



MODEL LEGISLATION, 2008 STATE LEGISLATIVE SESSIONS

**AN ACT TO IMPROVE THE PRESERVATION AND ACCESSIBILITY OF
BIOLOGICAL EVIDENCE**

SECTION 1. LEGISLATIVE INTENT

The legislature finds that:

1. The value of properly preserved biological evidence has been enhanced by the discovery of modern DNA testing methods, which, coupled with a comprehensive system of DNA databases that store crime scene and offender profiles, allow law enforcement to improve its crime-solving potential;
2. Tapping the potential of preserved biological evidence requires the proper identification, collection, preservation, storage, cataloguing and organization of such evidence;
3. Law enforcement agencies indicate that “cold” case investigations are hindered by an inability to access biological evidence that was collected in connection with criminal investigations;
4. Innocent people mistakenly convicted of the serious crimes for which biological evidence is probative cannot prove their innocence if such evidence is not accessible for testing in appropriate circumstances;
5. It is well established that the failure to update policies regarding the preservation of evidence squanders valuable law enforcement resources, manpower hours and storage space; and
6. Simple but crucial enhancements to protocols for properly preserving biological evidence can solve old crimes, enhance public safety and settle claims of innocence.

SECTION 2: DEFINITIONS

For the purposes of this Act:

1. “Biological evidence” means the contents of a sexual assault examination kit; and any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other identifiable biological material that was collected as part of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense. This definition applies whether that material is catalogued separately (e.g., on a slide, swab or in a test tube) or is present on other evidence (including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups, cigarettes, etc.);
2. “DNA” means deoxyribonucleic acid;
3. “Custody” means persons currently incarcerated; civilly committed; on parole or probation; or subject to sex offender registration;
4. “Profile” means a unique identifier of an individual, derived from DNA; and
5. “State” refers to any governmental or public entity within [name of State] (including all private entities that perform such functions) and its officials or employees, including but not limited to law enforcement agencies, prosecutors’ offices, courts, public hospitals, crime laboratories, and any other entity or individual charged with the collection, storage and/or retrieval of biological evidence.

SECTION 3. PRESERVATION OF EVIDENCE PROCEDURES

A. [Name of State] shall preserve all biological evidence:

1. That is secured in relation to an investigation or prosecution of a crime for the period of time that the crime remains unsolved; or

2. That is secured in relation to an investigation or prosecution of a crime for the period of time that the person convicted of that crime remains in custody.

B. This Act applies to evidence that:

1. Was in the possession of the State during the investigation and prosecution of the case;
and
2. At the time of conviction was likely to contain biological material.

C. The State shall not destroy biological evidence should (an) additional co-defendant(s), convicted of the same crime, remain in custody and shall preserve said evidence for the period of time in which all co-defendants remain in custody.

D. The State shall retain evidence in the amount and manner sufficient to develop a DNA profile from the biological material contained in or included on the evidence.

E. Upon written request by the defendant, the State shall prepare an inventory of biological evidence that has been preserved in connection with his criminal case.

F. The State may destroy evidence that includes biological material before the expiration of the time period specified in subsection (A) of this section if all of the following apply:

1. No other provision of federal or state law requires the State to preserve the evidence.
2. The State sends certified delivery of notice of intent to destroy the evidence to:
 - a. All persons who remain in custody as a result of the criminal conviction, delinquency adjudication, or commitment related to evidence in question;
 - b. The attorney of record for each person in custody;
 - c. The [name of State] public defender;
 - d. The district attorney in the county of conviction; and
 - e. The [name of State] Attorney General.

3. No person who is notified under Section 3(F)(2) of this Act does either of the following within 180 days after the date on which the person received the notice:

- a. Files a motion for testing of evidence under [statute citation relating to post-conviction access to DNA evidence]; or
- b. Submits a written request for retention of evidence to the State entity which provided notice of its intent to destroy evidence under Section 3(F)(2) of this Act.

G. If, after providing notice under Section (3)(F)(2) of this Act of its intent to destroy evidence, the State receives a written request for retention of the evidence, the State shall retain the evidence while the person remains in custody.

H. The State shall not be required to preserve physical evidence that is of such a size, bulk, or physical character as to render retention impracticable. When such retention is impracticable, the State shall remove and preserve portions of the material evidence likely to contain biological evidence related to the offense, in a quantity sufficient to permit future DNA testing before returning or disposing of said physical evidence.

I. Should the State be called upon to produce biological evidence that could not be located and whose preservation was required under the provisions of this statute, the chief evidence custodian assigned to the entity charged with the preservation of said evidence shall provide an affidavit in which he stipulates, under penalty of perjury, that describes the efforts taken to locate that evidence and that the evidence could not be located.

SECTION 4. REMEDIES FOR NONCOMPLIANCE

If the court finds that biological evidence was destroyed in violation of the provisions of this

statute, it may impose appropriate sanctions and order appropriate remedies.

SECTION 5. STANDARDS AND TRAINING OF EVIDENCE CUSTODIANS

A. From appropriations made for that purpose, a statewide task force comprised of members appointed by the Governor; the Attorney General; the State's District and County Attorneys Association; the State's Criminal Defense Lawyers Association; the State's Bar Association; the Judiciary/Criminal Justice Committee of the [name of State] Senate; the Judiciary/ Criminal Justice Committee of the [name of State] House of Representatives; the Chief Justice of the Supreme Court; the Chancellor of the State University system; the [name of State] property clerk's association; a [name of State] or national victims rights group; an organization in [name of State] that regularly represents clients pursuing claims of innocence based on post-conviction DNA evidence; and the [name of State] State Police, shall establish a system regarding the proper preservation of biological evidence. Specifically, the task force shall:

1. Devise standards regarding the proper collection, retention and cataloguing of biological evidence for ongoing investigations and prosecutions; and
2. Recommend practices, protocols, models and resources for the cataloguing and accessibility of preserved biological evidence already in the State's possession.

B. In consultation with the task force described in Section 5(A) of this Act, the Division of Criminal Justice Services shall administer and conduct training programs for law enforcement officers and other relevant employees that are charged with preserving and cataloguing biological evidence regarding the methods and procedures referenced in this Act.



SECTION 6. EFFECTIVE DATE

This Act shall take effect on [date].
