

Questions for the Record
“Promoting Justice for Victims of Crime: Examining the Federal Investment in DNA Analysis”
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Questions from Senator Grassley: Matthew Gamette

1. How many recipients of funds under the DNA Capacity Enhancement and Backlog Reduction (CEBR) program use some portion of their grant funds to outsource DNA casework to private laboratories? What is the total percentage of CEBR funding that went to outsourcing in each of the last five fiscal years? If we don't know the answer, would it be helpful to have this information to better assess the effectiveness of this program?

This data would likely be available through the National Institute of Justice Office of Investigative and Forensic Sciences. Grant recipients we represent are required to provide a budget forecast in advance of spending and a budget report when we complete a grant. The amount spent, the number and type of cases completed, and where the analysis was performed is all information we report to NIJ. Labs generally use outsourcing to clear a bolus number of cases to allow them to get caught up with incoming cases. For example, many labs outsourced DNA database samples while they were building capacity to do the analysis in-house. Very few labs, if any, outsource database samples now because the capacity has been built in public labs. Right now labs are mainly outsourcing sexual assault kits due to the sheer number being found in law enforcement storage rooms and the need for the public lab to keep working current incoming cases. Labs also outsource cases for Y-STRs, touch DNA, familial searching, or SNP analysis. These are techniques that are starting to become mainstream in public labs, but private labs are generally able to validate these techniques faster and make them available for a fee. Public labs generally have more limited resources and have to deal with state law and other policy that may slow down the implementation process. As these services become readily available at the public labs, the outsourcing from the public lab goes away. The importance of understanding how much money is being used to outsource is that it gives an indication of the capacity need for the public laboratories in the country.

2. According to the SAFER Working Group, which includes victims, victim advocates, medical examiners, forensic scientists, and law enforcement officials, a “comprehensive inventory should be conducted to determine the number, status, location and individual descriptive information (e.g., unique kit identifier, data collected) for all SAKs [sexual assault evidence collection kits].”¹ You testified that the Idaho State Police Crime Laboratory already conducts an inventory of its unanalyzed sexual assault kits and posts this information on the State’s website. Should all States conduct such an inventory and make similar information available for use in evaluating CEBR?

¹ National Institute of Justice, Office of Justice Programs, U.S. Department of Justice, “National Best Practices for Sexual Assault Kits: A Multidisciplinary Approach” (2017), available at <https://www.ncjrs.gov/pdffiles1/nij/250384.pdf>

Definition of term:

- **Inventory/Audit=count of law enforcement property rooms for physical sexual assault kits that need to be sent to a lab for testing.**

Idaho has a state law that requires the lab to inventory all law enforcement agencies in the state. This is a fairly unique law. These inventories are usually done out of the Attorney General Office or some other entity. In addition, most labs do not store sexual assault kits. They come into the lab for a period of time for testing and are returned to the law enforcement agency. Most importantly, any kit inventory of law enforcement storage spaces, hospitals, or other locations must not be funded with typical funding going to forensic labs such as CEBR or Coverdell funding. In addition, labs should generally not be held responsible to perform the audits because in the vast majority of cases, the labs do not store evidence nor do they have oversight of the law enforcement agency property rooms. Labs should not have CEBR or Coverdell funds withheld or threatened due to the lack of a state-wide audit.

I believe that each state should conduct an audit/inventory of all kits that currently exist. It is important to provide resources to a state to conduct such an audit. It is also important to note that while we use the term “kits,” these represent cases where there are frequently other types of evidence that must be accounted and analyzed outside of the small box we envision as a kit, such as clothing, bedding, and other types of evidence such as fingerprints or drugs. Idaho learned many lessons in conducting a state-wide kit audit of law enforcement agencies. To conduct a robust audit, federal government auditing entities and agencies may be helpful in developing the survey tools and methods. It is also important to remember that law enforcement needs resources to have staff go back through and do a physical inventory of kits. In many cases agencies do not have electronic tracking systems or even paper records of how many kits they have. We learned that many times an individual had to physically go into the evidence space and pull kits off the shelf to get the information. Just counting the kits is not enough. It is important that with the evolution of kit retention statutes that states get pertinent information about the kits during the audit. States should be encouraged to obtain data such as agency case number, collection date, collection location, and lab processing information (if applicable). Applying a kit tracking number, bar code, or serial number should be accomplished during the audit and information should be populated into kit tracking software. States should be able to provide information to the public and policy makers regarding the number of kits that exist in the state and basic information about those kits such as which ones have been tested by a laboratory. This kit tracking software is available commercially and several entities (such as the Idaho State Police) have offered kit tracking software for free to any public agency or entity. ASCLD is working with government and non-profit organizations to make these kit tracking systems widely available and encouraging states to perform these audits. Software must be able to track kits to destruction and victims should have access to information about a pending destruction date so that they have the opportunity to challenge that destruction with the agency or in court.

ASCLD is also in the process of collecting sexual assault kit information from laboratories. The intention is to survey over 200 labs and find out how many kits are currently at labs being processed and what the average turnaround time is for those cases. This will be a survey that is outdated the second it is published because this is such a dynamic process. It is merely a snapshot of the scope of the problem crime labs are facing right now. This study must be coupled with a state-wide inventory in every state to understand the scope of the problem. Labs are increasing capacity as quickly as possible because most states will have a huge influx of cases as law enforcement starts to send in kits identified in audits of storage locations. This study must also be coupled with studies on the increase of contemporary sexual assault collections. As testified, the increases seen in laboratories are from old kits found in audits, an increase in new kit collections, and law enforcement submitting a greater percentage of kits collected. Several weeks ago I had a state legislator call me and ask what the impact would be on the state lab if a state law was changed related to sexual assault kits. Because we know how many kits we have and we know specific information about those kits, I was able to give the legislature a quick fiscal estimate including the number personnel, instruments, lab space, and consumables needed for the lab to comply with a proposed statute change.

The other important thing that should be done by Congress or NIJ is to define the term “test all” or the final goal of the audit/inventory. National advocacy groups advocate for testing every kit identified in audits. If that is what is intended by Congress, additional resources will be needed. During the audit it would be important to determine how many kits still need testing, and what testing is needed. Even if every kit that exists in the United States is tested, states have various approaches to testing the kits. NIJ has recommended best practices for testing a kit, but those are not being followed by most jurisdictions. For example, some labs test every swab in the kit regardless of the police report or victim/suspect statements. Other labs only test swabs that may answer the proposed questions from the statements. If the intent of Congress is not clearly defined, this is going to be a longer-term problem where states may have to reopen kits multiple times for further testing as criteria changes over time.

3. To what extent, if any, does the National Institute of Justice encourage states to make capacity enhancement a top priority under CEBR, and what more might NIJ do to encourage capacity enhancement at the nation’s public crime laboratories?

We believe that labs are laser focused on increasing capacity in their laboratories. Labs are using CEBR funds to increase capacity. Due to changes in the 2016 reauthorization of JFAA, labs are starting to get more money to put into this endeavor. There are two ways to increase capacity. The first way is to increase efficiency. Labs are using Coverdell funds to improve methods, decrease the number of steps, and implement faster and larger capacity instrumentation. Second, labs must add infrastructure. Labs are increasing physical space, buying instruments, updating software, validating instrument and methods, increasing hiring, and training analysts with CEBR funds. NIJ should find ways to help labs increase physical laboratory

space. This can be done by implementation of more matching funds for construction of new laboratory space. Increasing instrumentation and personnel requires physical space to put these resources. States and locals can generally come up with some monetary or “in-kind” match, but have a very difficult time obtaining funds for remodeling or construction. NIJ should also implement match grants for hiring personnel. The match required could increase each year to encourage states to move these employees from federal funding to state funding. Due to lengthy approval processes, it takes time to secure state and local full-time funded personnel positions. The federal government initially funding these positions entirely and then weaning them onto state or local funding works to increase capacity because labs can justify the need to the funding entities with real productivity the individual is producing. NIJ can do a better job of real technology transfer and implementation. Labs have huge issues navigating state procurement procedures and then validating the instruments in the lab. NIJ partnering with centers of excellence or universities to perform validations and then making grants for a more efficient method (with all applicable instrumentation) would be amazingly helpful. For example, NIJ evaluates and validates a new quantitation based method to do high throughput screening of sexual assault kits. NIJ could provide a grant where the validated method with all associated instrumentation could arrive at the lab with a “teach back” for implementation. The federal government could do all the procurement and the grant money would be immediately spent. Thus, it would save the lab time and save NIJ frustration that results when labs have to buy and validate new instrumentation through state processes.

ASCLD has also discussed with NIJ what a centralized training might look like for DNA analysts. Having labs select their new hires and then sending them to a centralized training center would be very beneficial for labs. We would not have to divert experienced trainers, we would not have to spend months administratively overseeing training, and we could stay focused on casework while these new analysts get training they need to be beneficial to us. While not all the training would be the same lab to lab, much of the training is the same and it would allow NIJ to focus on technologies that all labs should be using (such as probabilistic genotyping). This could also be done through a collaboration of labs providing training staff to a centralized training center. Under this model, all would give a little and get much back in return.

4. What additional improvements, if any, should be made to the CEBR program to enhance its effectiveness?

The CEBR program should work with Project FORESIGHT to develop better metrics to track laboratory capacity increases. The newly established FLN-TWG at NIJ should be tasked with regularly evaluating the effectiveness of the CEBR program against the operational needs of the labs. The CEBR grants should be evaluated to determine the best methods to use the funding for physical infrastructure improvement like lab space. Congress should heavily consider the value of the Grant Program Assessment (GPA) tool that was eliminated from the program around 2011. The GPA sent out auditors to evaluate if funds were being used appropriately and on schedule. This tool would allow NIJ to help mentor the labs that are struggling, or help them evaluate the root causes of problems. This tool could allow NIJ better insights into best practices and corrective actions needed around the country. Reinstating the GPA program also allows NIJ to evaluate best practices and training, taking the best approaches being used by some labs to the masses. This is a key program to eliminate wasteful spending. In addition to auditing, grant managers are in critical need of training. NIJ eliminated most training for grant managers and this creates a lack of communication on grant applications, management, and reporting. Regular training should be implemented and training for new grant managers should be implemented and run as a program at NIJ. When a state or local lab hires a new grant manager, the learning curve is nearly impossible and the individual often fails. Allowing grant funding to be spent on grant managers is critical to success. Most labs do not have grant managers, and having more grant managers will free up time for the labs to work on implementation of grant objectives instead of applying for, managing, or reporting on grants. Labs around the country report that management of grants in the laboratory is a significant source of delay for getting things purchased, deployed, and implemented in the lab.

NIJ should evaluate ways to make the application and reporting process for laboratories easier on the formulary and competitive grant programs. Part of this effort should be to work with Project FORESIGHT to design and automate collection of important data points that would help evaluate the effectiveness of the program. Another part of the effort should be to simplify applications into easy forms. Instead of requiring labs to do lengthy applications where the evaluation criteria are not well understood by the labs, condense the applications into simple forms where the questions are more directed to solicit the information needed by NIJ. More employees are needed at NIJ to quickly approve initial applications, GANs, and other modifications. Grant funding should be awarded in October (at the start of the fiscal year) rather than January. Most states have a July fiscal year, and getting the funds half-way through the fiscal year is not conducive to getting the money spent in a timely manner because of state procurement rules.

NIJ should investigate ways to use federal purchasing power and validation abilities at federal labs for new instrument initiatives, rather than giving the money to the states and having them navigate the hurdles of the state programs. Having an emphasis program to target a new instrument procurement (e.g. Next Gen Sequencing, Rapid DNA screening, high throughput instrumentation for rape kit analysis) would allow states to access federal purchasing power and validation services, while decreasing the time needed to actually implement the technology. Purchasing, procurement, and validation are the major sources of delay in grant money not being spent in a timely manner and implemented on schedule.

Consolidation of grant programs should be considered. For example, the SAKI program is very similar to the SAFE-ITR initiatives. There needs to be more work to evaluate current programs to align purpose areas and consider emerging needs.

Senator Mazie K. Hirono
Questions for the Record for Matthew Gamette

1. Based on your experience, what are strategies or best practices that you would recommend for jurisdictions trying to reduce their sexual assault kit backlog or inventory without creating a new backlog or inventory of untested sexual assault kits?

It is paramount that jurisdictions understand the scope of the problem. First, a comprehensive audit must be completed of every law enforcement entity, hospital, clinic, or any other place that may have kits in storage. This audit must include information such as what testing, if any, has been performed on the kit. The audit must also include putting the kit into a tracking software or system of some kind and labeling the kit itself so that it can be tracked to destruction.

Information such as agency case number, storage location of the kit (e.g. police department evidence room), and investigation status should be included.

Second, it is important that Congress or NIJ define what needs to be tested and how it needs to be tested. National advocacy groups advocate for testing every kit identified in audits. If that is what is intended by Congress, additional laboratory resources must be allocated. During the audit it would be important to determine how many kits still need testing, and what testing is needed. Even if every kit that exists in the United States is tested, states have various approaches to testing the kits. NIJ has recommended best practices for testing a kit, but those are not being followed by most jurisdictions. For example, some labs test every swab in the kit regardless of the police report or victim/suspect statements. Other labs only test swabs that may answer the proposed questions from the statements. If the intent of Congress is not clearly defined, this is going to be a longer-term problem where states may have to reopen kits multiple times for additional testing as criteria changes over time. This process would create new backlogs each time a lab has to go back and test the kits again according to a new criteria.

Third, labs must have a strategy for addressing contemporary cases at the same time as bringing in older inventory kits from law enforcement storage rooms. Contemporary kit collections have increased dramatically due to the media and other attention to this issue. More and more victims are seeing that the criminal justice system is taking this issue seriously and are willing to submit to kit collection. More law enforcement agencies are submitting kits for testing due to state laws, better training of law enforcement, and more pressure from advocate groups. The increase of new kits coming into the laboratory is taxing laboratories already scarce resources. A testing strategy must be developed which includes prioritizing the most important or timely cases (from contemporary and older kit collections) such as public safety threats, threats to the ongoing security of the victim, and cases nearing statute of limitation dates. Most labs are bringing in the older kits in limited groups at a time so they do not dramatically impact the turnaround times for newer cases. Some jurisdictions are outsourcing cases to process through the bolus of cases that exist currently. Ultimately the answer to

solving this issue is to ensure that labs have the capacity required to address this and the next crisis that occurs. Most labs need resources for one or more of the following to be able to increase capacity and reduce backlogs: 1) more trained personnel to do the analysis; 2) additional or updated physical space for analysis (i.e. lab space, instrumental space, office space); and 3) enhanced instrumental capacity (e.g., automation). Labs are becoming more efficient at performing the analysis and developing methods that increase capacity, but ultimately more people and/or advanced technology are needed to significantly increase capacity.

Finally, the government should require states to implement kit tracking systems which mandate the participation of critical stakeholders (i.e., hospitals, law enforcement, forensic laboratories, etc) Doing this will ensure that there is not a growing number of kits that have not been submitted for analysis and can quickly identify system bottlenecks that require additional attention or resources. Laboratory capacity must be built over time and tracking these kits will allow us to better prepare for the resource needs and alert Congress to needed resources.

2. What are examples of successful coordination among law enforcement, forensic labs, medical care providers, victim service providers, and prosecutors in handling a sexual assault case? Do you have recommendations for how to best implement this multidisciplinary approach?

In Idaho we have developed a state-wide team called the Idaho Sexual Assault Kit Initiative (ISAKI). This is a group of individuals including the lab, sexual assault nurse examiners, sexual assault response team representatives, prosecutors, public defenders, judges, victim advocates, state sexual and domestic violence coalition members, statisticians, criminal justice researchers, law enforcement associations, detectives, legislators. We meet to determine good policy for sexual assault evidence, training for all the stakeholder groups (e.g. officers, nurses, prosecutors, advocates), and potential laws that may be needed to address problems. State-wide teams are important to set good laws and policy for states. For example, in California they have collaboratively developed Form 923 for sexual assault kit collection. Local teams are called sexual assault response teams. NIJ and others have invested in these teams using grants, but more can be done to help establish and run these teams. The teams consist of sexual assault nurse examiners, prosecutors, public defenders, judges, victim advocates, law enforcement detectives in the community to solve the issue at the local or regional level. These teams are helpful to resolve issues that prevent investigation and prosecution of these cases in local or regional courts.

At the lab level, we are encouraging the prosecutor, investigator, and lab analyst to get together and talk about the case approach and ensure that all forensic science disciplines surrounding the case have been addressed. Many times a sexual assault case involves firearms or other weapons, toxicology related to drug facilitated sexual assault, latent fingerprints, or trace evidence like hairs and fibers. Often laboratories are limited in some of these disciplines and training programs, instrumentation, and personnel may be needed to address cases in a holistic approach. Further, labs should resist the "factory processing" approach to kit testing. The more we try to automate

and standardize the DNA portion of the case, the less likely scientists will be to process other evidence and examine other case theories.

3. What types of training do you think are important for medical professionals collecting sexual assault kits from survivors to have? Are these trainings sufficiently available throughout the country, including in rural areas?

It is important for medical professionals to have a minimum of a 40-hour sexual assault nurse examiner (SANE) training. These courses are widely available online or in-person, but they are expensive and time consuming. Many hospitals and clinics will not allow their staff to attend due to the salary commitment to the hospital, the need to cover their shift, and because it is difficult to maintain their competency with the few exams they do each year. If one rural hospital has several trained examiners, one might not see a case in several years. Thus, ongoing competency and proficiency is an issue that must be addressed. In addition to the 40-hour course, there is a 2 day hands-on practical course available to nurses. This is a requirement for any nurse going for SANE certification. SANE certification is not a requirement in most states and hospitals to collect forensic evidence. SANE training is available for medical professionals working with adult, adolescent, and child victims. The exams are much different and the individuals are treated differently. There is funding at NIJ and through the OVW for SANE training. However, it takes effort to coordinate this training and ensure that the training is available in rural areas. There are robust programs both online and in-person for hospitals and clinics that serve Indian country, but these programs largely do not exist for general rural communities. In Idaho we have an initiative we call SANE250 where we are hiring a nurse coordinator that will take training to all areas of the state and to all size communities. We are going to offer introductory 40-hour training, 2 day practical training, and ongoing continuing education and practice to keep the nurses in practice when they may not be seeing a large number of patients each year. Because hospitals and clinics have shown that they are reticent to send their staff to training, it is much more efficient to drive the training to the hospitals. This is not widely being done around the country at this point and much more could be done to make this training widely available, affordable, and required for medical staff performing these types of examinations.