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The U.S. Department of Justice, Office of Justice Programs (OJP), National Institute of Justice is seeking applications for funding under the Postconviction DNA Testing Assistance Program. This program furthers the Department's mission by offering assistance to States to help defray the costs associated with postconviction DNA testing of forcible rape, murder, and nonnegligent manslaughter cases where actual innocence might be demonstrated.

# **Solicitation: Postconviction DNA Testing Assistance Program**

## **Eligibility**

(See "Eligibility," page 4)

## **Deadline**

All applications are due **March 24, 2008, 11:59 p.m. eastern time.**  
(Certifications are due **April 21, 2008, 11:59 p.m. eastern time.**)

## **Contact Information**

For assistance with the requirements of this solicitation, contact Charles Heurich at 202-616-9264 or [Charles.Heurich@usdoj.gov](mailto:Charles.Heurich@usdoj.gov).

This application must be submitted through Grants.gov. For technical assistance with submitting the application, call the Grants.gov Customer Support Hotline at 1-800-518-4726.

**Grants.gov Funding Opportunity No. 2008-NIJ-1775**

**SL# 000833**

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# Postconviction DNA Testing Assistance Program CFDA No. 16.743

## Overview

The National Institute of Justice (NIJ) is the research, development, and evaluation agency of the U.S. Department of Justice (DOJ) and a component of the Office of Justice Programs (OJP). NIJ provides objective, independent, evidence-based knowledge and tools to enhance the administration of justice and public safety. NIJ solicits proposals to inform its search for the knowledge and tools to guide policy and practice.

NIJ is seeking applications from States wishing to receive funding to help defray the costs associated with postconviction DNA testing of forcible rape, murder, and nonnegligent manslaughter cases in which actual innocence might be demonstrated. Funds may be used to review such postconviction cases and to locate and analyze biological evidence associated with these cases.

Postconviction DNA testing has received considerable attention in recent years. Since the advent of forensic DNA analysis, a number of people convicted of crimes have been subsequently exonerated through DNA analysis of crime scene evidence that was not tested at the time of trial. Additionally, newer technologies have substantially increased the successful DNA analysis of aged, degraded, limited, or otherwise compromised biological evidence. As a result, crime scene samples once thought to be unsuitable for testing in the past may now yield DNA profiles. Moreover, samples that previously generated inconclusive DNA results may now be amenable to reanalysis using newer methods. The President's DNA Initiative, *Advancing Justice Through DNA Technology*, supports funding to help defray costs of appropriate postconviction DNA testing.

## Deadline: Registration

Registering with Grants.gov is a one-time process; however, if you are a first-time registrant it could take up to several weeks to have your registration validated and confirmed and to receive your user password. Start the registration process early to prevent delays that may cause you to miss the application deadline. You must complete these three steps before you are able to register: 1) Register with Central Contractor Registry (CCR), 2) Register yourself as an Authorized Organization Representative (AOR), and 3) Be authorized as an AOR by your organization. For more information, visit <http://www.grants.gov>. **Note: Your CCR Registration must be renewed once a year. Failure to renew your CCR registration may prohibit submission of a grant application through Grants.gov.**

## Deadline: Application

The due date for applying for funding under this announcement is **March 24, 2008, 11:59 p.m. eastern time**. The certification is due **April 21, 2008, 11:59 p.m. eastern time**.

## Eligibility

States<sup>1</sup> may apply for funding under this solicitation. To be eligible for an award, a State must submit an express certification from the chief legal officer of the State (typically the Attorney General) that the State—

1. Provides postconviction DNA testing of specified biological evidence under a State statute, or under State rules, regulations, or practices, to persons convicted after trial and under a sentence of imprisonment or death for a State offense of forcible rape, murder, or nonnegligent manslaughter, in a manner intended to ensure a reasonable process for resolving claims of actual innocence; and
2. Preserves biological evidence secured in relation to the investigation or prosecution of a State offense of forcible rape, murder, or nonnegligent manslaughter under a State statute, local ordinances, or State or local rules, regulations, or practices, in a manner intended to ensure that reasonable measures are taken by all jurisdictions within the State to preserve such evidence.

Any certification that is submitted must be personally executed by the chief legal officer of the State after a determination that the certification properly can be made. To establish eligibility, the certification must be received by NIJ **no later than April 21, 2008, 11:59 p.m. eastern time** for inclusion as part of the grant application. See also “What an Application Must Include,” below, and appendix I, which includes a template for the certification.

**NOTE:** As indicated earlier, postconviction DNA testing has received considerable attention in recent years. States are encouraged to review the provisions of section 413 of the Justice for All Act of 2004 (Public Law 108–405) which, although not applicable to awards under this FY 2008 solicitation, may apply to future solicitations related to post-conviction DNA testing assistance. (A copy of section 413 appears in appendix II, along with copies of 18 U.S.C. §§ 3600(a) and 3600A, which are referenced therein.)

Applications for funding **MUST** be submitted by the State Administering Agency (SAA) listed on the OJP Web site at <http://www.ojp.usdoj.gov/saa/>. (Other interested State agencies or departments must coordinate with their respective SAAs.) Each applicant must satisfy the eligibility requirements outlined above, the application requirements outlined in this announcement, the general requirements for NIJ and OJP grants, and all other applicable legal requirements.

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<sup>1</sup>For purposes of this solicitation, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

# Specific Information—Postconviction DNA Testing Assistance Program

## A. Award Purpose

Funds are to be used by States to help defray the costs of postconviction DNA testing. Specifically, funding may be used to review postconviction cases of forcible rape, murder, and nonnegligent manslaughter, and to locate and analyze biological evidence samples associated with these cases.

For purposes of this announcement—

"Case review" means review of files or documentation of postconviction cases of forcible rape, murder, and non-negligent manslaughter by appropriate persons such as prosecutors, public defenders, law enforcement personnel, and medical examiners, in order to determine whether biological evidence may exist that might (through DNA analysis) demonstrate actual innocence.

"Locate evidence" means seek to locate, following a case review, biological evidence that (through DNA analysis) might demonstrate actual innocence, through activities such as the searching of files, storage facilities, and evidence rooms.

"DNA analysis of biological evidence" includes the handling, screening, and DNA analysis of biological evidence located in connection with a case review.

All DNA analyses conducted using funding from this program must be performed by a laboratory (government-owned or fee-for-service) that is accredited and currently undergoes external audits not less than once every 2 years that demonstrate compliance with the DNA Quality Assurance Standards established by the Director of the FBI.

Each DNA analysis conducted under this program must be maintained pursuant to all applicable Federal privacy requirements.

## B. Award Period

In general, NIJ will limit its grants under this program to a maximum period of 18 months after the start of the award.

## C. Expected Results and Outcomes

The result of receiving Postconviction DNA Testing Assistance funds should be the:

1. Review of appropriate postconviction cases in which DNA testing could prove actual innocence of a person convicted of forcible rape, murder, or nonnegligent manslaughter.
2. Location of biological evidence associated with such postconviction cases.
3. DNA analysis of appropriate biological evidence.

Accordingly, awardees must submit measurable data in their progress reports detailing the number and types of cases reviewed, the number of cases in which biological

evidence still existed, the number of cases subjected to DNA analysis, and the number of cases which yielded DNA profiles.

#### **D. Permissible Uses of Funds**

The following types of expenditures from awards under this program may be permitted:

1. **Supplies.** Funds may be used to acquire laboratory supplies for DNA analysis of biological evidence.
2. **Overtime.** Funds may be used for overtime for people directly engaged in case review, location of evidence, or DNA analysis of biological evidence. Any payments for overtime must be in accordance with the applicable provisions of the OJP Financial Guide, available at <http://www.ojp.usdoj.gov/financialguide/>.
3. **Consultant and Contractor Services.** Funds may be used to hire consultants and/or temporary contract staff to conduct case reviews, locate evidence, or conduct DNA analysis of biological evidence. Funds may also be used for contracts with accredited fee-for-service vendors to conduct DNA analysis of biological evidence.
4. **Computer Equipment.** Funds may be used to upgrade, replace, lease, or purchase computer hardware or software that will be used exclusively for case review, location of evidence, or DNA analysis of biological evidence.
5. **Salary and Benefits of Additional Employees.** Funds may be used for salaries and benefits of additional full-time or part-time employees to the extent such employees are directly engaged in case review, location of evidence, or DNA analysis of biological evidence. Applicants must provide documentation that the additional new full-time/part-time employee(s) will be directly engaged in these activities.

#### **E. Expenses That Are Not Permitted**

Federal funds awarded under the Postconviction DNA Testing Assistance Program may not be used for:

1. **Construction.**
2. **Renovation.**
3. **Laboratory Equipment.** Funds may not be used to upgrade, replace, lease, or purchase laboratory equipment.
4. **Salaries and Benefits for Existing Staff.** Funds may not be used to pay salaries and/or benefits for existing staff, other than overtime as discussed above.

#### **F. Cost of Proposed Work**

NIJ anticipates that up to \$12.6 million dollars may become available for awards under this solicitation. Awards will be made to eligible States based upon need and relevance

to the goals and objectives of the program. The total amount of funding requested by eligible States may affect award amounts.

All awards are subject to the availability of appropriated funds and to any modifications or additional requirements that may be imposed by law.

A grant made by NIJ under this solicitation may account for up to 100 percent of the total cost of the project. See “Cofunding,” under “What an Application Must Include.”

**Limitation on use of award funds for employee compensation; waiver:** No portion of any award of more than \$250,000 made under this solicitation may be used to pay any portion of the total cash compensation (salary plus bonuses) of any employee of the award recipient whose total cash compensation exceeds 110 percent of the maximum annual salary payable to a member of the Federal government’s Senior Executive Service (SES) at an agency with a Certified SES Performance Appraisal System for that year. (The salary table for SES employees is available at <http://www.opm.gov>.)

This prohibition may be waived at the discretion of the Assistant Attorney General for the Office of Justice Programs. An applicant that wishes to request a waiver should include a detailed justification in the budget narrative for the application.

## Performance Measures

To assist in fulfilling the Department’s responsibilities under the Government Performance and Results Act (GPRA), Public Law 103–62, applicants who receive funding under this solicitation must provide data that measures the results of their work. Performance measures for this solicitation are as follows:

Objective	Performance Measures	Data Grantee Provides
To help defray the costs associated with postconviction DNA testing.	Increase the number of postconviction cases— forcible rape, murder and nonnegligent manslaughter—that have been subjected to DNA testing.	<p>(1a) The number of postconviction cases—forcible rape, murder and nonnegligent manslaughter—reviewed, by offense.</p> <p>(1b) The number of postconviction cases—forcible rape, murder and nonnegligent manslaughter—reviewed pursuant to court order, by offense.</p> <p>(1c) The number of postconviction cases—forcible rape, murder and nonnegligent manslaughter—reviewed pursuant to executive order (e.g., order of the Governor), by offense.</p> <p>(2) The number of postconviction cases—forcible rape, murder and nonnegligent manslaughter— reviewed in which biological evidence still existed, by offense.</p>

		<p>(3) The number of postconviction cases—forcible rape, murder and nonnegligent manslaughter—subjected to DNA testing, by offense.</p> <p>(4) The number of postconviction cases—forcible rape, murder and nonnegligent manslaughter— which yielded DNA profiles, by offense.</p>
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## How to Apply

DOJ is participating in the e-Government initiative, one of 25 initiatives included in the President’s Management Agenda. Part of this initiative—Grants.gov—is a “one-stop storefront” that provides a unified process for all customers of Federal grants to find funding opportunities and apply for funding.

**Grants.gov Instructions:** Complete instructions can be found at [http://www.grants.gov/applicants/get\\_registered.jsp](http://www.grants.gov/applicants/get_registered.jsp). If you experience difficulties at any point during this process, please call the Grants.gov Customer Support Hotline at 1–800–518–4726.

**Note: Grants.gov does not support the Microsoft Vista operating system.** The PureEdge software used by Grants.gov for forms is not compatible with Vista. Also, Grants.gov cannot yet process Microsoft Word 2007 documents saved in the new default format with the extension ".DOCX." Please ensure the document is saved using "Word 97–2003 Document (\*.doc)" format.

**Please also note: OJP’s Grants Management System (GMS) does not accept executable file types as application attachments.** OJP’s Grants Management System (GMS) downloads applications from Grants.gov and is the system in which OJP reviews applications and manages awarded grants. These disallowed file types include, but are not limited to, the following extensions: ".com", ".bat", ".exe", ".vbs", ".cfg", ".dat", ".db", ".dbf", ".dll", ".ini", ".log", ".ora", ".sys", and ".zip".

**CFDA Number:** The Catalog of Federal Domestic Assistance (CFDA) number for this solicitation is 16.743, titled “Post Conviction DNA Testing Assistance Program,” and the Grants.gov funding opportunity number is 2008–NIJ–1775.

**A DUNS number is required:** The Office of Management and Budget requires that all businesses and nonprofit applicants for Federal funds include a DUNS (Data Universal Numeric System) number in their application for a new award or renewal of an award. Applications without a DUNS number are incomplete. A DUNS number is a unique nine-digit sequence recognized as the universal standard for identifying and keeping track of entities receiving Federal funds. The identifier is used for tracking purposes and to validate address and point of contact information. The DUNS number will be used throughout the grant life cycle. Obtaining a DUNS number is a free, simple, one-time activity. Obtain one by calling 1–866–705–5711 or by applying online at <http://www.dnb.com/us>. Individuals are exempt from this requirement.



# What an Application Must Include

## Standard Form 424

### Program Narrative

The program narrative must address the specific project objectives, expected results, and implementation approach. It should demonstrate, specifically and comprehensively, how requested funds will be used to help defray costs of postconviction DNA testing of forcible rape, murder, and nonnegligent manslaughter cases.

Applicants must define the case review selection criteria they will use. Case review and follow-through strategies should be developed in cooperation with the forensic laboratory, prosecutor, defense counsel, courts, law enforcement, corrections and any other criminal justice agencies that would be affected.

The Program Narrative includes:

- a. Abstract (not to exceed 400 words).
- b. Table of contents.
- c. Main body, which includes:
  - Purpose, goals, objectives, and expected results.
  - Implementation approach, including case review selection criteria.
  - Management plan and organization.
- d. Appendixes (not counted against program narrative page limit) include:
  - Bibliography/References (if applicable).
  - List of key personnel (required).
  - Résumés of key personnel (required).
  - List of previous and current NIJ awards (required).
  - Letters of cooperation/support or administrative agreements from organizations collaborating in the project (if applicable).
  - Chart for timeline, research calendar, or milestones (required).
  - Other materials required by the solicitation.

### Budget Detail Worksheet

Templates for filling out the Budget Detail Worksheet may be found online at [http://www.ojp.usdoj.gov/funding/forms/budget\\_detail.pdf](http://www.ojp.usdoj.gov/funding/forms/budget_detail.pdf), OJP Standard Forms & Instructions. If you have any questions, please contact the Office of the Chief Financial Officer's Customer Service Center at 1-800-458-0786.

### Budget Narrative

The Budget Narrative is a plain-language description of each of the proposed expenditures listed in the Budget Detail Worksheet.

### Indirect Rate Agreement (if applicable)

Applicants that do not have a federally negotiated indirect cost rate and wish to establish one can submit a proposal to their "cognizant" Federal agency. Generally, the cognizant Federal agency is the agency that provides the preponderance of direct Federal funding. This can be determined by reviewing an organization's schedule of Federal financial assistance. If DOJ is your cognizant Federal agency, obtain information needed to submit an indirect cost rate proposal at <http://www.ojp.usdoj.gov/oc/indirectcosts.htm>.

## **Certification as to Provision of Postconviction DNA Testing and Preservation of Biological Evidence**

As described above in the “Eligibility” section, to be eligible for an award, a State must submit a specific certification personally executed by its chief legal officer (typically the Attorney General) regarding the provision of postconviction DNA testing and preservation of biological evidence. A template for the certification appears in appendix I. As noted earlier, any such certification must be received by NIJ **no later than April 21, 2008, 11:59 p.m. eastern time.**

## **Other Program Attachments**

These include several forms, available on OJP’s funding page at <http://www.ojp.usdoj.gov/funding/forms.htm>.

**Cofunding:** A grant made by NIJ under this solicitation may account for up to 100 percent of the total cost of the project. You must indicate whether you believe it is feasible for you to contribute cash, facilities, or services as non-Federal support for the project. Your application should identify generally any such contributions that you expect to make and your proposed budget should indicate in detail which items, if any, will be supported with non-Federal contributions.

**Page limit:** The program narrative section of your proposal must not exceed 20 double-spaced pages in 12-point font with 1-inch margins. Abstract, table of contents, charts, figures, appendixes, and government forms do not count toward the 20-page limit for the narrative section.

## **Selection Criteria and Review Process**

Awards will be made to eligible States based upon need and relevance to the goals and objectives of the program. The total amount of funding requested by eligible States may affect award amounts.

Successful applicants must demonstrate the following:

### **Understanding of the problem and its importance.**

### **Capabilities, demonstrated productivity, and experience of applicants.**

1. Qualifications and experience of proposed staff.
2. Demonstrated ability of proposed staff and organization to manage the effort.
3. Adequacy of the plan to manage the project, including how various tasks are subdivided and resources are used.
4. Successful past performance on NIJ grants and contracts (when applicable).

### **Budget.**

1. Total cost of the project relative to the perceived benefit.
2. Appropriateness of the budget relative to the level of effort.
3. Use of existing resources to conserve costs.

**Reasons for rejection:** NIJ may reject applications that are incomplete, do not respond to the scope of the solicitation, do not comply with format requirements, or are submitted after the deadline.

**When awards will be made:** All applicants, whether they are accepted or rejected, will be notified. The review and approval process takes about 6 months. You should not propose to begin work until at least 6 months after the proposal deadline on the cover of this solicitation. Also, you should not expect to receive notification of a decision for at least 6 months after that date. Lists of awards are updated regularly on NIJ's Web site at <http://www.ojp.usdoj.gov/nij/funding/welcome.htm>.

## **Additional Requirements and Information**

- Civil Rights Compliance
- Confidentiality and Human Subjects Protections Regulations
- Anti-Lobbying Act
- Financial and Government Audit Requirements
- National Environmental Policy Act (NEPA) Compliance
- DOJ Information Technology Standards
- Single Point of Contact Review
- Nonsupplanting of State or Local Funds
- Criminal Penalty for False Statements
- Compliance with OJP Financial Guide  
<http://www.ojp.usdoj.gov/financialguide/>
- Suspension or Termination of Funding
- Nonprofit Organizations
- Government Performance and Results Act (GPRA)
- Rights in Intellectual Property
- Federal Funding Accountability and Transparency Act (FFATA)

We strongly encourage you to review the information pertaining to these additional requirements prior to submitting your application. Additional information for each can be found at [http://www.ojp.usdoj.gov/funding/other\\_requirements.htm](http://www.ojp.usdoj.gov/funding/other_requirements.htm).

If your proposal is funded, you will be required to submit several reports and other materials including: quarterly financial reports, semi-annual progress reports, a final progress report, and, if applicable, an annual audit report in accordance with Office of Management and Budget Circular A-133. The final report must include a summary and assessment of the program carried out with the award. Future awards and fund drawdowns may be withheld if reports are delinquent.

# Appendix I: Certification Template

U.S. DEPARTMENT OF JUSTICE  
OFFICE OF JUSTICE PROGRAMS  
NATIONAL INSTITUTE OF JUSTICE

**FY 2008 Postconviction DNA Testing Assistance Program**

Certification as to Provision of Postconviction DNA Testing  
and Preservation of Biological Evidence

On behalf of the applicant State (as defined in the solicitation) named below, I certify the following to the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice:

(A) The State provides postconviction DNA testing of specified biological evidence under a State statute, or under State rules, regulations, or practices, to persons convicted after trial and under a sentence of imprisonment or death for a State offense of forcible rape, murder, or nonnegligent manslaughter, in a manner intended to ensure a reasonable process for resolving claims of actual innocence; and

(B) The State preserves biological evidence secured in relation to the investigation or prosecution of a State offense of forcible rape, murder, or nonnegligent manslaughter under a State statute, local ordinances, or State or local rules, regulations, or practices, in a manner intended to ensure that reasonable measures are taken by all jurisdictions within the State to preserve such evidence.

I am the chief legal officer of the applicant State and have authority to make this certification. I am aware that a false statement in this certification may be subject to criminal prosecution, including under 18 U.S.C. § 1001.

\_\_\_\_\_  
Signature of Certifying Official

\_\_\_\_\_  
Printed Name of Certifying Official

\_\_\_\_\_  
Title of Certifying Official

\_\_\_\_\_  
Name of Applicant State

\_\_\_\_\_  
Date

## **Appendix II: Selected Statutes**

(See “**NOTE**” in the “Eligibility” section of the solicitation.)

**Section 413 of the Justice for All Act of 2004 (Public Law 108–405) provides:**

Incentive grants to States to ensure consideration of claims of actual innocence

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 postconviction DNA testing of specified evidence—

(i) under a State statute enacted before the date of enactment of this Act [October 30, 2004] (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 [October 30, 2004], 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 postconviction 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 [October 30, 2004] (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 [October 30, 2004], 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.



**18 U.S.C. § 3600(a) provides:**

**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:

(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 [October 30, 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 [October 30, 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.

## **18 U.S.C. § 3600A provides:**

### **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 [October 30, 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 [October 30, 2004], the Attorney General shall promulgate regulations to implement and enforce 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.