

## § 28.24

possible types of organic matter, but rather refers to organic matter that may derive from the body of a perpetrator of the crime, and hence might be capable of shedding light on a defendant's guilt or innocence by including or excluding the defendant as the source of its DNA.

*Example 1.* In a murder case in which the victim struggled with the killer, scrapings of skin tissue or blood taken from under the victim's fingernails would constitute biological material in the sense of section 3600A(b)(2), and would be subject to section 3600A's requirement to preserve biological evidence, assuming satisfaction of the statute's other conditions. Such material, which apparently derives from the perpetrator of the crime, could potentially shed light on guilt or innocence through DNA testing under 18 U.S.C. 3600 to determine whether a defendant was the source of this material.

*Example 2.* Biological material in the sense of section 3600A(b)(2) would not include the body of a murder victim who was shot from a distance, the carcasses of cattle in a meat truck secured in an investigation of the truck's hijacking, a quantity of marijuana seized in a drug trafficking investigation, or articles made from wood or from wool or cotton fiber. While such items of evidence constitute organic matter in a broader sense, they are not biological material within the scope of section 3600A(b)(2), because they do not derive from the body of a perpetrator of the crime, and hence could not shed light on a defendant's guilt or innocence through DNA testing under 18 U.S.C. 3600 to determine whether the defendant is the source of the evidence.

## § 28.24 Exceptions based on the results of judicial proceedings.

Subsection (c) of section 3600A makes the biological evidence preservation requirement inapplicable in two circumstances relating to the results of judicial proceedings:

(a) *Judicial denial of DNA testing.* Section 3600A(c)(1) exempts situations in which a court has denied a motion for DNA testing under 18 U.S.C. 3600 and no appeal is pending.

(b) *Inclusion of defendant as source.* Section 3600A(c)(5) exempts situations in which there has been DNA testing under 18 U.S.C. 3600 and the results included the defendant as the source of the evidence.

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## § 28.25 Exceptions based on a defendant's conduct.

Subsection (c) of section 3600A makes the biological evidence preservation requirement inapplicable in two circumstances relating to action (or inaction) by the defendant:

(a) *Waiver by defendant.* Section 3600A(c)(2) makes the biological evidence preservation requirement inapplicable if the defendant knowingly and voluntarily waived DNA testing in a court proceeding conducted after the date of enactment, *i.e.*, after October 30, 2004. Hence, for example, if a defendant waives DNA testing in the context of a plea agreement, in a pretrial colloquy with the court, in the course of discovery in pretrial proceedings, or in a postconviction proceeding, and the proceeding in which the waiver occurs takes place after October 30, 2004, the biological evidence preservation requirement of section 3600A does not apply.

(b) *Notice to defendant.* (1) Section 3600A(c)(3) makes the biological evidence preservation requirement inapplicable if the defendant is notified that the biological evidence may be destroyed "after a conviction becomes final and the defendant has exhausted all opportunities for direct review of the conviction," and "the defendant does not file a motion under section 3600 within 180 days of receipt of the notice."

(2) Effective notice concerning the possible destruction of biological evidence for purposes of section 3600A(c)(3) cannot be given if the case is pending on direct review of the conviction before a court of appeals or the Supreme Court, if time remains for the defendant to file a notice of appeal from the judgment of conviction in the court of appeals, or if time remains for the defendant to file a petition for certiorari to the Supreme Court following the court of appeals' determination of an appeal of the conviction.

(3) Once direct review has been completed, or the time for seeking direct review has expired, section 3600A(c)(3) allows notice to the defendant that biological evidence may be destroyed. The biological evidence preservation requirement of section 3600A thereafter does not apply, unless the defendant

files a motion under 18 U.S.C. 3600 within 180 days of receipt of the notice. Notice to a defendant that biological evidence may be destroyed may be provided by certified mail, and the Federal Bureau of Prisons shall create a record concerning the delivery of such mail to an inmate. To determine whether a defendant has filed a motion under 18 U.S.C. 3600 within 180 days of receipt of such a notice, the agency providing the notice may obtain confirmation of delivery and the date of delivery by inquiry with the Federal Bureau of Prisons, and may ascertain whether the defendant has filed a motion under 18 U.S.C. 3600 within 180 days of that date by checking the records of the district court which entered the judgment of conviction of the defendant for the offense or asking the United States Attorney's office in that district.

**§ 28.26 Exceptions based on the nature of the evidence.**

Subsection (c)(4) of section 3600A provides that the section's biological evidence preservation requirement does not apply if "the evidence must be returned to its rightful owner, or is of such a size, bulk, or physical character as to render retention impracticable." This exception is subject to the condition that the Government must "take[] reasonable measures to remove and preserve portions of the material evidence sufficient to permit future DNA testing."

(a) *Evidence not retained beyond the investigative stage.* Section 3600A(c)(4) has no application if items of the sort it describes—*e.g.*, items that must be returned to the rightful owner, or items that are so large that their retention is impracticable—are not kept until the time when a defendant is convicted and sentenced to imprisonment. Investigative agents may take samples from such items during the investigative stage of the case, in accordance with their judgment about what is needed for purposes of DNA testing or other evidentiary use, or may conclude that the nature of the items does not warrant taking such samples, and the items themselves may then be returned to the owners or otherwise disposed of prior to the trial, conviction, or sentencing of any defendant. In such

cases, section 3600A is inapplicable, because its evidence preservation requirement does not apply at all until a defendant is sentenced to imprisonment, as noted in § 28.22(b)(1).

(b) *Evidence not constituting biological material.* It is rarely the case that a bulky item of the sort described in section 3600A(c)(4), or a large part of such an item, constitutes biological evidence as defined in section 3600A(b). If such an item is not biological evidence in the relevant sense, it is outside the scope of section 3600A. For example, the evidence secured in the investigation of a bank robbery may include a stolen car that was used in the getaway, and there may be some item in the car containing biological material that derives from a perpetrator of the crime, such as saliva on a discarded cigarette butt. Even if the vehicle is kept until a defendant is sentenced to imprisonment, section 3600A's preservation requirement would not apply to the vehicle as such, because the vehicle is not biological material. It would be sufficient for compliance with section 3600A to preserve the particular items in the vehicle that contain identified biological material or portions of them that contain the biological material.

(c) *Preservation of portions sufficient for DNA testing.* If evidence described in section 3600A(c)(4) is not otherwise exempt from the preservation requirement of section 3600A, and section 3600A(c)(4) is relied on in disposing of such evidence, reasonable measures must be taken to preserve portions of the evidence sufficient to permit future DNA testing. For example, considering a stolen car used in a bank robbery, it may be the case that one of the robbers was shot during the getaway and bled all over the interior of the car. In such a case, if the car is kept until a defendant is sentenced to imprisonment for the crime, there would be extensive biological material in the car that would potentially be subject to section 3600A's requirement to preserve biological evidence. Moreover, the biological material in question could not be fully preserved without retaining the whole car or removing and retaining large amounts of matter from the interior of the car. Section 3600A(c)(4) would be relevant in such a case, given