



Law and Justice Interim Committee

61st Montana Legislature

SENATE MEMBERS

JOHN ESP
GREG HINKLE
CAROL JUNEAU
JESSE LASLOVICH
LYNDA MOSS
JIM SHOCKLEY

HOUSE MEMBERS

SHANNON AUGARE--Chair
RON STOKER--Vice Chair
BOB EBINGER
DAVID HOWARD
MIKE MENAHAN
KEN PETERSON

COMMITTEE STAFF

SHERI HEFFELFINGER, Research Analyst
VALENCIA LANE, Staff Attorney
DAWN FIELD, Secretary

MINUTES

September 29, 2009 - Day 2

Room 137, State Capitol
Helena, Montana

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. The minutes are accompanied by an audio recording. For each action listed, the minutes indicate the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time may be used to locate the activity on the audio recording.

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COMMITTEE MEMBERS PRESENT

REP. SHANNON AUGARE, Chair

SEN. JOHN ESP
SEN. GREG HINKLE
SEN. CAROL JUNEAU
SEN. JESSE LASLOVICH
SEN. LYNDA MOSS
SEN. JIM SHOCKLEY

REP. BOB EBINGER
REP. MIKE MENAHAN
REP. KEN PETERSON

COMMITTEE MEMBERS EXCUSED/ABSENT

REP. RON STOKER, Vice Chair
REP. DAVID HOWARD

STAFF PRESENT

SHERI HEFFELFINGER, Research Analyst
VALENCIA LANE, Staff Attorney
DAWN FIELD, Secretary

AGENDA & VISITORS' LIST

Agenda, Attachment #1.

Visitors' list, Attachment #2.

CALL TO ORDER AND ROLL CALL

00:00:01 REP. AUGARE reconvened the LJIC at 8:05 a.m. The Secretary called roll, REP. STOKER and REP. HOWARD were excused, SEN. LASLOVICH arrived later in the meeting.

SJR 29 - PRESERVATION AND STORAGE OF BIOLOGICAL EVIDENCE

00:01:40 REP. AUGARE reviewed meeting procedure to be used. **Sheri Heffelfinger, Research Analyst, Legislative Services Division (LSD)**, asked committee members to refer the pre-meeting reading packet on preservation and storage of biological evidence (EXHIBIT #24). She briefly reviewed the information, particularly the draft survey and what questions the committee would like to have on the survey, and said that the panelists would address four questions in their presentations, listed below.

Panel Presentation and discussion:

- (1) What is the current law on preservation and storage:**
- (2) What are the key challenges?**
- (3) What changes to current law should the committee further examine?**
- (4) Are the proposed survey questions on target?**

00:04:34 **Sheriff Dave Castle, Cascade County**, said that current practice for preserving and storing evidence is that the evidence will be kept until the department is advised by the proper authority on the final disposition of evidence, usually the county attorney's office. Sheriff Castle said that the key challenge is lack of funding and that his office has to compete with other county departments for funding. He said that there is not a single fix because the problems and resources differ from county to county and that smaller counties, in particular, are challenged by the issues of evidence storage and preservation. Key questions to address are: does the agency store evidence or does it rely on another agency or the state to store evidence; if it does have storage capability, who handles the property room; what is the person's expertise and training; what is the amount and volume of property moving through the facility; is there an auditing system in place to oversee security; how often is evidence reviewed; what is the clearance rate; is an evidence technician employed; if not, how is the evidence handled; is the person sworn or a civilian; and is all or some of the evidence submitted to the state and who makes the call. Sheriff Castle said that the crime rate in a particular county should be a factor in determining the size of the facility and amount of equipment needed to store evidence. He said that media storage, such as photographs, CDs, DVDs, or video taped footage, is another issue, because of the finite shelf life of such media. Sheriff Castle said he would summarize his comments and submit them to the Committee after the meeting.

00:14:35 SEN. ESP asked, in Cascade County, if the county and city have separate evidence rooms and facilities. Sheriff Castle said yes, but that there are certain cases that are tied together.

- 00:16:25 REP. PETERSON asked Sheriff Castle to give his opinion on a bill, introduced but not passed in the 2009 Legislature, that would have required evidence to be preserved forever. Sheriff Castle said that several issues are at play, such as certain statutory requirements or the shelf life of the evidence. He said that Cascade County gets a legal opinion and recommendation on what the best course of action is for all of the evidence for each case. He said there is a need for a process on how to sift through evidence using the judicial branch and the justice system to determine what evidence that needs to be preserved.
- 00:19:31 SEN. JUNEAU asked if federal issues will be considered within the parameter of the study, if any state agencies are working with tribes in the preservation of DNA evidence, and what types of relationships exist between tribal police and state crime lab. Sheriff Castle said his agency collects and retains all evidence regardless of where the crime scene is, until such time the appropriate authority that will be dealing with that case determines what happens to that evidence. He said that could not speak for other agencies but would assume that other law enforcement agencies' practices would be similar. SEN. JUNEAU asked, using an example of a rape on a reservation of an Indian woman by a non Indian male, where the evidence would be stored, since the non Indian male would not be tried in a tribal court, but in a state court.
- 00:23:40 **Mark Murphy, Chief Criminal Deputy, Yellowstone County Attorney's Office,** said that evidence gathered in a situation within a county jurisdiction, whether Native American or non Native American, will be handled the same.
- 00:25:12 REP. PETERSON said that the State-Tribal Relations Committee discussed the issue of jurisdiction at a recent meeting. He said that there is a great gap in the justice system and that many times non Indian offenders are not prosecuted. REP. PETERSON said this needs to be addressed, perhaps at the federal level.
- 00:26:44 REP. AUGARE said that Glacier County is working with the Blackfeet Tribe on a model law enforcement agreement and that the LJIC would be updated on the status of the agreement at a spring LJIC meeting.
- 00:27:36 SEN. HINKLE asked for details on Cascade County's evidence facilities. Sheriff Castle said that the county has indoor, outdoor, and limited refrigerated facilities. He said that 200-300 new pieces of evidence are brought in for every 100 pieces destroyed and that homicide evidence, for example, must be kept for 75 years. He said that yearly audits are done, with assistance from the county attorney, to determine the status of each case and if evidence can be destroyed.
- 00:30:28 SEN. SHOCKLEY asked, when destroying evidence, if the defense is consulted. Sheriff Castle said he didn't know because the county attorney makes that determination. Mr. Murphy said it varies from county to county. He said that in Yellowstone County, the Clerk of Court is just now beginning the process of going through 40 years of evidence and destroying what can be destroyed. He said that there is a detailed procedure for destroying of evidence and could provide that to the committee.

- 00:34:08 **Tom Weightman, Evidence Technician, City of Bozeman and Gallatin County**, said that when he took control, it took over 1,000 man hours to perform an audit of all of the evidence in the vault. Mr. Weightman discussed several points, saying that:
- mandating a protocol for evidence handling could create conflicts with state crime lab standards or FBI standards, possibly compromising trial outcomes;
 - care must also be taken to not create unfunded mandates on already stressed budgets;
 - the legislature should defer to courts on evidence collection standards because mandates on how to collect and store evidence will be expensive and cause problems, particularly for smaller towns and counties, and may not keep up with current standards;
 - the backlog of DNA evidence at the state crime log affects investigations and prosecutions at all levels;
 - the initial collector is responsible for preserving that evidence until it is no longer considered evidence; and
 - issues such as evidence with no case file and a computer tracking system that doesn't tie into other systems must be addressed also.
- Mr. Weightman said most of the problems come back to lack of funding.
- 00:45:11 SEN. SHOCKLEY asked if adopting the same standards as the state crime lab for evidence handling would help. Mr. Weightman said yes. Mr. Murphy disagreed, saying that approach would cover only a small amount of evidence collected by law enforcement agencies. He said he saw no need for a standard and asked why this issue is being investigated.
- 00:48:09 REP. PETERSON asked Mr. Weightman if he has experienced problems with how evidence is handled. Mr. Weightman said that problems with custody of evidence have been resolved. REP. PETERSON asked about the process for getting rid of evidence. Mr. Weightman explained that the county attorney or a judge is consulted but that it is difficult for the county attorney to find the time to deal with old or unneeded evidence.
- 00:51:14 **Lt. Rob Moccasin, Great Falls Police Department (GFPD)**, echoed Sheriff Castle's concerns, mainly the lack of funding for dealing with evidence. He said that currently, the GFPD has about 30,000 pieces of evidence and that the department is taking in far more evidence that it is getting rid of. He said that the issue of providing cold storage facilities for DNA evidence is huge. He said that he is responsible for maintaining the evidence room and that he consults with the city and county attorney to obtain a release for disposal of evidence. He said that he has the same problem as Mr. Weightman in having no time to research what old evidence can be destroyed because he is so busy dealing with new evidence.
- 00:54:02 REP. EBINGER asked of the 30,000 pieces of evidence stored by the GFPD, how many are DNA evidence. Mr. Moccasin said that a conservative estimate would be about 1,500 pieces.

- 00:55:35 SEN. ESP asked about the security of evidence rooms. Mr. Moccasin said it is virtually impossible to get into the GFPD evidence room and explained the security measures in place.
- 00:57:50 Mark Murphy, Chief Criminal Deputy, Yellowstone County Attorney's Office, reviewed his personal experience as a prosecutor in handling of DNA evidence. He said that the Yellowstone County Attorney's Office handles over 1,000 felonies per year and of those, only about 40 - 50 cases are tried. Mr. Murphy said that because storage space is such an issue, Yellowstone County hired a person whose only job is to deal with evidence and that only very important pieces of evidence are retained for more than 60 days. Mr. Murphy said he did not see the need for changes and recommended that a complete analysis be done before spending money and burdening counties. He discussed legislative changes made in the 2003 and 2009 Legislatures and said that the biggest help would be to fully fund the public defender's office, in order to request DNA testing prior to trials, and the crime lab, in order to keep up with the ever increasing amounts of evidence sent there.
- 01:09:13 REP. PETERSON discussed an example of a criminal case in which eight people were killed in a head-on collision involving a drunk driver. He said that a critical element of the case was to establish what time the driver had consumed his last drink, so vitreous, blood, and urine samples were taken, which were retained by the state crime lab for use at the trial. He asked how long that type of evidence should be retained. Mr. Murphy said that evidence for major litigation should be retained for several years at least and that a civil action or court order should be obtained in order to preserve the evidence, if a prosecutor or defense attorney is concerned.
- 01:15:21 REP. MENAHAN asked how long evidence is retained in unsolved homicide cases or cold sexual assault cases. Mr. Murphy said that there are 40-year old unsolved cases in Yellowstone County for which evidence is still maintained and checked against the CODIS system regularly. He said that the cost of maintaining DNA evidence is extreme and related a case that has cost the state over \$100,000 to test and maintain DNA evidence.
- 01:18:41 **Jon Moog, Public Defender, Helena**, said that his major concern is with preservation of DNA samples. He referred to the Bromgard case and said that what evidence can't be tested today may be able to be tested in the future, as technology advances.
- 01:20:29 REP. PETERSON asked if Mr. Moog is talking about preservation of DNA evidence only. Mr. Moog said he is concerned only with DNA evidence and DNA sampling. Mr. Murphy said that the definition contained in 46-21-111 (2)(a), MCA, is very broad.
- 01:25:08 **Dr. Phil Kinsey, Supervisor, State Crime Lab, Missoula**, discussed procedures used in the state crime lab for handling and storage of evidence (EXHIBIT #25). Dr. Kinsey said his suggestion regarding the maintaining of evidence would be to incorporate an agreement at the time of adjudication of a

court case to address evidence storage issues. He said that the defense and prosecution could review the evidence collected and agree on what should be retained or destroyed.

- 01:39:19 REP. MENAHAN asked if the defense can also request analysis of evidence. Dr. Kinsey said yes, that the crime lab works for both the prosecution and defense.
- 01:41:00 REP. PETERSON asked why, if the crime lab identifies and stores a DNA sample, would any other agency would need to. Dr. Kinsey said the concern is that may be other evidence that could be exculpatory that was not looked at.
- 01:42:31 REP. PETERSON asked, once a DNA sample is converted to a profile, why is the actual sample needed. Dr. Kinsey said it is retained for quality control assurances. REP. PETERSON asked, if once a case is over and there is no chance that other charges will be filed, what is the point of saving evidence. Dr. Kinsey said that there is no point in preserving evidence once a case is resolved.
- 01:44:45 REP. PETERSON asked Mr. Murphy to respond to his question. Mr. Murphy said that if space was not a consideration, he would keep evidence under certain circumstances. He explained under what circumstances evidence would be retained.
- 01:48:28 REP. PETERSON said that there needs to be a reasonable approach for determining how evidence will be preserved or destroyed, with allowances for exceptional cases. Mr. Murphy said his opinion is that a reasonable process exists now, through the use of a court order from a judge.
- 01:50:11 SEN. ESP asked Sheriff Castle to comment. Sheriff Castle said that law enforcement officers are taught that it is their moral obligation to collect evidence that will prove people innocent. He said that this philosophy results in the collection of an overwhelming amount of evidence and does create storage problems. He said a decision should be made at the judicial level on what should be kept and what can be discarded.
- 01:52:57 SEN. SHOCKLEY asked at what point in time does evidence deteriorate to the point where it could not be considered stable. Dr. Kinsey said it depends on the type of storage method used. He said the more drastic the environmental circumstances are, the more quickly the evidence will deteriorate.
- 01:55:22 Mr. Moog said his opinion is that evidence not sampled, such as blood stains not swatched and tested from evidence, should be preserved in case a need arises to go back for more testing.
- 01:55:59 SEN. ESP asked Mr. Weightman how long he would keep a blood-stained shirt, for example. Mr. Weightman said he would keep it until a court order was given to destroy it.
- 01:56:27 **Jessie McQuillan, Montana Innocence Project**, said she has worked with SEN. MOSS and SEN. SHOCKLEY on SJR 29 because of its importance to the

criminal justice system. She said that all of the panelists have attested to the invaluable role DNA evidence plays. Ms. McQuillan discussed her perspective, saying that in last 15 years since DNA testing became available, 242 Americans have been exonerated of felony crimes, including three Montanans, because of DNA evidence. She said that DNA evidence is used to exonerate people and also to identify and convict true perpetrators. Ms. McQuillan said that current Montana law is inadequate and that Kelson Young, Director, Montana Coalition Against Domestic and Sexual Violence, shares the Montana Innocence Project's concerns with current policy and practice, as established by 46-21-111 (EXHIBIT #26). Ms. McQuillan discussed several concerns, such as that statute focuses only on evidence resulting in felony convictions and allows for the destruction of evidence after three years; and that there is no requirement to notify victims that evidence is going to be destroyed. Ms. McQuillan said that this is a huge issue nationally because science has advanced rapidly and laws haven't kept up. She said she would be happy to share research on other states, that she shares the concern about costs and mandates on law enforcement agencies already struggling with budget issues, and that the purpose of SJR 29 is to help clarify and ease the burden. Ms. McQuillan said that other states have limited the range of felony offenses in which evidence would have to be kept and that other states provide a mechanism and laying out process for evidence technicians to keep clippings without retaining the entire piece of evidence. Ms. McQuillan said that she provided an article to Ms. Heffelfinger that discussed the question of what kind of equipment and infrastructure is needed to deal with DNA evidence. She said that in the 2004 Justice for All Act, standards for evidence preservation were created, and that federal grants and funding are available under certain circumstances for states who preserve evidence. Ms. McQuillan said that she offered comments on the draft survey and said that it is very important to get a baseline established on what is being done in the state, so that some level of consistency may be established.

- 02:09:58 SEN. SHOCKLEY asked if rape kits are kept by a hospital, if no suspect is identified. Mr. Murphy said no, that the evidence is kept by law enforcement.
- 02:10:20 SEN. ESP asked Ms. McQuillan to say what changes she would make, based on the testimony given. Ms. McQuillan said that the three-year requirement for evidence retention and preservation is not long enough and the lack of consistency between agencies.
- 02:11:05 REP. PETERSON asked why all DNA evidence is not analyzed, rather than just certain samples. Dr. Kinsey said that time restrictions are a factor and that because the identity of a victim or perpetrator must be established only once, there isn't always a need to analyze and test everything. He said that there are instances in which everything would be tested. REP. PETERSON said that it makes sense to identify all DNA samples and to put them into a data base for future reference. Dr. Kinsey said that there are strict rules on what can be entered into the database and how it is entered into the database.
- 02:13:53 REP. PETERSON asked if preservation of evidence could be tied to the maximum length of a sentence for a particular crime. Ms. McQuillan said that was an

interesting possibility and would address part of her concern. She said that language would have to identify specific felonies and what evidence would be preserved. REP. PETERSON asked other panelists to respond to his suggestion. Mr. Murphy said it would not change his position.

- 02:16:49 SEN. SHOCKLEY asked if it would be good policy to extend the time frame for retaining evidence and to limit the requirement to certain felonies. Mr. Murphy said he remains concerned about creating unfunded mandates and said that any public policy should be funded accordingly. He said that creation of the state crime lab and the public defender system took care of many problems. SEN. SHOCKLEY asked about the retention of rape kits. Mr. Murphy said that penalties for rapists have been increased but that it is still very difficult to deal with rape cases and sometimes not worth the trauma to the victim.
- 02:22:59 REP. MENAHAN referred to 46-21-111, MCA (EXHIBIT #28) and said that upon a final conviction, the state is obligated to retain biological evidence for three years, at which point it the court can be petitioned to destroy it and that the defendant has the ability to object. He asked why there should be a blanket requirement that law enforcement agencies retain the evidence when that concern is addressed in the statute. Ms. McQuillan said her interpretation of the statute the language in subsection (1)(b), as referred to by REP. MENAHAN, addresses destroying the evidence before the three years is up.
- 02:25:15 SEN. ESP said his interpretation is, because of the language in subsection (1)(c), that the requirement extends to the full three years and beyond. Sheriff Castle said that deputies and law enforcement agencies are very hesitant to destroy evidence and frequently hold on to evidence past the three year requirement.
- 02:26:47 SEN. JUNEAU agreed with Ms. McQuillan that subsections (1)(b) and (1)(c) would apply only if before three-year deadline. She said there is no provision in current law for dealing with the issue after the three year window has passed and that the language needs to be clarified. She asked if others have a different understanding of the statutory language.
- 02:28:18 SEN. ESP agreed that the language needs to be clarified. Mr. Murphy said it is a complicated issue of statutory interpretation because the sections of law were passed as a unit in 2003. He explained his interpretation of the statute.
- 02:30:40 SEN. JUNEAU referred to the third and fourth paragraphs of the letter from Kelson Young (EXHIBIT #26) and read aloud information regarding how an exam and a rape kit is handled and stored, and the changes advocated for by Ms. Young. She said she would like to address those issues and asked Dr. Kinsey to respond. Dr. Kinsey said his understanding of the Forensic Rape Exam Payment Program (FREPP) is that a sexual assault victim can have use a rape kit to have evidence collected. The evidence is retained at the Office of Victim Services (OVS) of the Attorney General's Office until the victim decides if the rape is going to be reported to law enforcement. If the rape is reported, the kit is submitted to the crime lab, through local law enforcement, where a DNA profile is created. He said that the evidence swabs and DNA profile are maintained at the lab and that

the remaining evidence is sent back to local law enforcement. SEN. JUNEAU asked Dr. Kinsey if he thought the kits should be kept longer than three years and if the victim should be notified that the evidence is going to be destroyed. Dr. Kinsey asked to defer the question to Mr. Murphy, who said that if a victim chooses not to participate in an investigation, she must pay for the kit at a cost of over \$600. He said he is not aware of any victims who have done that.

- 02:35:41 **Ali Bovingdon, Attorney General's Office**, said that if a victim decides not to report an assault to law enforcement, state funding is available to the victim to pay for the kit. She said she does not know how many kits are being retained at the OVS but would find out and provide the information to the LJIC. She said she did not know the specific OVS office policy for retention of rape kits and would report back to the committee in the afternoon. REP. AUGARE asked to have the information by 11:30 a.m., if possible.
- 02:37:32 **Valencia Lane, Staff Attorney, LSD**, said, regarding the interpretation of statute 26-21-111, MCA, agreed that it is slightly ambiguous but said as drafted, (1)(c) would apply to subsections (1)(a) and (1)(b).
- 02:38:48 SEN. MOSS asked about other states that are also looking at this issue and if they have found efficient processes and procedures for dealing with storage of evidence. Ms. McQuillan said yes, that other states allow for small clippings, rather than keeping an entire piece of evidence, as well as limiting the types of crimes in which DNA evidence is required to be preserved.
- 02:40:46 SEN. MOSS asked Dr. Kinsey if there are professional organizations or programs providing information on evidence preservation and storage. Dr. Kinsey said yes, that there is a national organization for evidence technicians, and that he would get the name of the organization to the LJIC.
- 02:41:41 SEN. MOSS asked Mr. Murphy if the survey would be useful to him in budgeting and planning decisions. Mr. Murphy said that information is always useful and that he is always interested in ways to save the taxpayer money.
- 02:44:14 **BREAK** The LJIC took a 15-minute break at 10:50 a.m. until 11:05 a.m.
03:00:27 REP. AUGARE called the meeting back to order at 11:07 a.m.
- 03:00:51 Ms. Heffelfinger distributed copies of 46-21-110 MCA (EXHIBIT #27) and 46-21-111, MCA (EXHIBIT #28).

Public comment

- 03:01:19 **Bob Clark, Lewis and Clark County Sheriff's Office**, evidence technician, said that his concern that certain issues might get overlooked in the study have been eliminated and that the LJIC has covered the topic to his satisfaction. He said that evidence storage is a nationwide problem and that procedure, rather than space, is often the main stumbling block. Mr. Clark also discussed budget concerns, saying that it is important to look at all aspects of what goes into property and evidence preservation, not just preservation of biological evidence.

Committee work session: What legislative issues does the Committee want to further examine and review and approval of survey questions

- 03:06:48 SEN. MOSS said that the survey will be an important tool in getting a baseline understanding of the complexity of the issue. She said that some minor changes could be made to the survey but that she thought the LJIC should move ahead with it.
- 03:07:45 Ali Bovingdon, Attorney General's Office, returned to update the LJIC. Ms. Bovingdon said that 46-15-411, MCA, regarding FREPP, was amended in 2005 to require the OVS to pay for the medical exam of a rape victim. Ms. Bovingdon explained how FREPP works and said that administrative rules have been adopted to deal with the rape kits and their storage. She said that only rape kits of victims who choose not to report the crime are stored at the OVS for 60 days, due to space and storage limitations, and that the victims are not notified that the kit will be destroyed.
- 03:11:14 SEN. SHOCKLEY said he thought that 46-21-111, MCA, should be amended to narrow the crimes covered to homicide and rape only.
- 03:11:51 Ms. Heffelfinger said that she would like the LJIC to list specific questions that the members would like on the survey. She said she will use all of the questions and comments from the LJIC to craft the survey, that the survey will be web-based, and that it will be made available to all law enforcement agencies. Ms. Heffelfinger said that the issues of costs, staffing, clearance, and shared rooms should be included on the survey, as well as what protocols are in place to deal with shared jurisdiction. She asked the committee to decide if it wants final review of the survey or if she should post it and begin gathering responses. It was agreed by the LJIC that Ms. Heffelfinger would move ahead with the survey without final review by the members.
- 03:14:44 SEN. JUNEAU agreed that looking at specific crimes would be helpful and asked that agencies report the size of the agency and if it is rural. She said she would also like each agency to list its top two challenges.
- 03:16:02 SEN. MOSS asked that survey results be shared with the agencies. She asked that the survey include questions on what professional training or technical assistance is needed and could be provided to local agencies.
- 03:17:07 SEN. ESP said that he didn't think much needed to be done and that the survey must be simple and easy to complete because law enforcement officers are very busy people. REP. PETERSON agreed and said he would like recommendations from law enforcement officers on how to reduce and eliminate evidence that no longer is useful or needed. He said he would also like an analysis of 46-21-110 and 46-21-111, MCA, to determine the legislative intent, saying that they were originally passed as one package but are not being used that way. He said that 46-21-111 may need clarification. REP. AUGARE asked Ms. Lane to perform the analysis. REP. PETERSON asked, if the state crime lab has to preserve evidence, why local law enforcement should have to preserve evidence as well.

He said he would like that to be included on the survey and said that he agreed with SEN. SHOCKLEY's suggestion on limiting preservation to certain felonies.

- 03:20:36 REP. MENAHAN asked that the survey use the same terms and language as in statute, in order to be very clear on what is being asked.
- 03:21:48 SEN. SHOCKLEY said that there needs to be a provision for keeping rape kits but he did not want the statute to apply to the OVS in the Attorney General's Office.
- 03:23:08 SEN. ESP asked Ms. Lane to look into statutes covering retention of rape kits, particularly if the case is an open one. Ms. Lane asked for clarification, saying that kits collected by the OVS in the AG's office are for crimes not yet reported to police and that SEN. ESP's request deals with county retention of evidence in active cases. SEN. SHOCKLEY said if a rape has been reported and a kit prepared, by virtue of it being an open case, the evidence would be retained. SEN. ESP said he didn't think that this issue belonged in this area of statute and that it is a separate issue from where the OVS keeps evidence.
- 03:25:43 REP. MENAHAN responded that the discussion has dealt with the two separate issues of post conviction relief and of cold and open cases. He said he thought the survey would question law enforcement about each and said he would like to see what policies are in place around the state before he considers creating new or amending current statute. He said it has been his experience that evidence in open or cold cases are maintained indefinitely.
- 03:27:12 REP. PETERSON asked why all rape kit evidence is not automatically sent to the crime lab. Dr. Kinsey said it may be a question of resources and that the crime lab is not allowed to put information into the database unless there is an active and ongoing investigation.
- 03:30:18 REP. MENAHAN explained why not every rape kit needs to go to the state crime lab, saying that the issue could be whether or not the sexual contact was consensual.
- 03:33:48 SEN. ESP said he would like the Committee to consider the unintended consequences of notifying victims regarding the destruction of rape kits. He said great care must be taken to consider the anonymity of the victim and the victim's wishes.
- 03:34:43 SEN. JUNEAU agreed that the issue needs to be looked at but agreed that it should be addressed in a different statute. She said that she thinks that a 60 day retention of rape kits is not lengthy enough and that a simple solution would be to provide the OVS with additional storage. She said the issue may not fit with the topic, but certainly fits under the Committee's jurisdiction.
- 03:37:14 The LJIC recessed for lunch until 1 p.m.
04:55:07 REP. AUGUARE called the meeting back to order at 1:00 p.m.

OTHER ISSUES: ANIMAL HOARDING

04:55:51 SEN. ESP said that he had requested that the issue of animal hoarding be given more consideration. He said that the committee had received background information in the mailing, which included an issue summary, MCA sections relating to animal cruelty and hoarding, a copy of SB 221 introduced in the 2009 legislature, and other information (EXHIBIT #29).

Panel: Current law and recent cases - identification

04:57:31 **Dr. Deb Sanchez**, said animal hoarding is a complicated issue and that there are few straight forward answers. She said that hoarding is a symptom, not a disease; and that there is a very high recidivism rate for hoarders. She said that animal hoarding creates a public health problem as well health problems for the animals and hoarder. Dr. Sanchez said that a multi-disciplinary approach is the best avenue for treatment. She said that she is not an expert but was able to learn that there are certain characteristics associated with animal hoarding. She discussed a typical case and said that a hoarder is frequently an older woman. She said that there are several different types of hoarding and that while prosecution plays a role in dealing with a hoarder, it does nothing to eliminate the illness. She said intervention methods must include criminal intervention, civil and regulatory intervention, and mental health intervention; and must be tailored to the needs of the individual.

05:05:52 SEN. ESP asked if her research has indicated if the multi-disciplinary solutions are effective. Dr. Sanchez said that she has not read many of the case studies because of their length but said that there is success using that approach.

05:06:45 SEN. HINKLE asked if any types of legitimate hoarding existed, such as animal organizations that care for unwanted animals. Dr. Sanchez said any program would have to be able to meet the definition of proper care.

05:08:02 Ms. Heffelfinger said that the Committee would view a short video that would put the issue into context. She said the video deals with "Camp Collie", which affected Cascade and Toole Counties. She said the members must focus on how hoarding relates to current statutes on animal cruelty and that funding is a critical aspect of the issue. The Committee viewed the video.

05:17:27 Mark Murphy, Deputy County Attorney, Yellowstone County, discussed a similar case in Yellowstone County, saying that there was over \$100,000 of in-kind donations and over \$40,000 in cash donations made to care for the animals in that case; and that 250 volunteers, including veterinarians and vet techs, put in uncounted hours in caring for the animals. He said that a bill of \$194,000 was given to the hoarder for the restitution costs. Mr. Murphy explained that because the animals were considered evidence, they had to be maintained for the duration of the investigation and trial, which required daily care and numerous veterinarian bills. He said that the defendant argued that she was mentally fit and able to care for the animals and that in the end, she forfeited all of her titles and rights to the animal, which allowed the animals to be adopted. He said that had such an outpouring of supplies and volunteers not occurred, the restitution bill would have been much closer to \$1 million. Mr Murphy said he found it

astonishing that this case got so much media attention and that three large criminal cases going on at the same time received much less attention. Mr. Murphy said that if hoarders are going to be prosecuted, there must be a funding source to pay for it. He said that hearing animal hoarding cases under the animal welfare act is not adequate to address this issue and he suggested amending 27-1-434, MCA, to allow for removing ownership interest by adding a subsection (e) to subsection (5) to allow for ownership interests to be taken away from the owner, which would greatly decrease the costs of these cases.

- 05:26:54 SEN. ESP asked if Yellowstone County petitioned the court to compel the defendant to post bond or if the County Attorney asked for bond. Mr. Murphy said that the defendant's only income was a social security disability payment, so the judge imposed a \$50 per month payment for the entirety of her 20 year suspended sentence. He said that typically, it would be a two-year sentence but because the defendant had a previous felony conviction, it was possible to hand down a longer sentence.
- 05:28:53 SEN. SHOCKLEY suggested adding statutory language saying that if an owner can't feed and care for his or her animals and the state takes over for a certain period of time, the animals may be disposed of in a humane manner. Mr. Murphy said that type of language would help expedite the process.
- 05:31:47 REP. PETERSON discussed SB 221, introduced in the 2009 Legislature, and asked Mr. Murphy to comment. Mr. Murphy reviewed the legislative hearing held on the bill, saying that testimony focused on the mental health aspect of the issue and that there was support for the hoarders to be sentenced to the Department of Public Health and Human Services (DPHHS). REP. PETERSON said he did not like the bill because the first offense was a felony conviction. Mr. Murphy said only way to get long-term mental health treatment is to get long-term supervision, which is only possible through felony conviction.
- 05:34:58 REP. PETERSON asked what could be done to be proactive and prevent it from happening, such as restricting the number of animals owned or creating a permit process. Mr. Murphy said there is nothing like that in place and said while such measures would help, it may not prevent all situations from occurring. He referred to the hoarding case in Shelby and pointed out that the dogs were driven into the community from Canada on a semi-truck, so permitting or ownership limits would not have helped.
- 05:36:15 REP. AUGARE said that local governments should have control of these issues and that the legislature should not involve itself in this arena.
- 05:37:43 **Ed Sheehy, Public Defender, Missoula, Regional Deputy Public Defender,** discussed his involvement with the case in Billings and agreed that it was very expensive, very emotional, and attracted a great deal of media attention. He said both sides agreed that prison was not the answer. He said that the defendant's previous felony conviction for writing bad checks allowed the judge to hand down a 20-year suspended sentence. He reviewed the specifics of case and stated that the only real defense was to try to get the defendant into the mental health

system. He said they did not succeed but that even if they had won, the defendant could not be forced to take medication. He said he hopes the defendant will continue to follow through with the mental health treatment she has been receiving.

- 05:44:37 REP. MENAHAN said that the aggravated animal cruelty statute has only a two-year maximum sentence and asked Mr. Sheehy to give his opinion on making it longer, which would give courts more tools and authority. Mr. Sheehy said he would support lengthening the sentence but that it shouldn't be to the Department of Corrections, but rather to the DPHHS. REP. MENAHAN asked about Mr. Murphy's recommendation to amend Title 27 to allow seizure of animals earlier in the process. Mr. Sheehy said that he would object to that because it could be used against a client in a criminal case.
- 05:49:04 REP. PETERSON asked what will happen if the defendant doesn't comply with the provisions of her 20-year suspended sentence. Mr. Sheehy said she would be committed to DPHHS and that she likely would be placed in a mental health treatment center. REP. PETERSON said that the case would have been much more difficult to handle without the defendant's previous felony conviction. Mr. Sheehy agreed but that charges could have been filed differently for misdemeanor charges that still would have imposed a multi-year sentence but that it would not have included mental health treatment.
- 05:51:42 Sheriff David Castle said that law enforcement agencies need help because the work load for law enforcement has grown tremendously over the years because of cases such as these. He said he would like clarification of the language regarding intent and said certain criminal elements must be met before charges and be filed and that mental health considerations cloud the process.
- 05:54:23 **Dave Pauli, Regional Director, Humane Society of the United States**, said that he also serves as the legislative chair for the Montana Animal Care Association, and that a number of bills on this issue were submitted in the 2009 Legislature, indicating that there is a huge demand for relief. He agreed that the Yellowstone County case was unique because of the felony issue but said the crux of the issue is expanding the length of sentence. He said that sentencing options and early intervention options are not available at this time but that those tools are needed. Mr. Pauli said, regarding challenges faced by animal shelters in Montana, that all shelters are underfunded and that animal agencies have to work with law enforcement agencies to deal with these cases. Regarding statutory deficiencies, Mr. Pauli said that more authority should be given to the courts to deal with the animals and that long-term probation should be an option. Additionally, he said, a pet facilities care act for mandatory inspection and licensing for pet stores would be of help.
- 06:02:34 Mr. Pauli distributed packet of information (EXHIBIT #30) and discussed various topics associated with animal health issues, a definition of hoarding, puppy mills, and other states' animal hoarding laws.

SEN. HINKLE related a case involving a very elderly lady who owned many cats and dealt with their deaths by putting them in her freezer. He said that she obviously was suffering from mental health issues and that under HB 221, she would have been convicted of a felony offense and sentenced to jail. He asked Mr. Pauli to give his specific recommendations on what should be done. Mr. Pauli said he doesn't support sending people to prison and that he would like them to get the help they need, but that the health of the animals involved must also be considered. He said that a longer sentence with treatment options would be the best course, but that there is no legal means to do that right now.

- 06:12:06 SEN. SHOCKLEY said that hoarding is a mental illness and that it is inappropriate to address is through criminal statutes. Mr. Pauli said that there are many degrees of mental illness and that the practical question is how to determine when it intertwines with criminal activity. He said that his goal is to get longer supervisory time but that the only tool at this time to get it is through a felony charge. SEN. SHOCKLEY asked if any other state as addressed this as civil charge. Mr. Pauli said not that he is aware.
- 06:14:26 In response to a question from SEN. SHOCKLEY, Dr. Sanchez said that animal hoarding is not mentioned in the DSM-IV. She said that animal hoarding is not an illness, but rather a symptom of mental illness; and that current mental health statutes are not adequate to address the issue.
- 06:15:44 SEN. ESP asked Dr. Sanchez to describe what multi-disciplinary treatment approaches are being successfully used in Montana. Dr. Sanchez said that a person is committed to the state hospital for treatment and when discharged, works with a probation officer if the person has been charged with a crime. She said the piece that would have to be added would be a public health component. She said that flexible sentencing would be critical because a "one size fits all" approach would not work. SEN. ESP asked, if there is no official diagnosis made under a multi-disciplinary treatment approach, how would billing be handled. Dr. Sanchez said that it is a symptom of a number of diagnosis and could be billed as such. SEN. ESP asked if treatment could be paid for by Medicaid or Medicare, if the person was eligible for those programs. Dr. Sanchez said yes.
- 06:18:42 **Paul Babb, Chief Executive Officer, Butte-Silver Bow County**, distributed a spread sheet of the costs incurred due to Camp Husky costs (EXHIBIT #31). He said that costs to Butte-Silver Bow County would have been much higher if it had to have paid shelter costs. He said that a means to expedite the process would not only save counties a great deal of money and resources, but also the emotional cost to the community. He described how the case ended up in Butte-Silver Bow and said that the defendant is now in Colorado and could very likely be doing the same thing there. He agreed that prison isn't the answer but that there should be consequences, and that any help would be appreciated.
- 06:23:43 SEN. ESP asked for discussion about the fiduciary and budget implications of a civil commitment to the DPHHS versus the DOC. **Deb Matteucci, Behavioral Health Liaison DOC, DPHHS**, explained how a civil commitment is paid for by general fund dollars. She said that if the person has a diagnosis for a Seriously

Disabling Mental Illness (SDMI), the person may apply for Medicaid or other assistance but that if the person does not meet criteria, the person would be responsible for paying treatment costs. SEN. ESP asked if funding could be found to assist those who don't qualify for Medicaid. Ms. Matteucci said that she wasn't sure where such funding would come from or how it would be handled statutorily, because each case is so unique.

06:28:59 SEN. SHOCKLEY said it is clear to him that hoarding is a mental illness, not a crime. He discussed various models in law that could be used to deal with hoarders, including eminent domain law or an agister's lien. He described a civil proceeding that would allow a county to take possession of the animals and bill the owner for care. He said that a county would be allowed to disperse or humanely dispose of the animals if the owner couldn't pay, which would eliminate the need to hold the animals and provide care for them while dealing with the situation. He said the best solution would be to craft legislation in a way that the underlying disease could be used as cause for civil commitment, because it would be better for the person and would not burden the corrections system.

06:31:58 REP. PETERSON agreed that hoarding should be a civil offense. He asked Ms. Matteucci to comment on what kind of incentive, under a civil proceeding, could be used to make sure that the offender is obeying the law. Ms. Matteucci said that statute already allows a person to be committed to the Montana State Hospital under a civil involuntary commitment, but that the criteria is very difficult to meet, so proving that the severity of the illness is difficult. She explained how the statute works and said that a person originally sentenced to the Montana State Hospital as guilty but mentally ill may end up in prison anyway.

06:38:43 REP. AUGARE recessed the LJIC at 2:45 p.m. for 15 minutes until 3 p.m.

06:55:04 REP. AUGARE called the committee back to order at 3:01 p.m

Public comment

06:55:50 **Matt Kuntz, Executive Director National Alliance on Mental Illness (NAMI)**, thanked SEN. ESP for the opportunity to address the LJIC. Mr. Kuntz said that NAMI agrees that hoarding is a mental illness but feels that a felony conviction not warranted. Mr. Kuntz reviewed several legislative options and recommended using a civil process to deal with hoarders (EXHIBIT #32).

06:59:52 **Peggy Duezabou, citizen**, said that while she is appreciative of the difficulty created by a hoarding situation, she is yet to be convinced that there is a compelling public interest to create legislation to deal with it. Additionally, Ms. Duezabou said, it bothers her to think that government and legislators are trying to define hoarding before the medical community does.

07:02:59 **Linda Metzger, citizen**, thanked the LJIC for considering the issue of animal hoarding and said she was speaking on behalf of an entire community affected by an animal hoarding situation. Ms. Metzger said that her community became collateral damage in the effort to deal with a hoarder and that while she has compassion for hoarders, the issue also affects deeply everyone who lives in the area. She described what she personally and her community went through in

dealing with a hoarder. She related efforts undertaken by the local law enforcement agencies and the county attorney, and also described the two lawsuits filed against the hoarder in an attempt to get the situation taken care of. Ms. Metzger discussed several other points, including that she and others are now being sued by the hoarder for tens of millions of dollars, that this is a real issue that needs to be dealt with, and that hoarders have an almost 100% recidivism rate. Ms. Metzger said that she wants statutory language that would clearly address animal hoarding.

07:11:08 **Cheryl Moldenhauer**, testified that she opposed creating a felony charge for a mental health issue, saying that animal hoarders truly don't know they are doing something wrong.

Committee work session

07:12:53 SEN. SHOCKLEY asked Ms. Moldenhauer to comment on treating hoarding as a mental illness, and to treat the person at a hospital. Ms. Moldenhauer said that each case is different, so she couldn't really say. She said one solution would not fit all cases.

07:14:00 Ms. Heffelfinger asked the LJIC to decide if it wanted to continue working on the issue of animal hoarding. After discussion, it was agreed that the committee would not devote more time or resources to the issue.

WRAP UP

07:28:49 REP. EBINGER asked to discuss an issue of concern and said that he has heard from several law enforcement agencies about the Two Rivers Detention Center in Hardin. REP. AUGARE asked if it could be addressed at the December meeting. REP. PETERSON said that it would be purposeless because the facility is private and not under the purview of the LJIC. After a brief discussion, REP. AUGARE asked Ms. Heffelfinger to draft a letter to request a written report from the Two Rivers facility officials to the LJIC.

NEXT MEETING

07:39:04 Ms. Heffelfinger reviewed a draft agenda for the December meeting (EXHIBIT #33). She reminded the members that Thursday, December 17, is optional, but that if members chose to take the tour of the WATCH program, they would get salary, per diem, and travel.

07:40:00 **Rick Deady, DOC**, reviewed details of the WATCH tour and events of the day. He said he could be reached by telephone at 444-4092 or by email at rdeady@mt.gov, and would assist in arranging transportation, if needed.

RULE REVIEW

07:41:00 Valencia Lane, Staff Attorney, LJIC, reviewed a September 22 memo regarding administrative rules proposed by the Department of Justice and the Department of Corrections (EXHIBIT #34).

OTHER BUSINESS

07:46:14 There was no other business to discuss.

ADJOURNMENT

07:47:23 With no further business before the LJIC, REP. AUGARE adjourned the meeting.
The next meeting is scheduled for December 18, 2009, in Helena.

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