

Justice For All Act Of 2004

By Hans Sherrer

The Justice For All Act of 2004 (JFAA) was signed into law by President Bush on October 30, 2004. Legislatively identified as H.R. 5107, the JFAA was passed by a vote of 393-14 in the House of Representatives on October 6, 2004 and by a unanimous vote of the Senate on October 9, 2004.

The JFAA is comprised of four sections:

- Title I. Crime Victims Rights Act
- Title II. Rape Kits and DNA Evidence Backlog Elimination Act of 2004
- Title III. DNA Sexual Assault Justice Act of 2004
- Title IV. Innocence Protection Act of 2004

The innocent can be affected by one or more sections of the JFAA's four titles. Those provisions that are most likely to affect the innocent will be briefly analyzed.

Title I. Crime Victims Rights Act

Title I, Section 102 "Establishes enhanced rights for victims of Federal crimes, including the right to be reasonably protected from the accused; the right to reasonable, accurate, and timely notice of certain proceedings and events; the right not to be excluded from certain proceedings; the right to be reasonably heard at certain proceedings and to confer with the attorney for the Government in the case; the right to full and timely restitution..."¹ Under Title I, an innocent person can have their torment increased prior to their trial, and if wrongly convicted, after their trial, by pressure brought to bear on the prosecutor and/or the court by the victim or alleged victim of the crime.

Title II. Rape Kits and DNA Evidence Backlog Elimination Act of 2004

Title II, Section 202 increases the authorized funding to analyze DNA evidence to \$151 million annually for the next five years. This money can be distributed at the state level to fund the testing of potential DNA evidence, including several hundred thousand rape kits nationwide that are unanalyzed.

Section 203 authorizes expansion of the information in the national Combined DNA Index System (CODIS) to include virtually any DNA information a State chooses to collect, with two exceptions: DNA profiles of arrestees who have not been charged in an indictment or information, and DNA samples that are voluntarily submitted solely for elimination purposes.

Section 204 changes federal law so the statute of limitations begins tolling when DNA testing implicates a person in the commission of a felony (except for a felony offense under chap. 109A) - not the date the crime was committed.

Section 206 authorizes State and local governments to spend federal funds to hire private for profit laboratories to analyze DNA in order to reduce their backlog of evidence samples.

Title III. DNA Sexual Assault Justice Act of 2004

Title III, Section 302 "Requires that eligible State and local government public crime labs are accredited and undergo external audits, not less than once every 2 years, to demonstrate compliance with Federal standards established by the Federal Bureau of Investigation."²

Several sections – 303 and 304 - authorize a total of \$42.5 million per year to train and educate law enforcement and correctional personnel, prosecutors, defense lawyers, judges, forensic scientists and medical personnel in the identification, collection, preservation and analysis of DNA evidence. Other sections authorize money to advance DNA research and development and FBI DNA programs.

Section 309 expands the potential fine to \$100,000 for each federal criminal offense of unauthorized "use" of DNA information.

Title IV. Innocence Protection Act of 2004

Title IV most directly affects the innocent, and it includes three subtitles.

Subtitle 1 - Exonerating The Innocent Through DNA Testing, includes specific guidelines under Section 411 for Federal prisoners asserting a claim of "actual innocence" to apply for DNA testing of potentially exculpatory evidence. Section 411's language implies retroactivity, and furthermore, it specifically directs that a federal court "shall" grant an applicant's motion for a new trial or resentencing 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..."³ Section 411 also "prohibits the destruction of DNA evidence in a Federal criminal case while a defendant remains incarcerated, with certain exceptions." A federal defendant with an active case and untested evidence who makes a timely motion to preserve that evidence is excluded from the exceptions. Although diligent enforcement is problematic, Section 411 does codify that "Intentional violations of these evidence-retention provisions to prevent evidence from being tested or used in court are punishable by a term of imprisonment."⁴ It needs to be emphasized that Section 411 only applies to Federal cases, and its provisions are specifically excluded from providing "a basis for relief in any Federal habeas corpus proceeding."⁵

Section 412 "authorizes \$5 million a year in grants through 2009 to help States to defray the costs of post-conviction DNA testing."⁶ This program is named in honor of Kirk Bloodsworth, the first death row prisoner to be exonerated by DNA testing. Section 413 authorizes granting that money to "States that have adopted reasonable procedures for providing post-conviction DNA testing and preserving DNA evidence."⁷

Subtitle 2 - Improving The Quality of Representation In State Capital Cases, authorizes \$75 million per year under Section 421 "to improve the quality of legal representation provided to indigent defendants in State capital cases. Grants shall be used to establish, implement, or improve an effective system for providing competent legal representation in capital cases, but may not be used to fund representation in specific cases. An effective system is one in which a public defender program or other entity establishes qualifications for attorneys who may be appointed to represent indigents in capital cases; establishes and maintains a roster of qualified attorneys and assigns attorneys from the roster (or provides the trial judge with a choice of attorneys from the roster); trains and monitors the performance of such attorneys; and ensures funding for the full cost of competent legal representation by the defense team and any outside experts."⁸

Subtitle 3—Compensation Of the Wrongfully Convicted, Section 431, "Increases the maximum amount of damages that the U.S. Court of Federal Claims may award against the United States in cases of unjust imprisonment from a flat

\$5,000 to \$50,000 per year in non-capital cases, and \$100,000 per year in capital cases."⁹ Although it doesn't have the force of law, Section 432 "expresses the sense of Congress that States should provide reasonable compensation to any person found to have been unjustly convicted of an offense against the State and sentenced to death."¹⁰

Summary

As with all legislation, the JFAA is a product of compromises that watered down some of its provisions from what they were when first proposed over four years prior to its enactment. The Innocence Protection Act of 2004, like the other provisions, was affected by compromises after it was originally introduced in 2001. The JFAA includes a total of \$1.26 billion over five years in new grant programs, and over \$1 billion of that is earmarked to States for the testing and better understanding of DNA evidence by people at all levels of the law enforcement systems and the improvement of representation in capital cases.

Unfortunately, most of the JFAA amounts to 'smoke and mirrors' posturing that will do little if anything to actually protect the innocent. An example is Section 302 that, "Requires that eligible State and local government public crime labs are accredited and undergo external audits, not less than once every 2 years..." The accreditation part of the section means nothing because it simply relates to ensuring crime labs shuffle their paperwork properly. However the "external audit" provision could contribute to improving the competence of technicians, evidence handling and storage procedures, and testing protocols of state and local crime labs, if not for the fact that the FBI is the arbiter of the "external audit" standards to be applied to those labs. That is like putting the fox in charge of guarding the henhouse. There has been a stream of disclosures over the past several decades that the FBI crime lab routinely provides prosecutors with insubstantial evidence test results, and that its technicians regularly either perjure themselves in court or overstate the evidentiary value of a tested item. Those practices continue to this day, and they can be expected to continue for at least as long as the FBI's crime lab is exempt from independent external auditing. The FBI has shown by its actions that it is unlikely to audit state crime labs with honest vigilance, and that deficiency is compounded by the FBI's designation in the JFAA as the agency that establishes the standards of the audit. An excellent critique of the FBI's crime lab's endemic problems, is *Tainting Evidence: Inside the Scandals at the FBI Crime Lab* by John F. Kelly and Phillip K. Wearne (The Free Press 1998).

Another provision of the JFAA section that superficially looks like it might help an innocent person accused of a state capital offense, but which is unlikely to do so in practice, is Section 421. It authorizes \$75 million per year for five years "to improve the quality of legal representation provided to indigent defendants in State capital cases." However, accomplishing that objective is undercut by Section 421's very next sentence that prohibits any of that money from being used "to fund representation in specific cases." The problem with representation accorded an indigent innocent defendant in a capital case directly relates to the amount of money available to pay a team of competent lawyers, to pay for a thorough investigation, and to pay the necessary paralegal and secretarial support staff. The JFAA completely ignores the legal, investigative and support services required to provide meaningful assistance for an indigent person legally presumed innocent of a capital crime – and who may be actually innocent. (*Justice: Denied* Issue 26, Fall 2004, included a series of four articles related to the generally deficient legal representation provided indigent people in the U.S.).

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Another part of the JFAA that cosmetically looks like a step forward is Section 431's increase in compensation for an unjustly imprisoned federal prisoner from a flat \$5,000 payment, to a maximum of \$50,000 per year of "unjust imprisonment" in non-capital, and \$100,000 per year of "unjust imprisonment" in capital cases. However that change will likely mean little in actual practice, because a microscopic percentage of federal prisoners will be found to have satisfied the compensation requirement of having been "unjustly imprisoned."

Still another provision of the JFAA, Section 204, could prove ominous if applied to cases that don't involve DNA evidence, since it alters the tolling of the statute of limitations from the date of a crime's commission, to the date a suspect is implicated by an inculpatory DNA test.

Furthermore, there is one glaring omission from the JFAA that would have provided meaningful assistance to innocent death row prisoners: Reestablishment of state level Death Penalty Resource Centers, for which funding was cut in 1996.

One the other hand, a glaring inclusion in the JFAA that can harm an innocent person, is Section 411's specific exclusion of its provision acknowledging the exculpatory value of DNA evidence from being applicable to a habeas corpus proceeding. A provision in the JFAA mandating that Federal courts consider the exculpatory value of DNA evidence in a habeas petition by a federal or state prisoner would have provided an additional measure of protection for the innocent. Particularly since there is no consensus in Federal court as to the evidentiary value of exculpatory DNA evidence.

The JFAA does however, have several provisions that may help the innocent. Section 202 provides for funding the testing of DNA samples at the state level, particularly in several hundred thousand untested rape kits, that could potentially prove to include exculpatory evidence for a wrongly accused or convicted person. Section 411 establishes clear and important guidelines for the preservation, testing, and consideration of DNA evidence in Federal cases. Section 412 authorizes a nominal amount of money (\$5 million per year) "...to help States to defray the costs of post-conviction DNA testing."

The miracle that the JFAA has any teeth at all is indicated by the fact that when the House of Representatives passed it, the White House (President Bush), the U.S. Department of Justice (Attorney General John Ashcroft) and two influential Republican Senators (Jeff Sessions and Jon Kyl) were adamantly opposed to its enactment. Given the overwhelming support for the JFAA in both the House and Senate, the Bush Administration's determined efforts to block it failed. However President Bush did wait until the last day that he had available to sign the bill, which he might have vetoed if he hadn't known Congress would have overridden it.

The Justice For All Act of 2004 can be read, downloaded or printed (34 pgs) from *Justice:Denied's* website at: <http://justicedenied.org/jfaa.pdf>

Endnotes:

¹ Justice For All Act of 2004: Section-By-Section Analysis, U.S. Senator Patrick Leahy, <http://leahy.senate.gov/press/200410/100904E.html>

² *Id.*

³ Justice For All Act of 2004. Sec. 411. Federal post-conviction DNA testing.

⁴ *Id.*

⁵ *Id.*

⁶ Justice For All Act of 2004: Section-By-Section Analysis, *supra*.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Justice For All Act of 2004. Sec. 432. Sense of Congress regarding compensation in State death penalty cases.

Convictions Tossed For Talking Suggestively On Telephone

Seventeen year-old Anthony McKenzie made several collect phone calls in June and July 2003 from Georgia's Forsyth County jail to a 14-year-old girl he met over the Internet. During the jail monitored calls the couple carried on sexually suggestive conversations.

McKenzie was then prosecuted and convicted of two counts of violating a Georgia state law (OCGA § 46-5-21(a)(1)) that criminalizes "indecent, lewd, lascivious, and filthy, as well as obscene, telephonic communication made by private individuals or commercial entities regardless of the speaker's intent." (*McKenzie v. State*, No. S05A0298 (Ga. 04/26/2005); 2005.GA.0000544 ¶ 9 <<http://www.versuslaw.com>>).

On April 25, 2005 the Georgia Supreme Court tossed McKenzie's convictions when it unanimously ruled:

"Instead of applying only to obscene speech, it [the statute] applies to speech that is merely indecent. Instead of making illegal such speech only when directed at minors, it makes such speech illegal when heard by adults. Instead of applying only to speech not welcomed by the listener and spoken with intent to harass, it applies to speech welcomed by the listener and spoken with intent to please or amuse. Because the statute is an overbroad infringement on the First Amendment's guarantee of freedom of speech, appellant's convictions for violating the unconstitutional statute must be reversed." (*Id.* at ¶ 11)

Source: *McKenzie v. State*, No. S05A0298 (Ga. 04/26/2005)

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from below-upward. Dr. Cohle was then given PX #14 (a photo of the victim lying on the floor) and asked if the path of the bullet would be consistent with that photo, if a person was standing at the victim's feet and shooting her. He replied that it was consistent with what he previously said. He stated that there was little bleeding from this wound, which would indicate that it was one of the last or the last wound. He was told that Priscilla had last been seen alive about 7:00 p.m. and found dead at 10:00 p.m., so he determined that she was shot about 7:15 p.m. Dr. Cohle's testimony was used to corroborate Peters' testimony. But, Dr. Cohle's testimony is contrary to the physical facts contained in Autopsy Reports (A-95-480) which state the path of direction of this bullet is slightly from above-downward and testimony and physical evidence shows Priscilla was lying on her back. Therefore, this wound could not have been inflicted as was testified to, nor could it have been one of, or the last shot fired. The autopsy reports were not offered into evidence by either my lawyer or the prosecutor. Evidence shows that this wound would have been the first or one of first inflicted, before Priscilla ended up on her back.

Detective Renhawitz testified that he saw a bruise under one of Peters eyes and that was contrary to Peters' testimony. Her mug shot, taken at the time of her arrest, showed there was no bruise, but the mug shot was not offered into evidence by my lawyer.

Several of Priscilla's neighbors testified to seeing Peters in the neighborhood of Priscilla's house, and around the house itself. Several forensic experts testified that the fingerprints and footwear impressions found at the crime scene and in the victim's car did not match mine, nor was the murder weapon traceable to me. The fabric, tape, plastic, and steel wool samples from the crime scene did not match the items taken from my apartment or the device from my car. No physical evidence links me to Priscilla's murder. The prosecution's case hinged on its star witness — Peters. The judge observed, "If Ms. Peters didn't testify against him, I wouldn't think the prosecution would have an awful lot of case." The judge added, "The prosecution would have a real tough time convicting you without that evidence."

Mr. Hanner, a co-worker of Priscilla's, alleged that Priscilla told him that I had called her the morning of this homicide, and threatened to kill her. The judge ruled prior to my trial that his testimony concerning the phone call was inadmissible, but during the trial he changed his mind and decided to allowed it under MRE 803(2), as an excited utterance. When my lawyer tried to elicit Hanner's entire statement, the prosecution objected that it was hearsay. The judge ruled the jury couldn't hear, "Ms. Peters might kill her," because it was neither material nor relevant. However the judge did allow the statement, "Mr. Davis threatened to kill her." After Hanner left the stand, the judge told the jury the reason he allowed this testimony was because it served to identify the perpetrator. At that point the judge effectively expressed to the jury the belief that I was the perpetrator, and the prosecution capitalized on that in his closing argument. Hanner's handwritten statement and his police interview support that his alleged conversation with Priscilla was not an excited utterance. The statements also conflict with his testimony and indicate he told the jury his own words and not those of Priscilla. My lawyer didn't present Hanner's previous statements to strengthen his objection to the judge's ruling allowing Hanner's testimony.

I took the stand on my own behalf and testified that I did not kill my wife, nor was I involved in her murder. I was with our 4-year-old daughter when I received a page on my pager. I then made a phone call from the town of Paw Paw at 7:01 p.m. for 2 minutes to Priscilla's house. That call was answered by the answering machine. I was not even in Berrien County that evening. The only corroborating evidence my lawyer presented was the phone bill showing the call I made from Paw Paw. Also, I had not seen Peters since about 1:00 p.m. until I picked her up at about 8:20 p.m.

On rebuttal, testimony was given that it took a police officer 24 minutes to drive the 27 miles from Paw Paw to the Benton Harbor Exit 33, on I-94, traveling at 71 mph, which was still 5-6 miles, 4 stop signs, and reduced city speed limits from the crime scene. The undisclosed phone records for (616) 927-6068 would have established that Priscilla was home before 7:00 p.m., and that she paged me. That is critical because Priscilla's Certificate of Death states her time of death was 1915 hrs. (7:15 p.m.). It is physically impossible that I, or anyone, could drive from Paw Paw to the crime scene in 12 minutes, which is half the time it took the police to just drive from Exit 60 (Paw Paw) to Exit 33.

The prosecutor misstated crucial evidence and testimony in his closing argument and presented his own version of the alleged phone conversation between my wife and I that was not in evidence or testified to at trial.

My conviction was affirmed by the Michigan Court of Appeals on June 5, 1998. The Michigan Supreme Court denied an application for leave to appeal on March 30, 1999. A Motion for Relief from Judgment was denied on October 24, 2000, by my trial judge, who indicated that I failed to satisfy the "actual prejudice" and "good cause" requirements set forth in MCR 6.508(D)(3)(A). My trial judge denied a Motion for Subpoena for Phone Records stating that there was no meritorious basis for granting the motion, even though it is exculpatory evidence that would help establish my innocence. On September 30, 2002 the U.S. District Court, Eastern District denied a habeas corpus petition. On April 9, 2002 the federal Sixth Circuit Court of Appeals denied my appeal of the District Court's decision. On August 5, 2004 the U.S. Supreme Court rejected my petition for a writ of certiorari. To date, no state or federal court has considered the importance of my claims of actual innocence.

Thank you for reading about my case and my current legal predicament. I can be contacted at:
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