after a conviction becomes final and the defendant has exhausted all opportunities for direct review of the conviction, the defendant is notified that the biological evidence may be destroyed and the defendant does not file a motion under section 3600 within 180 days of receipt of the notice;

(4)(A) the evidence must be returned to its rightful owner, or is of such a size, bulk, or physical character as to render retention impracticable; and

(B) the Government takes reasonable measures to remove and preserve portions of the material evidence sufficient to permit future DNA testing; or

(5) the biological evidence has already been subjected to DNA testing under section 3600 and the results included the defendant as the source of such evidence.

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