

Testimony of
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United States Senate Committee on the Judiciary
Oversight of the Justice for All Act: Has the Justice Department Effectively Administered the
Bloodsworth and Coverdell DNA Grant Programs?

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Peter M. Marone
Chairman
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Mr. Chairman and Members of the Committee:

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

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

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

Unfortunately, this increase in backlog and caseload has not been accompanied by a commensurate increase in funding for our labs. It is difficult to obtain funding to cover both the

large numbers of new cases that are being presented to our labs daily and the backlog of cases from the past that require a timely review. While the crime labs clearly understand and concur that some cases from the past need to be reviewed promptly, to address both issues is both time consuming, costly, and logistically problematic.

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

One of the issues I wish to address is the requirements established in order for a laboratory to receive federal funds to conduct post-conviction testing, specifically what is being discussed here today, the Bloodsworth Amendment in the Justice for All Act.

Please bear in mind that the time permitted to respond to these solicitations from the Department of Justice has been just four weeks. Unfortunately, the solicitation requirements were not available to any of the laboratories prior to the solicitation announcement; therefore four weeks meant four weeks. Further, Compliance with these requirements has required implementation of new legislation or at least an amendment of existing statutes at the State level. The State of Virginia was able to comply with this because it had statutes in place already, which I have submitted for the record. We were confident that this provision met the solicitation and were frustrated when advised that we did not meet the requirement to obtain this funding. If we had had this funding in the timeline we had anticipated, it would be a significant help in completing the project. Ironically, Mr. Chairman, my State has been criticized by some in the State for not processing these cases more expeditiously.

The other issue I wish to address is Oversight Boards for forensic laboratories. Many laboratories, if asked, will state that their oversight is provided by the accrediting body under which they operate. Some people would say that this is the fox guarding the hen house and there is something inherently wrong with this process. However every other oversight board, whether it be commercial, medical, legislative or the legal has oversight bodies which are comprised of the practitioners in that profession. It makes sense that the most knowledgeable about a particular topic would come from that discipline. But that does not seem to meet the current needs. The key to appropriate and proper oversight is to have individuals representing the stakeholders, but that these individuals must be there for the right reason, to provide the best possible scientific analysis. There cannot be any room for preconceived positions and agenda driven positions. Unfortunately, we have seen this occur in some States. As a result, many States have taken it upon themselves to create their own commissions. Unfortunately, this means that no two States are following the same criteria.

The Virginia Department of Forensic Science has both a Scientific Advisory Board and a Forensic Science Board. These entities are created by statute with members appointed by the Governor.

The Forensic Science Board is created (under §9.1-1109) as a policy board which is charged with the adjudication of violations of policies or regulations, reviewing and commenting on the budget, adopting regulations, monitoring the activities of the Department of Forensic Science and its effectiveness in implementing standards and goals of the Forensic Science Board. In addition, they approve all applications for grants.

The Scientific Advisory Committee is created (under §9.1-1113) as an advisory board which provides advice and comment to the Forensic Science Board, the Department and the public. In addition, it is the formal liaison between the Department of Forensic Science and the public. Further duties of the Scientific Advisory Committee include reviewing new scientific programs, reviewing analytical work, reports and conclusions of scientists, and providing the Forensic Science Board a review process for allegations of misidentification or other testing errors.

These two entities are comprised of persons that are appointed by the Governor and include scientists from all over the United States as well as stakeholders within the Commonwealth. Of note we are also aware of several other States that are in the process of establishing these Boards: such as California and Missouri. If the Committee would like we can gladly provide the information from these other States.

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

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

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

SEC. 413. INCENTIVE GRANTS TO STATES TO ENSURE CONSIDERATION OF CLAIMS OF ACTUAL INNOCENCE.

For each of fiscal years 2005 through 2009, all funds appropriated to carry out sections 303, 305, 308, and 412 shall be reserved for grants to eligible entities that--

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

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

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

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

19.2-327.1 under the Code of Virginia allows for Scientific Analysis of Newly Discovered or Untested Evidence requirements are that the petitioner (defendant) must show:

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

(ii) under a State statute enacted after the date of enactment of this Act, or under a State rule, regulation, or practice, to persons under a sentence of imprisonment or death for a State felony offense, in a manner comparable to section 3600(a) of title 18, United States Code (provided that the State statute, rule, regulation, or practice may make post-conviction DNA testing available in cases in which such testing is not required by such section), and if the results of such testing exclude the applicant, permits the applicant to apply for post-conviction relief, notwithstanding any provision of law that would otherwise bar such application as untimely; and

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

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

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

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

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

under a State statute or a State or local rule, regulation, or practice, enacted or adopted before the date of enactment of this Act (or extended or renewed after such date), in a manner that ensures

that reasonable measures are taken by all jurisdictions within the State to preserve such evidence;
or

The Virginia Department of Forensic Science continually trains law enforcement regarding evidence handling and preservation. In addition the Department of Forensic Science has issues standards and guidelines for the preservation of human biological evidence.

This has been a practice of the Department of Forensic Science prior to the Justice for All Act and acts to ensure that reasonable measures are taken by all jurisdictions in Virginia to preserve evidence.

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

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

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

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

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

(1) a sexual assault forensic examination kit; or

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

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

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

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

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

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

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

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

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