

# Unofficial Draft Copy

As of: June 15, 2010 (4:53pm)

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\*\*\*\* Bill No. \*\*\*\*

Introduced By \*\*\*\*\*

By Request of the \*\*\*\*\*

**NOTE: This bill is presented by Sen. Moss as a starting point for committee discussion. As drafted, the bill reflects only the position of the Innocence Project and the Coalition Against Domestic and Sexual Violence. The working group did not reach consensus.**

A Bill for an Act entitled: "An Act extending the time period for which biological evidence must be preserved after a conviction has been obtained for certain felony criminal offenses; providing a minimum time period for which biological evidence must be preserved in felony criminal investigations when a conviction has not been obtained; authorizing the disposal of evidentiary items that are impractical to store if portions of the items sufficient to permit future DNA testing are preserved; and amending section 46-21-111, MCA."

WHEREAS, the value of biological evidence has been enhanced by the discovery of modern DNA testing methods which allow law enforcement to improve its crime-solving potential, and tapping this potential requires the preservation of biological evidence.

WHEREAS, the Law and Justice Interim Committee conducted an interim study on the preservation and storage of biological evidence as requested by SJR 29; and

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WHEREAS, the committee found that in serious crimes the current 3-year minimum time period for the preservation and storage of biological evidence in felony criminal cases for which a conviction has been obtained is among the lowest in the nation and is insufficient to safeguard a convicted person's right to petition the court for DNA testing that may prove the person's innocence; and

WHEREAS, the committee also found that current statute does not address the preservation and storage of biological evidence in felony criminal cases for which a conviction has not been obtained; and

WHEREAS, a committee survey found that a majority of law enforcement agencies responding to the survey keep biological evidence in unsolved cases at least as long as applicable statutes of limitations; and

WHEREAS, the committee found that while other states have laws clarifying that an agency need not store large or bulky items, such as sleeping bags, couches, or beds, if smaller pieces of the material may be sufficient for future DNA analysis, Montana has no such provision; and

WHEREAS, the committee's recommended changes to state statute will address these shortcomings in current law.

Be it enacted by the Legislature of the State of Montana:

**Section 1.** Section 46-21-111, MCA, is amended to read:

**"46-21-111. Preservation and disposal of biological**

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**evidence obtained in felony criminal proceeding.** (1) (a) A law enforcement agency shall preserve as provided in this section biological evidence that the agency has reason to believe contains DNA material and that is obtained in connection with an investigation of an offense that could result in a felony for which a conviction is obtained.

(b) The After a conviction is obtained, the agency shall:

(i) except as provided in subsection (b)(ii), preserve the evidence for a minimum of 3 years after the conviction in the case becomes final or for any period beyond 3 years that is required by a court order issued within 3 years after the conviction in the case becomes final.

(ii) preserve the evidence for at least the term of convicted person's incarceration if the conviction is for one of the following offenses:

(A) deliberate homicide under 45-4-102;

(B) mitigated deliberate homicide under 45-5-103;

(C) negligent homicide under 45-4-105;

(D) sexual assault under 45-5-502; or

(E) sexual intercourse without consent under 45-5-503.

(c) When a conviction has not been obtained for a felony criminal offense listed in subsection (2)(b)(ii), the agency shall preserve the evidence for at least the time period prescribed in the statutes of limitation applicable to the offense.

~~(b)~~ (2) (a) An agency may propose to dispose of biological evidence before the expiration of the time period described in

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subsection (1)~~(a)~~ if:

(i) with respect to biological evidence obtained in an investigation of a felony criminal offense for which a conviction has been obtained, the agency notifies the convicted person, the attorney of record for the convicted person, and the Montana chief public defender.

(ii) with respect to biological evidence obtained in an investigation of a felony criminal offense for which a conviction has not been obtained, the agency notifies the victim and the county attorney.

(b) The notification must include a description of the biological evidence, a statement that the agency will dispose of the evidence unless a party files an objection in writing within 120 days from the date of service of the notification in the court that entered the judgment, and the name and mailing address of the court where an objection may be filed. If an objection to the disposition of the evidence is not filed within the 120-day period, the agency may dispose of the evidence. If a written objection is filed, the court shall consider the reasons for and against disposition of the evidence, may hold a hearing on the proposed disposition of the evidence, and shall issue an order ruling on the matter as required by the interests of justice and the integrity of the criminal justice system.

(c) If a party objects to the disposition of the biological evidence, the agency has the burden of proving by a preponderance of the evidence that the evidence should be disposed of.

(3) Nothing in this section requires an agency to store an

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item of such size, bulk, or physical character as to render retention impractical. If retention is impractical because of an item's size, bulk, or physical character, the agency may remove and preserve a portion or portions of the item sufficient to permit future DNA testing.

~~(2)~~(4) Upon completion of laboratory analysis, the laboratory operated by the forensic sciences division of the department of justice shall permanently preserve under laboratory control any remaining biological evidence collected from items submitted to it.

~~(3)~~(5) For purposes of this section, the following definitions apply:

(a) "Biological evidence" means 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.

(b) "DNA" means deoxyribonucleic acid."

{Internal References to 46-21-111: None.}

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