



Report of the
Preservation of Evidence Study Committee

Submitted to the
House and Senate
Committee on Judiciary

December 14, 2007

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Act 60 of the 2007 Legislature allows one convicted of a felony to file a petition requesting DNA testing of any evidence that may contain DNA evidence obtained during the investigation or prosecution of that crime. The Act also permits one who was wrongfully convicted and imprisoned for a crime the person was exonerated for, on the basis of DNA evidence, to bring an action against the state for compensation. In addition, Act 60 created two different study committees; one was the Preservation of Evidence Study Committee, and the other was the Eyewitness Identification and Custodial Interrogations Study Committees. This is the report of the Preservation of Evidence Study Committee.

I. The Committee Members.

The Committee was comprised of the following people:

Jane Woodruff, the Executive Director of the Department of State's Attorneys and Sheriffs' Departments, Chair;
Attorney General's Office designee, David Tartter;
District Court Clerk, Tari Scott;
Vermont Association of Chiefs of Police representative, Chief Tom Hanley, Middlebury Police Department;
Captain of the Bureau of Criminal Investigations from the Vermont State Police, Captain Edward Ledo;
a representative from the Vermont Criminal Justice Training Council, John Gonyea;
Commissioner of Public Safety, Kerry Sleeper;
Director of the Vermont Forensic Laboratory, Eric Buel, Ph.D.;
Defender General, Matthew Valerio;
Defender General's Investigator, Guy Paradee;
Staff Public Defender, Anna Saxman;
Vermont Sheriffs' Association designee, Sheriff Sam Hill, Washington County;
representative of the Center for Crime Victim Services, Jennifer Poehlmann;
one member of the Vermont Police Association, Officer Scott McGivern, Winooski Police Department;
representative of the Commissioner of Buildings and General Services, Dave Burley; and
representative of the State's Attorneys, Chris Perkett, Deputy State's Attorney, Addison County.

The Committee met four times to discuss the issues presented in the charge. Those meetings were held on July 24, September 18, October 17, and November 29, 2007. The Committee took testimony from Rebecca Brown and her assistant, who are representatives from the Innocence Project out of the Cardozo Law School in New York City. The testimony was taken at the September 18, 2007

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meeting. Rebecca Brown provided the Committee with materials, which were considered in analyzing the issues put before the Committee.

II. Charge of the Committee

Sec. 2. PRESERVATION OF EVIDENCE STUDY COMMITTEE

- (a) A committee is established for the purpose of studying issues related to the preservation of evidence in criminal cases.
- (c) The committee shall consider the following:
 - (1) Current statewide policies regarding the preservation of evidence in criminal cases, and whether a statewide policy should be adopted.
 - (2) Current policies in local jurisdictions regarding the preservation of evidence in criminal cases, and whether these policies are consistent with one another and with relevant statewide policies.
 - (3) Best practices regarding the preservation of evidence in criminal cases.
 - (4) The appropriate duration for preservation of evidence, with specific consideration of whether evidence should be preserved while a convicted person is incarcerated or while the person is under other forms of state supervision.
 - (5) Whether and how advances in DNA testing technology should affect policies concerning preservation of evidence.
 - (6) If the committee determines that a statewide policy should be adopted regarding the preservation of evidence in criminal cases, the committee shall recommend a policy and a timeline for its adoption.
 - (7) Whether current facilities provide enough space to preserve the evidence that needs to be preserved.
 - (8) Whether there should be one central, statewide repository for evidence collected in criminal cases.
- (d) The committee shall have the assistance and cooperation of all state and local agencies and departments. The committee shall consult with the Innocence Project. The department of public safety shall provide professional and administrative support for the committee.
- (e) The committee shall report its findings and recommendations, including proposals for legislative action, to the senate and house committees on judiciary no later than December 15, 2007 whereupon the committee shall cease to exist.

III. Materials Reviewed

To assist the Committee in analyzing the issues presented by the Legislature, the following materials were reviewed and are attached as Appendix I.

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- Minutes of Meeting
- VT Forensic Laboratory Procedures and Guidelines
- Eyewitness Identification Resource Guide: A Primer for Reform
- American Prosecutors Research Institute: DNA Evidence Policy Considerations for the Prosecutor
- Title IV—Innocence Protection Act of 2004
- International Association for Property and Evidence
- Innocence Project: Preservation of Evidence (Benjamin Cardozo School of Law, Yeshiva University)
- Title 28: Judicial Administration; Part 28—DNA Identification System
- Croatian Medical Journal Forum: Preservation and Collection of Biological Evidence (Henry C. Lee, Carll Ladd)
- National Institute of Justice: What Every Law Enforcement Officer Should Know About DNA Evidence
- Standards and Guidelines for the Method of Custody, Transfer and Return of Evidence (Virginia Code § 19.2-270.4:1)

IV. The Issues

There are eight points for the Committee to consider. The Committee makes recommendations in this report. All of the recommendations were made by consensus, and they are unanimous. Further, the Committee's recommendations are best practice policies and are not intended to be binding. Further, as will be understood throughout the Report, nothing that the Committee recommends can be accomplished without adequate funding.

A: Current statewide policies regarding the preservation of evidence in criminal cases and whether a statewide policy should be adopted.

Each of the individual law enforcement agencies does have a policy regarding the preservation of evidence. There is no "statewide policy" that guides all agencies. However, all of the law enforcement officers in the State of Vermont, who are certified in the State of Vermont are taught at the Vermont Police Academy and therefore, are trained in the Police Academy best practices with respect to the preservation of evidence. The Vermont Police Academy teaches best practices as developed by the Vermont Forensic Laboratory.

B: Current policies in local jurisdictions regarding the preservation of evidence in criminal cases and whether these policies are consistent with one another in relevant statewide policies.

As was noted in Paragraph 1, Vermont is lucky in that one police academy trains all of the law enforcement officers that are certified in this state. Thus, the training is guided by the best practices and teachings of the Vermont Forensic Laboratory.

C: Best practices regarding the preservation of evidence in criminal cases.

As set out in the physical evidence handbook, which was promulgated by the State of Vermont, Department of Public Safety, Criminal Justice Services, Vermont Forensic Laboratory, police officers are trained in how to properly secure a crime scene, and then ultimately how to properly collect, log, and transmit evidence to the Vermont Forensic Laboratory. There are specific requirements with respect to latent evidence, biological evidence, arson evidence, and other types of evidence. As was stated in the earlier paragraphs, these procedures are taught at the Vermont Police Academy and the handbook is available to every law enforcement agency. Thus, the Committee recommends that these procedures, taught at the Vermont Police Academy be recognized as best practices for the preservation of evidence in criminal cases.

D: The appropriate duration for preservation of evidence with specific consideration of whether evidence should be preserved while a convicted person is incarcerated or while the person is under other forms of State supervision.

With respect to this paragraph, the answer regarding duration for preservation of evidence may in fact depend upon what the offense is as well as, what type of evidence is being preserved. The Committee recommends that the only evidence preserved be biological evidence. Biological evidence means biological evidence as defined in the Federal Regulations under the Justice for All Act. See 28 C.F.R. Part 28.23. These recommendations only apply to the crimes listed in Act 60, Section 1, 2007 Session. For biological evidence that has been tested, this evidence will be preserved for the length of time that the offender is under the control of the Department of Corrections, in any status, for that Act 60 crime. For all biological evidence, 90 days after the judgment is final in the first post-conviction relief proceeding regarding an Act 60 crime, all evidence may be destroyed.

E: Whether and how advances in DNA testing technology should affect policies concerning preservation of evidence.

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Forensic DNA analysis started during the late 1980's with the introduction of the process known as RFLP. During this time, the sample size required for a DNA profile was about half the size of a dime, and the process could take a month to complete. Today a profile can be obtained using the technique known as PCR from a handful of cells representing a stain the size of the period at the end of this sentence. The great changes we have seen over the years since the inception of forensic DNA analysis will probably not be matched in the upcoming decade. We will see improvements in the science and enhancements in the field's ability to capture information from a sample.

The size of DNA databases will increase making them more useful and the database will become a very important tool for criminal investigation. More loci, genetic markers, may be added to the database which will help make international comparisons (Interpol) easier.

The successful analysis of degraded DNA samples will become routine with the introduction of analysis methods that allow scientists to analyze damaged DNA samples. These methods are more sensitive and can yield profiles from diminishingly small sample sizes. Additional DNA typing methods will allow the analysis of sexual assault cases where there are a number of male contributors or where the male profile is a minor contribution.

Technology may improve the methods currently employed to determine the nature of a stain and will allow the examiner to more definitively identify a stain as human blood, saliva, semen or perhaps other biological fluid.

An important issue for consideration as technology improves is the concern with contamination. As science advances forensic DNA typing, and smaller samples are able to be analyzed, one must be aware of the limitations of the science. Contamination or incidental DNA must be considered in any interpretation. Almost anything could be saved and later analyzed for DNA. The merits and value of such testing must be weighed cautiously as the science improves to allow the analysis of only a few cells.

In conclusion, DNA analysis of properly maintained evidence that is retained for the time periods considered in this document is appropriate, and will only improve as new and additional methods become available.

F: If the Committee determines that a statewide policy should be adopted regarding the preservation of evidence in criminal cases, the Committee shall recommend policy and a timeline for its adoption.

It is clear that the Vermont Police Academy teaches the policies with respect to the collection and preservation of evidence in a criminal case. Thus, the Committee recommends that the policies and procedures promulgated by the

Vermont Forensic Laboratory are the best practices for the collection and preservation of evidence.

G: Whether current facilities provide enough space to preserve the evidence that needs to be preserved.

There are very few police agencies in the State of Vermont that have enough room to preserve the evidence that has been collected by that agency in the course of criminal investigations. It is not uncommon for law enforcement agencies to use closets and back rooms to store evidence and it is clear that the Vermont Forensic Laboratory in Waterbury cannot hold all of the evidence collected through the course of criminal investigations in the State. Thus the establishment of a centralized evidence repository should be explored.

H: Whether there should be one central statewide repository for evidence collected in criminal cases.

The Committee heard testimony from Rebecca Brown from the Innocence Project, who indicated that several states are turning to regional repositories for evidence. If there were, for example, three regional repositories around the state, it would cut down on travel time for law enforcement officers to and from the repository. However, a repository needs to be staffed so it would cost money not only in personnel costs, but also in infrastructure. In addition, each time you add another step in the chain of custody, you run the risk of contamination if that repository holds pre-conviction evidence. Retention of evidence is burdensome on the small departments pre-conviction and a statewide repository would be essential for post-conviction evidence. Under our Vermont Forensic Laboratory's accreditation guidelines, they are not supposed to manage evidence long term. Therefore, the Vermont Forensic Laboratory will not be an answer to long-term retention of evidence. Moreover, once a case is over when an appeal becomes final, if the District Court is holding the evidence, the court no longer has the responsibility to preserve the evidence. In addition the District Courts have very limited space to store any trial evidence.

The ideal solution is to have one, new statewide evidence repository. The following is an extremely simplified cost estimate to build an evidence room and intake area *within an existing facility*. The following assumptions underlie this construction budget:

1. That the selected existing facility has adequate roads, parking, and access to this new storage area.
2. That the selected existing facility has enough electrical power, heating, ventilation, air conditioning, bathrooms, etc. to support the addition of this specialized room/area and staff.

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3. That the selected existing facility has security staff, monitors and infrastructure to accommodate additional security equipment.
4. This area would be an add-on within an existing unused space, NOT a significant renovation, NO asbestos or hazardous waste abatement, etc.
5. The storage room would be 1,000 square feet with an intake/administrative area of 500 square feet.
6. No operational costs are included, i.e. staff, utilities, office furniture, etc.
7. No specialized climate control systems, lighting, mechanical or electrical equipment. No highly specialized wall or ceiling construction, etc.

Basic space fit up (walls, ceilings, floors, door, heating, ventilation, air conditioning, power, communications) 1500 square feet at \$175 per square foot	\$262,500.00
Security keypad/card swipe access	\$4,500.00
Cameras, motion detection, heat sensors with recording equipment	\$5,000.00
Bar Code system for evidence tracking	\$10,000.00
Computer and data access to existing systems	\$1,000.00
Modular shelving units (broad estimate based on limited information And brief discussions with shelving company)	<u>\$100,000.00</u>
TOTAL CONSTRUCTION	\$383,000.00

In addition to construction costs are the one-time costs of design, permitting, administration, inspection, etc. that will also be required which typically represent 20% of the cost of a project, which in this case is \$76,000.00. Therefore the total cost of the project would be **\$460,000.00**.

An additional benefit of having a centralized storage facility is that such a facility can be used to preserve forensic sexual assault examination kits where the victim/survivor has chosen not to report the sexual assault to law enforcement at the time of the exam, but has requested evidence to be collected and preserved should she decide to report at a later date. Law enforcement agencies throughout the state transport kits to the lab where they are stored for six months in order to preserve evidence and allow time for the victim/survivor to decide whether to report the crime to law enforcement. However, due to the current shortage of storage space, many kits are not even kept for this long. A secure, climate controlled facility such as the one proposed would allow for the storage of such kits beyond the 6 month period, ideally until the expiration of the statute of limitations.

Thus, it is the recommendation of the Committee that a statewide evidence repository should be established but only if such a repository is adequately funded.

