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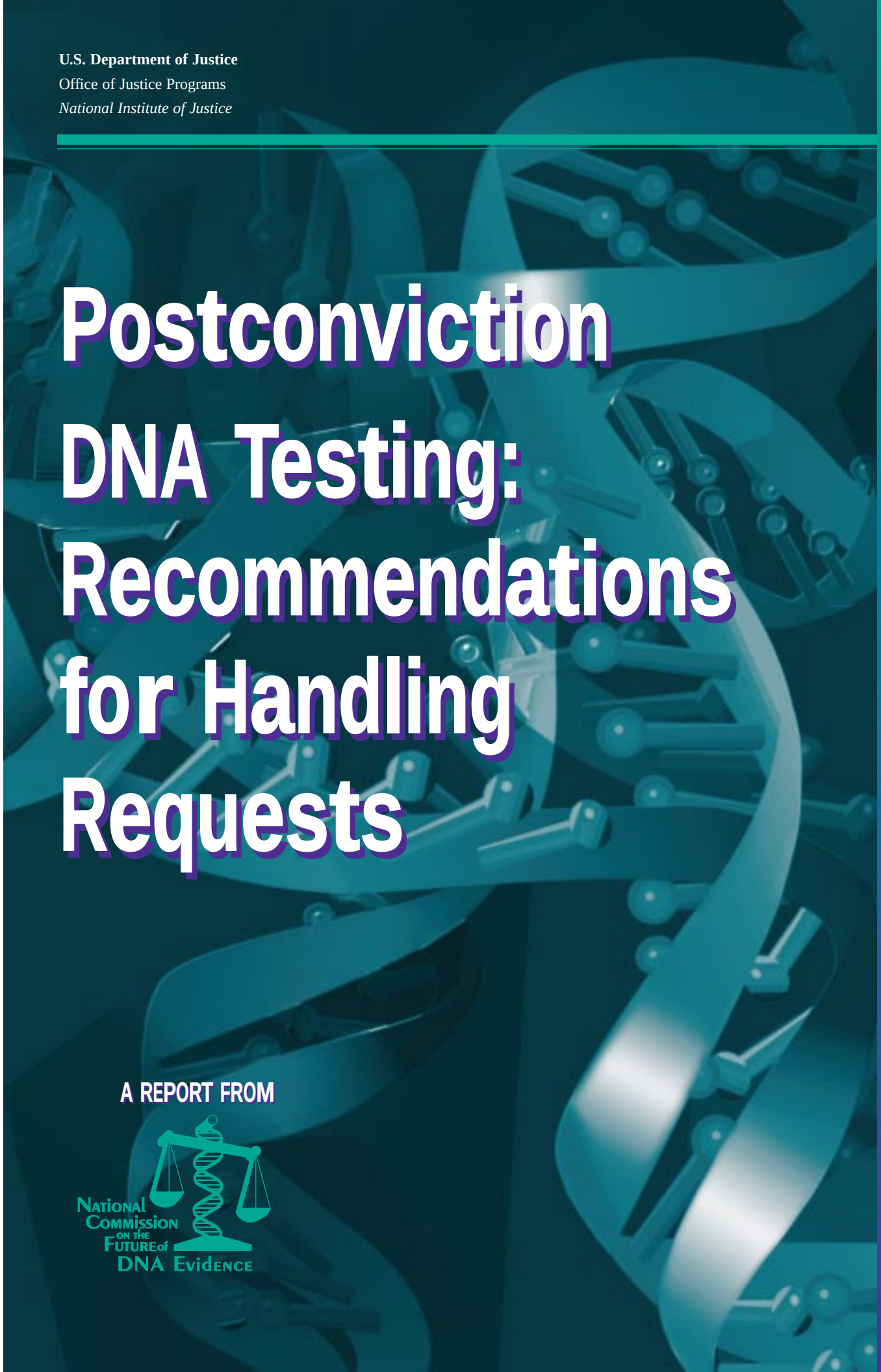
National Institute of Justice

Postconviction DNA Testing: Recommendations for Handling Requests



A REPORT FROM

National Commission on the Future of DNA Evidence

NIJ
National Institute of Justice

U.S. Department of Justice
Office of Justice Programs
810 Seventh Street N.W.
Washington, DC 20531

Janet Reno
Attorney General

Raymond C. Fisher
Associate Attorney General

Laurie Robinson
Assistant Attorney General

Noël Brennan
Deputy Assistant Attorney General

Jeremy Travis
Director, National Institute of Justice

Office of Justice Programs World Wide Web Site *http://www.ojp.usdoj.gov*	National Institute of Justice World Wide Web Site *http://www.ojp.usdoj.gov/nij*

Postconviction DNA Testing: Recommendations for Handling Requests

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Jeremy Travis
Director, National Institute of Justice

Christopher Asplen
Executive Director
National Commission on the Future of DNA Evidence

The National Institute of Justice is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance, Bureau of Justice Statistics, Office of Juvenile Justice and Delinquency Prevention, and Office for Victims of Crime.

Message From the Attorney General

The vigilant search for truth is the hallmark of our criminal justice system. Our methods of investigation, rules of criminal procedure, and appellate process are designed to ensure that the guilty are apprehended and convicted while the innocent are protected. But while ours is a system to be cherished, it is not a perfect system, and those of us charged with the administration of justice have a responsibility to seek its continued improvement. These recommendations acknowledge and accept that responsibility. They were created because forensic DNA technology can strengthen our confidence in the judicial process.

In 1996 the National Institute of Justice (NIJ) issued the research report, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*. It told the stories of 28 men whose innocence was proven by applying DNA technology to evidence after they were convicted and sent to prison. They had, however, served an average of 7 years in prison. Since the publication of that report, more than 40 other similar cases have been identified.

In response to NIJ's report, I requested that the Institute establish a National Commission on the Future of DNA Evidence to identify ways to maximize the value of DNA in our criminal justice system. I commend the Commission's recognition of the need to address the postconviction issue immediately and I applaud the vision of a better system that these recommendations provide.

The analysis offered by these recommendations applies DNA technology to the appeals process while recognizing the value of finality in the criminal justice system. Where DNA can establish actual innocence, the recommendations encourage the pursuit of truth over the invocation of appellate time bars. In those cases in which DNA testing may be determinative of innocence, the recommendations encourage cooperation between prosecutors, defense attorneys, laboratories, and the judiciary. Likewise, in those cases in which a DNA exclusion would be of no value in the determination of actual innocence, the recommendations discourage the filing of a DNA-based appeal simply because the attorney's client requests it.

I encourage prosecutors, defense attorneys, the judiciary, victim advocates, and laboratory personnel to apply these recommendations to their individual cases. Using DNA technology fairly and judiciously in postconviction proceedings will help those of us responsible for the administration of justice do all we can to ensure a fair process and a just result.

Janet Reno
Attorney General

National Commission on the Future of DNA Evidence

The National Commission on the Future of DNA Evidence was created in 1998 at the request of Attorney General Janet Reno. When she read about the use of DNA to exonerate someone wrongfully convicted of rape and homicide, she became concerned that others might also have been wrongly convicted. The Attorney General then directed the National Institute of Justice (NIJ) to identify how often DNA had exonerated wrongfully convicted defendants. After extensive study, NIJ published the report *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, which presents case studies of 28 inmates for whom DNA analysis was exculpatory.

On learning of the breadth and scope of the issues related to forensic DNA, the Attorney General asked NIJ to establish the Commission as a means to examine the future of DNA evidence and how the Justice Department could encourage its most effective use. The Commission was appointed by the Director of the National Institute of Justice, Jeremy Travis, and represents the broad spectrum of the criminal justice system. Chaired by the Honorable Shirley S. Abrahamson, Chief Justice of the Wisconsin State Supreme Court, the Commission consists of representatives from the prosecution, the defense bar, law enforcement, the scientific community, the medical examiner community, academia, and victims' rights organizations.

The Commission's charge is to submit recommendations to the Attorney General that will help ensure more effective use of DNA as a crimefighting tool and foster its use throughout the entire criminal justice system. Other focal areas for the Commission's consideration include crime scene investigation and evidence collection, laboratory funding, legal issues, and research and development. The Commission's working groups, consisting of Commissioners and other non-Commission experts, research and examine various topics and report back to the Commission. The working group reports are submitted to the full Commission for approval, amendment, or further discussion and provide the Commission background for its recommendations to the Attorney General.

By nature of its representative composition and its use of numerous working groups, the Commission receives valuable input from all areas of the criminal justice system. The broad scope of that input enables the Commission to develop recommendations that both maximize the investigative value of the technology and address the issues raised by the application of a powerful technology.

Commission Members

Chair

The Honorable Shirley S. Abrahamson
Chief Justice
Wisconsin Supreme Court

Members

Dwight Adams
Section Chief
Scientific Analysis
Federal Bureau of Investigation

Jan S. Bashinski
Chief
Bureau of Forensic Services
California Department of Justice

George W. Clarke
Deputy District Attorney
San Diego, California

James Crow
Professor
Department of Genetics
University of Wisconsin

Lloyd N. Cutler
Wilmer, Cutler & Pickering
Washington, D.C.

Joseph H. Davis
Former Director
Miami-Dade Medical Examiner Department

Paul B. Ferrara
Director
Division of Forensic Sciences
Commonwealth of Virginia

Norman Gahn
Assistant District Attorney
Milwaukee County
Wisconsin

Terrance W. Gainer
Executive Assistant Chief
Metropolitan Police Department
Washington D.C.

Terry G. Hillard
Superintendent of Police
Chicago Police Department

Aaron D. Kennard
Sheriff
Salt Lake County, Utah

Philip Reilly
President and CEO
Shriver Center for Mental Retardation
Harvard University

Ronald S. Reinstein
Associate Presiding Judge
Superior Court of Arizona
Maricopa County

Darrell L. Sanders
Chief of Police
Frankfort, Illinois

Barry C. Scheck
Professor
Cardozo Law School
New York, New York

Kurt L. Schmoke
Mayor
Baltimore, Maryland

Michael Smith
Professor
University of Wisconsin Law School

Jeffrey E. Thoma
Public Defender
Mendocino County, California

Kathryn M. Turman
Acting Director
Office for Victims of Crime
U.S. Department of Justice

William Webster
Milbank, Tweed, Hadley & McCloy
Washington, D.C.

James R. Wooley
Assistant U.S. Attorney
Cleveland, Ohio

Commission Staff

Christopher H. Asplen, AUSA
Executive Director

Lisa Forman, Ph.D.
Deputy Director

Robin S. Wilson
Executive Assistant

Postconviction Issues Working Group

A convicted individual's continued assertion of innocence is not new to the criminal justice system and in fact is familiar to appeals courts. The use of DNA technology may bring to courtroom proceedings a degree of certitude to which neither the defense nor the prosecution is accustomed. Typically in an appeal, the possibility that the original verdict will be overturned is merely suggested.

By contrast, the introduction of DNA evidence after conviction may definitively prove innocence. Because of the high level of certainty made possible by DNA technology, the decision to oppose or not oppose a motion requesting postconviction relief may now be based on a different foundation of knowledge.

The implications of DNA technology for criminal justice are most evident in postconviction appeals, both in the use of DNA evidence in specific cases and in its broader impact on the criminal justice system. The Commission has examined the use of DNA evidence in previously adjudicated cases in order to develop recommendations about the postconviction process and is exploring the effect that DNA technology may have on the statutes of limitation for filing

appeals and charges. The latter issue arises because DNA samples last indefinitely, beyond the periods of time permitted for such filings.

Postconviction DNA Testing: Recommendations for Handling Requests will serve criminal justice system practitioners as guidelines for analyzing cases in which DNA evidence is presented. These recommendations have been unanimously approved by the Commission. The guidelines constitute the scientific ground on which to make fully informed decisions and on which to develop the legal approaches needed when DNA may determine the outcome of an appeal. Separate chapters of the guidelines are tailored to the needs of prosecutors, defense attorneys, the judiciary, forensics laboratories, and victim advocates.

Working Group Members

Chair

Ronald Reinstein
Associate Presiding Judge
Superior Court of Arizona
Maricopa County

Members

Christopher H. Asplen, AUSA
Executive Director
National Commission on the Future of DNA Evidence
U.S. Department of Justice

Dennis D. Bauer
Senior Deputy District Attorney
Orange County, California

Margaret Berger
Professor
Brooklyn Law School
New York, New York

Kevin C. Curran
Assistant Federal Public Defender
Eastern District of Missouri

Lisa Forman, Ph.D.
Deputy Director
National Commission on the Future of DNA Evidence
U.S. Department of Justice

Geoffrey C. Hazard, Jr.
Director
American Law Institute
Philadelphia, Pennsylvania

Barbara R. Morgan
Solicitor, 2nd Judical Circuit
South Carolina

Barry C. Scheck
Professor
Cardozo Law School
New York, New York

Jane Siegel
Winston & Strawn
Chicago, Illinois

Kathryn M. Turman
Acting Director
Office for Victims of Crime
U.S. Department of Justice

Charlotte J. Word
Deputy Laboratory Director
Cellmark Diagnostics
Germantown, Maryland

Table of Contents

Executive Summary

In recent years, technological progress in DNA (deoxyribonucleic acid) testing has made DNA evidence a predominant forensic technique for identifying criminals when biological tissues are left at a crime scene. DNA testing on samples such as saliva, skin, blood, hair, or semen not only helps to convict, but also serves to exonerate.

The sophisticated technology makes it possible to obtain conclusive results in cases in which previous testing had been inconclusive. Postconviction testing will be requested not only in cases in which DNA testing was never done, but also in cases in which the more refined technology may result in an indisputable answer.

It is hoped this report, *Postconviction DNA Testing: Recommendations for Handling Requests,* will help participants through the postconviction process. The report is the work of the Working Group on Postconviction Issues, one of five working groups that report to the National Commission on the Future of DNA Evidence. The suggestions are based on the group's consensus on how defense counsel, prosecutors, judicial officers, victims' advocates, and DNA laboratories can respond effectively at the various stages of a postconviction request for DNA testing. Cooperation on the part of law enforcement officials may be crucial; materials needed for testing or retesting may be in their possession.

To properly implement the recommendations contained in this report, participants in postconviction DNA proceedings need to consider the category of the case in which the DNA testing is sought and whether participants need to adjust the roles they customarily play in adversarial proceedings.

Case Categories

As information is gathered about a case, it may be helpful to evaluate it in terms of five broad categories, as follows:

Category 1. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, exclusionary results will exonerate the petitioner. In these cases, prosecutors and defense counsel should concur on the need for DNA testing.

Category 2. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, exclusionary results would support the petitioner's claim of innocence, but reasonable persons might disagree as to whether the results are exonerative. The prosecutor and defense counsel may not agree on whether an exclusion would amount to an exoneration or would merely constitute helpful evidence.

Category 3. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, favorable results will be inconclusive. Future developments may cause such a case to be reassigned to a different category.

Category 4. These are cases in which biological evidence was never collected, or cannot be found despite all efforts, or was destroyed, or was preserved in such a way that it cannot be tested. In such a case, postconviction relief on the basis of DNA testing is not possible.

Category 5. These are cases in which a request for DNA testing is frivolous. In these cases, prosecutors and defense counsel should generally agree that no testing is warranted.

When a request for postconviction DNA testing is made, prosecutors should consider whether expeditious discussions with defense counsel might resolve the matter promptly. Defense counsel may not be aware of prior DNA testing that confirmed guilt. In addition, when an inmate is truly innocent, interests converge, so that prosecutors and defense counsel may have to modify their usual adversarial postures.

The chapters in this report deal with applicable law, provide an overview of the applicable science, and contain suggestions on how the various players can best proceed during the stages of a postconviction proceeding. Highlights include:

Legal Issues

This document discusses the kinds of legal issues that have already arisen, and others that will probably develop, as applications for postconviction DNA testing continue to be made and the technology to conduct those tests advances.

The advent of DNA testing raises the question of whether a different balance should be struck regarding the right to postconviction relief. The probative value of DNA testing has been steadily increasing as technological advances and growing databases expand the ability to identify perpetrators and eliminate suspects. The strong presumption that verdicts are correct, one of the underpinnings of restrictions on postconviction relief, has been weakened by the growing number of convictions that have been vacated because of exclusionary DNA results.

DNA evidence also has given rise to thorny legal issues, because postconviction requests for testing do not fit well into existing procedural schemes or established constitutional doctrine. The typical inmate making a postconviction DNA request wants the following: discovery of evidence so that it can be tested, the right to present favorable test results in a judicial proceeding or in an executive proceeding for clemency, and the State to pay for the testing. Currently, the law in many jurisdictions is not clear as to the legal theory that entitles the petitioner to have any of these requests granted, or what the appropriate procedural mechanisms are for making these demands.

Because of this present state of legal uncertainty, litigating postconviction DNA applications often will be unnecessarily complex, expensive, and time consuming, unless prosecutors, defense counsel, and trial courts work cooperatively to assess cases, find the evidence, arrange for DNA testing, and make joint requests for judicial or executive relief when the facts so warrant after a result favorable to the petitioner.

Biological Issues

The technology has undergone rapid change that has increased both its capability to obtain meaningful results from old evidence samples and its discriminatory capabilities. At first, crime

laboratories relied primarily on restriction fragment length polymorphism (RFLP) testing, a technique that is very discriminating but requires a comparatively large quantity of good quality DNA (100,000 or more cells). Most laboratories are now shifting to using tests based on the polymerase chain reaction (PCR) method, a kind of molecular copying technique that can generate reliable data from extremely small amounts of DNA in crime scene samples (50 to 100 cells).

Several basic steps are performed during DNA testing regardless of the type of test being done. The general procedure includes: 1) the isolation of the DNA from an evidence sample containing DNA of unknown origin, and generally at a later time, the isolation of DNA from a sample (e.g., blood) from a known individual; 2) the processing of the DNA so that test results may be obtained; 3) the determination of the DNA test results (or types), from specific regions of the DNA; and 4) the comparison and interpretation of the test results from the unknown and known samples to determine whether the known individual is not the source of the DNA or is included as a possible source of the DNA.

Any probative biological sample that has been stored dry or frozen, regardless of age, may be considered for DNA analysis. Types of samples suitable for DNA testing include:

Questioned or unknown samples collected from the crime scene. These include liquid blood and bloodstains, liquid saliva and saliva stains, and liquid semen and dried semen stains deposited on virtually any surface; genital/vaginal/cervical samples collected on swabs, gauze, or as aspirates; rectal/anal swabs, penile swabs; pieces of tissue/skin; fingernails; plucked and shed hairs; and skin cells on drinking vessels or clothing.

Samples from unidentified bodies. These include blood, buccal swabs, hairs, bone, teeth, fingernails, tissues from internal organs, muscle, and skin.

Reference samples from known individuals. These include blood, oral/buccal swabs, and/or plucked hairs.

Samples to use when no conventional reference samples are available. These include clothing where biological fluids may be deposited, bedding, fingernail clippings, cigarette butts, toothbrushes, hairs in razors and hairbrushes, discarded facial tissues or handkerchiefs with nasal secretions, and condoms.

Information that must be obtained on any previous testing includes:

- What items of evidence existed at the time of the original trial and what type of analyses or tests were done on that evidence?
- What are the limitations of the tests that were performed?
- Were the results used at trial, and, if they were not used, what was the reason?

Recommendations for Prosecutors

Requests for postconviction DNA testing may come from a variety of parties, including inmates, their families, defense attorneys, or police. When a request for postconviction DNA testing is received, recommendations for prosecutors include the following:

- Get as much information as possible about the inmate and the case, including defenses proffered at trial and defenses currently claimed.
- Determine whether the case is suited to DNA testing, depending on the category of the case. Evaluate previous DNA testing.
- Provide information to the requestor, including the fact that DNA testing could have a negative effect if the inmate's DNA testing results are placed in a DNA criminal identification bank and he is identified as a perpetrator of other crimes.
- Throughout the process, consult and notify victim/witness specialists, forensic DNA experts, defense counsel, and prosecutors experienced in DNA technologies and postconviction relief issues.

Recommendations for Defense Counsel

When a request for postconviction DNA testing is received, recommendations for defense counsel include the following:

- Perform extensive screening to determine if the case is suited to DNA testing.
- If a case is determined to warrant DNA testing, conduct an extensive search for evidence, consulting with prosecutors throughout the search.
- Do not contact the victim. It is up to the prosecutor's office, through its victim services agency, to determine if it is appropriate to inform the victim of testing.

Recommendations for the Judiciary

Trial courts will likely be involved in category 1 and category 2 cases. By issuing orders, the court can play an important role in helping obtain access to evidence prior to testing, which is part of the screening process and helps determine if DNA evidence will be irrelevant to the case.

In the pretesting stage, it is recommended that the court set an informal conference with counsel to discuss issues such as the type of DNA analysis to be used, whether it will be necessary to test the victim's relatives or third parties, and whether additional samples need to be obtained from the victim.

Once postconviction DNA test results have been obtained, if the results are favorable to the inmate and no alternative explanations exist, the court should be prepared to grant a joint request to vacate the conviction. In the absence of a joint motion, an evidentiary hearing should be set to determine if there is a reasonable probability of a change in the verdict or judgment of conviction.

Recommendations for Victim Assistance

It is extremely important that crime victims and their family members are provided with information and approached with great sensitivity regarding postconviction issues. Notification of requests for DNA testing should be made by the prosecutor through a victim assistance specialist.

Avoid unreasonable and intrusive sample collection. Explain technical aspects of testing and the significance of the samples request. Ensure that information about the location of victims and family members remains confidential.

Provide information about testing results in a timely fashion, in person, if possible.

Recommendations for Laboratory Personnel

A DNA testing laboratory may be requested to serve as a consultant to the attorneys, the defendant, or the judge. The laboratory also has an obligation to perform quality DNA tests and to interpret and report the results accurately and without bias.

The laboratory should test only the amount of sample needed to obtain reliable test results and retain untested samples for possible future testing.

This chapter also discusses choosing a laboratory to perform testing. When selecting a laboratory for DNA testing, issues officials should consider include what DNA tests are available in the laboratory, the laboratory's experience, and whether the laboratory is accredited.

The Future

DNA testing technology is constantly being improved. For example, convicted offender databases and databases of probative samples from unsolved crimes are being developed rapidly. These databases will be especially helpful for linking previously unrelated cases and for screening a large number of known individuals already convicted of a crime.

The need for postconviction DNA testing will wane over time. Within the decade, DNA testing with highly discriminatory results will be performed in all cases in which biological evidence is relevant, and advanced technologies will become commonplace in all laboratories.

Chapter 1

Introduction

Background

DNA Testing

In little more than a decade, DNA (deoxyribonucleic acid) evidence has become the foremost forensic technique for identifying perpetrators, and eliminating suspects, when biological tissues such as saliva, skin, blood, hair, or semen are left at a crime scene. First introduced into evidence in a United States court in 1986 and the subject of numerous court challenges in the ensuing years, DNA evidence is now admitted in all United States jurisdictions.

Over the years, the technology has undergone rapid change and refinement that has increased both its capability to obtain meaningful results from old evidence samples and its discriminatory capabilities. At first, crime laboratories relied primarily on restriction fragment length polymorphism (RFLP) testing, a technique that is very discriminating but requires a comparatively large quantity of good quality DNA. Now, however, most laboratories are shifting to using tests based on the polymerase chain reaction (PCR) method, a kind of molecular copying technique that can generate reliable data from extremely small amounts of DNA in crime scene samples. Indeed, we are moving into an era where a PCR-based test using mitochondrial DNA can successfully obtain results from a shaft of hair or dried bones. (See discussion in chapter 3.)

> In 1986, in the first known use of DNA testing to solve a criminal identification, Colin Pitchfork's DNA was matched by multilocus RFLP testing to the DNA from semen from two rape/homicides in Narborough, England. Before Pitchfork was identified, a 17-year-old mentally challenged mental hospital kitchen porter, who had confessed to one of the murders, was released after 3½ months in custody when the DNA results showed the same person raped both girls and eliminated the kitchen porter as the source of the semen. Although homicide detectives originally thought the DNA evidence contradicting the confession was "bloody outrageous," the kitchen porter was released based on the work of the same people who had put him in custody.
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> [Details of the investigation, identification, and prosecution of Pitchfork are presented in the novel, *The Blooding*, by former Los Angeles Police Officer Joseph Wambaugh, Perigold Press, 1989.]

Moreover, law enforcement agencies and legislatures have come to understand the potential of using DNA testing systematically by constructing DNA databases on a State and Federal level that inventory DNA profiles from new unsolved cases, old unsolved cases, and convicted offenders. As these DNA databanks grow in size, society will benefit even more from the technology's incredible power to link seemingly unrelated crimes and to identify with alacrity suspects who were until then completely unknown to investigators. In the United States, to date, DNA testing is for the most part used in rape and homicide prosecutions. In Great Britain, DNA evidence is

also regularly used to obtain burglary convictions. As American databanks expand, DNA testing will undoubtedly be used to solve a broader spectrum of crimes in the United States as well.

A remarkable feature of DNA testing is that it not only helps to convict but also serves to exonerate.[1] A 1995 survey of laboratories reported that DNA testing excluded suspects in about one-fourth to one-fifth of the cases. (See the National Institute of Justice publication, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996)). These suspects were fortunate: Before the advent of DNA testing they might have been indicted on the basis of an eyewitness' statement or other evidence and possibly been convicted on the basis of such proof. Numerous instances of erroneous imprisonment have come to light through efforts such as the Innocence Project, which helps convicts obtain postconviction DNA testing. As of this writing, more than 60 convictions in the United States have been vacated on the basis of DNA results. Some of the cases are discussed in the NIJ study cited above. Almost half of the convictions that have been vacated were set aside after 1996. The technological progress that occurred in the 1990s now makes it possible to obtain conclusive results in cases in which previous testing had been inconclusive. Consequently, postconviction testing will be requested not only in cases in which DNA testing was never done, but also in cases in which a newer, more sensitive technology may now be able to furnish a conclusive answer.

The Commission

The documentation of erroneous convictions provided the impetus for Attorney General Janet Reno to establish a National Commission on the Future of DNA Evidence. Five working groups that report to the Commission were organized, and members of the working groups were appointed by the chair of the Commission, Chief Justice Shirley Abrahamson of Wisconsin. As shown in the biographies contained in appendix IV, the members of the Working Group on Postconviction Issues included two defense counsel and two prosecutors, a judge, a victims' rights advocate, a scientist, and academics, who have had considerable experience with various issues relating to the forensic use of DNA.

The Working Group on Postconviction Issues was directed to respond on an expedited basis in recognition of the need for speed when an innocent person may be imprisoned. The urgency of the task was compounded by the uncertainty surrounding many issues relating to postconviction DNA testing. It is, after all, a scant decade since DNA evidence was first introduced in a criminal proceeding. Consequently, considerable confusion exists about numerous questions, ranging from the preservation of DNA evidence to the applicability of statutes of limitation with regard to newly discovered evidence. Over time, these issues will have to be resolved by legislatures and courts in each jurisdiction. In the interim, it is hoped that the recommendations below will be helpful. The suggestions are based on the working group's consensus on how defense counsel, prosecutors, judicial officers, victims' advocates, and DNA laboratories can respond effectively at the various stages of a postconviction request for DNA testing.

These suggestions seek to maximize opportunities for the truly innocent to obtain redress without forfeiting the legal system's need for finality. For while we realize that claims of factual innocence must be taken seriously, and that we cannot tolerate the incarceration of those not guilty, we must also recognize the desirability of definitive determinations. In an era in which courts are hard put to handle their current dockets and judicial budgets are strained, proceedings

[1] As used in this document, "exoneration" may mean either that a person cannot have committed the charged crime or that reasonable doubt exists as to whether the person committed the charged crime. In the latter instance, DNA results may result in a new trial rather than the inmate's release. See chapter 2.

should be reopened only in the rare instance when justice so demands. Consequently, State-funded postconviction DNA testing should be granted only when there is a strong probability that the results that can be anticipated from DNA testing would have changed the prior verdict. Furthermore, even aside from concerns of efficiency and economy, closure is essential for victims and their families, for witnesses, and for judicial officers and prosecutors. Finality is a fundamental value that can properly be ignored only in the extraordinary case. Fortunately, DNA analysis now provides us with the ability to do justice in the exceptional situation.

The need for postconviction DNA testing will wane over time. Within the next decade, DNA testing with highly discriminatory results will undoubtedly be performed in the vast majority of cases in which biological evidence is relevant. Furthermore, advanced technologies that are not yet in all laboratories will become commonplace. When that occurs, requests for postconviction relief that seek DNA testing or retesting will for the most part cease.

The chapters that follow present information that is pertinent to postconviction requests for DNA testing. Chapter 2 deals with the applicable law, chapter 3 provides an overview of the applicable science, and chapters 4 through 8 contain suggestions on how prosecutors, defense counsel, judges, victims' rights advocates, and laboratory personnel might proceed most effectively at various stages of such a postconviction proceeding. To implement these recommendations properly, participants in postconviction DNA proceedings need to consider 1) the category of case in which the DNA testing is sought and 2) whether circumstances require the participants to adjust the roles they customarily play in adversarial proceedings.

A Framework for Analysis

Clearly, postconviction DNA testing will be useful only if a case meets certain criteria, which cannot be determined until sufficient information is gathered. The recommendations in chapter 4 contain numerous suggestions on how to obtain the needed details at different stages of a postconviction proceeding. As information becomes available, it may be helpful to evaluate a case in terms of five broad categories, recognizing that the case may have to be reclassified because of new information, evidence, or technology, and that the boundaries delineating these categories are not always clear or undisputed. These categories are not intended to spell out legal consequences, which may in any event vary somewhat from jurisdiction to jurisdiction. Our aim is to provide the reader with an organizational framework for identifying issues and appropriate steps to take at various stages of an application for postconviction DNA testing. It must also be remembered that technology may vary from jurisdiction to jurisdiction and even within jurisdictions. Laboratories do not uniformly adopt innovations with regard to DNA testing at the same moment in time. Consequently, some techniques that are discussed in chapter 3 may not be available in a particular laboratory.

Category 1 consists of cases in which both the prosecutor and defense counsel concur on the need for DNA testing. In such a case, if the parties cooperate, it should be possible to make the necessary arrangements without recourse to a court and without demanding payment for DNA testing when the inmate is indigent.

In some instances, however, exclusionary test results will not be determinative of innocence, although they may help an inmate obtain a new trial, a pardon, commutation, or clemency. There also are cases in which the prosecutor and defense counsel cannot agree on whether an exclusion

would amount to a demonstration of innocence, would establish reasonable doubt of guilt, or would merely constitute helpful evidence. In cases such as these and others, which are assigned to **category 2**, the assistance of a judicial officer may be essential to determine whether, and under what conditions, testing should be conducted.

Category 3 consists of cases in which, because of the present state of evidence or technology, testing will be inconclusive. Future developments may cause such a case to be reassigned to a different category.

Unfortunately, in **category 4** cases, it will be impossible to do any testing because the crime scene samples were never collected, were destroyed, or cannot be found despite best efforts. As chapter 4 relates in considerable detail, a case should never be relegated to category 4 until every possible attempt has been made to ascertain the availability of biological evidence.

Experience indicates that **category 5** cases exist in which false claims of innocence are made. In these cases, prosecutors and defense counsel generally agree that no testing is warranted. If an inmate nevertheless persists in pursuing a request for testing, defense counsel should warn the client that the results may substantiate the inmate's guilt.

The examples that follow of recurring fact patterns illustrative of these categories are not intended to be exclusive.

Category 1. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, exclusionary results will exonerate the petitioner.

> **Example 1:** Petitioner was convicted of the rape of a sexually inactive child. Vaginal swabs were taken and preserved. DNA evidence that excludes the petitioner as the source of the sperm will be dispositive of innocence. Note that in a case such as this, the victim's DNA—also obtainable from the vaginal swab—operates as a control that confirms that the correct sample is being tested. In addition, the victim's age and sexual status guarantee that the swab contains only biological material related to the crime.
>
> **Example 2:** Petitioner was convicted of the rape of a woman who reported that she was sexually attacked by two men. Vaginal swabs were taken and preserved. Exoneration of the defendant may depend on whether the DNA test of sperm on the vaginal swabs shows two male DNA profiles, both of which exclude petitioner.
>
> **Example 3:** Petitioner was convicted of the rape of a sexually active woman who reported that she had engaged in consensual sexual intercourse within 24 hours of the rape. Vaginal swabs were taken and preserved. Exoneration of the defendant may depend on whether a DNA sample from the victim's consensual partner is available.
>
> **Example 4:** Petitioner was convicted of a homicide. The evidence showed that the victim, who had been stabbed repeatedly, had resisted fiercely and that a single perpetrator was involved. There were pools of blood leading from the crime scene. Standard blood typing of the crime scene bloodstains showed that some samples were consistent with the blood of the victim and others were consistent with the blood of the petitioner. The blood samples were retained. DNA testing that excludes the petitioner as a source of the bloodstains would be dispositive of his innocence.

Category 2. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, exclusionary results would support the petitioner's claim of innocence, but reasonable persons might disagree as to whether the results rule out the possibility of guilt or raise a reasonable doubt about guilt. This category also includes cases in which, for policy and/or economic reasons, there may be disagreement as to whether DNA testing should be permitted at all or, for indigent inmates, at State expense. As the recommendations below indicate, the decision on whether this is a case for testing may have to be made by a judicial officer, who may also wish to ensure that defense counsel is available. These cases may raise difficult policy issues about how far postconviction relief should reach. Bearing on the decision to test will be factors such as:

- The other evidence in the case.
- Whether conviction was based on a guilty plea, a no contest plea, or a trial.
- The availability of DNA testing at the time of trial.
- The type of DNA technology available at the time of trial.
- The petitioner's current status.

Example 5: Petitioner was convicted of a homicide. The prosecution argued in closing that blood on a shirt found at petitioner's home came from the victim. Standard blood typing had shown a match between the sample and the victim's blood. DNA testing that excludes the victim as a source of the bloodstains might be helpful to petitioner's claims but does not prove that he was not guilty. How a case such as this should be treated will depend on the role the bloody shirt played at petitioner's trial and the strength of the other evidence against him. The prosecutor and defense counsel may not concur in their evaluations.

Example 6: Petitioner is presently incarcerated for a crime for which biological evidence is irrelevant. Petitioner had, however, been convicted of a prior crime in which biological evidence was collected and is still available. Evidence of petitioner's conviction of that prior crime had been utilized in connection with the crime for which he is incarcerated. The conviction may have been used to enhance sentencing; as one of the strikes in a "three strikes and you're out" jurisdiction; in connection with impeachment or the threat of impeachment; or as substantive proof, either as prior crimes evidence, or as evidence that satisfies a rule such as Rule 413 or 414 of the Federal Rules of Evidence, which make admissible in sexual assault cases evidence that defendant previously committed a sexual assault. If DNA testing were to exonerate him in connection with the prior crime, it might be helpful to petitioner.

Example 7: Petitioner has been released from prison after serving time for a crime in which biological evidence was collected. Petitioner claims that he cannot get a job because of his criminal record. DNA evidence that would lead to the expungement of the prior conviction might be helpful to the petitioner even though he is no longer incarcerated.

Category 3. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, the results will not be relevant to a guilt or innocence determination.

Example 8: Petitioner is presently incarcerated for a gang rape. The victim testified that seven persons were involved but that she is not sure that all actually engaged in sexual intercourse. If the vaginal swabs that were preserved are tested and petitioner's DNA profile is not found, the significance of the results will be minimal. It should be noted, however, that if other participants in the rape can be identified through DNA testing and petitioner can show the unlikelihood that he ever had any contact with the other participants, this case may fall into category 1 or 2.

Example 9: Biological evidence exists that cannot be analyzed with current technology.

Category 4. These are cases in which biological evidence was never collected, or cannot be found despite all efforts, or was destroyed, or was preserved in such a way that it cannot be tested. In such a case, postconviction relief on the basis of DNA testing is not possible.

Category 5. These are cases in which a request for DNA testing is frivolous.

Example 10: DNA testing results will be irrelevant, for instance, when petitioner testified about a consent defense in a rape case, or a self-defense claim in a homicide prosecution. If petitioner raised such a defense for tactical reasons but did not testify, the case may belong in a different category. A further caveat is that, even if petitioner testified, a judicial officer may have to rule on claims by petitioner, such as lack of capacity (insanity or mental retardation), or that the defense was coerced.

Example 11: The trial transcript discloses the existence of other evidence that makes petitioner's claim meaningless, as in a burglary conviction where petitioner was apprehended at the scene of the crime.

The Roles of the Participants

The recommendations in chapter 4 presuppose cooperation and concern on the part of those who play a part in handling postconviction requests for DNA testing. These attributes are essential in achieving the goals of exonerating the innocent while preserving the judicial system's needs for integrity, finality, and efficiency. When an inmate is truly innocent, or the facts are such that favorable testing results would create reasonable doubt, the interests of prosecutors and defense counsel converge so that they may at some points have to modify their usual adversarial posture and engage in a joint cooperative venture. The discussion below considers the factors that affect participants' roles at various stages of postconviction requests for DNA testing.

The Role of Prosecutors

Prosecutors understand that DNA testing can demonstrate actual innocence in a category 1 case. As officers of justice, prosecutors have an interest not only in exonerating the wrongly accused, but in bringing the guilty to justice. A groundless conviction means that the real perpetrator is probably still at large. DNA testing assists law enforcement because it may identify the true culprit in the case being challenged, clear up unsolved crimes, and prevent future criminal acts.

Consequently, some prosecutors may opt not to take a traditional adversarial stance when their office receives a request for postconviction DNA testing. Their response will be affected by the category of case, their familiarity with DNA testing, and the resources of their office. (See chapter 4, Recommendations for Prosecutors.) Prosecutors who are knowledgeable about DNA testing

and have ready access to laboratory facilities and expertise may feel comfortable initiating DNA testing themselves instead of waiting for defense counsel to take the laboring oar. On the other hand, a prosecutor who has had no previous experience with DNA and/or has inadequate technical assistance may respond to requests for DNA testing by seeking assistance from the legal community and/or scientists with DNA testing expertise, or by making appropriate referrals to defense counsel or to projects that handle actual innocence claims.

Even the prosecutor who basically treats requests for DNA testing like all other applications seeking postconviction relief should adopt a cooperative attitude with regard to certain matters or truly innocent persons will be unable to substantiate their claims. Except in the case of patently frivolous category 5 claims, use the following as a guide:

- Prosecutors should not delay responding to a request for DNA testing. Immediate action may be required because the statute of limitations may bar future proceedings. (See discussion in chapter 2.)
- Once a request for DNA testing is made, prosecutors should take affirmative steps to prevent the destruction of potentially relevant evidence (e.g., material from the crime scene or standards from victims or third parties) that may or may not have been tested. Immediate action may be needed when there is a policy authorizing the routine destruction of evidence.
- Prosecutors should use their best efforts to locate the crime scene samples. The prosecutor who handled the case originally may be the only person who knows where they are.

Furthermore, prosecutors should consider at the outset whether expeditious discussions with defense counsel might not resolve the matter promptly. Defense counsel may be unaware of prior DNA testing that confirmed guilt. The evidence may not have been introduced at the original trial because restrictions on the admissibility of DNA evidence existed at the time, or because the abundance of other evidence convinced the prosecution that DNA evidence would be superfluous and needlessly expensive.

Defense counsel may be raising an issue about prior DNA testing that could be resolved if the prosecutor showed defense counsel underlying laboratory notebooks or other materials that the jurisdiction does not ordinarily disclose. In such instances, prompt disclosure will ultimately save time and money.

The Role of Defense Counsel

Defense counsel should appreciate that convictions are rarely reopened and that a noncontentious attitude may expedite the location of needed biological samples and accelerate the testing process that is an innocent client's best hope for relief.

On the other hand, defense counsel must also recognize and inform their clients that truth may have a price and that inculpatory results will have to be disclosed to the prosecution. Convicted felons are not entitled to testing without risking the consequences of false claims of innocence.

The Role of Law Enforcement Personnel

Cooperation on the part of law enforcement officials may be crucial; materials needed for testing or retesting may be in their possession. Consequently, they can assist in:

- Finding the evidence that was sent to the laboratory for testing.

- Identifying and locating other evidence that is now testable.
- Preserving the evidence.

The Role of the Court

Judges may feel compelled to take a proactive stance to protect the inmate seeking relief if the prosecution and defense are refusing to cooperate. A court may be especially likely to exercise its discretion in the interests of justice in a potential category 1 case, particularly if the court fears that the passage of time may make it impossible to ascertain the validity of a claim of actual innocence.

The judge's assistance may be sought in connection with such matters as locating and preserving evidence, obtaining discovery from laboratories, and compelling third parties to provide samples for elimination testing. (See chapter 6, Recommendations for the Judiciary.)

The court might also consider whether to exercise its discretion to appoint an expert to assist the court in a case that presents disputed, complex, technical issues relating to DNA testing or interpretation.

The Role of the Victims' Advocate

The role of the victims' advocate in postconviction proceedings is essential and complex. The advocate's usual role is to provide support, which will likely be needed during a postconviction proceeding as it may be extremely traumatic for surviving victims and their families to learn that a person found guilty is now attempting to vacate the conviction. The early involvement of victims' advocates lessens the chance of victims and their families making this discovery through the media and ensures that they are kept informed and treated with appropriate concern and respect.

In category 1 cases, advocates may also have to prepare their clients for the possibility that the inmate will be exonerated. If this occurs, advocates face the difficult task of providing support for the person whose misidentification of the culprit may have been the chief evidence leading to the original guilty verdict.

Advocates will at times be called upon to persuade a victim to agree to DNA testing even though the victim is convinced of the accuracy of the identification he or she made at the inmate's trial. For exclusionary purposes, samples may also have to be tested from persons who were engaged in sexual relations with the victim at the relevant time. Victims may be reluctant to provide names or to urge these persons to cooperate. In order to expedite postconviction proceedings, victims' advocates must make victims appreciate the desirability of cooperating because DNA testing may lead to the apprehension of the person who was truly guilty and prevent future criminal acts.

The Role of Laboratory Personnel

The public or private laboratory skilled in DNA testing can assist in the postconviction process in a number of ways, including:

- Agreeing to conduct some pro bono testing at the request of a judicial officer, prosecutor, defense counsel, or project.
- Making its personnel available to assist participants in a postconviction proceeding who lack adequate technical expertise.

Chapter 2

Legal Issues

Background

An understanding of the novel legal issues posed by postconviction requests for DNA testing requires an appreciation of the traditional legal approach to postconviction relief that predated the forensic use of DNA typing. The judicial system provided two principal avenues of relief for a convicted defendant who had exhausted the process of appeal. The inmate could seek: 1) a new trial if the conviction rested on an error of fact contradicted by newly discovered evidence, or 2) a writ of habeas corpus in State or Federal court (after efforts to obtain relief in State court had been exhausted). In addition, it was conceded that the limited circumstances in which postconviction relief was available might cause some cases in which guilt was erroneously determined to fall between the cracks. In such a case, an inmate could still seek executive clemency as a means of correcting a miscarriage of justice.

Under common law, the window during which relief could be sought on the grounds of newly discovered evidence was extremely narrow, limited to the term of the court in which the judgment of conviction was entered. Most States have since expanded the applicable time bars, but at this time only 15 States permit new trial motions based on newly discovered evidence to be made more than 3 years after conviction. This restrictive approach rests on:

- The strong presumption that the verdict is correct because the accused was found guilty by a jury of peers after a trial conducted with full constitutional protections.
- The need for finality. (See discussion in chapter 1.)
- The recognition that the likelihood of more accurate determinations of guilt or innocence diminishes over time as memories fade, witnesses disappear, and the opportunity for perjury increases.
- The need to conserve judicial resources by not opening the floodgates to meritless and costly claims.

Federal habeas jurisprudence traditionally assumed that relief could not be grounded on an erroneous finding of guilt unless a constitutional error had occurred at the defendant's trial. This conclusion—that proof of actual innocence does not alone suffice to set aside a prior conviction—views the States as responsible for correcting faulty adjudications unaccompanied by a constitutional violation. It was justified by the assumption, mentioned above, that questions of guilt or innocence become more uncertain with the passage of time, so that accurate determinations are considerably less likely at a new trial.

The Impact of DNA Testing

The advent of DNA testing raises the question of whether a different balance ought to be struck regarding the right to postconviction relief. The results of DNA testing do not become weaker over time in the manner of testimonial proof. To the contrary, the probative value of DNA

testing has been steadily increasing as technological advances and growing databases amplify the ability to identify perpetrators and eliminate suspects. (See chapter 3.) We already have seen cases in which an exclusionary DNA test can prove actual innocence. (See example 1 in chapter 1.) In other cases, DNA results may raise a reasonable doubt about guilt. The strong presumption that verdicts are correct, one of the underpinnings of restrictions on postconviction relief, has been weakened by the growing number of convictions that have been vacated because of exclusionary DNA results. On the other hand, the need for finality and the conservation of judicial resources remain important concerns, and there are numerous types of cases in which the results of DNA testing would be debatable or inconclusive. (See A Framework for Analysis in chapter 1.) To date, however, only in New York and Illinois have State legislatures restructured the right to postconviction relief now that the possibility exists in some cases that more accurate and definitive adjudications can be achieved than at the original trial.[2]

In addition to challenging the assumptions that support the structure of postconviction relief, DNA evidence also has given rise to thorny legal issues because postconviction requests for testing do not fit well into existing procedural schemes or established constitutional doctrine. As an initial matter, postconviction procedures in both State and Federal court assume petitioners already have, in hand, new evidence that they claim proves innocence; postconviction DNA cases, however, invariably begin with applications to find and test evidence that is, and has been, in the control of the prosecution since the time of the original trial. The typical inmate making a postconviction DNA request wants: 1) discovery of the evidence so that it can be tested, 2) the right to present favorable test results in a judicial proceeding or in an executive proceeding for clemency, and 3) the State to pay for the testing. At this point in time, the law in many jurisdictions is not clear as to the legal theory that entitles the petitioner to have any of these requests granted, or what the appropriate procedural mechanisms are for making these demands. Frequently, these issues are intertwined, and petitioners make omnibus motions in which they raise all potentially relevant grounds for relief together.

Because of this present state of legal uncertainty, litigating postconviction DNA applications often will be unnecessarily complex, expensive, and time consuming, unless prosecutors, defense counsel, and trial courts work cooperatively to assess cases, find the evidence, arrange for DNA testing, and make joint requests for judicial or executive relief when the facts so warrant after a result favorable to the petitioner. That is why the recommendations in this report are designed to suggest how postconviction DNA applications can be handled expeditiously, ethically, flexibly, and lawfully by all parties, in any jurisdiction, with little or no need for judicial intervention.[3]

[2] New York and Illinois statutes specifically authorize postconviction DNA testing. See, N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney Supp. 1999); 725 Ill. Comp. Stat. 5/116-3(a) (West Supp. 1998). These statutes permit an indigent inmate to obtain postconviction DNA testing at State expense when certain evidentiary thresholds are met. The New York statute requires a showing that if the results of the requested DNA testing had been admitted at trial, there is "a reasonable probability that the verdict would have been more favorable to the defendant." The Illinois statute provides that testing should be conducted when test results would produce "new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence." Neither statute sets a time limit on bringing the motion. The New York statute applies only to convictions occurring before January 1, 1996; it will not therefore apply if DNA testing used in connection with a later trial was inconclusive but retesting might now produce conclusive results due to technological advances.

[3] Courts have, in the interests of justice, vacated convictions and released inmates when newly discovered DNA evidence demonstrates innocence and the prosecution joins in the motion. Accordingly, in Maryland, where newly discovered evidence of innocence motions cannot be brought more than 1 year after final judgment, Kirk Bloodsworth was nevertheless released, and his murder conviction vacated, based upon exculpatory DNA testing proffered in a joint motion by the prosecution and defense. Six months later Bloodsworth was pardoned by the Governor of Maryland after serving almost 9 years in prison, 2 on death row. See Connors, et al., *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial,* NIJ Research Report [hereinafter "NIJ Report"] 35–37 (1996). A similar chain of events led to the release of Dwayne Scruggs when a judge in Indiana granted a joint newly discovered DNA evidence motion that was filed long after Indiana's 30-day statute of limitations had passed. *Id.* at 68–70.

The purpose of this chapter is to identify the kinds of legal issues that have already arisen, and others that will probably develop, as applications for postconviction DNA testing continue to be made and the DNA technology available to conduct those tests advances. No attempt has been made to set forth in full the law of any particular jurisdiction.

Can a Right to Discovery Be Inferred From Statutes Providing for Postconviction Relief?

Courts do not agree on whether a request for DNA testing in a postconviction proceeding implies a right to discovery even if the statute is silent about such a right. Compare *People* v. *Callace*, 573 N.Y.S.2d 137, 138 (Suffolk County Ct. 1991) (finding discovery right pursuant to statute authorizing vacation of convictions on the basis of newly discovered evidence; decision predates statute discussed in note 2) and *Jenkins* v. *Scully*, No. CIV-91-298E, 1992 WL 32342, at *1 (W.D.N.Y. Feb. 11, 1992) (State ordered to produce evidence for DNA testing pursuant to rules governing habeas corpus), with *Ohio* v. *Wogenstahl*, No. C-970238, 1998 WL 306561, at *1 (Ohio Ct. App. Dist. 1 June 12, 1988) (request for DNA retesting because trial results were inconclusive is in the nature of a discovery request that the court is not required to grant in a postconviction proceeding).

Is There a Constitutional Right to Testing Under the Brady *Doctrine?*

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), the Supreme Court held that a defendant has a constitutional right at or before trial to be informed of exculpatory evidence in the hands of the State. A number of courts have extended *Brady* to requests for DNA testing even when the request is made after trial and although it is potentially exculpatory evidence that is being sought. In *Arizona* v. *Youngblood*, 488 U.S. 51 (1988), petitioner claimed that his conviction should be vacated because the State before trial had destroyed rectal swabs containing sperm which could have demonstrated his innocence if subjected to serological testing. Although the Supreme Court found that the conviction would not be overturned without proof that the swabs were destroyed in bad faith, nothing in the opinion suggests that petitioner would not have been entitled to testing if the swabs now existed.

These Supreme Court decisions provide an avenue for access to testing even when no formal discovery procedures exist as part of the postconviction statutory scheme in that jurisdiction. But see *Wogenstahl*, 1998 WL 306561, at *2–*3 (not *Brady* violation to refuse request for testing). While the weight of reported cases acknowledges a right of access to the evidence for purposes of DNA testing on *Brady* grounds, there are many unreported, summary decisions in which trial courts have simply dismissed applications for postconviction testing without reaching any *Brady*-based constitutional arguments.

An early case applying *Brady* is *Matter of Dabbs* v. *Vergari*, 570 N.Y.S.2d 765 (Sup. Ct. Westchester County 1990), in which an inmate requested access to perform DNA testing as a prelude to a possible motion to vacate the conviction based on newly discovered evidence. The prosecution opposed the motion on the grounds that no statutory right to the requested postconviction discovery then existed in New York; that the results of proposed testing were speculative; and that granting the petitioner's request would prompt other convicted sex offenders to demand DNA testing. The *Dabbs* court, relying on *Brady*, supported its decision to allow the requested testing as follows:

- [A] defendant has a constitutional right to be informed of exculpatory information known to the State….

- A corollary to the duty of disclosure is the duty to preserve exculpatory material….
- Courts have dismissed indictments after convictions because of destruction or loss of evidence by the police when that police conduct has deprived a defendant of material of high exculpatory potential….
- [W]hile it is unclear what such testing will ultimately reveal, [defendant] has demonstrated an adequate foundation for the testing by showing that the victim's panties, a gauze pad, and rape tests slides have high exculpatory potential.

Dabbs, 570 N.Y.S.2d at 767–68 (citations omitted). DNA testing ultimately exonerated Dabbs and his conviction was vacated. See *People* v. *Dabbs*, 587 N.Y.S.2d 90, 93 (N.Y. Sup. Ct. 1991).

In *State* v. *Thomas*, 586 A.2d 250 (1991), the court rejected lateness arguments from the prosecution and held that DNA evidence is such a potentially powerful tool to demonstrate actual innocence that even the most unyielding procedural bars must give way:

> Under these circumstances, consideration of fundamental fairness demands that the [DNA] testing of this now 7-year-old rape kit material be done now…. Our system fails every time an innocent person is convicted, no matter how meticulously the procedural requirements governing criminal trials are followed. That failure is even more tragic when an innocent person is sentenced to a prison term…. We regard it as… important to rectify that failure…. There is a possibility, if not a probability, that DNA testing now can put to rest the question of defendant's guilt…. We would rather [permit the testing] than sit by while a [possibly] innocent man… "languishes in prison while the true offender stalks his next victim."

Thomas, 586 A.2d at 253-54 (citations omitted).

Other cases embracing a *Brady* analysis are: *Sewell* v. *State*, 592 N.E.2d 705, 707–708 (Ind. Ct. App. Dist. 3 1992) (inmate allowed access to rape kit for DNA testing 10 years after conviction notwithstanding the absence of discovery procedures; "Advances in technology may yield potential for exculpation where none previously existed. The primary goals of the court when confronted with a request for the use of a particular discovery device are the facilitation of the administration of justice and the promotion of the orderly ascertainment of truth."); *Commonwealth* v. *Brison*, 618 A.2d 420, 423 (Pa. Super. Ct. 1992) ("where evidence has been preserved, which has high exculpatory potential, that evidence should be discoverable after conviction"); *Mebane* v. *State*, 902 P.2d 494, 497 (Kan. Ct. App. 1995) (requests for DNA testing can be granted under *Brady* when proper showing made).

Is There a Constitutional Right to Demonstrate Actual Innocence That Provides a Basis for Access to Testing Through Habeas Corpus Review in Federal or State Court?

In *Herrera* v. *Collins*, 506 U.S. 390 (1993) the Supreme Court addressed the question of whether it would violate the 14th Amendment's due process clause or the Eighth Amendment's prohibition against cruel and unusual punishment to execute an inmate who claimed he could prove, through newly discovered evidence proffered in a Federal habeas petition, that he was "actually innocent." Herrera had to present his newly discovered evidence in a Federal habeas petition because he was time barred from pursuing the claim in the Texas State courts.

In a plurality opinion, the Supreme Court rejected Herrera's habeas petition on the grounds that his factual showing was insufficient, but strongly suggested that it would violate the Constitution to punish someone who could make a "truly persuasive" showing of actual innocence.[4] See *Herrera*, 506 U.S. at 417 (plurality opinion of Chief Justice Rehnquist). See also 506 U.S. at 427 (O'Connor, J., concurring). Justice White, in a concurring opinion, and Justice Blackmun, writing for Justices Souter and Stevens in a dissenting opinion, set somewhat lower thresholds: According to Justice White, relief should be granted when, in light of the newly discovered evidence, "no rational trier of fact could [find] proof beyond a reasonable doubt." 506 U.S., at 429 (citation omitted); and Justice Blackmun concluded "that, to obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent." 506 U.S. at 442.

The discussion in *Herrera* about "actual innocence" is quite hypothetical. Justices Scalia and Thomas expressed doubt that the Court would ever again have to confront this issue, "since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon." 506 U.S. at 428. Several justices pointed to the evidential infirmities that occur over time as making it unlikely that a petitioner could make the requisite showing. This assumption was certainly reasonable under the facts of *Herrera*, which vividly illustrate why courts fear stale post-trial claims of innocence.[5]

Now, however, in some cases the possibility of demonstrating actual innocence has moved from the realm of theory to the actual with the availability of postconviction DNA testing. (See examples in chapter 1.) The opinions in *Herrera* may, therefore, provide a reasonable basis for an inmate who cannot obtain relief in State court to seek Federal habeas relief, even though, as noted in *Herrera,* it had long been the rule that newly discovered evidence claims do not state a ground for Federal habeas relief absent an independent constitutional violation occurring in the underlying State criminal proceeding.[6] *Herrera*, 506 U.S. at 399. Indeed, Federal courts have been quite willing to order DNA testing to supplement independent constitutional claims. See, e.g., *Toney* v. *Gammon*, 79 F.3d 693, 700 (8th Cir. 1996); *Jones* v. *Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997); *Jenkins*, 1992 WL 32342, at *1.

Are There Other Bases on Which Petitioners Can Obtain Access to Testing?

Freedom of Information Act (FOIA) statutes in many States are very broad and frequently permit access to "tangible" objects that might embrace the kind of biological evidence needed for postconviction DNA testing. Inmates seeking access to evidence have been pursuing State FOIA claims as separate actions or in conjunction with other postconviction motions. These FOIA requests specify that DNA testing will not be performed on the evidence, without court approval, unless the samples can be divided to permit replicate testing. There are no reported decisions to date on such FOIA requests.

The Innocence Project also has claimed a right of access to testing under section 1983 of the Civil Rights Act on the ground that courts act under the color of State law when they refuse access to testing. As of this writing, there are no reported decisions that discuss this theory.

[4] The punishment in *Herrera* was death, but the same constitutional arguments would apply to lesser punishments.

[5] Petitioner claimed 10 years after his conviction that his brother, who had died 6 years previously, was the actual killer. To prove this claim petitioner proffered a number of inconsistent affidavits. Proof of guilt at trial had been extensive, including a signed letter by petitioner found in his possession at the time of his arrest in which he admitted his guilt. 506 U.S. at 421–424 (O'Connor, J. concurring).

[6] See Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 Buff. L. Rev. 501, 516–518 (1996).

What Kind of a Showing Must the Petitioner Make to be Afforded Access to Testing?

A petitioner who is proceeding pursuant to a newly discovered evidence motion must meet the standard set forth in the governing statute. The precise formulation differs from jurisdiction to jurisdiction. In New York, the newly discovered evidence must be "of such a character as to create a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant[.]" NY Crim. Pro. § 440.10 (1)(g) (McKinney 1994). Other States say the newly discovered evidence should provide "conclusive proof" that there would have been a different verdict. See Wilkes, *State Postconviction Remedies and Relief*, § 1-13, at 31–32 (1996 ed.), § 1-13, at 30–32. Some States use, either as the exclusive ground for relief or as an additional, "catch-all" provision, a general "interests of justice" standard as suggested by section (1)(a)(5) of the 1980 Uniform Post-Conviction Procedure Act, "evidence, not previously presented or heard, exists requiring vacation of the conviction or sentence in the interest of justice." See Wilkes, supra, app. B, at 905.

Courts that afford access to testing via *Brady* motions, (see discussion supra), also require some showing by the petitioner that in light of the evidence introduced at trial DNA testing could somehow have affected the outcome. The reported cases report a variety of tests and conditions.

Clearly the courts perform the kind of analysis suggested in A Framework for Analysis in chapter 1 in determining whether access to testing is warranted. See, e.g., *People* v. *Gholston*, 697 N.E.2d 375, 379, (Ill. App. Ct. 1998) (refusing testing where multiple defendants participated in the sexual assault, one or more of whom may have ejaculated, and there was no evidence that defendant ejaculated; defendant had confessed to being at the scene); *Mebane*, 902 P.2d at 497 (will only allow testing if case involved a single perpetrator and trial evidence was weak); *Thomas*, 586 A.2d at 254 ("when the State's proofs are weak, when the record supports at least a reasonable doubt of guilt, and when there exists a way to establish guilt once and for all…").

The concurring and dissenting opinions in *Herrera* discuss various standards that might be required for showing "actual innocence." (See discussion supra.)

May Consensual Partners Be Required to Provide Elimination Samples?

On occasion, when an application for postconviction DNA testing is made, the prosecution opposes relief by taking a different factual position on the biological evidence than it did at trial. Most frequently, it claims in rape cases that no DNA testing needs be performed when the eyewitness identification is strong; the sperm on vaginal swabs or underwear, attributed to the defendant at trial, may have come from a prior consensual partner of the victim; and the defendant may have failed to ejaculate. While this argument has succeeded in some unreported cases, published decisions reject this position as a reason not to do initial testing that could exclude an inmate, or, once an inmate has been excluded, to deny a new trial without conducting a test that shows the prior consensual partner is, in fact, the source. See, e.g., *Commonwealth* v. *Reese*, 633 A.2d at 206, 209–10 (Pa. Super. Ct. 1995).

Our recommendation is that "elimination" samples from third parties may be needed in such a case but that they normally should not be sought until after an exclusion has been obtained from DNA testing. This is advisable both to minimize stress for victims and third parties, as well as to create a stronger legal basis for obtaining the "elimination" samples once it becomes necessary to do so.

In fact, elimination samples from third parties have routinely been obtained at the request of prosecutors, courts, and governors in more than a third of the postconviction DNA exonerations to date. The samples have generally been gathered on a voluntary basis, although in more than a few instances judges have made it clear to prosecutors that, in light of the DNA exclusion, the inmate's judgment would be vacated if the third-party samples were not produced. And as previously noted, in one reported decision, *Commonwealth* v. *Reese*, 663 A.2d at 209-10, the trial court made it clear that the potential need for third-party elimination samples was not, in and of itself, a basis not to permit access to evidence and potentially exculpatory DNA testing. Otherwise, we have not identified any reported cases that directly deal with a third party contesting the taking of an elimination sample in the context of postconviction DNA exclusion.

In a number of reported paternity cases, courts have compelled third-party relatives to submit to DNA testing for the purpose of establishing paternity.[7] Similarly, the U.S. Supreme Court has upheld the issuance of grand jury subpoenas, based upon a showing of relevancy to the investigation, not probable cause, to obtain "nontestimonial" evidence[8] such as voice exemplars from third parties for "elimination" purposes. See *United States* v. *Dionisio*, 410 U.S. 1, 5–7 (1973).

How Do Time Limits in Motions for a New Trial Based Upon Newly Discovered Evidence Affect Requests for Postconviction DNA Testing?

All States provide some type of statutory scheme, common law authority, or court rule for postconviction relief based upon "newly discovered evidence of innocence." "Newly discovered evidence" is generally construed to mean evidence that was not available at the time of trial, or evidence that counsel could not obtain with the exercise of due diligence.

Among the States, time limits on motions for a new trial based on newly discovered evidence of innocence vary considerably.[9] While some States impose no time limits or make them waivable, a substantial number require the motion to be made within 60 days after judgment. Another sizeable group of States calls for motions to be made within 1 to 3 years. Rule 33 of the Federal Rules of Criminal Procedure has a 2-year time limitation for new trial motions based upon newly discovered evidence. These statutes can impose substantial barriers to gaining access to DNA postconviction testing or to being allowed to introduce favorable results.

Even when a postconviction motion based on newly discovered evidence would lie, prosecutors still have successfully defeated the motion in some cases by using a laches argument. In *Ziegler* v. *State*, 654 So. 2d 1162 (Fla. 1995), although the Florida Supreme Court recognized that Florida's 2-year statute of limitations would not bar Ziegler from obtaining a particular kind of DNA test that had not been available at the time of his conviction (1976), the court nonetheless denied

[7] See, e.g., *Sudwishcher* v. *Estate of Hoffpauir*, 589 So. 2d 474 (La. 1991); *Lach* v. *Welch*, 1997 WL 536330 (Conn. Super. Ct. Aug. 15, 1997), 1994 WL 271518 (Conn. Super. Ct. June 13, 1994); I*n re Estate of Rogers*, 583 A.2d 782 (N.J. Super. Ct. App. Div. 1990). See also Charles Nelson Le Ray, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 B.C.L. Rev. 747 (1994) (discussing generally DNA testing on nonparty relatives).

[8] It is well established that the compelled taking of blood from a person for testing in the course of a criminal investigation is not a violation of the party's Fifth Amendment right against self-incrimination. See *Schmerber* v. *California*, 384 U.S. 757, 761–65 (1966). Moreover, on the basis of this distinction, one may be constitutionally compelled to provide handwriting exemplars, see *United States* v. *Mara*, 410 U.S. 19, 21–22 (1973) and *Gilbert* v. *California*, 388 U.S. 263, 266–67 (1966); to provide voice exemplars, see *Dionisio*, 410 U.S. at 5–7; to stand in a lineup, see *United States* v. *Wade*, 388 U.S. 218, 221–23 (1967); to don incriminating clothing, see *Holt* v. *United States*, 218 U.S. 245, 252–53 (1910); to submit to fingerprinting, see *United States* v. *Peters*, 687 F.2d 1295, 1297 (10th Cir. 1982); and to submit to photographing and to provide hair samples, see *In re Rosahn*, 671 F.2d 690, 694 (2d Cir. 1982).

[9] See Wilkes § 1-13, at 30 and app. A (survey of State postconviction remedies). See also *Herrera*, 506 U.S. at 410–11 nn. 8–11 (survey of applicable statutes).

his 1994 application because the DNA test Ziegler wanted to perform became "available" in 1991 and Ziegler, who had a postconviction motion pending on other grounds in 1991, did not seek the DNA test within the 2-year time limit. The Florida Supreme Court also found that the DNA test Ziegler was seeking would not produce sufficient exculpatory evidence to vacate the conviction even if the results were favorable to Ziegler. *Ziegler*, 654 So. 2d at 1164. The "laches" theory enunciated in *Ziegler* has recently been followed, although criticized in a dissent, by a lower Florida appellate court considering the DNA request of an indigent inmate who filed 2 years after the test was arguably "available" but whose conviction would probably be vacated if the test results were favorable. See *Dedge* v. *State*, 723 So. 2d 322, 324 (Fla. Dist. 5 Ct. App. 1998). One can expect further litigation in Florida, and in any other jurisdiction adopting the laches theory enunciated in *Ziegler*, about when new types of forensic DNA testing first became "available" as a scientific matter, and when, as a practical matter, such testing was truly "available" to indigent defendants.

It is important to note, however, that in addition to providing for new trial motions based on newly discovered evidence, many States have their own habeas statutes, court rules, and/or "interests of justice" case law that permit courts to extend or override time bars on newly discovered evidence motions. For example, in Mississippi there is explicit statutory authority to grant an untimely new trial motion "in the interest of justice" where the prisoner can produce evidence "not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence." Miss. Code. Ann. § 99-39-23 (1998).

Texas, in contrast, has "catch-all" rules that implicitly permit courts to override time bars to post-trial, newly discovered evidence motions. See *Tuffiash* v. *State*, 878 S.W.2d 197, 198 (Tex. Crim. App. 1994) (out of time post-trial motion to vacate conviction based upon newly discovered evidence granted because "[i]n an appropriate case, for good cause shown, Rules 2(b) and 80(c) of the Texas Rules of Appellate Procedure allow this court to suspend requirements and provisions of any rule in a particular case on application of a party or on our own motion and may order proceedings in accordance with our direction" (citation omitted)).[10]

Even without statutes that explicitly authorize exceptions to time-barred applications, courts have, in the interests of justice, vacated convictions and released inmates when newly discovered DNA evidence demonstrates innocence and the prosecution joins in the motion.[11] The Supreme Court of South Dakota recently turned aside the prosecutor's timeliness objection and authorized access to vaginal swabs for postconviction testing, *Davi* v. *Joseph Class, Warden*, unpublished decision, case No. 19844, Order of Remand (S.D. 1998), although the Court did not issue a written opinion on the subject. See also *Jenner* v. *Dooley*, No. 204-28, 1999 WL 105032 at *8, *9 (S.D. Feb. 10, 1999) (setting out guidelines for when postconviction scientific analysis may be authorized.

Finally, it has been suggested that in the State courts petitioners with strong newly discovered evidence should consider making constitutional arguments based on *Herrera* as a direct challenge to the constitutionality of State statutes of limitations that would bar "actual innocence" claims. See Vivian Berger, *Herrera* v. *Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 Wm. & Mary L. Rev. 943, 1012–15 (1994); *Holmes* v. *Honorable*

[10] See, NIJ Report, supra note 3 at 34–35 (discusses cases in which Texas prisoners had their convictions vacated as a result of untimely newly discovered evidence motions).

[11] See discussion at note 3, supra.

Court of Appeals for the Third District, 885 S.W.2d 389, 397–98 (Tex. Crim. App. 1994) (en banc) (habeas corpus appropriate vehicle for raising factual innocence claim).

Is a Petitioner Entitled to Testing in Order to Pursue Executive Clemency if the Results are Favorable?

Notwithstanding the narrow opening it arguably opened in *Herrera* for Federal habeas "actual innocence" claims, the Supreme Court stressed that executive clemency "is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where the judicial process has been exhausted." 506 U.S. at 411–12. Clemency is supposed to act as a "fail safe" mechanism, a protection against the "unalterable fact that our judicial system, like the human beings who administer it, is fallible." *Id*., at 415. In fact, executive clemency has been a mechanism for obtaining postconviction DNA exonerations, particularly in Virginia, where newly discovered evidence motions are time barred 21 days after final judgment. Significantly, however, most of the Virginia proceedings that culminated in executive clemency began in court with successful requests for access to court exhibits containing critical biological evidence that was ultimately subjected to DNA testing. See NIJ Report, supra, note 3 at 57, 72.

Because clemency is "an act of grace" by the executive branch, not a right (see *Herrera*, 506 U.S. at 413), the issuance of a grant is highly discretionary. Some governors work with formal advisory boards, some do not, and the standards of review governors employ are usually informal, if not unabashedly susceptible to political considerations. See Berger, supra, at 966–67; Bandes, supra note 6, at 520–21. As a result, the Supreme Court has been extremely reluctant to examine, much less question, the fairness or operation of State executive clemency systems. See *Ohio Adult Parole Authority* v. *Woodward*, 523 U.S. 272 (1998); *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458 (1981).

Moreover, it must be remembered that the vast majority of clemency decisions turn on forgiveness for an act committed, extraordinary rehabilitation, or other considerations that do not involve reevaluation of the guilt or innocence decision. Consequently, in the wake of *Herrera*, commentators studying executive clemency have identified statutory limitations, lack of money, investigatory powers, and/or expertise and have expressed serious doubt as to whether State clemency systems are doing an adequate job of assessing claims of actual innocence and wrongful conviction. See Victoria Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 Vand. L. Rev. 311, 369–72 (1996); Henry Pietrkowski, *The Diffusion of Due Process in Capital Cases of Actual Innocence After Herrera*, 70 Chi.-Kent L. Rev. 1391, 1401–13 (1995). Therefore, inmates who have not yet obtained exculpatory postconviction DNA evidence should be wary about seeking access to the relevant biological case material or permission to conduct DNA tests from officials within the executive clemency system.

Another unresolved issue is whether *Herrera* supports a due process "access" argument for an inmate who is precluded from presenting newly discovered DNA evidence of innocence in a State court but seeks, in the alternative, DNA testing to pursue executive clemency. The reasoning of the *Herrera* decision, with its emphasis on executive clemency as the historic safety valve and remedy for those who cannot get newly discovered evidence of innocence heard by the courts, suggests that States should not be able to both shut the courthouse door with a time bar and arbitrarily obstruct an inmate's opportunity to enter the executive clemency system armed with exculpatory DNA test results. To buttress this argument, inmates should be prepared to show the State will not be prejudiced in any ongoing cases by the testing, and that they will pay the costs of testing, as well as any reasonable administrative expenses that arise in the handling

of the evidence. Again, mindful of the Supreme Court's recent ruling in *Ohio Adult Parole Authority* v. *Woodward*, 523 U.S. 272 (1998), this argument should not be cast as a challenge to the fairness or procedures of a State's executive clemency system, but rather as the fair exercise of judicial power to obstruct or permit access to case evidence in the possession of the court or other criminal justice agencies.

Is an Indigent Petitioner Entitled to Have the State Pay for Postconviction DNA Testing?

The special New York and Illinois postconviction DNA statutes[12] require the State to pay for testing if the petitioner is indigent and there is a reasonable basis to believe that postconviction DNA testing could produce substantial evidence of innocence. There are no reported decisions as of this date mandating that indigent petitioners receive funds for postconviction DNA testing that could establish innocence. It is, however, our experience that once a court decides that postconviction DNA testing should be performed, or the prosecution and defense agree that testing is appropriate, funds for testing have been provided either by the court (just as it funds pretrial expert fees for an indigent defendant), by the public defender's office, or by the prosecution. Increasingly, as State and local crime laboratories develop the capacity to do DNA testing, postconviction DNA testing is simply referred by all parties to the public laboratory, which does it "free." Nonetheless, concern that the "floodgates" would be opened, and the public treasury depleted, by demands for postconviction DNA testing has been cited informally and formally as a factor in judicial and prosecutorial rejection of requests for postconviction DNA testing even in the category 1 and category 2 cases discussed in chapter 1. Payment for postconviction DNA testing by indigent petitioners is, therefore, likely to emerge as a significant issue for litigation. A related question is whether an indigent petitioner is entitled to funds for an expert needed to interpret the testing results.

Two Supreme Court cases bear on the payment issue. In *Ake* v. *Oklahoma*, 470 U.S. 68, 83 (1985) the Court held that an indigent defendant had a due process right to the services of a psychiatric expert when the expert's testimony would be "a significant factor in [the] defense." When expert assistance to an indigent provides "a reasonable chance of success," the Court reasoned, "the potential accuracy of the jury's determination is so dramatically enhanced" that "the State's interest in its fisc must yield." *Id*. Petitioners who can show that they have a "reasonable chance of success" to prove innocence through postconviction DNA testing, a technology that "dramatically enhances" the accuracy of factfinding, even decades after a verdict, will obviously find useful language in *Ake*. Nevertheless, there is a significant legal difference between a request to fund relevant DNA testing in a pretrial posture—where it is surely constitutionally required—and a post-trial application after the petitioner has been found guilty.

A second case, *Little* v. *Streater*, 452 U.S. 1 (1981), has relevance to the payment issue because it recognizes the constitutional significance of a technological advance that can definitively alter fact determinations. In *Streater*, the Court held that an indigent Connecticut inmate who was being sued in a paternity action had a right, under the due process and equal protection clauses, to funding for blood grouping tests because "[u]nlike other evidence that may be susceptible to varying interpretation or disparagement, blood test results, if obtained under proper conditions by qualified experts, are difficult to refute." 452 U.S. at 14. "Thus," the Court emphasized, "access to blood grouping tests for indigent defendants such as appellant would help to insure the correctness of paternity decisions in Connecticut." Plainly, the kind of conclusive results

[12] See discussion at note 2, supra.

DNA testing can generate in a criminal case are directly analogous to blood group paternity tests, but a postconviction application for DNA testing, cutting against the State's interest in preserving the "finality of judgments," is still a more difficult constitutional posture than the pretrial, "quasi-criminal" paternity testing request made in *Streater*.

Is an Inmate Whose Conviction is Vacated on the Basis of Favorable Postconviction DNA Testing Results Entitled to Compensation?

A survey of statutes that compensate persons wrongly imprisoned concludes that compensation statutes exist in only 14 States and the District of Columbia. Most of these statutes have low yearly caps, as well as total caps, and States pay few claims. See Michael Higgins, *Tough Luck for this Man*, 85 A.B.A.J. 46 (1999).

Chapter 3

Biological Issues

DNA

DNA is the abbreviation for deoxyribonucleic acid, which is the genetic material present in the nucleus of cells in all living organisms. DNA has been called the "blueprint of life," since it contains all of the information required to make an organism grow and develop. It encodes all of the information that gives each of us our physical characteristics and allows us to function and be recognized as human. The majority of the DNA is identical from one human to another, but there are locations in the DNA that have been found to differ from one individual to another, with the exception of identical twins. These are the regions of DNA that are analyzed and used to compare the DNA obtained from an unknown evidence sample to the DNA of a known individual in DNA identification testing. Because each individual inherited half of his or her DNA from each parent, DNA testing can be used to determine if individuals are genetically related to each other. DNA is found in all cells with a nucleus and is the same throughout the body, so virtually every fluid or tissue from a human contains some DNA and can be analyzed by DNA identification testing. DNA also is stable and does not change over time, so samples collected years ago may be compared to samples collected recently.

When DNA testing is done, several basic steps are performed regardless of the type of test. The general procedure includes: 1) the isolation of the DNA from an evidence sample containing DNA of unknown origin and, generally at a later time, the isolation of DNA from a sample (e.g., blood) from a known individual; 2) the processing of the DNA so that test results may be obtained; 3) the determination of the DNA test results (or types), from specific regions of the DNA; and 4) the comparison and interpretation of the test results from the unknown and known samples to determine whether the known individual is excluded as (is not) the source of the DNA or is included as a possible source of the DNA (see further discussion below).

Each additional test at a previously untested locus (location or site) in the DNA provides another opportunity for the result of "exclusion" if the known individual being used for comparison is *not* the source of the DNA from an evidence sample of unknown origin. If, however, the known individual is the source of the DNA on the evidence sample, additional testing will continue only to include that individual as a possible source of the DNA. When a sufficient number of tests have been performed in which an individual cannot be excluded as the source of the DNA by *any* of the tests, a point is reached at which the tests have excluded virtually the world's population and the unique identification of that individual as the source of the DNA has been achieved.

Types of Samples Suitable for DNA Testing

Questioned or Unknown Samples

Questioned or unknown samples collected from the crime scene can be any biological sample including: liquid blood or bloodstains, liquid saliva or saliva stains, and liquid semen or dried

semen stains (including from vasectomized males) deposited on virtually any surface; genital/vaginal/cervical samples collected on swabs or gauze, or as aspirates; rectal/anal swabs; penile swabs; pieces of tissue/skin; fingernails; plucked and shed hairs (e.g., head, pubic, body); skin cells on drinking vessels, clothing (e.g., neck collars, waistbands, hat linings); slides containing tissue, semen, etc.; and liquid urine.

Samples From Unidentified Bodies

Samples collected from unidentified bodies can include: blood, buccal swabs, hairs, bone, teeth, fingernails, tissues from internal organs (including brain), muscle, and skin.

Reference Samples From Known Individuals

The most common reference samples collected from known individuals are blood, oral/buccal swabs, and/or plucked hairs (e.g., head, pubic).

Samples to Use When No Conventional Reference Samples Are Available

Other samples that may be considered when individuals are unavailable or are reluctant to provide samples include clothing where biological fluids may be deposited (e.g., women's panty crotches or blood-, saliva-, or semen-stained items) and other clothing in close contact with the body where skin cells may have rubbed off (e.g., collars, waistbands, hats), bedding (with vaginal/semen stains or rubbed off skin cells), fingernail clippings, cigarette butts, toothbrushes, hairs in razors and hairbrushes, discarded facial tissues or handkerchiefs with nasal secretions, condoms, gum, feminine products, pathology paraffin blocks or slides from previous surgery or from autopsy, and teeth.

Reference Samples From Individuals Who Have Been Transfused

If an individual has received transfusions shortly before the collection of a blood sample (e.g., homicide victim), the DNA test results may indicate the presence of DNA from two or more sources. Generally the predominant DNA types reflect the types from the individual. However, other sources of reference samples for individuals who have received transfusions may need to be collected. These would include: blood-stained clothing or other material (bedding, etc.) and oral, vaginal, and other swabs in addition to the items listed above.

Use of Samples From Relatives for Testing

Because a child inherits half of its DNA from each parent, it is possible to use reference samples collected from close relatives (e.g., biological father, mother, and/or full siblings or the individual's spouse and their children) to identify or confirm the identity of bodies that have not been identified through other means. It is also possible to use reference samples collected from close relatives for comparison to crime scene samples, for example, in missing body cases where a bloodstain or tissue sample from a possible crime scene can be tested to demonstrate a biological relationship to known individuals.

Determination of Paternity or Maternity of a Child or Fetus

Aborted fetal tissue can be analyzed for determining paternity, for example, in sexual assault and/or incest cases where conception occurred. Paternity and/or maternity of a child can be confirmed using blood or other samples listed above from the child and the alleged parent(s).

Storage and Preservation of Samples

Any probative biological sample that has been stored dry or frozen, regardless of age, may be considered for DNA analysis. Nuclear DNA from blood and semen stains more than 20 years old has been analyzed successfully using polymerase chain reaction (PCR). Samples that have been stored wet for an extended period of time should be considered for testing only using PCR and may be unsuitable for DNA analysis. Mitochondrial DNA analysis has been performed on very old bones, teeth, and hair samples.

Samples generally considered unsuitable for testing with current techniques include embalmed bodies (with the possible exception of bone or plucked hairs), pathology or fetal tissue samples that have been immersed in formaldehyde or formalin for more than a few hours (with the notable exception of pathology paraffin blocks and slides (see above)), and urine stains. Other samples such as feces, fecal stains, and vomit can potentially be tested, but are not routinely accepted by most laboratories for testing.

Determination of the Age of the Sample

It is not possible to determine the age of a biological sample or the time of deposition of the sample by DNA analysis, with the notable exception of sperm detected on vaginal/cervical swabs or in vaginal aspirates. Although sperm may be present, generally, sufficient sperm to obtain DNA test results cannot be collected from the vaginal cavity of a living female more than 24 to 48 hours after deposition. Several factors may affect the ability to obtain DNA test results from sperm collected from a deceased individual, such as the extent to which the individual engaged in physical activity after the sperm was deposited, the time of death in relation to the deposition of the sperm, and the decomposition of the body.

Testing of Samples Deposited on Various Substrates

DNA test results can be obtained from biological samples deposited on a wide range of substrates (e.g., many types of cloth/fabric found in clothing, bedding, car upholstery, etc. and carpet, glass, tile, wood, plastic, metal, vinyl, wallboard, and latex (gloves, condoms)). Substrates that may be problematic are leather, dirt, or any dirty substrate (e.g., carpet, shoes, car upholstery) and vegetable matter (e.g, leaves).

Determining Which Samples to Test

Care should be taken in selecting samples for testing that will give meaningful/useful results for a particular case. There is no point in testing samples that have no relevance to the crime for which an individual was convicted. (See discussion of category 5 cases in chapter 1.)

It may be important to reevaluate/analyze previously collected evidence samples to determine if there are: 1) other relevant evidence samples that could be tested (e.g., slides made from vaginal or cervical swabs, if no vaginal swab remains for testing); 2) samples containing stains or other biological samples that had not been detected previously; or 3) samples that were unsuitable for testing with previous techniques but may give conclusive results with currently available DNA tests (e.g., very small blood or semen stains, hair shafts).

The availability of and need for samples from known individuals who should be tested for exclusionary purposes will need to be carefully considered. For example, in sexual assault cases in which the defendant is excluded as a donor of the DNA, it is imperative that a sample from the victim and any known consensual partner(s) be tested in order for that exclusionary result to provide exculpatory evidence. Additionally, the testing of the victim's sample in sexual assault cases can serve as a built-in control to confirm that the testing has been performed correctly and that the questioned sample is, in fact, linked to that victim.

It is advisable that samples be split whenever possible. This permits a portion of the sample to be available for:

- Retesting by opposing counsel.
- Retesting if there is a problem in the testing and it needs to be repeated.
- Additional testing for aiding in the interpretation of test results (e.g., mixtures), for providing more tests for exclusionary purposes, or for aiding in the identification of the true perpetrator when the convicted individual is excluded in postconviction testing.
- Future testing when new technologies become available.

For additional discussion, see the Selection of Samples for Testing section in chapter 8, Recommendations for Laboratory Personnel.

Previous Testing: Was It Done? What Do the Tests Mean?

To aid in the evaluation of a case and to assess the need and feasibility of doing DNA tests in postconviction cases, it is imperative that the following information be obtained regarding any previous testing that was done:

- **What items of evidence existed at the time of the original trial and what type of analyses or tests were done on that evidence?** This would include any microscopic or serological analysis (e.g., identification of sperm; detection of semen, saliva, or human blood; hair comparison; ABO blood typing; typing of other protein markers) as well as any DNA tests. This information should be obtained regardless of whether the results were used in the trial and regardless of whether the evidence still exists for retesting. This information may aid in determining whether to proceed with DNA testing in a postconviction relief case or categorize the case as one in which DNA testing would be meaningless (e.g., no biological sample exists on the evidence or sufficient conclusive restriction fragment length polymorphism (RFLP) results exist). This information also may aid in the identification of additional evidence and in locating the evidence for testing.
- **What are the limitations of the tests that were performed?** It is important to understand what the previous test results really mean and whether those results could have been obtained if another individual other than the alleged donor was the source of the sample. For instance, ABO blood testing and/or DQα. PCR test results alone are not sufficiently discriminating such that a falsely accused individual would necessarily be excluded with these tests; additional DNA testing may be suggested in these cases. Conversely, if a multiple-probe RFLP match was obtained previously, additional testing may not be advised unless there is a strong indication of an error in the testing.

- **Were the results used at trial and, if they were not used, what was the reason?** If the test results were used at the trial, it is important to understand how the results were used in the case and whether they were accurately presented to the trier-of-fact. Test results may not have been presented at the trial because they were obtained at a late date, or because they were inconclusive or not supportive for either the prosecution or defense position. Alternatively, test results may not have been presented at the trial because the prosecution reasoned that the other evidence in the case was overwhelming and chose not to admit the evidence. There are many cases in this country where four- or five-probe RFLP results have been obtained but not used at a trial for various reasons (e.g., the attorney did not want to go through an admissibility hearing, a witness was not available, or the results were obtained too late to provide in discovery).
- **Were there any test results reported to be inconclusive and, if so, what were the reasons for the inconclusive results?** The changes in expertise and technology available for forensic DNA testing may require the reexamination of previously inconclusive test results and/or retesting of the samples. Due to the technical limitations of various tests and the variation in expertise of scientists, some laboratories take a more "conservative" approach than others when reporting test results and report a result as inconclusive when other experts may report the result as an inclusion or exclusion. This has been especially true for DNA test results when a mixture of DNA from two or more individuals has been obtained. No results or inconclusive results (because only weak or partial results were obtained) may have been reported for a sample that might yield conclusive results if other tests are attempted. For example, samples that yielded no or uninterpretable results with RFLP testing may well yield interpretable results with nuclear PCR testing. Similarly, samples that were unsuitable for nuclear PCR testing may yield results with mitochondrial DNA testing.

  In older cases appropriate evidentiary samples or standards may not have been available or recognized as relevant and/or were unsuitable for testing with DNA tests available at that time. Reevaluation of collected evidence samples may lead to the identification of other relevant biological samples that had been previously undetected, or previously tested items that may give conclusive results with current techniques. Additional testing with newer, more sensitive, and more discriminating tests (e.g., short tandem repeats (STRs), Y chromosome) may help resolve previously inconclusive test results where the evidence sample and the known standards from the victim and suspect all gave the same test results, or evidentiary samples previously yielded no DNA foreign to the victim (e.g., vaginal swab, breast swab, fingernail clippings). Identification and testing with current techniques of other or newly discovered evidence samples, standards, or relatives of the victim may lead to conclusive results.
- **Are copies of the laboratory case notes, including any original photographs taken and films of any DNA test results, available for review by an expert?** In many of the situations listed above, it will be necessary for an expert to review the data previously obtained by a laboratory in order for that expert to advise an attorney regarding the need for retesting and/or the types of tests to request.

  It is recommended that one or both attorneys, and/or the court, seek the advice of an expert who can provide information regarding the issues and questions raised above. The expert may need to obtain copies of the previous test results and laboratory case notes for review in order to adequately advise the attorney/court. Whenever possible the appropriate attorney should obtain the needed materials and provide them to opposing counsel as requested. If additional testing is to be performed in a postconviction case, it may be important to consider what

comparisons will need to be made with already existing results (e.g., for third-party individuals, for comparison with database records, for comparison with other cases). Also see chapter 8 for additional information.

Location of Samples in Postconviction Cases

Samples for testing in postconviction cases may be found in a variety of places. Places and persons to consider include:

- Police department evidence or property rooms. Evidence is often found here if the evidence was never tested or it was sent to the State crime laboratory, which then returned it.
- Prosecutor's office. Evidence is often found here when it has been introduced at trial.
- State and local crime laboratories often will retain slides or other pieces of evidence after conducting testing. Laboratories usually will return to the police department the clothing and vaginal swabs that are introduced as exhibits at trial.
- Hospitals, pathology departments, medical examiners' offices, clinics, or doctors' offices where sexual assault kits are prepared.
- Defense investigators.
- Courthouse property/evidence rooms.
- Offices of defense counsel in jurisdictions that require parties to preserve exhibits produced at trial.
- Independent crime laboratories.
- Clerks of court.
- Court reporters.

Types of DNA Tests

Restriction Fragment Length Polymorphism Testing

The use of RFLP testing in human DNA identification was pioneered by Professor Sir Alec Jeffreys and first reported in 1985.[13] Since then, RFLP testing has been widely used by public and private crime laboratories and paternity testing laboratories throughout the United States and the world for determination of paternity (and other biological relationships) and for the exclusion or inclusion of individuals as the source of a biological sample. RFLP testing has been widely used and accepted in the courts and there are currently approximately 300 appellate rulings regarding RFLP testing in the United States. RFLP testing has been used in postconviction relief cases and has resulted in a number of exonerations.[14]

RFLP testing generally requires that a sample contain DNA that is not degraded (broken into smaller fragments), from 100,000 or more cells (e.g., a dime-sized or larger saturated bloodstain). Because of these sample requirements, many small samples collected from crime scenes are not suitable for RFLP testing (but see PCR testing below, which requires 10 to 1,000 times

[13] Jeffreys, A.J., V. Wilson, and S.L. Thein, "Individual-specific 'fingerprints' of human DNA," *Nature*, 316 (1985):76–79.

[14] See NIJ Report, note 3.

less DNA than RFLP testing). The procedure for RFLP testing requires that DNA isolated from a biological sample be specifically cut into smaller fragments using a protein called a restriction enzyme. The restriction enzymes most commonly used for RFLP testing of forensic samples have been *Hae*III, *Hin*fI, and *Pst*I. The DNA fragments are then separated based on their relative length, and the DNA fragment size variations among different individuals are determined using DNA probes (e.g., MS1, YNH24, MS621, TBQ7) specific for discrete locations in the human genome (e.g., DIS7, D2S44, D5S110, D10S28, respectively). These results are generally visualized as a series of bands on films. The relative position and number of the bands obtained from an evidentiary sample are compared to those obtained from known individuals for the determination of exclusion or inclusion. For a further discussion on the RFLP testing process, please refer to the 1992 National Research Council report.[15] RFLP testing has a high degree of discrimination such that falsely accused individuals will likely be excluded with testing at only one or a few regions of the DNA (loci). Generally, close biological relatives can be easily differentiated with testing at a few loci.

Polymerase Chain Reaction Testing—Nuclear DNA

PCR testing of nuclear DNA was developed by Dr. Kary Mullis at Cetus Corporation in 1984 and has rapidly become the most widely used technique in the field of molecular biology. First applied to DNA identification testing in a criminal case in the United States in 1986,[16] PCR testing has been used widely by crime laboratories (both public and private) in the United States and throughout the world since the early to middle 1990s. PCR testing has been widely used and accepted in the courts and there are currently more than 80 appellate rulings regarding PCR testing in the United States. PCR testing has been used in postconviction relief cases and has resulted in a number of exonerations.[17]

PCR testing of nuclear DNA as it is commonly used in forensic testing laboratories may be done on a wide variety of samples that are quite small, containing 50 to 100 cells or more (e.g., visible dot of blood, a single hair root). PCR is the test method of choice for samples that contain DNA that is degraded (e.g., pathology specimens, samples that have been improperly stored or are aged). The PCR test process consists of three basic steps: 1) the preparation of DNA in a sample for testing, 2) the amplification (or copying) of specific regions of the DNA using an enzyme called *Taq* polymerase, and 3) the analysis or readout of the test results.

Several different PCR-based test systems have been developed and are in common use for forensic DNA testing. The AmpliType® HLA DQα Forensic PCR Amplification and Typing Kit has been used since the early 1990s and provides results in the form of blue dots on a white background for one location in the DNA. As with serological tests, an exclusion with this test eliminates an individual as the source of the sample; however, an inclusion with this test simply includes an individual within a set of a large number of individuals that also have the same DNA types. A falsely accused individual may be included as a possible donor of a DNA sample with this test system; additional tests would need to be done to achieve an exclusion for a falsely accused individual. The AmpliType® PM PCR Amplification and Typing Kit allows for the typing of five regions of the DNA (LDLR, GYPA, HBGG, D7S8, and GC) in a format similar to the DQα test kit. The DQα and PM kits are now combined into one kit called the AmpliType®

[15] National Research Council, *DNA Technology in Forensic Science*, National Research Council, 1992.

[16] Blake, E., J. Milhalovich, J. Higuchi, P.S. Walsh, and H. Ehrlich, "Polymerase chain reaction (PCR) amplification and human leukocyte antigen (HLA)-DQ oligonucleotide typing on biological evidence samples: Casework experience," *J. For. Sci.*, 37 (1992):700–726.

[17] See NIJ Report, note 3.

PM + DQA1 PCR Amplification and Typing Kit, which allows for the amplification and typing of the six regions of the DNA. The use of the PCR with STR sequences and larger variable number tandem repeat (VNTR) sequences (such as in the AmpFLP D1S80 PCR Amplification Kit) has become common in many laboratories. With these test systems, the results are generally visualized as bands on films or multicolored peaks on a graph. Amplification by PCR of a small portion of the amelogenin region of the X and Y sex chromosomes allows the gender of the donor to be determined.

In the near future, DNA testing at a number of STR locations will likely replace RFLP and earlier PCR-based tests in most laboratories throughout the United States and the world. The Federal Bureau of Investigation (FBI) has recently established the 13 core STR sequences that will be used in the Combined DNA Index System (CODIS) database of convicted offenders.

PCR testing has a high degree of discrimination such that falsely accused individuals may be excluded with only one or a few test results, depending on the type of test system used.

Polymerase Chain Reaction Testing—Mitochondrial DNA

DNA contained in the mitochondria (an organelle involved in producing energy) of cells can be isolated and the sequence of the DNA bases can be determined. Mitochondrial DNA testing is generally performed on samples that are unsuitable for RFLP or PCR testing of nuclear DNA, such as dried bones or teeth, hair shafts, or any other samples that contain very little or highly degraded nuclear DNA. Mitochondrial DNA testing of forensic samples is increasing in the United States and throughout the world; at this time testing is available only in a limited number of laboratories. Mitochondrial DNA test results have been presented in court in a number of cases.

Mitochondria and their DNA are passed from a mother to her offspring. For comparison purposes, samples may be collected from any relative in the maternal lineage. For mitochondrial testing, the PCR is used to copy specific sequences in the hyper variable regions of the mitochondrial DNA. The DNA sequence is obtained from the mitochondrial DNA from the unknown sample and compared with the DNA sequence from a known individual. Mitochondrial DNA testing can be used to link a sample to a particular family.

Possible Results/Conclusions From DNA Tests

Inclusions

When the results obtained from the standard sample from a known individual are all consistent with or are all present in the results from the unknown crime scene sample, then the results are considered an inclusion or nonexclusion. The term “match” is also commonly used when the test results are consistent with the results from a known individual. That individual is included (cannot be excluded) as a possible source of the DNA found in the sample. Often, statistical frequencies regarding the rarity of the particular set of genetic information observed in the unknown evidence sample and for a known individual are provided for various population groups.

It is possible for a falsely accused individual to be included as a source of a sample, particularly if the test system used only tests at one or a few loci (e.g., the DQα). In this situation, additional testing at more loci should be performed with the remaining evidence and/or DNA.

In some cases where inclusions are reported, the results are not meaningful or are inconclusive for that particular case from a legal perspective. Situations where this might apply are when the results obtained are all consistent with the individual from whom the samples were collected (e.g., victim's results only on vaginal swabs taken from the victim, defendant's results only on a bloodstain on defendant's clothing).

Exclusions

When the results obtained from the standard sample from a known individual are not all present in the results from the unknown crime scene sample, the results are considered an exclusion, a nonmatch, or noninclusion. With limited exceptions, an exclusion of an individual at any one genetic region eliminates that individual as a source of the DNA found in the sample. (See Previous Testing, above.)

In some cases where an exclusion is reported, it may be necessary to do additional testing for that exclusion to be meaningful to the case or to provide evidence for exoneration. A situation where this might apply is when the defendant is excluded as a donor of the DNA in a sexual assault case, but no samples are available from the victim and/or consensual partners. (See Determining Which Samples to Test, above.)

Inconclusive Results

Results may be interpreted as inconclusive for several reasons. These include situations where no results or only partial results are obtained from the sample due to the limited amount of suitable human DNA or where results are obtained from an unknown crime scene sample but there are no samples from known individuals available for comparison. In the latter case, the results would be suitable for comparison once an appropriate sample for comparison is tested.

Databases

RFLP-based and PCR-based databases have been constructed and are continuing to be expanded in many laboratories throughout the United States and the world with samples from convicted sex offenders and convicted felons, as well as samples from unsolved crimes. These databases will be especially helpful for linking previously unrelated cases and for screening a large number of known individuals already convicted of a crime to newly tested crime scene samples.

DNA databases of mitochondrial sequences are being established that are currently being used for statistical purposes. It is possible that databases containing mitochondrial sequences may be constructed for comparison to crime scene samples in the future.

Testing in the Future

Testing of hair shafts using mitochondrial DNA sequencing likely will become more widely available in the immediate future. It may be possible to isolate and test DNA from other samples that are not routinely tested today (e.g., fingerprints).

Y-specific probes are sequences of DNA found only on the Y (or male) chromosome. Development and validation of these probes are in progress. These probes will be especially useful for mixed samples in which the female component is not relevant or may make interpretation of the

results more difficult (e.g., sexual assault samples, fingernails from female victims when the assailant is male) and in the analysis and determination of the number of male sources of DNA in samples where there are multiple male contributors (e.g., multiple assailants and/or consensual partners in sexual assault samples). Because Y chromosomes are inherited through the male lineage, Y-specific probe results may be used to link a crime scene sample to a particular family.

DNA probes useful for identification testing are being developed from many other organisms and may be useful in crime scene investigation. There are reported cases in which DNA from cat hair[18] and from a particular type of plant has been used to link individuals to a particular crime scene.

Progress is being made in developing technologies for miniaturization of DNA tests (e.g., microchip analysis) that may be applied to forensic testing in the future. Expansion of existing technologies (e.g., sequencing of nuclear DNA) may emerge for forensic testing. Other as yet unknown or undeveloped technologies may be forthcoming that could be applied to forensic testing. It is likely that future tests could increase the sensitivity and speed of testing, as well as increase the discrimination capability of a test to unique identification of an individual.

[18] Menotti-Raymond, M., V.A. David, J.C. Stephens, L.A. Lyons, and S.J. O'Brien, "Genetic Individualization of Domestic Cats Using Feline STR Loci for Forensic Applications," *Journal of Forensic Sciences*, 42 (1997): 1039–51.

Chapter 4

Recommendations for Prosecutors

Possible Responses to an Application for Postconviction DNA Testing

Requests for postconviction DNA testing may come from a variety of parties, including inmates, their families, defense attorneys, police, or other persons such as members of the judiciary or elected officials who have been contacted for assistance. When a prosecutor receives a request for postconviction DNA testing, the prosecutor may have several choices on how to proceed:

- Take no action until a formal motion or application is received.
- Advise the person making the request to retain defense counsel.
- Refer the person making the request to an organization that assists inmates with regard to postconviction DNA testing. (See Resources, appendix I).
- Refer the matter to a specialized unit in the prosecutor's office that handles postconviction matters.
- Begin an investigation following the steps suggested below.

The prosecutor's choice of option will be governed by many factors, such as:

- Whether statutory or case law dictates procedures that must be followed.
- The organization of the prosecutor's office. The office may have a specialized unit to which all postconviction requests for relief are referred and the office may have written guidelines for handling requests.
- The economic and personnel resources of the prosecutor's office, including the availability of technical assistance, with regard to DNA issues.
- The experience of the prosecutor in answering habeas corpus and other relief requests and dealing with issues relating to DNA. The prosecutor who has little experience with DNA may be more inclined not to begin an investigation until defense counsel has been retained.
- The information available to the prosecutor about the case on the basis of personal knowledge or details in the request. The prosecutor may conclude that the case probably falls into category 4 or 5 and can be disposed of promptly, or the prosecutor may conclude that the case is potentially a category 1 case that should be handled as quickly as possible in the interests of justice.

In the case of serial murderer Timothy Wilson Spencer, the "South Side Strangler," David Vasquez, an innocent man, confessed to murder, pleaded guilty, and spent 4 years in prison. FBI profilers had suggested the true serial rapist/murderer was a white male. The DNA RFLP pattern of Spencer, a black male, which occurs only once in every 135 million unrelated persons, matched the pattern of the DNA from the semen taken from three of four murder scenes. Spencer was matched to the fourth rape/murder by DNA PCR testing. Vasquez had confessed and pleaded to a fifth murder, which did not have sufficient biological evidence for DNA testing but matched the MO of the four rape/murders (of which Spencer was convicted), and another unprosecuted rape in which Spencer's DNA matched the DNA from the semen. Although not directly exonerated by DNA testing, Vasquez was released because of the unique MO of the many rapes and murders, and because of an FBI behavioral unit report, which concluded the same person had committed all the crimes. Although the police and prosecutor who originally prosecuted Vasquez were skeptical, Vasquez was released because of the efforts of the same people—police and prosecutors—who had incarcerated him, without a request by family or defense attorneys.

[*Commonwealth* v. *Spencer (I)* (Va. 1989) 384 S.E.2d 775, *(II)* (1989) 384 S.E.2d 785, *(III)* (1989) 385 S.E.2d 850, *(IV)* (1990) 393 S.E.2d 609 (four death penalties affirmed; executed on April 27, 1994), is dramatized in *Stalking Justice*, by Paul Mones, Pocket Books, 1995.]

On Saturday, June 22, 1996, frontpage headlines announced the release of Kevin Lee Green, who had been in prison for 17 years after being convicted by a jury of bludgeoning his wife and killing the fetus she carried. Green was released when DNA tests confirmed the confession of a second man who was identified by matches of his DNA, from a California statewide DNA database, to five other unsolved homicides from almost 20 years earlier. The police and prosecution were not expecting the confession to the Green case by the second man, were not investigating that case, and were not responding to requests for postconviction relief by the family or attorneys for Green.

["Falsely Jailed: What Happened?" and "Prosecutors Crack the Case Using Old-Fashioned Detective Work," *Orange County Register*, June 22, 1996, page 1.]

The recommendations that follow are designed for cases in which a prosecutor, after considering the factors listed above, concludes that a proactive approach is the best and most appropriate way to proceed. A proactive approach allows the prosecutor to exercise more control over timing and other decisions that must be made as the case continues. These recommendations provide information about the various stages of a request for DNA testing, give examples of various kinds of issues that may arise, and offer suggestions on ways in which these issues can be addressed efficiently and fairly.

The prosecutor should make every effort at cooperation and coordination with defense counsel once counsel is retained. The prosecutor and defense counsel should reach agreement on:

- Turning over copies of briefs and court transcripts that may not be in the possession of the other party.

- Selecting a laboratory to conduct testing.
- Making results open and unlimited in their use by prosecutors, police, and parole personnel.

Irrespective of how the prosecutor chooses to respond to a request for testing, once the prosecutor is aware of a request for DNA testing, the prosecutor should take steps to ensure that there will be no destruction of any evidence that relates to the case in which testing is being sought. (See Preserve Evidence and Information, below.)

Responding to a Request: The First Stage

When a request is received, the following steps are recommended:

Get Information

Upon receiving initial notification of a request for postconviction DNA analysis, attempt to gain as much information as possible about the inmate and the case in which he or she was convicted in order to expedite one or more of the following: locating evidence; case review; release of the inmate if exonerated; and reopening of the case in order to locate and prosecute the true perpetrator.

If the request is made by an inmate directly to a prosecutor, the prosecutor should consider whether the governing law of the local jurisdiction limits direct contact between an inmate and a prosecutor. If so, the prosecutor may have to limit the information gathering to identifying information and refer the inmate to legal counsel.

- Attempt to get the following information about the inmate:
  - Full name.
  - Date of birth.
  - Criminal identification index (CII) number.
  - Social Security account number (SSAN).
  - Prison or inmate number.
  - Current housing location.
  - Defenses proffered at trial.
  - Defenses currently claimed.

Also find out if the inmate is in custody on a separate case or unrelated charge for which the serological or DNA evidence is irrelevant, i.e., for which an exoneration will not result in release. (Such cases may have lower priority, but resolution may nonetheless have practical benefit to an inmate, such as reduced points relevant to prison classification or custodial status, or may affect calculation of a minimum release date.)

- Attempt to get the following information about the committing case:
  - Court case number.
  - Court department or division.
  - Name of trial judge.
  - Name of court reporter.

- Dates of trial, conviction, and sentencing.
- Name of prosecuting attorney and file number.
- Name of investigating officer.
- Police investigative file numbers.
- Police laboratory or outside serological laboratory case numbers.
- Names of trial and appellate defense counsel.
- Phone numbers of any of the above.

- Evaluate any prior DNA testing. A prosecutor may need to have prior DNA results reevaluated or interpreted. DNA results may **not** have been introduced in a prior trial because defense tactics made such introduction irrelevant or otherwise not advisable. DNA results that may not have been used because a laboratory called results "inconclusive" might perhaps now be declared a "match." (See discussion in chapter 3, and the more detailed discussion in Get Full Information About What Was Done Previously, below.)

  In 1983, Kerry Kotler was convicted by a jury of the burglaries and rapes of the same woman on two different occasions in 1978 and 1981. Kotler was identified by the victim after the second rape in a lineup of 500 photos and by voice and sight in an in-person police lineup. Kotler also was matched to the semen stain evidence by three non-DNA genetic markers. The prosecutor agreed to release Kotler after 11 years in custody based on PCR DQ alpha results only, which showed a type from the semen stain that could not have come from Kotler alone (or from a combination of Kotler and the victim or the victim's husband). However, the type from the semen stain did include Kotler's type, and if the type from the semen stain was a mixture, Kotler is not excluded. Kotler was released on December 1, 1992.

  In spring 1996, Kotler was rearrested and charged with the August 12, 1995 rape of a different woman. Kotler's DQ alpha type is a 4, which means he got a 4 from both his father and his mother. The semen stain from the 1981 rape was a DQ alpha type 1.1.4. There are a variety of possible types of a secondary source of DNA on the semen-stained panties, including types 1.1, 1.1; 1.1, 4; and 1.1, 1.2 (because the 1.2 type can be masked by the 4 type). With today's technology the 1981 semen stain could be tested with additional PCR to see if Kotler were one source of a mix.

  [A partial description of the Kotler case is found in *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, published by the National Institute of Justice, 1996, 61–64, 84.]

- Identify other factors that bear on DNA testing. Also, consider at this stage what additional discovery may be needed. Did the defendant plead guilty or nolo contendere? Did the defendant enter an "Alford" plea, pleading guilty in exchange for a lesser sentence, while claiming innocence, because the defendant believed he or she would be convicted on the evidence available to the prosecution? Should blood or other "elimination" standards be taken from consensual sex partners of the victim, or from coperpetrators of the crimes?

Gaining as much of the above information as possible will assist in later decisions such as the initial relevancy determination.

Initial Relevancy Determination

Ultimately, the prosecutor will have to determine whether a case is suited to DNA testing. Categories explained in chapter 1 are summarized below. Some prosecutors may agree to testing only in category 1 cases, while opposing testing in all other categories.

Category 1. These are cases in which biological evidence was collected and still exists. There is agreement on the need for DNA testing and that, if the results are exclusionary, the petitioner will be exonerated. (See examples in chapter 1.) These are cases in which the prosecution should be willing to stipulate to the testing and to agree that testing will be paid for by the State if the inmate is exonerated.

Category 2. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, favorable results would be helpful to the petitioner's claim of innocence, but reasonable people might disagree as to whether the results would amount to a demonstration of innocence, would establish reasonable doubt of guilt, or would merely constitute helpful evidence to exonerate him. This category also includes cases where, for policy and/or economic reasons, there might be disagreement as to whether DNA testing should be permitted at all or, for indigent inmates, at State expense. The decision on whether testing or retesting should be done may have to be made by a judicial officer.

Category 3. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing, favorable results would not be meaningful.

Category 4. These are cases in which biological evidence was never collected or cannot be found despite all efforts. In such cases, postconviction relief on the basis of DNA testing is not possible.

Category 5. These are cases in which a request for DNA testing is frivolous. (See examples 10 and 11 in chapter 1.) Considerations include: 1) whether the petitioner confessed or pleaded guilty at trial; 2) whether the petitioner testified to performing the charged act, but raised a defense such as consent, self-defense, duress, or entrapment; 3) whether the petitioner was caught in the act or other strong evidence of identity or involvement exists such as unambiguous fingerprint evidence; and 4) whether an earlier version of DNA testing had been performed but not introduced at trial.

In 1992 a prosecution office received a request to reopen a 1983 case and perform DNA testing on semen stains in a serial rape case. An attorney, newly contacted by the inmate's family, said the family claims the inmate has been in custody for almost 10 years (of a 37-year sentence) for crimes they all believe he did not commit, and that the DNA will prove all the crimes were committed by someone else. Before the case file was retrieved, the trial prosecutor was contacted. The trial prosecutor revealed that the defendant had pleaded guilty to crimes involving two victims where non-DNA identification evidence was strong, and that his MO was strong as to all five victims, including specific language used, and traditional serological tests matched the inmate as a source of the semen in all cases. The new defense counsel was notified that the District Attorney's office would resist all attempts to reopen the case for DNA testing.

[*People* v. *Morehead*, Orange County (CA) #C52794.]

Provide Information

Inform the requester that in many cases the costs of testing may have to be borne by the requester or the inmate. Costs can vary depending on the number of samples that need to be tested, the number of different tests conducted, and the pricing policies of the individual laboratory ultimately selected to perform the tests.

Inform the requester that, depending on the jurisdiction and the crime, DNA testing may have the negative consequence of identifying the inmate as a perpetrator of other crimes because his or her DNA testing results will be placed in a statewide and nationwide DNA criminal identification databank, or the profile may be checked against data already stored in such databanks. Also, DNA testing that further confirms an inmate's guilt may have an adverse effect on a parole board if the inmate has been consistently denying his guilt, and may preclude executive clemency or other relief sought on other grounds.

Information Gathering Stage

Preserve Evidence and Information

Immediately after the initial request, contact the applicable clerk of the court, court reporter, investigating agency, crime laboratories, trial prosecutor, and defense counsel and request that any remaining evidence be preserved and that applicable files and court reporter's transcripts or notes be forwarded to your office for review.

Make Preliminary Evaluation of Availability of Evidence

Based on the issues involved in the case, attempt to locate relevant physical evidence. Consider the possibility of testing items not traditionally thought to contain DNA evidence, such as slides taken by medical personnel during sexual assault examinations and paraffin-imbedded tissue samples taken at the time of an autopsy.

Try to determine if there is sufficient sample to achieve as many as possible of the following goals:

- Test the evidence now.
- Retain a portion of the sample for duplicate and/or additional genetic marker testing.
- Test the evidence on systems that will allow access to and entry into criminal identification DNA databanks.
- Retest for comparison with suspect standard samples when actual perpetrators are identified. (Even though the statute of limitations may have run out as to crimes committed by the true perpetrators, the evidence may still be useful in subsequent prosecutions as "other crimes" or penalty phase evidence.)
- Retest, if necessary, with newer genetic tests when they become available.

If, from initial contact with the investigating officer or review of case files, it appears that evidence suitable for DNA analysis was never collected, or has since been destroyed, it may prove impossible to continue with the rest of this guideline. (See category 4.) However, no final decision or notification should be made until it has been carefully verified that evidence did not or does not still exist.

Get Full Information About What Was Done Previously

If DNA testing was conducted but not used at the original trial, find out why. Sometimes DNA testing was performed, but not used at trial, because the laboratory declared the results inconclusive. It may be worthwhile to reexamine the results to determine whether they might now be viewed as conclusive. Even if a laboratory has a policy against reevaluating prior interpretations of its own work, numerous outside experts with excellent credentials are available from crime labs, universities, and research and medical facilities who can opine on the results of a prior test. One of the advantages of DNA testing is that each test creates actual data that can be independently evaluated by experts at a later date.

> An inmate requested postconviction polymerase chain reaction (PCR) testing where inconclusive restriction fragment length polymorphism (RFLP) testing had not been introduced at trial. After a court-ordered PCR test, the RFLP results were reviewed by a scientist expert who declared a "match" based on the previously declared "inconclusive" faint results, which was confirmed by PCR testing. Had the prosecution reviewed the RFLP results when the request for PCR testing was made, there might have been no need to go to court.
>
> [*Davi* v. *Joseph Class, Warden*, unpublished decision, case No. 19844, Order of Remand (S.D. 1998)].

Sometimes DNA test results were available, but not used at trial because the results were received so close to the trial that they were excluded by the trial judge as untimely, or they were not used by the prosecutor to avoid a continuance for the defense to prepare to respond to the evidence.

Prosecutors also may not have introduced DNA evidence because they were unsure of its admissibility based on conflicting or nonexistent appellate law, because they were uncomfortable with the science that would be encountered pretrial and/or at trial, or because they were uncomfortable in presenting statistical evidence and answering statistical challenges.

Laboratories have different policies about the information they routinely make available. Some laboratories provide an entire package, including final reports, final results (x-rays, films, or photos of gels or dot blots), and the case notes of the examiner. Other laboratories, accustomed to the former Federal system, in which the defense was entitled only to discovery of the final, conclusory laboratory report, initially provide only reports and will later forward other materials on request. The entire package may be needed to evaluate results of prior DNA testing.

Assessing the Viability of the Claim

Make a Preliminary Evaluation of the Merit of the Claim

A preliminary evaluation should be made of the potential significance of any further DNA testing. If testing would produce only irrelevant results, the request for DNA typing should be denied. If the results could be material to the petitioner's claim, determine, **in consultation with an expert,** whether or not available DNA analysis is capable of answering the question that the inmate now claims will exonerate him. Discuss your evaluation with defense counsel.

Conduct a Thorough Review of the Case File

In reviewing the case, keep in mind the framework for analysis set out above and in chapter 1. Determine which category or categories the case could fall into in light of the inmate's claim, and decide which DNA test results would be most favorable to the inmate.

Consultation With Defense Counsel

These recommendations assume the inmate is represented by counsel. In most instances, it is advisable to suggest that the requester get counsel. If the requester does not get counsel, it is advisable to make all communications in writing, including your suggestion that the requester should retain counsel. Throughout the entire process of reviewing a request for postconviction DNA testing, and during the testing process, actively consult with defense counsel if one has been retained for the inmate. Prosecutors should receive a notification letter early in the process from defense counsel if one has been retained. Defense counsel may be the first to learn a request is frivolous or has been withdrawn. If the prosecution unilaterally decides to order testing, the prosecution should give defense counsel or an unrepresented inmate advance written notice of the decision.

Interaction With Victims

Immediately consult the local victim/witness specialist in your jurisdiction, if one exists, to determine whether or not, and when, to advise the victim or survivors of the request for postconviction analysis of evidence. It is preferable for victims or survivors to learn of the request from a sensitive, trained professional (with whom the victim may have already developed a rapport), rather than from a crime scene investigation officer attempting to draw blood or collect saliva samples, or worse yet, from the news media. (See Recommendations for Victim Assistance, chapter 7.)

In 1984, a Virginia man was arrested and convicted of the brutal rapes and sodomies of a 19-year-old camper. Postconviction PCR DQ alpha testing eliminated both the inmate and the victim's boyfriend as a source of the semen on a vaginal swab taken shortly after the rapes. Before Virginia Gov. George F. Allen would grant a clemency petition, he ordered State police to interview the victim. She admitted a consensual liaison with another man beside her boyfriend. Results of DQ alpha testing of the second boyfriend showed a possible mix of the inmate's and the second boyfriend's semen. Additional PCR, polymarker testing eliminated the inmate. This case went from a category 1 case to a category 2 (or worse) case, to a category 1 case, based on the three sets of testing. The inmate was released after 10 years in custody. If the victim had been contacted up front, this process would have moved more swiftly. This case also shows the increasing power of newer DNA tests.

[This is the case of Edward Honaker, retold by Harlan Levey in *And the Blood Cried Out*, Avon, 1996, 179–86.]

Pretesting Considerations

Consultation With Experts and Experienced Colleagues

When evidence exists, contact a forensic DNA expert and, if needed, a prosecutor who is experienced and up to date on available DNA typing technologies and the handling of postconviction DNA analysis requests. Find out what kinds of tests are available, whether the available evidence is suitable for DNA testing, what issues the testing will be able to address, and whether the currently available test will consume the available evidence. Discuss possible nontraditional sources of evidence for testing.

Elimination Samples

Results of the analysis may not be dispositive unless both the defendant and all consensual sexual partners and codefendants are eliminated as a source of the evidence.

> In a case pending in 1998, two brothers were released (after 13 years in custody) by a judge who ordered a new trial when postconviction testing showed neither was the source of semen on a vaginal swab in a kidnap/rape. After the inmates were released, the victim, who was married at the time of the rape, disclosed she had had an affair and had intercourse within 2 days of the rape. Unfortunately, the man she named as her extramarital lover had died years earlier from being assaulted in a Mississippi jail. Fortunately, autopsy blood from this man had been preserved and DNA testing matched him to the semen from the vaginal swabs. If the disclosure of the extramarital affair had been made prior to the order for a new trial, that order may never have been issued.

Determine whether additional samples/standards need to be collected from the victim, from the victim's relatives, from other consensual sex partners, from third parties, or from coperpetrators. If the inmate claims he did not have sex with the victim, and there is no contention that third parties were involved, then a nonmatch of the inmate's DNA type to the semen DNA type may be dispositive without the need to collect additional reference/elimination samples. If, however, the victim claims to have had consensual sex with a third party, or claims to have been raped by more than one person, there may be a need to collect reference blood or buccal (swabs of the inside of the cheek) standards from each sex partner for elimination purposes.

Before ordering or agreeing to testing, consider whether an attempt should be made to get standard samples of all parties who may logically have contributed to the relevant biological sample. If victims or surviving family members must be contacted, do so through the local Victim/Witness Advocacy Program, if available. With most current testing methods, including all types of PCR-based testing, there is no need to bother victims and others until the defendant's standard has been tested and does not match the evidentiary sample. Issues to consider are: 1) not interfering with the feeling of finality for the victim, and 2) what delay in the process will be caused by waiting for "elimination" standards.

Mixtures

Mixtures of DNA types from more than one source of semen are more difficult to interpret. The greater the number of the victim's sex partners, either by consent or rape, the greater the likelihood

that the inmate's type will be masked by the presence of other types and not afford a clear elimination.

If an assault or homicide case involves possible blood transfers from multiple assailants and/or victims, the same issues of mixtures and masking may apply.

In sex cases with mixtures, or where an exclusion of the defendant is contrary to otherwise strong evidence, consider the possibility that the victim may have had an unrevealed prior consensual sexual partner within 24 to 48 hours prior to the rape.

Blood Transfusions

See discussion in chapter 3 under Reference Samples From Individuals Who Have Been Transfused. In some cases, reference samples may need to be collected from the donors of each unit of blood transfused to the victim during rescue surgery. Again, consult experts and discuss with defense counsel.

> In a case pending in 1999, the DNA type of the autopsy heart-blood standard of the victim did not match the DNA type of the blood on the shoes of the only suspect. The issue was resolved in two ways: First, the laboratory tested a sample of the victim's brain tissue, tissue not expected to be contaminated by transfusion blood. Second, by search warrant to the blood bank, the investigator learned the identities of all four donors of the blood transfused to the victim in surgery. All donors freely gave reference samples. The DNA type from the brain tissue matched the DNA type from the blood on the suspect's shoes. The DNA type of the heart-blood matched the DNA type of the donor of the last unit of blood transfused to the victim. Again, consult experts and discuss with defense counsel.

Decide Whether to Order DNA Analysis Without Challenge

A prosecutor should normally agree to testing without opposition in category 1 cases. For example, when a rape case turned solely, or in large part, on eyewitness testimony, where serology at the time was inconclusive or not highly discriminating, and newer, more discriminating tests are now available, the prosecutor should order DNA testing.

Notify the Defense and Victim of Decision

If the prosecutor decides, on his or her own, to order testing and the testing will consume remaining samples, the prosecutor should notify the defense.

If the prosecutor decides not to object to defense testing, the defense should be notified that the prosecution will cooperate, provided the defense agrees that the results will be open, reported to both sides, and available for future use by either side. The prosecution should also recommend that the testing be conducted either by an accredited laboratory or a laboratory that meets the criteria for accreditation (see discussion in chapter 8 on quality assurance standards for forensic DNA testing), that testing be conducted using techniques currently used for criminal identification databanking (such as the Combined DNA Index System (CODIS)), and that the results be released to the State for such databanking purposes.

Payment

In a category 1 case (where favorable testing results will exonerate the inmate or demonstrate reasonable doubt), if the inmate is indigent, the prosecution should attempt to have the testing done at public expense. When payment for the tests is made by the inmate or on his behalf, the prosecution should consider agreeing to court-ordered repayment or other forms of reimbursement if the results exonerate the inmate.

In category 2 cases (where favorable results will be helpful but do not exonerate) payment by the inmate may be required.

Procedures After Postconviction Testing Results Have Been Obtained

Again, consult with forensic DNA analysis experts to determine if results are dispositive (exonerates or confirms guilt) or inconclusive (e.g., results do not match the inmate but alternative explanations exist) or mixtures, contaminants, artifacts, or results with weak intensity make it impossible to report a clear match or exclusion.

If the testing ultimately exonerates a person who has been wrongly incarcerated, it is in the interests of the prosecution and in the interests of justice to release that person. If the results exonerate (are inconsistent with all theories of guilt), the prosecutor should immediately take the necessary steps to have the inmate released. The case investigation may be reopened and, if appropriate, the charges should be dismissed.

If the testing results further inculpate the inmate, confirming the validity of the conviction, the prosecutor should notify the parole board or probation department. The prosecutor should also request that the inmate's profile be added to CODIS offender databases, when appropriate, and should notify the victim or survivors (through the local victim's services agency).

If the results are inconclusive, the prosecutor should notify the defense and victim/survivors that the prosecution will oppose habeas corpus or new trial motions and they should prepare to defend against same.

In any case where the inmate is not exonerated, the prosecutor should request that, whenever appropriate, the newly developed DNA profile be added to CODIS offender databases.

In any case where the inmate is exonerated, the prosecutor should seek to have the evidentiary profile added to the unsolved cases section of the DNA databases, in hopes of identifying the true perpetrator.

The prosecutor should do all the above with liberal and frequent consultation with and notification to victim/witness specialists, forensic DNA experts, defense counsel, and prosecutors experienced in DNA technologies and postconviction relief issues.

Chapter 5

Recommendations for Defense Counsel

These protocols are addressed to public defenders, court-appointed counsel, private practitioners, pro se individuals, and law clinics (hereinafter "defense counsel"). It should be emphasized that defense counsel should seek the advice of experts in the field whenever possible. Please consult the resources in appendix I.

Handling Initial Requests

Screening

When defense counsel receives a request from an inmate or someone seeking assistance on an inmate's behalf to obtain a postconviction DNA test, the following steps should be taken:

Defense counsel should do an extensive screening to determine if the case is suited to DNA testing. The screening process' ultimate goal is to classify cases according to the criteria set forth in chapter 1. The classes of cases are as follows:

Category 1. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, both the prosecution and defense agree that favorable results will exonerate the petitioner.

Category 2. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, favorable results would be helpful to the petitioner's claim of innocence, but reasonable people might disagree as to whether the results would amount to a demonstration of innocence or would establish reasonable doubt, or would merely constitute helpful evidence. This category also includes cases where, for policy and/or economic reasons, there might be disagreement as to whether DNA testing should be permitted at all or, for indigent inmates, at State expense. The decision on whether retesting should be done may have to made by a judicial officer.

Category 3. These are cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing, favorable results will be inconclusive.

Category 4. These are cases in which biological evidence was never collected or cannot be found despite all efforts. In such a case, postconviction relief on the basis of DNA testing is not possible.

Category 5. These are cases in which a request for DNA testing is frivolous.

Please note that there are several types of situations within these classifications that may frequently occur. These include cases where:

- Evidence exists and elimination samples from third parties need to be collected.
- Evidence is believed to exist, but cannot be found, at least initially.
- Evidence exists, but may not be testable because it is old and has degraded.

To screen the cases effectively, defense counsel should follow several steps:

Initial relevancy determination. After the initial letter or other inquiry is received, defense counsel should review the request to determine whether DNA testing is at all relevant. For example, if it is a rape case in which the defense at trial was consent, or a murder trial in which defense counsel asserted self-defense, then DNA testing will not be helpful in proving innocence, barring special circumstances. (See discussion in chapter 1.) If, upon review, it is clear that the case does not involve biological evidence suitable for DNA testing, then a letter should be sent to the inmate as soon as possible explaining that he must pursue other avenues to challenge his conviction.

Prior DNA testing. If the inmate's letter indicates that DNA testing has already been conducted and the results were inculpatory, the defense team may choose to refer the inmate to an organization or attorney that can review the quality and legitimacy of the DNA testing. Please note, however, that even if DNA test results were inculpatory, more discriminating tests may be available, and defense counsel may want to consider pursuing this option. For example, a PCR-based DQ inclusion is not as discriminating as a short tandem repeat (STR)-based inclusion.

Followup questionnaire. If it appears to be a viable case or if more information is needed to make a determination, defense counsel should send a followup questionnaire, based on information immediately available to the inmate. The questionnaire should be composed of questions eliciting basic information about the background of the case. The questionnaire should include the following:

- Where and when did the offense and trial take place?
- What was the sentence?
- Who were the attorneys, both prosecuting and defense, at all stages of the case, including the appeals?
- What relevant items of evidence were collected that could contain biological samples suitable for DNA testing? Please note that this information does not mean that the items were introduced into evidence as exhibits at trial, or even tested.
- What testing, if any, was conducted?
- What biological evidence was tested or introduced at trial?
- What was the defense at trial?

The questionnaire should ask the inmate to identify what he or she has available, including trial transcripts, police reports, laboratory reports, appellate briefs, postconviction briefs, and lists of evidence collected (these lists may be known as logs, sheets, or inventories).

Defense counsel should send a cover letter with the questionnaire. The cover letter should advise the prospective client that:

- Defense counsel must notify the prosecution that a request for DNA testing has been received and that this notification may occur at any time after the initial inquiry.
- If DNA testing is conducted, the results will be disclosed to the prosecutor.

- If defense counsel finds the case to be viable and DNA testing is subsequently conducted that confirms the guilt of the inmate, the results of such testing could have negative consequences for the inmate. The negative consequences can include unfavorable outcomes at future parole hearings and/or unfavorable outcomes on other postconviction petitions.

Information Gathering

Once the questionnaire is returned, defense counsel should evaluate it. If the case still appears to be viable, then more documents should be requested to further evaluate the case. The items to be requested are case dependent, but will generally include the following:

- Trial transcripts (especially the closing arguments and any testimony regarding scientific evidence).
- Laboratory reports.
- Police reports.
- Appellate briefs (especially the prosecution's brief).
- Postconviction briefs.
- Evidence collection lists (may also be known as logs, inventories, or collection sheets).

Defense counsel should do whatever it takes to help the inmates find the material by calling either the former attorneys, the courts, investigators, or a friend or family member who may be able to help the inmate.

Assessing the Viability of the Claim

When the requested materials are received, defense counsel should conduct another evaluation to determine in which category the case falls. (See category descriptions earlier in this chapter and in chapter 1.) If it is determined that the case falls into category 1 or 2, then the case will be accepted and the search for the evidence can commence.

At this point, defense counsel should contact the prosecutor's office to notify it that the inmate is seeking DNA testing and that all evidence collected in connection with the case should be preserved. Throughout this entire process, defense counsel should actively consult with the prosecutors and seek their cooperation. (See the section, Consultation With Prosecutors (below), for further discussion.)

Investigation/Searching for the Evidence

Once a case has been determined to meet the criteria of a category 1 or category 2 case, defense counsel must begin a search for any biological evidence that may be available on which to conduct the DNA testing. Finding the evidence is the most difficult part of the process. Uniform protocols for the preservation of evidence in each jurisdiction do not exist. Each State, local, or county jurisdiction varies in its methods of collecting, storing, and preserving evidence. These methods may not conform to existing statutes and regulations. Many times all parties believe that the evidence has been destroyed, when in fact it has not. It may be necessary to search for evidence that has not previously been tested or introduced in court.

A major barrier to conducting DNA testing is that, quite frequently, the evidence has been destroyed or cannot easily be found. Destruction generally occurs as a routine matter and is not done with malicious intent. Once preservation statutes have been passed in each State, it will make the process of finding the evidence both more efficient and more likely to occur. However, at this time, since most jurisdictions do not have uniform procedures for storing evidence, it is necessary to follow certain steps. Note that these steps will differ from State to State and case to case.

The searcher for the evidence must determine the most likely places for the evidence to be found. Places and persons to consider and contact are:

- Police department evidence or property rooms. Evidence is often found here if the evidence was never tested or it was sent to the State crime laboratory, which then returned it.
- Prosecutor's office. Evidence is often found here when it has been introduced at trial.
- State and local crime laboratories will often retain slides or other pieces of evidence after conducting testing. Laboratories will usually return to the police department the clothing and vaginal swabs that are introduced as exhibits at trial.
- Hospitals, clinics, or doctors' offices where sexual assault kits are prepared.
- Defense investigators.
- Courthouse property/evidence rooms.
- Offices of defense counsel in jurisdictions that require parties to preserve exhibits produced at trial.
- Independent crime laboratories.
- Clerks of court.
- Court reporters.

The searcher should not give up until he has seen substantiation that the evidence has been destroyed. Even then, previously untested items may still be available, e.g., slides or clothing that were introduced for identification purposes.

Even if the evidence appears to have been destroyed, the laboratory may still have slides or previously isolated DNA, which, given advances in the sensitivity of DNA testing, frequently contain enough biological material to conduct successful testing.

The searcher may choose to go to court and move for the court to order custodial agencies to search for the evidence. This type of motion may be necessary if legitimate efforts are not being made to locate the evidence.

Preservation letters. It is extremely important that any evidence collected in connection with the case be preserved. Once counsel has determined that the case will be pursued, a blanket preservation letter should be sent asking the custodial authorities to preserve the evidence. Once potential or specific locations of the evidence have been identified, preservation letters should be sent to the custodial agencies. The letter should indicate the date on which the evidence was located, the person who indicated that it had been located, and the specific items of evidence that were located. Further, the letter should request that the evidence not be destroyed for an indefinite period of time because it will possibly form the basis of a postconviction relief petition,

and that if destruction is nonetheless contemplated, notice should be provided to counsel so that injunctive relief can be sought.

If the evidence has been destroyed, this must be confirmed in writing by the appropriate authority. In addition to the written assertion that the evidence was destroyed, there should be some additional documentation confirming destruction. For example, either a court order mandating the destruction or a log book entry would suffice.

Consultation With Prosecutors

Throughout the search for the evidence, defense counsel should actively consult with the prosecutors and seek their assistance. Defense counsel should contact the prosecutor soon after the request is initiated. A notification letter should be sent to inform the prosecutor's office that DNA testing has been requested. Defense counsel should send this letter after the initial questionnaire is returned.

Once evidence is found, all efforts should be made to obtain the prosecutor's consent to access the evidence for purposes of DNA testing. As discussed in chapter 1 and earlier in this chapter, the client must understand that, at an early stage in the process, defense counsel will notify the prosecutor that the request for DNA testing has been initiated and that defense counsel will inform the prosecutor of the DNA testing results.

In situations where the prosecutor is uncooperative or there is disagreement as to the category into which the case falls, defense counsel may have to litigate to obtain access to the evidence for DNA testing. However, defense counsel should encourage and seek cooperation with the prosecutors at every stage throughout this process.

Interaction With Victims and Dealing With the Media

Defense counsel should always instruct the client and the client's family to refrain from any contact with the victim both prior to and after the testing process. In general, defense counsel should also refrain from any contact with the victim.

Ordinarily, it is preferable to have the district attorney's office, through its victim services agency, determine if and when it is appropriate to inform the victim that a DNA test has occurred or will occur. It may not be necessary to inform victims that testing will occur, and thereby unnecessarily upset them when the results might be incriminating. If the results are exculpatory and further cooperation is needed from victims or family members in offering "elimination samples," victim services agencies are best equipped to deal with these issues.

Again, it is also preferable for the prosecutor to take the lead in terms of dealing with the media and the potential publicity surrounding correction of an injustice with regard to postconviction DNA testing.

Legal Avenues

Defense counsel should become familiar with the law in their State. Every State has its own postconviction remedies and procedures. There may be a statute that specifically allows for postconviction DNA testing. Defense counsel also should determine whether the client has made any

previous postconviction motions, regardless of whether they involved DNA issues. In general, these motions should be filed in State trial court. The motion will generally be entitled, "Motion to Access the Evidence for Purposes of DNA Testing," or it may be filed as a State habeas petition. There may be cases, however, in which all State court remedies have been exhausted and it is necessary to file a habeas corpus petition in Federal district court or to pursue executive clemency. Defense counsel should become familiar with the procedures for executive clemency in their State. There are basically three different types of jurisdictions in which applications will be made:

- States such as New York and Illinois, which have statutes permitting postconviction DNA testing.
- Jurisdictions where, by case law, postconviction DNA testing requests are permitted based on due process grounds. (See, e.g., *Commonwealth* v. *Brison*, 618 A.2d 420 (Pa. Super. 1992)).
- Jurisdictions where newly discovered evidence claims are time barred and applications are made for access to the evidence for the purpose of obtaining executive clemency.[19]

If there are no available remedies according to the State's postconviction statutory scheme, but if it is a category 1 case (i.e., DNA testing will be outcome determinative) then defense counsel should file in court for access to the evidence for purposes of obtaining executive clemency.

Pretesting Considerations

Consultation With Experts and Experienced Colleagues

To achieve satisfactory testing arrangements, defense counsel without extensive experience handling DNA matters should consult with more experienced colleagues in dealing with both the postconviction DNA applications and the testing process. Two particularly valuable sources to which attorneys can refer are: the National Institute of Justice study published in 1996 entitled, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* and the 1996 National Research Council's publication, *DNA Technology in Forensic Science.*

Deciding on a Mutually Agreeable Laboratory and Methods of Testing

A laboratory and the best methods of testing need to be agreed upon by representatives of both parties. Defense counsel should consider the following issues when entering into these discussions with the prosecutor:

- The different methods of DNA testing that are available.
- The age, type, and amount of evidence available.
- Where and how the evidence was stored.
- The types of technology that a specific laboratory has available.
- How long the laboratory has had the technology in question.
- The reputation of the laboratory.

[19] The Innocence Project takes the position that there is a constitutional right, notwithstanding State time bars, to obtain and test DNA evidence where the results could provide "truly persuasive evidence" of innocence pursuant to the Fifth and Eighth Amendments. See *Herrera* v. *Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

These factors are especially important where the samples may be old or have degraded and there is not enough sample to conduct more than one test. It is generally possible, for example, for scientists retained by both sides to work out a protocol whereby preliminary tests are performed by one laboratory to determine the quality and the quantity of DNA available. Based on these determinations, the parties can agree on what testing should be performed, who should do it, and who should be present to witness the testing.

Elimination Samples

It may be necessary to obtain additional samples from the victim and/or any of his or her prior consensual partners. If this is the case, the prosecutor, ideally through victims' services, should contact the victim to facilitate this process. If the victim or third party will not agree to submit samples for purposes of elimination, then it may be necessary to go to court to obtain an order.

Replicate Testing

Agreement should be reached, if there is enough sample, to do replicate testing, thereby minimizing the chances of an erroneous result due to contamination, mishandling of samples, or any other factor.

At the very least, provisions must be made to ensure that, if there is not enough sample to conduct replicate testing, a neutral expert can review the results and be involved in establishing the proper testing protocols in light of the facts of each case and on an individual basis.

Payment

In category 1 cases (i.e., where testing will determine the outcome) the State should pay. In category 2 cases (where the outcome is questionable) the inmate may have to bear the costs of testing. It is possible that in category 2 cases the inmate may be reimbursed if the results are exculpatory. It should be noted that if the State pays for the testing, then it will most likely use its own State or county laboratory.

Disclosure of DNA Testing Results

Defense counsel should ordinarily expect and agree that the DNA testing results, regardless of outcome, will be made public.

Establishing a Chain of Custody and Preserving Evidence for Testing

The original condition of the evidence and its packaging should be photographed and carefully documented at the time of its discovery and throughout all stages of the postconviction procedures.

The defense attorneys and prosecutors should develop mutually agreeable methods for preserving the chain of custody for the evidence throughout the testing process. This should include photographing the evidence and its packaging when it is received and sent; an evidence labeling system that includes initialing by evidence handlers with times and dates; and, if possible, photomicrographs of relevant slides, especially slides containing sperm in sexual assault cases.

The evidence should be properly preserved. The most important factor in storing evidence is a dry atmosphere at room temperature.

It is important to continue to carefully preserve the evidence even after postconviction DNA testing has been conducted because future developments in the technology may make it possible to obtain additional results at a later date. For example, there have been several cases where RFLP DNA testing was conducted and the results were inconclusive, but PCR-based testing was conducted years later and conclusive results were obtained. Particularly with the advent of mitochondrial DNA testing, there will be many new cases where future DNA testing will be able to produce results that were not previously obtainable.

Procedures After Postconviction Testing Results Have Been Obtained

If results are favorable to the applicant, defense counsel and prosecutors should join in either a motion to vacate a conviction or, in a jurisdiction where such motions are time barred, an application for executive clemency or a pardon.

If results are favorable to the applicant, but the prosecution nonetheless opposes a motion to vacate, defense counsel must be prepared to litigate a State application for relief, appeal any unfavorable findings, and ultimately seek relief in Federal court.

In jurisdictions where newly discovered evidence claims are time barred, defense counsel should still be prepared to seek Federal relief based on "truly persuasive" evidence of innocence.[20]

If DNA results incriminate the applicant, defense counsel should abandon a claim of actual innocence based on DNA testing and make appropriate referrals.

[20] The Commission takes no position on whether Federal courts should or should not grant Federal habeas claims where DNA testing has produced "truly persuasive" evidence of innocence; rather, it is simply suggested here that defense counsel should strongly consider litigating this undecided issue in appropriate cases.

Chapter 6

Recommendations for the Judiciary

Handling Initial Requests

Trial courts routinely receive requests, petitions, motions, or even letters for postconviction relief. Some are filed by defendants, some by their family members, and some by defense counsel on a defendant's behalf. Rules and statutes govern the manner in which courts act on these postconviction relief requests, based upon time limits, preclusion, and the like.

However, requests for postconviction DNA testing present a somewhat unique issue for the trial court in that the defendant making the request does not have "newly discovered evidence" that would probably overturn a conviction, and in many jurisdictions any request for relief would be time barred. But at the time of conviction, for example, a defendant who claimed innocence may not have had the opportunity to have evidence that was collected by law enforcement officials tested for DNA comparison, or the testing that was available at the time was not as sophisticated as today's.

In some cases, if the trial court is familiar with the case, a summary determination that DNA testing would not be relevant to the outcome of the case can be made. For example, if the court in a sexual assault case knows that the defense at trial was consent, or in a homicide case that the defense was self-defense, DNA analysis normally would not be relevant.

Assuming that the court does not make its own summary determination, the court's role, when it receives such a letter or request, should be as a referral source. A copy of the letter or request should be sent to the prosecuting agency. If the inmate or a family member writes the letter, it is recommended that a referral be made to the local public defender's office, the State criminal defense attorneys' organization, the local court-appointed counsel, or a national resource center that deals with DNA evidence cases such as the Innocence Project at Cardozo Law School in New York. The court should not notify the victim or victim's family upon the initial request, but rather should leave the notification, and the decision when to notify, to the prosecutor and victim assistance office.

Information Gathering/Searching for Evidence

Upon referring the request to the prosecution and defense, the court's role becomes more reactive than proactive. Extensive investigation needs to be done by counsel before a request for DNA testing can be granted. A hierarchy of cases has been described in the introductory chapter of these recommendations that will help the parties and the court determine if the case is suitable for DNA testing. The court will likely be involved only in category 1 and category 2 cases.

Category 1 involves cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, favorable results will exonerate the petitioner.

Category 2 involves cases in which biological evidence was collected and still exists. If the evidence is subjected to DNA testing or retesting, favorable results would be helpful to the

petitioner's claim of innocence, but reasonable people might disagree as to whether the results exonerate him. This category also includes cases where, for policy and/or economic reasons, there might be disagreement as to whether DNA testing should be permitted at all or, for indigent inmates, at State expense. The decision on whether this is a case for testing or retesting may have to be made by a judicial officer.

Category 3 involves cases in which biological evidence was collected and still exists. However, if the evidence is subjected to DNA testing or retesting, favorable results would be inconclusive.

Category 4 involves cases in which biological evidence was never collected, or cannot be found despite all efforts, or was destroyed, or was preserved in such a way that it cannot be tested. In such cases, postconviction relief on the basis of DNA testing is not possible.

Category 5 involves cases in which a request for DNA testing is frivolous.

The court can play an important role in helping obtain access to evidence prior to testing. This is a crucial issue in that it allows the "screening" process to continue. This screening serves as a weeding out of cases in which DNA evidence will be irrelevant. The court should be willing to enter orders for the parties to gain access to evidence that has been preserved, whether in a laboratory, police property room, clerk's office, or prosecutor's office. This evidence may include clothing or other crime scene evidence that was never before examined for biological evidence because it is not visually apparent.

As information is gathered and counsel search for the evidence, the court may be called on to issue certain orders. Upon request of counsel for the State or defendant, or jointly, or *sua sponte*, it is recommended that the court issue an evidence preservation order to the investigating agency, clerk of court, crime laboratory, prosecutor's office, or any other agency in a jurisdiction that may have evidence that might be subject to DNA testing. This is done to prevent destruction or disposal of the evidence, which would preclude testing in the future. The evidence to be preserved may include items not used at trial, but which were collected and might contain DNA evidence. At this stage, the court also can help determine if any orders were ever entered for destruction or disposal of evidence.

In appropriate circumstances, at the request of either party, or *sua sponte*, the court might consider whether a "no contact with the press" order should be issued. The court should be particularly sensitive to victim issues in this regard.

Pretesting Stage

Once it is determined that some evidence still exists and that DNA testing or retesting could lead to a different result in a case, it is recommended that the court set an informal conference with counsel. It may also be helpful to have a representative of the State crime laboratory or another laboratory acceptable to both parties present. At the informal conference, the court should do all it can to foster cooperation between the parties. The court should seek agreement between the parties or may need to make a determination as to several issues that should be raised in the informal conference, such as:

- The method of preserving evidence for chain-of-custody purposes during the testing process.
- The type of DNA analysis to be utilized.

- The laboratory that will perform the testing. It may be necessary for the court to enter an order to release certain evidence to a laboratory for testing. Prior to any release, both sides should be notified and given an opportunity to be heard.
- Determination of the estimated cost of the testing and who will pay for it. This may be determined by local policy, State statute, agreement between the parties, or court order. In category 1 cases, the testing will generally be at State expense, but often the petitioner or his family will have to pay, with reimbursement made if there is an exoneration or exclusion.
- Determination of the amount of sample available for testing and replicate testing. If the entire amount of sample will necessarily be consumed, arrangements should be made for a defense or prosecution expert to observe the testing procedures, either by counsel or upon order of the court. The court should try to get the parties or their experts to agree to a protocol to be used. Otherwise, the court may be called upon to determine the protocol to be followed.
- Determination of whether it will be necessary to test the victim's relatives or third parties or whether additional samples need to be obtained from the victim. If it is so determined, take the following action:
  - Ensure that contact with the victim is minimal, only when necessary, and through the victim services or advocacy office.
  - Offer the victim a choice of what type of sample to provide, if at all possible (buccal swab, blood, hair, etc.).
  - Attempt to seek stipulations or agreements between counsel on additional samples to be taken from others. If there is no agreement, the court will likely have to enter an order.

At this stage, it may be appropriate for the court to consider the use of "court experts" or a panel of the same, as has been done in complex civil cases with the use of special masters to assist in screening and evaluating evidence.

The court also should be aware of the need to preserve some of the sample, if at all possible, for investigation and testing of future suspects if the defendant is exonerated. This is another reason why the issue of replicate testing should be considered with input from laboratory personnel.

Procedures After Postconviction Testing Results Have Been Obtained

If the results of the testing are favorable to the inmate and no alternative explanations exist, the court should be prepared to grant a joint request by, or a motion from the defense or prosecution, to vacate the conviction in jurisdictions where postconviction relief is not time barred. In jurisdictions where a time bar exists it is recommended that the court note its findings and recommendations as an attachment to an application for executive clemency or pardon.

In the absence of a joint motion or stipulation for dismissal, if DNA testing results seem to exculpate the defendant because of an exclusion, an evidentiary hearing should be set to determine if there is a reasonable probability of a change in the verdict or judgment of conviction. Not all exclusions will result in exonerations. If the court makes such a finding, a new trial should be set, and the defendant's release conditions should be reexamined.

It is possible that, in States where a time bar exists for petitions for postconviction relief based on newly discovered evidence, the parties may stipulate to a waiver of the time bar or the court may use its inherent powers to prevent what may be a miscarriage of justice. This would only apply in cases where dispositive evidence of exoneration exists. The court, for example, could order a defendant's release from custody pending a decision on executive clemency.

If a petition for postconviction relief is granted, the court should ensure that the prosecution or a victim advocacy organization makes contact with the victim prior to any public release of the information to reduce additional emotional trauma and surprise.

If testing results further inculpate the defendant, it is recommended that the court promptly act upon a motion to dismiss the petition.

Chapter 7

Recommendations for Victim Assistance

Victims and surviving family members confront a number of issues and events following the conviction and sentencing of the defendant. Rarely does the impact of the crime end with the incarceration of the offender. Convicted defendants appeal their sentences, come up for parole, and sometimes request that evidence undergo DNA testing. All of these postconviction events may be upsetting to victims and families of murder victims and are painful reminders of the suffering and loss associated with the crime. It is extremely important that crime victims and surviving family members are provided with information and approached with great sensitivity. This is especially critical when the conviction was based primarily upon eyewitness identification by the victim. *Victims and their families may need access to special services to help them cope with this new case development.*

It is important to note that a number of States passed victims' rights statutes that require notification of victims, including notification of appeals proceedings, prison release, and application for pardon or commutation of sentence. Agencies involved in postconviction DNA cases should make certain they are complying with any applicable State statutes. (A compendium of State statutes addressing notification of victims is included in the appendixes.)

Initial Notification

Notification to victims of requests for DNA testing should be made by the prosecutor, preferably through a victim assistance specialist or advocate. When possible, notification should be made by someone who worked with the victim in the past. One person should be designated as the primary contact person for the victim. If the prosecutor's office does not have a victim assistance program, support and other assistance for the victim should be sought from a local victim assistance program, such as a rape crisis center or a homicide survivors' support program.

When to notify a victim is ultimately a judgment call on the part of the prosecutor and victims' advocate and should be based on the status of the request and the emotional and mental health status of the victim. Initial discussions regarding testing of DNA evidence should be informal and low profile. If DNA testing is not possible or turns out to incriminate the applicant, there may not be any reason to disturb the victim or his or her family. *The timing and manner of notification is extremely important when the victim has a history of severe depression or suicidal ideation.* While care should be taken to avoid upsetting victims or survivors unnecessarily, it is better to provide information to victims as early in the process as possible. Initial notification should be made before a motion to release the evidence is made to the court or before there is a chance the victim or surviving family members will hear or read it in the media or from other sources.

Victims and survivors need to be provided with a simple but thorough explanation of how DNA testing may be used in their case, the process and procedures used, and the potential outcomes of testing. It will help to provide written information about DNA testing so victims and survivors will have a chance to absorb complex information at their own convenience. (Sample brochure content is included in the appendixes.)

Victims and survivors should be provided with information about the status of the DNA testing request, how they will be notified about future events, and what types of victim assistance are available.

Searching for Evidence/Requesting DNA Samples From Victims and Third Parties

Unreasonable and intrusive sample collection should be avoided to prevent retraumatization of victims. Access to third parties should be permitted for elimination purposes only. When requesting samples from a victim after conviction, prosecutors and victims' advocates should weigh the level of trauma experienced by the victim at the time of the crime and the potentially traumatic impact of testing the victim *along with the possibility of a determinative outcome*.

Requests should be made only through the prosecutor, investigator, or victims' advocate.

The technical aspects of testing and the significance of the samples requested should be explained in detail so the victim understands how it will be collected, how it will be used, and what testing results may mean. It should be made clear to victims and third parties that DNA samples are to be used for elimination purposes only.

Victims, or third parties associated with the victim, may refuse to provide samples for testing. *Prosecutors and advocates should strongly encourage voluntary compliance by victims and third parties in order to avoid orders by the court for testing*. Courts should be strongly discouraged from ordering victims to provide samples for testing except as a last resort.

Victims who consent to testing should be provided with as much choice as possible with regard to the timing, method, and location of the testing. *The preference would be to use the least invasive method. When possible, the victim should be allowed to choose the type of sample to be used, such as buccal swab rather than a blood sample*.

Prosecutors or victims' advocates should provide escort and transportation assistance for testing, hearings, and meetings, if needed.

Ensuring Privacy of Victims and Survivors

Steps need to be taken to ensure that information about the location of victims and survivors remains confidential. Contact with victims should only be made by prosecutors or victims' advocates. Addresses and phone numbers of victims and survivors should not be provided to the defendant's counsel or other representatives and should not be included in court documents.

Victims and survivors should be reminded of their right to refuse media interviews.

Assisting Victims After Postconviction Results Have Been Obtained

Prosecutors and victims' advocates should ensure that information about testing results is provided to the victim or survivors in a timely fashion. Information should be provided in person, if

possible. The more critical the information, the more important it is to provide it in person, or at least by telephone. *Victims should be provided with a thorough explanation of the meaning and consequences of testing results*.

Prosecutors and victims' advocates should ensure that counseling resources are available through their offices or a community-based assistance program.

If testing results produce exculpatory evidence, particularly in mistaken eyewitness identification cases, victims may still believe the defendant is guilty. Victims may be upset and angry. The credibility of sexual assault victims is usually attacked in trial, and a conviction is viewed as a significant validation of the victim's credibility. To face having his or her credibility called into question once again will cause tremendous distress. Victims or survivors will need a great deal of support and an opportunity to express their anger and frustration. Some victims may feel terrible guilt about their part in convicting an innocent person.

A North Carolina man convicted and sentenced to life in prison for two rapes he did not commit was exonerated a decade after the crimes occurred because of DNA testing. After the attacks occurred on the same night in 1984, both victims went to the hospital and full "rape examination kits" were completed. Evidence included a flashlight found in the man's apartment that was identical to one stolen from the second victim; shoes found under the man's bed were missing insoles similar to foam found at the scene of the first rape; and the first victim had identified the man as her attacker. The man was convicted of the rape of the first victim and sentenced to life in prison. However, the North Carolina Supreme Court overturned the verdict and ordered a new trial, scheduled for 1987.

Meanwhile, the defendant met a fellow inmate in prison who bore a strong resemblance to the composite sketch used in his case. The other inmate denied involvement, but reportedly bragged to other inmates that he had committed the rapes. During the new trial, both victims testified against the defendant. Both the victims and the jury were unconvinced that the man the defendant had met in prison was the real assailant. And the court withheld evidence of the man's alleged confession. The defendant was convicted of both rapes and sentenced to two 1ife sentences plus 55 years in prison.

In 1994, the defendant learned about DNA testing (a procedure unavailable at the time of his trials), and filed and won a motion for DNA testing. In spring 1995, Burlington Police turned over to the court all case evidence containing semen or other bodily fluids. Samples from the first victim had deteriorated and could not be tested, but those from the second victim provided a breakthrough. On a tiny vaginal swab, scientists found sperm. Subjected to a DNA testing procedure known as polymerase chain reaction (PCR) testing, that sample did not match to the defendant. He could not have committed the crime.

The State DNA database matched the sample to the other prison inmate, who confessed to both rapes. In 1995, almost 11 years after the rapes and 10½ years after being taken into custody, the defendant was cleared of all charges and released from prison.

Reassure victims that they did the best they could at the time and that memory can be fallible. It may help to remind victims that DNA technology, which may not have been available at the time of the original investigation, can be an important tool in making sure the right person is convicted. Remind victims or survivors that the criminal justice system is not perfect, and emphasize the importance of knowing the truth and identifying the right perpetrator to ensure justice and to prevent future victimization of other individuals.

Also, it may help to inform victims of the following:

- Even the Innocence Project concedes that, in many cases in which postconviction requests are made for DNA testing, the results confirmed the identity of the convicted person as the true perpetrator. These confirmations may have a significant impact on any future decisions regarding probation or parole.
- The victim should be assured that everyone in the system, particularly prosecutors and judges, will make sure that ambiguous results, e.g., results that do not clearly exonerate the perpetrator, will not result in a new trial or weaken the conviction.
- If postconviction testing of DNA evidence results in a valid exclusion, the victim can be reassured that growing DNA databases will increase the future likelihood of identifying the true perpetrator in his or her case. DNA databases will also make it easier to accurately identify and link perpetrators to crimes in future cases.

A rape case was solved 6 years after it occurred because of a DNA databank. A Virginia woman was robbed and raped by a masked man who had dragged her from her house into a wooded area in 1989. The woman reported the attack and visited a hospital where a "rape examination kit" was completed and DNA and other evidence was collected from her body and clothing. For 6 years, she feared the man would come back, as he had threatened. Then a forensic scientist for the Commonwealth of Virginia notified her that the man who had raped her had been identified and was serving time for a separate offense. When run through Virginia's DNA databank, the inmate's DNA had produced a match or "hit" with the DNA sample of the woman's assailant collected years earlier. Later, the woman learned that her assailant had gone to jail only months after raping her. The necessary DNA evidence had been in the Commonwealth's possession but was not analyzed sooner because of a backlog in its DNA databank. By eliminating or at least reducing such backlogs, States will save victims like her years of suffering and allow them to begin healing much sooner.

Chapter 8

Recommendations for Laboratory Personnel

These recommendations are addressed to any laboratory personnel who are contacted regarding postconviction requests for DNA testing. This would include laboratories that are being contacted: 1) regarding work previously done on evidence in the case, or to determine whether any evidence remains, and its location; 2) as consultants to advise attorneys, the judge, or the defendant regarding DNA testing; and/or 3) to perform DNA tests. This chapter also covers considerations for selecting a laboratory for DNA testing.

Handling Initial Requests

The laboratory may be contacted by various individuals (e.g., defendant, defendant's family, prosecuting attorney, defense attorney, judge) regarding postconviction relief. Someone in the laboratory must determine the appropriate response in light of the stage in the postconviction process at which the laboratory is being contacted. For instance, if the laboratory is contacted directly by the defendant or the defendant's family seeking information regarding postconviction relief, the laboratory should refer the individual(s) to the prosecuting attorney's office and/or the defense attorney's/public defender's office. Depending on the laboratory's policies, information may be provided regarding the existence of any evidence remaining in the laboratory and its suitability for testing. If the laboratory is contacted by an attorney or a judge, the laboratory should provide the requested information and, most importantly, preserve the samples in an appropriate manner for future testing. Also see the section below regarding the role of the expert(s) in a laboratory for further information.

Role of the Expert in the Laboratory

Laboratory Previously Involved in the Case

A laboratory previously involved in the case may be requested to provide information regarding:

- The meaning and limitations of any previous test results obtained, including all serological and/or DNA testing and all results reported as inconclusive regardless of whether they were used at the trial or whether evidence still exists for retesting.
- Whether any evidence remains.
- The location and storage history of any remaining evidence.
- The laboratory's policies for the release of evidence to the defendant.
- The laboratory's policy for providing discovery (laboratory case notes and copies of data, or laboratory reports) regarding the disclosure of previous test results. The laboratory may also be requested to serve as a consultant to the attorney(s), judge, or defendant (see below) regarding DNA testing.

In a postconviction proceeding, the laboratory will likely be requested by the attorney(s) or ordered by the court to retain and preserve any evidence that remains in the laboratory's possession. The laboratory should locate the evidence and ensure that it is stored in a proper manner to preserve the samples for future DNA testing. Generally, stains, bones, and teeth should be stored dried at room temperature, 4ºC, or frozen; liquid samples should be stored frozen; and tissue samples should be stored frozen (preferably at -70ºC).

Laboratory as a Consultant

A laboratory may be requested to serve as a consultant to the attorney(s), the defendant, and/or the judge. It is important that expert personnel serve in a fair and unbiased manner as consultants to advise on issues regarding DNA testing in the particular postconviction proceeding, such as:

- The limitations and meaning of test results previously obtained.
- What evidence could and should be tested that would likely yield interpretable results.
- What DNA tests should be considered and what are the limitations and advantages of each test.
- Which DNA testing laboratory should be selected to do the testing.
- The possible results and the meaning of each of those possible results.
- Whether samples from additional individuals are required for the testing.

DNA Testing Laboratory

The DNA testing laboratory, in addition to serving as a consultant to the attorney(s), the defendant, and/or the judge, has an obligation to perform quality DNA tests according to accepted procedures and to interpret and report the results accurately and without bias. The laboratory expert may be required to present the test results and the conclusions derived from the test results in court.

Considerations for Selecting a Laboratory for DNA Testing

There are many issues that may need to be considered when selecting a laboratory to perform DNA testing in connection with a postconviction proceeding. Some of these issues are outlined below:

What DNA tests are available in the laboratory?

The DNA tests available in a laboratory need to be considered when selecting a laboratory for testing postconviction relief samples. Several questions that should be addressed are:

What is the size and type of the sample?

The size and type of the sample will determine which DNA tests can be performed. Samples available for testing are often quite small and may not have been properly stored, which may have caused the degradation (breaking down) of the DNA. Either of these situations will make the samples unsuitable for RFLP testing (see chapter 3 for further information on RFLP testing); therefore, the selected laboratory must have PCR testing capabilities. If the DNA is severely degraded, or the sample to be tested is a hair shaft or dried bone, PCR testing of nuclear DNA may not yield results, and a laboratory that performs mitochondrial DNA testing should be considered.

What is the level of discrimination required in the testing?

If the desired testing outcome is to simply distinguish one known individual from another known individual (e.g., the consensual partner from the perpetrator in a sexual assault case), then the discriminatory capabilities of the test methods available in the laboratory may not matter. However, if the test must be highly discriminatory so as to eliminate falsely accused individuals, particularly if any individuals are related, then the discrimination capabilities of the tests available in the laboratory should be considered. A laboratory should be selected that has the testing capabilities to address the level of discrimination required.

Have samples been tested previously that will be used for comparison purposes?

If the samples to be tested will be compared with results from samples tested previously (e.g., known individuals in convicted offender databases, samples from other possible serial sexual assault cases, results from samples tested in the laboratory selected by opposing counsel), then the selected testing laboratory must have the appropriate tests available so that the data may be compared.

Will the test results be compared to those in a DNA database?

If the defendant is found to be innocent of a crime for which he or she was convicted based on being excluded as the donor of the DNA from a relevant sample, then the prosecutor may want to compare the DNA test results to those in databases of convicted offenders (e.g., CODIS) to help identify the true perpetrator. In this situation, it will be important to use DNA tests compatible with the database to be used for comparison purposes.

What experience does the laboratory have?

A laboratory should be selected that has experience using the particular DNA test method to be used on the type(s) of forensic samples that will be analyzed in the postconviction relief case. Information regarding validation studies performed by the laboratory and its history of obtaining reliable results on samples similar to those being tested in the postconviction case with that test method may be requested.

Is there an expert(s) available for consultation and testimony?

The experience and availability of experts from the laboratory to assist the attorneys and the court in decisions regarding the appropriate samples to be tested, the test methods to be used, the meaning of the results, chain-of-custody issues, and the need for testing additional samples from other individuals should be considered. It may also be important to consider the qualifications of the expert(s) and his or her experience in presentation of DNA data to the court.

Is the laboratory accredited?

Accreditation is a process in which a laboratory undergoes a review and onsite inspection by individuals from other DNA testing laboratories. This process generally requires a review of the procedures followed in the laboratory for DNA testing, security, evidence handling, protocol validation, and documentation of results, proficiency testing, and quality assurance to determine if they meet accepted guidelines. The laboratory is accredited if it meets the specified criteria for accreditation. Other review processes include certification and internal and external audits of the laboratory.

Does the laboratory do testing for the prosecution or the defense?

It may be important to consider the laboratory's policies regarding those for whom it does testing. Some laboratories may only be available for testing by the State or by the defense. Some laboratories may be retained by either the defense or the prosecution but may not be able to work for both parties jointly; for instance, a particular laboratory's policy may preclude a prosecutor and defense counsel from agreeing to share decisions about testing and to both receive test results. The perceptions of bias in the testing laboratory may also require consideration.

What level of confidentiality does the laboratory maintain?

The laboratory's policies regarding confidentiality and discovery may need to be considered. Although it is recommended that all results from postconviction relief testing be available to the prosecution, the defense, and the court, there may be circumstances in which the results of the testing must remain confidential. It may also be important to understand if the test results from a particular postconviction case will be usable in other ongoing investigations of unsolved cases. For example, will the defendant's DNA profile be entered into any laboratory or State database for future comparison purposes?

Is the laboratory a public or private laboratory?

This may be an important consideration for determining whether the laboratory can be retained by either the prosecuting or defense attorney or both. It may also affect whether the counsel who did not request the DNA tests has access to the laboratory's experts for consultation, the availability of expert testimony and discovery, the cost of testing, and confidentiality issues.

What materials are available from the laboratory for discovery purposes?

At times, an attorney, an expert, or the court may request documentation of the DNA tests performed in a postconviction case, or information about quality control/assurance, chain of custody, validation studies, proficiency tests, and/or information regarding the databases used. It may be important to consider what materials are available from a laboratory before doing the DNA testing if this could become an issue in a particular case.

What is the laboratory's policy for retaining untested portions of samples and/or DNA extracted from a sample?

Samples tested in connection with postconviction requests are often quite old and small, particularly if RFLP testing had been attempted previously. There may only be a sufficient sample to do a limited number of tests. In this situation, it is important to understand the laboratory's policy regarding destruction of the entire piece of evidence versus retention of a portion of the untested sample as well as a portion of the extracted DNA for possible future testing. The laboratory should test only the amount of sample needed to obtain reliable results and should retain any untested sample and/or extracted DNA whenever possible so that repeat or additional testing can be performed at a later time. (See the section, Retention of Samples for Future Testing, below, for further discussion.)

Does the laboratory permit outside experts to observe testing?

Samples tested in postconviction relief cases are often limited in size (e.g., a single hair root or a very small bloodstain) and cannot be divided prior to isolating the DNA from the sample. Since the sample will be destroyed during DNA testing, if there is only enough sample for one test, the attorney who did not select the testing laboratory may request that an expert be permitted to observe the DNA testing. Some States have statutes or case law permitting a defendant the right to have the testing witnessed when evidence will be consumed (e.g., Colorado, California). In these situations, it will be important to select a laboratory that permits outside experts to observe the testing and to understand its policies concerning outside expert witnesses.

Has the laboratory done previous testing in this case?

For continuity in testing or for consideration of potential bias, it may be important to consider whether the laboratory has already been involved in testing for the case.

Selection of Samples for Testing

Care should be taken in selecting a single sample (or at least the minimum number of samples) for testing that will give meaningful/useful results for a particular case. There is no point in testing samples in category 5 cases. (See discussion in chapter 3, Determining Which Samples to Test). Criteria for selection of the sample may include:

- Which sample would prove innocence if the defendant is excluded as a donor.
- Which sample is of sufficient size and quality to likely give reliable and interpretable test results.
- Which sample is of sufficient size to permit repeat or additional testing at a later time.
- Which probative sample has been collected, preserved, and handled appropriately to ensure the integrity of the sample results.
- Which sample has sufficient chain-of-custody documentation.
- Are additional samples available that have not been evaluated previously? (See discussion in chapter 3 on reasons for inconclusive results.)

The availability of and necessity for samples from known individuals who should be tested for exclusionary purposes will need to be carefully considered. For example, in sexual assault cases where the defendant is excluded as a donor of the DNA, it is imperative that a sample from the victim and any known consensual partner(s) be tested in order for that exclusionary result to provide exculpatory evidence. Additionally, testing of the victim's sample in sexual assault cases can serve as a built-in control to confirm that the testing has been performed correctly and that the questioned sample is, in fact, linked to that victim.

Retention of Samples for Future Testing

It is highly recommended that samples be split whenever possible before and during the testing process. The laboratory should only test the amount of sample needed to obtain reliable and interpretable test results; any untested sample should be retained for possible future testing.

Once DNA is obtained from a sample, the laboratory should assess the quality and quantity of the DNA, whenever possible, and consult with the individual who submitted the evidence regarding tests to be done. Again, only the amount of DNA required to obtain reliable and interpretable test results should be consumed in the testing; any remaining DNA should be preserved for future testing. The preserved and untested sample remains available for:

- **Repeat testing by opposing counsel.** The prosecuting attorney or the defense attorney may request a portion of the untested sample to repeat the testing or have additional testing done in a laboratory of his or her choice.
- **Retesting if there is a problem.** If a problem arose in interpreting the results, or an error occurred during the first test, an untested portion of the sample will be available to repeat the test.
- **Additional testing to exclude a falsely accused individual.** Testing at additional regions of the DNA may be required to exclude a falsely accused individual. Untested areas of the sample or remaining DNA may be used for these additional tests.
- **Additional testing to aid in the interpretation of the test results.** In situations where more information would be helpful for interpreting the test results, testing at additional regions of the DNA is advised. For example, the additional tests could confirm that the DNA sample contains a mixture of DNA from two or more individuals and may aid in determining whether the defendant can be excluded as one source of the DNA.
- **Future testing when new technologies become available.** A portion of the sample and the DNA should always be retained, whenever possible, for testing in the future when additional technologies become available. Many samples that proved inconclusive with RFLP testing have been retested using PCR and the results have been exonerative.[21] In contrast, samples that were consumed during RFLP testing are now not available to the defendant for PCR testing. Samples that were inconclusive with nuclear PCR testing may be suitable for mitochondrial DNA testing and could lead to exonerations in the future. Other tests not now available could be used in the future to confirm convictions or to exonerate defendants.
- **Additional testing to aid in identification of the perpetrator when the convicted individual has been excluded.** If the DNA test performed in a postconviction relief case results in the exclusion of, and thereby establishes the innocence of, the convicted individual, the prosecutor may require additional testing of the evidence sample to aid in the identification and prosecution of the real perpetrator of the crime.

Quality Assurance Standards for Forensic DNA Testing Laboratories and Technical Working Group on DNA Analysis Methods (TWGDAM) Guidelines: Validation With Nonprobative Evidence

The DNA Advisory Board has issued "Quality Assurance Standards for Forensic Testing Laboratories" and the Technical Working Group on DNA Analysis Methods (TWGDAM) has made recommendations for a laboratory doing forensic DNA testing. Both of these documents (Standard 8.1.3 and Guideline 4.1.5.8) advise that validation of any new DNA test system include testing with nonprobative evidence samples. The purpose is to provide experience with and an understanding of how forensic samples perform with a new test system. Different definitions of nonproba-

[21] See NIJ Report, note 3.

tive evidence have been used by crime laboratories, including adjudicated cases (convictions) or cases where the defendant confessed to the crime. When laboratories are training analysts and/or validating new DNA test systems, discretion should be used in selecting samples from "nonprobative evidence" samples. To prevent the unfortunate and unnecessary destruction of evidence that may be important in a postconviction relief proceeding, the following criteria are provided for the selection of test samples from actual forensic cases:

- **Only select samples where sufficient original and untested evidence samples will remain to do a minimum of two to three DNA tests using currently available DNA technology.** For example, if four vaginal swabs remain after successfully using one for RFLP testing previously, then one to two swabs could be used for validation studies because the one untested swab would be sufficient for several PCR tests. Similarly, a portion of a large bloodstain could be used for validation studies without jeopardizing any future testing of the stain.
- **Only test samples that are less informative regarding the crime than other samples.** For example, if several samples containing sperm have been associated with a sexual assault, select the sample for validation studies that would be duplicative and less informative than another sample, such as a panty crotch or a semen stain on a blouse, rather than the vaginal swab. Caution is advised because making these determinations requires specific information regarding the crime, such as whether the perpetrator ejaculated in the vagina, whether there were previous consensual partners, which may cause mixed DNA results from the vaginal swab and make the swab the less informative sample, or whether there were multiple assailants, in which case every semen stain may be probative.
- **Use DNA isolated from previous validation studies** whenever possible rather than consuming additional evidence in a case.

Glossary

ABO blood typing: A commonly used genetic typing test that uses antibodies to detect variations on the surface of human red blood cells. Individuals are typed as having A, B, O, or AB type blood by testing liquid or stains from body fluids (e.g., blood, saliva, vaginal secretions). One out of every three randomly selected pairs of people have the same ABO blood type.

Amelogenin: A gene present on the X and Y sex chromosomes that is used in DNA identification testing to determine the gender of the donor of the DNA in a biological sample.

CODIS: Combined DNA Index System. A collection of databases of DNA profiles obtained from evidence samples from unsolved crimes and from known individuals convicted of particular crimes. Contributions to this database are made through State crime laboratories and the data are maintained by the FBI.

D1S80: A region of the DNA on chromosome 1 that contains a 16-base pair DNA sequence that is repeated in tandem from 14 to ~40 times; this region has been commonly tested using PCR with the AmpFLP D1S80 PCR Amplification Kit for human identification testing.

D7S8: Polymorphic region of DNA on chromosome 7.

DNA: Deoxyribonucleic Acid. Often referred to as the "blueprint of life," DNA is the genetic material present in the nucleus of cells which is inherited half from each biological parent. (See chapter 3 for additional information.)

DNA profile: For an individual, the DNA types present at a particular set of tested DNA regions.

DQA1 (DQα): A polymorphic gene in the Human Leukocyte Antigen (HLA) region of chromosome 6 that has been well studied and analyzed for many purposes including paternity testing, transplantation biology, and human DNA identification testing. This region has been commonly tested using the AmpliType® HLA DQα Forensic PCR Amplification and Typing Kit and the AmpliType® PM + DQA1 Amplification and Typing Kit for human DNA identification testing.

Exclusion: The elimination of an individual as the source of a biological sample. This occurs when one or more types from a specific location in the DNA of a known individual are not present in the type(s) for that specific location in the DNA obtained from an evidence sample. (See chapter 3 for additional information.)

Exemplar: A biological sample (e.g., blood, saliva) collected from a known individual to be used for comparison to DNA test results from evidence samples. Also referred to as a standard. (See chapter 3 for additional information.)

GC: Group specific component (see PM).

GYPA: Glycophorin A (see PM).

HBGG: Hemoglobin G gammaglobin (see PM).

Inclusion: The inability to exclude an individual as a possible source of a biological sample. This occurs when all types from a specific location in the DNA of a known individual are also

present in the types for that specific location in the DNA obtained from an evidence sample. (See chapter 3 for additional information.)

Inconclusive: A situation in which no conclusion can be reached regarding testing done due to one of many possible reasons (e.g., no results obtained, uninterpretable results obtained, no exemplar/standard available for testing).

Laches theory: Undue delay in asserting a legal right or privilege.

LDLR: Low density lipoprotein receptor (see PM).

Mitochondrial DNA: The DNA found in the many mitochondria found in each cell of a body. The sequencing of mitochondrial DNA can link individuals descended from a common female ancestor. (See chapter 3 for additional information.)

Nuclear DNA: The DNA found in the nucleus of a cell. DNA testing using RFLP, DQA1 (DQα), PM, D1S80, or STRs screens nuclear DNA.

PCR: Polymerase Chain Reaction. A process used in DNA identification testing in which one or more specific small regions of the DNA are copied using a DNA polymerase enzyme so that a sufficient amount of DNA is generated for analysis. (See chapter 3 for additional information.)

PM: (Also referred to as "polymarker"). A PCR-based test (AmpliType® PM PCR Amplification and Typing Kit and AmpliType® PM + DQA1 PCR Amplification and Typing Kit) commonly used since 1994 for human DNA identification testing. The kit types five specific regions of the DNA: LDLR (low density lipoprotein receptor), GYPA (glycophorin A), HBGG (hemoglobin G gammaglobin), D7S8, and GC (group specific component).

Polymorphism: Variations in DNA sequences in a population that are detected in human DNA identification testing.

Restriction enzyme: A protein used in RFLP testing that cleaves a double-stranded DNA molecule at a specific DNA sequence (e.g., *Hae*III cleaves at GG↓CC).

RFLP: Restriction Fragment Length Polymorphism. A process used in DNA identification testing in which size (fragment length) differences at specific regions of the DNA are detected. (See chapter 3 for additional information.)

STR: Short Tandem Repeat(s). Small regions of the DNA that contain short segments (usually 2, 3, 4, or 5 bases long) repeated several times in tandem (side-by-side). Thirteen STR sequences have been selected for the Combined DNA Index System (CODIS). (See chapter 3 for additional information.)

Substrates: Any background material upon which biological sample has been deposited (e.g., clothing, glass, wood, upholstery).

TWGDAM: Technical Working Group for DNA Analysis Methods. An organization made up largely of individuals from the FBI and public crime laboratories that published guidelines for DNA identification testing.

Y Chromosome: The DNA in the nucleus of a cell that is present only in males. Testing of DNA from the Y-chromosome can be used to link males descended from a common male ancestor.

Appendix I

Resources

Science

American Society of Crime Laboratory Directors
c/o NFSTC, SPJC Allstate Center
3200 34th Street, South
St. Petersburg, FL 33711
Phone: 813–341–4409
http://www.ascld.org

DOE Human Genome Program
Department of Energy, Life Sciences Division
Office of Biological and Environmental Research
U.S. Department of Energy
19901 Germantown Road, SC–72
Germantown, MD 20874–0963
Phone: 301–903–5468
http://www.er.doe.gov/production/ober/HELSRD_top.html

NIH National Center for Human Genome Research
Building 31, Room 4B 09
31 Center Drive
Bethesda, MD 20892
http://www.nchgr.nih.gov

Legal

American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
Phone: 312–988–5000
Criminal Justice Section
740 15th Street N.W.
Washington, DC 20005
Phone: 202–662–1500
http://www.abanet.org

American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22314
Phone: 703–549–4253
http://www.ndaa-apri.org/apri/

Association of Federal Defense Attorneys
8530 Wilshire Boulevard, Suite 404
Beverly Hills, CA 90211
Phone: 310–854–5135
http://www.afda.org

Conference of State Court Administrators
c/o National Center for State Courts
300 Newport Avenue
Williamsburg, VA 23185
Phone: 757–253–2000
http://www.ncsc.dni.us/COSCA

Innocence Project
Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, NY 10003
Phone: 212–790–0200
http://www.yu.edu/cardozo/law/innocent.html

National Association of Attorneys General
750 First Street N.E.
Suite 1100
Washington, DC 20002
Phone: 202–326–6000
http://www.naag.org

National Association of Criminal Defense Lawyers (NACDL)
1025 Connecticut Avenue N.W., Suite 901
Washington, DC 20036
Phone: 202–872–8600
http://www.criminaljustice.org
http://www.nacdl.org

National Center for State Courts
300 Newport Avenue
Williamsburg, VA 23185
Phone: 757–253–2000
http://www.ncsc.dni.us

National District Attorneys Association
99 Canal Center Plaza
Alexandria, VA 22314
Phone: 703–549–9222
http://www.ndaa-apri.org

National Legal Aid & Defender Association
1625 K Street N.W.
Washington, DC 20006
Phone: 202–452–0620
http://www.nlada.org

Victims

National Center for Victims of Crime
2111 Wilson Boulevard, Suite 300
Arlington, VA 22201
Phone: 703–276–2880
E-mail: ncvc@ncvc.org
http://www.ncvc.org

National Coalition Against Sexual Assault
125 North Enola Drive
Enola, PA 17025
Phone: 717–728–9764
http://www.ncasa.org

National Organization of Parents of Murdered Children, Inc.
100 East Eighth Street, B–41
Cincinnati, OH 45202
Phone: 888–818–7662
http://www.pomc.com

Office for Victims of Crime
U.S. Department of Justice
810 Seventh Street N.W.
Washington, DC 20531
Phone: 202–307–5983
http://www.ojp.usdoj.gov/ovc

Office for Victims of Crime Resource Center
Box 6000
Rockville, MD 20849–6000
National Criminal Justice Reference Service (NCJRS)
Phone: 800–627–6872
TTY: 877–712–9279
http://www.ncjrs.org

General

National Institute of Justice
810 Seventh Street N.W.
Seventh Floor
Washington, DC 20531
Phone: 202–307–2942
http://www.ojp.usdoj.gov/nij

National Criminal Justice Reference Service (NCJRS)
P.O. Box 6000
Rockville, MD 20849–6000
Phone: 800–851–3420 or 301–519–5500
TTY Service for the Hearing Impaired: (toll free) 877–712–9279; (local) 301–947–8374

Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial, Research Report, by Edward Connors, Thomas Lundregan, Neal Miller, and Tom McEwen. Washington: DC: U.S. Department of Justice, Office Justice Programs, National Institute of Justice, 1996. NCJRS, NCJ 161258.

DNA Technology in Forensic Science (NRCI). Written by a committee of the National Research Council, it is the first report by this group, which largely endorsed DNA typing but balked on the statistical issues over a concern for possible differences in different populations and suggested ceiling numbers. Washington, D.C.: National Academy Press, 1992.

The Evaluation of Forensic DNA Evidence (NRCII). Written by a committee of the National Research Council, it is the second report by this group, which focuses mostly on statistics, rejecting the need for the previously suggested ceiling methods. Washington, D.C.: National Academy Press, 1996.

"Reference Guide on Forensic DNA Evidence," by David H. Kaye and George F. Sensabaugh, Jr., in ***Reference Manual on Scientific Evidence, 2nd Edition.*** Washington, D.C.: Federal Judicial Center, forthcoming.

Appendix II

State Statutes on Notification of Victims

Victims' Rights: Notification, Consultation, Attendance, and Participation After Trial

The Project

In 1998 the Vera Institute of Justice began an extensive review of Victims' Rights legislation in all 50 States. Employing a standardized 215-item coding form, our legal analysts evaluated more than 10,000 pages of legislation concerning victims' rights to notification, consultation, participation, restitution, compensation, and services. The results of this evaluation are currently being assembled in a large research database that will include information about victims' rights at all stages of the criminal justice process.

With this project for the Office for Victims of Crime (OVC), we were able to focus particularly on legislative provisions regarding victims' rights in the post-trial phases of the criminal justice process.

The information presented is based only on a review of legislation. It does not address the implementation of victims' rights through State regulations or established practices.

The Tables

The seven tables included here are:

- **Table 1. Defining Victim—Notification and Participation.** Looks at the definition of crimes to which notification and participation rights apply. The definition operating in these cases generally applies to consultation and the right to attend as well. The chart does not include definitions of the individuals to whom the rights apply since they are generally consistent for all States. They include the person affected by the crime, guardians of a minor or incompetent, and the immediate family of a deceased victim. The definitions of family vary slightly by State, being broader or narrower. The chart also excludes routine and obvious limitations. For example, most States exclude those arrested or in custody for the crime from the definition of victim.
- **Table 2. Notifications Related to Sentencing.** Provides information about notification rights relevant to the sentencing phase of the process. Where the legislation provides specific information about deadlines or officials responsible for notification that information is included in the table.
- **Table 3. Notification—Postsentencing Proceedings.** Affords a view of notification after sentencing proceedings, including details and qualifications wherever possible.
- **Table 4. Notification—Offender Death, Escape, or Release.** Offers information about notifications related to victim notification of offender release, escape, or death. This table distinguishes between automatic notifications and those provided only to victims who make a special request. Merely keeping a current telephone number or address on file was not treated as a request.

- **Table 5. Consultation—After the Trial.** The large number of blank cells for the postsentencing phases indicates that consultation during this phase is rarely addressed directly in the legislation.
- **Table 6. Right to Attend—Post-Trial Proceedings.** Refers to rights to attend post-trial proceedings. This chart does not include certain routine qualifications, including the exclusion of victims held in custody from the right to attend. In this chart, again, the large number of empty cells indicates the limited detail provided about the victims' right to attend. Often this legislation indicates rights in general language and makes no effort to provide details.
- **Table 7. Participation—Sentencing and Postsentencing Proceedings.** Participation means the right to provide victim impact statements, either directly for that proceeding or indirectly, in the sense that a statement made at earlier proceedings must be forwarded to later ones.

A general note: All States have been evaluated for all questions. A blank cell indicates that researchers were unable to identify legislation addressing that issue.

Perry Deess, Ph.D., Principal Investigator, The Vera Institute of Justice

Table 1. Defining Victim—Notification and Participation

State	For what crimes do victims have the right to notification?	Qualifications to the definition of victim for purposes of notification.	For what crimes do victims have the right to participation?	Qualifications to the definition of victim for purposes of participation.
Alabama	Conduct (attempted or occurred) for which sentence to prison, death penalty, or fine is attached.	Notification rights do not apply to any family member who is in custody for an offense.	Violent felonies and all conduct (attempted or occurred) for which sentence to prison, death penalty, or fine is attached.	Notification rights do not apply to any family member who is in custody for an offense.
Alaska	Violent felonies, nonviolent felonies, misdemeanors.		Violent felonies, nonviolent felonies.	
Arizona	Violent felonies, nonviolent felonies, misdemeanors involving physical injury, the threat of physical injury, or a sexual offense.		Violent felonies, nonviolent felonies, misdemeanors involving physical injury, the threat of physical injury, or a sexual offense.	
Arkansas	Violent felonies, nonviolent felonies.		Violent felonies.	
California	Violent felonies, nonviolent felonies, misdemeanors.		Violent felonies, nonviolent felonies, misdemeanors.	
Colorado	Enumerated crimes, including most felonies.		Enumerated crimes, including most felonies.	
Connecticut	Where individual suffers direct or threatened physical, emotional, or financial harm.		Where individual suffers direct or threatened physical, emotional, or financial harm.	
Delaware	Violent felonies, nonviolent felonies, misdemeanors resulting in death or injury.		Violent felonies, nonviolent felonies, misdemeanors resulting in death or injury.	
Florida	Violent felonies, nonviolent felonies, misdemeanors.		Violent felonies, nonviolent felonies, misdemeanors.	
Georgia	Enumerated crimes, mostly violent felonies.	During victim's physical disability, notices to be provided to victim shall continue to be afforded only to victim.	Enumerated crimes, mostly violent felonies.	

Table 1. Defining Victim—Notification and Participation

State	For what crimes do victims have the right to notification?	Qualifications to the definition of victim for purposes of notification.	For what crimes do victims have the right to participation?	Qualifications to the definition of victim for purposes of participation.
Hawaii	Violent felonies, nonviolent felonies, misdemeanors (only offenses against the person).		Violent felonies, nonviolent felonies, misdemeanors (only offenses against the person).	
Idaho	If victim suffers direct or threatened physical, financial, or emotional harm from felony/ misdemeanor causing physical injury, threat of injury, or sexual offense.		If victim suffers direct or threatened physical, financial, or emotional harm from felony/ misdemeanor causing physical injury, threat of injury, or sexual offense.	
Illinois	Violent crimes and some vehicular crimes.		Violent crimes and some vehicular crimes.	
Indiana	Violent felonies, nonviolent felonies, misdemeanors.		Violent felonies, nonviolent felonies, misdemeanors.	
Iowa	"Criminal offenses other than simple misdemeanors."		"Criminal offenses other than simple misdemeanors."	
Kansas	Violent felonies, nonviolent felonies, acts of terrorism.		Violent felonies, nonviolent felonies, acts of terrorism.	
Kentucky	Enumerated list, mostly violent felonies, some violent misdemeanors.		Enumerated list, most violent felonies, some violent misdemeanors.	
Louisiana	Violent felonies, nonviolent felonies.		Violent felonies.	
Maine	Enumerated list, most violent felonies.			
Maryland	Violent felonies, nonviolent felonies, misdemeanor—if they result in serious physical harm or death.	Victims of sexually violent offenses have special notification rights, if requested, including notice of registration statement, immediate notice of escape.	Violent felonies, nonviolent felonies, misdemeanors—if they result in serious physical harm or death.	

Table 1. Defining Victim—Notification and Participation

State	For what crimes do victims have the right to notification?	Qualifications to the definition of victim for purposes of notification.	For what crimes do victims have the right to participation?	Qualifications to the definition of victim for purposes of participation.
Massachusetts	If victim suffers direct or threatened physical, emotional, or financial harm.		If victim suffers direct or threatened physical, emotional, or financial harm.	
Michigan	Any crime carrying a potential sentence greater than 1 year.		Any crime carrying a potential sentence greater than 1 year.	
Minnesota	Violent felonies, nonviolent felonies, misdemeanors.		Violent felonies, nonviolent felonies, misdemeanors.	
Mississippi	Violent felonies, sexual offense, spousal abuse, domestic violence, burglary of dwelling house.		Violent felonies, sexual offense, spousal abuse, domestic violence, burglary of dwelling house.	
Missouri	Crimes in which the victim suffers direct or threatened physical, emotional, or financial harm as the result of the commission or attempted commission of a crime.		Crimes in which the victim suffers direct or threatened physical, emotional, or financial harm as the result of the commission or attempted commission of a crime.	
Montana	Violent felonies, nonviolent felonies, violent misdemeanors.		Crimes not specified in the legislation.	
Nebraska	Enumerated list, including many violent felonies.		Enumerated list, including many violent felonies.	
Nevada	Violent felonies, nonviolent felonies, misdemeanors.		Crimes not specified in the legislation.	
New Hampshire	Crimes punishable by more than 1 year imprisonment.		Crimes punishable by more than 1 year imprisonment.	
New Jersey	Violent felonies, nonviolent felonies.		Violent felonies, nonviolent felonies.	
New Mexico	Enumerated list, mostly violent felonies.		Enumerated list, mostly violent felonies.	

Table 1. Defining Victim—Notification and Participation

State	For what crimes do victims have the right to notification?	Qualifications to the definition of victim for purposes of notification.	For what crimes do victims have the right to participation?	Qualifications to the definition of victim for purposes of participation.
New York	If victim "sustained physical or financial injury to person or property."		If victim "sustained physical or financial injury to person or property."	VIS at sentencing applies only to felony.
North Carolina	Not clear from the legislation.			
North Dakota	Violent felonies, nonviolent felonies, class A misdemeanors.		Violent felonies, nonviolent felonies, class A misdemeanors.	Only victims of violent crimes may appear and make an oral statement at parole hearing.
Ohio	Violent felonies, nonviolent felonies, only enumerated misdemeanors.		Violent felonies, nonviolent felonies, only enumerated misdemeanors.	
Oklahoma	Violent felonies, nonviolent felonies, misdemeanors.		Violent felonies, nonviolent felonies, misdemeanors.	
Oregon	"All types of crimes, with particular emphasis on serious crimes against persons and property."	Counties instructed to enforce victims' rights.	"All types of crimes, with particular emphasis on serious crimes against persons and property."	Counties instructed to enforce victims' rights.
Pennsylvania	Enumerated crimes including many felonies and some misdemeanors.		Enumerated crimes including many felonies and some misdemeanors.	
Rhode Island	Violent felonies, nonviolent felonies, misdemeanors.		Violent felonies, nonviolent felonies.	
South Carolina	"An offense against the person or an offense against the property of the person when the value of the property destroyed or the cost of the damage is in excess of one thousand dollars."		"An offense against the person or an offense against the property of the person when the value of the property destroyed or the cost of the damage is in excess of one thousand dollars."	
South Dakota	Violent felonies, all violent crimes, and DUI offenses.		Violent felonies.	

Table 1. Defining Victim—Notification and Participation

State	For what crimes do victims have the right to notification?	Qualifications to the definition of victim for purposes of notification.	For what crimes do victims have the right to participation?	Qualifications to the definition of victim for purposes of participation.
Tennessee	Violent felonies, nonviolent felonies.		Violent felonies, nonviolent felonies.	
Texas	Sexual assault, kidnapping, aggravated robbery, felony stalking, or any crime resulting in bodily injury or death.		Sexual assault, kidnapping, aggravated robbery, felony stalking, or any crime resulting in bodily injury or death.	
Utah	Violent felonies, nonviolent felonies, class A and B misdemeanors.		Violent felonies, nonviolent felonies, class A and B misdemeanors.	
Vermont	Violent felonies, nonviolent felonies.		Violent felonies, nonviolent felonies.	
Virginia	Violent felonies, nonviolent felonies, misdemeanors.		Violent felonies, nonviolent felonies.	
Washington	Violent felonies, nonviolent felonies.		Violent felonies, nonviolent felonies.	
West Virginia	Violent felonies, nonviolent felonies, misdemeanors.		Violent felonies, nonviolent felonies, misdemeanors.	Victim may make an oral statement only in felony cases; only a written statement may be made in misdemeanor cases.
Wisconsin	Crimes enumerated in legislation, mostly violent felonies and nonviolent felonies.		Crimes enumerated in legislation, mostly violent felonies and nonviolent felonies.	
Wyoming	Violent felonies, nonviolent felonies, misdemeanors.		Violent felonies, nonviolent felonies, misdemeanors.	

Table 2. Notifications Related to Sentencing

State	What notifications related to sentencing are provided?	What is the deadline for sentencing hearing notification?	What is the deadline for notification of sentence?	What official is responsible for these notifications?	Qualifications and additional comments
Alabama	Sentencing hearing, sentence.		As soon as is practicable.	Prosecuting attorney.	
Alaska	Sentencing hearing, sentence.		Within 30 days after final disposition of case.	Prosecuting attorney.	Notification of sentence, by request only and only for felony or domestic violence victims.
Arizona	Sentencing hearing, sentence.	In a timely manner after court notification, which must be 5 days prior to proceeding.	Within 15 days, upon request.	Prosecutor's office provides notice of right; Probation Department provides times and places.	
Arkansas	Sentencing hearing, sentence.			Prosecuting attorney.	
California	Sentencing hearing, sentence.				
Colorado	Sentencing hearing, sentence.				
Connecticut					
Delaware	Sentencing hearing, sentence.			Attorney General.	
Florida	Sentencing hearing, sentence.	In advance.			
Georgia					
Hawaii	Sentencing hearing, sentence.			Official who prepares presentencing report.	

Table 2. Notifications Related to Sentencing

State	What notifications related to sentencing are provided?	What is the deadline for sentencing hearing notification?	What is the deadline for notification of sentence?	What official is responsible for these notifications?	Qualifications and additional comments
Idaho	Sentence.				Upon request, for sex crimes, violent crimes, and all crimes against children.
Illinois	Sentencing hearing, sentence.			Prosecuting attorney.	
Indiana	Sentencing hearing.	At least 7 days before hearing.			
Iowa					
Kansas	Sentencing hearing, sentence.				
Kentucky	Sentencing hearing.			Attorneys for Commonwealth.	
Louisiana	Sentencing hearing, sentence.			Appropriate law enforcement or judicial agency.	
Maine	Sentencing hearing.			State's attorney.	
Maryland	Sentencing hearing, sentence.	Prior.	As soon as practicable.	State's attorney.	By request.
Massachusetts	Sentencing hearing, sentence.			Prosecutor.	
Michigan	Sentencing hearing, sentence.	Prompt.	Prompt.		
Minnesota	Sentence.			Officer conducting presentence investigation.	Also when an offender absconds pending sentencing.
Mississippi	Sentencing hearing, sentence.	5 days prior to sentencing hearing.	As soon as practicable after sentencing.	Prosecuting attorney.	

Table 2. Notifications Related to Sentencing

State	What notifications related to sentencing are provided?	What is the deadline for sentencing hearing notification?	What is the deadline for notification of sentence?	What official is responsible for these notifications?	Qualifications and additional comments
Missouri	Sentencing hearing, sentence.			Prosecutor.	
Montana	Sentencing hearing, sentence.	Prompt.	Prompt.		
Nebraska	Sentencing hearing, sentence.	Prompt.	Within 30 days of final disposition.	County attorney.	Also notification of acquittal by reason of insanity and any subsequent judicial proceeding.
Nevada	Sentencing hearing, sentence.	Reasonable notice.			
New Hampshire	Sentencing hearing, sentence.				
New Jersey	Sentencing hearing, sentence.			Office of Victim Advocacy.	
New Mexico	Sentencing hearing, sentence.			District Attorney.	Notification of all court proceedings.
New York	Sentence.		Within 60 days of final disposition.	District Attorney.	"Victim" as indicated in accusatory instrument.
North Carolina					
North Dakota	Sentencing hearing.			District Attorney.	
Ohio	Sentencing hearing.			Prosecutor.	
Oklahoma	Sentencing hearing, sentence.			District Attorney.	
Oregon	Sentencing hearing, sentence.				In addition, it is recommended that victims' assistance programs should inform the victims of their case status and progress.

Table 2. Notifications Related to Sentencing

State	What notifications related to sentencing are provided?	What is the deadline for sentencing hearing notification?	What is the deadline for notification of sentence?	What official is responsible for these notifications?	Qualifications and additional comments
Pennsylvania	Sentence.				
Rhode Island					
South Carolina					
South Dakota					
Tennessee	Sentencing hearing.				
Texas	Sentencing hearing.	In advance.			
Utah	Sentencing hearing.			Prosecuting agency.	
Vermont	Sentencing hearing.	In advance.			
Virginia					
Washington					
West Virginia	Sentencing hearing.	Reasonable.		Prosecuting attorney.	
Wisconsin	Sentencing hearing, sentence.				
Wyoming	Sentencing hearing, sentence.		Prompt.	Prosecuting attorney.	

Table 3. Notification—Postsentencing Proceedings

State	What notifications for postsentence proceedings are provided?	What official(s) are responsible for postsentence notification?	Qualifications for postsentence proceeding notifications
Alabama	The status of any postconviction court review or appellate proceeding or any decisions arising from those proceedings.	Office of the Attorney General or the Office of the District Attorney; Board of Pardons and Parole.	Victim does not have to be notified in advance of restitution hearing.
Alaska	Any hearing in which the defendant's release from custody is considered.	Appropriate law enforcement agency or the prosecuting attorney.	
Arizona	Appeal, review, pardon, parole, probation.	Prosecutor's office; Sheriff or municipal jailer, if release; Board of Pardons and Paroles for pardons and paroles.	Court must only provide notice, upon request, of proceeding to modify probation, if it will substantially affect victim's safety.
Arkansas	Appeal, review, pardon, parole.	Prosecuting attorney, Post Prison Transfer Board, Attorney General.	
California	Review, parole.	Board of Prison Terms.	Victim must request.
Colorado	Appeal, review, pardon, parole, probation.	District Attorney.	
Connecticut	Appeal, review, pardon, parole.	Office of Victim Services.	
Delaware	Appeal, review, pardon, parole, probation.	Attorney General.	
Florida			
Georgia	Notification of any judicial proceeding at which release is considered; notification of result of motion for appeal.	Prosecuting attorney.	Notification is 20 days when going to release defendant for more than 60 days.
Hawaii	Parole, probation.		
Idaho	Appeal, review, pardon, parole, probation.	For probation hearing: prosecuting attorney; when a pardon is issued: the Commission; parole: the law enforcement agent or prosecutor.	Upon request for notification of parole; others require only registration of current address.
Illinois	All proceedings where custody may change.	Prosecuting attorney.	Notice of date/time/place of postconviction review.

Table 3. Notification—Postsentencing Proceedings

State	What notifications for postsentence proceedings are provided?	What official(s) are responsible for postsentence notification?	Qualifications for postsentence proceeding notifications
Indiana	Parole.	Department of Corrections.	At least 40 days before discharge or release.
Iowa	All dispositional orders, and any other orders affecting custody or confinement.	County attorney.	
Kansas			
Kentucky	Appeal, parole, status of case.	Attorney for Commonwealth: parole; Attorney General notifies victim of appeal.	
Louisiana	Appeal, pardon, parole.	Board of Parole; Dept. of Public Safety and Corrections; Board of Pardons.	
Maine			
Maryland	That offender is being considered for commutation, pardon, or remission of sentence; granting of appeal; revocation of parole for violent crime, if requested; parole hearing or work release from mental/ emotional facility; any other postsentencing court proceeding.	State's Attorney; Department of Public Safety and Correctional Services; Board of Review for mental/emotional facility.	
Massachusetts	Parole.	Parole Board.	
Michigan	Result of appeal, if decision reversed or remanded.	Prosecuting Attorney.	By request of victim, notice of final disposition within 30 days.
Minnesota	Appeal, review, pardon, parole.	Prosecuting Attorney; Commissioner.	
Mississippi	Appeal, review, pardon, parole.	Attorney General or District Attorney.	
Missouri	Pardon, parole.	Detention facility.	
Montana	Appeal, review, parole, pardon, any postconviction remedy, petition to waive restitution.	Parole Board.	
Nebraska	Appeal, review, parole.		
Nevada	All proceedings.		

Table 3. Notification—Postsentencing Proceedings

State	What notifications for postsentence proceedings are provided?	What official(s) are responsible for postsentence notification?	Qualifications for postsentence proceeding notifications
New Hampshire	Appeal, review, parole.	Parole.	For parole board: request by the victim through victim's advocate.
New Jersey	Parole.		
New Mexico	Appeal, review, pardon, parole, probation.	District Attorney.	
New York	Appeal, parole.	Prosecutor/Court.	
North Carolina			
North Dakota	Pardon, parole.	Custodial authority.	
Ohio	Pardon, parole, probation.	Board of Pardons and Paroles.	By request.
Oklahoma	Appeal, review.		
Oregon	Board of Pardons and Parole hearings. "Recommended" that victims be informed of case status and progress.	Board of Pardons and Paroles.	The victim must request notification in writing.
Pennsylvania	Pardon, parole, commitment of offender to a mental health facility and the location of the facility.	For most notification: District Attorney; parole: Parole Board or Court (as appropriate); mental health: corrections officials; preparole: victims' advocate.	Notification within 24 hours of the commitment or transfer to mental health center.
Rhode Island	Parole.	Parole Board.	
South Carolina	Appeal, pardon, parole, probation.	Dept. of Corrections or Pardons and Paroles.	
South Dakota	Parole.	Board of Pardons and Parole.	
Tennessee	All pertinent stages in proceeding following presentment and indictment.	Agency that has custody of defendant.	
Texas	Parole.	Parole Panel.	
Utah	All hearings to consider discretionary release from confinement.	Board of Pardons and Parole.	
Vermont	Hearing, appeal, or postconviction remedy.		

Table 3. Notification—Postsentencing Proceedings

State	What notifications for postsentence proceedings are provided?	What official(s) are responsible for postsentence notification?	Qualifications for postsentence proceeding notifications
Virginia			
Washington	Pardon, parole, probation.	Dept. of Corrections.	For violent crime, sex crime, or felony harassment.
West Virginia	Parole.	Prosecuting Attorney.	
Wisconsin	Pardon, parole.		
Wyoming	Any postsentencing hearings.	Prosecuting Attorney.	Without undue delay.

Table 4. Notification—Offender Death, Escape, or Release

State	Are victims notified of offender release, escape, or death?	Deadline for notification of offender change in status	Officials responsible for change in status notifications	Qualifications/comments about notification requirements
Alabama	Yes, by request.	As soon as practicable.	Agency having physical custody of a prisoner.	In case of escape, agency shall give notice to the victim of the escape and, subsequently, the return of the prisoner into custody.
Alaska	Yes, by request.	As soon as practicable.	Appropriate law enforcement agency or the prosecuting attorney.	Required for domestic violence.
Arizona	Yes, by request.	Immediately, for escape from prison or from mental health treatment agency; within 30 days after request for release, and then again 15 days before release; 15 days after death; 15 days after decision to release made for parole or pardon; 10 days before release from mental health agency.	Custodial agency or Sheriff for escape or death; Director of State Dept. of Corrections or Sheriff having custody for release; mental health treatment agent for release from mental health agency.	
Arkansas	Yes.	30 days before release on furlough, work release, community corrections.	Computerized victim notification system designed by Crime Information Court; Dept. of Corrections; State Hospital.	
California	Yes, by request.	Not less than 30 days before placement; immediately after escape; both: return receipt mail.	Board of Prison Terms or the Department of Corrections.	Victim is also notified if offender placed in a work furlough program.
Colorado	Yes.		Correction officials.	
Connecticut	Yes.		Office of Victim Service.	
Delaware	Yes.	Immediately after escape.	Department of Corrections.	
Florida	Yes.	Within 6 months before release; also 4 hours after release.	Department of Corrections, State's attorney, Parole Commission, Control Release Authority.	

Table 4. Notification—Offender Death, Escape, or Release

State	Are victims notified of offender release, escape, or death?	Deadline for notification of offender change in status	Officials responsible for change in status notifications	Qualifications/comments about notification requirements
Georgia	Yes, with qualifications.	Practicable and prompt; 72 hours after parole decision; 10 days before release when felony or sexual offense and sentenced for more than 18 months or within 6 hours of escape.	Investigating law enforcement agency, prosecuting attorney, custodial authority.	No notification given unless victim expressed objection to release or has expressed desire for such notification.
Hawaii	Yes, by request	Not less than 10 days prior to planned release; immediately following escape.	Department of Public Safety for prison release/escape/death; the court for probation; paroling authority for parole.	Notice may be given to District Attorney's office instead of directly to victim.
Idaho	Yes, by request.		Law enforcement authority with custody; unless given by Commission on Pardons and Parole.	
Illinois	Yes.	Within a reasonable time for death or release; immediately following escape.	Prisoner Review Board.	By written request.
Indiana	Yes.	At least 40 days before release and no later than 24 hours after escape.	Department of Corrections.	
Iowa	Yes.			
Kansas	Yes.	In the case of juvenile offenders, 45 days prior to discharge.		
Kentucky	Yes, by request.		Law enforcement.	Law enforcement personnel shall inform victim of how to register for notification of release.
Louisiana	Yes.	In the case of sex offenders, mail notification of release on parole within 3 days after hearing, if victim (or family) was not at hearing.	Department of Public Safety and Corrections.	A victim/witness notice form required in some cases.

Table 4. Notification—Offender Death, Escape, or Release

State	Are victims notified of offender release, escape, or death?	Deadline for notification of offender change in status	Officials responsible for change in status notifications	Qualifications/comments about notification requirements
Maine	Yes, by request.	Upon release or discharge.	Custodial institution.	
Maryland	Yes, by request.		State's attorney or Department of Corrections.	
Massachusetts	Yes, by request for parole; Yes for release, escape, death, transfer to less secure facility.		"Appropriate custodial authority."	Victim must request notice of release of sexual offender from treatment center.
Michigan	Yes, by request.	Generally no deadline; immediately following escape.	Sheriff or Department of Corrections.	
Minnesota	Yes.	Within 6 hours of escape; good faith effort must occur 60 days before release for felony offender imprisoned more than 18 months.	Commissioner or other custodial authority.	
Mississippi	Yes, by request.	15 days prior to release; 15 days after death.	Agency with physical custody.	
Missouri	Yes, by request.	Within 30 days of release or death; within 24 hours for escape.	Appropriate custodial authority.	By written request.
Montana	Yes, by request.	Promptly.	Custodial institution.	
Nebraska	Yes.		Board of Parole, Department of Correctional Services, Department of Health and Human Services.	
Nevada	Yes, by request.		Court, prosecuting attorney, police.	
New Hampshire	Yes, by request.			
New Jersey	Yes.		Office of Victim Advocacy	
New Mexico	Yes.	Immediately.	District Attorney.	

Table 4. Notification—Offender Death, Escape, or Release

State	Are victims notified of offender release, escape, or death?	Deadline for notification of offender change in status	Officials responsible for change in status notifications	Qualifications/comments about notification requirements
New York	Yes, by request.	Immediately following escape.	Department of Correctional Service.	Victim must fill out form from prosecutor to indicate notifications wanted; Department of Correctional Service must inform by certified mail.
North Carolina	Yes.	Within 20 days.	Governor.	Notification of commutation.
North Dakota	Yes.	"Within a reasonable time."	Custodial authority.	
Ohio	Yes, by request.	Promptly.	Incarcerating facility.	
Oklahoma	Yes.		Pardon and Parole Board.	
Oregon	Yes, by request.	At least 30 days prior to release from actual physical custody.	State Board of Parole and Post-Prison Supervision or Department of Corrections.	Notification of death not included, only release and escape.
Pennsylvania	Yes, by request.	Immediately.	Law enforcement agency; in case of escape: the superintendent of the State correctional institution or warden of a local correctional facility.	Applies only to personal injury crimes.
Rhode Island	Yes.		Parole Board.	
South Carolina	Yes, by request.		Holding facility.	
South Dakota	Yes, for release and escape; no notice for offender death.		Board of Pardons and Parole: pardons and parole; Department of Corrections: escape, release, furlough, or work release.	Neither the Board nor the Department is liable for any damages to the victim if there is a failure to mail the notice.
Tennessee	Yes.	90 days before, in cases where inmate serves a sentence of 2 or more years.		

Table 4. Notification—Offender Death, Escape, or Release

State	Are victims notified of offender release, escape, or death?	Deadline for notification of offender change in status	Officials responsible for change in status notifications	Qualifications/comments about notification requirements
Texas	Yes.	Immediately.	Custodial agency.	Notification only in cases of family violence, violation of restraining order, or stalking.
Utah	Yes, by request for escape or release; no notice for offender death.		Department of Corrections, coordinating with Board of Pardons and Paroles.	
Vermont	Yes, by request.			
Virginia	Yes.		Jail official.	
Washington	Yes.		Chief of Police.	
West Virginia	Yes.	Timely.	Detaining facility.	
Wisconsin	Yes, by request, for escape from psychiatric facility; yes for release or conditional release.	At least 7 days before an extended home visit (criminals in psychiatric facilities), leave from minimum security facility, or juvenile's release from detention; "as soon as possible" (escape).	Department of Corrections; department having supervision over juvenile.	
Wyoming	Yes.	Without undue delay.	Prosecuting attorney.	

Table 5. Consultation—After the Trial

State	Does the victim have the right to be consulted at sentencing?	Qualifications/ comments about victim consultation at sentencing	At what postsentencing processing do victims have the right to be consulted?	Qualifications/ comments about consultation after sentencing	What official(s) are responsible for assuring consultation?
Alabama	Yes, with qualifications.	Victim has right to be conferred with prior to sentence recommendation.	Probation.		
Alaska	Yes.	Felony victim only.			
Arizona	Yes, by request.				
Arkansas	Yes.			Post Prison Transfer Board shall solicit victim's input.	
California	No.				
Colorado	Yes.				
Connecticut	No.				
Delaware	Yes.				
Florida	Yes.		Parole.		Parole Commission.
Georgia	Yes.	Prosecuting attorney should offer victim opportunity to express an opinion about the disposition of the case, particularly views involving the sentence.	Prosecuting attorney should offer victim opportunity to express opinion on disposition of the case, including views on postconviction diversion programs.		
Hawaii	Yes, by request.				
Idaho	Yes, by request.				
Illinois	No.				

Table 5. Consultation—After the Trial

State	Does the victim have the right to be consulted at sentencing?	Qualifications/ comments about victim consultation at sentencing	At what postsentencing processing do victims have the right to be consulted?	Qualifications/ comments about consultation after sentencing	What official(s) are responsible for assuring consultation?
Indiana	Yes.				
Iowa	No.				
Kansas	Yes.				
Kentucky	No.				
Louisiana	Yes.	Victim may review case and make comments to the District Attorney.			
Maine	No.				
Maryland	No.		Probation, parole, pardon; release from mental/emotional facility.		State's attorney; Commission (Corrections) member or Board of Review.
Massachusetts	Yes.				
Michigan	Yes, by request.				
Minnesota	Yes.	Also, officer conducting presentence investigation shall provide victim with information about the court's options for sentencing and other dispositions.	Victim has right to request probation hearing.	If offender fails to pay restitution.	
Mississippi	Yes.				
Missouri	Yes, with qualifications.	Felony only.	Probation.		Probation officer.
Montana	Yes.				
Nebraska	No.				
Nevada	No.				

Table 5. Consultation—After the Trial

State	Does the victim have the right to be consulted at sentencing?	Qualifications/ comments about victim consultation at sentencing	At what postsentencing processing do victims have the right to be consulted?	Qualifications/ comments about consultation after sentencing	What official(s) are responsible for assuring consultation?
New Hampshire	Yes.		Probation, parole.		
New Jersey	Yes.				
New Mexico	No.				
New York	Yes.		Parole.		Division of Parole.
North Carolina	No.				
North Dakota	Yes.				
Ohio	Yes.		Probation, parole, pardon.		Parole Board.
Oklahoma	Yes.				
Oregon	Yes, with qualifications.	"Involving victims, when possible, in the decisionmaking process in the criminal justice system" suggested by the State for local victims' programs.	Probation, parole.	"Involving victims, when possible, in the decisionmaking process in the criminal justice system" suggested by the State for local victims' programs.	
Pennsylvania	Yes, with qualifications.		Parole.		Parole Board.
Rhode Island	Yes.				
South Carolina	No.		Probation, parole, appeal, pardon.		Attorney General.
South Dakota	No.				
Tennessee	Yes.				
Texas	No.				
Utah	No.				
Vermont	No.				

Table 5. Consultation—After the Trial

State	Does the victim have the right to be consulted at sentencing?	Qualifications/ comments about victim consultation at sentencing	At what postsentencing processing do victims have the right to be consulted?	Qualifications/ comments about consultation after sentencing	What official(s) are responsible for assuring consultation?
Virginia	No.		Parole.		Parole Board.
Washington	Yes.	For felonies only.			
West Virginia	Yes, with qualifications.	Unless court orders otherwise.	Parole.		Parole Board.
Wisconsin	Yes.	In juvenile proceedings where crime would have been felony if perpetrator was adult, or where bodily damage or theft/ damage of property resulted.			
Wyoming	Yes.				

Table 6. Right to Attend—Post-Trial Proceedings

State	Do victims have the right to attend sentencing proceedings?	What postsentencing proceedings do victims have the right to attend?	Comments/qualifications for the right to attend post-trial proceedings
Alabama	Yes.	Right to be heard at all crucial stages of criminal proceedings.	
Alaska	Yes.	All proceedings defendant has right to attend.	
Arizona	Yes.	Any proceeding in which postconviction release from confinement is being considered.	
Arkansas	Yes.		
California	Yes.	Review, parole.	
Colorado	Yes.	Appeal, review, pardon, parole, probation.	
Connecticut	No.	Parole, pardon, probation.	
Delaware	Yes.		
Florida	Yes.	Parole.	
Georgia	Yes.	Parole, any court exercising jurisdiction over offense committed against victim.	
Hawaii	Yes.		
Idaho	Yes.		
Illinois	Yes.	Appeal, review, pardon, parole, probation.	
Indiana	Yes, if public hearing.		
Iowa	Yes.		
Kansas	Yes.	Pardon.	
Kentucky	No.		
Louisiana	Yes.	Pardon, parole.	
Maine	Yes.		
Maryland	Yes, by request.	All proceedings defendant has right to attend. Victim may be restricted if disruptive, in danger, or if there is a lack of space.	

Table 6. Right to Attend—Post-Trial Proceedings

State	Do victims have the right to attend sentencing proceedings?	What postsentencing proceedings do victims have the right to attend?	Comments/qualifications for the right to attend post-trial proceedings
Massachusetts	Yes.	Parole.	
Michigan	Yes.	Review, parole.	
Minnesota	Yes.		
Mississippi	Yes.		
Missouri	Yes.	Parole, probation.	
Montana	Yes.		
Nebraska	No.		
Nevada	Yes, by request.	Probation, and “all public proceedings.”	
New Hampshire	Yes.	Appeal, review, pardon, parole.	
New Jersey	Yes.		
New Mexico	Yes.	Appeal, review, pardon, parole, probation.	
New York	No.		
North Carolina	Yes.		
North Dakota	No.	Parole.	Only victims of violent crime.
Ohio	Yes.	Parole.	
Oklahoma	Yes.	Appeal, review.	
Oregon	No.	Parole.	
Pennsylvania	Yes.	Parole.	
Rhode Island	Yes.	Pardon.	
South Carolina	Yes, by request.	Appeal, pardon, parole, probation.	
South Dakota	Yes.	Parole, hearing to reduce sentence.	
Tennessee	Yes.	Parole, probation.	

Table 6. Right to Attend—Post-Trial Proceedings

State	Do victims have the right to attend sentencing proceedings?	What postsentencing proceedings do victims have the right to attend?	Comments/qualifications for the right to attend post-trial proceedings
Texas	Yes.	Parole.	
Utah	Yes.	Parole; rehearing for granting or revoking parole, if offender is present.	Victim of felony or class A misdemeanor.
Vermont	Yes.	Appeal, review, pardon, parole, probation.	
Virginia	Yes.	Parole.	
Washington	Yes.		
West Virginia	Yes.	Parole.	
Wisconsin	Yes.	Pardon, parole.	
Wyoming	Yes.	Pardon, parole, probation.	

Table 7. Participation—Sentencing and Postsentencing Proceedings

State	Do victims have the right to provide victim impact statements at sentencing?	At what postsentencing proceedings does the victim have the right to provide some type of victim impact statement?	Comments/qualifications to this participation
Alabama	Yes.	All.	Statement shall be considered during any review for community status of the prisoner or prior to release of the prisoner.
Alaska	Yes.	Parole.	
Arizona	Yes.	Parole, probation.	
Arkansas	Yes, by request.	Parole, pardon.	
California	Yes.	Parole.	
Colorado	Yes.	Parole.	
Connecticut	Yes, with significant limitations.	Parole, probation, pardon.	
Delaware	Yes.	Parole, pardon.	Oral VIS, only in homicide cases.
Florida	Yes.	Parole.	
Georgia	Yes.	Parole, pardon.	If victim did not contribute a VIS during the trial, can submit statement to Board of Pardons and Parole.
Hawaii	Yes.	Victim may only make a written or oral statement at hearing to determine minimum term of imprisonment in cases where indeterminate sentence has been given.	
Idaho	Yes.	Probation.	Also, victim has the right to be heard at “all other trial proceedings.”
Illinois	Yes.	None.	
Indiana	Yes.	None.	
Iowa	Yes.	At any hearing affecting sentencing.	
Kansas	Yes.	Parole.	

Table 7. Participation—Sentencing and Postsentencing Proceedings

State	Do victims have the right to provide victim impact statements at sentencing?	At what postsentencing proceedings does the victim have the right to provide some type of victim impact statement?	Comments/qualifications to this participation
Kentucky	Yes, by request.	Parole.	
Louisiana	Yes.	Parole, pardon.	
Maine	Yes.	None.	
Maryland	Yes, with significant limitations.	Parole, probation, civil commitment proceedings or release request.	VIS in person allowed if practicable and requested; victim of violent crime must request right to update VIS within 90 days of notice of parole hearing; victim must submit recommendation at least 30 days prior to release hearing; VIS considered if submitted; inmate may examine it, with personal information removed.
Massachusetts	Yes.	Parole.	
Michigan	Yes.	Parole, pardon, appeal, review.	Right to appear and make a victim impact statement at any proceeding to set aside the conviction.
Minnesota	Yes.	Parole, pardon.	Board of Pardons and Commissioner must consider victim's recommendation.
Mississippi	Yes.	Parole, pardon.	
Missouri	Yes.	Parole.	
Montana	Yes.	Parole.	
Nebraska	No.	Parole.	
Nevada	Yes, by request.	Parole.	
New Hampshire	Yes.	Parole.	Hearings regarding sentence reduction or suspension, if they involve a violent crime; request to make a VIS must be made through the victim advocate.
New Jersey	Yes, by request.	Parole.	

Table 7. Participation—Sentencing and Postsentencing Proceedings

State	Do victims have the right to provide victim impact statements at sentencing?	At what postsentencing proceedings does the victim have the right to provide some type of victim impact statement?	Comments/qualifications to this participation
New Mexico	Yes.	All post-trial proceedings.	
New York	Yes, by request.	Parole.	
North Carolina	No.	None.	
North Dakota	Yes, with significant limitations.	Parole.	Victims of violent crime may appear and make an oral statement; others' statements written.
Ohio	Yes, by request.	Right to provide written statement at hearing for "commutation, pardon, parole, transitional control, other form of authorized release"; right to make statement at motion for judicial release.	
Oklahoma	Yes.	Parole.	VIS is prepared for the sentencing procedure.
Oregon	Yes, with limitations.	Parole.	Criminal justice officials can elect to forward a statement made by the victim or an immediate family member.
Pennsylvania	Yes.	Parole.	
Rhode Island	Yes, by request.	Parole.	Written impact statement made at outset of case becomes part of materials submitted later.
South Carolina	Yes, by request.	Present a written VIS at all postsentencing adjudications.	
South Dakota	Yes, with significant limitations.	Parole.	
Tennessee	Yes.	Parole.	
Texas	Yes.	Parole.	
Utah	Yes, with significant limitations.	Parole, special attention hearings.	
Vermont	Yes.	None.	

Table 7. Participation—Sentencing and Postsentencing Proceedings

State	Do victims have the right to provide victim impact statements at sentencing?	At what postsentencing proceedings does the victim have the right to provide some type of victim impact statement?	Comments/qualifications to this participation
Virginia	Yes.	Parole.	
Washington	Yes.	None.	
West Virginia	Yes.	Parole.	
Wisconsin	Yes.	Parole, pardon.	
Wyoming	Yes.	Any proceeding to reduce or correct sentence.	

Appendix III

Sample DNA Test Brochure

Understanding DNA Evidence: A Guide for Victims and Advocates

Stories about the use of DNA evidence to convict or exonerate defendants in sexual assault or murder cases have appeared in the media with increasing frequency. It has become apparent, to both criminal justice professionals and the public, that DNA evidence is playing a larger role in determining guilt and innocence. While the testing of DNA has become commonplace in many criminal cases, DNA technology is relatively new and is improving rapidly. Evidence that is impossible to test for DNA today may be routinely tested in the future. It is important for victims to understand the potential significance of DNA evidence in their cases.

What is forensic evidence?

DNA is only one type of forensic evidence that may be used in an investigation. Forensic evidence consists of things that can be analyzed to help establish the identity of the assailant by eliminating suspects, to prove the victim or assailant was at a certain place, or to help investigators find out how the crime was committed. In sexual assault cases, the forensic evidence that may be helpful are hair, fibers, fingerprints, saliva, semen, and blood recovered from clothing, a sexual assault kit, or a crime scene.

What is DNA evidence?

DNA is the abbreviation for *deoxyribonucleic acid*, which stores the genetic code of the human body—our hereditary blueprint passed on to us by our parents. DNA determines our personal characteristics, such as eye and hair color, height, and bone structure. DNA is found in saliva, skin tissue, blood, the root and shaft of hair, bone, and semen. DNA is useful because it is present in all cells, it is the same throughout the body, and it does not change in the course of a person's life. For each individual (except identical twins) the sequence (the order of the DNA building blocks) is different in particular regions of the cell, making each person's DNA unique. If properly preserved, DNA from bones or body fluid stains can be tested after many years in older cases in which questions of identity remain unresolved or disputed. In many cases, these substances can be analyzed to reliably link criminals to crimes or clear them as suspects.

How is DNA and other forensic evidence collected?

The way DNA evidence is collected and preserved is critical to the success of its use in criminal cases. DNA evidence is particularly important in sexual assault cases, so it is important for sexual assault victims to notify the police before showering or changing clothing after an assault. Semen may be on the clothing, bedding, or still in the vaginal region. The skin of the assailant may be found under a victim's fingernails. A broken fingernail left at the scene by the perpetrator may also be analyzed for DNA evidence. Victims should not wash or throw away anything else that

the assailant's semen may have come into contact with—bed sheets or covers, rugs, cushions, wash cloths, tissues, or condoms. If the assault happened in a house or apartment, the police may be able to collect fingerprint and other evidence from the scene.

The police will collect evidence from the scene of the crime, and evidence that is on or in a victim's body can be collected by a physician or sexual assault nurse examiner during an examination after a sexual assault. A medical examination is conducted to make sure the victim is okay, to treat any injuries, to test for sexually transmitted diseases, and to look for and collect any evidence. The doctor or nurse will use sterile cotton swabs to remove fluids which might contain semen from the victim's vagina or mouth or other parts of the body touched by the assailant. If the victim scratched the assailant, they will scrape under her fingernails to recover skin cells. They may also collect head and pubic hairs and take a blood sample. In most cases, the victim's clothing will be collected, so the doctor or nurse should provide something else to wear. In cases of homicide, DNA evidence may be collected from the crime scene and from the body of the victim by the pathologist conducting a forensic autopsy.

What do the police do with the evidence they collect?

Hair and fiber. Often in sexual assault cases, because the victim and assailant have come in close contact, hairs and fibers from clothing, carpet, bedding, or furniture will be transferred. Hairs and fiber are compared with known samples (taken from the victim and the assailant) to determine whether there are any matches. Hair and fiber evidence can be very helpful in proving that there was contact between an assailant and a victim.

Saliva, blood, skin, and semen. Saliva, blood, and semen are generally tested by using DNA analysis. If there is enough high-quality DNA, a comparison can be done that can establish whether the suspect is or is not a likely source of the semen taken from the victim's body or other evidence. DNA evidence is not available in every case, or the evidence may have been subjected to conditions that contaminated or degraded it, but it is very powerful evidence when it is available. In some cases a blood sample from the victim's husband, boyfriend, or other sexual partner may be needed in order to account for all of the DNA that is found on the victim or at the scene.

How does DNA testing work?

There are several chemical processes used in the analysis of DNA evidence. While these processes are very reliable, sometimes results cannot be obtained or are inconclusive if there is not enough evidence to analyze or if the evidence has been contaminated or improperly preserved. The types of processes and the technology used in processing DNA evidence are increasing in sophistication and ability to distinguish individuals, so it may be possible to test evidence in the future in ways that are not possible today. DNA testing can take weeks or months to complete and can be expensive for some agencies. During a criminal investigation, the costs are paid by the police department or the prosecutor's office.

The police will need a sample of the victim's DNA to compare other DNA evidence against. In sexual assault cases, it usually will be collected at the time a rape kit is completed. A sample of DNA can also be collected from a blood sample or from swabbing the inside of the mouth. DNA samples will be collected from the suspect. Samples may also need to be collected from the victim's partner, or anyone else with whom she had sexual contact within the several days prior to the assault.

There are two types of DNA tests that may be performed, depending upon the type of evidence available.

- *Restriction fragment length polymorphism (RFLP) testing* usually requires a sample that has 100,000 or more cells (an example would be a dime-sized bloodstain) and contains DNA that is not degraded (broken into smaller fragments). RFLP has been widely used since the late 1980s and is able to exclude wrongly accused individuals with only one or a few test results.
- *Polymerase chain reaction (PCR) testing can be conducted on DNA from different parts of the cell: the nucleus and the mitochondria.* PCR testing of DNA from the nucleus of the cell can be done on small samples containing 50 to 100 cells or more (for example, a visible dot of blood or a single hair root). PCR testing on nuclear DNA has been available since the early 1990s. It can be used on DNA that has been degraded (samples that have been improperly stored or aged) and has a high degree of reliability. Testing on DNA from the mitochondria of the cell is generally conducted on samples that are unsuitable for RFLP or PCR testing of nuclear DNA, such as dried bones or teeth, hair shafts, or any other samples that contain very little or highly degraded nuclear DNA. At present, mitochondrial DNA testing is available only in a limited number of laboratories.

What do DNA testing results mean?

There are different types of results that can occur in DNA testing. Prosecutors and investigators should be able to explain the meanings of these potential results in more detail.

- *Inclusion* means the test may indicate that DNA found at the scene of the crime is that of the suspect. In some cases the result may be "inclusion" but the results are not helpful in the criminal case. For example, results from samples taken from the victim may be consistent with the DNA of the victim. The results do not mean the suspect was not present and did not commit the crime—only that the substance tested did not come from the suspect.
- *Exclusion* is when the results obtained from the sample from a suspect or known individual are not present in the results from the unknown crime scene sample. The test results show that the sample found at the scene does not belong to the suspect. In some cases, it may be necessary to do additional testing for that exclusion to be meaningful or to provide evidence for exoneration. An example would be when the suspect is excluded as the source of the DNA in a sexual assault, but no samples have been taken from the victim and/or her consensual partners. In other words, the test may show that the sample was from the victim or a family member or other person with whom he or she had contact around the time of the crime.
- *Inconclusive results* include situations in which no results were obtained from the sample because there was not enough DNA to test or in which results are obtained from an unknown sample from the crime scene but there are no samples from known individuals or suspects to test for comparison. Also, the results may be inconclusive because the sample is not in suitable shape for testing or contains a mixture of DNA from several individuals (e.g., from a sample taken from the victim of a gang rape).

DNA Evidence: Closed Cases and Unsolved Cases

DNA is a useful and neutral tool in the search for justice. It can cut both ways: DNA evidence can help prove innocence or guilt. News reports about convicted persons being released after old

evidence is tested for DNA appear regularly. Many sexual assault and homicide cases occurred before DNA testing was an option or was widely recognized. In some cases, convicted defendants who maintain their innocence have sought to have evidence tested to see if the DNA from that evidence matches their own. More than 50 such convicted persons have had their convictions overturned or have been released because DNA testing showed they could not have committed the crime. Many of these cases involved convictions that were based primarily upon eyewitness identification of the alleged perpetrator. DNA typing is now being used to assist investigators in solving crimes in which a suspect has not readily been identified. DNA has been used to connect a particular perpetrator with other unsolved assaults.

Most States have created, or plan to create, databases that store DNA profiles of convicted perpetrators. The FBI created a system called the Combined DNA Index System (CODIS) which is a collection of DNA databases from forensic laboratories around the United States. The DNA profiles of individuals previously convicted of serious crimes such as rape and homicide will be maintained in computer files and compared to DNA profiles collected from cases with no suspects. It is hoped that local laboratories will tie into State databases that allow comparisons between the local laboratories. The national database, operated by the FBI, will link together the profiles from the databases of each of the participating States. As of April 1998, the CODIS system has successfully made 250 DNA matches within or between States that currently use CODIS. The CODIS system will have an impact on the identification of serial rapists who have committed crimes in more than one jurisdiction. Whether it helps absolve or convict individuals, DNA evidence will play an increasingly important role in solving crimes in the future.

Appendix IV

Working Group on Postconviction Issues

Chair:

Ronald S. Reinstein is the associate presiding judge of the Superior Court of Arizona. He was appointed to the bench in December 1985 and served as presiding criminal judge from 1990 to 1998. Prior to his appointment, he was a deputy Maricopa County attorney from 1974 to 1985, serving as supervisor of the Criminal Trial Unit and as the head of the Sex Crimes Unit. In 1998, Judge Reinstein was named by the State Bar of Arizona as the recipient of the James A. Walsh Award for the outstanding judge in Arizona. In 1999 he was selected as the first recipient of the State Bar Public Lawyer's Section's Judicial Award of Excellence. He has also received the Henry Stevens Outstanding Judge Award from the Maricopa County Bar Association, the Arizona Attorney General's Distinguished Service Award, the Society of Professional Journalists' Sunshine Award, and the Lecturer of Merit Award from the National College of District Attorneys. Additional awards include Awards of Excellence and Achievement from the Governor's Children's Justice Task Force, Maricopa County Victim-Witness Program, and Parents of Murdered Children. Judge Reinstein serves as a member of the National Commission on the Future of DNA Evidence, the National Advisory Board of the Justice Department Center for Sex Offender Management, and the Governor's Children's Justice Task Force. He has served on the faculty of the National College of District Attorneys, the National Juvenile and Family Court Judges College, the National Center for the Investigation and Prosecution of Child Abuse, the National Institute for Trial Advocacy, the Arizona Prosecuting Attorneys Advisory Counsel, Arizona Judicial College, the Einstein Institute for Science, Health, and the Courts, the National Center for Effective Public Policy, the American Probation and Parole Association Training Institutes, American Judicature Society Symposiums, and Valley Leadership. Judge Reinstein is a graduate of Indiana University School of Law.

Christopher H. Asplen is an assistant U. S. attorney in the U. S. Attorney's Office for the District of Columbia. He is currently detailed as the executive director of the National Commission on the Future of DNA Evidence, a commission established at the request of the U. S. Attorney General and administered through the National Institute of Justice. Prior to joining the U. S. Attorney's Office, Mr. Asplen was the DNA unit director for the American Prosecutors' Research Institute/National District Attorneys Association. He has educated prosecutors, defense attorneys, and judges across the country on the science and courtroom application of forensic DNA. Prior to moving to Washington, D.C., Mr. Asplen was a senior deputy district attorney in Pennsylvania specializing in the prosecution of child sexual abuse. Mr. Asplen received his undergraduate degree from West Chester University and his J. D. from the Dickinson School of Law.

Dennis D. Bauer, a senior deputy district attorney in the Office of the District Attorney, Orange County, California, has been a deputy district attorney since 1979. In 1987, Mr. Bauer began to specialize in the prosecution of cases involving sexual assault and child abuse. He has been a leading advocate for the use of DNA analysis and has served as special counsel on DNA evidentiary hearings in jurisdictions in California. Mr. Bauer has published numerous articles concerning DNA analysis in the courtroom. As a faculty member of the American Prosecutors Research

Institute, he has lectured extensively on the utility, admissibility, and court presentation of DNA evidence. Mr. Bauer also has been a guest lecturer at the FBI Academy and has spoken before groups such as the Alabama District Attorney's Association and the South Carolina Solicitors. He received his undergraduate degree from Western Washington University and his J. D. from the University of San Diego.

Margaret A. Berger is the Suzanne J. and Norman Miles professor of law at Brooklyn Law School in New York, where she teaches evidence, civil procedure, and courses on the interaction of science and law. She is the coauthor of *Weinstein's Evidence*, the author of the "Evidentiary Framework" in the Federal Judicial Center's *Reference Manual on Scientific Evidence* (1994), and a coauthor of the Weinstein, Mansfield, Abrams, and Berger *Evidence Casebook* (revised in 1997). She also has published numerous articles on evidentiary issues. Professor Berger has served as the reporter to the Advisory Committee on the Federal Rules of Evidence, as a consultant to the Carnegie Commission on Science, Technology, and Government, and as a member of the National Research Council's Committee on DNA Forensic Science and Black and Smokeless Powders. She received an A.B. magna cum laude from Radcliffe College and a J.D. from Columbia University School of Law.

Kevin C. Curran is an assistant federal public defender in the office of the Federal Public Defender for the Eastern District of Missouri, a position he has held since 1996. Previously, he served for 8 years as director of the newly formed Capital Litigation Division of the Missouri State Public Defender System, and for 10 years as an assistant public defender for the Missouri State Public Defender System in the St. Louis office. Mr. Curran is an adjunct professor of law at St. Louis University, where he supervises the Criminal Law Clinic and conducts a seminar in death penalty litigation. He also is on the adjunct faculty at Washington University, where he teaches trial advocacy. Mr. Curran graduated from St. Louis University Law School in 1978.

Lisa Forman is currently the deputy director of the National Commission on the Future of DNA Evidence and a program manager in the Office of Science and Technology at the National Institute of Justice. Prior to joining the National Institute of Justice, Dr. Forman worked for 8 years as an associate director at Cellmark Diagnostics in Germantown, Maryland. Dr. Forman has extensive experience in the application of forensic science and population genetics. She earned her bachelor of science degree from the University of California at Berkeley and her masters of arts and doctor of philosophy in anthropology from New York University.

Geoffrey C. Hazard, Jr., is trustee professor of law at the University of Pennsylvania Law School and sterling professor of law emeritus at Yale University. He is also director emeritus of the American Law Institute (ALI) and a member of the ALI Council. He served as ALI director for 15 years before stepping down and being elected to the ALI Council in 1999. A graduate of Swarthmore College and Columbia University School of Law, Professor Hazard received Columbia's 1999 Medal for Excellence. He also received the American Judicature Society's 1999 Justice Award. Professor Hazard began his career in private practice in Oregon, where he was also deputy legislative counsel for the State of Oregon and executive secretary of the Oregon Interim Committee on Judicial Administration. He became a member of the law faculty of the University of California at Berkeley in 1958, moved to the University of Chicago in 1964, and was a member of the Yale faculty from 1971 until his retirement from Yale in 1994, when he became sterling professor of law emeritus. An authority on civil procedure, trial practice, and legal ethics, Professor Hazard also has been a visiting professor at Harvard, Stanford, the University of Michigan, and Universite d'Aix-Marseille. During his tenure at Yale he served as

associate, acting, and deputy dean of the Yale School of Organization and Management. He was executive director of the American Bar Foundation from 1964 to 1970. Professor Hazard is the author of numerous published articles and books.

Barbara R. Morgan is the Solicitor of the Second Judicial Circuit. Appointed to the position by the South Carolina governor in 1990, she was elected Solicitor by popular vote in 1992 and re-elected 4 years later. Prior to her appointment, she served as Assistant Solicitor for the Second Judicial Circuit and Deputy Solicitor for the Second Judicial Circuit. Ms. Morgan was the first full-time Assistant Solicitor for Darlington County in the Fourth Judicial Circuit, served as city prosecutor and assistant city attorney for Florence, South Carolina, and in the early 1980s, as law clerk for the Honorable C. Anthony Harris. She was the first prosecutor in South Carolina to present mitochondrial DNA in criminal court. Her honors/awards include Victim Advocate of the Year for Outstanding Service 1989; Aiken Jaycee's Boss of the Year, 1991; and most Distinguished Alumni Award from USC-Aiken, 1997. Current activities include serving as vice chairman of the Governor's Youth Council, 1998–Present; and as member of the APRI Board of Directors. She has also served as chairman of Growing Into Life–A Community Collaborative, president of the Solicitor's Association, and chairperson of the Advisory Committee to Review South Carolina Drug and Common Laws. She received a B.A. from the College of Charleston in 1978 and graduated from the University of South Carolina School of Law in 1981.

Barry C. Scheck currently serves as a professor of law and director of clinical legal education at Cardozo Law School in New York. He has served on the faculty of the National Institute of Trial Advocacy and Defense Council and is coauthor of *Raising and Litigating Claims of Small Electronic Surveillance*. Professor Scheck is a member of the Committee on the Criminal Courts, Association of the Bar of the City of New York. Through Cardozo's Criminal Law Clinic, he litigated—in the trial courts and on appeal—a number of well-known cases that set significant precedents, particularly in the areas of DNA fingerprinting and family violence. Professor Scheck also teaches and organizes trial advocacy programs for many public defenders' offices, bar associations, and law firms across the country. Recently, he has focused his efforts on developing materials for law students and practitioners in the area of legal ethics and professional discipline. After graduating from law school in 1974, Professor Scheck was a staff attorney for 3 years with the Legal Aid Society of New York. Professor Scheck earned his B.S. from Yale University in 1971 and his J.D., M.C.P. from the University of California-Berkeley.

Jane Siegel is an associate in the New York office of Winston & Strawn, a Chicago law firm. She is the former executive director of the Innocence Project, based at the Cardozo School of Law in New York, which uses DNA testing to exonerate inmates who have been wrongfully convicted. Ms. Siegel received a B.A. from the University of Pennsylvania in 1991 and a law degree from the University of Pennsylvania Law School in 1995.

Kathryn M. Turman is the Acting Director of the Office for Victims of Crime (OVC), U.S. Department of Justice, a position she has held since July 1998. Prior to joining OVC, she served as chief of the Victim Witness Assistance Unit in the U.S. Attorney's Office. From 1993 to 1994, Ms. Turman was a senior associate in the Criminal Justice Services Division of the Public Administration Service in McLean, Virginia, where she directed a national training and technical assistance program to help communities organize multiagency teams to handle child victim cases. Ms. Turman was the Director of the Missing and Exploited Children Program in the U.S. Department of Justice from 1991 to 1993, and served as special administrative assistant to the late Senator John Heinz from 1987 to 1991. She is the author of *Child Victims and Witnesses: A*

Guide for Criminal Justice Professionals, published by the Department of Justice, and *Recovery and Reunification of Missing Children*, published by the Department of Justice and the National Center for Missing and Exploited Children. She is on the national board of the American Professional Society on the Abuse of Children and on project advisory boards for several projects focusing on child victims. She has served on the Washington, D.C., Child Death Review Team, the Regional Child Fatalities Review Council, the D.C. Children's Advocacy Center Steering Committee, and the D.C. Superior Court Family Violence Coordinating Council.

Charlotte J. Word is deputy laboratory director for Cellmark Diagnostics in Germantown, Maryland. She is an expert in DNA identification testing, including supervising and analyzing validation studies and other research in DNA identification and testifying in Frye hearings and trials. She holds a B.S. from the College of William and Mary and a Ph.D. in microbiology from the University of Virginia.

Index

Case Index

About the National Institute of Justice

The National Institute of Justice (NIJ), a component of the Office of Justice Programs, is the research agency of the U.S. Department of Justice. Created by the Omnibus Crime Control and Safe Streets Act of 1968, as amended, NIJ is authorized to support research, evaluation, and demonstration programs, development of technology, and both national and international information dissemination. Specific mandates of the Act direct NIJ to:

- Sponsor special projects, and research and development programs, that will improve and strengthen the criminal justice system and reduce or prevent crime.
- Conduct national demonstration projects that employ innovative or promising approaches for improving criminal justice.
- Develop new technologies to fight crime and improve criminal justice.
- Evaluate the effectiveness of criminal justice programs and identify programs that promise to be successful if continued or repeated.
- Recommend actions that can be taken by Federal, State, and local governments as well as by private organizations to improve criminal justice.
- Carry out research on criminal behavior.
- Develop new methods of crime prevention and reduction of crime and delinquency.

In recent years, NIJ has greatly expanded its initiatives, the result of the Violent Crime Control and Law Enforcement Act of 1994 (the Crime Act), partnerships with other Federal agencies and private foundations, advances in technology, and a new international focus. Some examples of these new initiatives:

- New research and evaluation are exploring key issues in community policing, violence against women, sentencing reforms, and specialized courts such as drug courts.
- Dual-use technologies are being developed to support national defense and local law enforcement needs.
- The causes, treatment, and prevention of violence against women and violence within the family are being investigated in cooperation with several agencies of the U.S. Department of Health and Human Services.
- NIJ's links with the international community are being strengthened through membership in the United Nations network of criminological institutes; participation in developing the U.N. Criminal Justice Information Network; initiation of UNOJUST (U.N. Online Justice Clearinghouse), which electronically links the institutes to the U.N. network; and establishment of an NIJ International Center.
- The NIJ-administered criminal justice information clearinghouse, the world's largest, has improved its online capability.
- The Institute's Drug Use Forecasting (DUF) program has been expanded and enhanced. Renamed ADAM (Arrestee Drug Abuse Monitoring), the program will increase the number of drug-testing sites, and its role as a "platform" for studying drug-related crime will grow.
- NIJ's new Crime Mapping Research Center will provide training in computer mapping technology, collect and archive geocoded crime data, and develop analytic software.
- The Institute's program of intramural research has been expanded and enhanced.

The Institute Director, who is appointed by the President and confirmed by the Senate, establishes the Institute's objectives, guided by the priorities of the Office of Justice Programs, the Department of Justice, and the needs of the criminal justice field. The Institute actively solicits the views of criminal justice professionals and researchers in the continuing search for answers that inform public policymaking in crime and justice.