Department of Justice

STATEMENT

OF

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BEFORE THE

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

REGARDING

THE PRESIDENT'S DNA INITIATIVE:
ADVANCING JUSTICE THROUGH DNA TECHNOLOGY

ON

JULY 17, 2003

Mr. Chairman and Members of the Subcommittee:

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

The promise and importance of the DNA technology are so great that the President has endorsed a major initiative, totaling more than $1 billion over five years, to fully realize its potential in the criminal justice process. My testimony today will focus on the proposals in the President's initiative. I will also discuss needed DNA-related reforms in Federal law which we have already recommended to Congress in previous testimony and statements. In addition, as requested by the Subcommittee staff, I will comment on the proposed Debbie Smith Act (H.R. 1046) and the Innocence Protection Act bills, including capital counsel and habeas corpus issues that have been linked to DNA reforms in some legislative proposals.

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

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

(i) **DNA BACKLOG ELIMINATION** – $92.9 million to assist in clearing backlogs of unanalyzed crime scene DNA samples (such as rape kits) and offender DNA samples. Nationwide, there is an unacceptably high number of unanalyzed crime scene DNA samples in sexual assault, homicide, and kidnapping cases. If analysis of these backlogged samples results in DNA "hits" in even a fraction of these cases, the result will be the solution of thousands or tens of thousands of the most serious violent crimes. The President's initiative proposes the critical funding needed to clear these backlogs.

(ii) **STRENGTHENING CRIME LABORATORY CAPACITY** – $90.4 million to increase forensic laboratory capacity at the State and local levels for DNA analysis, for Federal DNA laboratory programs, and to operate and improve the Combined DNA Index System. The existence of DNA sample backlogs has resulted from the failure of public laboratory capacity

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

for DNA analysis to keep pace with the growth of the DNA identification system. The proposed funding aims to upgrade State and local forensic laboratory capacity so that these laboratories will be able to keep abreast of incoming DNA work in the future – thereby avoiding the development of new DNA backlogs – and will no longer require Federal assistance for this purpose.

(iii) **RESEARCH AND DEVELOPMENT** – $24.8 million for DNA-related research and development. This commitment of funding will result in smaller, faster, and less expensive tools for DNA analysis which will reduce capital investments for crime laboratories while increasing their capacity to process cases.

(iv) **TRAINING** – $17.5 million for training in the collection, handling, and use of DNA evidence, including training for both law enforcement and medical personnel. Adequate training can greatly increase the number of cases in which usable DNA evidence is obtained, as well as ensuring appropriate sensitivity to and treatment of crime victims in obtaining biological material.

(v) **POSTCONVICTION DNA TESTING** – $5 million to defray costs of post-conviction DNA testing in the State systems. The historically recent emergence of the DNA technology means that new evidence may be generated from retained biological material in cases that predate the availability of DNA testing. Most States have accordingly adopted provisions authorizing postconviction DNA testing in recent years. The funding proposed in the President's initiative will encourage and support these State efforts.

(vi) **MISSING PERSONS IDENTIFICATION** – $2 million to promote the use of the DNA technology to identify missing persons. This funding is needed to realize the full potential of the Missing Persons DNA Database Program, which can provide closure to the families of missing persons by identifying human remains.

In addition to the critical need for adequate funding, which the President's initiative proposes, the efficacy of the DNA system depends on having adequate laws governing the system's operation and related procedural matters. To this end, we have proposed the following Federal law reforms:[2]

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

(i) **ALL-FELONS SAMPLE COLLECTION** – The existing categories of convicted Federal offenders from whom the collection of DNA samples is authorized are too narrow, and should be expanded to include all convicted felons. Twenty-nine States have already adopted this reform.

(ii) **COMPREHENSIVENESS OF THE NATIONAL DNA INDEX** – The statute governing the national DNA index should be amended to allow submitting jurisdictions to include the DNA profiles of all persons from whom they lawfully collect DNA samples. Currently, the national index statute only allows the inclusion of DNA profiles from convicted offenders, though many States collect DNA samples from some categories of non-convicts (such as adjudicated delinquents) and include the resulting profiles in their own DNA databases.

(iii) **STATUTE OF LIMITATIONS REFORM** – Existing time rules can confer effective immunity from prosecution on persons whose identity as the perpetrators of rapes and other serious crimes is conclusively established through DNA matching. Congress should permit the statute of limitations to be tolled where DNA evidence identifies the perpetrator.

(iv) **POSTCONVICTION DNA TESTING** – While most States have made provision for postconviction DNA testing in appropriate cases, the Federal government has yet to do so. We look forward to working with Congress to establish postconviction DNA testing standards and procedures for Federal convicts who could not have obtained such testing at the time of their trials.

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

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

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

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

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

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

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

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

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

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

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

Our detailed testimony is as follows:

I. THE PRESIDENT'S DNA INITIATIVE

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

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

Comparing the DNA profile derived from biological material left by the perpetrator at a crime scene – e.g., semen in a sexual assault examination kit – to that of a known suspect may confirm or refute the suspect's identity as the perpetrator. In cases where there are no known suspects, matching of crime scene DNA to DNA profiles of convicted offenders which are maintained in State and national databases can promptly solve crimes that would otherwise be unsolvable. Even where an individual is not specifically identified, common DNA profiles at multiple crime scenes may show a common perpetrator, thereby allowing the pooling of critical investigative information.

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

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

- In December 1998, a 21-year-old pediatric nursing student was kidnapped, sexually assaulted, and murdered in Broward County, Florida. Three months later a DNA sample from Lucious Boyd was matched to semen found on the victim's body. Boyd was convicted of sexually assaulting and murdering the nursing student and sentenced to death in June 2002.

- In 1983, a boy was raped and murdered in Virginia while walking on a path. Investigators resubmitted the case in 1999 for DNA analysis. In August 1999, they matched the profile to Willie Butler, who was in the database due to a previous conviction for burglary. Butler was convicted of this crime.

- In 1977, a six-year-old girl disappeared while vacationing with her family in Reno, Nevada. Her remains were found two months later. DNA testing was not available in 1977, and the case remained unsolved for twenty-three years. In 2000, renewed investigative efforts resulted in a DNA test of the victim's clothing and entry of the resulting DNA profile into the Nevada State DNA database. A database search revealed a match to a man who had been on parole since 1976 for a previous sexual assault of a minor. The man pled guilty to the murder in October 2000.

Given the extraordinary potential of the DNA technology, both Congress and the Department of Justice have endeavored for a number of years to further the system's development. For example, in 2000, Congress enacted the DNA Analysis Backlog Elimination Act, which authorized funding assistance to the States to clear DNA backlogs, and provided the initial authorization for the collection of DNA samples from convicted Federal offenders. The Department's activities have included extensive DNA programs of the National Institute of Justice and the FBI. For example, by the end of last year, the National Institute of Justice had disbursed funds supporting the analysis of more than 470,000 DNA samples collected from convicted offenders by the States, and had awarded Federal

funds to support the analysis of more than 24,000 crime scene DNA samples in State cases involving no known suspects.

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

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

A. <u>DNA BACKLOG ELIMINATION</u> (FY 04 amount: $92.9 million)

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

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

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

In addition to the States' backlog of convicted offender samples, the Federal Bureau of Prisons, the Federal probation offices, and the Court Services and Offender Supervision Agency for

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

the District of Columbia began to collect DNA samples from Federal and District of Columbia offenders following the authorization of such sample collection by the DNA Analysis Backlog Elimination Act of 2000. The FBI's Federal Convicted Offender Program (FCOP) is responsible for processing and analyzing these samples. At the time of the announcement of the President's initiative, approximately 18,000 DNA samples from Federal and D.C. offenders had been collected and submitted to the FBI. The President's initiative calls for $1.9 million in FY 2004 to fund FCOP, which includes funding for analysis of the collected samples.

B. <u>STRENGTHENING CRIME LABORATORY CAPACITY</u> (FY 04 amount: $90.4 million)

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

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

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

In addition, the FBI administers the Combined DNA Index System (CODIS) which effectively integrates the DNA information obtained under the various State and Federal DNA systems, and makes it available on a nationwide basis for law enforcement identification purposes. The initiative budgets $9.9 million for the operation and improvement of CODIS in FY 2004. This includes completing a general redesign and upgrade of CODIS, which will increase the system's capacity to 50 million DNA profiles, reduce the search time from hours to microseconds for matching DNA profiles, and enable instant, real-time (as opposed to weekly) searches of the database by participating forensic laboratories.

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

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

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

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

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

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

training and education for police officers and investigators, prosecutors, defense attorneys, judges, offender supervision and corrections personnel, forensic scientists, medical personnel, and victim service providers.

E. <u>POSTCONVICTION DNA TESTING</u> (FY 04 amount: $5 million)

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

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

- A Maryland man served 20 years of a 30-year sentence after being convicted of a 1982 home invasion rape of a schoolteacher. Through postconviction DNA testing, the man was exonerated in 2002. When the crime scene profile was uploaded to CODIS, it was preliminarily linked to a felon whose DNA profile was maintained in the DNA database. This man has subsequently been arrested and charged for the 1982 crime. The original defendant was pardoned in January 2003.

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

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

been misused to inflict further harm on the crime victim. The recent experience of a local jurisdiction is instructive:

> Twice last month, DNA tests at the police crime lab in St. Louis confirmed the guilt of convicted rapists. Two other tests, last year and in 2001, also showed the right men were behind bars for brutal rapes committed a decade or more earlier.
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> [The St. Louis circuit attorney's] staff spent scores of hours and thousands of dollars on those tests. She personally counseled shaking, sobbing victims who were distraught to learn that their traumas were being aired again.
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> One victim, she said, became suicidal and then vanished; her family has not heard from her for months. Another, a deaf elderly woman, grew so despondent that her son has not been able to tell her the results of the DNA tests. Every time he raises the issue, she squeezes her eyes shut so that she will not be able to read his lips.
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> "She finally seemed to have some peace about the rape, and now she's gone back to being angry," the woman's son said.
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> DNA tests confirmed that she was raped by Kenneth Charron in 1985, when she was 59. To get that confirmation, however, investigators had to collect a swab of saliva from her so that they could analyze her DNA. They also had to inquire about her sexual past, so they could be sure the semen found in her home was not that of a consensual partner.
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> The questioning sent the woman into such depression that she's now on medication. "None of this needed to happen," her son said . . . .
>
> The Innocence Project screens inmate petitions, selecting only the cases that seem to offer the best shot at exoneration. Still, [an Innocence Project attorney] said, 60% of the inmates represented . . . prove to be guilty when the results come in.[5]

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

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

[6] *See* note 3 *supra*.

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

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

A number of elements of the President's DNA initiative discussed above will contribute to the solution of this problem. These include the general strengthening of crime laboratory capacity which will facilitate timely analysis of biological samples from unidentified human remains; assistance in the analysis of degraded and old biological samples through the FBI's Mitochondrial DNA Analysis Program; and research and development of more robust methods for analyzing degraded, old, or compromised biological samples.

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

II. FEDERAL LAW REFORMS

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

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

A. ALL-FELONS SAMPLE COLLECTION

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

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

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

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

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

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

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

[9] Legislation to effect such an extension should preserve the current unrestricted coverage of crimes of violence, and of sexual abuse offenses under chapter 109A of the criminal code, regardless of

B. COMPREHENSIVENESS OF THE NATIONAL DNA INDEX

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

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

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

C. STATUTE OF LIMITATIONS REFORM

A statute of limitations usually reflects a legislative judgment that the burden of prosecuting an old crime may outweigh its benefits. It balances the need to prosecute serious crimes with concerns that a delayed prosecution may be unreliable given the passage of time and faded memories. A statute of limitations may also encourage law enforcement officials to investigate promptly suspected criminal

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penalty grading. Suitable legislative language for this purpose appears in § 3(b)-(c) of S. 149, 108th Cong., 1st Sess. (2003).

activity. For serious crimes, such as murder, where the public interest in holding an offender accountable is particularly compelling, there is usually no statute of limitations.

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

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

Nor is the problem confined to the area of sexually violent offenses. For example, consider a case in which a person commits a murder in violation of the interstate domestic violence or interstate stalking provisions of Federal law, 18 U.S.C. 2261 and 2261A. Since these provisions include no death penalty authorizations, the no-limitation rule for capital cases under 18 U.S.C. 3281 is inapplicable, and

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[10]*See, e.g.* , http://www.townhall.com/columnists/stevechapman/sc000312.shtml (regarding California case involving rape of Jeri Elster in 1992 and solution of the case through DNA testing in 1999, following expiration of six-year statute of limitations); New York Times, Aug. 29, 2001, at A12, "In Rape Case Gone Awry, New Suspect – DNA Freed a Man, Now Implicates a 2nd" (regarding Oklahoma case in which DNA testing exonerated individual imprisoned for 15 years for a rape he did not commit, and implicated a second person following the expiration of the statute of limitations); Tulsa World, Dec. 22, 2002, at A4, "Statutes of limitations get look" (regarding prosecution of Edward Alberti for 1987 sexual assault, based on DNA evidence that had exonerated another man imprisoned for 14 years for the crime).

they must normally be prosecuted within five years under the general limitation rule of 18 U.S.C. 3282. Thus, if the offender is not identified and indicted within five years, prosecution under these provisions is thereafter likely to be impossible, even if DNA matching establishes the identity of the perpetrator following the expiration of the limitation period.

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

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

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[11] We have also proposed a reform to allow prosecution without limitation of time of felonies under the principal sex offense chapters of the Federal criminal code, and of kidnapping of children in violation of Federal law. *See, e.g.,* Letter of Assistant Attorney General Daniel J. Bryant to Honorable Joseph R. Biden, Jr., *supra* note 2, at 2, 8-10 (Nov. 25, 2002). Considerations supporting this reform include the frequent availability of DNA evidence in sex offense cases, which may lead to conclusive identification of the perpetrator even after the passage of many years; the seriousness of these crimes; the likelihood that sex offenders will reoffend if not restrained by prosecution and conviction; and the delay in the reporting of these crimes which may occur because of the dependence, intimidation, or traumatization of the victim. The House of Representatives has already passed this reform. *See* H.R. 5422, § 202, 107th Cong., 2d Sess. (2002). The statute of limitations reform that Congress recently

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

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

D. POSTCONVICTION DNA TESTING

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

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

The general objective of the proposed Debbie Smith Act is to improve the investigation and prosecution of sexual assault cases with DNA evidence. The bill includes proposals which aim to authorize funding for the DNA analysis backlog elimination programs; to ensure adequate training of medical personnel, law enforcement personnel, and prosecutors in obtaining, handling, and using DNA

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enacted in the PROTECT Act (P.L. 108-21, § 202, amending 18 U.S.C. 3283), while beneficial, does not obviate the need for the proposed general reform for sex offense cases because: (i) the PROTECT Act reform only applies in cases involving child victims, and hence does not help in adult victim rape cases or any other cases involving adult victims, and (ii) it only suspends the statute of limitations during the life of the child victim, and hence does not help in cases in which the child is killed or dies.

evidence; to ensure that statutes of limitations do not bar the prosecution of sex offenders identified through DNA testing; and to strengthen the administration of the DNA identification system at the national level.

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

H.R. 1046 is the same as S. 2513, which the Senate passed last year. We have previously provided detailed comments on the bill's provisions in our views letter on S. 2513.[12] In brief, our specific comments are as follows:

Section 2 (unanalyzed rape kits assessment)

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

Sections 3-6 (backlog elimination grants amendments)

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

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

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

We support the proposal in section 5 to extend the class of eligible grantees to include local governments, as opposed to channeling all backlog reduction funding through the State governments. The current system, in which local governments can participate only through their States, has prevented several local jurisdictions from receiving essential funds. In a number of cases, these jurisdictions have backlogs larger than those of many States. However, including Indian tribes as grantees – as section 5 proposes – would serve no purpose, because the Federal government prosecutes rapes and other major crimes committed in Indian country, and is responsible for the analysis of DNA samples (both casework samples and convicted offender samples) in Indian country cases. Since the tribal governments do not analyze DNA samples, they would not be appropriate grantees under a program to assist State and local governments in clearing their backlogs of unanalyzed DNA samples and in increasing their public laboratory capacity for DNA analysis.

We recommend against adding the priority language in section 6 to the grant program, for reasons explained in our statement of views on the corresponding provision in S. 2513.[13]

Section 7 (quality assurance for DNA evidence)

We recommend against including this section's requirement that the Attorney General develop a recommended national protocol for DNA evidence collection. Such a requirement would likely have unintended negative effects, and its objectives can be better accomplished by other means. See our statement of views on S. 2513.[14]

Sections 8-9 (training programs)

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

Section 10 (John Doe indictments)

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

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[13] *See id*. at 6.

[14] *See id*. at 6-7.

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

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

Sections 11-12 (FBI funding)

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

Section 13 (privacy requirements)

This section directs the Attorney General to issue regulations limiting access to or use of stored DNA samples or DNA analyses. However, the DNA identification system is already subject to strict statutory privacy rules – which generally preclude the use of DNA samples and analyses for purposes other than law enforcement identification – and is already subject to quality control standards required by statute. *See* 42 USC §§ 14131, 14132(b), 14133(a)-(b). Violation of these rules and standards would result in ineligibility to participate in CODIS, ineligibility for Federal DNA backlog reduction funding, and other sanctions. See 42 USC §§ 14132(c), 14133(c), 14135(b)(2), 14135e.

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

[15] *See id*. at 7-8, 10-12.

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

A. POSTCONVICTION DNA TESTING

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

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

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

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

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

The appropriate approach to this issue is that proposed in the President's DNA initiative. The States have demonstrated leadership in enacting post-conviction DNA testing provisions. The President's initiative seeks to ensure that testing is not denied for financial reasons, and to encourage and assist the States in providing appropriate postconviction DNA testing in their systems. We believe that the $5 million budgeted annually for this purpose will be adequate. The States should not be subject to new Federal mandates concerning the specific standards and procedures for such testing, and certainly should not be denied Federal DNA funding assistance because they make their own reasonable judgments on these issues.

B. CAPITAL COUNSEL PROVISIONS

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

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

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

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

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

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

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

Third, the bulk of any funding provided under such a program should be committed to capital case representation *at trial*, as opposed to representation in postconviction proceedings. The trial is the critical event in which society's resources are marshaled to the maximum extent possible to provide a full

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

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

presentation of evidence and arguments in order to achieve an accurate verdict and a just sentence. To the extent that the trial performs its functions adequately, there is a reduced need for postconviction proceedings. Thus, funding incentives should seek to preserve and enhance the central role of the trial.[19]

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

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

C. HABEAS CORPUS PROPOSALS

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

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

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

these requirements in some jurisdictions would undermine the important public interest in identifying and correcting legal errors as soon as they occur.

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

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

In Federal habeas corpus proceedings, as in earlier stages of litigation, rules of this sort exist, which were considerably strengthened by the habeas corpus reforms adopted as part of the Antiterrorism and Effective Death Penalty Act in 1996. However, significant gaps remain which can result in highly protracted litigation, and some of the reforms that Congress did adopt in 1996 have been substantially undermined in judicial application.

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

While 28 USC 2244(d) appears clear on its face about the amount of time allowed for filing, and the exceptions thereto, some courts have had other ideas about how the system should operate. One avenue of circumvention has been reliance on the doctrine of "equitable tolling" – i.e., failing to comply with the time limitation rule of 28 USC 2244(d), and instead allowing Federal habeas petitions to be filed beyond the time limit prescribed in the statute on judicially created grounds that the statute does not authorize. Another stratagem may come into play where a petitioner presents a "mixed" petition, which includes some claims for which he has properly exhausted State remedies, but also other claims which he

has not pursued in the State courts prior to the expiration of the time limit for Federal habeas filing under 28 USC 2244(d). In such a case, the Federal habeas court may hold the petition in abeyance, send the petitioner back to State court to exhaust State remedies on the unexhausted claims, and then allow the petitioner to rejoin these claims to the original petition later on. This can result in the litigation of habeas petitions years beyond the expiration of the time limit for Federal habeas filing prescribed in the statute, including claims that the petitioner failed to present in any cognizable form within that time limit.[20]

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

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

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

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

appropriate, which allows adequate time for the ordinary conduct of such proceedings, while guarding against inexcusable tardiness in completing the litigation.[21] This proposal would help promote confidence in Federal judicial proceedings.

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

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

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