

HOUSE BILL NO. 263
INTRODUCED BY R. HEINERT

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THAT AN INDIVIDUAL CHARGED WITH THE COMMISSION OF A FELONY OR A YOUTH CHARGED WITH THE COMMISSION OF A SEXUAL OR VIOLENT OFFENSE PROVIDE A BIOLOGICAL SAMPLE FOR DNA TESTING, UPON A FINDING OF PROBABLE CAUSE TO REQUIRE THE SAMPLE, WHEN THE INDIVIDUAL OR YOUTH FIRST APPEARS IN COURT UPON CHARGES FOR THE OFFENSE; PROVIDING A PROCEDURE FOR THE COLLECTION OF A BIOLOGICAL SAMPLE; AMENDING SECTIONS 41-5-1404, 44-6-102, 44-6-103, 44-6-107, 46-5-306, 46-5-309, 46-10-202, AND 46-12-201, MCA; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 41-5-1404, MCA, is amended to read:

"41-5-1404. Service of summons -- biological sample at first proceeding following service of summons. (1) Any youth who is the subject of a proceeding under this chapter must be personally served with summons at least 5 days before the time stated for appearance.

(2) Service of summons on all other persons designated in 41-5-1403(1) ~~shall~~ must be made in accordance with Rule 4D of the Montana Rules of Civil Procedure, except that in all cases service ~~shall~~ must be completed at least 5 days before the time stated for appearance.

(3) If a party referred to in subsection (2) ~~herein~~ is not personally served before a hearing and has not been secluded ~~himself with in~~ an attempt to delay or disrupt any proceeding, ~~such~~ the party may appear within a reasonable time subsequent to the hearing and, on motion to the court, request a rehearing. The motion may be granted at the discretion of the judge if a rehearing would be in the best interest of the youth.

(4) The court may authorize payment from county funds of costs of service and necessary travel expenses incurred by persons summoned or otherwise required to appear at the hearing.

(5) An actual abandonment of a youth by ~~his~~ the youth's parent or parents ~~shall constitute~~ constitutes a waiver of the summons and notice requirements by the parent or parents. A return endorsed upon the summons showing inability to serve the summons constitutes prima facie evidence of actual abandonment.

(6) The youth court may, in the interests of justice, shorten the notice requirements contained ~~herein in~~ this section, and ~~such~~ the notice of shortened time ~~shall~~ must be endorsed on the summons.

(7) A party, other than the youth, may waive service of summons on ~~himself~~ that party by written stipulation or by voluntary appearance at the hearing. If the youth is present at the hearing, ~~his~~ the youth's counsel may waive service of summons ~~in his~~ on the youth's behalf.

(8) (a) At the first appearance of a youth against whom a petition has been filed because of the commission of a sexual offense or a violent offense, the court shall determine whether there is probable cause for collection of a biological sample from the youth using the procedure provided in 44-6-103 and, if there is sufficient probable cause, shall require that the sample be taken.

(b) For purposes of subsection (8)(a), "biological sample", "sexual offense", and "violent offense" have the meanings provided in 44-6-101."

Section 2. Section 44-6-102, MCA, is amended to read:

"44-6-102. Establishment of DNA identification index. (1) The department shall establish a computerized DNA identification index for the receipt, storage, and exchange of DNA records. The DNA identification index is the central repository for DNA records in the state of Montana.

(2) The DNA identification index must include:

(a) DNA records for:

(i) an individual charged with or convicted of a felony offense, as provided in 44-6-103; or
(ii) a youth against whom a petition has been filed pursuant to 41-5-1402 because of the commission of a sexual or violent offense or a youth found under 41-5-1502 to have committed a sexual or violent offense, as provided in 44-6-103;

(b) DNA records for a person upon order of a sentencing judge under 46-18-202; and

(c) analyses of DNA samples recovered from crime scenes, medical examinations, and unidentified human remains. For purposes of identification of missing persons, the DNA identification index may include DNA records of close biological relatives of a missing person.

(3) The DNA identification index and the DNA testing done by a forensic DNA laboratory must be compatible with the systems of DNA identification used by other criminal justice agencies or private testing laboratories to the extent necessary to permit the exchange of DNA information.

(4) The DNA records collected and stored in the DNA identification index may contain only information relating to the identification of individuals. Information that identifies a person that is the subject of a record must be limited to the information that is necessary to pursue criminal investigations and to support statistical interpretation of results.

(5) The DNA identification index may be used:

(a) by law enforcement agencies for purposes of identification in the course of criminal investigations and proceedings;

(b) to assist in the identification of human remains, including identification of missing persons; and

(c) if information allowing a person to be identified is removed, for a population statistics database and for identification, research, and protocol development for forensic DNA analysis and quality control."

Section 3. Section 44-6-103, MCA, is amended to read:

"44-6-103. Collection of samples and maintenance of data. (1) ~~(a) Following entry of judgment, a~~
A person convicted charged with the commission of a felony offense by any of the methods provided for in 46-11-101, a youth found under 41-5-1502 to have committed against whom a petition has been filed pursuant to 41-5-1402 because of the commission of a sexual or violent offense, or a defendant ordered under 46-18-202 to provide a biological sample for DNA testing shall provide a biological sample for DNA analysis to determine identification characteristics specific to the person.

(b) The sample must be provided at the preliminary examination pursuant to Title 46, chapter 10, if the court determines that there is sufficient probable cause to require the sample at that time. In determining whether there is sufficient probable cause, a court may take testimony as part of the preliminary examination or, upon notice that it considers reasonable, may conduct a separate hearing and require testimony. If the court determines that there is sufficient probable cause to require the sample and determines the use of a search warrant to be necessary, the court shall issue a search warrant for the collection of the sample.

(c) If the court determines that there is not sufficient probable cause at a preliminary examination to require the sample or if there has been no preliminary examination, the sample must be required at arraignment if a court determines, under the procedure provided in this section, that there is sufficient probable cause at that time. If there is not sufficient probable cause to require the sample at a preliminary examination or arraignment, the sample must be provided following any entry of a judgment of conviction or any finding under 41-5-1502 that the youth committed the offense.

(d) The sample must be provided to the department of corrections if the person is incarcerated in a facility administered by the department of corrections. If the person is not incarcerated in a facility administered by the department of corrections, the sample must be provided to a person or entity designated by the county sheriff.

(2) The biological sample must be collected, stored, and sent by the department of corrections or the

person or entity designated by the county sheriff under subsection (1)(d) to the department for entry in the DNA identification index in accordance with rules adopted by the department with the advice of the department of public health and human services.

(3) ~~The~~ If the offender is ~~responsible~~, if able to pay, for the cost of the collection of the sample, the offender is responsible for that cost. The fees charged for the collection may not exceed the actual costs of collection.

(4) The forensic DNA laboratory may perform DNA analysis only for those markers that have value for law enforcement identification purposes.

(5) The knowing refusal or failure to provide a biological sample under this part following entry of a judgment of conviction is grounds for revocation of a suspended or deferred imposition of sentence.

(6) A biological sample taken pursuant to this section for the purposes of DNA testing may be retained for use in the DNA identification index without a further proceeding and without further notice to the person from whom the sample was taken."

Section 4. Section 44-6-107, MCA, is amended to read:

"44-6-107. Expungement of DNA records. If a charge of a felony offense or a petition regarding the commission of a sexual or violent offense by a youth is dismissed or if a conviction of a felony offense or the adjudication of a youth for a sexual or violent offense is reversed, the record relating to the offense must be expunged from the DNA identification index. The county attorney of the county in which the charge was brought or the conviction occurred shall notify the department ~~of a reversal of~~ if a charge is dismissed or if a conviction for the offense or adjudication is reversed."

Section 5. Section 46-5-306, MCA, is amended to read:

"46-5-306. Purpose. (1) The purpose of 46-5-306 through 46-5-309 is to provide a procedure by which physical evidence in criminal cases may be destroyed or appropriated for law enforcement use when prosecutions have been completed and no further legal proceeding is contemplated or when it does not appear that criminal charges will be initiated. The procedure in 46-5-306 through 46-5-309 does not apply to a biological sample taken pursuant to 44-6-103 for the purposes of DNA testing.

(2) For purposes of this section, "biological sample" and "DNA testing" have the meanings provided in 44-6-101."

Section 6. Section 46-5-309, MCA, is amended to read:

"46-5-309. Applicability of other statutes. The provisions of Title 70, chapter 9, relating to the disposition of unclaimed or abandoned property, do not apply to actions filed pursuant to 46-5-306 through 46-5-309 or the collection and retention of a biological sample, as defined in 44-6-101, pursuant to 44-6-103."

Section 7. Section 46-10-202, MCA, is amended to read:

"46-10-202. Presentation of evidence. (1) The defendant may not enter a plea. The judge shall hear the evidence without unnecessary delay. All witnesses must be examined in the presence of the defendant. The defendant may cross-examine witnesses against the defendant and may introduce evidence in the defendant's own behalf. For purposes of this section, a preliminary examination conducted by the use of two-way electronic audio-video communication that allows all of the participants to be observed and heard by all other participants and that allows the defendant to cross-examine witnesses is considered to be an examination of a witness in the presence of the defendant. Two-way electronic audio-video communication may not be used unless the defendant's counsel is physically present with the defendant, unless this requirement is waived by the defendant.

(2) During the examination of a witness or when the defendant is making a statement or testifying, the judge may, and on the request of the defendant or state shall, exclude all other witnesses. The judge may also cause the witnesses to be kept separate and to be prevented from communicating with each other until all are examined.

(3) An objection to evidence on the ground that it has been acquired by unlawful means is not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in 46-13-302.

(4) For purposes of a hearing under this chapter, a defendant may, in the discretion of the court, appear before the court either by physical appearance or by two-way electronic audio-video communication. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other, so that the defendant and the defendant's counsel, if any, can communicate privately, and so that the defendant and the defendant's counsel are both physically present in the same place during the two-way electronic audio-video communication. The defendant may waive the requirement that counsel be in the defendant's physical presence during the two-way electronic audio-video communication. A judge may order a defendant's physical appearance in court for a preliminary examination.

(5) (a) If probable cause exists, the court shall require that a biological sample be taken for the purpose of DNA testing using the procedure provided in 44-6-103.

(b) For purposes of subsection (5)(a), "biological sample" and "DNA testing" have the meanings provided in 44-6-101."

Section 8. Section 46-12-201, MCA, is amended to read:

"46-12-201. Manner of conducting arraignment -- use of two-way electronic audio-video communication -- exception. (1) Arraignment must be conducted in open court and must consist of reading the charge to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead to the charge. The defendant must be given a copy of the charging document before being called upon to plead. For purposes of this chapter, an arraignment that is conducted by the use of two-way electronic audio-video communication, allowing all of the participants to be heard in the courtroom by all present and allowing the party to be seen, is considered to be an arraignment in open court.

(2) The court shall inquire of the defendant or the defendant's counsel the defendant's true name, and if the defendant's true name is given as any other than that used in the charge, the court shall order the defendant's name to be substituted for the name under which the defendant is charged.

(3) The court shall determine whether the defendant is under any disability that would prevent the court, in its discretion, from proceeding with the arraignment. The arraignment may be continued until the court determines the defendant is able to proceed.

(4) Whenever the law requires that a defendant in a misdemeanor or felony case be taken before a court for an arraignment, this requirement may be satisfied by two-way electronic audio-video communication if neither party objects and the court agrees to its use and has informed the defendant that the defendant has the right to object to its use. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other, so that the defendant and the defendant's counsel, if any, can communicate privately, and so that the defendant and the defendant's counsel are both physically present in the same place during the two-way electronic audio-video communication. The defendant may waive the requirement that the defendant's counsel be in the defendant's physical presence during the two-way electronic audio-video communication.

(5) A judge may order a defendant's physical appearance in court for arraignment. In a felony case, a judge may not accept a plea of guilty or nolo contendere from a defendant unless the defendant is physically present in the courtroom or is appearing before the court by means of two-way electronic audio-video communication.

(6) (a) If a biological sample has not yet been taken from the defendant for the purposes of DNA testing

and if probable cause exists, the court shall require that a biological sample be taken for that purpose using the procedure provided in 44-6-103.

(b) For purposes of subsection (6)(a), "biological sample" and "DNA testing" have the meanings provided in 44-6-101."

NEW SECTION. Section 9. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 10. Applicability. [This act] applies to biological samples, as defined in 44-6-101, taken on or after October 1, 2007.

- END -

