Testimony of

Peter Neufeld

January 23, 2008

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ON BEHALF OF
THE INNOCENCE PROJECT

BEFORE THE
SENATE JUDICIARY COMMITTEE
UNITED STATES SENATE

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REGARDING

"OVERSIGHT OF THE JUSTICE FOR ALL ACT:
HAS THE JUSTICE DEPARTMENT
EFFECTIVELY ADMINISTERED THE BLOODSWORTH AND COVERDELL GRANT PROGRAMS?"

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

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

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

Post-conviction DNA testing does not merely exonerate the innocent, it can also solve crimes and lead to the incarceration of very dangerous criminals. In case after case, DNA testing that exculpates a wrongfully convicted individual also inculpates the real criminal."1

The Justice for All Act is the most significant step we have taken in many years to improve the quality of justice in this country. The reforms it enacts will create a fairer system of justice, where the problems that have sent innocent people to death row are less likely to occur, where the American people can be more certain that violent criminals are caught and convicted instead of the innocent people who have been wrongly put behind bars for their crimes, and where victims and their families can be more certain of the accuracy, and finality, of the results.2

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

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

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

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

-Section 412, which was crafted in response to the difficulties and costs confronting state inmates who wished to prove their innocence through DNA testing. Just as Congress had established a reasonable procedure for federal prisoners to obtain post conviction DNA testing, it was hoped that the Kirk Bloodsworth Post-Conviction DNA Testing Program would provide sufficient funds to pay for and encourage the states to implement their own post conviction DNA testing program. But in contrast to Coverdell monies that were handed out to all fifty states without any real executive branch scrutiny, OJP created so many barriers to potential grantees for Bloodsworth fund money that only three applied and all three were rejected.

-Section 413, which was enacted to provide an incentive to the states in order to advance two crucial innocence practices: post-conviction DNA testing and the preservation of biological evidence. Just as Congress enacted a DNA access program for federal prisoners, it also passed a critically important preservation of biological evidence statute for federal crimes. You can't

conduct testing to prove innocence if the evidence has not been preserved. Nor can a detective use DNA to re-open a cold case if the evidence is destroyed. Thus the Incentive Grants to States to Ensure Consideration of Claims of Actual Innocence was established to provide four pools of funding to the states to encourage them to create schemes for post-conviction DNA testing and the preservation of evidence. The four JFAA grant programs covered by Section 413 include JFAA Sections:

o 303, DNA Training and Education for Law Enforcement, Correctional Personnel, and Court Officers;

o Section 305, DNA Research and Development;

o Section 308, DNA Identification of Missing Persons; and

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

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

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

II. Executive Subversion of Congressional Intent Regarding Justice for All Act Sections 412 and 413

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

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

provided to those applicants for OJP's rejection. While the Bloodsworth grant program was funded by Congress for 2007, no RFP for 2007 was ever issued.

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

A. OJP Stringently Applied JFAA Section 413 Requirements to Bloodsworth Program, Preventing Innocence Protection Fund Disbursement Interestingly - and in stark contrast to the extremely lax OJP enforcement of Congressional intent of JFAA Section 311(b) innocence protections under the Coverdell grant program (described in detail below) - OJP interpreted its Congressional mandate for the Bloodsworth program so rigidly that only three jurisdictions attempted to apply.

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

The reason that States did not apply for this much-needed federal DNA support - and OJP's potential3 justification for denying all funding for Bloodsworth applicants - seems likely to stem from the extraordinary hurdle that OJP set for applicants regarding how they were to "demonstrate" that they met the preservation of biological evidence requirements as presented in the RFP.

The OJP demonstration requirement, when closely scrutinized, seems to have been misinterpreted, or exceedingly severely interpreted, in a manner that thwarted disbursement of any Bloodsworth funds to date.
The reasons leading to this conclusion are that:

-OJP interpreted JFAA Section 413 applicant eligibility requirements exceedingly stringently, particularly:

o in comparison to OJP's exceedingly lax interpretation of JFAA Section 311(b) innocence protection requirements, and

o when specific Section 413, upon plain reading, should be interpreted as demanding less strenuous proof than Section 311(b);

- Congress did not specifically require a role in grant application by the State Attorney General or chief legal officer in order to demonstrate compliance with the Section 413 provisions, as it had for other program where same is required; and

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

These reasons are explained in greater detail below.

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

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

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

Specifically, the JFAA requires Coverdell applicants were to "certify" their compliance, whereas it requires Bloodsworth applicants to "demonstrate" their compliance. Whereas the former requirement calls for higher applicant accountability than the latter, OJP administered the two programs as if the opposite were true. This transposition of meanings as applied to these two important innocence protection components of the JFAA strongly suggests that OJP intended to undercut the reach of those innocence protections under the Bloodsworth program.

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

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

Congressional "Demonstrate" Requirement Extraordinarily Applied by OJP JFAA Section 413, in relevant part, requires that "For each of fiscal years 2005 through 2009, all funds appropriated to carry out sections 303, 305, 308, and 412 shall be reserved for grants to eligible entities that... (2) demonstrate that the State in which the eligible entity operates (preserve biological evidence and provide access to post-conviction DNA testing)."4
OJP went further than Congress in its 2006 Bloodsworth program RFP, requiring the following: "To demonstrate that the State satisfies these requirements, an application must include formal legal opinions (with supporting materials) issued by the chief legal officer of the State (typically the Attorney General), as described below. All opinions must be personally signed by the Attorney General."5

The plain language of the JFAA states that "eligible entities" demonstrate their compliance with the JFAA Section 413 innocence protections; yet OJP requires that the State Attorney General (or

other chief legal officer) demonstrate this fact. OJP's is clearly a more demanding application of the requirement than Congress sought.

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

On this question one must consider the only other recent OJP grant program identified by the Innocence Project that requires such verification from a similarly high-placed State legal officer: the Office on Violence Against Women FY 2008 Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program.6 Notably, this program requires that certification of compliance with the laws specified by Congress come from such officials, yet the requirement that such officer provide the certification is specified within the statute authorizing that grant program.7 Neither JFAA Sections 413 nor 412 specify the participation of these legal officers, and certainly not "certification" from any party.

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

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

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

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

One could readily understand that of all people, States Attorneys General or chief legal officers might not be particularly interested in efforts to prove (additional) wrongful convictions in their states (as doing so would obviously prove error by the state, and could likely expose the state to liability for such wrongful convictions).

Particularly when one considers that OJP required the personal signature of that Attorney General or chief legal officer on a legal memorandum (as opposed to a simple narrative submitted by the applicant, which is the case for other OJP grant programs where

"demonstration" is required9), one can understand that this requirement might have presented for some an insurmountable obstacle to successfully submitting an application. It is impossible to know whether this did in fact occur, or if the requirement itself simply chilled a potential applicant's assessment of the return on investment of pursuing a grant application.

But we submit this concern - particularly in light of the fact that such signatures may not have been legally necessary (see previous subsection) - for the Committee's consideration.

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

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

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

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

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

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

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

During drafting of the JFAA, lawmakers understood that given competing priorities and politics, the only way to be sure to induce states to mandate the proper preservation of biological evidence was through the power of the purse. That is why as originally drafted, this requirement

appropriately attached to many funding streams, as Congress appreciated that states would only act if large quantities of federal funding compelled them to prioritize the issue.

In the course of negotiations, however, the number of grant programs that expressly required proper evidence retention practices was reduced to four. As described above, three of those four programs were never funded, and while one was funded, no funds have ever been disbursed.

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

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

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

Innocence Claims Hinge on Preserved Evidence: Scott Fappiano

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

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

DNA in the late 1980's was limited, and although Lifecodes found semen to be present on the available evidence, they could not produce a conclusive result. In 1998, more advanced DNA testing methods had developed and the Innocence Project embarked upon a search for the original crime scene evidence. The DA's office fully cooperated with a search of its storage areas, but none of the original exhibits could be located. A similar search of NYPD storage facilities yielded nothing.

After a long and uncertain search, the Innocence Project ultimately contacted Orchid Cellmark, a private DNA laboratory in Texas which had, after a series of mergers, taken over the Lifecodes lab. Remarkably, in August of 2005, two test tubes containing biological samples from the crime scene were located. DNA testing of those extracts, using more progressive DNA testing methods, excluded Mr. Fappiano.

He was freed from prison in October of 2006 - 21 years after his wrongful conviction, and 8 years after the post-conviction DNA testing could have been performed if the crime scene evidence had been properly preserved.

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

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

The nation's 212 DNA exonerees like Scott Fappiano are the lucky ones. The tortured are those wrongfully convicted persons for whom post-conviction DNA testing could prove their innocence, but for whom that evidence has been either lost or destroyed.

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

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

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

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

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

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

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

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

Recommended Congressional Action

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

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

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

III. Leaving the Public Unprotected: OJP Enforcement of Congressional Intent Regarding Innocence Protections Under the Paul Coverdell Forensic Science Improvement Grant Program

The JFAA program with the broadest reach and greatest direct potential for preventing wrongful convictions may well be Section 311(b) of the Justice for All Act. It requires that state and local

jurisdictions seeking Paul Coverdell Forensic Science Improvement Grant Program (Coverdell) funds certify that:

A government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount.10

The Innocence Project views the Congressional mandate under Section 311(b) as a crucial step toward ensuring the integrity of forensic evidence, because we know that lab errors, both inadvertent and calculated, contribute significantly to wrongful convictions. In fact, according to a recent study by University of Virginia professor Brandon Garrett, problems with forensic evidence such as blood evidence, a fingerprint match or a hair comparison contributed to 55 percent of the convictions of the first 200 DNA exonerees in the United States.11

Without the development of DNA testing, there would be no Innocence Project - and more than 200 factually innocent Americans would remain wrongfully convicted, 15 of whom had been on death row. With our use of this validated and unambiguous science, we have proven that wrongful convictions do in fact often result from unvalidated or unreliable forensics, or exaggerated expert testimony. Together, misapplication of forensics and misplaced reliance on unreliable or unvalidated methodologies are the second greatest contributors to wrongful convictions. Despite these demonstrated problems, independent and appropriately conducted investigations - which should be conducted when serious forensic negligence or misconduct may have transpired - have been exceedingly rare.

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

- Bypass internal politics that might otherwise impede the efficacy, disclosure - or even the simple performance - of such investigations,

- Identify the challenges faced by forensic entities and employees (as they are confronted with ever-increasing workloads) that may have led to problems alleged,

- Understand the steps necessary to ensure that such alleged negligence or misconduct will not re-occur, and

- Consider how other cases - past, present and future - may be connected to the same problems identified, as well as how to best address those cases. In the wake of allegations of serious forensic negligence or misconduct, independent and external investigations and reports are essential to consistent public faith in the integrity of forensic evidence - evidence that juries rely upon greatly when determining questions of innocence or guilt.

If that faith wanes, juries can question the veracity of evidence, and might acquit - even when that evidence otherwise would prove a defendant's guilt.
In other instances, juries have exhibited too much faith in flawed forensic evidence, which has resulted in numerous wrongful convictions. Such wrongful convictions mean that the real perpetrators eluded detection. In many of the 212 wrongful convictions proven by DNA evidence, those same real perpetrators have gone on to commit other crimes. Indeed, in the 77 exonerations in which real perpetrators have been identified, we have documented dozens of rapes and murders committed after the arrest of the wrong person and before the identification and apprehension of the real perpetrator.

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

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

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

Jimmy Ray Bromgard and Montana

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

At the request of the Innocence Project, a peer review committee of the nation's top hair examiners reviewed Melnikoff's testimony, issued a report concluding that his use of statistical evidence was junk science and urged Montana's Attorney General, which ran the lab, to set up an independent audit of Melnikoff's work in other cases. Two more Montana inmates were exonerated by DNA in two other criminal cases where Melnikoff had offered the same fabricated statistics he offered against Bromgard. Thus, in the first three cases in Montana in which an inmate secured post conviction DNA testing, the testing cleared the inmate and in all three cases, the state's lab director and "hair expert" most likely engaged in misconduct.

At the request of the prosecution, the FBI hair unit re-examined the hairs in the Bromgard case and concluded that Mr. Bromgard was - in direct contradiction of Melnikoff's findings - excluded as the source of the hairs. Even then, the Montana Attorney General stubbornly refused to order an external independent audit. Instead, he conducted his own internal review, employing a retired law enforcement officer who had relied on Melnikoff to make cases and at least one state crime

lab employee who had been trained by Melnikoff. His report concluded there was no reason to re-examine the evidence in Melnikoff's other cases.

Ultimately, it was revealed that before the state Attorney General had assumed that post, he had been a county prosecutor who had used Melnikoff as his expert witness in numerous cases that either he personally tried or supervised. The Coverdell mandate of external independent investigations was designed, in part, to overcome these types of situations in which key players in an investigation process have a conflict of interest.

Virginia and the Earl Washington Audit

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

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

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

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

In May 2005, ASCLD/LAB issued its report finding that numerous errors were made in the 1993 and 2000 DNA testing by the Virginia Bureau of Forensic Science. The independent external auditors specifically rejected the findings of the state's internal review and criticized the state's failure not to take appropriate remedial action, declaring:

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

ASCLD/LAB recommended extensive remedial action including sweeping reviews of other cases. None of this would have occurred but for the independent external audit.
Because of the initial wrongful prosecution and conviction of Washington, the state's investigation of the 1982 murder ceased prematurely, and the real perpetrator remained at liberty to commit at least one other violent rape.

Because of the failed laboratory work of the Virginia Division of Forensic Science, the victim's widower endured additional hardship and was denied emotional closure, needlessly, for several years. Following the ASCLD/LAB audit, the Special Prosecutor reinvestigated the case and indicted Kenneth Tinsley. Mr. Tinsley pled guilty in 2007 and received a life sentence.

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

B. OJP's Failure to Carry Out Congressional Intent

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

C. OJP Fails to Provide Applicants with Guidance

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

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

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

Although, in light of the serious questions raised, the NIJ could have amended its RFP - and provided grantees with guidance that could help them determine how they might comport with the external investigations requirement - it opted not to. The NIJ told the OIG that it would respond to specific questions by applicants on case-by-case bases - yet never did.

Instead, upon further prodding from the OIG, it sent all grant applicants a memo that sketched three government entities and attendant processes that it deemed to be in keeping with the spirit of the JFAA, five that did not, and - while expressly stating that it was up to the applicant, rather than OJP, to determine whether the applicant complied with the JFAA12 - required that all applicants recertify their compliance with Coverdell program requirements after reviewing the memo. (The memo is attached as EXHIBIT B.)

OJP ultimately approved every applicant that recertified - seemingly without reference to whether each applicant adhered to the memo. That approach continued into the next funding cycle, as the NIJ funded every FY06 application that included a signed certification,13 despite what seem to be shortcomings on this count on many 2006 applications. (The Innocence Project currently is reviewing FY07 applications.)

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

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

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

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

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

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

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

Case Example 1: Santa Clara County Internal Affairs Investigation

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

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

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

relied on errant analysis to convict Mr. Rodriguez in the first place, and whether problems with fiber analysis may have tainted other cases the lab handled. Several months later, the DA's office published a report in response to the NCIP's allegation. That report focused not on providing an objective analysis of Mr. Moriyama's forensic work seeking to understand if a problem occurred,

and if so why and what remedial measures might be appropriate, but instead defended the propriety of Mr. Rodriguez's conviction and the role of Mr. Moriyama's testimony therein.

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

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

Internal affairs divisions can be compromised by conflicts of interest that undermine their objectivity when they must report their results to the public. It is one thing for an entity's internal management to determine how to conduct itself based on its own internal reviews, but yet another thing to provide the public with assurances of quality when there is potential fiscal liability and political embarrassment at stake for the government official to whom both the investigated and investigator ultimately report.

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

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

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

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

when none was present. As a result of the internal review, Mansour was suspended and eventually left the NYPD.

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

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

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

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

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

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

recipients, themselves, to see how they would establish the appropriate investigative entities and processes.

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

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

F. Other Problems with Coverdell Grant Administration

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

i. Too Few Coverdell Investigations

Nationally, the adoption and utilization of the external investigatory Coverdell requirements has been glacial. In New York, where two Innocence Project co-directors sit on the New York Commission of Forensic Science -- established more than 10 years ago to oversee the state's forensic laboratories -- four Coverdell investigations already have unfolded. Clearly, the New York Commission has taken to heart the importance of Coverdell investigations. By comparison, we are aware of only six other Coverdell investigations requested nationally.14 It's inconceivable that outside of New York there have only been six instances of serious forensic negligence and misconduct nationwide in the past three years that deserve investigation. Common sense, experience, and tracking of news reports nationwide tell us the number of incidents deserving of such investigations must be far larger.

Even if a state has established a robust oversight process in connection with 311(b), most jurisdictions do not notify the employees and other staff of their laboratories about the right and ability to make allegations. Consequently, there have been dramatically fewer Coverdell allegations than we otherwise would expect. The typical Coverdell allegation has arisen after a media report - such as in a newspaper - that serious negligence or misconduct might have occurred at a lab. The media, in their watchdog role, have informed the public of concerns that

others have then brought to the attention of Coverdell oversight entities. But in this arrangement, it is likely that only a handful of the instances of serious negligence or misconduct ever see the light of day. Laboratory employees - those who witness laboratory activities on a daily basis and may be in best position to report on them - need to know that the Coverdell oversight entities are there for them to raise issues safely, as whistleblowers, outside their chains of command.

As such, state laboratories should inform their staff members of the Coverdell requirements. New York State took on such an effort via its Commission on Forensic Science, but other states must follow suit.15

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

ii. Certifications Signed Even without Functional Oversight Entities

The Innocence Project, in its canvassing of Coverdell funding recipients, determined that numerous grant recipients signed their Section 311(b) Coverdell certifications without first considering which entity would conduct such investigations, and what process the entity would use in those investigations. Several states admitted this openly to the Innocence Project, (yet still received federal monies that, ostensibly, should have been denied in the absence of a supportable certification.)16 Without a clear plan for Coverdell compliance, many states have been playing catch-up when they've been faced with allegations - if they receive allegations at all.

iii. Certifications Signed with Uninformed Oversight Entities

The Innocence Project's national canvassing also revealed the troubling fact that some oversight entities named in applications for Coverdell monies never were informed that they had been selected for oversight duties. 17 In Massachusetts, for example, in 2007 the New England Innocence Project filed an allegation with the state Inspector General's office because the state's Coverdell application indicated that the IG was the office fielding the state's Coverdell allegations. The IG, however, indicated that it never had been informed of this designation, which by definition meant it was unprepared to vet the allegation immediately upon its receipt. While the IG has endeavored to undertake the task responsibly, the IG, which has required time to get up to speed on the Coverdell 18 Similarly, the Innocence Project learned that the Inspector General in Illinois, named along with the Illinois State Police's internal investigatory arm to handle Coverdell allegations in Illinois, also had no notice of its designation.

iv. Subgrantees Avoid Scrutinty

In many states Coverdell grants are awarded to state offices that administer federal grants and then disburse monies to subgrantees. The Innocence Project has found that, although state recipient agencies signed certifications regarding external investigations, the actual recipients of the monies were not similarly pressed for documentation. As such, these agencies received

monies without certifying - thus circumventing the certification requirement. We should note that several states have taken it upon themselves to require their subgrantees to provide them with documentation concerning the entities they'd utilize in vetting a Coverdell allegation. But the standards across the country on this front are far from uniform and, in function, wholly voluntary. As a result of this disconnect, many jurisdictions are not truly prepared to provide the public confidence in forensic evidence envisioned by Congress.

In 20