Public Comment

Proposed Amendments

2006

United States
Sentencing Commission

Practitioners' Advisory Group

A Standing Advisory Group of the United States Sentencing Commission

August 15, 2005

The Honorable Ricardo H. Hinojosa, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: 2006 Priorities

Dear Judge Hinojosa:

On June 14 of this year we wrote on behalf of the Practitioners' Advisory Group to suggest priorities that PAG believes the Commission should address in the next amendment cycle. One of the issues we urged upon the Commission was the development of policy guidance for courts considering sentence reduction motions under § 3582(c)(1)(A)(i). This issue has been on the Commission's list of priorities for the past two years, though to our knowledge the Commission has not yet taken action to address it.. We were concerned to see that this issue did not appear on the Commission's proposed list of priorities for 2006, and are writing to ask the Commission to reconsider its apparent decision to omit this admittedly sensitive and difficult issue from the priorities list.

The Commission was directed by Congress to promulgate general policy for sentence reduction motions under § 3582(c)(1)(A)(i), as part of its policy-making responsibility under the 1984 Act, if in its judgment this would "further the purposes set forth in § 3553(a)(2)." *See* 28 U.S.C. §§ 994(a)(2)(C), 994(t). Section 3582(c)(1)(A)(i) specifically provides that in considering whether "extraordinary and compelling" reasons warrant sentence modification in a particular case, the court is required to "consider[] the factors set forth in § 3553(a), to the extent that they are applicable." This seems to establish Congress' intention that a court should apply the same criteria in considering sentence reduction motions under § 3582(c)(1)(A) ("to the extent that they are applicable") as it applies to determine the sentence in the first instance. Thus, for example, if a sentencing court could have taken into account a defendant's serious health problems and exigent family circumstances in determining the sentence in the first instance, it could also properly consider them as a basis for sentence reduction if they were to develop or become aggravated unexpectedly mid-way through a prison term. As a corollary, it would seem reasonable to suggest that Congress intended to provide a

means of bringing these circumstances to the court's attention. This interpretation of the government's responsibility under § 3582(c)(1)(A)(i) would underscore the importance of having the Commission play a role in developing uniform policy for implementing this statute.

PAG hopes that the Commission has not permanently changed its view as to whether it would further the purposes of § 3553(a)(2) to develop a policy statement to implement § 3582(c)(1)(A)(i). As we pointed out in our June 14 letter, the Bureau of Prisons, which is charged with the gate-keeping function of bringing motions under § 3582(c)(1)(A)(i), has interpreted its responsibilities under this statute very narrowly, authorizing sentence reduction motions only in cases where a prisoner is near death. We believe that Congress intended this statute to be used more broadly, for reasons described in our earlier letter. More important for present purposes, we believe that the Commission is in an excellent position to give guidance, both to courts and to BOP, to ensure that the statute can be implemented in a broad range of situations, as intended by Congress, by providing criteria, content, and examples on which the BOP and the courts may rely in exercising its discretion. We recognize that the Commission has been exceptionally busy over the past year, and that to a certain extent it must be judicious in setting priorities. But PAG believes that this issue is an important one which deserves the Commission's attention, and therefore we urge the Commission to continue to work on this equitable and important "safety valve" statute.

Sincerely,

Mark Flanagan (by GSS)

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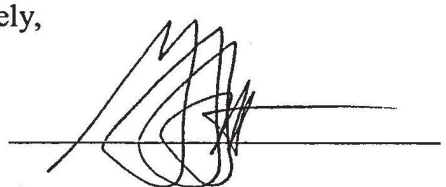

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August 18, 2005

MEMORANDUM

TO: Chair Hinojosa
Commissioners

FROM: Judy Sheon

SUBJECT: Public Comment and Additional Information on Proposed Priorities

Enclosed please find a binder containing all public comment received to date pursuant to the Commission's request for comment on its proposed priorities for 2005-2006. The deadline for comment was Monday, August 15th. You should also find within the binder summaries of the public comment prepared by the legal staff.

Additionally enclosed are two items you also may want to consider in determining your final priorities for the coming amendment year: (1) a letter to Judge Stadtmueller from Commission staff in regard to an issue the judge brought to commissioner attention at the most recent Sentencing Institute, and (2) materials on the Crime Victims Act related to Judge Cassel's suggestions last February as to how the Commission might implement that Act.

If you have any questions, please call me at (202) 502-4524.

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July 18, 2005

Hon. Joseph P. Stadtmueller
United States District Court
471 United States Courthouse
517 East Wisconsin Avenue
Milwaukee, WI 53202

Dear Judge Stadtmueller,

It was good seeing you at the Sentencing Institute in D.C. and conversing with you on the phone last week. Thanks for sending me the Washington Post article on the Border Patrol's release policy. I gave copies to the co-chairs of the Commission's staff working group on immigration issues.

I have thought further about the concerns you raised regarding §5K1.1 substantial assistance motions in cases that do not meet the criteria, and your suggestion that §3E1.1 (Acceptance of Responsibility) might be expanded to a maximum of 5 levels as a remedy. I recall a few previous guideline amendments that warrant consideration regarding this issue, specifically the amendment to §3E1.1 in November 1992 (Amendment #459), the amendment to §5K1.1 in November 1989 (Amendment #290), and the PROTECT Act amendment to §3E1.1 in April 2003 (Amendment #649).

The §3E1.1 amendment of 1992 expanded the acceptance of responsibility adjustment to add the possibility of a third level off if the defendant either timely gave complete information to the government concerning his own involvement in the offense or timely notified authorities of his intention to plead guilty. The Reasons for Amendment states, "This amendment provides an additional reduction of one level for certain defendants whose acceptance of responsibility includes assistance to the government in the investigation or prosecution of their own misconduct." This seems to have been intended to cover one of the issues that you are now suggesting be addressed by additional levels for acceptance of responsibility.

Note, however, that the PROTECT Act amendment to §3E1.1 on April 30, 2003, struck "timely providing complete information to the government concerning his own involvement in

the offense" and restricted the third level to a defendant timely notifying authorities of his intention to plead guilty. This seems to have removed a consideration that you think should be available for the additional levels.

The §5K1.1 amendment of 1989 removed the previous language of §5K1.1, which stated, "[u]pon motion of the government that the defendant has made a GOOD FAITH EFFORT to provide substantial assistance in the investigation or prosecution of another person...", and replaced it with "[u]pon motion of the government that the defendant has provided substantial assistance in the investigation or prosecution of another person..."

The Reason for Amendment for #290 states, "The purpose of this amendment is to clarify the Commission's intent that departures under this policy statement be based upon the provision of substantial assistance. The existing policy statement could be interpreted as requiring only a willingness to provide such assistance."

As you can see, both the Commission and the Congress have previously made amendments in the areas in which you have concern.

The Commissioners have a planning session scheduled for their August meeting. To ensure that they have your issue for consideration, I will note your concern and route this letter to their attention.

I will be "on the road" doing training programs for the next week and a half, but should you need to contact me, I generally check my voicemail (202-502-4542) on a daily basis and can return a call.

All the best to you,

Rusty Burress/jms

L. Russell Burress
Principal Training Advisor

August 17, 2005

TO: All Commissioners
Judy Sheon

FROM: Lisa Rich

RE: Crime Victims' Rights Act

On July 28, 2005, Professor Sara Beale, the new reporter for the Judicial Conference Criminal Rules Committee sent an email to Pam Montgomery inquiring about when the Commission might act on Judge Paul Cassell's proposal for implementing the Crime Victims' Rights Act ("CVRA") into the Federal sentencing guidelines. According to Professor Beale, Judge Cassell has prepared detailed proposals regarding implementation of the CVRA into the Criminal Rules, which reference his guidelines-related proposals therefore it would be helpful to the Rules Committee to work with the Commission on this issue. A copy of Professor Beale's email is attached.

The CVRA was enacted on October 30, 2004 as part of the Justice for All Act of 2004. On February 15, 2005, Judge Cassell testified before the Commission recommending that the Commission amend Chapter Six of the *Guidelines Manual* to incorporate certain provisions of the CVRA. An excerpt of Judge Cassell's written submission discussing his proposal is attached for your reference. In follow-up to questions he received during the hearing, Judge Cassell submitted a letter to Tim McGrath further explaining his proposal. An "email" copy of that letter is attached. You will see in the attachment that one of the questions posed was whether victims should be given access to the PSR and Judge Cassell sets forth several options in response. Judge Cassell also provides his opinion on how "victim" should be defined in the guidelines, in response to a posting Professor Doug Berman put on his website following the hearing.

If you have questions about this material, please do not hesitate to contact me or Judy.

Cassell Testified on 2.15.05 that we should amend Chtr 6 - he then sent follow-up letter

From: "Sara Beale" <SUN@law.duke.edu>
To: <PAMM@ussc.gov>
Date: 7/28/2005 3:59:19 PM
Subject: Implementing the Crime Victims Rights Act

Hi Pam,

I am transitioning into the position of reporter for the Judicial Conference Criminal Rules Committee, and we are working on implementing the CVRA. I noticed that there is a letter from Judge Cassell to Tim McGrath (attached) about implementing the CVRA into the guidelines, and I wondered if you (or someone else) could give me some background on when the Commission might act on this proposal, etc. Judge Cassell has also prepared detailed proposals regarding the implementation of the CVRA in the Criminal Rules, which references his guidelines-related proposals. So it would be very helpful to know more about the proposals now before the Commission.

Who do you think is the best person for me to speak to?

Thanks.
Sara Beale

Sara Sun Beale
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August 1, 2005

Tim McGrath
Staff Director
United States Sentencing Commission
Washington, DC
Via Email – tmcgrath@ussc.gov

Re: Additional Information About Crime Victims

Dear Mr. McGrath:

Thanks again very much to the Commission for inviting me to testify yesterday. I appreciated the opportunity to share with the Commission my thoughts for improving the Guidelines in the wake of *Booker*.

I wanted to send a short note to the Commission regarding crime victims issues raised by questions during the hearings or afterward.

Victim Access to Pre-Sentence Reports

Commissioner Steer asked whether victims should receive access to pre-sentence reports. I propose giving victims access to the pre-sentence report via the prosecutor.

First the background law – As I understand the law, there would be nothing in statute precluding release of pre-sentence reports to victims. Title 18 U.S.C. § 3552 *requires* disclosure to government and defense counsel, but does not forbid further dissemination. Some court's local rules, however, do forbid further dissemination. *See, e.g.,* D. Utah Crim. Local R. 32-1(c) (pre-sentence reports not released without order of the court).

In view of that landscape, the options for disclosure appear to be:

(1) No Disclosure.

The Commission could opt not to direct disclosure of any type to a victim. In my view, this approach would be inconsistent with the victim's right to be "reasonably heard." As explained at greater length in my prepared testimony (pp. 41-42), the right to be heard must be granted in a meaningful manner. It is not meaningful to let the victim make a sentencing recommendation when that recommendation might be made meaningless if the court chooses to follow the Guidelines. Being "reasonably" heard must mean being able to comment on what could be central to the judge's determination.

(2) Complete Disclosure.

The Commission could direct full disclosure of the pre-sentence report to the victim. I do not see any statutory barriers to this approach, but legitimate concerns might be raised. Portions of the report may contain sensitive private information about the defendant (reports of psychiatric examinations, prior history of drug use or sexual abuse, and the like). The report may also

disclose confidential law enforcement information that should not be widely circulated. In light of these concerns, total disclosure might not be ideal.

(3) Selective Disclosure.

The Commission could direct that the probation office redact any pre-sentence report to remove confidential information, with the redacted report then provided to the victim. This, too, seems problematic, in that it would require considerable work on the part of busy probation officers to prepare two separate documents (presumably only after consulting with the attorneys on both sides of the case about what might be viewed as confidential).

(4) Disclosure through an intermediary.

In my view, the simplest solution remains the one I proposed in my prepared testimony (p. 43) of disclosure through an intermediary, specifically the prosecutor. The prosecutor would serve as the filter for confidential information, and at the same time could assist the victim by highlighting critical parts of the report. It might be objected that this approach would burden prosecutors, who are no less busy than probation officers. But the new law already gives victims the right to "confer" with prosecutors – and presumably they will be conferring regarding sentencing. Moreover, many U.S. Attorney's Offices already have Victim-Witness Coordinators who communicate with victims regarding impact statements.

I would like to make one change from my earlier prepared testimony. Requiring prosecutors to disclose pre-sentence reports to victims in all cases, even when they are not interested in such disclosure, might be burdensome. Accordingly, I would now like to proposed adding a new section (§ 6A1.2(d)) regarding disclosure of pre-sentence reports that would read as follows (change from my previous testimony underlined):

> Upon request from the victim, the attorney for the government shall communicate the relevant contents of the pre-sentence report, including information about the impact of the offense on the victim and about restitution to the victim in the case.

This would narrow down the obligations of the prosecutor considerably to situations where the victim was genuinely interested in the contents of the report. Presumably such situations are those in which the victim will already be conferring with the government.

Defining the Victim

Following the hearing, Professor Berman's blog wondered about who might qualify as a "victim" under the Crime Victims Rights Act (CVRA). Because several members of the Commission are professed readers of his blog; an answer to the questions he raised may be appropriate.

Professor Berman is curious who might qualify as a "victim" under the new law. The CRVA's definition of "victim" (*see* 18 U.S.C. § 3771(e)) is taken almost verbatim from the 1996 Mandatory Victims Restitution Act (*see* 18 U.S.C. § 3663A(a)(2)); in turn, the MVRA drew on the 1982 Victim Witness Protection Act, a 1982 statute (*see* 18 U.S.C. § 3663(a)(2).)

As a result, the CVRA uses a definition of "victim" that is 22-years-old and has not produced major administrative or definitional problems.

Under this definition, answers to hypothetical situations raised by Professor Berman are straightforward. As to drug cases: no victim; as to felon-in-possession-of-a-firearm cases: no victim; as to immigration cases: no victim (except, possibly, victim smuggling). On the other hand, in a large securities fraud case (e.g., manipulation of the stock market), many victims would result. Under the CVRA, such situations can be handled flexibly, because the Act permits the court to "fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings." 18 U.S.C. § 3771(d)(2). The courts are, of course, familiar with such situations. Class action securities fraud cases are already handled with mail or website notice and the like, and such procedures could be used here.

Professor Berman also wonders whether the victim of an uncharged offense could be heard at a plea hearing. In my view, that issue has already essentially been litigated. In *Hughey v. United States*, 495 U.S. 411 (1990), the Supreme Court held that the VWPA authorizes restitution only for loss caused by the specific conduct which forms the basis for the offense of conviction. Seemingly, the Court's analysis would extend to the CVRA so that victims of uncharged offenses would appear not to have formal rights. Even if victims lack formal rights, however, courts presumably possess discretion to hear from anyone regarding whether to accept a plea, as that decision involves an open-ended interests-of-justice kind of determination. Moreover, the *Hughey* analysis is not free from doubt. Senator Jon Kyl, co-sponsor of the CVRA, explained that the definition of "victim" in the CVRA is an intentionally broad definition because all victims of crime deserve to have their rights protected, whether or not they are the victim of the count charged." *See* 150 CONG. REC. S10910-01 (Oct. 2004) (statement of Sen. Kyl).

All of these victims issues may be new terrain for the Commission, as victims are frequently "off the radar" for prosecutors, defense attorneys, and (I have to admit) even judges. As a result, victims sometimes get short shrift in the system. The CVRA appears to be Congress' attempt to guarantee victims a role in the federal criminal justice process, including the Sentencing Guidelines process. If you would like more information on the general subject of victims, Professor Douglas Beloof, Stephen Twist, and I have a new law school casebook coming out next month (*Victims in Criminal Procedure* (North Carolina Academic Press 2d ed. 2005)) which explores this general subject. I would be happy to provide a copy to the Commission if it would be helpful in exploring victims issues.

Once again, I hope I have not been too long winded in offering these ideas. Please feel free to contact me if I can provide any other assistance.

Sincerely,

Paul G. Cassell
United States District Judge

both the Sentencing Commission and the Congress to monitor how the new system is working. It was for this very reason, among others, that the PROTECT Act required courts to specifically state in writing their reasons for issuing a sentence outside the Guidelines range.[205] Congress will understandably still be quite interested in learning how often sentences under the post-*Booker* regime fall within or outside of the Guidelines, and for what reason.[206] In the wake of *Booker*, some commentators have urged Congress to act quickly to prevent judicial leniency and disparity from developing under the now-advisory Guidelines system.[207] Determining whether such concerns are valid requires a hard-headed look at the data on judicial reaction to *Booker*. Unless a district court is clear about how it arrived at a sentence – "showing its work" as one respected commentator colorfully put it[208] – that data collection process will be aborted.

For all these reasons, the Commission should require courts to always consider whether a departure is appropriate before considering a possible variance from the Guidelines. Courts should also be required to indicate when they are following the Guidelines, when they are departing from the Guidelines, and when they are varying from the Guidelines.

IV. THE COMMISSION SHOULD REVISE THE GUIDELINES TO ALLOW VICTIM PARTICIPATION IN GUIDELINES DETERMINATIONS AS REQUIRED BY RECENT CRIME VICTIMS LEGISLATION.

The Commission should change the procedural provisions of the Guidelines to allow participation by crime victims. Currently those provisions allow only "the parties" (i.e., the prosecution and the defense) to dispute sentencing factors contained in the pre-sentence report. Last year, Congress passed a new law guaranteeing victims participation in all aspects of the criminal justice system. In light of that law, the Guidelines provisions should be expanded to include victims.

Last October, Congress passed the "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act," as codified in Title 18 U.S.C. § 3771.[209] I understand that Scott Campbell's mother – Collene (Thompson) Campbell – will testify later this afternoon before the Commission. One particular provision in the Act is worth highlighting here because of its effects on Guidelines procedures. (Also, because the new legislation is not widely known, a full copy of the Act is included as an attachment to this

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[205] 18 U.S.C. § 3553(c)(2).

[206] *See* Memorandum from Richardo H. Hinojosa, Chair, U.S. Sentencing Comm'n, and Sim Lake, Chair, Criminal Law Committee of the Judicial Conference of the U.S., Regarding Documentation Required to be Sent to the Sentencing Comm'n (Jan. 21, 2005).

[207] *See, e.g.,* Testimony of Daniel P. Collins before the House Judiciary comm. Subcomm. On Crime (Feb. 10, 2005).

[208] http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/always_remember.html.

[209] PUB.L. 108-405, Title I, § 102(a), Oct. 30, 2004, 118 Stat. 226.

testimony.)

Among its comprehensive list of rights, the Crime Victims' Rights Act gives victims "the right to be reasonably heard at any public proceeding in the district court involving . . . sentencing . . . ."[210] This codifies the right of crime victims to provide what is known as a "victim impact statement" to the court.[211] However, the right is not narrowly circumscribed to just impact information. To the contrary, the right conferred is a broad one – to be "reasonably heard" at the sentencing proceeding.

The victim's right to be "reasonably heard" appears to include a right for the victim to speak to disputed Guidelines issues. As Senator (and co-sponsor) Jon Kyl explained, the right includes sentencing recommendations:

> When a victim invokes this right during plea and sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact: the character of the victim, the impact of the crime on the victim, the victims' family and the community, and *sentencing recommendations*.[212]

A "sentencing recommendation" may well implicate Guidelines issues, particulary where a court gives heavy weight (as I do) to the Guidelines calculation. Moreover, the Congress intended the right to be construed broadly. Again, as Senator Kyl explained:

> In short, the victim of crime, or their counsel, should be able to provide *any information*, as well as their opinion, directly to the court concerning the . . . sentencing of the accused.[213]

Finally, the natural reading of a right to be "reasonably heard" is a right to be heard at a time when that statement might make a difference. "As long ago as 1914, the [Supreme] Court emphasized that' the fundamental requisite of due process of law is the opportunity to be heard.'"[214] "It is equally fundamental that the right to . . . an opportunity to be heard 'must be

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[210] 18 U.S.C. § 3771(a)(4).

[211] *See generally* DOUGLAS BELOOF, PAUL CASSELL & STEPHEN TWIST, VICTIMS IN CRIMINAL PROCEDURE chapt. 10 (2d ed. 2005 forthcoming) (discussing victim impact statmeents); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1395-96 (same).

[212] 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added). *See generally* BELOOF, CASSELL & TWIST, *supra*, chapt. 10 (discussing three types of victim impact information).

[213] 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added).

[214] *Davis v. Scherer*, 468 U.S. 183, 200 (1984) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

granted at a meaningful time and in a meaningful manner.'" [215]

A victim's right to be heard regarding sentencing issues is important for another reason: insuring proper restitution. Federal law guarantees most victims of serious crimes the right to restitution.[216] Reinforcing those laws, the new Crime Victims Rights Act also guarantees that victims have "[t]he right to full and timely restitution as provided in law."[217] As a practical matter, many of the calculations undergirding an award of restitution will rest on information contained in the pre-sentence report. While the restitution statutes have their own detailed procedural provisions,[218] it is unclear how those provisions are integrated with the Guidelines procedural provisions. For all these reasons, the Rights of Crime Victims' Act should be understood as giving victims the right to be heard *before* a court makes any final conclusions about Guidelines calculations and other sentencing matters.

Because the Act gives victims a right to be heard on Guidelines issues, the Commission should revise the Chapter 6 sentencing procedures. Currently, those procedures fail to leave any room for victim participation – permitting only the parties (the government and the defense) to be involved in the process. For example, section § 6A1.3 provides: "When any factor important to the sentencing determination is reasonably in dispute, *the parties* shall be given an adequate opportunity to present information to the court regarding that factor."[219] In light of the new Act, victims should likewise be given an opportunity to present information on a disputed sentencing factor.

Victims may often possess information quite relevant to the district court's assessment of the Guidelines range. The Guidelines themselves contain an entire part devoted to "victim-related adjustments."[220] This part requires the court to make such determinations as whether a defendant selected his victim because of race, whether a defendant should have known that a victim was vulnerable, and whether a victim was physically restrained during the course of an offense. In addition, other Guidelines look to victim-related characteristics. The kidnaping provision, for example, looks to such things as the degree of injury suffered by the victim.[221] The fraud provision looks to loss to the victim.[222]

To be sure, in many cases a prosecutor may bring some of these relevant facts to the

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[215] *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

[216] *See* 18 U.S.C. § 3663A (Mandatory Victims Restitution Act); *see also* 18 U.S.C. § 3663 (Victim Witness Protection Act).

[217] 18 U.S.C. § 3771(a)(6).

[218] 18 U.S.C. § 3664.

[219] U.S.S.G. § 6A1.3(a) (emphasis added).

[220] U.S.S.G. § 3A.1.1 *et seq.*

[221] U.S.S.G. § 2A4.1(b)(2).

[222] U.S.S.G. § 2B1.1(b).

court's attention. Indeed, under the new Act prosecutors are required to "use their best efforts" to insure that victims' rights are protected.[223] But the Act clearly indicates that the prosecutor's representations are not a substitute for the victim's personal right to be reasonably heard. Thus, the Act begins: "A *crime victim* has the following rights . . . ."[224] Moreover, the Act specifically provides that victims can "assert the rights" provided in the statute both before the district court and on appeal by way of expedited mandamus relief.[225] This demonstrates that Congress intended victims to be involved in sentencing proceedings as the functional equivalent of parties, that is, as equal participants in the process.[226] As Senator Kyl explained about the right-to-be-heard provision:

> This provision is intended to allow crime victims to directly address the court in person. It is not necessary for the victim to obtain the permission of either party to do so. This right is a right independent of the government or the defendant that allows the victim to address the court. To the extent the victim has the right to independently address the court, the victim acts as an *independent participant in the proceedings.*[227]

In light of the new Act, the Commission should revise its Guidelines to clarify that both the parties *and* any victim have the right to be heard on Guidelines issues, including issues relating to restitution. These changes can be easily accomplished with only three modest changes to the Guidelines:

First, a new section (6A1.2(d)) should be added regarding disclosure of pre-sentence reports:

> The attorney for the government shall communicate the relevant contents of the pre-sentence report, including information about the impact of the offense on the victim and about restitution to the victim in the case.

Second, a new section (6A1.3(c)) should be added regarding opportunity for victims to dispute sentencing:

> The attorney for the government shall advise the court of any relevant sentencing factors that are disputed by the victim in the case, including facts about the impact of the offense on the victims and about restitution. The court

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[223] 18 U.S.C. § 3771(c).

[224] 18 U.S.C. § 3771(a).

[225] 18 U.S.C. § 3771(d).

[226] *See generally* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah L. Rev. 289 (explaining victim participation model of criminal justice).

[227] 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added).

shall give the victim an opportunity to be heard on these subjects before resolving any such disputed sentencing factors.

Third, section 6A1.4 should be amended by adding the following underlined language:

> Before the court may depart from the applicable sentencing guideline range on a ground not identified for departure either in the presentence report or in a party's rehearing submission or in a victim impact statement, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure. The prosecutor shall advise defense counsel and the court of any ground identified by the victim that might reasonably serve as a basis for departure.

With these changes, the Guidelines will implement Congress' intent that victims have an opportunity to be reasonably heard in sentencing proceedings. It is also appropriate to have prosecutors assist victims on these issues. The Crime Victims Rights Act requires government attorneys to "make their best efforts to see that crime victims are notified of, and accorded, the[ir] rights . . . ."[228] More important, the Act gives victims "[t]he reasonable right to confer with the attorney for the Government in the case."[229] This means that victims will be regularly conferring with prosecutors about sentencing matters. As Senator Kyl explained:

> [T]he victim has a reasonable right to confer with the attorney for the government in the case. This right is intended to be expansive. For example, the victim has the right to confer with the government concerning any critical stage or disposition of the case. . . . Prosecutors should consider it part of their profession to be available to consult with crime victims about concerns the victims may have which are pertinent to the case, case proceedings or dispositions. Under this provision, victims are able to confer with the government's attorney about proceedings after charging.[230]

For all these reasons, the Guidelines should be changed to guarantee crime victims participation as required by the Crime Victims Rights Act. Other bodies of law may also need modification to reflect the new Act. For example, it seems likely that the Act will require significant changes in the Federal Rules of Criminal Procedure. I am currently in the process of preparing suggestions for the Advisory Committee on Rules of Criminal Procedure as to how this might be accomplished. But the need for changes elsewhere in the system provides no justification for delaying appropriate changes to the Guidelines. The Guidelines should be changed to give victims their right to participate in the Guidelines process.

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[228] 18 U.S.C. § 3771(c)(1).

[229] 18 U.S.C. § 3771(a)(5).

[230] 150 CONG.REC. S10910-01 (Oct 9, 2004) (remarks of Sen. Kyl) (emphasis added).

CONCLUSION

In concluding my (perhaps too lengthy) testimony, one last point may deserve brief mention. Most of the changes I propose may act to solidify the Guidelines and caution against more lenient punishments. This is entirely appropriate. The Guidelines have the backing of the public. According to sophisticated public opinion polling, "there is a fair amount of agreement between sentences prescribed in the guidelines and those desired by the members of the [public]."[231] Convergence between the Guidelines and the public is not surprising. For nearly two decades, in an on-going dialogue with the Sentencing Commission, Congress has repeatedly reaffirmed its view that the Guidelines are not overly severe. Indeed, as demonstrated by the PROTECT Act's recent significant restrictions on downward departures, Congress, if anything, takes the opposite view.

The decision about how harshly to punish crime in this country is a matter of legislative prerogative. As *Booker* plainly held: "The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."[232] However unhappy some may be with that allocation of power, that is the allocation our democratic system has created.

Yet paradoxically, *Booker* presents the judiciary with an opportunity to assume a greater role in sentencing decisions. For many years, judges have sought greater freedom from the Guidelines strictures.[233] Those judicial pleas were accompanied by assurances that judges would use any newly-granted freedom responsibly. Now, as a result of shifting majorities in the *Booker* decision, a less rigid system of advisory Guidelines has been put in place – at least temporarily. The judiciary thus has the chance to demonstrate to Congress that it can be trusted with greater freedom – that it will responsibly exercise any discretion not to thwart congressional objectives, but to implement them discriminatingly in particular cases.

Should the courts fail to carry out congressional will, there should be little doubt what will follow. Congress can easily implement its desired level of punitiveness in the criminal justice system, through such blunderbuss devices as mandatory minimum sentences. It is far better, then, for courts to exercise their discretion to insure that Congress' intention is implemented through close adherence to the congressionally-approved Guidelines system, with only rare exceptions for unusual situations. I encourage the Commission to do whatever it can to

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[231] *Wilson*, 2005 WL 78552 at *5 (citing PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1997)). Mandatory minimum sentences are, at least in some situations, out of step with public views. *See United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah 2004) (55-year mandatory minimum sentence called for by federal law, more than recommended by the jury or by any other state).

[232] *Booker*,125 S.Ct. at 768.

[233] *See, e.g.*, Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998).

JUSTICE FOR ALL ACT OF 2004

Public Law 108–405
108th Congress

An Act

To protect crime victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of Federal, State, and local crime laboratories, to increase research and development of new DNA testing technologies, to develop new training programs regarding the collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in State capital cases, and for other purposes.

Oct. 30, 2004
[H.R. 5107]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Justice for All Act of 2004.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

42 USC 13701 note.

(a) SHORT TITLE.—This Act may be cited as the "Justice for All Act of 2004".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

TITLE I—SCOTT CAMPBELL, STEPHANIE ROPER, WENDY PRESTON, LOUARNA GILLIS, AND NILA LYNN CRIME VICTIMS' RIGHTS ACT

Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act.

SEC. 101. SHORT TITLE.

18 USC 3771 note.

This title may be cited as the "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act".

SEC. 102. CRIME VICTIMS' RIGHTS.

(a) AMENDMENT TO TITLE 18.—Part II of title 18, United States Code, is amended by adding at the end the following:

"CHAPTER 237—CRIME VICTIMS' RIGHTS

"§ 3771. Crime victims' rights

"(a) RIGHTS OF CRIME VICTIMS.—A crime victim has the following rights:

"(1) The right to be reasonably protected from the accused.

"(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

"(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

"(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

"(5) The reasonable right to confer with the attorney for the Government in the case.

"(6) The right to full and timely restitution as provided in law.

"(7) The right to proceedings free from unreasonable delay.

"(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

"(b) RIGHTS AFFORDED.—In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

"(c) BEST EFFORTS TO ACCORD RIGHTS.—

Notification.

"(1) GOVERNMENT.—Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

"(2) ADVICE OF ATTORNEY.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

"(3) NOTICE.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

"(d) ENFORCEMENT AND LIMITATIONS.—

"(1) RIGHTS.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

"(2) MULTIPLE CRIME VICTIMS.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

"(3) MOTION FOR RELIEF AND WRIT OF MANDAMUS.—The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

Deadline.

"(4) ERROR.—In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

"(5) LIMITATION ON RELIEF.—In no case shall a failure to afford a right under this chapter provide grounds for a

new trial. A victim may make a motion to re-open a plea or sentence only if—

"(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

"(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

"(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.".

"(6) NO CAUSE OF ACTION.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

"(e) DEFINITIONS.—For the purposes of this chapter, the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

"(f) PROCEDURES TO PROMOTE COMPLIANCE.—

"(1) REGULATIONS.—Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims. Deadline.

"(2) CONTENTS.—The regulations promulgated under paragraph (1) shall—

"(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

"(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

"(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

"(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.".

(b) TABLE OF CHAPTERS.—The table of chapters for part II of title 18, United States Code, is amended by inserting at the end the following:

"237. Crime victims' rights ..... 3771".

(c) REPEAL.—Section 502 of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10606) is repealed.

SEC. 103. INCREASED RESOURCES FOR ENFORCEMENT OF CRIME VICTIMS' RIGHTS.

(a) CRIME VICTIMS LEGAL ASSISTANCE GRANTS.—The Victims of Crime Act of 1984 (42 U.S.C. 10601 et seq.) is amended by inserting after section 1404C the following:

42 USC 10603d.

"SEC. 1404D. CRIME VICTIMS LEGAL ASSISTANCE GRANTS.

"(a) IN GENERAL.—The Director may make grants as provided in section 1404(c)(1)(A) to State, tribal, and local prosecutors' offices, law enforcement agencies, courts, jails, and correctional institutions, and to qualified public and private entities, to develop, establish, and maintain programs for the enforcement of crime victims' rights as provided in law.

"(b) PROHIBITION.—Grant amounts under this section may not be used to bring a cause of action for damages.

"(c) FALSE CLAIMS ACT.—Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the 'False Claims Act'), may be used for grants under this section, subject to appropriation.".

(b) AUTHORIZATION OF APPROPRIATIONS.—In addition to funds made available under section 1402(d) of the Victims of Crime Act of 1984, there are authorized to be appropriated to carry out this title—

(1) $2,000,000 for fiscal year 2005 and $5,000,000 for each of fiscal years 2006, 2007, 2008, and 2009 to United States Attorneys Offices for Victim/Witnesses Assistance Programs;

(2) $2,000,000 for fiscal year 2005 and $5,000,000 in each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice for enhancement of the Victim Notification System;

(3) $300,000 in fiscal year 2005 and $500,000 for each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice for staff to administer the appropriation for the support of organizations as designated under paragraph (4);

(4) $7,000,000 for fiscal year 2005 and $11,000,000 for each of the fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice, for the support of organizations that provide legal counsel and support services for victims in criminal cases for the enforcement of crime victims' rights in Federal jurisdictions, and in States and tribal governments that have laws substantially equivalent to the provisions of chapter 237 of title 18, United States Code; and

(5) $5,000,000 for fiscal year 2005 and $7,000,000 for each of fiscal years 2006, 2007, 2008, and 2009, to the Office for Victims of Crime of the Department of Justice, for the support of—

(A) training and technical assistance to States and tribal jurisdictions to craft state-of-the-art victims' rights laws; and

(B) training and technical assistance to States and tribal jurisdictions to design a variety of compliance systems, which shall include an evaluation component.

(c) INCREASED RESOURCES TO DEVELOP STATE-OF-THE-ART SYSTEMS FOR NOTIFYING CRIME VICTIMS OF IMPORTANT DATES AND DEVELOPMENTS.—The Victims of Crime Act of 1984 (42 U.S.C. 10601 et seq.) is amended by inserting after section 1404D the following:

"SEC. 1404E. CRIME VICTIMS NOTIFICATION GRANTS. 42 USC 10603e.

"(a) IN GENERAL.—The Director may make grants as provided in section 1404(c)(1)(A) to State, tribal, and local prosecutors' offices, law enforcement agencies, courts, jails, and correctional institutions, and to qualified public or private entities, to develop and implement state-of-the-art systems for notifying victims of crime of important dates and developments relating to the criminal proceedings at issue in a timely and efficient manner, provided that the jurisdiction has laws substantially equivalent to the provisions of chapter 237 of title 18, United States Code.

"(b) INTEGRATION OF SYSTEMS.—Systems developed and implemented under this section may be integrated with existing case management systems operated by the recipient of the grant.

"(c) AUTHORIZATION OF APPROPRIATIONS.—In addition to funds made available under section 1402(d), there are authorized to be appropriated to carry out this section—

"(1) $5,000,000 for fiscal year 2005; and

"(2) $5,000,000 for each of the fiscal years 2006, 2007, 2008, and 2009.

"(d) FALSE CLAIMS ACT.—Notwithstanding any other provision of law, amounts collected pursuant to sections 3729 through 3731 of title 31, United States Code (commonly known as the 'False Claims Act'), may be used for grants under this section, subject to appropriation.".

SEC. 104. REPORTS.

(a) ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS.—Not later than 1 year after the date of enactment of this Act and annually thereafter, the Administrative Office of the United States Courts, for each Federal court, shall report to Congress the number of times that a right established in chapter 237 of title 18, United States Code, is asserted in a criminal case and the relief requested is denied and, with respect to each such denial, the reason for such denial, as well as the number of times a mandamus action is brought pursuant to chapter 237 of title 18, and the result reached. Deadline. 18 USC 3771 note.

(b) GOVERNMENT ACCOUNTABILITY OFFICE.—

(1) STUDY.—The Comptroller General shall conduct a study that evaluates the effect and efficacy of the implementation of the amendments made by this title on the treatment of crime victims in the Federal system.

(2) REPORT.—Not later than 4 years after the date of enactment of this Act, the Comptroller General shall prepare and submit to the appropriate committees a report containing the results of the study conducted under subsection (a). Deadline.

Debbie Smith Act of 2004.

TITLE II—DEBBIE SMITH ACT OF 2004

42 USC 13701 note.

SEC. 201. SHORT TITLE.

This title may be cited as the "Debbie Smith Act of 2004".

SEC. 202. DEBBIE SMITH DNA BACKLOG GRANT PROGRAM.

(a) DESIGNATION OF PROGRAM; ELIGIBILITY OF LOCAL GOVERNMENTS AS GRANTEES.—Section 2 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135) is amended—

(1) by amending the heading to read as follows:

"SEC. 2. THE DEBBIE SMITH DNA BACKLOG GRANT PROGRAM.";

(2) in subsection (a)—

(A) in the matter preceding paragraph (1)—

(i) by inserting "or units of local government" after "eligible States"; and

(ii) by inserting "or unit of local government" after "State";

(B) in paragraph (2), by inserting before the period at the end the following: ", including samples from rape kits, samples from other sexual assault evidence, and samples taken in cases without an identified suspect"; and

(C) in paragraph (3), by striking "within the State";

(3) in subsection (b)—

(A) in the matter preceding paragraph (1)—

(i) by inserting "or unit of local government" after "State" both places that term appears; and

(ii) by inserting ", as required by the Attorney General" after "application shall";

(B) in paragraph (1), by inserting "or unit of local government" after "State";

(C) in paragraph (3), by inserting "or unit of local government" after "State" the first place that term appears;

(D) in paragraph (4)—

(i) by inserting "or unit of local government" after "State"; and

(ii) by striking "and" at the end;

(E) in paragraph (5)—

(i) by inserting "or unit of local government" after "State"; and

(ii) by striking the period at the end and inserting a semicolon; and

(F) by adding at the end the following:

"(6) if submitted by a unit of local government, certify that the unit of local government has taken, or is taking, all necessary steps to ensure that it is eligible to include, directly or through a State law enforcement agency, all analyses of samples for which it has requested funding in the Combined DNA Index System; and";

(4) in subsection (d)—

(A) in paragraph (1)—

(i) in the matter preceding subparagraph (A), by striking "The plan" and inserting "A plan pursuant to subsection (b)(1)";

(ii) in subparagraph (A), by striking "within the State"; and

(iii) in subparagraph (B), by striking "within the State"; and

(B) in paragraph (2)(A), by inserting "and units of local government" after "States";

(5) in subsection (e)—

(A) in paragraph (1), by inserting "or local government" after "State" both places that term appears; and

(B) in paragraph (2), by inserting "or unit of local government" after "State";

(6) in subsection (f), in the matter preceding paragraph (1), by inserting "or unit of local government" after "State";

(7) in subsection (g)—

(A) in paragraph (1), by inserting "or unit of local government" after "State"; and

(B) in paragraph (2), by inserting "or units of local government" after "States"; and

(8) in subsection (h), by inserting "or unit of local government" after "State" both places that term appears.

(b) REAUTHORIZATION AND EXPANSION OF PROGRAM.—Section 2 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135) is amended—

(1) in subsection (a)—

(A) in paragraph (3), by inserting "(1) or" before "(2)"; and

(B) by inserting at the end the following:

"(4) To collect DNA samples specified in paragraph (1).

"(5) To ensure that DNA testing and analysis of samples from crimes, including sexual assault and other serious violent crimes, are carried out in a timely manner.";

(2) in subsection (b), as amended by this section, by inserting at the end the following:

"(7) specify that portion of grant amounts that the State or unit of local government shall use for the purpose specified in subsection (a)(4).";

(3) by amending subsection (c) to read as follows:

"(c) FORMULA FOR DISTRIBUTION OF GRANTS.—

"(1) IN GENERAL.—The Attorney General shall distribute grant amounts, and establish appropriate grant conditions under this section, in conformity with a formula or formulas that are designed to effectuate a distribution of funds among eligible States and units of local government that—

"(A) maximizes the effective utilization of DNA technology to solve crimes and protect public safety; and

"(B) allocates grants among eligible entities fairly and efficiently to address jurisdictions in which significant backlogs exist, by considering—

"(i) the number of offender and casework samples awaiting DNA analysis in a jurisdiction;

"(ii) the population in the jurisdiction; and

"(iii) the number of part 1 violent crimes in the jurisdiction.

"(2) MINIMUM AMOUNT.—The Attorney General shall allocate to each State not less than 0.50 percent of the total amount appropriated in a fiscal year for grants under this section, except that the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands shall each be allocated 0.125 percent of the total appropriation.

"(3) LIMITATION.—Grant amounts distributed under paragraph (1) shall be awarded to conduct DNA analyses of samples from casework or from victims of crime under subsection (a)(2) in accordance with the following limitations:

"(A) For fiscal year 2005, not less than 50 percent of the grant amounts shall be awarded for purposes under subsection (a)(2).

"(B) For fiscal year 2006, not less than 50 percent of the grant amounts shall be awarded for purposes under subsection (a)(2).

"(C) For fiscal year 2007, not less than 45 percent of the grant amounts shall be awarded for purposes under subsection (a)(2).

"(D) For fiscal year 2008, not less than 40 percent of the grant amounts shall be awarded for purposes under subsection (a)(2).

"(E) For fiscal year 2009, not less than 40 percent of the grant amounts shall be awarded for purposes under subsection (a)(2).";

(4) in subsection (g)—

(A) in paragraph (1), by striking "and" at the end;

(B) in paragraph (2), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following:

"(3) a description of the priorities and plan for awarding grants among eligible States and units of local government, and how such plan will ensure the effective use of DNA technology to solve crimes and protect public safety.";

(5) in subsection (j), by striking paragraphs (1) and (2) and inserting the following:

"(1) $151,000,000 for fiscal year 2005;

"(2) $151,000,000 for fiscal year 2006;

"(3) $151,000,000 for fiscal year 2007;

"(4) $151,000,000 for fiscal year 2008; and

"(5) $151,000,000 for fiscal year 2009."; and

"(6) by adding at the end the following:

"(k) USE OF FUNDS FOR ACCREDITATION AND AUDITS.—The Attorney General may distribute not more than 1 percent of the grant amounts under subsection (j)—

"(1) to States or units of local government to defray the costs incurred by laboratories operated by each such State or unit of local government in preparing for accreditation or reaccreditation;

"(2) in the form of additional grants to States, units of local government, or nonprofit professional organizations of persons actively involved in forensic science and nationally recognized within the forensic science community—

"(A) to defray the costs of external audits of laboratories operated by such State or unit of local government, which participates in the National DNA Index System, to determine whether the laboratory is in compliance with quality assurance standards;

"(B) to assess compliance with any plans submitted to the National Institute of Justice, which detail the use of funds received by States or units of local government under this Act; and

"(C) to support future capacity building efforts; and

"(3) in the form of additional grants to nonprofit professional associations actively involved in forensic science and nationally recognized within the forensic science community to defray the costs of training persons who conduct external audits of laboratories operated by States and units of local government and which participate in the National DNA Index System.

"(l) USE OF FUNDS FOR OTHER FORENSIC SCIENCES.—The Attorney General may award a grant under this section to a State or unit of local government to alleviate a backlog of cases with respect to a forensic science other than DNA analysis if the State or unit of local government—

"(1) certifies to the Attorney General that in such State or unit—

"(A) all of the purposes set forth in subsection (a) have been met;

"(B) a significant backlog of casework is not waiting for DNA analysis; and

"(C) there is no need for significant laboratory equipment, supplies, or additional personnel for timely DNA processing of casework or offender samples; and

"(2) demonstrates to the Attorney General that such State or unit requires assistance in alleviating a backlog of cases involving a forensic science other than DNA analysis.

"(m) EXTERNAL AUDITS AND REMEDIAL EFFORTS.—In the event that a laboratory operated by a State or unit of local government which has received funds under this Act has undergone an external audit conducted to determine whether the laboratory is in compliance with standards established by the Director of the Federal Bureau of Investigation, and, as a result of such audit, identifies measures to remedy deficiencies with respect to the compliance by the laboratory with such standards, the State or unit of local government shall implement any such remediation as soon as practicable.".

SEC. 203. EXPANSION OF COMBINED DNA INDEX SYSTEM.

(a) INCLUSION OF ALL DNA SAMPLES FROM STATES.—Section 210304 of the DNA Identification Act of 1994 (42 U.S.C. 14132) is amended—

(1) in subsection (a)(1), by striking "of persons convicted of crimes;" and inserting the following: "of—

"(A) persons convicted of crimes;

"(B) persons who have been charged in an indictment or information with a crime; and

"(C) other persons whose DNA samples are collected under applicable legal authorities, provided that DNA profiles from arrestees who have not been charged in an indictment or information with a crime, and DNA samples that are voluntarily submitted solely for elimination purposes shall not be included in the National DNA Index System;"; and

(2) in subsection (d)(2)—

(A) by striking "if the responsible agency" and inserting "if—

"(i) the responsible agency";

(B) by striking the period at the end and inserting "; or"; and

(C) by adding at the end the following:

"(ii) the person has not been convicted of an offense on the basis of which that analysis was or could have been included in the index, and all charges for which the analysis was or could have been included in the index have been dismissed or resulted in acquittal.".

(b) FELONS CONVICTED OF FEDERAL CRIMES.—Section 3(d) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a(d)) is amended to read as follows:

"(d) QUALIFYING FEDERAL OFFENSES.—The offenses that shall be treated for purposes of this section as qualifying Federal offenses are the following offenses, as determined by the Attorney General:

"(1) Any felony.

"(2) Any offense under chapter 109A of title 18, United States Code.

"(3) Any crime of violence (as that term is defined in section 16 of title 18, United States Code).

"(4) Any attempt or conspiracy to commit any of the offenses in paragraphs (1) through (3).".

(c) MILITARY OFFENSES.—Section 1565(d) of title 10, United States Code, is amended to read as follows:

"(d) QUALIFYING MILITARY OFFENSES.—The offenses that shall be treated for purposes of this section as qualifying military offenses are the following offenses, as determined by the Secretary of Defense, in consultation with the Attorney General:

"(1) Any offense under the Uniform Code of Military Justice for which a sentence of confinement for more than one year may be imposed.

"(2) Any other offense under the Uniform Code of Military Justice that is comparable to a qualifying Federal offense (as determined under section 3(d) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a(d))).".

(d) KEYBOARD SEARCHES.—Section 210304 of the DNA Identification Act of 1994 (42 U.S.C. 14132), as amended by subsection (a), is further amended by adding at the end the following new subsection:

"(e) AUTHORITY FOR KEYBOARD SEARCHES.—

"(1) IN GENERAL.—The Director shall ensure that any person who is authorized to access the index described in subsection (a) for purposes of including information on DNA identification records or DNA analyses in that index may also access that index for purposes of carrying out a one-time keyboard search on information obtained from any DNA sample lawfully collected for a criminal justice purpose except for a DNA sample voluntarily submitted solely for elimination purposes.

"(2) DEFINITION.—For purposes of paragraph (1), the term 'keyboard search' means a search under which information obtained from a DNA sample is compared with information in the index without resulting in the information obtained from a DNA sample being included in the index.

"(3) NO PREEMPTION.—This subsection shall not be construed to preempt State law.

(e) INCREASED PENALTIES FOR MISUSE OF DNA ANALYSES.—(1) Section 210305(c)(2) of the DNA Identification Act of 1994 (42 U.S.C. 14133(c)(2)) is amended by striking "$100,000" and inserting "$250,000, or imprisoned for a period of not more than one year, or both".

(2) Section 10(c) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135e(c)) is amended by striking "$100,000" and inserting "$250,000, or imprisoned for a period of not more than one year, or both".

(f) REPORT TO CONGRESS.—If the Department of Justice plans to modify or supplement the core genetic markers needed for compatibility with the CODIS system, it shall notify the Judiciary Committee of the Senate and the Judiciary Committee of the House of Representatives in writing not later than 180 days before any change is made and explain the reasons for such change. 28 USC 531 note.

SEC. 204. TOLLING OF STATUTE OF LIMITATIONS.

(a) IN GENERAL.—Chapter 213 of title 18, United States Code, is amended by adding at the end the following:

"§ 3297. Cases involving DNA evidence

"In a case in which DNA testing implicates an identified person in the commission of a felony, except for a felony offense under chapter 109A, no statute of limitations that would otherwise preclude prosecution of the offense shall preclude such prosecution until a period of time following the implication of the person by DNA testing has elapsed that is equal to the otherwise applicable limitation period.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 213 of title 18, United States Code, is amended by adding at the end the following:

"3297. Cases involving DNA evidence.".

(c) APPLICATION.—The amendments made by this section shall apply to the prosecution of any offense committed before, on, or after the date of the enactment of this section if the applicable limitation period has not yet expired. 18 USC 3297 note.

SEC. 205. LEGAL ASSISTANCE FOR VICTIMS OF VIOLENCE.

Section 1201 of the Violence Against Women Act of 2000 (42 U.S.C. 3796gg–6) is amended—

(1) in subsection (a), by inserting "dating violence," after "domestic violence,";

(2) in subsection (b)—

(A) by redesignating paragraphs (1) through (3) as paragraphs (2) through (4), respectively;

(B) by inserting before paragraph (2), as redesignated by subparagraph (A), the following:

"(1) DATING VIOLENCE.—The term 'dating violence' means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on a consideration of—

"(A) the length of the relationship;

"(B) the type of relationship; and

"(C) the frequency of interaction between the persons involved in the relationship."; and

(C) in paragraph (3), as redesignated by subparagraph (A), by inserting "dating violence," after "domestic violence,";

(3) in subsection (c)—

(A) in paragraph (1)—

(i) by inserting ", dating violence," after "between domestic violence"; and

(ii) by inserting "dating violence," after "victims of domestic violence,";

(B) in paragraph (2), by inserting "dating violence," after "domestic violence,"; and

(C) in paragraph (3), by inserting "dating violence," after "domestic violence,";

(4) in subsection (d)—

(A) in paragraph (1), by inserting ", dating violence," after "domestic violence";

(B) in paragraph (2), by inserting ", dating violence," after "domestic violence";

(C) in paragraph (3), by inserting ", dating violence," after "domestic violence"; and

(D) in paragraph (4), by inserting "dating violence," after "domestic violence,";

(5) in subsection (e), by inserting "dating violence," after "domestic violence,"; and

(6) in subsection (f)(2)(A), by inserting "dating violence," after "domestic violence,".

SEC. 206. ENSURING PRIVATE LABORATORY ASSISTANCE IN ELIMINATING DNA BACKLOG.

Section 2(d)(3) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135(d)(3)) is amended to read as follows:

"(3) USE OF VOUCHERS OR CONTRACTS FOR CERTAIN PURPOSES.—

"(A) IN GENERAL.—A grant for the purposes specified in paragraph (1), (2), or (5) of subsection (a) may be made in the form of a voucher or contract for laboratory services, even if the laboratory makes a reasonable profit for the services.

"(B) REDEMPTION.—A voucher or contract under subparagraph (A) may be redeemed at a laboratory operated on a nonprofit or for-profit basis, by a private entity that satisfies quality assurance standards and has been approved by the Attorney General.

"(C) PAYMENTS.—The Attorney General may use amounts authorized under subsection (j) to make payments to a laboratory described under subparagraph (B).".

DNA Sexual Assault Justice Act of 2004.

TITLE III—DNA SEXUAL ASSAULT JUSTICE ACT OF 2004

42 USC 13701 note.

SEC. 301. SHORT TITLE.

This title may be cited as the "DNA Sexual Assault Justice Act of 2004".

SEC. 302. ENSURING PUBLIC CRIME LABORATORY COMPLIANCE WITH FEDERAL STANDARDS.

Section 210304(b)(2) of the DNA Identification Act of 1994 (42 U.S.C. 14132(b)(2)) is amended to read as follows:

"(2) prepared by laboratories that—

Deadline.

"(A) not later than 2 years after the date of enactment of the DNA Sexual Assault Justice Act of 2004, have been accredited by a nonprofit professional association of persons

actively involved in forensic science that is nationally recognized within the forensic science community; and

"(B) undergo external audits, not less than once every 2 years, that demonstrate compliance with standards established by the Director of the Federal Bureau of Investigation; and".

SEC. 303. DNA TRAINING AND EDUCATION FOR LAW ENFORCEMENT, CORRECTIONAL PERSONNEL, AND COURT OFFICERS. 42 USC 14136.

(a) IN GENERAL.—The Attorney General shall make grants to provide training, technical assistance, education, and information relating to the identification, collection, preservation, analysis, and use of DNA samples and DNA evidence by— Grants.

(1) law enforcement personnel, including police officers and other first responders, evidence technicians, investigators, and others who collect or examine evidence of crime;

(2) court officers, including State and local prosecutors, defense lawyers, and judges;

(3) forensic science professionals; and

(4) corrections personnel, including prison and jail personnel, and probation, parole, and other officers involved in supervision.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $12,500,000 for each of fiscal years 2005 through 2009 to carry out this section.

SEC. 304. SEXUAL ASSAULT FORENSIC EXAM PROGRAM GRANTS. 42 USC 14136a.

(a) IN GENERAL.—The Attorney General shall make grants to eligible entities to provide training, technical assistance, education, equipment, and information relating to the identification, collection, preservation, analysis, and use of DNA samples and DNA evidence by medical personnel and other personnel, including doctors, medical examiners, coroners, nurses, victim service providers, and other professionals involved in treating victims of sexual assault and sexual assault examination programs, including SANE (Sexual Assault Nurse Examiner), SAFE (Sexual Assault Forensic Examiner), and SART (Sexual Assault Response Team).

(b) ELIGIBLE ENTITY.—For purposes of this section, the term "eligible entity" includes— Definition.

(1) States;

(2) units of local government; and

(3) sexual assault examination programs, including—

(A) sexual assault nurse examiner (SANE) programs;

(B) sexual assault forensic examiner (SAFE) programs;

(C) sexual assault response team (SART) programs;

(D) State sexual assault coalitions;

(E) medical personnel, including doctors, medical examiners, coroners, and nurses, involved in treating victims of sexual assault; and

(F) victim service providers involved in treating victims of sexual assault.

(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $30,000,000 for each of fiscal years 2005 through 2009 to carry out this section.

SEC. 305. DNA RESEARCH AND DEVELOPMENT. 42 USC 14136b.

(a) IMPROVING DNA TECHNOLOGY.—The Attorney General shall make grants for research and development to improve forensic Grants.

DNA technology, including increasing the identification accuracy and efficiency of DNA analysis, decreasing time and expense, and increasing portability.

Grants.

(b) DEMONSTRATION PROJECTS.—The Attorney General shall make grants to appropriate entities under which research is carried out through demonstration projects involving coordinated training and commitment of resources to law enforcement agencies and key criminal justice participants to demonstrate and evaluate the use of forensic DNA technology in conjunction with other forensic tools. The demonstration projects shall include scientific evaluation of the public safety benefits, improvements to law enforcement operations, and cost-effectiveness of increased collection and use of DNA evidence.

(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $15,000,000 for each of fiscal years 2005 through 2009 to carry out this section.

42 USC 14136c.

SEC. 306. NATIONAL FORENSIC SCIENCE COMMISSION.

(a) APPOINTMENT.—The Attorney General shall appoint a National Forensic Science Commission (in this section referred to as the "Commission"), composed of persons experienced in criminal justice issues, including persons from the forensic science and criminal justice communities, to carry out the responsibilities under subsection (b).

(b) RESPONSIBILITIES.—The Commission shall—

(1) assess the present and future resource needs of the forensic science community;

(2) make recommendations to the Attorney General for maximizing the use of forensic technologies and techniques to solve crimes and protect the public;

(3) identify potential scientific advances that may assist law enforcement in using forensic technologies and techniques to protect the public;

(4) make recommendations to the Attorney General for programs that will increase the number of qualified forensic scientists available to work in public crime laboratories;

(5) disseminate, through the National Institute of Justice, best practices concerning the collection and analyses of forensic evidence to help ensure quality and consistency in the use of forensic technologies and techniques to solve crimes and protect the public;

(6) examine additional issues pertaining to forensic science as requested by the Attorney General;

(7) examine Federal, State, and local privacy protection statutes, regulations, and practices relating to access to, or use of, stored DNA samples or DNA analyses, to determine whether such protections are sufficient;

(8) make specific recommendations to the Attorney General, as necessary, to enhance the protections described in paragraph (7) to ensure—

(A) the appropriate use and dissemination of DNA information;

(B) the accuracy, security, and confidentiality of DNA information;

(C) the timely removal and destruction of obsolete, expunged, or inaccurate DNA information; and

(D) that any other necessary measures are taken to protect privacy; and

(9) provide a forum for the exchange and dissemination of ideas and information in furtherance of the objectives described in paragraphs (1) through (8).

(c) PERSONNEL; PROCEDURES.—The Attorney General shall—

(1) designate the Chair of the Commission from among its members;

(2) designate any necessary staff to assist in carrying out the functions of the Commission; and

(3) establish procedures and guidelines for the operations of the Commission.

(d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $500,000 for each of fiscal years 2005 through 2009 to carry out this section.

SEC. 307. FBI DNA PROGRAMS.

(a) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Federal Bureau of Investigation $42,100,000 for each of fiscal years 2005 through 2009 to carry out the DNA programs and activities described under subsection (b).

(b) PROGRAMS AND ACTIVITIES.—The Federal Bureau of Investigation may use any amounts appropriated pursuant to subsection (a) for—

(1) nuclear DNA analysis;
(2) mitochondrial DNA analysis;
(3) regional mitochondrial DNA laboratories;
(4) the Combined DNA Index System;
(5) the Federal Convicted Offender DNA Program; and
(6) DNA research and development.

SEC. 308. DNA IDENTIFICATION OF MISSING PERSONS.

42 USC 14136d.

(a) IN GENERAL.—The Attorney General shall make grants to promote the use of forensic DNA technology to identify missing persons and unidentified human remains.

Grants.

(b) REQUIREMENT.—Each State or unit of local government that receives funding under this section shall be required to submit the DNA profiles of such missing persons and unidentified human remains to the National Missing Persons DNA Database of the Federal Bureau of Investigation.

(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $2,000,000 for each of fiscal years 2005 through 2009 to carry out this section.

SEC. 309. ENHANCED CRIMINAL PENALTIES FOR UNAUTHORIZED DISCLOSURE OR USE OF DNA INFORMATION.

Section 10(c) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135e(c)) is amended to read as follows:

"(c) CRIMINAL PENALTY.—A person who knowingly discloses a sample or result described in subsection (a) in any manner to any person not authorized to receive it, or obtains or uses, without authorization, such sample or result, shall be fined not more than $250,000, or imprisoned for a period of not more than one year. Each instance of disclosure, obtaining, or use shall constitute a separate offense under this subsection.".

SEC. 310. TRIBAL COALITION GRANTS.

(a) IN GENERAL.—Section 2001 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796gg) is amended by adding at the end the following:

"(d) TRIBAL COALITION GRANTS.—

"(1) PURPOSE.—The Attorney General shall award grants to tribal domestic violence and sexual assault coalitions for purposes of—

"(A) increasing awareness of domestic violence and sexual assault against American Indian and Alaska Native women;

"(B) enhancing the response to violence against American Indian and Alaska Native women at the tribal, Federal, and State levels; and

"(C) identifying and providing technical assistance to coalition membership and tribal communities to enhance access to essential services to American Indian women victimized by domestic and sexual violence.

"(2) GRANTS TO TRIBAL COALITIONS.—The Attorney General shall award grants under paragraph (1) to—

"(A) established nonprofit, nongovernmental tribal coalitions addressing domestic violence and sexual assault against American Indian and Alaska Native women; and

"(B) individuals or organizations that propose to incorporate as nonprofit, nongovernmental tribal coalitions to address domestic violence and sexual assault against American Indian and Alaska Native women.

"(3) ELIGIBILITY FOR OTHER GRANTS.—Receipt of an award under this subsection by tribal domestic violence and sexual assault coalitions shall not preclude the coalition from receiving additional grants under this title to carry out the purposes described in subsection (b).".

(b) TECHNICAL AMENDMENT.—Effective as of November 2, 2002, and as if included therein as enacted, Public Law 107–273 (116 Stat. 1789) is amended in section 402(2) by striking "sections 2006 through 2011" and inserting "sections 2007 through 2011".

42 USC 3796gg–1—3796gg–5, 3796–1 note.

(c) AMOUNTS.—Section 2007 of the Omnibus Crime Control and Safe Streets Act of 1968 (as redesignated by section 402(2) of Public Law 107–273, as amended by subsection (b)) is amended by amending subsection (b)(4) (42 U.S.C. 3796gg–1(b)(4)) to read as follows:

"(4) 1/54 shall be available for grants under section 2001(d);".

SEC. 311. EXPANSION OF PAUL COVERDELL FORENSIC SCIENCES IMPROVEMENT GRANT PROGRAM.

(a) FORENSIC BACKLOG ELIMINATION GRANTS.—Section 2804 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797m) is amended—

(1) in subsection (a)—

(A) by striking "shall use the grant to carry out" and inserting "shall use the grant to do any one or more of the following:

"(1) To carry out"; and

(B) by adding at the end the following:

"(2) To eliminate a backlog in the analysis of forensic science evidence, including firearms examination, latent prints,

toxicology, controlled substances, forensic pathology, questionable documents, and trace evidence.

"(3) To train, assist, and employ forensic laboratory personnel, as needed, to eliminate such a backlog.";

(2) in subsection (b), by striking "under this part" and inserting "for the purpose set forth in subsection (a)(1)"; and

(3) by adding at the end the following:

"(e) BACKLOG DEFINED.—For purposes of this section, a backlog in the analysis of forensic science evidence exists if such evidence—

"(1) has been stored in a laboratory, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility; and

"(2) has not been subjected to all appropriate forensic testing because of a lack of resources or personnel.".

(b) EXTERNAL AUDITS.—Section 2802 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797k) is amended—

(1) in paragraph (2), by striking "and" at the end;

(2) in paragraph (3), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

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

(c) THREE-YEAR EXTENSION OF AUTHORIZATION OF APPROPRIATIONS.—Section 1001(a)(24) of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3793(a)(24)) is amended—

(1) in subparagraph (E), by striking "and" at the end;

(2) in subparagraph (F), by striking the period at the end and inserting a semicolon; and

(3) by adding at the end the following:

"(G) $20,000,000 for fiscal year 2007;

"(H) $20,000,000 for fiscal year 2008; and

"(I) $20,000,000 for fiscal year 2009.".

(d) TECHNICAL AMENDMENT.—Section 1001(a) of such Act, as amended by subsection (c), is further amended by realigning paragraphs (24) and (25) so as to be flush with the left margin.

SEC. 312. REPORT TO CONGRESS.

(a) IN GENERAL.—Not later than 2 years after the date of enactment of this Act, the Attorney General shall submit to Congress a report on the implementation of this title and title II and the amendments made by this title and title II.

(b) CONTENTS.—The report submitted under subsection (a) shall include a description of—

(1) the progress made by Federal, State, and local entities in—

(A) collecting and entering DNA samples from offenders convicted of qualifying offenses for inclusion in the Combined DNA Index System (referred to in this subsection as "CODIS");

(B) analyzing samples from crime scenes, including evidence collected from sexual assaults and other serious

violent crimes, and entering such DNA analyses in CODIS; and

(C) increasing the capacity of forensic laboratories to conduct DNA analyses;

(2) the priorities and plan for awarding grants among eligible States and units of local government to ensure that the purposes of this title and title II are carried out;

(3) the distribution of grant amounts under this title and title II among eligible States and local governments, and whether the distribution of such funds has served the purposes of the Debbie Smith DNA Backlog Grant Program;

(4) grants awarded and the use of such grants by eligible entities for DNA training and education programs for law enforcement, correctional personnel, court officers, medical personnel, victim service providers, and other personnel authorized under sections 303 and 304;

(5) grants awarded and the use of such grants by eligible entities to conduct DNA research and development programs to improve forensic DNA technology, and implement demonstration projects under section 305;

(6) the steps taken to establish the National Forensic Science Commission, and the activities of the Commission under section 306;

(7) the use of funds by the Federal Bureau of Investigation under section 307;

(8) grants awarded and the use of such grants by eligible entities to promote the use of forensic DNA technology to identify missing persons and unidentified human remains under section 308;

(9) grants awarded and the use of such grants by eligible entities to eliminate forensic science backlogs under the amendments made by section 311;

(10) State compliance with the requirements set forth in section 313; and

(11) any other matters considered relevant by the Attorney General.

Innocence Protection Act of 2004.

TITLE IV—INNOCENCE PROTECTION ACT OF 2004

18 USC 3600 note.

SEC. 401. SHORT TITLE.

This title may be cited as the "Innocence Protection Act of 2004".

Subtitle A—Exonerating the Innocent Through DNA Testing

SEC. 411. FEDERAL POST-CONVICTION DNA TESTING.

(a) FEDERAL CRIMINAL PROCEDURE.—

(1) IN GENERAL.—Part II of title 18, United States Code, is amended by inserting after chapter 228 the following:

"CHAPTER 228A—POST-CONVICTION DNA TESTING

"§ 3600. DNA testing

"(a) IN GENERAL.—Upon a written motion by an individual under a sentence of imprisonment or death pursuant to a conviction for a Federal offense (referred to in this section as the 'applicant'), the court that entered the judgment of conviction shall order DNA testing of specific evidence if the court finds that all of the following apply: Applicability.

"(1) The applicant asserts, under penalty of perjury, that the applicant is actually innocent of—

"(A) the Federal offense for which the applicant is under a sentence of imprisonment or death; or

"(B) another Federal or State offense, if—

"(i) evidence of such offense was admitted during a Federal death sentencing hearing and exoneration of such offense would entitle the applicant to a reduced sentence or new sentencing hearing; and

"(ii) in the case of a State offense—

"(I) the applicant demonstrates that there is no adequate remedy under State law to permit DNA testing of the specified evidence relating to the State offense; and

"(II) to the extent available, the applicant has exhausted all remedies available under State law for requesting DNA testing of specified evidence relating to the State offense.

"(2) The specific evidence to be tested was secured in relation to the investigation or prosecution of the Federal or State offense referenced in the applicant's assertion under paragraph (1).

"(3) The specific evidence to be tested—

"(A) was not previously subjected to DNA testing and the applicant did not—

"(i) knowingly and voluntarily waive the right to request DNA testing of that evidence in a court proceeding after the date of enactment of the Innocence Protection Act of 2004; or

"(ii) knowingly fail to request DNA testing of that evidence in a prior motion for postconviction DNA testing; or

"(B) was previously subjected to DNA testing and the applicant is requesting DNA testing using a new method or technology that is substantially more probative than the prior DNA testing.

"(4) The specific evidence to be tested is in the possession of the Government and has been subject to a chain of custody and retained under conditions sufficient to ensure that such evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed DNA testing.

"(5) The proposed DNA testing is reasonable in scope, uses scientifically sound methods, and is consistent with accepted forensic practices.

"(6) The applicant identifies a theory of defense that—

"(A) is not inconsistent with an affirmative defense presented at trial; and

"(B) would establish the actual innocence of the applicant of the Federal or State offense referenced in the applicant's assertion under paragraph (1).

"(7) If the applicant was convicted following a trial, the identity of the perpetrator was at issue in the trial.

"(8) The proposed DNA testing of the specific evidence may produce new material evidence that would—

"(A) support the theory of defense referenced in paragraph (6); and

"(B) raise a reasonable probability that the applicant did not commit the offense.

"(9) The applicant certifies that the applicant will provide a DNA sample for purposes of comparison.

"(10) The motion is made in a timely fashion, subject to the following conditions:

"(A) There shall be a rebuttable presumption of timeliness if the motion is made within 60 months of enactment of the Justice For All Act of 2004 or within 36 months of conviction, whichever comes later. Such presumption may be rebutted upon a showing—

"(i) that the applicant's motion for a DNA test is based solely upon information used in a previously denied motion; or

"(ii) of clear and convincing evidence that the applicant's filing is done solely to cause delay or harass.

"(B) There shall be a rebuttable presumption against timeliness for any motion not satisfying subparagraph (A) above. Such presumption may be rebutted upon the court's finding—

"(i) that the applicant was or is incompetent and such incompetence substantially contributed to the delay in the applicant's motion for a DNA test;

"(ii) the evidence to be tested is newly discovered DNA evidence;

"(iii) that the applicant's motion is not based solely upon the applicant's own assertion of innocence and, after considering all relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice; or

"(iv) upon good cause shown.

"(C) For purposes of this paragraph—

"(i) the term 'incompetence' has the meaning as defined in section 4241 of title 18, United States Code;

"(ii) the term 'manifest' means that which is unmistakable, clear, plain, or indisputable and requires that the opposite conclusion be clearly evident.

"(b) NOTICE TO THE GOVERNMENT; PRESERVATION ORDER; APPOINTMENT OF COUNSEL.—

"(1) NOTICE.—Upon the receipt of a motion filed under subsection (a), the court shall—

"(A) notify the Government; and

"(B) allow the Government a reasonable time period to respond to the motion.

"(2) PRESERVATION ORDER.—To the extent necessary to carry out proceedings under this section, the court shall direct the Government to preserve the specific evidence relating to a motion under subsection (a).

"(3) APPOINTMENT OF COUNSEL.—The court may appoint counsel for an indigent applicant under this section in the same manner as in a proceeding under section 3006A(a)(2)(B).

"(c) TESTING PROCEDURES.—

"(1) IN GENERAL.—The court shall direct that any DNA testing ordered under this section be carried out by the Federal Bureau of Investigation.

"(2) EXCEPTION.—Notwithstanding paragraph (1), the court may order DNA testing by another qualified laboratory if the court makes all necessary orders to ensure the integrity of the specific evidence and the reliability of the testing process and test results.

"(3) COSTS.—The costs of any DNA testing ordered under this section shall be paid—

"(A) by the applicant; or

"(B) in the case of an applicant who is indigent, by the Government.

"(d) TIME LIMITATION IN CAPITAL CASES.—In any case in which the applicant is sentenced to death— Deadlines.

"(1) any DNA testing ordered under this section shall be completed not later than 60 days after the date on which the Government responds to the motion filed under subsection (a); and

"(2) not later than 120 days after the date on which the DNA testing ordered under this section is completed, the court shall order any post-testing procedures under subsection (f) or (g), as appropriate.

"(e) REPORTING OF TEST RESULTS.—

"(1) IN GENERAL.—The results of any DNA testing ordered under this section shall be simultaneously disclosed to the court, the applicant, and the Government.

"(2) NDIS.—The Government shall submit any test results relating to the DNA of the applicant to the National DNA Index System (referred to in this subsection as 'NDIS').

"(3) RETENTION OF DNA SAMPLE.—

"(A) ENTRY INTO NDIS.—If the DNA test results obtained under this section are inconclusive or show that the applicant was the source of the DNA evidence, the DNA sample of the applicant may be retained in NDIS.

"(B) MATCH WITH OTHER OFFENSE.—If the DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, and a comparison of the DNA sample of the applicant results in a match between the DNA sample of the applicant and another offense, the Attorney General shall notify the appropriate agency and preserve the DNA sample of the applicant.

"(C) NO MATCH.—If the DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, and a comparison of the DNA sample of the applicant does not result in a match between the DNA sample of the applicant and another offense, the Attorney General shall destroy the DNA sample of the applicant and ensure that such information is not retained

in NDIS if there is no other legal authority to retain the DNA sample of the applicant in NDIS.

"(f) POST-TESTING PROCEDURES; INCONCLUSIVE AND INCULPATORY RESULTS.—

"(1) INCONCLUSIVE RESULTS.—If DNA test results obtained under this section are inconclusive, the court may order further testing, if appropriate, or may deny the applicant relief.

"(2) INCULPATORY RESULTS.—If DNA test results obtained under this section show that the applicant was the source of the DNA evidence, the court shall—

"(A) deny the applicant relief; and

"(B) on motion of the Government—

"(i) make a determination whether the applicant's assertion of actual innocence was false, and, if the court makes such a finding, the court may hold the applicant in contempt;

"(ii) assess against the applicant the cost of any DNA testing carried out under this section;

"(iii) forward the finding to the Director of the Bureau of Prisons, who, upon receipt of such a finding, may deny, wholly or in part, the good conduct credit authorized under section 3632 on the basis of that finding;

"(iv) if the applicant is subject to the jurisdiction of the United States Parole Commission, forward the finding to the Commission so that the Commission may deny parole on the basis of that finding; and

"(v) if the DNA test results relate to a State offense, forward the finding to any appropriate State official.

"(3) SENTENCE.—In any prosecution of an applicant under chapter 79 for false assertions or other conduct in proceedings under this section, the court, upon conviction of the applicant, shall sentence the applicant to a term of imprisonment of not less than 3 years, which shall run consecutively to any other term of imprisonment the applicant is serving.

"(g) POST-TESTING PROCEDURES; MOTION FOR NEW TRIAL OR RESENTENCING.—

"(1) IN GENERAL.—Notwithstanding any law that would bar a motion under this paragraph as untimely, if DNA test results obtained under this section exclude the applicant as the source of the DNA evidence, the applicant may file a motion for a new trial or resentencing, as appropriate. The court shall establish a reasonable schedule for the applicant to file such a motion and for the Government to respond to the motion.

"(2) STANDARD FOR GRANTING MOTION FOR NEW TRIAL OR RESENTENCING.—The court shall grant the motion of the applicant for a new trial or resentencing, as appropriate, if the DNA test results, when considered with all other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal of—

"(A) in the case of a motion for a new trial, the Federal offense for which the applicant is under a sentence of imprisonment or death; and

"(B) in the case of a motion for resentencing, another Federal or State offense, if evidence of such offense was admitted during a Federal death sentencing hearing and exoneration of such offense would entitle the applicant to a reduced sentence or a new sentencing proceeding.

"(h) OTHER LAWS UNAFFECTED.—

"(1) POST-CONVICTION RELIEF.—Nothing in this section shall affect the circumstances under which a person may obtain DNA testing or post-conviction relief under any other law.

"(2) HABEAS CORPUS.—Nothing in this section shall provide a basis for relief in any Federal habeas corpus proceeding.

"(3) NOT A MOTION UNDER SECTION 2255.—A motion under this section shall not be considered to be a motion under section 2255 for purposes of determining whether the motion or any other motion is a second or successive motion under section 2255.

"§ 3600A. Preservation of biological evidence

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

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

"(1) a sexual assault forensic examination kit; or

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

"(c) APPLICABILITY.—Subsection (a) shall not apply if—

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

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

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

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

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

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

"(d) OTHER PRESERVATION REQUIREMENT.—Nothing in this section shall preempt or supersede any statute, regulation, court order, or other provision of law that may require evidence, including biological evidence, to be preserved.

"(e) REGULATIONS.—Not later than 180 days after the date of enactment of the Innocence Protection Act of 2004, the Attorney General shall promulgate regulations to implement and enforce

Deadline.

this section, including appropriate disciplinary sanctions to ensure that employees comply with such regulations.

"(f) CRIMINAL PENALTY.—Whoever knowingly and intentionally destroys, alters, or tampers with biological evidence that is required to be preserved under this section with the intent to prevent that evidence from being subjected to DNA testing or prevent the production or use of that evidence in an official proceeding, shall be fined under this title, imprisoned for not more than 5 years, or both.

"(g) HABEAS CORPUS.—Nothing in this section shall provide a basis for relief in any Federal habeas corpus proceeding.".

(2) CLERICAL AMENDMENT.—The chapter analysis for part II of title 18, United States Code, is amended by inserting after the item relating to chapter 228 the following:

"228A. Post-conviction DNA testing ..... 3600".

18 USC 3600 note.

(b) SYSTEM FOR REPORTING MOTIONS.—

(1) ESTABLISHMENT.—The Attorney General shall establish a system for reporting and tracking motions filed in accordance with section 3600 of title 18, United States Code.

(2) OPERATION.—In operating the system established under paragraph (1), the Federal courts shall provide to the Attorney General any requested assistance in operating such a system and in ensuring the accuracy and completeness of information included in that system.

(3) REPORT.—Not later than 2 years after the date of enactment of this Act, the Attorney General shall submit a report to Congress that contains—

(A) a list of motions filed under section 3600 of title 18, United States Code, as added by this title;

(B) whether DNA testing was ordered pursuant to such a motion;

(C) whether the applicant obtained relief on the basis of DNA test results; and

(D) whether further proceedings occurred following a granting of relief and the outcome of such proceedings.

(4) ADDITIONAL INFORMATION.—The report required to be submitted under paragraph (3) may include any other information the Attorney General determines to be relevant in assessing the operation, utility, or costs of section 3600 of title 18, United States Code, as added by this title, and any recommendations the Attorney General may have relating to future legislative action concerning that section.

18 USC 3600 note.

(c) EFFECTIVE DATE; APPLICABILITY.—This section and the amendments made by this section shall take effect on the date of enactment of this Act and shall apply with respect to any offense committed, and to any judgment of conviction entered, before, on, or after that date of enactment.

42 USC 14136e.

SEC. 412. KIRK BLOODSWORTH POST-CONVICTION DNA TESTING GRANT PROGRAM.

(a) IN GENERAL.—The Attorney General shall establish the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program to award grants to States to help defray the costs of post-conviction DNA testing.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $5,000,000 for each of fiscal years 2005 through 2009 to carry out this section.

(c) STATE DEFINED.—For purposes of this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

SEC. 413. INCENTIVE GRANTS TO STATES TO ENSURE CONSIDERATION OF CLAIMS OF ACTUAL INNOCENCE. 42 USC 14136 note.

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

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

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

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

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

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

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

(i) under a State statute or a State or local rule, regulation, or practice, enacted or adopted before the date of enactment of this Act (or extended or renewed after such date), in a manner that ensures that reasonable measures are taken by all jurisdictions within the State to preserve such evidence; or

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

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

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

Subtitle B—Improving the Quality of Representation in State Capital Cases

42 USC 14163.

SEC. 421. CAPITAL REPRESENTATION IMPROVEMENT GRANTS.

(a) IN GENERAL.—The Attorney General shall award grants to States for the purpose of improving the quality of legal representation provided to indigent defendants in State capital cases.

(b) DEFINED TERM.—In this section, the term "legal representation" means legal counsel and investigative, expert, and other services necessary for competent representation.

(c) USE OF FUNDS.—Grants awarded under subsection (a)—

(1) shall be used to establish, implement, or improve an effective system for providing competent legal representation to—

(A) indigents charged with an offense subject to capital punishment;

(B) indigents who have been sentenced to death and who seek appellate or collateral relief in State court; and

(C) indigents who have been sentenced to death and who seek review in the Supreme Court of the United States; and

(2) shall not be used to fund, directly or indirectly, representation in specific capital cases.

(d) APPORTIONMENT OF FUNDS.—

(1) IN GENERAL.—Of the funds awarded under subsection (a)—

(A) not less than 75 percent shall be used to carry out the purpose described in subsection (c)(1)(A); and

(B) not more than 25 percent shall be used to carry out the purpose described in subsection (c)(1)(B).

(2) WAIVER.—The Attorney General may waive the requirement under this subsection for good cause shown.

(e) EFFECTIVE SYSTEM.—As used in subsection (c)(1), an effective system for providing competent legal representation is a system that—

(1) invests the responsibility for appointing qualified attorneys to represent indigents in capital cases—

(A) in a public defender program that relies on staff attorneys, members of the private bar, or both, to provide representation in capital cases;

(B) in an entity established by statute or by the highest State court with jurisdiction in criminal cases, which is composed of individuals with demonstrated knowledge and expertise in capital cases, except for individuals currently employed as prosecutors; or

(C) pursuant to a statutory procedure enacted before the date of the enactment of this Act under which the trial judge is required to appoint qualified attorneys from a roster maintained by a State or regional selection committee or similar entity; and

(2) requires the program described in paragraph (1)(A), the entity described in paragraph (1)(B), or an appropriate entity designated pursuant to the statutory procedure described in paragraph (1)(C), as applicable, to—

(A) establish qualifications for attorneys who may be appointed to represent indigents in capital cases;

(B) establish and maintain a roster of qualified attorneys;

(C) except in the case of a selection committee or similar entity described in paragraph (1)(C), assign 2 attorneys from the roster to represent an indigent in a capital case, or provide the trial judge a list of not more than 2 pairs of attorneys from the roster, from which 1 pair shall be assigned, provided that, in any case in which the State elects not to seek the death penalty, a court may find, subject to any requirement of State law, that a second attorney need not remain assigned to represent the indigent to ensure competent representation;

(D) conduct, sponsor, or approve specialized training programs for attorneys representing defendants in capital cases;

(E)(i) monitor the performance of attorneys who are appointed and their attendance at training programs; and

"(ii) remove from the roster attorneys who—

"(I) fail to deliver effective representation or engage in unethical conduct;

"(II) fail to comply with such requirements as such program, entity, or selection committee or similar entity may establish regarding participation in training programs; or

"(III) during the past 5 years, have been sanctioned by a bar association or court for ethical misconduct relating to the attorney's conduct as defense counsel in a criminal case in Federal or State court; and

(F) ensure funding for the cost of competent legal representation by the defense team and outside experts selected by counsel, who shall be compensated—

(i) in the case of a State that employs a statutory procedure described in paragraph (1)(C), in accordance with the requirements of that statutory procedure; and

(ii) in all other cases, as follows:

(I) Attorneys employed by a public defender program shall be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.

(II) Appointed attorneys shall be compensated for actual time and service, computed on an hourly basis and at a reasonable hourly rate in light of the qualifications and experience of the attorney and the local market for legal representation in cases reflecting the complexity and responsibility of capital cases.

(III) Non-attorney members of the defense team, including investigators, mitigation specialists, and experts, shall be compensated at a rate that reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.

(IV) Attorney and non-attorney members of the defense team shall be reimbursed for reasonable incidental expenses.

42 USC 14163a.

SEC. 422. CAPITAL PROSECUTION IMPROVEMENT GRANTS.

(a) IN GENERAL.—The Attorney General shall award grants to States for the purpose of enhancing the ability of prosecutors to effectively represent the public in State capital cases.

(b) USE OF FUNDS.—

(1) PERMITTED USES.—Grants awarded under subsection (a) shall be used for one or more of the following:

(A) To design and implement training programs for State and local prosecutors to ensure effective representation in State capital cases.

(B) To develop and implement appropriate standards and qualifications for State and local prosecutors who litigate State capital cases.

(C) To assess the performance of State and local prosecutors who litigate State capital cases, provided that such assessment shall not include participation by the assessor in the trial of any specific capital case.

(D) To identify and implement any potential legal reforms that may be appropriate to minimize the potential for error in the trial of capital cases.

(E) To establish a program under which State and local prosecutors conduct a systematic review of cases in which a death sentence was imposed in order to identify cases in which post-conviction DNA testing may be appropriate.

(F) To provide support and assistance to the families of murder victims.

(2) PROHIBITED USE.—Grants awarded under subsection (a) shall not be used to fund, directly or indirectly, the prosecution of specific capital cases.

42 USC 14163b.

SEC. 423. APPLICATIONS.

Procedures.

(a) IN GENERAL.—The Attorney General shall establish a process through which a State may apply for a grant under this subtitle.

(b) APPLICATION.—

(1) IN GENERAL.—A State desiring a grant under this subtitle shall submit an application to the Attorney General at such time, in such manner, and containing such information as the Attorney General may reasonably require.

(2) CONTENTS.—Each application submitted under paragraph (1) shall contain—

Certification.

(A) a certification by an appropriate officer of the State that the State authorizes capital punishment under its laws and conducts, or will conduct, prosecutions in which capital punishment is sought;

(B) a description of the communities to be served by the grant, including the nature of existing capital defender services and capital prosecution programs within such communities;

(C) a long-term statewide strategy and detailed implementation plan that—

(i) reflects consultation with the judiciary, the organized bar, and State and local prosecutor and defender organizations; and

(ii) establishes as a priority improvement in the quality of trial-level representation of indigents

charged with capital crimes and trial-level prosecution of capital crimes;

(D) in the case of a State that employs a statutory procedure described in section 421(e)(1)(C), a certification by an appropriate officer of the State that the State is in substantial compliance with the requirements of the applicable State statute; and

(E) assurances that Federal funds received under this subtitle shall be—

(i) used to supplement and not supplant non-Federal funds that would otherwise be available for activities funded under this subtitle; and

(ii) allocated in accordance with section 426(b).

SEC. 424. STATE REPORTS. 42 USC 14163c.

(a) IN GENERAL.—Each State receiving funds under this subtitle shall submit an annual report to the Attorney General that—

(1) identifies the activities carried out with such funds; and

(2) explains how each activity complies with the terms and conditions of the grant.

(b) CAPITAL REPRESENTATION IMPROVEMENT GRANTS.—With respect to the funds provided under section 421, a report under subsection (a) shall include—

(1) an accounting of all amounts expended;

(2) an explanation of the means by which the State—

(A) invests the responsibility for identifying and appointing qualified attorneys to represent indigents in capital cases in a program described in section 421(e)(1)(A), an entity described in section 421(e)(1)(B), or a selection committee or similar entity described in section 421(e)(1)(C); and

(B) requires such program, entity, or selection committee or similar entity, or other appropriate entity designated pursuant to the statutory procedure described in section 421(e)(1)(C), to—

(i) establish qualifications for attorneys who may be appointed to represent indigents in capital cases in accordance with section 421(e)(2)(A);

(ii) establish and maintain a roster of qualified attorneys in accordance with section 421(e)(2)(B);

(iii) assign attorneys from the roster in accordance with section 421(e)(2)(C);

(iv) conduct, sponsor, or approve specialized training programs for attorneys representing defendants in capital cases in accordance with section 421(e)(2)(D);

(v) monitor the performance and training program attendance of appointed attorneys, and remove from the roster attorneys who fail to deliver effective representation or fail to comply with such requirements as such program, entity, or selection committee or similar entity may establish regarding participation in training programs, in accordance with section 421(e)(2)(E); and

(vi) ensure funding for the cost of competent legal representation by the defense team and outside experts

selected by counsel, in accordance with section 421(e)(2)(F), including a statement setting forth—

(I) if the State employs a public defender program under section 421(e)(1)(A), the salaries received by the attorneys employed by such program and the salaries received by attorneys in the prosecutor's office in the jurisdiction;

(II) if the State employs appointed attorneys under section 421(e)(1)(B), the hourly fees received by such attorneys for actual time and service and the basis on which the hourly rate was calculated;

(III) the amounts paid to non-attorney members of the defense team, and the basis on which such amounts were determined; and

(IV) the amounts for which attorney and non-attorney members of the defense team were reimbursed for reasonable incidental expenses;

(3) in the case of a State that employs a statutory procedure described in section 421(e)(1)(C), an assessment of the extent to which the State is in compliance with the requirements of the applicable State statute; and

(4) a statement confirming that the funds have not been used to fund representation in specific capital cases or to supplant non-Federal funds.

(c) CAPITAL PROSECUTION IMPROVEMENT GRANTS.—With respect to the funds provided under section 422, a report under subsection (a) shall include—

(1) an accounting of all amounts expended;

(2) a description of the means by which the State has—

(A) designed and established training programs for State and local prosecutors to ensure effective representation in State capital cases in accordance with section 422(b)(1)(A);

(B) developed and implemented appropriate standards and qualifications for State and local prosecutors who litigate State capital cases in accordance with section 422(b)(1)(B);

(C) assessed the performance of State and local prosecutors who litigate State capital cases in accordance with section 422(b)(1)(C);

(D) identified and implemented any potential legal reforms that may be appropriate to minimize the potential for error in the trial of capital cases in accordance with section 422(b)(1)(D);

(E) established a program under which State and local prosecutors conduct a systematic review of cases in which a death sentence was imposed in order to identify cases in which post-conviction DNA testing may be appropriate in accordance with section 422(b)(1)(E); and

(F) provided support and assistance to the families of murder victims; and

(3) a statement confirming that the funds have not been used to fund the prosecution of specific capital cases or to supplant non-Federal funds.

(d) PUBLIC DISCLOSURE OF ANNUAL STATE REPORTS.—The annual reports to the Attorney General submitted by any State under this section shall be made available to the public.