

### Subpart B—DNA Sample Collection, Analysis, and Indexing

#### § 28.11 Definitions.

*DNA analysis* means analysis of the deoxyribonucleic acid (DNA) identification information in a bodily sample.

*DNA sample* means a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out.

#### § 28.12 Collection of DNA samples.

(a) The Bureau of Prisons shall collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of—

(1) A qualifying Federal offense as described in § 28.2;

(2) A qualifying military offense, as determined under 10 U.S.C. 1565; or

(3) A qualifying District of Columbia offense, as determined under section 4(d) of Public Law 106–546.

(b) Notwithstanding paragraph (a) of this section, the Bureau of Prisons may, but need not, collect a DNA sample from an individual described in paragraph (a) of this section if the Combined DNA Index System contains a DNA analysis with respect to that individual, or if a DNA sample has been collected from that individual under 10 U.S.C. 1565.

(c) Each individual described in paragraph (a) of this section shall cooperate in the collection of a DNA sample from that individual by the Bureau of Prisons. The Bureau of Prisons may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual described in paragraph (a) of this section who refuses to cooperate in the collection of the sample.

(d) The Bureau of Prisons may enter into agreements with units of State or local government or with private entities to provide for the collection of samples under this section.

(e) The Bureau of Prisons shall furnish each DNA sample collected under this section to the Federal Bureau of Investigation.

#### § 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 investigation 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