

ASLME Reports: A Summary of the Justice for All Act

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Grant No. 1 ROI-HG002836-01

The Justice for All Act (H.R. 5107), a law that has significant implications for both the expansion of forensic DNA data banks and exoneration through post-conviction DNA testing, was signed into law by President George W. Bush on October 30, 2004. The sections of the omnibus legislation that relate to forensic DNA are aimed at: (1) eliminating the backlog of DNA samples collected from crime scenes and convicted offenders; (2) expanding the Combined DNA Index System (CODIS); (3) improving and expanding DNA testing capacity of federal, state and local crime laboratories; (4) increasing research and development of new DNA testing technologies; (5) developing new training programs for the collection and use of DNA evidence; (6) extending the statute of limitations for crimes where the suspect is linked to the crime through DNA evidence; (7) providing post-conviction DNA testing and the preservation of biological evidence. The Act establishes a National Forensic Science Commission, to include persons from the forensic science and criminal justice communities. Also, the Act authorizes grants to states for improving the quality of legal representation, including investigative and expert services, provided to indigent defendants in state capital cases. The provisions of The Justice for All Act have been codified in various sections of Titles 42 and 18 of the United States Code.

The following provides a brief summary of the salient provisions relating to forensic DNA:

1. DNA Backlog Grant Program.

[Amending 42 U.S.C. 14135]

The Justice for All Act continues and expands the grant program set out in the DNA Analysis and Backlog Elimination Act of 2000. The provision authorizes the Attorney General to award grants to states and local units of governments to allow them to expand their capacity to collect and analyze DNA samples from individuals and from crime scenes in a timely manner. The Act authorizes the appropriation of \$755,000,000.00 in grants for a period of five years. The Act also allows for the participation of private for-profit DNA labs to help reduce the backlog. Private labs, whether nonprofit or for-profit, that meet quality assurance requirements, may be awarded a contract or voucher by the Attorney General for their efforts.

2. Expansion of CODIS

[Amending 42 U.S.C. 14132, 14133, 14135a, 14135e, 10 U.S.C. 1565(d)]

Inclusion of DNA profiles from states: This section of the Act amends and expands the DNA Identification Act of 1994 to permit the inclusion of “persons who have been charged in an indictment or information with a crime,” and “other persons whose DNA samples are collected under applicable legal authorities” in CODIS. The statute makes clear, however, that arrestees who have not been indicted or charged in an information with a crime, and those individuals who voluntarily submitted a DNA sample for elimination purposes cannot be included in CODIS. This amendment works to permit the

uploading of DNA profiles collected by those states that currently authorize the inclusion of arrestees in their state DNA databases (Va., La., Texas), as well as other DNA profiles, such as those of missing persons, if “collected under applicable legal authority.”

Expungement requirement. The statute also requires that each state that includes arrestee profiles in their DNA database “shall promptly expunge” from CODIS the DNA analysis of the arrestee who has not been convicted of the crime and the charges have been dismissed or an acquittal entered.

Federal qualifying offenses added: With regard to federal offenses for which DNA profiles may be obtained and entered into CODIS, the category has been expanded, but a conviction remains a prerequisite to entry into the DNA database. Qualifying federal offenses now include any felony, crimes of sexual abuse as set out in 18 U.S.C. § 4221 et seq., any crime of violence, as defined in 18 U.S.C. § 16, as well as any attempt or conspiracy to commit any of these offenses. Qualifying military offenses formerly limited to felony or sex offenses, now include any offense under the Uniform Code of Military Justice for which a sentence of confinement for more than one year may be imposed.

One-time keyboard Codis searching permitted: Any person who is authorized to access CODIS is also authorized to perform a one-time keyboard search on information obtained from a DNA sample that was lawfully taken for criminal justice purposes. The statute prohibits a keyboard search where the DNA sample has been voluntarily obtained for elimination purposes.

Increased penalties for misuse of CODIS data: Along with this expansion of CODIS, the penalties for misuse have been strengthened. Anyone who misuses DNA analyses under 42 U.S.C. §14133(c)(2) or who violates the privacy protection standards under 42 U.S.C. §14135e, is subject to a fine of not more than \$250,000 or imprisonment for not more than one year, or both. Prior to this amendment, the penalty was a fine of not more than \$100,000.

Change in core genetic markers: The Department of Justice must notify the Judiciary Committees of the House and Senate 180 days prior to a modification or supplement to the core genetic markers needed for compatibility with the CODIS system.

3. Tolling of the Statute of Limitations

[Amending 18 U.S.C. Ch. 213]

The Justice for All Act effectively tolls the statute of limitations for all felony offenses (with the exception of crimes of sexual abuse under Chapter 109A of Title 18 (42 U.S.C. § 4221 et seq.)) until such time as an identified individual is implicated by DNA testing. Once a DNA sample matches to a profile in the database, thereby implicating an identified individual, the statute of limitations pertinent to the offense charged will begin to run. The tolling applies to the prosecution of all applicable offenses, whether before, on, or after the effective date of the statute, as long as the statute of limitations for that offense has not expired.

4. Laboratory quality standards enhanced:

[Amending 42 U.S.C. 14132]

The DNA Identification Act of 1994, specifically 42 U.S.C. § 14132 (b)(2), has been amended to require all laboratories submitting DNA profiles to CODIS be accredited by a nationally recognized nonprofit professional association within two years of the Act's passage, and undergo external compliance audits once every two years.

5. Grants for training education, research and development

The Act also authorizes grant funding to states and local governments for DNA training and education of law enforcement, correctional, and court personnel, as well as training for sexual assault forensic examinations programs, and to promote the use of DNA to identify missing persons. Also, grants will be made available for research and development to improve forensic DNA technology to increase the identification accuracy and efficiency of DNA analysis, to decrease time and expense, and to increase portability. Demonstration projects studying the public safety benefits, improvements to law enforcement, and cost-effectiveness of increased collection and use of DNA, will also be funded. Nearly \$300,000,000 is authorized for these purposes for a period of five years. Money is also allocated specifically to the Federal Bureau of Investigation (\$42,100,000 per year for five years) for use in designated DNA-related programs and activities.

6. National Forensic Science Commission:

The Act calls for the appointment of a National Forensic Science Commission by the Attorney General, and lays out a broad mandate for it. The members of the Commission, to be chosen by the Attorney General, will be individuals with experience in criminal justice, including forensic scientists and those from the criminal justice community. The Commission is expected to advise on such matters as resource needs, maximizing the use of forensic technologies and techniques, identifying relevant scientific advances, increasing the pool of qualified forensic scientists to work in public crime laboratories, the development of "best practices" regarding collection and analysis of DNA. The Commission is also responsible for evaluating the sufficiency of privacy protections of federal, state and local laws and practices concerning access, use, and storage of DNA samples and profiles.

7. Increased criminal penalties for unauthorized disclosure.

[Amending 42 U.S.C. 14135e]

Knowingly disclosing, obtaining, or using DNA information as described in this section, shall be fined a maximum of \$250,000, or imprisoned for a period of not more than one year. Each instance of disclosure, obtaining, or use shall constitute a separate offense.

8. Federal post-conviction DNA testing

[Amending Title 18 of the U.S.C. by adding Ch. 228A, sections 3600, 3600A]

The statute permits individuals, who have been sentenced to imprisonment or death pursuant to a conviction for a federal offense, to apply to the court where the original judgment of conviction was entered for DNA testing of certain evidence. The statute also requires the preservation of biological evidence.

A. DNA testing.

Requirements for filing and granting a motion for post-conviction DNA testing.

An individual, who has been convicted of a federal offense and sentenced to a period of imprisonment or to death, may file a motion for DNA testing. The court shall grant such a motion if all of the following requirements have been met:

- The applicant asserts under penalty of perjury that he is actually innocent of either a federal offense for which he is currently sentenced to imprisonment or to death, or of a federal or state offense that was used as evidence during a death sentencing hearing where exoneration would entitle him to a reduced sentence or new sentencing hearing
- Evidence to be tested was obtained in connection with the investigation of the federal or state offense noted above
- Evidence to be tested was not previously analyzed nor did the applicant waive his right to request DNA testing, or, if previously tested, a current testing method or technology is substantially more probative than the prior method
- Evidence has been maintained by the Government, subject to a chain of custody, and retained in such a way that it is suitable for testing
- The scope of the testing is reasonable and conforms to scientific methods, and is consistent with accepted forensic practices
- The applicant's theory of defense is not inconsistent with an affirmative defense at trial, and would establish the actual innocence of the defendant
- Where a trial resulted in a conviction, identity of the perpetrator was an issue at trial
- Testing would produce new material evidence that would support the defense theory and would raise a reasonable probability that the applicant is innocent of the crime at issue
- Applicant certifies that he will provide a DNA sample
- Motion is filed in a timely manner. There will be a rebuttable presumption of timeliness if the applicant files the motion within 5 years of the enactment of the law, or within three years of the conviction, whichever comes later.

Provisions regarding notice, counsel, costs. The statute also provides for notice and an opportunity for the government to respond to the motion, and requires that the government preserve the relevant evidence. Provision is made for the appointment of

counsel for the applicant if the interests of justice so require and the applicant is indigent. Also, costs of testing are borne by the applicant unless indigent. With regard to reporting testing results, simultaneous reporting to the court, the applicant, and the government is required.

Inclusion in national forensic DNA database. The DNA sample of the applicant will be entered into NDIS. If there is no match between the applicant and the sample tested, or between the applicant and any other offense, the DNA sample of the applicant will be destroyed and will not be retained in NDIS, unless there is other legal authority to retain the applicant's DNA sample. Otherwise, the DNA sample will be retained.

Inconclusive or inculpatory test results. Where the DNA testing is inconclusive, the court may order further testing or may deny the applicant relief. Where the DNA testing inculcates the applicant, the statute authorizes sanctions, such as loss of good conduct credit towards prison release, denial of parole. The statute also imposes a three year minimum sentence, to be served consecutively to any other sentence of imprisonment, upon a conviction of false assertion, made in connection with the filing of the motion, under federal perjury law.

Standard to be applied to motion for a new trial or for resentencing. Where the results of the testing excludes the applicant as the source of DNA, a motion for new trial or for resentencing may be filed, notwithstanding any laws barring the motion as untimely. The motion will be granted where the test results, when viewed with all other evidence in the case (regardless of whether the evidence was introduced at trial), establishes "compelling evidence" that a new trial would result in acquittal of (1) a federal offense for which the defendant is serving a sentence of imprisonment, or has been sentenced to death, or (2) of a state or federal offense that was admitted during a federal death sentencing hearing, entitling the applicant to a reduced sentence or new sentencing hearing.

Effect upon other laws. The opportunity for post-conviction relief does not affect any other law under which an individual may obtain post-conviction relief. This section does not provide a basis for relief under a federal habeas corpus proceeding.

B. Preservation of Biological Evidence

This section requires the preservation of all biological evidence, including sexual assault forensic examination kits, semen, blood, saliva, hair, skin tissue, of other identified biological material, collected during the investigation or prosecution of a federal offense, where the defendant is under a sentence of imprisonment for that offense.

Preservation will not be required if a motion for DNA testing has been denied, the defendant has waived testing, or the evidence has been tested and such testing identifies the defendant as the source of the sample. Preservation of evidence is not required if the defendant's conviction becomes final and all opportunities for further review are exhausted, and the defendant has been given notice and an opportunity to file a motion to request testing.

This section does not preempt or supersede other laws that may require preservation of biological or other evidence.

9. Grants to states related to post-conviction DNA testing.

The Act authorizes grants to states to help defray the cost of post-conviction DNA testing. The Act also reserves the total amount of grant funding made available throughout the Act (training and education grants, DNA research and development, DNA identification of missing persons, post-conviction testing) to those states who can demonstrate that they provide post-conviction DNA testing and preservation of biological evidence within the eligibility guidelines set forth in the Act.

10. Increased compensation for wrongfully convicted.

[Amending 28 U.S.C. 2513(e)]

Compensation for individuals wrongfully convicted shall not exceed \$100,000 for each year of incarceration for those sentenced to death, or \$50,000 for each year of incarceration for all others unjustly sentenced.

The Act also notes the “sense of Congress” that states should likewise reasonably compensate individuals wrongfully convicted and sentenced to death.