

# CRS Report for Congress

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## **DNA Evidence: Legislative Initiatives in the 106<sup>th</sup> Congress**

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## Summary

DNA evidence is a powerful forensic tool in criminal cases. Its use and capabilities have increased substantially since it was first introduced in the late 1980s. That growth has led to the emergence of the following issues that were considered by the 106<sup>th</sup> Congress in legislative initiatives: eliminating the nationwide backlog of unanalyzed DNA samples, expanding the kinds of offenders who are profiled, providing opportunities for postconviction testing of DNA evidence, and continuing development of forensic science capabilities.

A DNA profile may provide powerful evidence in many criminal investigations, either to incriminate or exculpate a suspect. DNA evidence is very stable and can be extracted and profiled from a sample many years after being deposited. The technologies used are increasingly sensitive, powerful, fast, and cost-effective. The cost of performing analyses and the time required continue to decline. Those features of the technology are likely to continue to improve over the next decade.

In 1994, Congress enacted the DNA Identification Act, which provided for the establishment by the FBI of a national index, called CODIS, of profiles of DNA from convicted criminals and from crime-scene evidence. A search of the index may match a crime with a known offender or with another crime. All 50 states now require collection of DNA samples from certain categories of offenders, including persons convicted of sexual felonies. However, DNA samples from offenders and crime scenes have accumulated in many states more rapidly than forensic laboratories can process them for entry into CODIS. More than 700,000 convicted-offender samples awaited processing at the end of 1999. In FY2000 and FY2001, Congress appropriated funds to help address the backlogs, and some states have also provided funding. Several bills in the 106<sup>th</sup> Congress would have provided additional funds; H.R. 4640 was enacted (P.L. 106-546) and authorizes \$170 million over four years.

States vary in the types of crimes for which they collect DNA samples for inclusion in databases. Several have broadened the offenses that qualify. Proponents argue that expansion will help solve crimes because offenders often commit more than one kind. Opponents argue that qualifying offenses should be limited only to crimes for which DNA evidence is commonly used. Several bills in the 106th Congress specified qualifying federal offenses for inclusion in CODIS, and P.L. 106-546 includes several crimes against persons and some property crimes.

DNA evidence has helped exonerate more than 60 wrongfully convicted persons. In many cases, DNA technology was not available or not sensitive enough to produce usable results at the time of trial, and legal and other barriers exist to postconviction testing in many instances. Some states have established a statutory right to postconviction DNA testing, and several bills in the 106th Congress also addressed aspects of that issue, although none were enacted. Aspects addressed included the time period during which testing would be permitted, the degree to which evidence must be exculpatory, how long it should be preserved, whether exonerated persons should receive compensation, and the degree to which states would be encouraged or required to provide postconviction testing.

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# DNA Evidence: Legislative Initiatives in the 106<sup>th</sup> Congress

## Introduction

DNA evidence is a powerful forensic tool that can aid investigators in many criminal cases. Its use and capabilities have increased substantially since it was first introduced in the late 1980s. That growth has led to the emergence of the following issues that were considered by the 106<sup>th</sup> Congress in several legislative initiatives:

- ! eliminating the nationwide backlog of unanalyzed DNA samples,
- ! specifying the kinds of DNA profiles that should be included in law-enforcement databases,
- ! providing opportunities for postconviction testing of DNA evidence, and
- ! continuing development of forensic science capabilities.

This report discusses those and related issues and the legislation proposed and enacted to address them. It begins by describing provisions in prior federal law and then discusses issues and the legislation proposed, including the enacted DNA Analysis Backlog Elimination Act of 2000 (H.R. 4640, which became P.L. 106-546).

## Features of DNA Evidence

A DNA profile may provide powerful evidence in many criminal investigations, either to incriminate or exculpate a suspect. As with many kinds of forensic evidence, a profile from a sample whose source is not known (but may be suspected) is compared to one whose source is known, usually the suspect. In such a case, if the two profiles do not match, the suspect cannot be the source of the evidence. If the profiles match, the suspect may be the source of the evidence, or the match might be coincidental. The likelihood of a coincidental match depends on how common that profile is among other people. The characteristics of DNA permit an expert to provide an estimate of that likelihood, usually in the form of a probability. If the estimated probability is very small, a jury or judge might reasonably conclude that the suspect is indeed the source of the evidence.

Other key characteristics of DNA evidence are that it is very stable and can be extracted and profiled from a sample many years after being deposited, provided that the sample is stored appropriately; that evidence can be extracted from many kinds of biological tissues, including saliva, hair, tears, and bone fragments; and that the technologies used are increasingly sensitive, powerful, fast, and cost-effective. Usable DNA can now be extracted from very small samples, such as a drop of blood the size of a pinhead; a profile can yield a probability of coincidental match of less than one

in billions or even trillions; and the cost of performing analyses and the time required continue to decline. Those features of the technology are likely to continue to improve over the next decade.<sup>1</sup>

DNA evidence also has significant limitations. It is not pertinent and is unlikely to be deposited in many kinds of cases, such as much nonviolent crime. Even for cases where it is present, it might not be relevant if, for example, the identification of the perpetrator is not in question. There might be more than one victim or perpetrator, in which case the DNA from different persons may be mixed, making analysis much more difficult. Also, the DNA may be contaminated, degraded in storage, improperly collected or handled, or tested inappropriately. Even with those limitations, however, DNA evidence is an extraordinarily and increasingly important forensic tool.

## Prior Federal Law

Recognizing the great potential utility of DNA evidence, Congress enacted the DNA Identification Act of 1994 (108 Stat. 2065, hereinafter called the DNA Act) as part of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322).<sup>2</sup> The DNA Act established the DNA Identification Grants program (42 U.S.C. 3796kk), authorized through FY2000, to help state and local governments develop and improve their ability to analyze DNA evidence, and it authorized use of Drug Control and System Improvement Grants for similar purposes (42 U.S.C. 3751; those grants are part of the Edward Byrne Memorial State and Local Law Enforcement Assistance Programs<sup>3</sup>).

The DNA Act provided for the establishment by the FBI of a national index of profiles (42 U.S.C. 14132). The law authorized inclusion of profiles from convicted criminals, from samples recovered from crime scenes, and from unidentified human remains. However, it did not specify the crimes covered and did not specifically authorize *collection* of DNA from convicted persons. The Consolidated Appropriations Act of 2000 (P.L. 106-113) additionally provided for an index of profiles from “samples voluntarily contributed from relatives of missing persons.”

The resulting system of local, state, and national indexes is called CODIS (Combined DNA Index System). The system’s national index, maintained by the FBI, is called NDIS (National DNA Indexing System). Law enforcement agencies usually use CODIS in one of two ways. If they have a profile of unknown origin from a crime scene sample, they may search the index for a match with the profile of a

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<sup>1</sup>For a discussion of the technology and how it is used in identification, see CRS Report RL30717, *DNA Identification: Applications and Issues*.

<sup>2</sup> See David L. Teasley, *Crime Control: The Federal Response*, CRS Issue Brief IB90078, for a discussion of this and other crime control measures.

<sup>3</sup>See (name redacted), CRS Report 97-265, *Crime Control Assistance Through the Byrne Programs*, for a discussion of Byrne grants. Also, see CRS Report RL30717 for more information on federal programs relating to DNA identification.

convicted offender. If they have a profile from a suspect in a crime, they may search the index for a match with a profile from an unsolved case.

The DNA Act also established a requirement (42 U.S.C. 3753(a)(12), 3796kk-2, 14132(b)) that participating laboratories meet quality-assurance and proficiency-testing standards and permit access to DNA samples and analyses only

- (i) to criminal justice agencies for law enforcement identification purposes;
- (ii) in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules;
- (iii) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; or
- (iv) if personally identifiable information is removed, for a population statistics database, for identification research and protocol development purposes, or for quality control purposes.

Section 811 of the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132, 110 Stat. 1312-1313, hereinafter called the Antiterrorism Act) authorized the expansion of CODIS to “include federal crimes or those committed in the District of Columbia,” although it did not specify particular offenses that would qualify. The act also authorized the FBI to provide grants to states (including the District of Columbia) to help them ensure that their DNA-typing capabilities were “compatible and integrated” with CODIS and to develop computerized identification systems and automated fingerprint identifications systems that were similarly compatible with FBI systems. To be eligible for any of those grants, a state was required to collect for analysis DNA samples from “each person convicted of a felony of a sexual nature.” Eligibility did not, however, specifically require that those samples be analyzed.

Section 102 of the Crime Identification Technology Act of 1998 (P.L. 105-521, 112 Stat. 1871) established the State Grant Program for Criminal Justice Identification, Information, and Communication, authorized through FY2003. Grants can be awarded for a broad range of activities to, among other things, improve state capabilities in crime identification and promote compatibility and integration among local, state, and federal identification systems, and including accreditation and certification programs relating to DNA analysis.

Those laws, in conjunction with other factors, have been very successful in increasing the use of DNA evidence: All 50 states now require collection of DNA samples from sexual felons, as stipulated in the Antiterrorism Act, and many from other categories of offenders, making profiles from those samples available for criminal identification purposes through CODIS. Hundreds of thousands of samples have been collected from convicted offenders nationwide, and CODIS has assisted in hundreds of criminal investigations. Also, over the past five years, Congress has appropriated more than \$60 million to help state and local DNA laboratories. According to the Bureau of Justice Statistics, funding requests received from those laboratories have exceeded available appropriations.<sup>4</sup>

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<sup>4</sup>Greg W. Steadman, *Survey of DNA Crime Laboratories, 1998*, Bureau of Justice Statistics (continued...)

## Legislative Issues

The success of DNA evidence and its increasing sophistication have led to the emergence of the four issues listed at the beginning of this report — sample backlogs, expansion of coverage in CODIS, postconviction testing, and support for forensic science. Those issues and legislative proposals that address them are discussed below.

### Sample Backlogs

For the past few years, DNA samples have been accumulating in many state and local jurisdictions more rapidly than forensic laboratories can process them for entry into CODIS. The laboratories usually do not have the resources to process all samples quickly, and they must prioritize those they receive, with the highest priority usually being given to cases going to trial and those where a suspect has been identified. In some instances, released offenders have committed additional crimes that might have been prevented had the laboratories been able to process their DNA more quickly.

**Kinds of Backlogs.** The backlogs consist of hundreds of thousands of samples from convicted offenders and thousands of samples from cases for which there are currently no suspects. That does not include “owed” samples — those that have not yet been collected — of which there may be similar numbers. In addition, as states expand the crimes covered (see below), the backlog may well increase. As of December 1999, only 35,000 of the 750,000 samples collected from offenders nationwide had been reported as profiled using the most up-to-date DNA markers. Nevertheless, since its inception as a pilot program in 1990, CODIS has aided in more than 1,100 investigations nationwide.<sup>5</sup> By comparison, Britain’s national forensic DNA database holds approximately 700,000 profiles and has matched crimes to suspects more than 75,000 times since its inception in 1995.<sup>6</sup>

There is also another kind of backlog resulting from improvements in forensic DNA technology. Many thousands of samples must be reanalyzed, because the profiles they yielded, currently in many state and local DNA indexes, are based on an older DNA technology, called VNTR or RFLP technology, and cannot be compared with those created with the newer, STR, technology that has become the NDIS

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<sup>4</sup>(...continued)

Special Report NCJ 179104, February 2000, 2, available at [<http://www.ojp.usdoj.gov/bjs/pub/pdf/sdnac198.pdf>].

<sup>5</sup>Dwight E. Adams, Federal Bureau of Investigation, *Statement*, Legislative Hearing on H.R. 2810, the “Violent Offender DNA Identification Act of 1999”, H.R. 3087, the “DNA Backlog Elimination Act”, and H.R. 3375, the “Convicted Offender DNA Index Systems Support Act”; Subcommittee on Crime, House Committee on the Judiciary, 13 March 2000, [<http://www.house.gov/judiciary/adam0323.htm>].

<sup>6</sup>The Forensic Science Service, *Annual Report and Accounts 1999–2000*, 25 July 2000, [[http://www.forensic.gov.uk/forensic/corporate/annual\\_rep/annual\\_report2000.pdf](http://www.forensic.gov.uk/forensic/corporate/annual_rep/annual_report2000.pdf)], 20–21.

standard.<sup>7</sup> Use of STRs permits faster typing from much smaller amounts of DNA than VNTRs. It is also less expensive, although conversion costs can be high.

Failure to process backlogs may have several consequences. Crimes that might be solved with the help of a database match may remain unsolved. That is of particular concern in cases where a perpetrator is likely to perform additional crimes, or where a wrongly accused person might otherwise be cleared by DNA evidence. Also, crime-scene samples from unsolved crimes may eventually be destroyed, permanently eliminating any possibility of analyzing any DNA evidence.

**Cost of Backlog Elimination.** The cost of processing backlogs can be difficult to estimate because of variability in the circumstances involved. The backlog of convicted-offender samples is much larger than the casework backlog. However, convicted-offender samples are much less costly to process; typing<sup>8</sup> can be largely automated and outsourced. Costs may be substantially reduced if samples can be outsourced to private laboratories and analyzed in large batches, but costs may be significantly higher if samples must be processed in small numbers or by government forensic laboratories, for example in states with relatively small backlogs. Casework generally cannot be automated and can cost thousands of dollars per case, whether or not it is outsourced. Such estimates do not include the costs of any new infrastructure that might be required, for example if a laboratory needs to convert from VNTR to STR technology.

A commission established in 1997 by Attorney General Reno has examined the backlog problem and other issues. The National Commission on the Future of DNA Evidence (hereinafter called the DNA Commission) recommended that grants be used to rapidly eliminate the backlog, that a common set of STR markers and quality assurance standards be adopted by laboratories, and that privacy issues be addressed with regard to outsourcing of samples.<sup>9</sup> The DNA Commission estimated that approximately 450,000 convicted-offender samples had yet to be processed at the time of this recommendation, and that 260,000 needed conversion from VNTR to

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<sup>7</sup>VNTRs (variable number of tandem repeats) are a kind of genetic marker that varies greatly from person to person and so can be used to help identify individuals. RFLP (restriction fragment length polymorphism) refers to the method by which VNTRs are processed. STRs (short tandem repeats) are genetic markers that are not as variable as VNTRs but have other advantages. They are processed using PCR (polymerase chain reaction) technology. Although DNA technology continues to advance, the current STR standards are expected to remain in place for several years (see National Commission on the Future of DNA Evidence, *The Future of DNA Testing: Predictions of the Research and Development Working Group*, National Institute of Justice, NCJ 183697 (November 2000), available at [<http://www.ojp.usdoj.gov/nij/pubs-sum/183697.htm>]).

<sup>8</sup>Analyzing DNA to produce a profile is often called DNA typing.

<sup>9</sup> National Commission on the Future of DNA Evidence, *Recommendation of the National Commission on the Future of DNA Evidence*, [<http://www.ojp.usdoj.gov/nij/dna/codisrc.html>], 16 January 2000.



STR profiles. The commission also estimated that if samples were outsourced, profiling would cost about \$50 per sample with current technology.<sup>10</sup>

Combining the figures above yields an estimate of approximately \$35 million to eliminate the convicted-offender backlog. However, that is likely to be low because of infrastructure needs and other costs, as well as the variability mentioned above. It also does not take into account owed samples or unprocessed casework. According to the Bureau of Justice Statistics, publicly funded forensic laboratories reported a backlog of 6,800 unprocessed cases for 1997 alone.<sup>11</sup>

**Funding Options.** In appropriating funds for the Department of Justice for FY2000 (P.L. 106-113) and FY 2001 (P.L. 106-553),<sup>12</sup> Congress specified backlog elimination as one use of the \$30 million designated each of those years for state and local DNA laboratories. In FY2000, the Office of Justice Programs allocated half of that funding to address the backlogs. Some states with large backlogs — notably Virginia (191,750 convicted-offender samples at the end of 1999<sup>13</sup>), California (132,000), Florida (55,100), and Illinois (15,500) — have also allocated millions of dollars in state funds to address them.

Several bills introduced in the 106th Congress authorized funding specifically to eliminate the backlogs. Those introduced during the first half of the first session provided \$30 million to address the convicted-offender backlog (H.R. 2810, S. 254, S. 899, S. 903<sup>14</sup>), which had also been the first kind of backlog examined by the DNA Commission. Those introduced later provided from \$60 million to \$170 million over two or more years to address both the convicted-offender and casework backlogs (H.R. 3087, H.R. 3375, H.R. 4640, H. R. 5000, and S. 3130). One bill, S. 2859, provided \$100 million over four years for the casework backlog only.

All those bills required that applicants satisfy quality assurance standards. Other conditions included using state-of-the-art typing methods and providing privacy protections by restricting access in a manner similar to that specified in the DNA Act, as described earlier in this report. H.R. 2810, H.R. 3087, H.R. 3375, S. 254, S. 899, S. 903, S. 2859, and S. 3130 required the Department of Justice to develop a plan to eliminate the backlog(s) addressed in the bills. H.R. 4640 and H.R. 5000 required states requesting funds to develop individual plans. H.R. 3375 gave preference to addressing the casework backlogs. H.R. 3375 and S. 3130 also required that all work

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<sup>10</sup> NIJ, through its Five Year DNA Program (1999–2003), is awarding \$5 million per year to support research with a goal of reducing the cost of processing to \$10 per sample over the next four years, in addition to other objectives (National Institute of Justice, *Technology Development Portfolio: Investigative and Forensic Sciences*, [<http://www.ojp.usdoj.gov/nij/sciencetech/invest.htm>], 16 January 2000).

<sup>11</sup> Steadman, *Survey of DNA Laboratories*, 1.

<sup>12</sup>For a general discussion of Department of Justice appropriations, see (name redacted) Coordinator, *Appropriations for FY2001: Commerce, Justice, and State, the Judiciary, and Related Agencies*, CRS Report RL30509, 11 January 2001.

<sup>13</sup>Data on backlogs are from an FBI survey cited in Adams, *Statement*.

<sup>14</sup>See the section on legislation below for descriptions of individual bills.

on convicted-offender backlogs be outsourced to private laboratories. The other bills either did not specify the kind of laboratory (H.R. 2810, H.R. 3087, S. 254, S. 899, S. 903) or explicitly permitted the use of either public or private laboratories (H.R. 4640, H.R. 5000).

The cost of eliminating backlogs depends substantially on economies of scale. In FY2000, grants for backlog elimination were awarded to individual states, which were then each responsible for processing the samples. States with small backlogs would have higher per-sample costs. Those costs could be reduced significantly if samples could be pooled for processing. One way of doing that is through a voucher system, as provided for in H.R. 4640 and H.R. 5000, whereby states send samples to a private laboratory approved by the U.S. Attorney General. That approach can also reduce state administrative costs and provide more uniform quality assurance.

**P.L. 106-546.** The DNA Analysis Backlog Elimination Act of 2000 (H.R. 4640, hereinafter called the Backlog Elimination Act) was enacted at the end of the 106<sup>th</sup> Congress. It authorizes \$45 million in grants over three years to address the convicted offender backlog and \$125 million over four years to eliminate casework backlogs. It requires that states receiving grants specify qualifying crimes for inclusion in CODIS and develop individual plans for eliminating the backlogs. It permits the use of private laboratories and vouchers, includes quality-assurance and privacy requirements, and contains other provisions discussed later in this report.

See below for a discussion of hearings and other legislative activity on bills discussed above.

## Profiles To Be Included in CODIS

There were two main issues before the 106<sup>th</sup> Congress with respect to profiles included in convicted-offender databases: the kinds of offenses that should qualify for inclusion, and authorization of sample collection from offenders. Those issues and bills that addressed them are discussed below.

**Qualifying offenses.** Before enactment of the Backlog Elimination Act, federal law did not specify offenses except as discussed earlier with respect to sexual felonies. States vary in the crimes for which they collect DNA samples for inclusion in databases. Qualifying offenses include, at a minimum, felony sex crimes, but others specified by different states include murder, offenses against children, assault and battery, kidnapping, robbery, and burglary; and some states include all felonies.<sup>15</sup> Many collect samples from juveniles convicted of qualifying offenses, most collect retroactively from incarcerated convicts, and some collect from those previously paroled or on probation. In Britain, samples can be collected from anyone suspected of a “recordable offense” — any crime punishable by imprisonment, plus certain other specified offenses — and their profiles added to the national DNA database; the profile is removed if the person is acquitted.

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<sup>15</sup> See Adams, *Statement*, for a summary of qualifying offenses in all 50 states as of March 2000.

Several states enacted legislation in 2000 that broadens the offenses that qualify, and several others considered such legislation.<sup>16</sup> One argument often made in favor of such expansion is that offenders often commit more than one kind of crime. For example, burglary may be a precursor to a violent offense such as rape. While no definitive studies appear to have been done to test that view, available evidence does seem to support it. For example, suspects in more serious crimes have sometimes been identified after being typed in conjunction with lesser offenses. Also, an examination of Virginia data through June 2000 yielded the following results: The state DNA database, which contained more than 115,000 profiles of convicted persons at the time, had yielded more than 180 hits (matches between crimes or between persons and crimes) since 1993.<sup>17</sup> Virginia profiles those convicted of any felony offense. About half of the case-to-offender hits identified would have been missed if the database were limited to violent offenders. Also, nearly half the violent crimes solved with the help of the database were perpetrated by persons who had previous property-crime convictions.<sup>18</sup>

Some argue that qualifying offenses should be limited only to those, such as violent crimes, for which DNA evidence is directly relevant. One concern is whether broadening the list of qualifying offenses is cost-effective in comparison to other approaches to solving a crime. Whether it is will depend on factors such as the cost of DNA typing and the “hit rate” — how often a person typed for a nonviolent offense will be matched to another crime. For example, if a profile cost \$50 and the hit rate were one out of 100 profiles, then the cost per hit would be \$5,000. Such costs will likely continue to decline as the technology improves. Another concern relates to protection of individual rights and privacy, both of a profiled person and family members. For example, unlike fingerprints, a DNA sample contains much more information than that used in making the identification — it contains a person’s entire genetic code, and much of that code will be identical in close blood relatives. A related concern is that specific DNA sequences from markers currently used for profiling might in the future be found to contain additional information, such as an association with genes relating to disease or other conditions. However, the access restrictions that apply to CODIS (42 U.S.C. 14132(b), discussed above) are intended to provide protections against such broader uses.

Several bills introduced in the 106<sup>th</sup> Congress listed specific qualifying offenses for inclusion in CODIS:

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<sup>16</sup>States enacting such legislation in 2000 include Arizona, Colorado, Florida, Georgia, Iowa, New Jersey, South Carolina, South Dakota, and West Virginia. Others where such legislation was considered but either failed or is pending include Alaska, California, Connecticut, Hawaii, Kentucky, Mississippi, New York, North Carolina, Ohio, and Washington.

<sup>17</sup>As of December 2000, 20,000 additional profiles and 100 additional hits had been added to the figures cited here (Virginia Division of Forensic Science, “DNA Databank Statistics,” [[http://www.dcjs.state.va.us/forensic/DNA\\_2000\\_graph.htm](http://www.dcjs.state.va.us/forensic/DNA_2000_graph.htm)], 10 January 2001).

<sup>18</sup>Source: Dr. Paul Ferrara, Director, Virginia Division of Forensic Sciences, communication with author, 28 August 2000. See also House Committee on the Judiciary, *DNA Analysis Backlog Elimination Act of 2000*, 106<sup>th</sup> Cong., 2<sup>nd</sup> sess., 2000, H.Rept. 106-900, Part 1, 24, 34. The report also cites similar figures for Florida (Ibid.).

- ! serious violent felonies (H.R. 2810);
- ! crimes of violence (H.R. 3375, S. 254, S. 899, S. 903);
- ! murder, voluntary manslaughter, and other offenses relating to homicide (H.R. 4640, H.R. 5000)
- ! kidnapping (H.R. 4640, H.R. 5000);
- ! sexual abuse, sexual exploitation or other abuse of children, transportation for illegal sexual activity (H.R. 4640, H.R. 5000);
- ! offenses relating to peonage and slavery (H.R. 4640);
- ! robbery (H.R. 4640);
- ! burglary (H.R. 2810, H.R. 4640, H.R. 5000);
- ! other felonies as determined by the FBI Director (S. 254, S. 899, S. 903);
- ! all felonies (S. 3130);
- ! acts of juvenile delinquency that would constitute a crime of violence if committed by an adult (H.R. 3375, S. 254, S. 899, and S. 903);
- ! acts of juvenile delinquency that would constitute a felony if committed by an adult (S. 3130); and
- ! attempts or conspiracy to commit offenses covered (H.R. 4640, H.R. 5000).

S. 2783 did not specify particular categories of offenses but expanded coverage to permit inclusion of juvenile delinquents. H.R. 3375 and S. 2783 also expanded CODIS to include profiles from samples voluntarily contributed from relatives of missing persons.<sup>19</sup> H.R. 357 specified inclusion in CODIS for members of the armed forces who are convicted of sexual offenses. The House version of H.R. 4205 included offenses committed under the Uniform Code of Military Justice that are equivalent to serious violent felonies. H.R. 4640 also specified certain violent crimes and other felonies committed on American Indian lands.

Before enactment of the Backlog Elimination Act, federal law did not restrict the categories of qualifying offenses, although the lack of specific authority to collect samples (see below) meant that no persons had been profiled in CODIS as a result of a federal conviction. Representatives of the Department of Justice expressed concerns about specifying particular categories of offenses, for reasons similar to those discussed above with respect to state laws, and support for inclusion of offenses committed by juveniles.<sup>20</sup>

**Sample collection.** The other issue related to sample collection and application of CODIS to federal, military, and District of Columbia offenders, both prisoners and those on supervised release, parole, or probation. While the DNA Act and Antiterrorism Act authorized inclusion of profiles from such persons in CODIS, federal law did not expressly authorize collection of samples from them. Several bills authorized such collection and inclusion in CODIS for the offenses specified (H.R. 2810, H.R. 3375, H.R. 4640, H.R. 5000, S. 254, S. 899, S. 903, S. 2783, S. 3130).

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<sup>19</sup> A similar provision was included in The Consolidated Appropriations Act of 2000 (P.L. 106-113).

<sup>20</sup>David G. Boyd, National Institute of Justice, *Statement*, Hearing on H.R. 2810, H.R. 3087, and H.R. 3375 [<http://www.house.gov/judiciary/boyd0323.htm>]; Robert Raben, Assistant Attorney General, letter to Chairman Hyde, in H.Rept. 106-900, 23–44.

H.R. 357 and H.R. 4205 authorized collection and inclusion for offenders who are members of the armed forces.

**Hearings.** On March 23, 2000, the Subcommittee on Crime of the House Committee on the Judiciary held a hearing on H.R. 2810, H.R. 3087, and H.R. 3375. Witnesses from the Department of Justice and state forensic laboratories expressed strong support for the objectives of those bills. A representative of the American Civil Liberties Union expressed concerns about protection of privacy, nonforensic use of samples and profiles, and the potential expansion of qualifying offenses.

**Legislative Action.** H.R. 4640 was introduced on June 12, 2000, and contained provisions similar to several in the three bills that were the subject of the hearing. The bill was marked up by the Subcommittee on Crime on June 15, and by the full committee on July 26. It passed the House under suspension of the rules on October 2. The House-passed version contained several differences from the bill as introduced, including increased funding for elimination of both convicted-offender and casework backlogs, increased flexibility in how funds can be used for backlog elimination, expansion of the list of qualifying offenses, and addition of provisions relating to privacy protection. The bill was passed by the Senate on December 6 with the addition of a sense of Congress amendment on postconviction DNA testing. The amended bill passed the House on December 7 and was signed into law on December 19.

**P.L. 106-546.** The Backlog Elimination Act provides for collection of DNA samples for inclusion in CODIS from federal, military, and District of Columbia offenders who have committed qualifying crimes. Qualifying federal and military offenses include murder, kidnapping, certain sexual offenses, offenses relating to peonage or slavery, robbery, burglary, those and certain other offenses committed on American Indian lands, and attempts or conspiracy to commit covered offenses.

## Postconviction DNA Testing

One use of DNA evidence that has gained substantial prominence is to help exonerate a wrongfully convicted person. In criminal investigations where DNA evidence is used, it has been reported to exclude initial suspects in approximately one-quarter of cases.<sup>21</sup> If the DNA profile of a suspect does not match that from an evidence sample, the suspect cannot be the source of the evidence. In many instances, that means that the suspect cannot have perpetrated the crime, even if other evidence, such as eyewitness testimony, is incriminating. For many cases, especially those that were tried before the mid-1990s, DNA technology was not available at the time of the trial. In others, the technology that was available was not sensitive enough to produce usable profiles from the evidence. In more than 60 cases, wrongfully convicted persons have subsequently been exonerated through the application of modern DNA-identification techniques; in some of those cases, the DNA analysis has

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<sup>21</sup>Louis J. Freeh, *Ensuring Public Safety and National Security Under the Rule of Law: A Report to the American People on the Work of the FBI 1993 - 1998*, Federal Bureau of Investigation, 2000, 36, available at [[http://www.fbi.gov/library/5-year/5YR\\_report\\_.PDF](http://www.fbi.gov/library/5-year/5YR_report_.PDF)].

also aided in the identification of the actual perpetrator.<sup>22</sup> Such wrongful convictions are of particular concern in cases where a sentence of death was imposed, and concerns about some death-penalty cases has tended to amplify the attention paid to the potential importance of postconviction DNA testing. However, as of January 2001 there were no cases where a person had been shown through DNA evidence to have been wrongfully executed.

**Difficulties in Obtaining Postconviction Testing.** Attorney General Reno established the DNA Commission specifically in response to a 1996 National Institute of Justice report on postconviction testing.<sup>23</sup> In 1999 the commission issued a report on postconviction testing that included recommendations to prosecutors, defense counsel, the judiciary, victim assistance units, and laboratory personnel.<sup>24</sup> The report discussed the difficult legal issues often raised by postconviction testing, and pointed out that “postconviction requests for testing do not fit well into existing procedural schemes or established constitutional doctrine.”<sup>25</sup> However, it did not specifically address possible legislative solutions, but the commission did consider model legislation separately (see below).

Several factors may make postconviction testing difficult in many cases. First, few states permit motions for a new trial, based on newly discovered evidence, more than three years after conviction (which is the current federal limit, F.R. Crim. P. 33), and in most the time period is less than one year. There are several reasons for such limits, among them that the value and reliability of testimony and other evidence often diminishes over time. However, DNA evidence, if properly collected and stored, is very stable and can often be analyzed with probative results many years after it was initially deposited. Many cases of postconviction exoneration have in fact involved tests done several years after the trial. Also, as a result of improvements in the technology, DNA evidence has become and may continue to become more rather than less probative with the passage of time. A second factor is that the evidence containing DNA will often already be in the possession of the government — it is not, therefore, what would normally be considered new evidence. A third factor is that DNA testing of casework samples can be expensive, and many of the prisoners who might seek it are indigent. Fourth, policies on the preservation of evidence vary among jurisdictions, and in some the evidence in a case may be destroyed after appeals are exhausted. In such cases, opportunities for testing would be lost.

**State Laws.** Some states have established a statutory right to postconviction DNA testing. In 1994, New York amended state law to authorize such testing for DNA evidence secured in connection with the trial if there is a “reasonable

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<sup>22</sup> Edward Connors and others, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice Report NCJ161258, June 1996, available at [<http://www.ncjrs.org/pdffiles/dnaevid.pdf>].

<sup>23</sup>Ibid.

<sup>24</sup>National Commission on the Future of DNA Evidence, *Postconviction DNA Testing: Recommendations for Handling Requests*, National Institute of Justice, NCJ 177626 (September 1999), available at [<http://www.ojp.usdoj.gov/nij/pubs-sum/177626.htm>]

<sup>25</sup>Ibid, xiv.

probability” that the results of such testing, had they been admitted at the trial, would have led to a verdict more favorable to the defendant (C.P.L. Sec. 440.30(1-a)). However, testing is available only to defendants convicted before January 1, 1996.

Since 1998, Illinois (725 I.L.C.S. 5/116-3) has permitted postconviction testing for evidence secured in relation to the trial but which was not tested because the particular technology requested by the petitioner was not available at that time. The defendant must present a prima facie case<sup>26</sup> that identity was at issue in the trial and “the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.” Additional requirements are that “the result of the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant’s assertion of actual innocence,” and the testing employs a generally accepted scientific method.<sup>27</sup> Illinois separately enacted legislation (725 I.L.C.S. 5/116-4) in June 2000 extending the length of time that the state must retain physical evidence after a conviction. Delaware (S.B. 329) enacted a similar statute, effective September 2000, which, however, provides a time limit on motions of 3 years after conviction. Tennessee (H.B. 2490) enacted a similar statute, effective July 2000, that applies only to capital murder cases.

An Arizona law on postconviction testing (A.R.S. Sec. 13-4240) became effective in July of 2000. It is very similar to a model statute drafted by the DNA Commission. It applies to cases where evidence that is “related to the investigation or prosecution” and that may contain DNA is “in the possession or control of the court or the state,” is in a condition that allows DNA testing, and was not previously tested or “was not subjected to the testing that is now requested and that may resolve an issue not previously resolved by the previous testing.” Testing is mandatory if a “reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained,” and it is discretionary if a reasonable probability exists that either it will produce exculpatory evidence or “the verdict or sentence would have been more favorable” to the petitioner if the results had been available at the trial. In the latter case, the petitioner may be required to pay for the testing. The law also permits appointment of counsel for indigent petitioners. Evidence must be preserved “during the pendency of the proceeding,” and sanctions can be imposed for intentional destruction. The law also provides for obtaining “elimination samples” from third parties. In the event that a postconviction test

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<sup>26</sup>A prima facie case is one that on its own merits is adequate to prevail unless the opposition specifically presents evidence to disprove it (*Oran’s Dictionary of the Law*, [<http://www.lawoffice.com/pathfind/orans/orans.asp>]).

<sup>27</sup>This is known as the general-acceptance standard for scientific evidence, or Frye test (from the 1923 case, *Frye v. United States*, 293 F. 1013, in which the standard was first articulated). The main alternative to Frye is known as the sound-methodology, or Daubert, test (from *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786), a broader and less restrictive standard, based on the Federal Rules of Evidence, that was prescribed by the U.S. Supreme Court in 1993. In considering a motion for postconviction DNA testing, a court would rely on such standards to determine whether to allow the use of any new DNA technology that might be requested. Nonfederal jurisdictions vary in the standards they use, and the standards are continuing to evolve.

excludes a convicted person as the source of the DNA evidence, elimination samples may be needed to determine if the source was a known third party, such as a consensual sex partner or a codefendant, rather than an unknown perpetrator.<sup>28</sup>

A California law (S.B. 1342) that became effective in September 2000 permits a convicted person who is incarcerated to request DNA testing. It requires testing if the court finds the following: The evidence to be tested is available, in testable condition, has been subject to a sufficient chain of custody, and has not been tested or would yield more “discriminating or probative” results with the testing requested; identity was or should have been at issue in the case; the convicted person makes a prima facie showing that the evidence is material to the identity of the actual perpetrator or accomplice or certain other factors; the results would “raise a reasonable probability” that the verdict or sentence would have been more favorable to the convicted person had the results been available at trial; the testing employs a generally accepted scientific method; and the request is not simply a delaying tactic. The court may also consider evidence that was not introduced at the trial. The law also permits the state to pay for testing and to appoint counsel for indigent petitioners. Biological evidence from a criminal case must be retained while anyone remains incarcerated in connection with the case, unless the government first provides notice and an opportunity to request DNA testing. The law will remain in effect through 2002.

Some other states also enacted legislation in 2000 relating to postconviction testing. For example, a law passed in Oklahoma permits indigent persons convicted of a felony offense to request a DNA test from the Oklahoma Indigent Defense System. Resulting claims of “factual innocence” are then presented to “the appropriate prosecutorial agency....Factual innocence requires the defendant to establish by clear and convincing evidence that no reasonable jury would have found the defendant guilty beyond a reasonable doubt in light of the new evidence” (22 O.S. 1371.1). The law stipulates that persons who are not incarcerated are not required to provide samples, in contrast to the Arizona law’s provision on elimination samples. Also, Washington state enacted a law (S.H.B. 2491) authorizing postconviction DNA testing for convicted persons who are sentenced to life imprisonment or death “if the DNA evidence was not admitted into evidence because it did not meet acceptable scientific standards or the testing technology was not sufficiently developed to test DNA in the case.” Requests are submitted to local prosecutors, who review them “based on the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis.” Connecticut (PA 00-80) now permits at any time a motion for a new trial based on DNA evidence that was not “discoverable or available at the time of the original trial.”

**Current Federal Legislation.** There are currently no federal laws that specifically provide for postconviction DNA testing. However, several bills providing for it or addressing related issues were introduced in the 106<sup>th</sup> Congress. Legislative provisions in those bills address several questions altogether:

! Can previously obtained evidence be submitted to testing?

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<sup>28</sup>DNA Commission, *Postconviction DNA Testing*, 39.



- ! Should the chain of custody for the evidence be a factor?
- ! Should retesting of evidence with newer technology be permitted?
- ! Must the evidence be potentially exculpatory?
- ! For what time period should postconviction testing be permitted?
- ! Should the government be required to preserve evidence that might contain DNA?
- ! How should testing and counsel be paid for?
- ! Should exonerated persons receive compensation?
- ! Should the provisions apply to states?

Those questions and the provisions addressing them are discussed below.

***Evidence previously obtained.*** A potential gap in current legal procedure was identified by the DNA Commission. In many cases, any testing that might be done would be on materials that had been obtained as part of the original investigation, which is arguably not new evidence. Ensuring that a wrongfully convicted person has a fair opportunity to prove actual innocence might require legislation to provide specifically for testing such materials.

Most of the bills addressing postconviction testing applied only to evidence that was previously obtained. The kind of evidence specified varied somewhat. Some applied to evidence that was specifically secured in relation to the trial (H.R. 3233, S. 1700) or to the investigation or prosecution (H.R. 4980, H.R. 5000, S. 3130) that resulted in conviction, while others applied more broadly to evidence that is related to the prosecution (S. 2859) or to the investigation or prosecution (H.R. 4078, H.R. 4167, S. 2690). Those alternatives could be subject to different interpretations by courts.

One bill referred to new postconviction DNA evidence: H.R. 4162 applied only to death penalty cases and provided the opportunity “to produce any exculpatory DNA or similar evidence which was not available to that individual at the time of the trial that resulted in the sentence of death.” S. 2463 also applied only to death penalty cases. It did not provide specifically for postconviction testing but rather for the establishment of a National Commission on the Death Penalty. The commission would examine several topics, including “[p]rocedures to ensure that persons sentenced to death have access to forensic evidence and modern testing of such evidence, including DNA testing, when such testing could result in new evidence of innocence.”

***Retesting.*** In some cases, DNA typing might not have been performed at all during the original investigation or trial, and in others, it might have been done but proved inconclusive. One issue associated with the possibility of retesting using newer technologies is how useful the results are likely to be. For example, the result of the original test might have been inconclusive because there was too little DNA to produce a usable profile with the technology used. In such a case, a retest with a more sensitive technology might show that the DNA did not come from the person convicted of the crime. If the DNA could have come only from the true perpetrator, such as in many rape cases, then the person convicted could not have committed the crime. Alternatively, the original test might have yielded strong identifying evidence, such as a coincidental-match probability of one in billions. In that case, a new test

would be very unlikely to provide results favorable to the defendant. Another possibility would be that the DNA in the evidence did not come from the convicted person but nevertheless was not exculpatory. For example, as tests become more sensitive, it is increasingly possible that DNA from persons unconnected with the crime will be found, as is often the case with fingerprints.

Several bills would have permitted the typing of evidence that was available at the trial but not tested for DNA or that was originally analyzed with older DNA technology. Some limited retesting to situations where the technology was not previously available (H.R. 3233, S. 1700, H.R. 4980, S. 3130). Others provided for retesting where new techniques could “provide a reasonable likelihood of more accurate and probative results” (H.R. 4078, H.R. 4167, S. 2690). H.R. 5000 required that the evidence not have been subject to the testing that is being requested. S. 2859 required that retesting be able to resolve an issue that previous testing did not. H.R. 3233 required that the testing to be done use a method “generally accepted within the relevant scientific community.”

***Potential for exculpation.*** Most public attention has focused on the use of DNA evidence to demonstrate actual innocence of the crime for which a person was convicted because he or she was mistakenly identified, such as through eyewitness testimony. One issue is whether postconviction testing should apply only to such cases or more broadly. For example, had DNA evidence been introduced at trial, it might in some cases have led to a lighter sentence. However, there is also a concern that such broadening could lead to meritless claims that would waste resources.

The bills that were introduced in the 106<sup>th</sup> Congress took several different approaches to this issue, requiring that test results could potentially produce evidence that

- ! is new, noncumulative and materially relevant to the assertion of innocence (H.R. 3233, S. 1700);
- ! is noncumulative, exculpatory, and relevant to the claim of wrongful conviction or sentencing (H.R. 4078, H.R. 4167, S. 2690);
- ! if favorable, “no reasonable finder of fact would have found the applicant guilty beyond a reasonable doubt,” or would result in a mandatory sentence reduction (H.R. 4980); or
- ! would, assuming exculpatory results, establish innocence of the crime for which the person was convicted or of uncharged conduct in cases where that would lead to a mandatory sentence reduction (H.R. 5000 and S. 3130).

One bill (S. 2859) provided, like the Arizona statute, for both mandatory and discretionary testing. Testing would be mandatory if the court found a reasonable probability that the requester would not have been prosecuted or convicted if the results of the test, had they been available, were exculpatory. It would be discretionary if there were a reasonable probability that the outcome of the prosecution or sentencing would have been more favorable to the requester.

Some bills further required that requests for testing be made to demonstrate actual innocence rather than to delay punishment (S. 2859, H.R. 5000, S. 3130).

Also, some required that identity was an issue at the trial that resulted in conviction (H.R. 3233, H.R. 5000, S. 1700, S. 3130).

The requirements placed on the petitioner also varied. Some required a petitioner to present a *prima facie* showing that identity was at issue (H.R. 3233, H.R. 5000, S. 1700, S. 3130) and that the chain of custody was sufficient (H.R. 3233, S. 1700) or that results, if exculpatory, would establish actual innocence (H.R. 5000, S. 3130). Some required the petitioner to specifically identify the evidence to be tested and to present a theory of defense (H.R. 5000, S. 3130). Some also contained provisions for assessing penalties in response to perjurious applications (H.R. 5000, S. 3130).

**Time limits.** The stability of DNA means that it can provide usable profiles even after several years, as has been demonstrated in many cases of postconviction exoneration. Rule 33 of the Federal Rules of Criminal Procedure currently permits a motion for a new trial, based on newly discovered evidence, within three years of the verdict. A study sponsored by the National Institute of Justice<sup>29</sup> found that for 28 convicted persons who were later exonerated through DNA testing, the average length of time served was almost 7 years. However, as the technology becomes increasingly available and sophisticated over the next few years, the potential utility of providing for postconviction testing long after the original trial may decrease substantially, especially for previously obtained evidence.

Some bills did not specify time limits during which a convicted person may petition for analysis of DNA evidence (H.R. 3233, H.R. 4162, H.R. 4980, S. 1700). Some expressly permitted such a petition at any time (S. 2859) or at any time after conviction (H.R. 4078, H.R. 4167, and S. 2690). Two took a different approach, providing for postconviction testing during the 30 months after becoming law (H.R. 5000, S. 3130).

**Chain of custody.** The integrity of the custody chain<sup>30</sup> for evidence to be tested is vital to ensuring accurate results. If it is not properly maintained after conviction, the evidence could be compromised. Also, if evidence has not been properly stored, any DNA present might have deteriorated and not produce usable results. Some bills specifically required that the evidence was subject to a sufficient chain of custody (H.R. 3233, H.R. 5000, S. 1700, S. 3130). Others required that evidence be in the actual or constructive possession of the government (H.R. 4078, H.R. 4167, S. 2690) or in the possession (H.R. 5000, S. 3130) or possession or control (S. 2859) of the Government or the court. One required that evidence be in good enough condition to permit testing (S. 2859). Several also had specific provisions relating to evidence preservation.

**Evidence preservation.** The stability of DNA evidence, and its demonstrated ability to exonerate a wrongfully convicted person even several years

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<sup>29</sup>Connors, *Convicted by Juries*, 12.

<sup>30</sup>The chain of custody of a piece of evidence is the complete history of its possession from the time it was originally received. (*Oran's Dictionary of the Law*, [<http://www.lawoffice.com/pathfind/orans/orans.asp>]).

after conviction, raise the question of whether provisions should be made specifically to preserve evidence that might contain DNA. Otherwise, the evidence might not be stored in a way that preserves DNA or it might be destroyed while a convicted person is still incarcerated for the crime. In at least one case,<sup>31</sup> evidence that had been slated for destruction was instead tested and proved exculpatory.

Some bills required that the government preserve evidence that might contain DNA while a convicted person remains incarcerated, unless it first provides notice and an opportunity to request DNA testing (H.R. 4078, H.R. 4167, S. 2690, S. 2859). One required that reasonably necessary steps be taken to preserve such evidence during incarceration (H.R. 4980). Others prohibited destruction for 30 months after enactment of the legislation in cases in which the convicted person is incarcerated and identity was at issue during the trial (H.R. 5000, S. 3130). Some did not explicitly address the issue of evidence preservation (H.R. 3233, H.R. 4162, S. 1700, S. 2463).

**Costs.** Casework can cost several thousand dollars per case to analyze, and many convicted persons who might request such analyses are indigent. Such persons would not likely be able to pay for testing or to afford counsel. Several bills provided for government payment, for indigent federal convicts, of the costs of DNA tests (H.R. 4078, H.R. 4167, H.R. 4980, H.R. 5000, S. 2690, S. 2859, S. 3130) and provision of counsel (H.R. 4078, H.R. 4167, S. 2690, S. 2859, S. 3130). Some also required states receiving Byrne formula grants to provide counsel in capital cases and provided grants to help provide such defense services (H.R. 4078, H.R. 4167, and S. 2690).

**Compensation.** According to the DNA Commission, only 14 states and the District of Columbia provide for compensation to wrongfully convicted persons. The maximum award under federal law is \$5,000 (28 U.S.C. 2513). Some bills increased the maximum award for unjust conviction and imprisonment to \$100,000 if the person was sentenced to death and \$50,000 per year for other cases (H.R. 4078, H.R. 4167, and S. 2690). They also required that states requesting federal assistance for the construction of correctional facilities provide procedures whereby a person wrongfully convicted and sentenced to death could collect damages.

**Application to states.** Only a few states currently provide specifically for postconviction DNA testing, as discussed above. The adoption of provisions in federal law could provide an impetus for states to implement similar procedures. Also, federal law could include specific guidelines or grant-eligibility requirements to encourage states to adopt such procedures. In addition, some proponents of postconviction DNA testing argue that there are constitutional grounds for making it available in state courts.

Some bills applied only to federal courts and would have amended Title 18 of the U.S. Code, dealing with federal criminal procedures (H.R. 3233, H.R. 4980, S. 1700, H.R. 5000, S. 3130). Others would have amended the federal judicial code in Title 28 (H.R. 4078, H.R. 4167, S. 2690, S. 2859) and contained provisions encouraging states to provide postconviction DNA testing by amending requirements for DNA

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<sup>31</sup>Cited in Connors, *Convicted by Juries*, 49–51.

Identification Grants (42 U.S.C. 3796kk-2); Drug Control and System Improvement Grants (42 U.S.C. 3753(a)(12)), which are Byrne-program block grants; and Public Safety and Community Policing (COPS) Grants (42 U.S.C. 3796dd-1(c)).<sup>32</sup> The revisions required participating states to make postconviction testing available and to preserve biological evidence. One bill (S. 3130) required states, to be eligible for grants to eliminate convicted-offender backlogs (see section on sample backlogs above), to provide for postconviction testing in a manner consistent with the provisions of the bill. Some bills also explicitly prohibited states, on constitutional grounds, from denying access to postconviction DNA testing if there is a reasonable probability that a favorable result could establish that the person was wrongfully convicted or sentenced (H.R. 4078, H.R. 4167, and S. 2690). One bill would have imposed a moratorium on both federal and state executions until postconviction procedures were established that met the standards laid out in the bill (H.R. 4162).

**Hearings.** Both the Senate Committee on the Judiciary (June 13, 2000) and the House Subcommittee on Crime of the Committee on the Judiciary (June 20) held hearings on postconviction testing. Witnesses at both hearings included state attorneys general, district attorneys, defense lawyers, and persons who had been exonerated by postconviction DNA testing. Concerns expressed by some witnesses about federal legislation on postconviction testing included the possibility of prolonging the appeal process unnecessarily, producing additional trauma for victims and their families, interfering with state sovereignty by forcing changes to established state procedures, and the potentially high costs and other impacts of testing and related activities, including preservation of evidence. Some noted that the impacts of such factors will depend on the breadth of the standards that are established for permitting motions for postconviction testing — that abuse and erroneous exoneration is less likely with narrower standards. Other witnesses held that postconviction testing can ensure the integrity of the judicial process without placing undue burdens on it, and that federal legislation is required to ensure that testing is available with appropriate standards in all states.

No bills specifically addressing the issues discussed in this section were enacted in the 106<sup>th</sup> Congress. However, the Backlog Elimination Act contains a provision indicating the sense of Congress that grants to states for forensic science should be conditioned on the provision of postconviction DNA testing by those states, and that Congress should work with states to ensure that defendants in capital cases have competent counsel.

## Other Issues

**Funding.** From FY1996-FY1999, Congress appropriated more than \$30 million for DNA Identification grants authorized through FY2000 under the DNA Act. The purpose of those discretionary grants was to improve the DNA-analysis

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<sup>32</sup> See (name redacted), *Crime Control Assistance Through the Byrne Programs*, CRS Report 97-265, 8 August 2000; and David L. Teasley and (name redacted), *The Community Oriented Policing Services (COPS) Program: an overview*, CRS Report 97-196, 7 September 2000.

capabilities of state and local forensic laboratories.<sup>33</sup> For FY2000 and FY2001, Congress appropriated \$30 million each year, under authorization provided by the Crime Identification Technology Act, for the Crime Laboratory Improvement Program (CLIP), to support those activities and general forensic science capabilities of the laboratories, and for backlog elimination grants.<sup>34</sup>

In addition to the backlog elimination funding contained in bills discussed earlier, several bills provided more broadly for federal funding in support of DNA analysis. H.R. 3144, S. 1760, and S. 2783 authorized Law Enforcement Technology grants, under the COPS program,<sup>35</sup> which could be used, among other purposes, for developing and improving state and local DNA-analysis capabilities. H.R. 2340 and S. 1196 established a program of Forensic Sciences Improvement Grants to states to improve their forensic science services, and authorized \$768 million over 5 years for those formula grants. S. 9 would have extended authorization of DNA Identification Grants through FY 2002.

**Office of Science and Technology.** H.R. 4403 would have established within the Office of Justice Programs a separate Office of Science and Technology, which would assume the functions of the current Office of Science and Technology at the National Institute of Justice. Its duties would include research and development of DNA technologies.

**Statutes of limitations.** The stability of DNA evidence has led to exoneration in some cases several years after conviction. That same stability also raises the possibility of identifying perpetrators years after a crime has been committed — even after the statute of limitations for a crime has expired. That has led some states to consider extending statutes of limitations for some crimes, and it has led prosecutors in some cases to seek “John Doe” indictments of unknown persons, based on the DNA profiles obtained from crime-scene evidence.<sup>36</sup> The bills discussed in this report did not address this issue, except that H.R. 4640, as introduced, provided that a state plan to address casework backlogs may include cases for which the statute of limitations has expired. That provision was later deleted.

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<sup>33</sup>There are approximately 120 publicly funded crime laboratories in the United States.

<sup>34</sup>CLIP provides up to 90% of the cost of a project, and DNA Identification grants up to 75%.

<sup>35</sup>For a general discussion of this program, see David Teasley and JoAnne O’Bryant, *The Community Oriented Policing Services (COPS) Program: An Overview*, CRS Report 97-196.

<sup>36</sup>California has enacted legislation (AB 1742) that extends the statute of limitations for certain sex crimes from 6 to 10 years. However, it did not become effective until a postconviction testing bill (SB 1342) became law — see section on postconviction testing above. Connecticut (PA 00-80) has extended the statute of limitations to 20 years for sexual assaults for which a DNA profile of the perpetrator is obtained from the evidence. Colorado has enacted legislation (HB 1216) that permits indictment of an unnamed offender on the basis of the person’s DNA profile. Delaware (SB 329) has extended the statute of limitations to 10 years for crimes where the prosecution is based on DNA evidence. Minnesota (HB 2688) has eliminated the statute of limitations for certain sex crimes where there is physical evidence that can be tested for DNA.

**Expungement of DNA Records.** Current federal law relating to CODIS does not contain specific provisions providing for (1) the removal of the DNA profiles of a convicted person if the conviction is overturned or (2) the destruction of blood or other DNA samples taken from a convicted person in such a case, or (3) removal of profiles, taken from crime scene evidence, of persons who are not suspects. State laws vary in their provisions with respect to such expungement.<sup>37</sup> Several of the bills discussed in this report addressed situation (1); they contained provisions for removing DNA identification records and analyses in the event of an overturned conviction or related event (H.R. 2810, H.R. 3375, H.R. 4205, H.R. 4640, H.R. 5000, S. 254,<sup>38</sup> S. 899, S. 903, and S. 3130). Supporters of expungement provisions argue that they are necessary for protection of the individual rights and privacy of innocent persons.<sup>39</sup> Opponents argue that DNA records should not be treated differently than fingerprints, which are normally not subject to expungement, and that existing safeguards make expungement unnecessary to protect privacy and prevent misuse.<sup>40</sup> P.L. 106-546 provides for expungement of records if a conviction is overturned.

## Legislation

*The following laws, enacted in the 106<sup>th</sup> Congress, contain provisions relating to DNA evidence:*

**P.L. 106-113.** Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2000. Designated \$30 million for state and local DNA laboratories, under programs authorized by the Crime Identification Technology Act of 1998 (P.L. 105-521). DOJ allocated half of that funding to address backlogs. Signed into law, November 29, 1999.

**P.L. 106-553.** Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001. Designated \$30 million for state and local DNA laboratories, under programs authorized by the Crime Identification Technology Act of 1998 (P.L. 105-521), to be used for backlog elimination and laboratory improvement. Signed into law, December 21, 2000.

**P.L. 106-546.** DNA Analysis Backlog Elimination Act of 2000 (H.R. 4640 — McCollum). Provides \$170 million over four years to assist states in analyzing convicted-offender and casework samples. Expands CODIS to include criminal offenses committed under Federal law, UCMJ, and DC Code. Requires establishment of qualifying offenses, to include kidnapping, offenses relating to homicide or to peonage or slavery, certain sexual offenses, robbery or burglary, certain offenses

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<sup>37</sup>Michelle Hibbert, “DNA Databanks: Law Enforcement’s Greatest Surveillance Tool?” *Wake Forest Law Review* 34 (1999): 808–812.

<sup>38</sup>Expungement provisions in S. 254 apply only to juveniles.

<sup>39</sup>Hibbert, “DNA Databanks,” 812, 816–817.

<sup>40</sup>Boyd, *Statement*; Raben, letter in H.Rept. 106-900, 38.

committed on American Indian Lands, and attempts or conspiracy to commit covered offenses; authorizes collection of samples from those convicted. Specifies privacy protections, adherence to quality-assurance standards, and expungement of records if conviction is overturned. Indicates sense of Congress that states should provide for postconviction DNA testing and competent defense counsel in capital cases. Introduced June 12, 2000; referred to Committees on the Judiciary and Armed Services. Ordered reported, with amendments, by Judiciary, July 26. See H.Rept. 106-900, Part I. Discharged by Armed Services, September 26. Passed House, amended, October 2. Passed Senate, amended, December 6. House agreed to Senate amendment, December 7. Signed by President, December 19, 2000.

*The following bills, introduced in the 106<sup>th</sup> Congress, were not enacted (except H.R. 4205, from which provisions relating to DNA evidence were deleted before enactment).*

**H.R. 357 (Conyers).** Violence Against Women Act of 1999. Required anyone convicted by court-martial of a sexual offense to provide a DNA sample for inclusion in CODIS. Contained other measures to help prevent violence against women. Introduced January 19, 1999; referred to the Committees on the Judiciary, Education and the Workforce, Ways and Means, Commerce, Banking and Financial Services, Armed Services, and Government Reform.

**H.R. 1501 (McCollum).** Consequences for Juvenile Offenders Act of 1999. See S. 254. Introduced April 21, 1999; reported by Crime Subcommittee of Committee on the Judiciary, April 22. Passed House, amended, June 17, 1999. Senate amended, passed, and appointed conferees, July 28, 1999. House appointed conferees, July 30, 1999.

**H.R. 2340 (Bishop)/S. 1196 (Coverdell).** National Forensic Sciences Improvement Act of 1999. Provided \$768 million over 5 years for Forensic Sciences Improvement Grants, which are formula grants to states to improve their forensic science services. S. 1196 introduced June 9, 1999, H.R. 2340 introduced June 24, 1999; referred to Committee on the Judiciary.

**H.R. 2810 (Kennedy).** Violent Offender DNA Identification Act of 1999. Required voluntary plan, and provided \$30 million over two years, to assist state and local forensic laboratories to eliminate convicted-offender backlog. Expanded CODIS to include criminal offenses committed under Federal law, Uniform Code of Military Justice (UCMJ), and District of Columbia (DC) Code. Required establishment of qualifying criminal offenses, to include serious violent felony or burglary; authorized collection of samples from those convicted. Specified privacy protections and adherence to quality-assurance standards. Introduced June 8, 1999; referred to Committees on the Judiciary and Armed Services. Hearings held by Judiciary Subcommittee on Crime, March 23, 2000.

**H.R. 3087 (Weiner).** DNA Backlog Elimination Act. Required voluntary plan, and provided \$60 million over two years, to assist state and local forensic laboratories to eliminate convicted-offender and casework backlogs. Specified privacy protections and adherence to quality-assurance standards. Introduced October 14, 1999; referred



to Committee on the Judiciary. Hearings held by Judiciary Subcommittee on Crime, March 23, 2000.

**H.R. 3144 (Weiner)/S. 1760 (Biden).** Providing Reliable Officers, Technology, Education, Community Prosecutors, and Training In Our Neighborhoods Act of 1999 or PROTECTION Act. Authorized use of COPS grants for, among other purposes, enhancing law enforcement access to new technologies, including developing and improving state and local DNA-analysis capabilities. S. 1760 introduced October 21, 1999, H.R. 3144 introduced October 25, 1999; referred to Committee on the Judiciary.

**H.R. 3233 (Jackson)/S. 1700 (Durbin).** Right to Use Technology in the Hunt for Truth Act or TRUTH Act. Amended federal criminal procedure to allow a court, on a motion by defendant, to order DNA testing of evidence secured in relation to trial but not tested because the technology was not available. Required defendant to present prima facie case that identity was an issue at trial and that the evidence was subject to a sufficient chain of custody. Directed court to allow testing if it determined that results had potential to produce evidence materially relevant to defendant's assertion of innocence, and that testing requested employed a scientific method generally accepted within relevant scientific community. S. 1700 introduced October 6, 1999, H.R. 3233 introduced November 5, 1999; referred to Committee on the Judiciary.

**H.R. 3375 (Gilman).** Convicted Offender DNA Index System Support Act. Required plan, and provided \$79 million over two years, to assist state and local forensic laboratories to eliminate convicted-offender and casework backlogs. Gave preference to states that had developed programs for analyzing samples from cases with no suspects. Required that analysis of convicted-offender samples be performed by private laboratories. Expanded CODIS to include information from relatives of missing persons and to criminal offenses and acts of juvenile delinquency committed under Federal law, UCMJ, and DC Code. Required establishment of qualifying offenses, to include crimes of violence and equivalent juvenile offenses; authorized collection of samples from those convicted. Specified privacy protections and adherence to quality-assurance standards. Introduced November 16, 1999; referred to Committees on the Judiciary and Armed Services. Hearings held by Judiciary Subcommittee on Crime, March 23, 2000.

**H.R. 4078 (Hastings)/H.R. 4167 (Delahunt)/S. 2690 (Leahy).** Innocence Protection Act of 2000. Amended federal judicial code to permit a person convicted in a federal court to apply at any time for DNA testing of evidence related to the investigation or prosecution, in the possession of the government, and either was not tested or could be retested with new technology that will likely provide more accurate and probative results. Directed court to order testing if it determines that results may produce exculpatory evidence relevant to applicant's claim of wrongful conviction or sentencing. Required preservation of relevant biological evidence while person was incarcerated, with exceptions. Provided for government funding of testing and counsel for indigent applicants. Established posttesting procedures. Required states, to be eligible for DNA Identification or Byrne grants, to provide for postconviction testing, evidence preservation, and competent legal services for indigent persons in capital cases; and prohibited denial by a state of request for postconviction testing, if

criteria were met. Provided for compensation for wrongfully convicted persons. Specified privacy protections and adherence to quality-assurance standards. H.R. 4078 introduced March 23, 2000, H.R. 4167 introduced April 4; referred to Committee on the Judiciary. Hearings held by Judiciary Subcommittee on Crime, June 20. S. 2690 introduced June 7, 2000; referred to Committee on the Judiciary (see also S. 2073, introduced February 10, 2000).

**H.R. 4162 (Jackson).** Accuracy in Judicial Administration Act of 2000. Established moratorium on executions and directed Attorney General to prescribe standards to provide overwhelming confidence that innocent parties would not suffer death penalty, including procedures to assure that a person convicted of capital offense had opportunity to produce exculpatory DNA or similar evidence not available at time of trial. Moratorium would have ended on the later of seven years after enactment or establishment of approved standards and procedures. Introduced April 14, 2000; referred to Committee on the Judiciary (see also H.R. 3623, introduced March 27, 2000).

**H.R. 4205 (Spence).** Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001. Authorized appropriations for FY 2001 for defense activities of Departments of Defense and Energy, and other purposes. House version expanded CODIS to include offenses committed under UCMJ that were equivalent to serious violent felonies and authorizes collection of DNA samples from offenders. Senate version and enacted bill (H.R. 5408, P.L. 106-398) did not include that provision. Introduced April 6, 2000; referred to Committee on Armed Services; reported with amendments, May 12; passed House May 18. Passed Senate July 13, with amendments, and conferees appointed. House appointed conferees, July 27. Conference report (H.Rept. 106-945) including the substitute (H.R. 5408) approved by House on October 11 and Senate October 12. Signed by President October 30, 2000.

**H.R. 4403 (Boehlert).** Law Enforcement Science and Technology Act of 2000. Would have established, within Office of Justice Programs of DOJ, an Office of Science and Technology, to carry out programs to improve safety, effectiveness, and access to law-enforcement technology, including DNA; replaced office of same name currently within National Institute of Justice. Provided \$1 billion over five years for office and programs. Introduced May 9, 2000; referred to Committee on the Judiciary.

**H.R. 4980 (Sensenbrenner).** Scientific Certainty in Sentencing Act of 2000. Would have amended federal criminal procedure to allow a court, on a motion by a defendant, to order DNA testing of evidence that was secured in relation to an investigation or prosecution resulting in conviction but was not tested because the technology was not available. Directed the court to order testing if, assuming a favorable result, no reasonable finder of fact would have found the applicant guilty at trial, or there would have been a mandatory reduction in the sentence. Required preservation of relevant biological evidence while the person was incarcerated, with exceptions. Introduced July 26, 2000; referred to Committee on the Judiciary.

**H.R. 5000 (McCollum).** Criminal Justice Integrity and Law Enforcement Assistance Act. Provided \$170 million over four years to assist states in analyzing

convicted-offender and casework samples. Expanded CODIS to include criminal offenses committed under Federal law, UCMJ, and DC Code. Required establishment of qualifying offenses, to include kidnapping, offenses relating to homicide, certain sexual offenses, burglary, or attempts or conspiracy to commit such offenses; authorized collection of samples from those convicted. Specified privacy protections and adherence to quality-assurance standards. Amended federal criminal procedure to allow a court, on motion by defendant during the 30 months after enactment, to order DNA testing of evidence secured in relation to investigation or prosecution resulting in conviction but not subject to testing requested. Required defendant to assert innocence, under penalty of perjury; identify evidence to be tested and theory of defense not inconsistent with those previously asserted; and present prima facie case that identity was an issue in trial and that evidence, if exculpatory, would establish innocence or result in reduction in sentence. Directed court to order testing, with exceptions, if it determined that defendant met requirements, evidence was subject to sufficient chain of custody, and motion was timely and was made to demonstrate actual innocence. Required preservation of relevant biological evidence. Provided for government funding of testing for indigent applicants. Established posttesting procedures. Introduced July 27, 2000; referred to Committees on the Judiciary and Armed Services.

**S. 9 (Daschle).** Safe Schools, Safe Streets, and Secure Borders Act of 1999. Criminal justice bill that included extension of authorization of DNA Identification Grants through FY 2002. Introduced January 19, 1999; referred to the Committee on the Judiciary.

**S. 254 (Hatch).** Violent and Repeat Juvenile Offender Accountability and Rehabilitation Act of 1999. Juvenile justice bill that included provisions requiring voluntary plan, and providing \$30 million over two years, to assist state and local forensic laboratories to eliminate convicted-offender backlog. Expanded CODIS to include criminal offenses and acts of juvenile delinquency committed under Federal law, UCMJ, and the DC Code. Required establishment of qualifying offenses, to include crimes of violence and equivalent juvenile offenses; authorizes collection of samples from those convicted. Specified privacy protections and adherence to quality-assurance standards. Introduced January 20, 1999. Passed Senate, amended, May 20, 1999. Received in House, May 26. Returned to the Senate pursuant to the provisions of H.Res. 249, July 16, 1999.

**S. 899 (Hatch).** 21st Century Justice Act of 1999. Omnibus crime bill containing provisions relating to DNA evidence similar to those in S. 254. Introduced April 28, 1999; referred to Committee on Judiciary.

**S. 903 (Kohl).** Violent Offender DNA Identification Act of 1999. Required voluntary plan, and provided \$30 million over two years, to assist state and local forensic laboratories to eliminate convicted-offender backlog. Expanded CODIS to include criminal offenses and acts of juvenile delinquency committed under Federal law, UCMJ, and the DC Code. Required establishment of qualifying criminal offenses, to include crimes of violence and equivalent juvenile offenses; authorized collection of samples from those convicted. Specified privacy protections and adherence to quality-assurance standards. Introduced April 28, 1999; referred to Committee on the Judiciary.

**S. 2463 (Feingold).** National Death Penalty Moratorium Act of 2000. Would have instituted moratorium on imposition of death penalty at federal and state levels until a national commission studied its use, and Congress considered findings. Among issues to be studied were procedures to ensure that persons sentenced to death have access to potentially exonerating forensic evidence, including DNA testing. Introduced April 26, 2000; referred to Committee on the Judiciary.

**S. 2783 (Leahy).** 21st Century Law Enforcement and Public Safety Act. Omnibus crime bill. Expanded CODIS to include information from relatives of missing persons and to criminal offenses and acts of juvenile delinquency committed under Federal law, the UCMJ, and DC Code. Authorized use of COPS grants for, among other purposes, enhancing law enforcement access to new technologies, including developing and improving state and local DNA-analysis capabilities. Introduced June 26, 2000; referred to Committee on the Judiciary.

**S. 2859 (Schumer).** DNA Testing Availability Act. Required plan, and provided \$100 million over four years, to assist state and local forensic laboratories to eliminate casework backlogs of unsolved crimes. Specified privacy protections and adherence to quality-assurance standards. Amended federal judicial code to permit a person convicted in a federal court to apply at any time for DNA testing of evidence related to the prosecution leading to conviction and in possession or control of government. Directed court to order testing if it determined that results, if exculpatory, would not have led to prosecution of conviction and would likely have provided more accurate and probative results relevant to applicant's claim of wrongfully conviction or sentencing; evidence was in testable condition and was not tested in the way requested; and request was made to demonstrate actual innocence. Court could also order discretionary testing if it might reasonably lead to more favorable outcome for requestor. Provided for government funding of testing and counsel for indigent applicants. Required preservation of relevant biological evidence while person is incarcerated, with exceptions. Established posttesting procedures. Required states, to be eligible for DNA Identification or Byrne grants, to provide for postconviction testing and evidence preservation. Introduced July 13, 2000; referred to Committee on the Judiciary.

**S. 3130 (Hatch).** Criminal Justice Integrity and Law Enforcement Assistance Act. Required plan, and provided \$120 million over two years, to assist state and local forensic laboratories to eliminate convicted-offender and casework backlogs. Required that analysis of convicted-offender samples be performed by private laboratories. Expanded CODIS to include information from relatives of missing persons and to criminal offenses and acts of juvenile delinquency committed under Federal law, UCMJ, and DC Code. Required establishment of qualifying offenses, to include felonies and equivalent juvenile offenses; authorized collection of samples from those convicted. Specified privacy protections and adherence to quality-assurance standards. Would have amended federal criminal procedure to allow a court, on motion by defendant during the 30 months after enactment, to order DNA testing of evidence secured in relation to investigation or prosecution resulting in conviction but not subject to testing requested. Required defendant to assert innocence, under penalty of perjury; identify evidence to be tested and theory of defense not inconsistent with those previously asserted; and present prima facie case that identity was an issue in trial and that evidence, if exculpatory, would establish

innocence or result in reduction in sentence. Directed court to order testing, with exceptions, if it determined that defendant met requirements, evidence was subject to sufficient chain of custody, and motion was timely and was made to demonstrate actual innocence. Required preservation of relevant biological evidence. Provided for government funding of testing and counsel for indigent applicants. Established posttesting procedures. Introduced September 28, 2000; referred to Committee on the Judiciary.

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