Testimony of

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November 10, 2009

TESTIMONY OF KEITH A. FINDLEY,
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ON BEHALF OF
THE INNOCENCE NETWORK

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

November 10, 2009

REGARDING
THE IMPORTANCE OF THE BLOODSWORTH PROGRAM CONTAINED IN THE
JUSTICE FOR ALL ACT OF 2004

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On Behalf of the Innocence Network
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Chairman Leahy, Senator Specter, and other Members of the Committee, my name is Keith Findley and I am the President of The Innocence Network. I am here to testify with regard to the importance of the Kirk Bloodsworth Post-Conviction DNA Testing Assistance Program ("Bloodsworth Program"). Further, I will testify about the need for reauthorization and improvement of Sections 303, 305, 308 and 413 of the Innocence Protection Act (collectively, "DNA Initiatives") contained within the Justice For All Act of 2004 ("the JFAA"). Thank you for inviting me to testify before you today.

The Innocence Network is an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions. To date, 245 men and women have been exonerated by post-conviction DNA testing nationwide, and the 54 constituent organizations of the Innocence Network have either represented or assisted in the representation of each of these innocents.
My testimony today will provide:

I. A description of the significance of the Bloodsworth Program, including a brief overview of both the importance of post-conviction DNA testing and the Program;
II. Recommendations to enhance the value of the JFAA's DNA Initiatives as tools to preserve biological evidence, settle claims of innocence and solve crimes.

I. The Significance of the Bloodsworth Program

A. The Importance of Post-Conviction DNA Testing

Forensic DNA technology, simply put, changed the fabric of the criminal justice system. Before DNA, there were few surefire ways to assess claims of actual innocence. Now, DNA testing of crime scene evidence can provide the criminal justice system with significant and enduring proof of innocence or guilt, from the initial stages of an investigation to years after a conviction. Indeed, in the early days of the FBI DNA Laboratory, some 25 per cent of the DNA tests excluded suspects who had been identified by other types of evidence. Since 1989, at least 245 innocent people have been exonerated by post-conviction DNA testing after their wrongful convictions for serious crimes.

1. Post-Conviction DNA Testing Aids the Innocent.

While forensic DNA testing is itself only dispositive of guilt or innocence in a limited number of criminal cases, when it is dispositive, it can answer the question of innocence or guilt beyond dispute. And as the science progresses, the realm of cases in which DNA testing is dispositive is growing. A review of a list of items, produced by the National Institute of Justice ("NIJ"), where biological evidence can be found illustrates the variety of items that, today, can be successfully tested with improved technology: fingernail scrapings; skins cells in the hinge of eyeglasses; dandruff, saliva, hair, sweat and skin cells from hats, bandanas and masks; saliva cells on tape or ligatures; traces of blood on a bullet; traces of blood and/or hairs on, or in the crevices of, a variety of weapons used to inflict injury; or even blood and tissue cells swabbed from the bullet inside a gun, identifying the person who might have last loaded it. Post-conviction DNA testing statutes have begun to contemplate these technological advances and many now include provisions that permit additional testing in cases where previous testing using older testing methods could not produce conclusive results.

A Case Study in the Importance of Post-Conviction DNA Testing to the Innocent

Consider the following case of justice denied in the absence of a post-conviction DNA testing law. In March 1989, New Jerseyan Larry Peterson was convicted of sexual assault and murder. Although three men originally indicated to police that they were with Mr. Peterson at the time the murder took place, they later changed their accounts during interrogations and told law enforcement that Mr. Peterson confessed to them that he had indeed committed the crime. One forensic scientist testified at trial that her hair comparison analysis tied Mr. Peterson to the murder and another analyst with the New Jersey State Police testified that there was seminal fluid on the victim's jeans and sperm on her underwear. No seminal fluid or sperm was found in her rape kit. All tests on these items of evidence were inconclusive at the time of trial.

Mr. Peterson testified in his own defense at trial. Alibi witnesses supported his whereabouts during the time of the crime. Work records also showed that he did not work on the day that the victim was found - the day he supposedly confessed to the crime on his way to work. The jury convicted Mr. Peterson of felony murder and aggravated sexual assault in March 1989. He was sentenced to life plus twenty years in prison.

Although there was no post-conviction DNA testing law in New Jersey, Mr. Peterson first sought access to DNA testing in 1994 under the state's existing post-conviction review process. When

the Court finally heard his motion in 1998, it denied his petition. In 2000, the Appellate Division affirmed the denial of his petition for post-conviction relief, ruling that there was overwhelming evidence of guilt in his case. In March of 2001, the state supreme court denied his Petition for Certification.

Mr. Peterson was without hope until New Jersey passed a statute granting access to post-conviction DNA testing. The law became effective on July 7, 2002. On July 8, 2002, Larry Peterson became the first New Jerseyan to file a petition for post-conviction DNA testing under the new law and ultimately testing was granted, after the appeal of an initial denial.

In February 2005, the Serological Research Institute ("SERI") reported the results of testing: Mr. Peterson was excluded as a contributor of any and all of the biological evidence. Although the New Jersey State Police Laboratory had reported that there was no semen in the victim's rape kit, SERI identified sperm on her oral, vaginal, and anal swabs. Two different male profiles were found. One of the males was one of the victim's consensual partners, and his profile was also found on her underwear, jeans, and rape kit. The other unknown male was found on all of the swabs in her rape kit. Based on this evidence, Mr. Peterson's conviction was vacated in July 2005. On May 26, 2006, the prosecution decided to drop all charges against Mr. Peterson. Without the passage of New Jersey's post-conviction DNA testing law, Mr. Peterson would have spent the rest of his life in prison, but innocent.

2. Post-Conviction DNA Testing Reveals Systemic Potential for Error.

With the ability to transcend fallible human judgment, DNA testing - and particularly post-conviction DNA exonerations - have proven the potential for error that exists in our criminal justice system, that our appeals processes are not sufficient for identifying those errors, and perhaps most importantly, that there are consistent and widespread factors that mislead our criminal process that should be examined and remedied. In this regard, the importance of the DNA exonerations transcends the significant contributions that DNA makes to correcting injustices in individual cases. The DNA exonerations provide, for the first time in the history of the criminal justice system, a body of cases in which we know, with scientific certainty, that the criminal justice system erred. These exonerations therefore provide case studies in error that we can examine, to identify the features of our criminal justice system that lead to wrongful convictions, so that we can improve the system and effectuate reforms to prevent such errors in future cases, where there may not be DNA evidence to rely upon to catch the errors. In fact, DNA exonerations have identified seven common causes of wrongful convictions: eyewitness misidentification; unvalidated or improper forensic science; false confessions or admissions; government misconduct; informants or snitches; and bad defense lawyering. For instance, of the nation's first 225 DNA exonerations, 77 per cent were attributable to eyewitness misidentification, 52 per cent to unvalidated or improper forensic science, 23 per cent to false confessions or admissions and 16 per cent to informant or snitch testimony. , Understanding these causes of wrongful convictions allows for the improvement of the criminal justice system through targeted reforms.

Throughout the country, policy makers, judges, prosecutors, police and defense attorneys are beginning to learn the lessons from these cases, and are implementing reforms that simultaneously help guard against wrongful convictions of the innocent, while more reliably identifying and convicting the guilty. In many states, for example, these cases have led to reforms in the procedures police use to obtain eyewitness identification evidence, reforms that social science research shows can reduce the rate of eyewitness error--and thereby simultaneously protect the innocent and help convict the truly guilty. In literally hundreds of

jurisdictions across this country, police are beginning to electronically record their custodial interrogations, because DNA exonerations have shown that false confessions are a reality, and experience shows that electronic recording is one of the most effective methods of both guarding against coerced confessions and developing powerful evidence of guilt from valid confessions. Recently, especially in light of the new report issued this past February by the National Academy of Sciences that highlights extensive problems with forensic science evidence, and given the high rate at which forensic science errors have contributed to wrongful convictions, reform efforts are under way to improve the reliability and validity of forensic sciences. These calls for reform run the gamut from increasing research in and funding for forensic sciences, to mandatory accreditation and certification of crime laboratories and analysts, to ensuring that crime laboratories are independent of both parties in the criminal justice system. Each of these reforms, and many others like them, promises to enhance the ability of the criminal justice system to more accurately sort the innocent from the guilty, and in this sense, to benefit both prosecution and defense. And continued post-conviction DNA testing serves an important role in providing the impetus for such reform efforts.

3. Post-Conviction DNA Testing Assists Law Enforcement in Apprehending the Real Perpetrator.

In this regard, as Chairman Leahy aptly put it: "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." Put differently, innocence claims are simply another form of cold cases. In 105 of the nation's first 241 DNA exonerations, the process of settling these claims of innocence also resulted in the detection of the true perpetrator, in many cases through a "hit" to the CODIS database. After these 105 innocent men were wrongfully convicted, the true perpetrators, who were later discovered through DNA testing, went on to commit - and be convicted of - 19 murders, 56 rapes and 15 other violent crimes.

B. The JFAA and Bloodsworth Program

In 2004, Congress recognized DNA's potential, and passed, with bi-partisan support, the Innocence Protection Act contained in the JFAA. The JFAA established, for the first time, a number of federal statutory innocence protections and federal incentives to help states uncover wrongful convictions. Then-President George W. Bush noted in his 2005 State of the Union address: "In America we must make doubly sure no person is held to account for a crime he or she did not commit. So we are dramatically expanding the use of DNA evidence to prevent wrongful conviction."

The JFAA was intended to serve as an incentive to states to enable proper post-conviction DNA testing by rewarding states, through four federal-to-state funding programs related to DNA outlined in Section 413 of the JFAA, with proper polices and practices for the preservation of biological evidence and post-conviction DNA testing. Section 413, in relevant part, states

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

The four JFAA DNA Initiatives covered by Section 413 are the following JFAA Sections:
? 303, DNA Training and Education for Law Enforcement, Correctional Personnel, and Court Officers;
? 305, DNA Research and Development;
? 308, DNA Identification of Missing Persons; and
? 412, Kirk Bloodsworth Postconviction DNA Testing Grant Program.
That is to say, a bi-partisan Congress, in passing the JFAA, and - presumably - then-President Bush, in signing the JFAA into law, intended for those monies for the above-listed programs to be tied to the preservation of biological evidence and post-conviction DNA testing access requirements per Section 413.
Yet, despite the overwhelming support for this invaluable legislation, the JFAA's innocence protection incentivizing grant programs have not been fully effective in encouraging states to adopt DNA preservation and testing statutes because they were supplanted by an alternate set of grant programs in "The President's DNA Initiative." This initiative provided similar DNA-related grant funding to states, but without the JFAA's requirements that recipient states properly preserve biological evidence and provide access to post-conviction DNA testing. As a result, Congress's intent in passing the innocence protection programs under the JFAA was thwarted, and the JFAA's requirements were rendered toothless. This executive maneuvering was devastating to wrongfully convicted individuals for whom DNA testing was the only path to proving innocence, many of whom were clients of Innocence Network projects. It was also devastating to those of us who had hoped that the JFAA would enhance state and local systems of justice by fostering appropriate post-conviction DNA testing and by enabling jurisdictions to recognize and learn from wrongful convictions proven by post-conviction DNA testing.
In addition, in the first few years of the JFAA, no grants were issued for post-conviction DNA testing under the Bloodsworth Program. The first grants under that program were awarded in FY 2008, and then only to five states.
But all is not lost. In early 2009, the National Institute of Justice convened a "Post-Conviction DNA Case Management Symposium" that assembled stakeholders from all perspectives in the criminal justice system from virtually every state to examine the issue. That symposium fostered cooperation among diverse actors in the criminal justice system on issues related to post-conviction DNA preservation and testing. Further, in particular and of special import to the Innocence Network, the spirit of the Bloodsworth Program--to provide funds to enable states to process post-conviction claims of innocence that could be proven by DNA testing--was ultimately respected under the Office of Justice Program's more recent grant funding. As noted, in FY 2008, five states applied for and received Bloodsworth Program funds. In FY 2009, another nine will receive funding. Many Innocence Network members are either direct recipients of or are partners with state agencies that have received Bloodsworth funding.
C. The Value of the Bloodsworth Program
The Bloodsworth Program will prove integral to the work of many Innocence Network member organizations. The funding will dramatically improve the ability of Innocence Network members to meet the tremendous need for post-conviction DNA testing. Many of the projects funded under the Bloodsworth Program will enable projects in various states to proactively search for and identify non-negligent homicide and rape cases in which DNA testing can prove guilt or innocence, but which are otherwise overlooked or hidden. Examples of the projects funded under the Bloodsworth Program include:
1. Arizona

With the $1,386,699.00 that Arizona was awarded for FY 2008, the Arizona Justice Project, in conjunction with the Arizona Attorney General's Office, began the Post-Conviction DNA Testing Project. Together, they have canvassed the Arizona inmate population, reviewed cases, worked to locate evidence and filed joint requests with the court to have evidence released for DNA testing. With this much-needed assistance, the offices working in tandem have sent evidence from three cases to the crime lab for testing. Of those samples, two are in queue for testing and one confirmed test results obtained prior to trial. According to the Post-Conviction DNA Testing Project Manager, Lindsay Herf,

Although we have not yet uncovered DNA that proves a wrongful conviction, the project has already had amazing results. We have cultivated an environment in our state in which law enforcement seeks justice hand-in-hand with the state's innocence project. Our Attorney General, Director of the Criminal Justice Commission, President of the Prosecuting Attorneys Association, and crime lab directors all strongly support this effort to uncover the truth in an efficient and cooperative manner. We are not tying up courts to argue about whether to test certain pieces of evidence in a case. We meet with DNA experts and come to an agreement as to the most beneficial method of DNA analysis. We have alerted the state's law enforcement agencies to the need for better evidence retention practices. We have been given access to a population that the grant was intended to benefit, the prisoners. Each prisoner is personally invited to participate in the program if they have a claim of innocence. Even the prisoners have been cooperative. We have received requests for assistance from only about 8% of those who attend our sessions. We have not suffered from a flood of frivolous requests.

We believe our cooperative model is one worth replicating. In Arizona, law enforcement sees the value in DNA as a superior truth-telling device in criminal trials. Where biological evidence is left at the scene, DNA evidence more accurately identifies the source of the evidence than eye-witness identification, confessions, and other forensic sciences. We are grateful for the funding that has allowed us the means to one day be able to say that if there is another Kirk Bloodsworth in an Arizona prison, we found him, we tested the evidence, we released him, and we captured the true perpetrator.

2. California

California was awarded $2,500,000.00 for FY 2009. With these funds, according to Cookie Ridolfi, Director of the Northern California Innocence Project:

The California DNA Testing Assistance Program (CADNAP) will systematically identify and review forcible rape, murder, and non-negligent manslaughter convictions in cases where DNA testing might raise a reasonable probability that an innocent person was convicted.

By working in cooperation with the California Department of Correction (CDC), CADNAP will be identifying those prisoners who have been convicted of the relevant offenses and then contacting them with information about the program. The CDC will distribute information packets to the inmates, including a questionnaire and stamped, self-addressed envelope that an inmate can use to request consideration of a case. The project is receiving support and direction from the Northern California Innocence Project at Santa Clara University School of Law and the California Innocence Project at California Western School of Law.

3. Connecticut

Connecticut received $1,486,134.00 for FY 2009. The funding will be used in a collaborative effort by the Office of the State's Attorney and the State of Connecticut Forensic Science Laboratory to expedite the identification of relevant cases for testing and the exoneration of wrongfully convicted individuals. According to Karen A. Goodrow, Director of the Connecticut Innocence Project:

The funding offered through the Bloodsworth Grant is essential in order for states to obtain adequate resources to insure that innocent inmates, serving lengthy sentences for crime which they did not commit, have an opportunity to demonstrate their innocence through post-conviction DNA testing. The Bloodsworth Grant funding is particularly crucial to small projects such as [the Connecticut Innocence Project], which operate on relatively modest budgets. States with small projects and limited resources rely heavily on the availability of Bloodsworth funding...Moreover, the use of the Bloodsworth Grant in a collaborative manner provides a necessary tool for law enforcement to insure that the true perpetrators of crime are brought to justice.

A 2006 applicant for Bloodsworth funding, the Connecticut Innocence Project could have more expeditiously processed the claims of two wrongfully convicted prisoners, had it received such funding when it first applied.

4. Louisiana

Louisiana was awarded $1,376,206.00 under the Bloodsworth Program. The funds will be distributed to a number of Orleans Parish organizations including the Orleans Parish Clerk of Court, District Attorney's Office, New Orleans Police Department, Innocence Project New Orleans, and the New Orleans Police and Justice Foundation, each of which will have a role assisting in the project. The purpose of the project is to find every item of evidence relating to a homicide or rape case in the possession of the Orleans Parish Clerk of Court, determine the status of the case in which the evidence relates, screen the case documents and determine the likelihood of DNA testing being determinative of guilt or innocence. Finally, the project will perform evidence screening and testing in those cases where biological evidence exists, would be suitable for testing and would be determinative of the guilt or innocence of the person convicted. According to Emily Maw, Director of the Innocence Project New Orleans,

Funding for this project is so crucial because there is currently no complete inventory of the evidence that is stored at the Orleans Parish Courthouse - the busiest criminal courthouse in the State of Louisiana. The storm exacerbated the previously chaotic practices and so in addition to there being no inventory of the evidence stored there (that in some cases dates back to the 1940's and 1950's), there is still not definitive answer as to what evidence was destroyed by the flooding from Hurricane Katrina and what survived. Additionally, much evidence that did survive is un-identifiable until someone opens the evidence. While the office has been trying to computerize its evidence inventory moving forward, none of the pre-2008 evidence stored at the courthouse will ever be identified and inventoried without the Bloodsworth grant coming to Louisiana. At the end of this project, there will be for the first time, a complete, computerized inventory of the evidence in the possession of the Orleans Parish Clerk of Court's office. Additionally, while there have been [eight] non-DNA exonerations in Orleans Parish since 1990, and while Orleans Parish has the most rape and homicide convictions in the state, there have been no DNA exonerations from the parish because, for the most part, the evidence in rape and homicide cases from even relatively recent cases in Orleans Parish can never be found. This grant will change that and

enable us to do an effective audit of New Orleans's criminal convictions for the first time in history.

5. Maryland

Maryland received a grant of $284,871.00 for FY 2009. The funds will be disbursed by the Governor's Office of Crime Control and Prevention to the University of Baltimore. By way of background, the Maryland Office of the Public Defender created a small unit within that statewide system to handle cases of post-conviction claims of innocence in 2002. The unit was staffed by three attorneys and a paralegal until the spring of 2008 when budget cuts decimated the project, resulting in the elimination of all support staff and the transfer of two of the three attorneys. In the fall of this year, the Office of the Public Defender and the University of Baltimore Law School entered into a partnership in order to preserve the Maryland Innocence Project, which found itself with much work and little support.

Since its creation, the Maryland Project has won five new trials on the basis of post-conviction DNA testing, two of which resulted in exoneration. Further, two cases are currently pending before the Maryland Court of Appeals on the contention that the lower court erred in denying new trial based on the DNA testing results. The project has one case that is currently awaiting the court's decision on a motion for new trial. Two other cases are on remand from the Court of Appeals: one to enter an order for DNA testing and the other for reconsideration of the denial of the motion for DNA testing.

Essential to the very survival of the Maryland Project, the Bloodsworth funds will go to pay for the retention of one staff attorney and a paralegal, along with the costs of testing, investigators and related office expenses.

6. Minnesota

Through the Bloodsworth Program, the Minnesota Board of Public Defense, the Innocence Project of Minnesota, the Minnesota Bureau of Criminal Apprehension and the Hennepin County Attorney's Office were granted $859,527.00 for FY 2009. The monies will fund a joint task force of prosecutors, defense attorneys, investigators and staff from the Innocence Project of Minnesota to conduct a review of more than 13,000 violent-crime convictions to determine whether DNA testing is warranted. If it is, testing will be conducted. Where the testing indicates that a convicted person is innocent, the Innocence Project of Minnesota will commence the legal work to secure his or her release. If the testing determines that another person committed the crime, such information will be turned over to the appropriate law enforcement authorities.

"This partnership is the first statewide effort to perform systematic DNA testing," Ed Magarian, co-chair of the Innocence Project of Minnesota, and partner at Dorsey & Whitney noted.

It represents an unprecedented level of collaboration between a non-profit organization, law enforcement, prosecutors, and defense attorneys. We are all vitally interested in exonerating the innocent, but also in drawing attention to the fact that when someone is wrongfully convicted, the person guilty of the crime may remain on the street, free to reoffend. This grant and this collaboration further our goals of securing justice, which we, as Minnesotans, all share.

"DNA evidence is a powerful tool in both securing convictions and in exonerating the innocent," said Pat Diamond, Deputy Hennepin County Attorney. "By systematically reviewing convictions that were obtained before DNA testing was widespread, the Partnership will serve important interests in promoting public confidence in the criminal justice system and seeing that justice is done. Nobody is served by a wrongful conviction. Even if an innocent person has served his

sentenced, the guilty remain on the street and free to reoffend."

7. North Carolina

The North Carolina Innocence Inquiry Commission will receive $566,980.00 under Bloodsworth the Program. The Commission is partnering with the State Bureau of Investigation, LabCorp and the North Carolina Center on Actual Innocence. The funds will cover the hiring of two attorneys to work on DNA cases, the costs of testing and other related office expenses.

8. Wisconsin

Wisconsin's Office of Justice Assistance plans to use the $647,286.00 disbursed to it through the Bloodsworth Program to support state-mandated post-conviction DNA testing, which has already resulted in the exoneration of at least six people. The Wisconsin project will involve a partnership between the Wisconsin Innocence Project at the University of Wisconsin Law School, the Wisconsin Department of Justice, the Wisconsin Department of Corrections, the State Public Defender, and the Wisconsin Office of Justice Assistance, which will involve a proactive and systematic search for every non-negligent homicide and forcible rape case that could benefit from post-conviction DNA testing. The bulk of the work to search for and identify appropriate cases for post-conviction DNA testing will be undertaken by the Wisconsin Innocence Project, but with the cooperation of the other partner agencies. These funds will permit us, for the first time, to actively identify appropriate cases, which otherwise would be overlooked because the innocent prisoners involved lack the ability to advocate for themselves, or the savvy and knowledge to recognize the potential for DNA testing in their cases or to seek the help they need. In many cases, innocent defendants are not aware of the remarkable sensitivity of modern DNA testing, so they are unaware that DNA testing is possible in their cases. This project builds off of the experience of states like Virginia, where 31 rape cases were randomly selected for post-conviction DNA testing. The DNA tests of those randomly selected cases in 2005 proved that two of the 29 individuals who had been convicted in those cases were in fact innocent.

The Wisconsin grant application also promises to use the post-conviction DNA testing in these cases to advance our understanding of the criminal justice system. The Wisconsin plan involves a commitment by the participating agencies to work together to draw lessons from the DNA exonerations and to use those lessons to improve the system's reliability and effectiveness.

II. Recommendations to Enhance the Value of the JFAA's DNA Initiatives

In order to assure that the innocence protections intended under the JFAA are achieved, all four incentive grant programs attached to Section 413 of the JFAA should be reauthorized and funded. As noted earlier in this testimony, the four grant programs governed by Section 413 of the JFAA are:

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

? Section 305, DNA Research and Development;

? Section 308, DNA Identification of Missing Persons; and

? Section 412, Kirk Bloodsworth Postconviction DNA Testing Grant Program.

Failure to re-authorize and fund these programs would render moot the incentives created under the JFAA. Although their influence was thwarted by executive maneuverings following the JFAA's original passage, and although some improvements in post-conviction DNA testing access and the preservation of biological evidence in the intervening years, many states still fail to provide the innocent with access to proving their innocence through post-conviction DNA testing.

Many laws fail to include adequate safeguards for the preservation of DNA evidence; indeed, more than half the states lack evidence preservation requirements that ensure preservation of biological evidence throughout an incarcerated person's sentence. Without preservation, of course, there is no possibility to use DNA to exonerate wrongly convicted individuals. The experience of Innocence Network member organizations is that in at least 25% of the cases they investigate for purposes of finding evidence to prove innocence, the biological evidence that could potentially prove innocence has been lost or destroyed. Untold numbers of innocent people languish in prison because the evidence that could free them--and could in many cases identify the true perpetrators--has not been preserved.

Although 47 states have post-conviction DNA testing access statutes, many of these testing laws are limited in scope and substance and fall short of the JFAA's original intent. For example, nearly twenty states fail to provide counsel to indigent applicants seeking post-conviction DNA testing as recommended in the Innocence Protection Act. The complexity of the petition process for DNA testing is quite cumbersome and difficult, even for experienced advocates. Without counsel, most indigent petitioners do not know the full extent of their rights for post-conviction DNA testing or the potential value or availability of DNA testing in their cases.

Twelve states still have a statute of limitation that precludes innocent people from access to post-conviction DNA testing. For example, South Carolina limits the time for seeking post-conviction DNA testing to "no later than seven years from the date of sentencing."

Some states preclude testing when it was previously available, but not conducted or accomplished. In some cases where post-conviction DNA testing could provide the answer about innocence or guilt, courts refuse to order testing because it hadn't been requested at trial. Such a law, for instance, effectively bars testing for individuals who did not receive effective assistance of counsel at trial.

A handful of states still limit access to DNA testing to certain categories of offenses or capital cases, leaving the vast majority of innocent defendants, convicted of other types of crimes or non-capital offenses, with no opportunity to prove their innocence through DNA testing. Several states do not allow individuals to appeal denied petitions for testing. Still others fail to require full, fair and prompt proceedings once a DNA testing petition has been filed, allowing the potentially innocent to languish interminably in prison. Further, some laws present insurmountable hurdles to the individual seeking access, putting the burden on the defense to effectively solve the crime and prove that the DNA evidence promises to implicate another individual. Despite the fact that 11 of the first 225 individuals proven innocent through DNA testing initially pled guilty, certain laws still do not permit access to DNA when the defendant originally pled guilty.

Finally, some laws fail to explicitly affirm judicial discretion to enter orders requiring pre- and post-conviction comparisons of profiles derived from crime scene evidence to be run in the Combined DNA Index System ("CODIS"), the nation's DNA database. Without such authority, the full potential for DNA to both exonerate the innocent and identify the true perpetrators of crimes is undermined.

Congress already created a valuable vehicle for motivating states to establish proper rules for access to post-conviction DNA testing and the preservation of biological evidence: Section 413 of the Justice for All Act of 2004. Re-authorization of that section and funding of those programs will provide the unrealized incentives Congress intended in 2004.

Recommendation #1

Provide Incentives to States to Implement Innocence Reforms Through Reauthorization and Funding of All Four Section 413 Grant Programs

It is only through the incentives offered by the four grant programs in Section 413 of the JFAA that states will appreciate the value of implementing innocence reforms in the face of other competing needs.
The Innocence Network recommends Congressional reauthorization and funding of all four of the JFAA Section 413 grant programs for FY 2009 - FY 2014. The additional five years of funding will, in part, replace those years essentially lost due to the implementation challenges of Section 412, the Bloodsworth Program. However, it is worth stating that even if all of the funding connected to this grant program had been disbursed as early as FY 2005 as intended by Congress, the survival of this grant program would still be essential to meet the ongoing need to perform post-conviction case review and DNA testing.
Recommendation #2

Extend the Provisional Language Guiding the Kirk Bloodsworth DNA Testing Assistance Program (and other reauthorized Section 413 grant programs)

As a result of its stated difficulty in administering Bloodsworth Program in years past, the Department of Justice sought the following provisional language to loosen Section 413 grant requirements to assure the disbursal of unspent, unobligated funds, as well as those funds for the remaining fiscal years in the funding cycle:
$5,000,000 shall be for the purposes described in the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program (Public Law 108-405, section 412): Provided, that unobligated funds appropriated in FY 2006 and FY 2007 for grants as authorized under sections 412 and 413 of the foregoing Public Law are hereby made available, instead, for the purposes herein before specified....

The Department of Justice represented that this provisional language freed it from the constraints of the Justice for All Act's authorizing language and ultimately allowed for the disbursal of funds associated with this grant program.
As with last year's appropriation language, the Innocence Network recommends an extension of the use of this provisional language so that future grant applicants can meet Section 413 requirements and receive expeditious funding under the Bloodsworth Program. This provisional language should also apply to the other Section 413 grant programs that are reauthorized, so that larger pots of federal-to-state funding - and by extension greater incentives - are made available to states that take steps to ensure compliance with the innocence protections sought in the Justice for All Act.
Recommendation #3
Address the Insufficiency of State Level Evidence Retention Policies and Its Effect on the Disbursal of Section 413 Funds

Many states have not applied for Bloodsworth funding because their evidence retention policies fall short of even the relaxed requirements articulated in the two most recent solicitations. In order to honor the Congressional intent of providing immediate funding for post-conviction DNA testing to all states in need of financial support in this area, we propose a short-term (#3(a)) and long-term solution (#3(b)) to address the preservation of evidence requirement, which has

been a proven barrier to the disbursement of funds.
Recommendation #3(a)

Short-term Stopgap Measure to Allow Post-Conviction DNA Testing Funds to Immediately Flow to All States in Need: Addressing Preservation of Biological Evidence on the State Level Through a One Time Waiver

Allow potential applicants who do not meet the evidence retention obligation, even given the relaxed requirements under the loosened appropriations language, to seek post-conviction DNA testing funding - and other federal-to-state grant funding subject to evidence retention requirements under Section 413 - if the following requirements are met:
? the applicant state has an adequate post-conviction DNA framework;
? the chief legal officer of the state issues an order enacting a moratorium on the destruction of biological evidence in all violent, felony crimes statewide pending a permanent statewide evidence retention policy; and
? the applicant state has taken steps - either through the executive or legislative branch - to establish a statewide working group to become compliant with Bloodsworth evidence retention requirements, with an established timeline and articulated process for the production of an updated statewide policy.
This stopgap measure shall only be applicable to an applicant state once; if efforts are not made to address evidence retention in earnest after grant awards are made, future applications should be not permitted.
Recommendation #3(b)

Long-term Solution to Address Evidence Retention: Establishment of a National Technical Work Group on the Proper Preservation of Biological Evidence

The creation of multiple state-level working groups to address biological evidence retention would be unnecessary if federal guidance was provided to the states on best practices in this area. The Innocence Project has already requested that the NIJ convene a national technical working group on the proper preservation of biological evidence and delivered a working document that describes a proposal for consideration.
? The Innocence Network requests Congress to join the Innocence Project and the Innocence Network in calling on the NIJ to establish a National Technical Working Group on the Proper Preservation of Biological Evidence.

? Should a National Technical Working Group be established, potential grant applicants in future years could issue moratoria on evidence destruction pending the recommendations of the federal working group.

? A National Technical Working Group would not only provide the long-awaited and critically necessary technical support to states regarding best practices for the retention of biological evidence; it could also provide non-binding guidance to the Office of Justice Programs about how best to achieve the evidence retention goals articulated in Section 413 for those grant programs subject to those requirements.

We believe this longer-term solution is more efficient than the short-term solution offered above, as it would obviate the need for multiple state-level evidence preservation working groups and allow Section 413 monies to flow immediately so long as state-level moratoria on evidence destruction are issued. It is our hope that the establishment of a national technical working group will replace the need to implement the stopgap, or waiver, measure in future years.

Recommendation #4

Consider Modest Proposals to Realize More Fully the Potential of Section 411 of the Justice for All Act

Section 411 of the Justice for All Act established statutory access to post-conviction DNA testing for individuals convicted of federal crimes. Understandably, the creation of this alternate avenue to seek post-conviction relief had to be balanced with concerns about overwhelming the federal courts and flooding the criminal justice system with frivolous requests for post-conviction DNA testing. As has been our experience on the state level, however, those jurisdictions establishing statutory access to post-conviction DNA testing have not reported a flood of frivolous petitions. In light of this reality, and combined with Attorney General Holder's recent remarks that states would do well to follow the federal lead with respect to establishing state-level statutory access to post-conviction DNA testing, the Innocence Network believes that the federal statute should be broadened to assure that more categories of deserving candidates for testing have the opportunity to do so. This is of significant importance given the fact that states will be looking to the federal government for guidance in this area as they establish testing laws for the first time or seek changes to their existing laws in the interests of justice. The following recommendations will also function in service of law enforcement efforts to identify the true perpetrators of crime by expanding access to previously barred individuals and maximizing use of CODIS, the national DNA database.

Therefore, the Innocence Network recommends consideration of the following proposals to clarify, and in some areas, enhance the federal post-conviction DNA testing law:

1. Establish Judicial Authority to Order Comparisons of CODIS

Section 411 does not provide explicit judicial authority to order the comparison of profiles derived from crime scene evidence to the CODIS database; the discretion to do so currently lie solely in the hands of law enforcement. A right to compare crime scene evidence to the DNA database is of critical importance, however, because in many cases, excluding a defendant from the DNA profiles developed from crime scene evidence is alone not sufficient to establish that person's innocence. In those cases, matching the DNA to another offender, or to DNA from another crime that the defendant could not have committed, is needed to give the DNA from the case its full probative power. Moreover, as the nation's DNA exonerations have demonstrated, the ability to realize the full potential of the national DNA database will not only help to free the innocent; it will also supply the needed evidence to identify and prosecute the truly guilty.

A Case Study in the Need for Database Comparisons

The Jeffrey Deskovic case illustrates precisely why such database comparisons serve the interests of justice. When Mr. Deskovic first sought a comparison of the crime scene evidence in his case to the CODIS database - in the hopes of identifying the true perpetrator of the crime for which he was wrongfully convicted - a federal habeas court rejected the application as outside its authority to act and appellate lawyers in the Westchester County District Attorney's office

advised that New York's post-conviction DNA statute did not cover his request because he was not seeking a new DNA testing technique to demonstrate he was excluded from the semen found on vaginal swabs. (He had already been excluded by earlier DNA tests from these samples, but ultimately convicted regardless of that DNA exclusion, as the prosecution had argued at trial that the semen came from a prior consensual partner.) Notwithstanding that legal opinion, the newly elected District Attorney, Janet DiFiore, personally authorized new DNA tests so a DNA profile from the vaginal swab samples could be run through CODIS. Within two days there was a "hit" to Steven Cunningham, a convicted murderer who was in prison for strangling the sister of his live-in girlfriend, who immediately confessed. Mr. Deskovic, a teenager with no criminal record, served 16 years in prison for the rape and murder committed by Mr. Cunningham, a wrongful conviction that could have been exposed years earlier had the statutory fix proposed below been in place.

This case demonstrates that without express statutory authority for judges to order comparisons of crime scene evidence in CODIS upon request of an accused or convicted person, the innocent are forced to rely upon the good will and discretion of government actors. In the interests of consistent justice, federal law should explicitly permit a judge to grant a petitioner's motion for such evidence comparison whenever the judge deems that action to be in the interests of justice, be that during the course of an investigation or following a defendant's conviction.

We recommend that the federal post-conviction DNA testing law be amended to allow, upon court order, for a DNA profile derived from the crime scene evidence, to be compared to the CODIS database, either pre-trial or post-conviction. We propose the following model language to address this area in need of renovation:

For purposes of making an application pursuant to 18 U.S.C.A. § 3600, for purposes of making a credible application for executive clemency, or before trial, for purposes of obtaining exculpatory evidence, a court may order that a law enforcement entity that has access to the Combined DNA Index System submit the DNA profile obtained from probative biological material from crime scene evidence to determine whether it matches a profile of a known individual or a profile from an unsolved crime. The petitioner must show that the DNA profile derived from probative biological material from crime scene evidence complies with the Federal Bureau of Investigation's scientific requirements for the uploading of crime scene profiles to the National DNA Index System.

2. Adopt a Provision that Clarifies that Individuals Who Confessed to Crimes May Seek Post-Conviction DNA Testing Under the Federal Statute

A false confession, admission or dream statement was found to have contributed to nearly 25% of the wrongful convictions in America's 245 DNA exonerations. While for most it is virtually impossible to fathom why a person would wrongly confess to a crime he or she did not commit, researchers who study this phenomenon have determined that the following factors contribute to or cause false confessions:

? Real or perceived intimidation of the suspect by law enforcement
? Use of force by law enforcement during the interrogation, or perceived threat of force
? Compromised reasoning ability of the suspect, due to exhaustion, stress, hunger, substance use, and, in some cases, mental limitations, or limited education
? Devious interrogation techniques, such as untrue statements about the presence of

incriminating evidence
? Fear, on the part of the suspect, that failure to confess will yield a harsher punishment

Unfortunately, despite the demonstrated prevalence of false confessions, a notable provision - which requires the petitioner to prove "identity was at issue" at trial - in some state laws have been interpreted by the courts to bar post-conviction DNA testing to those who confessed to the crime for which they were convicted. This significant provision is contained in the federal post-conviction access to DNA testing law and reads: "If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial."
We recommend that this provision in the federal post-conviction DNA testing law be clarified to read:
If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial. The fact that evidence of a confession by the applicant was introduced into evidence does not preclude an application for testing under this clause from being granted.

III. Conclusion
Some 75 DNA exonerations have been realized since the passage of the JFAA, even despite the failure of its federal-to-state grant programs. How many more wrongfully convicted would have been able to prove their innocence had these funds flown as Congress had originally intended? Fortunately, with the recent funding of the Bloodsworth Program and the continued hard work of the many member projects of the Innocence Network, those wrongfully convicted can finally be vindicated. Moreover, reauthorization and re-appropriation of the JFAA DNA Initiatives will further aid in the discovery and prevention of wrongful convictions.

Thank you for the opportunity to present before you today. If the Committee has any questions about any of the testimony presented, it would be my pleasure to explore these matters further with you.