



Combating DUIs,



Preserving DNA, and



**Examining Emerging
Law & Justice Issues**

A REPORT TO THE 62ND LEGISLATURE

**Activities of the
Law and Justice Interim Committee
2009-2010**

**Published By
Legislative Services Division
PO Box 201706
Helena, MT 59620-1706
PHONE: (406) 444-3064
FAX: (406) 444-3036
<http://leg.mt.gov/>**

**Prepared By Sheri Scurr
January 2011**

**LAW AND JUSTICE INTERIM COMMITTEE
2009-2010**

Committee Members

Senators:

John Esp (R - Big Timber)

Greg Hinkle (R - Thompson
Falls)

Larry Jent (D - Bozeman)

Carol Juneau (D - Browning)

Lynda Moss (D - Billings)

Jim Shockley (R - Victor)

Representatives:

Shannon Augare (D - Browning)
Presiding Officer

Ron Stoker (R - Darby)
Vice-Presiding Officer

Bob Ebinger (D - Livingston)

David Howard (R - Park City)

Mike Menahan (D - Helena)

Ken Peterson (R - Billings)

Staff

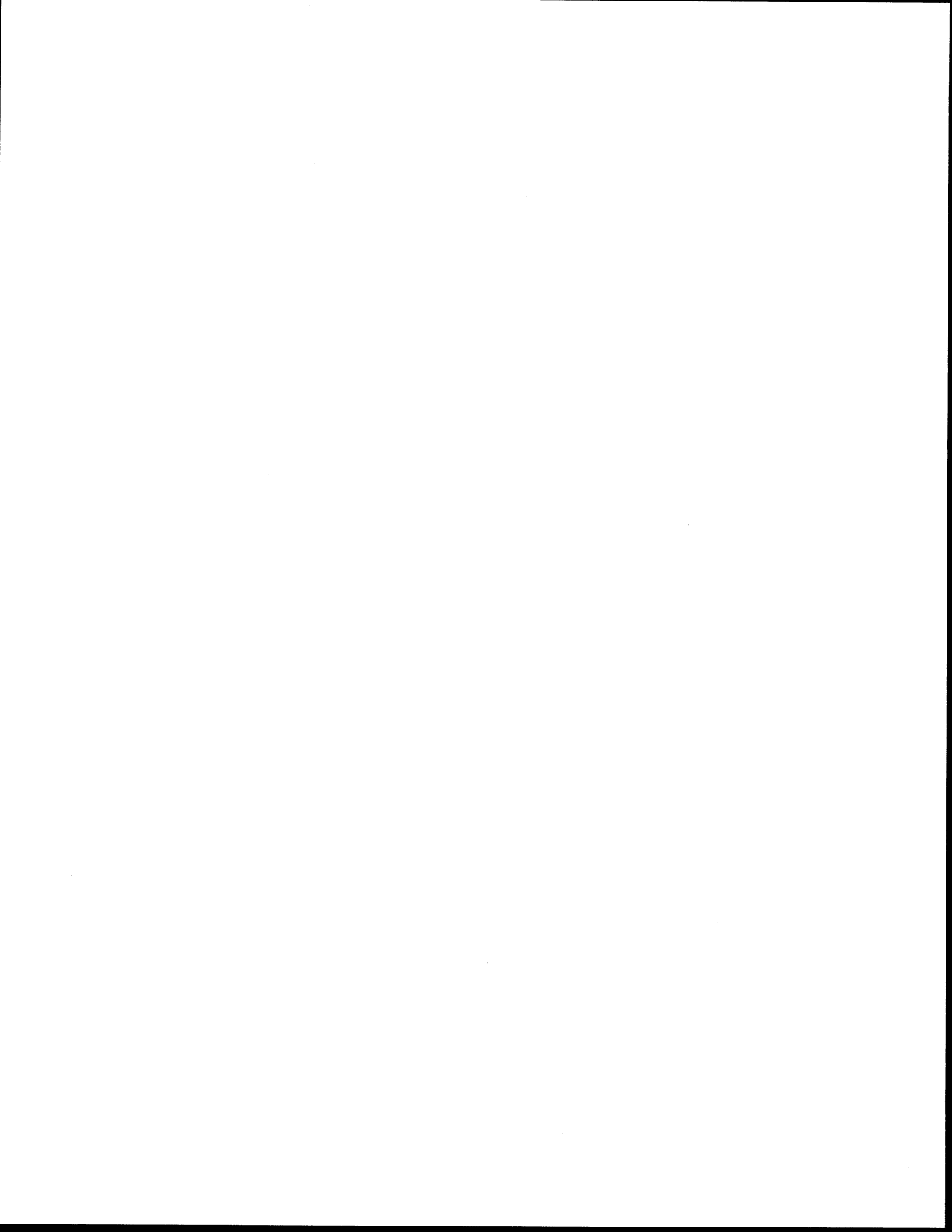
Sheri (Scurr) Heffelfinger, Research Analyst
Valencia Lane, Attorney
Dawn Field, Secretary

Published By

Montana Legislative Services Division
P.O. Box 201706
Helena, MT 59620-1706
<http://leg.mt.gov>
(406) 444-3064 FAX: (406) 444-3036

PART II

SJR 29 - Study Retention of DNA Evidence



SJR 29 - Study Retention of DNA Evidence

Issue Background

Advances in technology

Technological advances in forensic DNA analysis provide new opportunities to solve cold cases and exonerate the wrongly convicted. However, these advances also present challenges for retaining and preserving the biological evidence. 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".⁷⁷ 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 contaminated, lost, or inadvertently destroyed.

As DNA forensic technology has advanced, 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 evidence retention times.⁷⁸

Local enforcement agencies are especially challenged to keep track of biological evidence and preserve it for future use.

Practical challenges

How are law enforcement evidence rooms coping? Unfortunately, not well. An investigative series by *The 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. Additionally, written policies on the

⁷⁷ Senate Bill No. 447 from the 2009 Session. See new subsection (3)(a) added to section 46-21-111, Montana Code Annotated (MCA).

⁷⁸ William P. Kiley, "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.

preservation of biological evidence are either inadequate or nonexistent.⁷⁹ *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.⁸⁰ What does this mean for Montana? At the very least it means that the challenges concerning proper collection, cataloguing, storage, preservation, and access are formidable and complex and how Montana's evidence rooms are meeting these challenges bears examination.

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 postconviction DNA testing, the high court made it clear that it

The challenges concerning proper collection, cataloguing, storage, preservation, and access are formidable and complex and how Montana's evidence rooms are meeting these challenges bears examination.

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 individual liberty and privacy rights.⁸¹ According to the Innocence Project, about half of the states currently compel the retention and preservation of DNA evidence after conviction. Many states also currently restrict how long biological evidence must 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.⁸²

Montana law

Section 46-21-111 of the Montana Code Annotated (MCA) governs the preservation and disposal of biological evidence obtained in felony cases. The 2009 Legislature amended this section by passing SB 447, sponsored by Sen. Moss and cosponsored by Sen. Shockley. Under SB 447, the state crime lab is required to "permanently preserve under laboratory control any remaining

⁷⁹ Chuck Plunket, "DNA retention policies unclear, unwritten", *The Denver Post*, July 24, 2007.

⁸⁰ Mike Mofeit and Susan Greene, "Trashing the Truth", *The Denver Post*, July 2007.

⁸¹ *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.

⁸² Innocence Project, "Preservation of Evidence", Fact Sheet. Available at <http://www.innocenceproject.org>.

biological evidence collected from items submitted to it". The testimony on the bill was that this language simply codified what is current policy at the state crime lab.⁸³

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 that may wish to dispose of the evidence earlier.⁸⁴ The statute does not address retention of biological evidence obtained in connection with a felony that has not been solved.

Committee Work

Overview

Committee activities related to the SJR 29 study on the preservation of biological evidence included special panel discussions at several meetings, a survey of county and city law enforcement agencies, two staff working group meetings, a subcommittee meeting by conference call, and final Committee action.

Survey

Legislative staff surveyed the state's 116 city police departments and sheriff's offices in an effort to determine the extent to which preservation policies and practices varied, what were the most challenging issues concerning preservation of biological evidence, and whether local agencies would support statewide standards. The survey was constructed so that agencies could respond to the survey's 30 questions, most were multiple choice, through the Internet. Only 27 agencies responded.

The following bullet points summarize the survey results. The complete report is available on the Committee's website or in the Committee's hard copy files maintained by the Legislative Services Division.

For felony criminal cases in which a conviction has been obtained:

- ▶ 28% of respondents reported they retain biological evidence based on the statute of limitations for the crime involved;
- ▶ 20% of respondents reported they retain biological evidence for a minimum of 3 years after the conviction becomes final or for any period

⁸³ Senate Judiciary Committee hearing on SB 447, February 20, 2009, and House Judiciary Committee hearing on SB 447, March 18, 2009.

⁸⁴ Section 46-21-111(1)(b), MCA.

beyond 3 years that is required by a court order issued within 3 years after the conviction becomes final (which is required under current law);

- ▶ 36% of respondents reported they retain biological evidence indefinitely; and
- ▶ 16% of the respondents reported their biological evidence retention practices depend on the crime.

For biological evidence in felony criminal cases in which a conviction has not been obtained:

- ▶ approximately 58% of respondents reported a retention schedule based on the statute of limitations for the crime involved;
- ▶ approximately 39% of respondents reported they retain the evidence indefinitely; and
- ▶ one agency reported it retained the evidence for 40 years for homicides, 10 years for sexual assault or rape, or 5 years for other sex crimes.

Most of the survey respondents reported that the agency's most challenging issue with respect to preservation of biological evidence was storage space.⁸⁵

Meeting Guide

The following table provides a guide to the Committee's work relevant to the SJR 29 study.

Meeting dates	Major relevant agenda items
Sept. 29, 2009	Panel - current practices and problems <ul style="list-style-type: none">• Sheriff Dave Castle, Cascade County• Tom Weightman, Evidence Technician, City of Bozeman and Gallatin County• Lieutenant Rob Moccasin, Investigative Services, Great Falls Police Department• Mark Murphy, Deputy County Attorney, Yellowstone County• Jon Moog, Office of State Public Defender• Phil Kinsey, Serology and DNA Section, State Crime Lab• Jessie McQuillan, Montana Innocense Project

⁸⁵ Dave Bohyer, *Overview of A Survey on the Preservation of Biological Evidence: A Component of the SJR 29 Study*, Montana Legislative Services Division, prepared for the Law and Justice Interim Committee, February 2010.

Meeting dates	Major relevant agenda items
Feb. 9, 2009	Staff Report: Findings of survey of local law enforcement agencies concerning preservation and storage of biological evidence. Staff instructed to organize stakeholder working group and draft bill based on working group recommendations. (Two working group meetings were conducted without a group consensus being reached.)
June 29, 2010	<p>Preliminary bill draft based on instructions from Sen. Moss: LCdna1</p> <p>Panel - defense perspective</p> <ul style="list-style-type: none"> • Jessie McQuillan, Executive Director, Montana Innocence Project • Kelsen Young, Executive Director, Coalition Against Domestic and Sexual Violence • Jon Moog, Office of State Public Defender <p>Panel - law enforcement perspective</p> <ul style="list-style-type: none"> • Mark Murphy, MCAA • Sheriff Dave Castle, Cascade County • Anne Jacobson, Evidence Technician, Helena Police Department • Megan Ashton, State Crime Lab <p>Subcommittee appointed to continue work on bill draft (Sen. Moss, Sen. Shockley, Rep. Peterson, and Rep. Menahan)</p>
Aug. 3, 2010	Subcommittee meeting by conference call - discussion and revision of LCdna2, based on revisions proposed by Sen. Shockley
Sept. 9, 2010	Final public hearing on Committee bill recommendation LCdna3

Recommendation

The Committee developed one recommendation concerning its study under SJR 29. This recommendation is summarized on the following page.

(see next page)

SJR 29 - Study Retention of DNA Evidence

Recommendation

LC0354 Lengthen time DNA evidence must be preserved in certain cases

Working draft no.: LCdna
Proposal sponsor: Senator Moss

Summary:

This bill would require that biological evidence collected in certain specified felony criminal cases must be preserved for the period of time in the statute of limitations for the crime or for 30 years, whichever is less. The specified crimes are: deliberate homicide, mitigated deliberate homicide, negligent homicide, vehicular homicide while under the influence, sexual assault, and sexual intercourse without consent. The bill also contains a new provision to allow destruction of evidence that is large or bulky if a smaller piece of the evidence containing biological evidence is preserved.

Background:

Under section 46-21-110, MCA, a person convicted of a felony and who is serving a term of incarceration may petition the court for DNA testing. The statute specifies the conditions that must exist in order for the court to grant the petition. Among the conditions are that the evidence:

- (i) was secured in relation to the trial that resulted in the conviction;
- (ii) is available; and
- (iii) is in a condition that would permit the requested testing;

The section further states that "the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, degraded, contaminated, altered, or replaced in any material aspect".

Section 46-21-111, MCA, currently requires local law enforcement agencies to preserve biological evidence in felony criminal cases for at least 3 years after a conviction in the case becomes final unless otherwise ordered by a court.

Data:

According to Montana Board of Crime Control data, in 2009, there were 26 homicides and 325 reported rape incidents statewide.⁸⁶

Testimony and discussion:

The Committee's recommended bill draft was supported by the Montana Innocence Project, the Coalition Against Domestic and Sexual Violence, the Office of State Public Defender, the Montana Association of Criminal Defense Lawyers, and Ron Waterman, Helena Attorney. Proponents argued that:

- 3 years is not long enough for preservation of DNA evidence in serious criminal cases (as listed in the bill);
- the bill does not create a new burden on local agencies because the survey showed that most local agencies are already preserving evidence longer in serious cases;
- because practices vary so widely, state law is needed to provide a uniform time period for preservation;
- the Bromgard case (where Jimmy Ray Bromgard was exonerated after spending 14.5 years in prison) illustrated the problem because evidence was fortuitously preserved even though current statute would have allowed that evidence to be destroyed;
- the new language in the bill is consistent with laws in other states;
- the statute will still allow agencies to request earlier destruction of evidence if they do not wish to preserve it;
- new language in the bill concerning large evidentiary items will help agencies clear out those items and keep only small samples as appropriate to allow future DNA testing, thus saving money.

The proposal was opposed by the Montana County Attorneys Association, the Yellowstone County Attorney's Office, the Montana Association of Counties, and the Attorney General's Office.

Opposition was based on various details of the bill and questions about the following:

- notification of parties when evidence was to be destroyed;
- liability if the evidence was inadvertently destroyed by a fire or flood, for example;
- the provision prohibiting the waiver of the right to have evidence preserved;

⁸⁶ Montana Board of Crime Control, *Crime In Montana*, 2008-2009 Report.

- how to ensure that the evidence preserved was relevant to the identity of the perpetrator;
- potential costs, especially to small counties, of requiring longer retention of evidence; and
- the problem was not sufficiently defined (i.e., current law was sufficient, and that the proposed bill was unnecessary).

At various junctures, the Committee discussed amendments to the bill to address various concerns. A subcommittee met by conference call on August 3, 2010, to work out several revisions. Amendments were also discussed and passed at the final hearing on September 9, 2010.

Final Committee vote: 9-3 with Sen. Esp, Rep. Peterson, and Rep. Howard voting no.

PART III

Agency Oversight and Emerging Issues