

Office of Research and Policy Analysis

SJR 29: A Primer

Background and Study Tasks for the Study of the Retention and Preservation of Biological Evidence

A REPORT TO THE LAW AND JUSTICE INTERIM COMMITTEE

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Study of the Retention and Preservation of
Biological Evidence

prepared by Sheri S. Heffelfinger, Legislative Research Analyst
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for the
Law and Justice Interim Committee
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NOTE: This paper briefly summarizes the issues involved in the SJR 29 study, relevant law in other states, Montana's law, and specific study tasks. Key reference material related to the footnotes has been attached for further information and suggested reading.

ACTION ITEM: A threshold study question for stakeholder comment and committee discussion and action is provided on page 12.

Issue overview

Advances and challenges

Technological advances in forensic DNA analysis provide new opportunities to solve cold cases and exonerate the wrongly convicted. However, these advances also present challenges related to retaining and preserving biological evidence collected from the thousands of crime committed in Montana annually. Biological evidence is defined in Montana statute as "any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or other identifiable biological material, including the contents of a sexual assault examination kit, that is collected as part of a criminal investigation or that may reasonably be used to incriminate or exculpate any person of an offense."¹ These items may be clothing, weapons, sexual assault kits, bed sheets, carpet pieces, sleeping bags, furniture, cars, and other property. Local enforcement agencies are especially challenged to keep track of this material and preserve it for future use. Access to this evidence depends not only on proper storage, but also on good recordkeeping and accountability policies (i.e., maintaining a proper chain of custody) so that evidence is not

¹ Senate Bill No. 447 from the 2009 Session. See new subsection (3)(a) added to section 46-21-111, Montana Code Annotated (MCA).

contaminated, lost, or inadvertently destroyed.

As DNA forensic technology has advanced exponentially, so have the challenges. Crime scene investigators are collecting more evidence than ever before. And the laws are changing, too. States are extending or eliminating the statutes of limitations on certain crimes, authorizing DNA samples from more people, and setting longer retention times.²

How are law enforcement evidence rooms coping? Unfortunately, not well. A Denver Post investigative series examining police department evidence rooms in Colorado, Texas, California, and elsewhere across the country discovered that many evidence rooms are not only overcrowded, but are often managed by undertrained staff and that written policies on the preservation of biological evidence are either inadequate or nonexistent.³ The Denver Post also published a series of short videos further exposing the problem with startling images and poignant stories about heinous crimes that will never be solved and innocent people who remain imprisoned because crucial evidence was lost or destroyed.⁴

Thus, even though items stored in evidence rooms offer a goldmine of potential DNA evidence that could help solve crimes and exonerate innocent people, the challenges concerning proper collection, cataloguing, storage, preservation, and access are formidable and complex.

Issues beyond storage

Although the title of SJR 29 focuses on the retention and preservation of biological evidence, in the political arena, discussion about proper storage and recordkeeping inevitably leads to discussion about civil liberties and privacy. These policy issues are particularly contentious in states that require DNA samples be collected not only from convicted felons, but also from

² Kiley, William P., "The Effects of DNA Advances on Police Property Rooms", *FBI Law Enforcement Bulletin*, March 2009. Posted online at http://www.fbi.gov/publications/leb/2009/march2009/focus_on_forensics.htm.

³ Plunket, Chuck, "DNA retention policies unclear, unwritten", *The Denver Post*, July 24, 2007.

⁴ Moffeit, Mike and Greene, Susan, "Trashing the Truth", *The Denver Post*, July, 2007, posted online at <http://www.denverpost.com/evidence>.

arrestees or even suspects and where laws allow indefinite retention of DNA without clear restrictions on who may access that DNA and for what purposes. Some stakeholders concerned about constitutional and ethical implications argue that state lawmakers should adopt stricter sideboards to protect civil liberties and individual privacy.⁵ Other stakeholders argue that appropriate safeguards have already been developed and are in place in most states.⁶

Backlog

The elephant in the living room is backlog. There are hundreds of thousands of unsolved rape case and homicides nationally and a recent study estimates that in more than half of those cases, DNA evidence is available that could help solve those crimes but has never been analyzed because of the huge backlogs facing federal and state crime laboratories.⁷ Although the hearings on SJR 29 did not touch on potential backlog at the state crime lab, caseload may be an issue during the course of this study.

State legislatures

State legislatures are at the front and center of the growing policy debate. In a recent U.S. Supreme Court ruling that inmates do not have a constitutional right to post-conviction DNA testing, the high court made it clear that is up to Congress and state legislatures, not the courts, to decide how best to resolve these issues and balance the pursuit of justice with

⁵ Gaensslen, R. E., "Should Biological Evidence of DNA be Retained by Forensic Science Laboratories After Profiling? No, Except Under Narrow Legislatively-Stipulated Conditions", *Journal of Law, Medicine & Ethics*, Summer 2006. See also, Maschke, Karen J., "DNA and Law Enforcement", in *From Birth to Death and Bench to Clinic: The Hastings Center Bioethics Briefing Book for Journalists, Policymakers, and Campaigns*, 2008, Chapter 10, pp. 45-50.

⁶ Herkenham, M. Dawn, "Retention of Offender DNA Samples Necessary to Ensure and Monitor Quality of Forensic DNA Efforts: Appropriate Safeguards Exist to Protect the DNA Samples from Misuse", *Journal of Law, Medicine & Ethics*, Summer 2006.

⁷ Washington State University Wire Service, "WSU Researchers Uncover Huge Unsolved Crime DNA Testing Backlog", *Research News & Features, Society*, 2006, reporting on an article by Pratt, Gaffney, Lovich, and Johnson, "This Isn't 'CSI': Estimating the National Backlog of Forensic DNA Cases and the Barriers Associated with Case Processing", *Criminal Justice Policy Review*, Vol. 17, No. 1, 32-47 (2006).

individual liberty and privacy rights.⁸

Other states

Who must provide DNA samples

Currently, all 50 states require convicted sex offenders to provide DNA samples, and as of February 2009, 46 states (including Montana) require that all convicted felons provide a DNA sample; 11 states specify DNA samples must also be provided by those convicted of certain misdemeanors, such as certain sex or child victim offences; and 15 states authorize DNA collection from arrestees.⁹

Retention and use

About half of the states compel the retention and preservation of DNA evidence after conviction, but many states restrict how long samples may be retained, the types of crimes for which DNA samples are collected and retained, the circumstances under which the DNA may be accessed, and the purposes for which it may be used.¹⁰

Advocates of state studies

Stakeholders on various sides of the issues agree that biological evidence is an invaluable tool in fighting crime and solving cases. The Innocence Project, a national litigation and public policy organization, is actively advocating that states review and revise their collection, retention, and access laws to assist in efforts to exonerate wrongfully convicted

⁸ *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. ____ (2009). See also, Barnes, Robert, "Court Limits Access to DNA Evidence", *The Washington Post*, June 19, 2009.

⁹ National Conference for State Legislatures, "State Laws on DNA Data Banks Qualified Offenses, Others Who Must Provide Sample", February 2009. <http://www.ncsl.org>.

¹⁰ Innocence Project, "Preservation of Evidence", Fact Sheet. Available at <http://www.innocenceproject.org>.

people.¹¹ Law enforcement agencies, including the U.S. Department of Justice, advocate study to determine how to assist criminal investigators in meeting the space, staffing, and resource challenges associated with the proper collection, retention, and access to biological evidence.¹² Consequently, many states are looking at these issues.

Montana law

Preservation and disposal

Section 46-21-111 of the Montana Code Annotated (MCA) governs the preservation and disposal of biological evidence obtained in a criminal proceeding in Montana. The 2009 Legislature amended this section by passing SB 447, which was sponsored by Sen. Moss and co-sponsored by Sen. Shockley. Under SB 447, the state crime lab is required to "permanently preserve under laboratory control any remaining biological evidence collected from items submitted to it".¹³ The testimony on bill the bill was that this language simply codified what is current policy at the state crime lab.

SB 447 did not fundamentally change the portion of section 46-21-111, MCA, that requires local law enforcement agencies to preserve biological evidence "obtained in connection with a felony for which a conviction is obtained". The statute currently requires local agencies to retain biological evidence for a minimum of 3 years after the conviction becomes final. There is, however, a process available to law enforcement agencies who may wish to dispose of the evidence earlier.¹⁴

The statute does not address retention of biological evidence obtained in connection with a felony that has not been solved.

¹¹ Innocence Project, "Preservation of Evidence", Fact Sheet. Available at <http://www.innocenceproject.org>.

¹² U.S. Department of Justice, Office of Attorney General, "Advancing Justice Through DNA Technology", DNA Policy Book, March 2003.

¹³ Section 46-21-111(2), MCA, and Montana Legislative Branch, *Audio Minutes*, Senate Judiciary Committee hearing on SB 447, February 20, 2009, and the House Judiciary Committee hearing on SB 447, March 18, 2009, which is accessible from www.leg.mt.gov.

¹⁴ Section 46-21-111(1), MCA.

DNA identification index

Other Montana statutes (Title 44, chapter 6, part 1, MCA) require the Department of Justice to establish a computerized DNA identification record system for the "receipt, storage, and exchange of DNA records". The law specifies that the index is "the central repository for DNA records in the state".¹⁵ Under this part of Montana law, any person convicted of a felony offense, a youth found to have committed a sexual or violent offense, or a person ordered by a court pursuant to a plea agreement, must provide a biological sample for purposes of DNA analysis.¹⁶ These DNA profiles are then kept by the state for future reference and are linked to a national database used by criminal investigators to search for DNA matches and identify suspects.

SJR 29 Study

Overview

SJR 29 requests that an appropriate interim committee or sufficient staff resources be allocated to study the retention and preservation of DNA by Montana's state and local law enforcement agencies.

Committee hearings

During the hearings on SJR 29, proponents included:

- Jessie McQuillan, Executive Director, Montana Innocence Project;
- Pam Bucy, Montana Police Protective Association and Montana Association of Chiefs of Police;
- Julie Johnson, Attorney, Helena, Montana;
- Harold Blattie, Executive Director, Montana Association of Counties;
- Ali Bovington, Assistant Attorney General, Montana Department of Justice;
- Kelson Young, Montana Coalition Against Domestic and Sexual Violence;

¹⁵ Section 46-6-102, MCA.

¹⁶ Section 44-6-103, MCA.

- Harris Himes, representing himself; and
- Dallas Erickson, Montana Citizens for Decency Through Law.

After the session, a coalition of study advocates mailed a joint letter to the Legislative Council urge them to give SJR 29 priority consideration. The letter cited the need to include a range of stakeholders and a "deliberative process that considers all of the contours of the issue in a thoughtful way over time."¹⁷

There were no opponents or informational witnesses during the hearings.¹⁸

Floor action

SJR 29 passed the Senate Judiciary Committee by a vote of 12-0, the full Senate by a vote of 44 to 5 on third reading, the House Judiciary Committee by a vote of 11 to 7, and the full House by a vote of 63 to 37 on third reading.¹⁹

Ranking

In the post-session poll asking legislators to rank the study resolutions in order of priority, SJR 29 ranked 11th out of the 17 study resolutions included in the poll.²⁰ The Montana Legislative Council assigned the study to the Law and Justice Interim Committee and the committee must now must decide how to conduct the study.

¹⁷ Letter addressed to Montana Legislative Council dated April 30, 2009, and signed by Jessie McQuillan, Montana Innocence Project, Kelsen Young, Montana Coalition Against Domestic & Sexual Violence, and Pamela Bucy, Montana Association of Chiefs of Police and Montana Police Protective Association.

¹⁸ Montana Senate, *Minutes*, Senate Judiciary Committee, February 20, 2009; and Montana House of Representatives, *Minutes*, House Judiciary Committee, March 18, 2009.

¹⁹ Montana Legislative Branch, LAWS, Detailed Bill Information, www.leg.mt.gov, for SJR 29, 2009 Regular Session.

²⁰ See Bohyer, Dave, "Summary of the 2009-2010 Interim Study Poll", *The Interim*, June 2009, pg. 16.

Study objectives and tasks

The following chart summarizes the study objectives outlined in SJR 29 and provides a list of associated committee and staff tasks. However, these are options for consideration. It is up to the committee to decide which of the objectives and tasks to undertake and how.

SJR 29 Language	Committee Tasks/Options	Staff Task/Options
(1) Identify <i>current practices and challenges</i> of state and local law enforcement agencies and other entities charged with preserving biological evidence.	<ul style="list-style-type: none"> ▶ Review a staff paper. ▶ Conduct panel discussions. 	<ul style="list-style-type: none"> ▶ Conduct a survey. ▶ Conduct interviews. ▶ Prepare/present a research paper. ▶ Coordinate panel discussions.
(2) Consider practices and standards developed to improve preservation of biological practices in <i>other states</i> .	<ul style="list-style-type: none"> ▶ Review a staff paper. ▶ Invite testimony from experts. 	<ul style="list-style-type: none"> ▶ Contact national organizations that develop standards. ▶ Select model practices from other states. ▶ Prepare and present a research paper. ▶ Coordinate expert testimony.

SJR 29 Language	Committee Tasks/Options	Staff Task/Options
<p>(3) Recommend changes to existing definitions, practices, and statutes that will improve the accessibility of biological evidence in felony cases and improve the efficiency of agencies that dedicate valuable law enforcement resources to processing and preserving biological evidence.</p>	<ul style="list-style-type: none"> ▶ Consider testimony of all interested persons. ▶ Solicit specific recommendations from stakeholders. ▶ Develop committee recommendations. ▶ Conduct public hearings on proposed recommendations. ▶ Finalize recommendations. 	<ul style="list-style-type: none"> ▶ Analyze current statutes. ▶ Provide issues and options paper analyzing possible statutory changes. ▶ Coordinate testimony and hearings. ▶ Prepare decision tools. ▶ Draft bills to enact any final recommendations. ▶ Fiscal analysis of associated costs.
<p>(4) Recommend statewide standards regarding proper identification, collection, preservation, storage, cataloguing, and organization of biological evidence.</p>	<ul style="list-style-type: none"> ▶ Consider testimony of all interested persons. ▶ Solicit specific recommendations from stakeholders. ▶ Develop committee recommendations. ▶ Conduct public hearings on proposed recommendations. ▶ Finalize recommendations. 	<ul style="list-style-type: none"> ▶ Provide issues and options paper analyzing possible standards. ▶ Coordinate testimony and hearings. ▶ Prepare decision tools. ▶ Draft bills to enact any final recommendations. ▶ Fiscal analysis of associated costs.

SJR 29 Language	Committee Tasks/Options	Staff Task/Options
<p>(5) Recommend <i>essential components of training programs</i> for law enforcement officers and other relevant employees who are charged with preserving and retrieving biological evidence.</p>	<ul style="list-style-type: none"> ▶ Consider testimony of all interested persons. ▶ Solicit specific recommendations from stakeholders, which may be developed by working groups. ▶ Develop committee recommendations. ▶ Conduct public hearings on proposed recommendations. ▶ Finalize recommendations. 	<ul style="list-style-type: none"> ▶ Provide issues and options analysis of possible training program components. ▶ Coordinate and schedule testimony and hearings. ▶ Prepare decision tools. ▶ Draft bills to enact any final recommendations. ▶ Fiscal analysis of associated costs.

Stakeholder participation

SJR 29 requests that the committee use working groups, public hearings, and panel discussions to involve all stakeholders; and it specifically mentions the following groups:

- Department of Justice;
- county and local law enforcement agencies;
- tribal governments;
- the Office of the Public Defender;
- Montana Association of Clerk and Recorders;
- and organization dedicated to investigating postconviction claims of innocence;
- a victims' rights organization; and
- other stakeholders identified by the committee.

Study plan decisions

At its first meeting, LJIC members should consider all of the committee's statutory duties, study assignments, and potential member or emerging issues, set priorities, and instruct staff so that a detailed study plan for SJR 29 can be developed that allocates committee and

staff time, as well as the committee's monetary resources, in the most efficient and effective manner possible. In making its study plan decisions, the LJIC should discuss and answer the following threshold question with respect to SJR 29:

THRESHOLD QUESTION: Does the committee want the SJR 29 study to focus on the implementation of current law on retention and preservation of biological evidence and access to this evidence; or, does the committee want to take a broader approach, which could include one or more of the following issues:

- (1) who is required to submit DNA samples;**
- (2) how long biological evidence and DNA samples and profiles should be retained;**
- (3) the circumstances under which biological evidence and DNA samples and profiles may be accessed and used; and/or**
- (4) any backlog at the state crime lab?**

Clearly, if the committee desires to pursue a study that is broader than implementation of current law, more committee and staff time must be dedicated to SJR 29 and appropriate adjustments must be made to reduce the staff and committee time dedicated to the committee's other study assignment (SJR 39 - study of DUI laws and enforcement), the committee's statutory duties, and any member or emerging issues.

ATTACHMENTS

SUGGESTED READING

1. SJR 29 of the 2009 Session.
2. Kiley, William P., "The Effects of DNA Advances on Police Property Rooms", *FBI Law Enforcement Bulletin*, March 2009.
3. Plunket, Chuck, "DNA retention policies unclear, unwritten", *The Denver Post*, July 24, 2007.
4. Moffeit, Mike and Greene, Susan, "Trashing the Truth", *The Denver Post*, July, 2007, video available online at <http://www.denverpost.com/evidence>.
5. Gaensslen, R. E., "Should Biological Evidence of DNA be Retained by Forensic Science Laboratories After Profiling? No, Except Under Narrow Legislatively-Stipulated Conditions", *Journal of Law, Medicine & Ethics*, Summer 2006.
6. Maschke, Karen J., "DNA and Law Enforcement", in *From Birth to Death and Bench to Clinic: The Hastings Center Bioethics Briefing Book for Journalists, Policymakers, and Campaigns*, 2008, Chapter 10, pp. 45-50.
7. Herkenham, M. Dawn, "Retention of Offender DNA Samples Necessary to Ensure and Monitor Quality of Forensic DNA Efforts: Appropriate Safeguards Exist to Protect the DNA Samples from Misuse", *Journal of Law, Medicine & Ethics*, Summer 2006.
8. Washington State University Wire Service, "WSU Researchers Uncover Huge Unsolved Crime DNA Testing Backlog", *Research News & Features, Society*, 2006.
9. Barnes, Robert, "Court Limits Access to DNA Evidence", *The Washington Post*, June 19, 2009.
10. National Conference for State Legislatures, "State Laws on DNA Data Banks Qualified Offenses, Others Who Must Provide Sample", February 2009.
11. Innocence Project, "Preservation of Evidence", Fact Sheet, July 9, 2009.
12. SB 447 of the 2009 Session.
13. Title 44, chapter 6, part 1, MCA. Montana's DNA Index statutes.
14. Summary of the 2009-10 Interim Study Poll Results.

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