

§ 28.13 Analysis and indexing of DNA samples.

(a) The Federal Bureau of Investigation shall carry out a DNA analysis on each DNA sample furnished to the Federal Bureau of Investigation pursuant to section 3(b) or 4(b) of Public Law 106-54, and shall include the results in the Combined DNA Index System.

(b) The Federal Bureau of Investigation shall include in the Combined DNA Index System the results of each analysis furnished to the Federal Bureau of Investigation pursuant to 10 U.S.C. 1565(b)(2).

Subpart C—Preservation of Biological Evidence

SOURCE: Order No. 2762-2005, 70 FR 21957, Apr. 28, 2005, unless otherwise noted.

§ 28.21 Purpose.

Section 3600A of title 18 of the United States Code (“section 3600A”) requires the Government to 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, subject to certain limitations and exceptions. The general purpose of this requirement is to preserve biological evidence for possible DNA testing under 18 U.S.C. 3600. Subsection (e) of section 3600A requires the Attorney General to promulgate regulations to implement and enforce section 3600A, including appropriate disciplinary sanctions to ensure that employees comply with such regulations.

§ 28.22 The requirement to preserve biological evidence.

(a) *Applicability in general.* The requirement of section 3600A to preserve biological evidence applies to evidence that has been retained in cases in which the offense or conviction occurred prior to the enactment of section 3600A or the adoption of this subpart, as well as to evidence secured in pending and future cases.

(b) *Limitation to circumstances in which a defendant is under a sentence of imprisonment for the offense.* The requirement of section 3600A to preserve biological evidence secured in the in-

vestigation or prosecution of a Federal offense begins to apply when a defendant is convicted and sentenced to imprisonment for the offense, and ceases to apply when the defendant or defendants are released following such imprisonment. The evidence preservation requirement of section 3600A does not apply in the following situations:

(1) *Inapplicability at the investigative stage.* The requirement of section 3600A to preserve biological evidence does not apply at the investigative stage of criminal cases, occurring prior to the conviction and sentencing to imprisonment of a defendant. Biological evidence may be collected and preserved in the investigation of Federal offenses prior to the sentencing of a defendant to imprisonment, reflecting sound investigative practice and the need for evidence in trial proceedings that may result from the investigation, but section 3600A does not govern these activities.

(2) *Inapplicability to cases involving only non-incarcerative sentences.* The requirement of section 3600A to preserve biological evidence does not apply in cases in which defendants receive only nonincarcerative sentences, such as probation, fines, or payment of restitution.

(3) *Inapplicability following release.* The requirement of section 3600A to preserve biological evidence ceases to apply when the defendant or defendants are released following imprisonment, either unconditionally or under supervision. The requirement does not apply during any period following the release of the defendant or defendants from imprisonment, even if the defendant or defendants remain on supervised release or parole.

(4) *Inapplicability following revocation of release.* The requirement of section 3600A to preserve biological evidence applies during a defendant’s imprisonment pursuant to the sentence imposed upon conviction of the offense, as opposed to later imprisonment resulting from a violation of release conditions. The requirement does not apply during any period in which the defendant or defendants are imprisoned based on the revocation of probation, supervised release, or parole.

(c) *Conditions of preservation.* The requirement of section 3600A to preserve biological evidence means that such evidence cannot be destroyed or disposed of under the circumstances in which section 3600A requires its preservation, but does not limit agency discretion concerning the conditions under which biological evidence is maintained or the transfer of biological evidence among different agencies.

§ 28.23 Evidence subject to the preservation requirement.

(a) *Biological evidence generally.* The evidence preservation requirement of section 3600A applies to “biological evidence,” which is defined in section 3600A(b). The covered evidence is sexual assault forensic examination kits under section 3600A(b)(1) and semen, blood, saliva, hair, skin tissue, or other identified biological material under section 3600A(b)(2).

(b) *Biological evidence under section 3600A(b)(2).* Biological evidence within the scope of section 3600A(b)(2) is identified biological material that may derive from a perpetrator of the offense, and hence might be capable of shedding light on the question of a defendant’s guilt or innocence through DNA testing to determine whether the defendant is the source of the material. In greater detail, evidence within the scope of section 3600A(b)(2) encompasses the following:

(1) *Identified biological material.* Beyond sexual assault forensic examination kits, which are specially referenced in section 3600A(b)(1), section 3600A requires preservation only of evidence that is detected and identified as semen, blood, saliva, hair, skin tissue, or some other type of biological material. Section 3600A’s preservation requirement does not apply to an item of evidence merely because it is known on theoretical grounds that physical things that have been in proximity to human beings almost invariably contain unidentified and imperceptible amounts of their organic matter.

(2) *Material that may derive from a perpetrator of the crime.* Biological evidence within the scope of section 3600A(b)(2) must constitute “biological material.” In the context of section 3600A, this term does not encompass all

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.