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MEMORANDUM

TO: Nevada Advisory Commission on the Administration of Justice
FROM: Brett Kandt, NVPAC Executive Director
DATE: August 4, 2008
RE: Proposed Legislation for the Preservation of Biological Evidence

As requested by the Commission at its July 7 meeting, the following proposed legislation to automatically require the preservation of certain biological evidence at conviction was developed in collaboration with the Clark County and Washoe County Crime Labs and law enforcement agencies:

XXX.XXX Preservation of Biological Evidence.

1. *Upon the conviction of a defendant for homicide or for any sexual offense, any biological evidence used in the criminal case shall be preserved for the period of time the person convicted remains incarcerated or until the sentence is carried out.*
2. *Upon the motion of a person convicted of homicide or of any sexual offense, the court may order the preservation of any other specifically-identified biological evidence, not otherwise subject to preservation under subsection (1), for the period of time the person convicted remains incarcerated or until the sentence is carried out.*
3. *For purposes of this section, the term 'biological evidence' means semen, blood, saliva, hair, skin tissue, or other identified biological material removed from physical evidence.*
4. *The requirements of this section shall apply to any government agency that may be in possession of biological evidence.*
5. *Biological evidence subject to the requirements of this section may be consumed for testing upon notice to the person convicted.*



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MEMORANDUM

TO: Nevada Advisory Commission on the Administration of Justice

FROM: Brett Kandt, NVPAC Executive Director

DATE: July 7, 2008

RE: Preservation of Biological Evidence

This memorandum summarizes federal and state models and best practices regarding the preservation of biological evidence in criminal cases. Procedural models that may provide guidance have originated primarily through legislative action and protocols/guidelines. All sources are referenced herein and may include excerpts of model language; copies of the resource materials are available upon request.

Physical evidence that may require preservation includes biological evidence that may be subject to deoxyribonucleic acid (DNA) testing, or biological evidence that may not be subject to DNA testing, but may be subject to other forensic analysis. Since 1) DNA is basically unique; 2) DNA testing is highly reliable; and 3) a wide range of evidence can be tested for DNA, most technical issues related to the preservation of evidence focus primarily on the preservation of biological evidence for possible DNA testing. Since DNA testing can be determinative of guilt or innocence, most legal issues related to the preservation of physical evidence also focus primarily on the preservation of biological evidence for possible DNA testing.

Legal Aspects of Evidence Preservation

From a legal perspective, procedural models for evidence preservation are primarily statutory in nature. The absence of court-mandated procedural models for evidence preservation is accounted for in the U.S. Supreme Court's ruling that "the destruction or failure to preserve potentially useful evidence does not constitute a violation of the due process clause, unless it can be shown that the police, the prosecutor or the laboratory acted in bad faith." *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988). The U.S. Supreme Court in pertinent part recognized that DNA testing requires the consumption of biological evidence.

Statutory Procedural Models for Evidence Preservation

Currently, the U.S. government, thirty-six states and the District of Columbia have statutory requirements compelling the preservation of evidence to some extent, primarily the preservation of biological evidence for possible DNA testing.¹ The federal government, twenty-five states and the District of Columbia automatically require the preservation of physical evidence at or prior to conviction (further detailed below).² Twelve states have qualified evidence preservation statutes in which a duty to preserve is not imposed unless and until a defendant files a post-conviction motion for DNA testing access (further detailed beginning on page 5).³

Automatic Preservation of Evidence Statutes

Under federal law and the laws of twenty-six other jurisdictions the preservation of evidence is automatically required at or prior to conviction.

U.S. - In 2004, Congress passed the Justice for All Act (H.R. 5107), codified at 18 U.S.C. § 3600A, which generally requires the federal government to preserve biological evidence that was secured in the investigation or prosecution of a federal offense if a defendant is under a sentence of imprisonment for such offense. Regulations to enforce the statute were enacted as 28 C.F.R. Part 28 Subpart C (Preservation of Biological Evidence) (2005).

Arkansas - Ark. Code Ann. § 12-12-104 (2205) requires the preservation of evidence for all violent or sexual offenses. The length of preservation depends on the offense: for violent offenses it is permanent, for sex offenses 25 years, and for any other felony 7 years following conviction.

California - Cal. Penal Code § 1417.9 (2005) requires that evidence shall be preserved for all criminal convictions for so long as any person remains incarcerated in connection with that case.

Connecticut - Conn. Gen. Stat. § 54-102jj (2004) requires that all biological evidence from the conviction of a capital crime be preserved for the period of incarceration.

District of Columbia - D.C. Code Ann. § 22-4134 (2004) requires that biological evidence in connection with a violent crime be preserved for five years or as long as the person remains in custody for that offense, whichever is longer.

Florida - Fla. Stat. ch. 925.11(4) (2005) requires in death penalty cases that biological evidence be preserved until 60 days after execution of the sentence; in all other cases,

¹ The following states have post-conviction DNA testing access statutes but no statutory preservation of evidence requirement: Delaware, Idaho, New Jersey, New York, North Dakota, Oregon, Vermont and West Virginia. The following states have neither post-conviction DNA testing access statutes nor a statutory preservation of evidence requirement: Alabama, Alaska, Massachusetts, Mississippi, South Carolina, and South Dakota. Oklahoma has a statutory preservation of evidence requirement [Okla. Stat. Ann. tit. 22, § 1372.A (2004)], but no post-conviction DNA testing statute.

² Virginia is included in both categories since it has an automatic preservation of evidence requirement for death sentences and a qualified preservation of evidence requirement for non-death penalty sentences in felony cases [Va. Code Ann. § 19.2-270.4:1 (2005)].

³ Of those states with qualified preservation of evidence statutes, Virginia (in non-death penalty cases) [Va. Code Ann. § 19.2-270.4:1 (2005)] and Washington [Wash. Rev. Ann. Code § 10.73.170(6) (2005)] permit sentencing courts in felony cases to order the preservation of any biological material upon motion of defense counsel or on the court's own motion.

a governmental entity may dispose of physical evidence if the term of the sentence imposed in the case has expired and no other provision of law or rule requires that the physical evidence be preserved or retained.

Georgia – Ga. Code Ann. § 17-5-56 (2005) requires that all evidence must be maintained for the period of trial in any criminal case. In death penalty cases, the evidence shall be maintained until the sentence is carried out. For cases involving a serious violent felony, the evidence shall be maintained for ten years after the final judgment or ten years after May 27, 2003; whichever is later. Evidence in all other felony and misdemeanor cases may be destroyed.

Hawaii – Haw. Rev. Stat. § 844D-126 (2005) requires that evidence in any case in which there was a conviction must be retained until the later of the following: 1) all appeals are exhausted, or 2) incarceration, parole and probation have been completed. (Note: the statute also requires the Hawaii attorney general to establish procedures and protocols for the collection and preservation of evidence pursuant the section; procedures and protocols are under development).

Illinois - 725 Ill. Comp. Stat. Ann. 5/116-4(2005) requires that the evidence in any conviction involving sexual offenses, homicides, or attempts of either of these offenses, be preserved for 7 years following the conviction, unless the death penalty is imposed. The time limit for the preservation of evidence will be extended to the completion of a sentence, if so-called "enumerated" felonies apply. Retention is shall be permanent in cases where a sentence of death is imposed.

Iowa - Iowa Code § 81.10(10) (2005) requires every criminal or juvenile justice agency to maintain DNA samples and evidence that could be tested for DNA for a period of three years beyond the applicable statute of limitations.

Kentucky - Ky. Rev. Stat. Ann. § 524.140 (2004) requires law enforcement agencies to preserve biological evidence collected in any case leading to a conviction for a capital or felony offense for the period the defendant is incarcerated in connection with that conviction.

Louisiana – La. Code Crim. Proc. Ann. art. 926.1.H(4) (West 2005) requires that all evidence in cases resulting in a death sentence be preserved until the defendant has been executed.

Maine - Me. Rev. Stat. Ann. tit. 15, § 2138(14) (2005) requires that biological evidence relating to any criminal conviction eligible for post-conviction DNA analysis must be preserved for the length of time the person is incarcerated.

Maryland - Md. Code Ann., Crim. Pro § 8-201(i) (2004) requires that biological evidence be preserved for the length of the defendant's sentence for certain convictions, including sexual offenses and homicide.

Michigan – Mich. Stat. Ann. § 770.16(11) (West 2005) requires that biological evidence be preserved for the period of time a defendant is incarcerated; applicable to felony convictions before 2001 and all convictions after January 1, 2001.

Minnesota - Minn. Stat. Ann. § 590.10 (West 2005) requires the retention of any biological evidence relating to the identification of a defendant used to secure a conviction in a criminal case until expiration of sentence.

Missouri - Mo. Ann. Stat. § 650.056 (2004) requires that any evidence leading to a conviction of a felony for violent or sex offenses, and which has been or can be tested for DNA shall be preserved by the investigating law enforcement agency.

Montana - Mont. Code Ann. § 46-21-111 (2004) requires that any evidence that the state has reason to believe contains DNA material and is found in connection with a felony conviction shall be preserved for a minimum of 3 years after the conviction is final.

Nebraska - Neb. Rev. Stat. Ann. § 29-4125(1) (2005) requires that biological evidence secured in all criminal cases be preserved for the period the defendant remains incarcerated.

New Hampshire - N.H. Rev. Stat. Ann. §651-D:3 (2004) requires that evidence be preserved for five years from the date of conviction or adjudication, or as long as any person connected with that case or investigation remains in custody, whichever is longer.

New Mexico - N. M. Stat. Ann. § 31-1A-2 (2004) requires preservation of all biological evidence secured in relation to an investigation or prosecution of a crime to be preserved for the period the defendant remains incarcerated in connection with the case.

North Carolina - N.C. Gen. Stat. § 15A-268(a) (2004) requires that any DNA evidence collected during the course of a felony investigation shall be preserved for the period of time that the person convicted of the felony is incarcerated in connection with that case.

Oklahoma - Okla. Stat. Ann. tit. 22, § 1372.A (2004) requires that law enforcement agencies retain and preserve biological evidence from a violent felony conviction for the period of time an individual remains incarcerated in connection with that conviction.

Rhode Island - R.I. Gen. Laws § 10-9.1-11 (2005) requires law enforcement agencies to preserve biological evidence collected in any case leading to criminal conviction for the period a defendant is incarcerated in connection with that conviction.

Texas - Tex. Code Crim. Proc. Ann. art. 38.43 (2005) requires that biological evidence in any criminal case be preserved for the period a defendant convicted in that case is incarcerated.

Virginia - Va. Code Ann. § 19.2-270.4:1 (2005) requires that 1) if a defendant is sentenced to death, the State Department of Forensic Science must preserve evidence until the defendant is executed. The State of Virginia has adopted *Standards and Guidelines for the Method Of Custody, Transfer and Return of Evidence*.

Wisconsin - Wis. Stat. Ann. §§ 165.81(3)(b), 757.54(b), 968.205(2), and 978.08(3)(b)(2) (2003) require that if 1) physical evidence that includes any biological material that was collected in connection with a criminal investigation that resulted in a criminal conviction, a delinquency adjudication, or commitment, and 2) the biological material is from a victim of the offense that was the subject of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense, crime laboratories, court, law enforcement agencies, and district attorneys, respectively, shall preserve the physical evidence until every person in custody has reached his or her discharge date.

Qualified Preservation of Evidence Statutes

Twelve states have qualified evidence preservation statutes imposing a duty to preserve biological evidence for possible DNA testing if a defendant files a post-conviction motion for DNA testing access. Of those, Virginia (in non-death penalty cases) and Washington permit sentencing courts to order the preservation of any biological material upon motion of defense counsel or the court's own motion.

Arizona - Ariz. Rev. Stat. Ann. § 13-4240 (2006), the statutory procedure for post-conviction DNA testing, is limited to felonies and requires the court to order the state to preserve biological evidence that can be subjected to such testing for the pendency of the proceeding.

Colorado - Colo. Rev. Stat. § 18-1-414 (2004), the statutory procedure for post-conviction DNA testing, requires the court to order the appropriate law enforcement agency to preserve existing biological evidence for such testing.

Indiana - Ind. Code Ann. § 35-38-7-14(2) (2004), the statutory procedure for post-conviction DNA testing, requires the court to order the state to preserve biological evidence that can be subjected to such testing for the pendency of the proceeding.

Kansas - Kan. Stat. Ann. § 21-2512 (2005), the statutory procedure for post-conviction DNA testing, requires the prosecuting attorney to preserve biological evidence for the pendency of the proceeding.

Nevada - Nev. Rev. Stat. § 176.0918(3) (2004), the statutory procedure for post-conviction DNA testing, requires the court to order the appropriate agency to preserve existing biological evidence for such testing for the pendency of the proceeding.

Ohio - Ohio Rev. Code Ann. § 2953.81 (2005), the statutory procedure for post-conviction DNA testing, requires the state to preserve an inmate's DNA sample for at least 24 months after the inmate's death in prison or after an execution.

Pennsylvania - 42 Pa. Cons. Stat. Ann. § 9543.1 (2005), the statutory procedure for post-conviction DNA testing, requires the state to preserve biological evidence that can be subjected to such testing for the pendency of the proceeding.

Tennessee - Tenn. Code. Ann. § 40-30-309 (2004), the statutory procedure for post-conviction DNA testing, is limited to felonies and requires the court to order the state to preserve biological evidence that can be subjected to such testing for the pendency of the proceeding.

Utah - Utah Code Ann. § 78-35a-301 (2005), the statutory procedure for post-conviction DNA testing, is limited to felonies and requires the preservation of biological evidence that can be subjected to such testing for the pendency of the proceeding.

Virginia - Va. Code Ann. § 19.2-270.4:1 (2005) requires that upon motion of a defendant convicted of a felony but not sentenced to death, the court shall order the retention of specifically identified biological evidence for a period of up to 15 years from the time of conviction, unless the court determines that the evidence should be retained for a longer period of time.

Washington - Wash. Rev. Ann. Code § 10.73.170(6) (2005), provides that upon motion of defense counsel or the court's own motion, a sentencing court in a felony case may

order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of evidence. The court must specify the samples to be maintained and the length of time the samples must be preserved.

Wyoming - Wyo. Stat. § 7-12-302 (2008), the statutory procedure for post-conviction DNA testing, is limited to felonies and requires the preservation of biological evidence that can be subjected to such testing for the pendency of the proceeding.

Protocols and Guidelines on Legal Models

- U.S. Department of Justice – *Postconviction DNA Testing: Recommendations for Handling Requests* (September 1999).
- American Prosecutors Research Institute – *DNA Evidence Policy Considerations for the Prosecutor* (September 2004).

Core Issues in Creating Statewide Requirements on Evidence Preservation

From a legal standpoint, statewide requirements on the preservation of evidence should address the following core issues:⁴

1. When do evidence preservation requirements commence?

The statutory evidence preservation requirements for post-conviction purposes were previously detailed. Under federal law and the laws of 26 other jurisdictions the preservation of physical evidence is automatically required at or prior to conviction; 12 states have qualified evidence preservation statutes for post-conviction DNA testing in which the duty to preserve is not imposed unless and until a defendant files a post-conviction motion for DNA testing; with Virginia (in non-death penalty cases) and Washington permitting sentencing courts to order the preservation of any biological material upon motion of defense counsel or the court's own motion.

However, another policy consideration is the consumption of biological samples through DNA testing prior to a conviction, and whether notice to defense counsel is required for testing that will consume all of the sample material. In the majority of states, DNA testing can legally proceed without notice to defense counsel even though the testing will consume all of the sample material. In all states, upon consumption of a biological sample, it is the prosecutor's duty to inform the defense of such consumption.

2. Which offenses or sentences will require evidence preservation?

Among the jurisdictions that impose a statutory duty of evidence preservation, 20 jurisdictions limit the requirement to specific offenses or sentences: Arizona (felonies), Arkansas (violent or sex offenses), Connecticut (capital crimes), District of Columbia (violent crimes), Georgia (death penalty cases and serious violent felonies), Illinois (sex offenses and homicide and attempts), Kentucky (capital or felony offense), Louisiana (death sentences), Maine (sentence of imprisonment of at least 20 years), Maryland (sex offenses and homicide), Missouri (violent or sex offenses), Montana (felonies),

⁴ The Commission should also consider the privacy implications of maintaining a collection of biological material, which may contain DNA not only from the perpetrator of the crime, but also from victims and third parties.

Nevada (death sentence), North Carolina (felonies), Oklahoma (violent felonies), Tennessee (felonies), Utah (felonies), Virginia (felonies), Washington (felonies) and Wyoming (felonies).

Michigan limits the statutory duty to felony convictions before 2001, without limitation to specific offenses for convictions after 2001.

In the remaining 17 jurisdictions the statutory duty is not offense specific: U.S. (federal), California, Colorado, Florida, Hawaii, Indiana, Iowa, Kansas, Minnesota, Nebraska, New Hampshire, New Mexico, Ohio, Pennsylvania, Rhode Island, Texas, and Wisconsin.

3. What evidence must be preserved?

Since DNA testing can be determinative of guilt or innocence, most statutes, including all qualified preservation of evidence statutes, require the preservation of biological evidence for possible DNA testing. Among the jurisdictions with automatic preservation of evidence statutes and those that allow preservation upon motion at sentencing, several require the preservation of all physical evidence without limitation, all physical evidence that is reasonably likely to contain forensic evidence, or all biological evidence without limitation.

4. What is the time period for evidence preservation?

Among the jurisdictions with automatic evidence preservation statutes, 20 require preservation for the period of incarceration or until the sentence is carried out: U.S. (federal), California, Connecticut, District of Columbia, Florida, Hawaii, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, Texas and Wisconsin.

Among those jurisdictions with qualified evidence preservation statutes, 9 require preservation of all evidence which may be subject to DNA testing during the pendency of the proceeding on post-conviction DNA testing access: Arizona, Colorado, Indiana, Kansas, Nevada, Pennsylvania, Tennessee, Utah, and Wyoming.

Among the remaining jurisdictions:

In Arkansas, preservation depends on the offense: for violent offenses it is permanent, for sex offenses 25 years, and for any other felony 7 years following conviction.

Georgia requires preservation in death penalty cases until the sentence is carried out; for serious violent felonies, for ten years after the final judgment or ten years after May 27, 2003; whichever is later.

In Illinois, preservation depends on the offense: for sexual offenses or homicides for 7 years following the conviction, for so-called "enumerated" felonies to the completion of sentence, and for the death penalty it is permanent.

Iowa requires preservation of DNA samples for period of three years beyond the applicable statute of limitations.

Montana requires preservation for a minimum of 3 years after the conviction is final.

Missouri does not specify a period for preservation.

Ohio requires preservation of DNA samples for at least 24 months after the inmate's death in prison or after an execution.

Virginia requires preservation of evidence in death penalty cases until the sentence is carried out, and of specifically identified biological evidence for a period of up to 15 years from the time of conviction at the discretion of sentencing court.

Washington leaves the time period for preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, to the discretion of sentencing court.

5. Is there authorization for evidence disposal prior to the expiration of the preservation time period?

Among the jurisdictions with automatic evidence preservation statutes, there is statutory authorization for early disposal, after notice to the defendant and a showing of good cause, in Arkansas, California, Connecticut, District of Columbia, Florida, Illinois, Kentucky, Maryland, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, Texas and Wisconsin.

6. Who is the party responsible for evidence preservation?

Generally, statutory responsibility for preservation is imposed upon any government entity that may be in possession of physical evidence in a case; certain statutes specify law enforcement agencies, prosecuting attorneys, court authorities and/or crime laboratories.

Evidence Survey

1. Agency Affiliation - City		Agency Affiliation - County		Agency Affiliation - State		Total
Court	0	Court	3	Court	0	3
Law Enforcement Agency	15	Law Enforcement Agency	11	Law Enforcement Agency	9	35
Coroner Medical Examiner	0	Coroner Medical Examiner	1	Coroner Medical Examiner	0	1
Health Laboratory	0	Health Laboratory	0	Health Laboratory	0	0
Wildlife / Fish and Game	0	Wildlife / Fish and Game	0	Wildlife / Fish and Game	1	1
No Response	*18	No Response	*	No Response	*	18
Total Responses	15	Total Responses	15	Total Responses	10	TOTAL 58
2. Inventory Tracking System		3. Biological Storage		4. Wet / Stained drying areas		
Computer Program	26	Freezer	2	Yes	12	
Log Book	19	Refrigerator	11	No	29	
Card File	7	Both	19	Don't need one	8	
No Response	9	No Response	3	No Response	4	
Total Responses	52	Total Response	48	Total Responses	49	
5. Scheduled Audit		6. Retention Period / Type of Crime		7. Evidence Disposition (Civil Litigation)		
Yes	20	Yes	34	Yes	28	
No	9	No	14	No	19	
Rarely	11	No Response	3	No Response	4	
Never had one	8					
No Response	3					
Total Responses	48	Total Responses	48	Total Responses	47	
8. Evidence Release policy		9. Adjudicated Case review disposition		10. Latent Print / Photograph storage		
Yes	39	Investigator	8	Yes	24	
No	9	District Attorney	25	No	10	
No Response	3	Both	14	Both	15	
		Neither	1	No Response	3	
		Public Defender	1			
		No Response	3			
Total Responses	48	Total Responses	49	Total Responses	49	
11. Blood / Urine / Tissue storage		12. Retention regulating policy		13. Storage Space adequate		
Yes	27	Yes	32	Yes	15	
No	23	No	15	No	31	
No Response	3	No Response	4	No Response	5	
Total Responses	50	Total Responses	47	Total Responses	46	