

Preservation of Crime Scene Biological Evidence — the National Picture

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◆ **Nationally, 32 states require the automatic preservation of biological evidence, as does the federal government. Many of these statutory requirements are embedded in post-conviction DNA testing access laws.**

◆ **How Long Do Other States Preserve Biological Evidence from Crime Scenes?**

- **Length of Incarceration** (typically including state supervision) – 20 states
- **Permanently in Death Penalty Cases** – 6 states
- **Several states create different standards for different felony crimes:**
 - **Illinois:**
 - Death Penalty Cases=permanent
 - Homicides and Sex Offenses=Length of incarceration plus supervision
 - All Other Felonies=7 years
 - **North Carolina:**
 - Death Penalty Cases=permanent
 - Violent Felonies=period of incarceration
 - Offenses Requiring Sex Offender Registration=Incarceration plus supervision
 - Guilty Pleas= 3 years
 - All Other Felonies=7 years
 - **Arkansas**
 - Violent Offenses=permanent
 - Sex Offenses= 25 years
 - All Other Felonies= 7 years
- **Short-Term Preservation:**
 - 3 years: Montana & Iowa
 - 10 years: Georgia (this applies in serious felonies; death cases preserved until execution)
 - 15 years: Virginia
- **Other Periods:**
 - Life of Defendant
 - Court Determines Case-by-Case

◆ **How is Evidence from Unsolved/Cold Cases Preserved?**

- **At least two states set special preservation periods for crime scene evidence in unsolved cases:**
 - **Arizona** requires 55 years preservation in unsolved/cold cases; when felony sex offenses or homicides lead to conviction, preserves evidence for length of incarceration and supervision.
 - **Mississippi** preserves cold-case evidence “for the period of time that the crime remains unsolved”, and preserves evidence in convictions for the length of state custody.
- **Many state statutes don’t distinguish** between biological evidence in cases that are resolved and cases that are not, referring more generally to all biological evidence “collected in an investigation or prosecution.”
- **Some states specifically require preservation only when a conviction is obtained** (such as Montana, Hawaii, Maryland).

◆ **New Standards for Preserving Biological Evidence from Crime Scenes Need Not Be Approached/Viewed as Adding New Unfunded Mandates—We Should Follow Other States in Providing More Specific Guidance That Can Help Overburdened Evidence Custodians.**

IDEA #1: Reduce the Burden of Bulk Evidence – Statute could specify that evidence too large and impracticable to store in its entirety may be preserved in part. Removing clippings of evidence satisfies evidence needs and is a helpful tool for law enforcement agencies that need more space.

- 70% of survey respondents said they factor physical size of the evidence when deciding how long to preserve evidence.
- Adequate storage space is most pressing concern expressed in survey.

Examples of how other states have approached this issue:

- “The state shall not be required to preserve physical evidence that is of such a size, bulk or physical character as to render retention impracticable. When such retention is impracticable, the state shall remove and preserve portions of the material evidence likely to contain biological evidence related to the offense, in a quantity sufficient to permit future DNA testing, before returning or disposing of the physical evidence.” **(Mississippi, MS Code Ann. 99-49-1, Similar provisions are provided in Oregon, Colorado, Illinois, and under Federal DNA Preservation Regulations)**
- “An agency of criminal justice may establish procedures for: a) Retaining probative samples of biological evidence subject to the requirements of this section; and b) Disposing of bulk evidence that does not affect the suitability of such probative samples for testing.” **(Nevada, NRS 176.3)**

IDEA #2: Restrict the Felony Crime Categories Requiring Long-Term Preservation—Currently, all biological evidence from all felonies is treated equally by preservation statute. We could emphasize long-term preservation in limited categories such as homicides and sexual offenses.

- **Survey shows that some counties have already adopted this policy on their own, above and beyond the simple three-year requirement currently in place. This shows strong recognition of the crime-solving value of this biological evidence.** For instance:
 - One entity preserves for 100 years in homicides, and 15 years in sexual offenses.
 - One entity preserves for 40 years in homicides, 10 years in rapes, and 5 years in other sex offenses.
- **Improved and more specific state standards could provide for more consistency among law enforcement departments throughout the state.**
- **Examples of other states that use this approach include: Illinois, Georgia, North Carolina.**
- **Under this approach, MTIP would recommend preserving biological evidence from homicides and sexual offenses for the length of incarceration and supervision. We would support shorter-term preservation for lesser felonies, where biological evidence is not as probative.**

WEST'S ANNOTATED MISSISSIPPI CODE

TITLE 99. CRIMINAL PROCEDURE

CHAPTER 49. PRESERVATION AND ACCESSIBILITY OF **BIOLOGICAL EVIDENCE**→ § 99-49-1. **Biological evidence; legislative intent; definitions; preservation procedures; remedies**(1) **Legislative intent.** The Legislature finds that:

- (a) The value of properly preserved **biological evidence** has been enhanced by the discovery of modern DNA testing methods, which, coupled with a comprehensive system of DNA databases that store crime scene and offender profiles, allow law enforcement to improve its crime-solving potential;
- (b) Tapping the potential of preserved **biological evidence** requires the proper identification, collection, preservation, storage, cataloguing and organization of such **evidence**;
- (c) Law enforcement agencies indicate that "cold" case investigations are hindered by an inability to access **biological evidence** that was collected in connection with criminal investigations;
- (d) Innocent people mistakenly convicted of the serious crimes for which **biological evidence** is probative cannot prove their innocence if such **evidence** is not accessible for testing in appropriate circumstances;
- (e) It is well established that the failure to update policies regarding the preservation of **evidence** squanders valuable law enforcement resources, manpower hours and storage space; and
- (f) Simple but crucial enhancements to protocols for properly preserving **biological evidence** can solve old crimes, enhance public safety and settle claims of innocence.

(2) **Definitions.** For the purposes of this section:

- (a) "**Biological evidence**" means the **contents** of a **sexual assault examination kit** or any **item** that **contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids** or other identifiable **biological** material that was collected as part of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies whether that material is catalogued separately, such as on a slide, swab or in a test tube, or is present on other evidence, including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups, cigarettes or other items.
- (b) "DNA" means deoxyribonucleic acid.
- (c) "Custody" means persons currently incarcerated; civilly committed; on parole or probation; or subject to sex offender registration for the period of the registration or for the first five (5) years of the registration, whichever is the shorter period.
- (d) "Profile" means a unique identifier of an individual, derived from DNA.
- (e) "State" refers to any governmental or public entity within Mississippi, including all private entities that perform such functions, and its officials or employees, including, but not limited to, law enforcement agencies, prosecutors' offices, courts, public hospitals, crime laboratories, and any other entity or individual

charged with the collection, storage or retrieval of **biological evidence**.

(3) **Preservation of evidence procedures.** (a) **The state shall preserve all biological evidence:**

(i) **That is secured in relation to an investigation or prosecution of a crime for the period of time that the crime remains unsolved; or**

(ii) **That is secured in relation to an investigation or prosecution of a crime for the period of time that the person convicted of that crime remains in custody.**

(b) This section applies to evidence that:

(i) Was in the possession of the state during the investigation and prosecution of the case; and

(ii) At the time of conviction was likely to **contain biological** material.

(c) The state shall not destroy **biological evidence** should one or more additional co-defendants, convicted of the same crime, remain in custody, and shall preserve the **evidence** for the period of time in which all co-defendants remain in custody.

(d) The state shall retain **evidence** in the amount and manner sufficient to develop a DNA profile from the **biological material contained** in or included on the **evidence**.

(e) Upon written request by the defendant, the state shall prepare an inventory of **biological evidence** that has been preserved in connection with the defendant's criminal case.

(f) The state may destroy **evidence** that includes **biological** material before the expiration of the time period specified in paragraph (a) of this subsection if all of the following apply:

(i) No other provision of federal or state law requires the state to preserve the evidence.

(ii) The state sends certified delivery of notice of intent to destroy the evidence to:

1. All persons who remain in custody as a result of the criminal conviction, delinquency adjudication, or commitment related to evidence in question;

2. The attorney of record for each person in custody;

3. The Mississippi Office of Indigent Appeals;

4. The district attorney in the county of conviction; and

5. The Mississippi Attorney General.

(iii) No person who is notified under paragraph (f)(ii) of this subsection does either of the following within sixty (60) days after the date on which the person received the notice:

1. Files a motion for testing of **evidence** under Title 99, Chapter 39, Mississippi Code of 1972; or

2. Submits a written request for retention of **evidence** to the state entity which provided notice of its intent

to destroy **evidence** under paragraph (f)(ii) of this subsection.

(g) If, after providing notice under paragraph (f)(ii) of this subsection of its intent to destroy **evidence**, the state receives a written request for retention of the **evidence**, the state shall retain the **evidence** while the person remains in custody.

(h) The state shall not be required to preserve physical **evidence** that is of such a size, bulk or physical character as to render retention impracticable. When such retention is impracticable, the state shall remove and preserve portions of the material **evidence** likely to contain **biological evidence** related to the offense, in a quantity sufficient to permit future DNA testing, before returning or disposing of the physical **evidence**.

(i) Should the state be called upon to produce **biological evidence** that could not be located and whose preservation was required under the provisions of this statute, the chief **evidence** custodian assigned to the entity charged with the preservation of said **evidence** shall provide an affidavit in which the custodian stipulates, under penalty of perjury, an accurate description of the efforts taken to locate that **evidence** and that the **evidence** could not be located.

(4) Any **evidence** in a murder, manslaughter or felony **sexual assault** case in the possession of the state on July 1, 2009, whether **biological** or not, shall be preserved by the state consistent with the legislative intent expressed in subsection (1) and subject to compliance with subsection (3)(f).

(5) **Remedies for noncompliance.** If the court finds that biological evidence was destroyed in violation of the provisions of this section, it may impose appropriate sanctions and order appropriate remedies.

Current through End of the 2009 Regular and 1st to 3rd Extraordinary Sessions

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END OF DOCUMENT

18 U.S.C. § 3600A : US Code - Section 3600A: 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;

(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, 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.

West's Smith-hurd Illinois Compiled Statutes Annotated [Currentness](#)

Chapter 725. Criminal Procedure

Act 5. Code of Criminal Procedure of 1963

[Title VI.](#) Proceedings at Trial

[Article 116.](#) Post-trial Motions

➔5/116-4. Preservation of evidence for forensic testing

Specified Crimes Include:
homicide, criminal sexual assault,
agg. crim. sex. assault, predatory
crim. sex. assault of a child, crim.
sex. abuse, agg. crim. sex. abuse.

§ 116-4. Preservation of evidence for forensic testing.

(a) Before or after the trial in a prosecution for a violation of Section 12- 13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961 [\[FN1\]](#) or in a prosecution for an offense defined in Article 9 of that Code, [\[FN2\]](#) or in a prosecution for an attempt in violation of Section 8-4 of that Code [\[FN3\]](#) of any of the above-enumerated offenses, unless otherwise provided herein under subsection (b) or (c), a law enforcement agency or an agent acting on behalf of the law enforcement agency shall preserve, subject to a continuous chain of custody, any physical evidence in their possession or control that is reasonably likely to contain forensic evidence, including, but not limited to, fingerprints or biological material secured in relation to a trial and with sufficient documentation to locate that evidence.

(b) After a judgment of conviction is entered, the evidence shall either be impounded with the Clerk of the Circuit Court or shall be securely retained by a law enforcement agency. Retention shall be permanent in cases where a sentence of death is imposed. Retention shall be until the completion of the sentence, including the period of mandatory supervised release for the offense, or January 1, 2006, whichever is later, for any conviction for an offense or an attempt of an offense defined in Article 9 of the Criminal Code of 1961 or in Section 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961 or for 7 years following any conviction for any other felony for which the defendant's genetic profile may be taken by a law enforcement agency and submitted for comparison in a forensic DNA database for unsolved offenses.

(c) After a judgment of conviction is entered, the law enforcement agency required to retain evidence described in subsection (a) may petition the court with notice to the defendant or, in cases where the defendant has died, his estate, his attorney of record, or an attorney appointed for that purpose by the court for entry of an order allowing it to dispose of evidence if, after a hearing, the court determines by a preponderance of the evidence that:

(1) it has no significant value for forensic science analysis and should be returned to its rightful owner, destroyed, used for training purposes, or as otherwise provided by law; or

(2) it has no significant value for forensic science analysis and is of a size, bulk, or physical character not usually retained by the law enforcement agency and cannot practicably be retained by the law enforcement agency; or

(3) there no longer exists a reasonable basis to require the preservation of the evidence because of the death of the defendant; however, this paragraph (3) does not apply if a sentence of death was imposed.

(d) The court may order the disposition of the evidence if the defendant is allowed the opportunity to take reasonable measures to remove or preserve portions of the evidence in question for future testing.

(d-5) Any order allowing the disposition of evidence pursuant to subsection (c) or (d) shall be a final and appealable order. No evidence shall be disposed of until 30 days after the order is entered, and if a notice of appeal is filed, no evidence shall be disposed of until the mandate has been received by the circuit court from the appellate court.

(d-10) All records documenting the possession, control, storage, and destruction of evidence and all police reports, evidence control or inventory records, and other reports cited in this Section, including computer records, must be retained for as long as the evidence exists and may not be disposed of without the approval of the Local Records Commission.

(e) In this Section, "law enforcement agency" includes any of the following or an agent acting on behalf of any of the following: a municipal police department, county sheriff's office, any prosecuting authority, the Department of State Police, or any other State, university, county, federal, or municipal police unit or police force.

"Biological material" includes, but is not limited to, any blood, hair, saliva, or semen from which genetic marker groupings may be obtained.

CREDIT(S)

Laws 1963, p. 2836, § 116-4, added by [P.A. 91-871, § 10, eff. Jan. 1, 2001](#).
Amended by [P.A. 92-459, § 10, eff. Aug. 22, 2001](#).
[\[FN1\] 720 ILCS 5/12-13, 5/12-14, 5/12-14.1, 5/12-15, or 5/12-16.](#)

[\[FN2\] 720 ILCS 5/9-1](#) et seq.

[\[FN3\] 720 ILCS 5/8-4.](#)

HISTORICAL AND STATUTORY NOTES

P.A. 92-459 rewrote this section, which prior thereto read:

"Chain of custody.

"(a) In a prosecution for a violation of Section 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961 or in a prosecution for an offense defined in Article 9 of that Code, the law enforcement agency and the State's Attorney's Office shall preserve, subject to a continuous chain of custody, any physical evidence secured in relation to a trial and sufficient official documentation to locate that evidence.

"(b) After a trial resulting in a judgment of conviction the evidence shall either be impounded with the Clerk of the Circuit Court or shall be securely retained by a law enforcement agency. Retention shall be:

"(1) Permanent following any conviction for an offense defined in Article 9 of the Criminal Code of 1961.

"(2) For 25 years following any conviction for a violation of Section 12-13, 12-14, 12-14.1, 12-15, or 12-16 of the Criminal Code of 1961.

"(3) For 7 years following any conviction for any other felony for which the defendant's genetic profile may be taken by a law enforcement agency and submitted for comparison in a forensic DNA database for unsolved offenses.

"(c) After a judgment of conviction is entered, the State's Attorney or law enforcement agency having custody of evidence described in subsection (a) may petition the court with notice to the defendant for entry of an order allowing it to dispose of evidence if, after a hearing, the court determines by a preponderance of the evidence that:

"(1) it has no significant value for forensic science analysis and must be returned to its rightful owner; or

"(2) it has no significant value for forensic science analysis and is of a size, bulk, or physical character not usually retained by the law enforcement agency and cannot practicably be retained by the law enforcement agency.

"(d) The court may order the disposition of the evidence if the defendant is allowed the opportunity to take reasonable measures to remove or preserve portions of the evidence in question for future testing.

"(e) For purposes of this Section, 'law enforcement agency' has the meaning ascribed to it in clause (a)(4) of Section 107-4 of this Code."

CROSS REFERENCES

Crimes, chain of custody, intentional failure to comply, see [720 ILCS 5/33- 5](#).

LIBRARY REFERENCES

[Criminal Law](#) ¶700(9).

Westlaw Topic No. [110](#).

[C.J.S. Criminal Law §§ 541](#) to [548](#).

RESEARCH REFERENCES

Treatises and Practice Aids

[6 Illinois Practice Series § 23.46](#), Preserving Evidence (New).

[11 Illinois Practice Series § 901\(1\):2](#), Chain of Custody.

UNITED STATES CODE ANNOTATED

Innocence Protection Act of 2004, see [18 U.S.C.A. § 3600A](#); [42 U.S.C.A. §§ 14136e](#), 4163 et seq.

725 I.L.C.S. 5/116-4, IL ST CH 725 § 5/116-4

Current through P.A. 94-726 of the 2005 Reg. Sess.