

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2011-1882
	:	
Plaintiff-Appellee,	:	On Appeal from the Guernsey
	:	County Court of Appeals,
vs.	:	Fifth Appellate District
	:	
CLARENCE D. ROBERTS,	:	Court of Appeals
	:	Case No. 10CA47
Defendant-Appellant.	:	

MERIT BRIEF OF APPELLANT CLARENCE D. ROBERTS

OFFICE OF THE
OHIO PUBLIC DEFENDER

KRISTOPHER A. HAINES (0080558)
Assistant State Public Defender
(Counsel of Record)

CRAIG M. JAQUITH (0052997)
Assistant State Public Defender

250 East Broad Street – Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
kristopher.haines@opd.ohio.gov

COUNSEL FOR APPELLANT
CLARENCE D. ROBERTS

DANIEL G. PADDEN (0038781)
Guernsey County Prosecutor
(Counsel of Record)

139 West 8th Street
Cambridge, Ohio 43725
(740) 439-2082
(740) 439-7161 – Fax

COUNSEL FOR APPELLEE
STATE OF OHIO

DAVIS POLK & WARDWELL LLP

SHARON KATZ
(N.Y. Bar #1788090)
(PHV #2131-2012)
(Counsel of Record)

450 Lexington Avenue
New York, New York 10017
(212) 450-4508
(212) 701-5508 – Fax
sharon.katz@davispolk.com

COUNSEL FOR AMICUS CURIAE
THE INNOCENCE NETWORK

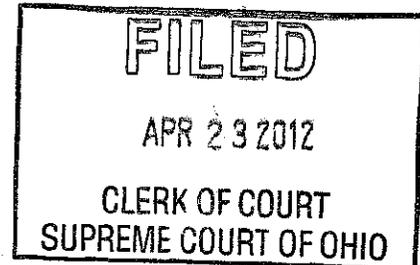


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STATEMENT OF THE CASE AND FACTS

In 1997, Mr. Roberts was indicted for aggravated robbery and capital aggravated murder regarding the stabbing death of Mr. Leo Sinnett. *State v. Roberts*, 5th Dist. No. 10CA000047, 2011-Ohio-4969, 2011 Ohio App. LEXIS 4086, ¶ 13. A jury found Mr. Roberts guilty of both offenses, but it did not recommend the death penalty. *Id.* at ¶ 2. Mr. Roberts was sentenced to life imprisonment without the possibility of parole. *Id.* On direct appeal, his convictions and sentence were affirmed. *See generally State v. Roberts*, 5th Dist. No. 97CA29, 1998 Ohio App. LEXIS 6506 (Nov. 24, 1998).

Mr. Roberts has maintained his claims of actual innocence. To aid his efforts to prove those claims, and following the enactment of R.C. 2933.82 on July 6, 2010, he filed with the trial court a pro se motion to preserve and catalog certain biological evidence from his case. (Sept. 30, 2010, Motion to Order Preservation and Listing of Evidence). The trial court denied that motion. (Nov. 30, 2010, Judgment Entry). Still acting pro se, Mr. Roberts timely appealed that decision to the Fifth District Court of Appeals. *Roberts* at ¶ 4. Based on the appellate court's belief that the mandates of R.C. 2933.82 did not apply to biological evidence which had been collected before the statute's effective date—because there was “no express, clear provision in the statute for retrospective application”—it overruled Mr. Roberts's sole assignment of error. *See Roberts* at ¶ 13-21.

INTRODUCTION

The Fifth District Court of Appeals misconstrued R.C. 2933.82, the new biological evidence preservation statute which was designed to protect innocent people from wrongful convictions. In doing so, the court of appeals complicated the General Assembly's unambiguous intent that certain government agencies must preserve biological evidence already possessed by those agencies at the time of the statute's enactment. That precedent cannot be upheld. Through R.C. 2933.82, the General Assembly acknowledged the well-supported need to properly preserve existing and yet-to-be-collected biological evidence if Ohio's criminal justice system is to continue to be one of integrity. But when the court of appeals set aside the plain mandates of R.C. 2933.82, it not only disregarded the General Assembly's goal to protect liberty through the use of sound scientific principles, it created a windfall for those who actually committed unsolved violent crimes.

Contrary to the lower court's holding, this case is not about statutory retrospectivity. *See Roberts* at ¶ 13-21; *see also* R.C. 1.48; *Kiser v. Coleman*, 28 Ohio St.3d 259, 261-62, 503 N.E.2d 753 (1986). The General Assembly did not tell any government agency to do "what it did not know it had to do i.e., meet R.C. 2933.82 standards in cases prior to its effective date." *Roberts* at ¶ 13. The legislature knew that the affected government entities could not manipulate the passage of time. Rather, through R.C. 2933.82, the legislature merely said that its directives must be applied to biological evidence which was already possessed at the time of the statute's enactment. That is, the legislature told certain government agencies that if they already possessed defined biological evidence as of July 6, 2010, that evidence needed to be retained and preserved. That made sense. And the General Assembly certainly did not say that its retention,

preservation, and cataloging mandates *only* applied to biological evidence which was yet to be obtained.

The language in R.C. 2933.82 is plain and belies its interpretation by the court of appeals. As such, there is no need to seek collateral indicia of legislative intent. But even if that exercise is conducted, such indicia further undermine the lower court's conclusion. Indeed, the appellate court's reasoning was squarely at odds with the General Assembly's noted objectives in enacting R.C. 2933.82, the circumstances under which the statute was enacted, the statute's legislative history, and the unjustifiable consequences of the statute's construction as held by the court of appeals. *See* R.C. 1.49. This Court must reverse the precedent set by the court of appeals and overrule that court's disregard of well-reasoned, plainly-worded legislation.

ARGUMENT

Proposition of Law: The obligations to preserve and catalog criminal offense-related biological evidence, imposed upon certain government entities by R.C. 2933.82, apply to evidence in the possession of those entities at the time of the statute's effective date.

I. The plain language of R.C. 2933.82 anticipated its application to new *and* pre-existing biological evidence in the possession of certain government entities at the time of the statute's enactment.

The General Assembly used unambiguous, plain language to state its purpose that the retention, preservation, and cataloging obligations of R.C. 2933.82 apply to new *and* pre-existing biological evidence already in the possession of those agencies at the time of the statute's enactment. *See* R.C. 2933.82; R.C. 109.561. The Fifth District Court of Appeals declined to give meaning to that plain language. Instead, the court of appeals erroneously held that "retrospective application" of R.C. 2933.82 was necessary to fulfill the legislature's intent. *Roberts* at ¶ 13-21. That analysis was neither asked for nor needed.

If the court of appeals had applied R.C. 2933.82 with recognition of its plain language, it would have given force to the General Assembly's mandate that biological evidence already in the government's possession—which might exonerate wrongfully convicted persons and bring to justice those who actually committed violent offenses—must be protected from destruction. See R.C. 2933.82; R.C. 109.561.

“In construing a statute, a court's paramount concern is the legislative intent. In determining legislative intent, the court first reviews the applicable statutory language and the purpose to be accomplished.” *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.2d 546, ¶ 20, quoting *State ex rel. Watkins v. Eighth Dist. Court of Appeals* (1998), 82 Ohio St.3d 532, 535, 1998-Ohio-190, 696 N.E.2d 1079. Courts are “required to apply the plain language of a statute when it is clear and unambiguous.” *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434, ¶ 14, citing *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9.

State v. Cook, 128 Ohio St.3d 120, 2010-Ohio-6305, 942 N.E.2d 357, ¶ 31. A statute “may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act.” *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079, ¶ 13, quoting *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948), paragraph five of the syllabus; see also *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 21. “[T]o understand a particular word used in a statute, a court is to read it in context and construe it according to the rules of grammar and common usage.” *Rhodes v. City of New Phila.*, 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2d 782, ¶ 17, citing R.C. 1.42. The court of appeals failed to apply those time-honored principles when it interpreted R.C. 2933.82.

Because Ohio has an extensive statutory scheme for postconviction review of cases involving potentially exculpatory biological evidence, the General Assembly enacted R.C. 2933.82, which required defined government entities to preserve and catalog biological evidence relevant to particular criminal cases. See R.C. 2953.21; R.C. 2953.71 through 2953.81; R.C.

2933.82. And R.C. 2933.82, which took effect on July 6, 2010, recognized that a simultaneously enacted statute created a multi-constituent entity to give legitimacy to its own mandates. *See* R.C. 2933.82(C)(1); R.C. 109.561. The General Assembly gave that entity a descriptive name: the “Preservation of Biological Evidence Task Force.” R.C. 109.561. The task force’s purpose was to “establish a system regarding the proper preservation of biological evidence in this state.” R.C. 2933.82(C)(1). Important for the purpose of this appeal, and contrary to the lower court’s interpretation of R.C. 2933.82, the task force was specifically required to “[r]ecommend practices, protocols, models, and resources for cataloging and accessibility of preserved biological evidence *already in the possession of* governmental evidence-retention entities.” (Emphasis added.) R.C. 2933.82(C)(1)(b).

Despite that plain language, which left no doubt that R.C. 2933.82 applied to biological evidence *already in the possession of* government entities as of July 6, 2010, the court of appeals mistakenly concluded that the statute applied only to new evidence “preserved pursuant to the practices and protocols under the new task force,” in great part because there was “no express, clear provision in the statute for retrospective application.” *See Roberts* at ¶ 13-21. But the statute’s plain language did not compel that conclusion, and it certainly cannot be said that a “retrospective application” analysis was necessary to give meaning to the General Assembly’s uncomplicated words. Rather, the conclusion reached by the court of appeals—that biological evidence that existed before the task force issued its “practices and protocols” is exempt from the requirements of R.C. 2933.82—was demonstrably incorrect. In light of the General Assembly’s explicit reference to biological evidence “already in the possession of” certain government agencies, the lower court’s interpretation cannot be given credence. *See* R.C. 2933.82(C)(1)(b).

Further, the General Assembly’s unambiguous intent was evinced by additional statutory language. Under R.C. 2933.82(A)(1)(a)(ii), “biological evidence” is, in part, “[a]ny item that

contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or any other identifiable biological material *that was collected as part of a criminal investigation or delinquent child investigation* and that reasonably may be used to incriminate or exculpate *any person* for an offense or delinquent act.” (Emphasis added.) *Id.* The General Assembly in no way suggested that its preservation directives applied only to biological evidence collected as part of an investigation conducted after July 6, 2010. The plain language of R.C. 2933.82(A)(1)(a)(ii) defies that notion. The legislature stated that biological evidence is that which “reasonably may be used to incriminate or exculpate *any person* for an offense. . . .” But if R.C. 2933.82 applied only to biological evidence collected after July 6, 2010, *any person* who was incarcerated before that date for an enumerated offense could not receive the benefit of proper evidence retention and preservation. *See id.* That conclusion is repugnant to the statute’s plain language. The General Assembly did not say that individuals who are already incarcerated, and who wish to establish their actual innocence through Ohio’s postconviction processes, cannot receive the benefit of evidence preservation. It said the opposite.

Moreover, while R.C. 2933.82(B)(1) established time durations for which government agencies must continue to retain biological evidence related to enumerated crimes, R.C. 2933.82(B)(2) unambiguously stated that those efforts applied to “evidence likely to contain biological material that *was in the possession*” of those agencies during the investigation and prosecution of certain offenses. As such, the legislature plainly applied retention obligations to biological material that *was in the government’s possession* at the time of the statute’s enactment. And it did not say that those obligations applied only to evidence *that will come into the possession* of the government post-enactment.

Further, the General Assembly repeatedly directed R.C. 2933.82 toward any governmental-evidence retention entity “*that possesses biological evidence.*” (Emphasis added.)

See, e.g., R.C. 2933.82(B)(3), (B)(5), (B)(7). Again, it did not direct its mandates to agencies that *will come to possess* such evidence after the statute's enactment. Although it could have done so, the legislature did not qualify the word "possesses" based on *when* the evidence was gathered. And R.C. 2933.82(B)(4) provides that when a defendant, such as Mr. Roberts, requests that a government entity "*that possesses biological evidence*" prepare an inventory of that evidence, the government agency shall do so. (Emphasis added.) R.C. 2933.82(B)(4). Again, the legislature did not qualify the word "possesses" based on *when* the evidence was gathered. *See id.* Rather, the General Assembly told the government: (1) if biological evidence is collected at any point in the future, apply the mandates included in R.C. 2933.82; and (2) if biological evidence is already possessed at the time of enactment, do the same.

But again, the plain wording of R.C. 2933.82(C)(1) provides, perhaps, the best evidence of the General Assembly's intent. The Preservation of Biological Evidence Task Force was told to "[d]evelop standards regarding the proper collection, retention, and cataloguing of biological evidence for ongoing investigations and prosecutions." R.C. 2933.82(C)(1)(a). But that was not all that the legislature said. The task force was also told to "[r]ecommend practices, protocols, models, and resources for the cataloging and accessibility of preserved biological evidence *already in the possession of governmental evidence-retention entities.*" (Emphasis added.) R.C. 2933.82(C)(1)(b). Thus, the statute's thrust reached not only evidence collected on or after July 6, 2010, but also that which was in the possession of the government before that date. And the plain wording of R.C. 2933.82(C)(1)(b) is wholly consistent with the General Assembly's repeated use, throughout R.C. 2933.82, of phrases such as "biological material that *was* collected," "to incriminate or exculpate *any* person," "to contain biological material that *was* in the possession of any governmental evidence-retention entity," and "government evidence-retention entity *that possesses* biological evidence." *See generally* R.C. 2933.82.

The General Assembly consistently expressed that R.C. 2933.82 applied not only to “new” biological evidence, but also to biological evidence that was already controlled by government agencies at the time of enactment. *See Cook* at ¶ 31; *Weaver* at ¶ 13, *Boley* at ¶ 21; *Rhodes* at ¶ 17. The legislature did not qualify the statute’s application based on when the evidence was obtained. But because the court of appeals applied the wrong standard of review, it failed to give meaning to the legislature’s well-reasoned language. Its interpretation of R.C. 2933.82 cannot stand.

II. The lower court’s interpretation of R.C. 2933.82 is wholly inconsistent with the General Assembly’s reasons for enacting that statute.

Again, the *plain language* of R.C. 2933.82 anticipated its application to new *and* pre-existing biological evidence. Moreover, not only was the appellate court’s retrospectivity-based analysis of R.C. 2933.82 unnecessary, the court’s ultimate conclusion is undermined by the legislature’s reasons for creating R.C. 2933.82, the circumstances under which the statute was enacted, its legislative history, and the unjustifiable consequences of its mistaken interpretation by the court of appeals. *See* R.C. 1.49. Thus, even if R.C. 2933.82 is somehow ambiguous (and it is not), the legislature’s accepted reasons for having enacted R.C. 2933.82 defy the lower court’s conclusion.

Because DNA analysis is a uniquely powerful truth-seeking tool, the General Assembly has created a robust statutory scheme for postconviction review of cases which might involve exculpatory DNA evidence. *See* R.C. 2953.21; R.C. 2953.71 through 2953.81. Today, DNA evidence is considered to be the most reliable of the myriad forensic investigation tools. *See generally* National Academy of Sciences, *Strengthening Forensic Evidence in the United States: A Path Forward* (2009). But Ohio’s comprehensive scheme will only work if its truth-seeking mechanisms are properly preserved. That is, the mechanisms for obtaining just results under

Ohio's scheme are the biological materials themselves. And absent the proper preservation of those materials, Ohio's efforts to assure that wrongful convictions are detected and corrected will be compromised. Reliability is the crux of sound science. That is why the General Assembly supplemented its postconviction framework with R.C. 2933.82.

Since DNA technology was first used in criminal trial courts, more than 280 DNA-based exonerations have occurred. Because the criminal justice system cannot abide such mistakes, and because DNA has great corrective force, Ohio enacted its postconviction DNA-testing provisions in 2003. *See* R.C. 2953.21; R.C. 2953.71 through R.C. 2953.81. But again, DNA testing is a sensitive scientific task and it will not achieve just ends if evidence which contains DNA is not retained and preserved in accordance with sound scientific principles. Indeed, the General Assembly enacted R.C. 2933.82 to improve its DNA-testing framework, not limit it.

The General Assembly did not create R.C. 2933.82 to unravel its other, recent legislation designed to protect the innocent; it meant for the statute to enhance its previous enactments. It certainly did not intend to preclude people who were convicted of crimes before reliable DNA testing was even available from receiving deserved, reliable DNA testing. Rather, the legislature asked government agencies to apply R.C. 2933.82 in an effort to assure consistency and scientific integrity in Ohio's postconviction DNA-testing scheme. That is, biological evidence is capable of providing conclusive proof of an offender's guilt or innocence, many years after a trial in which such evidence could not have been tested, or simply was not tested. The purpose of Ohio's postconviction DNA-testing provisions, and the solidification of those provisions through R.C. 2933.82, belies the conclusion reached by the court of appeals. The statute was meant to apply to both "new" and "old" biological evidence.

This Court has seen firsthand how DNA analysis can lead to exoneration of the wrongly accused, and the proper incarceration of those who actually committed criminal offenses, but

who escaped detection because crucial biological evidence was not tested. *See, e.g., State v. Steffen*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906 (DNA testing performed 20 years after conviction allowed the accused to prove that he was wrongfully convicted of sexual assault, an offense which had actually been committed by a morgue employee). Again, R.C. 2933.82 called for the retention and proper preservation of biological evidence so that the use of that evidence in Ohio's courts could prompt just results, as in Mr. Steffen's case. And R.C. 2933.82 called for the continued retention of that evidence for extensive, and sometimes indefinite, periods of time. *See* R.C. 2933.82(B). But nowhere in R.C. 2933.82, and nowhere in the legislative history of that statute, is there evidence that its provisions applied only to evidence collected after July 6, 2010. That is because R.C. 2933.82 was promulgated as a logical continuation of Ohio's recognition that biological evidence is of paramount importance in the criminal justice system. And if biological evidence is important (and it cannot be genuinely said that it is not), that evidence must be preserved through sound scientific techniques. However, the erroneous conclusion reached by the court of appeals will keep innocent persons in prison, while allowing guilty persons to remain free. That illogical conclusion came through misanalysis of the plain language of R.C. 2933.82. But affirmations that the lower court erred exist outside of the statute's four corners.

For example, the lower court's ruling would mean that no evidence comparable to that which exonerated Mr. Donte Booker of rape and other violent offenses would have to be preserved under R.C. 2933.82, merely because that evidence pre-dated the statute's enactment. *See* Innocence Project, *Donte Booker*, http://www.innocenceproject.org/Content/Donte_Booker.php (accessed Apr. 17, 2012). Mr. Booker, who proclaimed his innocence for more than twenty years, filed a successful application for DNA analysis of biological evidence which had been collected during the investigation of

offenses which occurred in 1986. *Id.* That application led to the reversal of all of Mr. Booker's convictions. Not only was Mr. Booker wholly exonerated, the biological evidence in his case led directly to the apprehension and incarceration of an ex-convict who subsequently pleaded guilty to rape. Wagner and Dutton, *Out of Time*, Columbus Dispatch (Sept. 9, 2011), <http://www.dispatch.com/content/stories/local/2008/01/28/dna2.html> (accessed Apr. 17, 2012). If the biological evidence which was tested in Mr. Booker's case had not been retained, not only would Mr. Booker have not been exonerated, the identity of the actual offender might never have been determined. And given that R.C. 2933.82 is a logical continuation of Ohio's comprehensive DNA-testing framework, it cannot reasonably be said that the General Assembly meant to prevent individuals such as Mr. Booker from having biological evidence properly retained, preserved, and upon request, inventoried.

Further, while the State noted within its memorandum in opposition of jurisdiction that Mr. Booker achieved his exoneration before the enactment of R.C. 2933.82, without "the benefit sought by [Mr. Roberts]," the State missed the point. (See Nov. 22, 2011, Memorandum in Opposition, at pp. 5-6). *Mr. Booker was lucky that the exonerative evidence still existed.* Through R.C. 2933.82, the General Assembly sought to take luck out of the equation. But the court of appeals thwarted that endeavor when it essentially held that new defendants will enjoy enhanced protections, while those who were convicted before July 6, 2010, and whose cases did not have the benefit of relevant DNA testing, might be out of luck if a government agency decides to destroy still-existing biological evidence. And under the appellate court's interpretation of R.C. 2933.82, there is little limitation upon the government's ability to destroy such biological evidence. The legislature did not intend unjust consequences.

While exonerating the innocent is a salutary goal, from society's perspective, the detection of actual offenders is arguably a more desirable one. But the latter aim will be much

less achievable if the appellate court's statutory interpretation is permitted to stand. If an actually innocent offender who was convicted of an enumerated offense before July 6, 2010, is not protected by R.C. 2933.82, it is foreseeable that he or she will be unable to meaningfully use the statutory postconviction DNA-testing application process. And for many such individuals, it is precisely that testing—and, as a practical matter, *only* that testing—which might lead to exoneration and the prosecution of the actual offender in a case previously thought to have been “solved.” Significantly, R.C. 2933.82 explicitly refers to the retention of biological evidence of “unsolved” crimes. R.C. 2933.82(B)(1)(a)-(b). Thus, the appellate court's holding would eliminate the government's explicit statutory duty to preserve evidence with respect to unsolved rapes and murders which occurred before July 6, 2010. Such a result is not merely undesirable; it is unacceptable and was simply not intended by the General Assembly.¹

The mandates of R.C. 2933.82 were enacted as a part of 2009 Ohio S.B. No. 77. State Senator David Goodman, a sponsor of that bill, was outspoken about his purposes for seeing R.C. 2933.82 into existence. Sen. Goodman sponsored the 2003 legislation which established Ohio's postconviction DNA-testing procedures. But a series of newspapers articles in the *Columbus Dispatch*, which focused on prisoners' attempts to prove their innocence, revealed a need to further strengthen Ohio's DNA testing laws. According to Sen. Goodman: “As we work to protect Ohioans and their families from those who would do them harm, it is essential that we take the necessary steps to ensure that everyone's rights are protected, the guilty are convicted

¹ Ohio's Attorney General was not content with mere preservation of existing biological evidence. He favors the creation of a statewide policy requiring the actual *testing* of unprocessed rape kits, the bulk of which date back several years. Dissell, *Ohio Attorney General Mike DeWine Calls for Statewide Policy for Testing Rape Kits*, Plain Dealer (May 20, 2011), http://blog.cleveland.com/metro/2011/05/attorney_general_calls_for_sta.html (accessed Apr. 17, 2012); *see also* Press Release, Attorney General Mike DeWine, Attorney General DeWine Announces Progress Made with SB 77 Connecting DNA with Unsolved Crimes (Feb. 15, 2012) (attached).

and the innocent vindicated.” Press Release, Senator David Goodman, Ohio Senate Approves Goodman’s Legislation that Expands DNA Testing and Improves System of Maintaining Evidence (June 24, 2009) (attached). Moreover, Sen. Goodman expressed that R.C. 2933.82 would “enact simple yet meaningful changes to our system of justice that will modernize Ohio’s best practices so that the best interests of justice can be served.” (Emphasis added.) *Id.* And Sen. Goodman’s press release specifically mentioned the expansion of postconviction DNA testing and that government agencies were required to establish retention policies to ensure that such evidence is readily available for testing. *Id.*

On the day that 2009 Ohio S.B. No. 77 was signed by the governor, Sen. Goodman stated: “Advancements in DNA testing in recent years have demonstrated the need to refine our policies regarding these procedures, and the changes made in Senate Bill 77 will allow our criminal justice system to take full advantage of these improvements to protect Ohio families.” Press Release, Senator David Goodman, Goodman’s Bill Expanding the Use of DNA Testing Signed into Law by Governor (Apr. 6, 2010) (attached). He continued: “I want to thank everyone who worked with us throughout the legislative process to craft a bill that will protect Ohioans’ rights *while ensuring the guilty are placed behind bars and the innocent go free.*” (Emphasis added.) *Id.* The sponsoring senator clearly expressed the purpose of R.C. 2933.82.

Moreover, when Governor Ted Strickland signed 2009 Ohio S.B. No. 77 into law, he stated: “There is a percentage of people in our prison system who are innocent of crimes. . . . The new procedures will help improve criminal investigations and save lives.” Craig, *DNA Testing Becomes Law in Ohio*, Cincinnati Enquirer (Apr. 6, 2010) (archived online version of article attached). After Gov. Strickland signed the bill, he apologized to Mr. Joseph Fears, Jr., who was released following twenty-five years of imprisonment for two rapes which postconviction DNA testing proved were not committed by Mr. Fears. *Id.* Thus, at least one

senator who sponsored what became R.C. 2933.82, and the governor who signed R.C. 2933.82, provided substantial indicia that R.C. 2933.82 applied to both new *and* pre-existing biological evidence already possessed by the government as of July 6, 2010. And those expressions came in furtherance of the plain, final language of R.C. 2933.82.²

Further, although the plain language of R.C. 2933.82 demonstrates that the lower court's ruling was incorrect, it is worth noting that when R.C. 2933.82 was enacted, a significant addition to R.C. 2953.71 was also enacted:

“Definitive DNA test” means a DNA test that clearly establishes that biological material from the perpetrator of the crime was recovered from the crime scene and also clearly establishes whether or not the biological material is that of the eligible offender. A prior DNA test is not definitive if the eligible offender proves by a preponderance of the evidence that because of advances in DNA technology there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may have failed to discover. Prior testing may have been a prior “definitive DNA test” as to some biological evidence but may not have been a prior “definitive DNA test” as to other biological evidence.

R.C. 2953.71(U). That provision, which established for the first time a statutory definition of “definitive DNA test,” and explicitly referenced “*prior* DNA tests,” inarguably anticipated that *all* eligible offenders will be allowed to benefit from advancements in DNA-testing technology, regardless of the date of the offense. (Emphasis added.) *Id.* By enacting R.C. 2953.71(U) at the same time as R.C. 2933.82, the General Assembly affirmed that Ohio's postconviction DNA-testing scheme and evidence-retention concerns apply to all eligible offenders. The lower court's ruling, in addition to failing to give effect to the plain language of R.C. 2933.82, is also squarely at odds with the purposes and goals of Ohio's DNA-testing laws, which R.C. 2933.82 was supposed to enhance and further legitimize.

² For further proof that the General Assembly enacted R.C. 2933.82 to help those who were wrongfully convicted before the statute's effective date, see the brief of Amicus Curiae The Innocence Network.

Furthermore, the amendment of R.C. 2953.72, which was a part of 2009 Ohio S.B. No. 77, and was promulgated simultaneously with the enactment of R.C. 2933.82, expanded Ohio's postconviction DNA-testing scheme by making such testing available to individuals who were already on parole. The lower court's unduly *narrow* reading of R.C. 2933.82 cannot be reconciled with the legislature's intent that postconviction DNA testing and preservation was to be *expanded* to promote the ends of justice. Again, for biological evidence to promote the ends of justice, it must be properly retained and preserved. The restrictive, mistaken interpretation of R.C. 2933.82 by the court of appeals allowed for the opposite to happen—evidence which might free the innocent and convict the guilty may be destroyed. This Court cannot sanction that conclusion.

Finally, the task force which was created to give meaning to the legislature's biological-evidence preservation concerns issued its guidelines in November 2010, and updated those guidelines in May 2011. Regarding the long-term retention of biological evidence, both the original and updated guidelines stated: "Retention of biological evidence and/or material pertains to long-term storage of *evidence from inactive cases, cold cases or after litigation*. (Emphasis added.) Preservation of Biological Evidence Task Force, *Guidelines for Preservation and Retention of Biological Evidence* 14 (Nov. 2010); (Emphasis added.) Ohio's Preservation of Evidence Task Force, *Guidelines for the Preservation and Retention of Evidence* 13 (May 2011). Thus, the task force itself had no problem following the plain language of R.C. 2933.82 and understanding that its guidelines were supposed to apply to evidence collected before July 6, 2010.

The ever-evolving ability to test and analyze biological evidence for the presence of identifiable DNA profiles has become vital to the most important function of the criminal justice

system: “to convict the guilty and free the innocent.” *Herrera v. Collins*, 506 U.S. 390, 398, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). Further, Ohio’s collaborative and concentrated focus on postconviction DNA testing—with procedures triggered by the application of an eligible offender—reflects the “concern about the injustice that results from the conviction of an innocent person [that] has long been at the core of our criminal justice system.” *Schlup v. Delo*, 513 U.S. 298, 325, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Because the holding below stands in derogation of the laudable, common-sense purposes and objectives of Ohio’s postconviction DNA-testing statutes, and the General Assembly’s reasons for creating the retention, preservation, and cataloging mandates of R.C. 2933.82 in furtherance of those statutes, that decision must be reversed.

CONCLUSION

This case is not about statutory retrospectivity. *See Roberts* at ¶ 13; *see also* R.C. 1.48. The General Assembly did not tell any government agency to do “what it did not know it had to do i.e., meet R.C. 2933.82 standards in cases prior to its effective date.” *Roberts* at ¶ 13. But the General Assembly *did* tell those agencies that if they already possessed biological evidence that was obtained before July 6, 2010, that evidence had to be retained and preserved in accordance with the directives R.C. 2933.82.

The plain language of R.C. 2933.82 imposed well-considered obligations to retain, preserve, and upon request, catalog criminal offense-related biological evidence. And it said that those obligations apply to evidence which was already in the possession of defined agencies when the statute took effect. This case is that simple. But even if additional statutory analysis is desired, the appellate court’s interpretation was belied by the General Assembly’s noted objectives in enacting R.C. 2933.82, its wise commitment to allowing access to reliable, potentially exculpatory DNA testing, and the unjustifiable consequences of the statute’s

interpretation by the court of appeals. *See* R.C. 1.49. The lower court's erroneous decision must be reversed.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



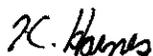
KRISTOPHER A. HAINES (0080558)
Assistant State Public Defender

250 East Broad Street – Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
kristopher.haines@opd.ohio.gov

COUNSEL FOR APPELLANT
CLARENCE D. ROBERTS

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing MERIT BRIEF OF APPELLANT CLARENCE D. ROBERTS was sent by regular U.S. mail to Daniel G. Padden, Guernsey County Prosecutor, 139 West 8th Street, Cambridge, Ohio 43725, and Sharon Katz, Counsel for Amicus Curiae The Innocence Network, 450 Lexington Avenue, New York, NY 10017, on this 23rd day of April, 2012.



KRISTOPHER A. HAINES (0080558)
Assistant State Public Defender

COUNSEL FOR APPELLANT
CLARENCE D. ROBERTS

#365043

IN THE SUPREME COURT OF OHIO

11-1882

STATE OF OHIO,

Case No.

Plaintiff-Appellee,

On Appeal from the Guernsey
County Court of Appeals
Fifth Appellate District

v.

CLARENCE D. ROBERTS,

Court of Appeals
Case No. 10CA47

Defendant-Appellant.

NOTICE OF APPEAL OF CLARENCE D. ROBERTS

OFFICE OF THE OHIO PUBLIC DEFENDER

DAVIS POLK & WARDWELL LLP

CRAIG M. JAQUITH 0052997
Assistant State Public Defender

SHARON KATZ
(N.Y. Bar #1788090)*
(Counsel of Record)

250 East Broad Street - Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 - fax
craig.jaquith@opd.ohio.gov

JULIA NESTOR
(N.Y. Bar #4537916)
DAVID C. NEWMAN
(N.Y. Bar #4590808)

COUNSEL FOR APPELLANT

450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4508
Fax: (212) 701-5508
E-mail: sharon.katz@davispolk.com

DANIEL G. PADDEN 0038781
Guernsey County Prosecutor

**Motion to admit pro hac vice pending*

139 West 8th Street
Cambridge, Ohio 43725
(740) 439-2082
(740) 439-7161 - fax

COUNSEL FOR AMICUS CURIAE
THE INNOCENCE NETWORK

COUNSEL FOR APPELLEE

FILED
NOV 07 2011
CLERK OF COURT
SUPREME COURT OF OHIO

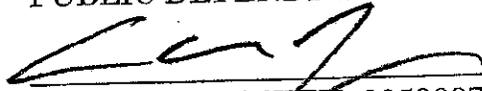
NOTICE OF APPEAL OF CLARENCE D. ROBERTS

Clarence D. Roberts hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Guernsey County Court of Appeals, Fifth Appellate District, entered in Court of Appeals Case No. 10CA47 on September 22, 2011.

This case involves a felony, and raises an issue of public or great general interest.

Respectfully submitted,

**OFFICE OF THE OHIO
PUBLIC DEFENDER**



CRAIG M. JAQUITH 0052997
Assistant State Public Defender

250 East Broad Street – Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – fax
craig.jaquith@opd.ohio.gov

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Clarence D. Roberts was sent by regular U.S. mail, postage prepaid to the office of Daniel G. Padden, Guernsey County Prosecutor, 139 West 8th Street, Cambridge, Ohio 43725, and Sharon Katz, Counsel for *Amicus Curiae* the Innocence Network, 450 Lexington Avenue, New York, NY 10017, on this 7th day of November, 2011.



CRAIG M. JAQUITH 0052997
Assistant State Public Defender

COUNSEL FOR APPELLANT

SEP 22 2011

GUERNSEY COUNTY, OHIO
Teresa A. Dankovic, Clerk of Court

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff - Appellee

-vs-

CLARENCE D. ROBERTS

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. Julie A. Edwards, J.

Case No. 10CA000047

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 97CR63

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

DANIEL G. PADDEN
139 West 8th Street
P.O. Box 640
Cambridge, OH 43725

For Defendant-Appellant

CLARENCE D. ROBERTS, PRO SE
Inmate No. 351-300
P.O. Box 4501
Lima, OH 45802

Farmer, J.

{¶1} On June 30, 1997, the Guernsey County Grand Jury indicted appellant, Clarence Roberts, on one count of aggravated robbery in violation of R.C. 2911.01 and one count of aggravated murder in violation of R.C. 2903.01 with a death penalty specification. Said charges arose from the robbery and stabbing death of Leo Sinnett on May 17, 1997.

{¶2} A jury trial commenced on September 15, 1997. The jury found appellant guilty as charged, but did not recommend the death penalty. The trial court sentenced appellant to life imprisonment without parole. Appellant's convictions and sentence were affirmed on appeal. See, *State v. Roberts* (November 24, 1998), Guernsey App. No. 97CA29.

{¶3} On September 30, 2010, appellant filed a motion to order preservation and listing of evidence regarding both physical and biological evidence from his case. By entry filed November 30, 2010, the trial court denied the motion.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

{¶5} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING ROBERTS' MOTION TO ORDER PRESERVATION OF EVIDENCE AND LISTING OF EVIDENCE IN VIOLATION OF THE MANDATES OF SB 77 AND O.R.C. §2933.82."

{¶6} Appellant claims the trial court erred in denying his request pursuant to R.C. 2933.82 for an inventory and preservation of evidence from his case. We disagree.

{¶7} R.C. 2933.82 governs preservation of biological evidence. Subsections (B)(1)(c), (B)(2), (B)(3), and (B)(4) state the following:

{¶8} "(B)(1) Each governmental evidence-retention entity that secures any biological evidence in relation to an investigation or prosecution of a criminal offense or delinquent act that is a violation of section 2903.01, 2903.02, or 2903.03, a violation of section 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907.03 or division (A)(4) or (B) of section 2907.05 of the Revised Code, or an attempt to commit a violation of section 2907.02 of the Revised Code shall secure the biological evidence for whichever of the following periods of time is applicable:

{¶9} "(c) If any person is convicted of or pleads guilty to the offense, or is adjudicated a delinquent child for committing the delinquent act, for the earlier of the following: (i) the expiration of the latest of the following periods of time that apply to the person: the period of time that the person is incarcerated, is in a department of youth services institution or other juvenile facility, is under a community control sanction for that offense, is under any order of disposition for that act, is on probation or parole for that offense, is under judicial release or supervised release for that act, is under post-release control for that offense, is involved in civil litigation in connection with that offense or act, or is subject to registration and other duties imposed for that offense or

act under sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code or (ii) thirty years. If after the period of thirty years the person remains incarcerated, then the governmental evidence-retention entity shall secure the biological evidence until the person is released from incarceration or dies.

{¶10} "(2) This section applies to evidence likely to contain biological material that **was** in the possession of any governmental evidence-retention entity during the investigation and prosecution of a criminal case or delinquent child case involving a violation of section 2903.01, 2903.02, or 2903.03, a violation of section 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907.03 or of division (A)(4) or (B) of section 2907.05 of the Revised Code, or an attempt to commit a violation of section 2907.02 of the Revised Code.

{¶11} "(3) A governmental evidence-retention entity that possesses biological evidence shall retain the biological evidence in the amount and manner sufficient to develop a DNA profile from the biological material contained in or included on the evidence.

{¶12} "(4) Upon written request by the defendant in a criminal case or the alleged delinquent child in a delinquent child case involving a violation of section 2903.01, 2903.02, or 2903.03, a violation of section 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907.03 or of division (A)(4) or (B) of section 2907.05 of the Revised Code, or an attempt to commit a violation of section 2907.02 of the Revised Code, a governmental evidence-retention entity that possesses biological evidence shall prepare an inventory of the biological evidence that

has been preserved in connection with the defendant's criminal case or the alleged delinquent child's delinquent child case." (Emphasis added.)

{¶13} R.C. 2933.82 became effective on July 6, 2010. Appellant was charged, tried, and convicted in 1997. In order for the statute to apply in appellant's case, it must be applied retrospectively. Pursuant to R.C. 1.48, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." "If there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment." *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262. We note there is no express, clear provision in the statute for retrospective application.

{¶14} Appellant argues the use of the verb "was" in subsection (B)(2) implies retroactive application. We disagree that the use of the past tense "was" expressly makes the statute retroactive. Because the statute sets forth requirements involving the preservation of evidence after conviction, the "was" refers to evidence in possession of any governmental evidence-retention entity during the investigation and prosecution of a criminal case after July 6, 2010. The state cannot do what it did not know it had to do i.e., meet R.C. 2933.82 standards in cases prior to its effective date.

{¶15} The statute creates new rights and duties upon the state to preserve biological evidence or to notify certain individuals in the event the evidence is to be destroyed. As stated in the Ohio Legislative Service Commission Final Bill Analysis of S.B. No. 77 as passed by the 128th General Assembly, effective July 6, 2010, R.C. 2933.82 "establishes within the Bureau of Criminal Identification and Investigation of the AG's Office a Preservation of Biological Evidence Task Force." The analysis states in relevant part:

{¶16} "The act requires the Task Force to establish a system regarding the proper preservation of biological evidence in Ohio and specifies that, in establishing the system, the Task Force must do all of the following: (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 possession of governmental evidence-retention entities.

{¶17} "The act provides that, in consultation with the Task Force, the Division of Criminal Justice Services of the Department of Public Safety must administer and conduct training programs for law enforcement officers and other relevant employees who are charged with preserving and cataloguing biological evidence regarding the methods and procedures referenced in the act's provisions described above that require or relate to the preservation of biological evidence. (R.C. 109.561 and 2933.82(C).)"

{¶18} In his September 30, 2010 motion, appellant requested "the preservation of all physical evidence in the above styled cause, including and specifically the clothing of the victim herein." Appellant argues "recent advances in DNA technology known as 'touch DNA' which can conclusively establish the presence of epithelial cell matter on objects touched by a person" could exonerate him. Appellant argues this technology could prove that it was another individual who removed the victim's wallet from his pocket and killed him. Because this item has not been preserved pursuant to the practices and protocols under the new task force, appellant cannot now benefit from retrospective application of the statute.

{¶19} Upon review, we find the provisions of R.C. 2933.82 are to be applied prospective only.

{¶20} The sole assignment of error is denied.

{¶21} The judgment of the Court of Common Pleas of Guernsey County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Edwards, J. concur.

Mark Farmer

W. Scott Gwin

John A. Edwards

JUDGES

SGF/sg 809

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED
COURT OF APPEALS

SEP 22 2011

GUERNSEY COUNTY, OHIO
Teresa A. Dankovic, Clerk of Court

STATE OF OHIO

Plaintiff-Appellee

-vs-

CLARENCE D. ROBERTS

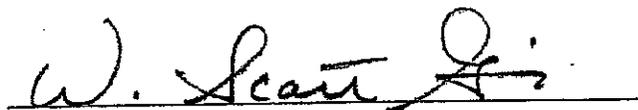
Defendant-Appellant

JUDGMENT ENTRY

Case No. 10CA000047

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Guernsey County, Ohio is affirmed. Costs to appellant.







JUDGES

IN THE COURT OF COMMON PLEAS
GUERNSEY COUNTY, OHIO

FILED
COMMON PLEAS COURT
NOV 30 2010
GUERNSEY COUNTY, OHIO
Teresa A. Dankovic, Clerk of Court

STATE OF OHIO,

Plaintiff,

CASE NO. 97-CR-63

vs.

CLARENCE D. (SKIP) ROBERTS,

ENTRY

Defendant.

This case comes before the Court for non-oral hearing upon Defendant's Motion to Order Preservation and Listing of Evidence, filed by Defendant, *pro se*, on September 30, 2010.

The Court finds that Defendant asks the Court to order the prosecuting attorney to ensure the preservation of all physical evidence in this case and to compile and certify a listing of all such evidence while Defendant is attempting to obtain the services of a scientist certified in "touch DNA" collection and analysis in order to examine the evidence in this case.

The Court finds that even if John LaFollett's DNA could be found on the clothing of the victim, specifically the pocket, the evidence would not disclose a strong probability that it would change the result if a new trial would be granted and merely would impeach and contradict the former evidence. See *Ohio v. Petro* (1947), 148 Ohio St. 505.

Defendant's Motion is hereby **DENIED**.

IT IS SO ORDERED.



JUDGE OF THE COMMON PLEAS COURT
GUERNSEY COUNTY, OHIO

cc: Prosecuting Attorney
Clarence D. Roberts, Defendant, #351-300, Allen Correctional Institution, P.O.
Box 4501, Lima, OH 45802-4501

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Current through Legislation passed by the 129th Ohio General Assembly
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*** Annotations current through January 9, 2012 ***

OHIO REVISED CODE GENERAL PROVISIONS
CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION
CONSTRUCTION

Go to the Ohio Code Archive Directory

ORC Ann. 1.48 (2012)

§ 1.48. Statute presumed prospective

A statute is presumed to be prospective in its operation unless expressly made retrospective.

HISTORY:

134 v H 607. Eff 1-3-72.

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OHIO REVISED CODE GENERAL PROVISIONS
CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION
CONSTRUCTION

Go to the Ohio Code Archive Directory

ORC Ann. 1.49 (2012)

§ 1.49. Ambiguous statutes

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

HISTORY:

134 v H 607. Eff 1-3-72.

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TITLE 1. STATE GOVERNMENT
CHAPTER 109. ATTORNEY GENERAL
BUREAU OF CRIMINAL IDENTIFICATION AND INVESTIGATION

Go to the Ohio Code Archive Directory

ORC Ann. 109.561 (2012)

§ 109.561. Preservation of biological evidence task force

There is hereby established within the bureau of criminal identification and investigation a preservation of biological evidence task force. The task force shall consist of officers and employees of the bureau; a representative from the Ohio prosecutors association; a representative from the Ohio state coroners association; a representative from the Ohio association of chiefs of police; a representative from the Ohio public defenders office, in consultation with the Ohio innocence project; a representative from the division of criminal justice services of the department of public safety; and a representative from the buckeye state sheriffs association. The task force shall perform the duties and functions specified in division (C) of *section 2933.82 of the Revised Code*.

HISTORY:

153 v S 77, § 1, eff. 7-6-10; 153 v S 58, § 1, eff. 9-17-10.

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 *** Annotations current through January 9, 2012 ***

TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2933. PEACE WARRANTS; SEARCH WARRANTS
 MISCELLANEOUS

Go to the Ohio Code Archive Directory

ORC Ann. 2933.82 (2012)

§ 2933.82. Preservation of biological evidence; preparation of inventory

(A) As used in this section:

(1) (a) "Biological evidence" means any of the following:

(i) The contents of a sexual assault examination kit;

(ii) Any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or any other identifiable biological material that was collected as part of a criminal investigation or delinquent child investigation and that reasonably may be used to incriminate or exculpate any person for an offense or delinquent act.

(b) The definition of "biological evidence" set forth in division (A)(1)(a) of this section applies whether the material in question is cataloged separately, such as on a slide or 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 or containers, or cigarettes.

(2) "Biological material" has the same meaning as in *section 2953.71 of the Revised Code*.

(3) "DNA" has the same meaning as in *section 109.573 [109.57.3] of the Revised Code*.

(4) "Profile" means a unique identifier of an individual, derived from DNA.

(5) "Prosecutor" has the same meaning as in *section 2935.01 of the Revised Code*.

(6) "Governmental evidence-retention entity" means all of the following:

(a) Any law enforcement agency, prosecutor's office, court, public hospital, crime laboratory, or other governmental or public entity or individual within this state that is charged with the collection, storage, or retrieval of biological evidence;

(b) Any official or employee of any entity or individual described in division (A)(6)(a) of this section.

(B) (1) Each governmental evidence-retention entity that secures any biological evidence in relation to an investigation or prosecution of a criminal offense or delinquent act that is a violation of section 2903.01, 2903.02, or 2903.03, a violation of section 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907.03 or division (A)(4) or (B) of *section 2907.05 of the Revised Code*, or an attempt to commit a violation of *section 2907.02 of the Revised Code* shall secure the biological evidence for whichever of the following periods of time is applicable:

(a) For a violation of *section 2903.01 or 2903.02 of the Revised Code*, for the period of time that the offense or act remains unsolved;

(b) For a violation of section 2903.03, a violation of section 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907.03 or of division (A)(4) or (B) of *section 2907.05 of the Revised Code*, or an attempt to commit a violation of *section 2907.02 of the Revised Code*, for a period of thirty years if the offense or act remains unsolved;

(c) If any person is convicted of or pleads guilty to the offense, or is adjudicated a delinquent child for committing the delinquent act, for the earlier of the following: (i) the expiration of the latest of the following periods of time that apply to the person: the period of time that the person is incarcerated, is in a department of youth services institution or other juvenile facility, is under a community control sanction for that offense, is under any order of disposition for that act, is on probation or parole for that offense, is under judicial release or supervised release for that act, is under post-release control for that offense, is involved in civil litigation in connection with that offense or act, or is subject to registration and other duties imposed for that offense or act under *sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code* or (ii) thirty years. If after the period of thirty years the person remains incarcerated, then the governmental evidence-retention entity shall secure the biological evidence until the person is released from incarceration or dies.

(2) This section applies to evidence likely to contain biological material that was in the possession of any governmental evidence-retention entity during the investigation and prosecution of a criminal case or delinquent child case involving a violation of section 2903.01, 2903.02, or 2903.03, a violation of section 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907.03 or of division (A)(4) or (B) of *section 2907.05 of the Revised Code*, or an attempt to commit a violation of *section 2907.02 of the Revised Code*.

(3) A governmental evidence-retention entity that possesses biological evidence shall retain the biological evidence in the amount and manner sufficient to develop a DNA profile from the biological material contained in or included on the evidence.

(4) Upon written request by the defendant in a criminal case or the alleged delinquent child in a delinquent child case involving a violation of section 2903.01, 2903.02, or 2903.03, a violation of section 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02 or 2907.03 or of division (A)(4) or (B) of *section 2907.05 of the Revised Code*, or an attempt to commit a violation of *section 2907.02 of the Revised Code*, a governmental evidence-retention entity that possesses biological evidence shall prepare an inventory of the biological

evidence that has been preserved in connection with the defendant's criminal case or the alleged delinquent child's delinquent child case.

(5) Except as otherwise provided in division (B)(7) of this section, a governmental evidence-retention entity that possesses biological evidence that includes biological material may destroy the evidence before the expiration of the applicable period of time specified in division (B)(1) of this section if all of the following apply:

(a) No other provision of federal or state law requires the state to preserve the evidence.

(b) The governmental evidence-retention entity, by certified mail, return receipt requested, provides notice of intent to destroy the evidence to all of the following:

(i) All persons who remain in custody, incarcerated, in a department of youth services institution or other juvenile facility, under a community control sanction, under any order of disposition, on probation or parole, under judicial release or supervised release, under post-release control, involved in civil litigation, or subject to registration and other duties imposed for that offense or act under *sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code* as a result of a criminal conviction, delinquency adjudication, or commitment related to the evidence in question;

(ii) The attorney of record for each person who is in custody in any circumstance described in division (B)(5)(b)(i) of this section if the attorney of record can be located;

(iii) The state public defender;

(iv) The office of the prosecutor of record in the case that resulted in the custody of the person in custody in any circumstance described in division (B)(5)(b)(i) of this section;

(v) The attorney general.

(c) No person who is notified under division (B)(5)(b) of this section does either of the following within one year after the date on which the person receives the notice:

(i) Files a motion for testing of evidence under *sections 2953.71 to 2953.81 or section 2953.82 of the Revised Code*;

(ii) Submits a written request for retention of evidence to the governmental evidence-retention entity that provided notice of its intent to destroy evidence under division (B)(5)(b) of this section.

(6) Except as otherwise provided in division (B)(7) of this section, if, after providing notice under division (B)(5)(b) of this section of its intent to destroy evidence, a governmental evidence-retention entity receives a written request for retention of the evidence from any person to whom the notice is provided, the governmental evidence-retention entity shall retain the evidence while the person referred to in division (B)(5)(b)(i) of this section remains in custody, incarcerated, in a department of youth services institution or other juvenile facility, under a community control sanction, under any order of disposition, on probation or parole, under judicial release or supervised release, under post-release control, involved in civil litigation, or subject to registration and other duties imposed for that offense or act under *sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code* as a result of a criminal conviction, delinquency adjudication, or commitment related to the evidence in question.

(7) A governmental evidence-retention entity that possesses biological evidence that includes biological material may destroy the evidence five years after a person pleads guilty or no contest to a violation of section 2903.01, 2903.02, or 2903.03, a violation of 2903.04 or 2903.06 that is a felony of the first or second degree, a violation of section 2907.02, 2907.03, division (A)(4) or (B) of section 2907.05, or an attempt to commit a violation of *section 2907.02 of the Revised Code* and all appeals have been exhausted unless, upon a motion to the court by the person who pleaded guilty or no contest or the person's attorney and notice to those persons described in division (B)(5)(b) of this section requesting that the evidence not be destroyed, the court finds good cause as to why that evidence must be retained.

(8) A governmental evidence-retention entity shall not be required to preserve physical evidence pursuant to this section that is of such a size, bulk, or physical character as to render retention impracticable. When retention of physical evidence that otherwise would be required to be retained pursuant to this section is impracticable as described in this division, the governmental evidence-retention entity that otherwise would be required to retain the physical evidence 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 that physical evidence.

(C) (1) The preservation of biological evidence task force established within the bureau of criminal identification and investigation under *section 109.561 [109.56.1] of the Revised Code* shall establish a system regarding the proper preservation of biological evidence in this state. In establishing the system, the task force shall do all of the following:

(a) Devise standards regarding the proper collection, retention, and cataloging of biological evidence for ongoing investigations and prosecutions;

(b) Recommend practices, protocols, models, and resources for the cataloging and accessibility of preserved biological evidence already in the possession of governmental evidence-retention entities.

(2) In consultation with the preservation of biological evidence task force described in division (C)(1) of this section, the office of the attorney general shall administer and conduct training programs for law enforcement officers and other relevant employees who are charged with preserving and cataloging biological evidence regarding the methods and procedures referenced in this section.

HISTORY:

153 v S 77, § 1, eff. 7-6-10; 153 v S 58, § 1, eff. 9-17-10.

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ORC Ann. 2953.21 (2012)

§ 2953.21. Petition for postconviction relief

(A) (1) (a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony and who is an offender, for whom DNA testing that was performed under *sections 2953.71 to 2953.81 of the Revised Code* or under former *section 2953.82 of the Revised Code* and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of *section 2953.74 of the Revised Code* provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under *sections 2953.71 to 2953.81 of the Revised Code* or under former *section 2953.82 of the Revised Code* been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of *section 2953.74 of the Revised Code* no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(c) As used in divisions (A)(1)(a) and (b) of this section, "former *section 2953.82 of the Revised Code*" means *section 2953.82 of the Revised Code* as it existed prior to the effective date of this amendment.

(2) Except as otherwise provided in *section 2953.23 of the Revised Code*, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in *section 2953.23 of the Revised Code*, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in *section 2953.23 of the Revised Code*, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I) (1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of *28 U.S.C. 154* with respect to capital cases that were pending in

federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or *section 120.06, 120.16, 120.26, or 120.33 of the Revised Code* and those appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by *section 2953.08 of the Revised Code*, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

HISTORY:

131 v 684 (Eff 7-21-65); 132 v H 742 (Eff 12-9-67); 141 v H 412 (Eff 3-17-87); 145 v H 571 (Eff 10-6-94); 146 v S 4 (Eff 9-21-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 258 (Eff 10-16-96); 149 v H 94. Eff 9-5-2001; 150 v S 11, § 1, eff. 10-29-03; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES
 POSTCONVICTION DNA TESTING FOR ELIGIBLE OFFENDERS

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ORC Ann. 2953.71 (2012)

§ 2953.71. Definitions

As used in *sections 2953.71 to 2953.83 of the Revised Code*:

(A) "Application" or "application for DNA testing" means a request through postconviction relief for the state to do DNA testing on biological material from the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing under *sections 2953.71 to 2953.81 of the Revised Code*.

(B) "Biological material" means any product of a human body containing DNA.

(C) "Chain of custody" means a record or other evidence that tracks a subject sample of biological material from the time the biological material was first obtained until the time it currently exists in its place of storage and, in relation to a DNA sample, a record or other evidence that tracks the DNA sample from the time it was first obtained until it currently exists in its place of storage. For purposes of this division, examples of when biological material or a DNA sample is first obtained include, but are not limited to, obtaining the material or sample at the scene of a crime, from a victim, from an offender, or in any other manner or time as is appropriate in the facts and circumstances present.

(D) "Custodial agency" means the group or entity that has the responsibility to maintain biological material in question.

(E) "Custodian" means the person who is the primary representative of a custodial agency.

(F) "Eligible offender" means an offender who is eligible under division (C) of *section 2953.72 of the Revised Code* to request DNA testing to be conducted under *sections 2953.71 to 2953.81 of the Revised Code*.

(G) "Exclusion" or "exclusion result" means a result of DNA testing that scientifically precludes or forecloses the subject offender as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the offender is an eligible offender and for which the sentence of death or prison term was imposed upon the offender.

(H) "Extracting personnel" means medically approved personnel who are employed to physically obtain an offender's DNA specimen for purposes of DNA testing under *sections 2953.71 to 2953.81 of the Revised Code*.

(I) "Inclusion" or "inclusion result" means a result of DNA testing that scientifically cannot exclude, or that holds accountable, the subject offender as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the offender is an eligible offender and for which the sentence of death or prison term was imposed upon the offender.

(J) "Inconclusive" or "inconclusive result" means a result of DNA testing that is rendered when a scientifically appropriate and definitive DNA analysis or result, or both, cannot be determined.

(K) "Offender" means a criminal offender who was sentenced by a court, or by a jury and a court, of this state.

(L) "Outcome determinative" means that had the results of DNA testing of the subject offender been presented at the trial of the subject offender requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the offender is an eligible offender and is requesting the DNA testing, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the offender's case as described in division (D) of *section 2953.74 of the Revised Code*, there is a strong probability that no reasonable factfinder would have found the offender guilty of that offense or, if the offender was sentenced to death relative to that offense, would have found the offender guilty of the aggravating circumstance or circumstances the offender was found guilty of committing and that is or are the basis of that sentence of death.

(M) "Parent sample" means the biological material first obtained from a crime scene or a victim of an offense for which an offender is an eligible offender, and from which a sample will be presently taken to do a DNA comparison to the DNA of the subject offender under *sections 2953.71 to 2953.81 of the Revised Code*.

(N) "Prison" and "community control sanction" have the same meanings as in *section 2929.01 of the Revised Code*.

(O) "Prosecuting attorney" means the prosecuting attorney who, or whose office, prosecuted the case in which the subject offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing.

(P) "Prosecuting authority" means the prosecuting attorney or the attorney general.

(Q) "Reasonable diligence" means a degree of diligence that is comparable to the diligence a reasonable person would employ in searching for information regarding an important matter in the person's own life.

(R) "Testing authority" means a laboratory at which DNA testing will be conducted under *sections 2953.71 to 2953.81 of the Revised Code*.

(S) "Parole" and "post-release control" have the same meanings as in *section 2967.01 of the Revised Code*.

(T) "Sexually oriented offense" and "child-victim oriented offense" have the same meanings as in *section 2950.01 of the Revised Code*.

(U) "Definitive DNA test" means a DNA test that clearly establishes that biological material from the perpetrator of the crime was recovered from the crime scene and also clearly establishes whether or not the biological material is that of the eligible offender. A prior DNA test is not definitive if the eligible offender proves by a preponderance of the evidence that because of advances in DNA technology there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may have failed to discover. Prior testing may have been a prior "definitive DNA test" as to some biological evidence but may not have been a prior "definitive DNA test" as to other biological evidence.

HISTORY:

150 v S 11, § 1, Eff 10-29-03; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

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ORC Ann. 2953.72 (2012)

§ 2953.72. Eligible offender may submit application and acknowledgment for DNA testing

(A) Any eligible offender who wishes to request DNA testing under *sections 2953.71 to 2953.81 of the Revised Code* shall submit an application for the testing to the court of common pleas specified in *section 2953.73 of the Revised Code*, on a form prescribed by the attorney general for this purpose. The eligible offender shall submit the application in accordance with the procedures set forth in *section 2953.73 of the Revised Code*. The eligible offender shall specify on the application the offense or offenses for which the offender is an eligible offender and is requesting the DNA testing. Along with the application, the eligible offender shall submit an acknowledgment that is on a form prescribed by the attorney general for this purpose and that is signed by the offender. The acknowledgment shall set forth all of the following:

(1) That *sections 2953.71 to 2953.81 of the Revised Code* contemplate applications for DNA testing of an eligible offender at a stage of a prosecution or case after the offender has been sentenced, that any exclusion or inclusion result of DNA testing rendered pursuant to those sections may be used by a party in any proceeding as described in *section 2953.81 of the Revised Code*, and that all requests for any DNA testing made at trial will continue to be handled by the prosecuting attorney in the case;

(2) That the process of conducting postconviction DNA testing for an eligible offender under *sections 2953.71 to 2953.81 of the Revised Code* begins when the offender submits an application under *section 2953.73 of the Revised Code* and the acknowledgment described in this section;

(3) That the eligible offender must submit the application and acknowledgment to the court of common pleas that heard the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing;

(4) That the state has established a set of criteria set forth in *section 2953.74 of the Revised Code* by which eligible offender applications for DNA testing will be screened and that a judge of a court of common pleas upon receipt of a properly filed application and accompanying acknowledgment will apply those criteria to determine whether to accept or reject the application;

(5) That the results of DNA testing conducted under *sections 2953.71 to 2953.81 of the Revised Code* will be provided as described in *section 2953.81 of the Revised Code* to all parties in the postconviction proceedings and will be reported to various courts;

(6) That, if DNA testing is conducted with respect to an offender under *sections 2953.71 to 2953.81 of the Revised Code*, the state will not offer the offender a retest if an inclusion result is achieved relative to the testing and that, if the state were to offer a retest after an inclusion result, the policy would create an atmosphere in which endless testing could occur and in which postconviction proceedings could be stalled for many years;

(7) That, if the court rejects an eligible offender's application for DNA testing because the offender does not satisfy the acceptance criteria described in division (A)(4) of this section, the court will not accept or consider subsequent applications;

(8) That the acknowledgment memorializes the provisions of *sections 2953.71 to 2953.81 of the Revised Code* with respect to the application of postconviction DNA testing to offenders, that those provisions do not give any offender any additional constitutional right that the offender did not already have, that the court has no duty or obligation to provide postconviction DNA testing to offenders, that the court of common pleas has the sole discretion subject to an appeal as described in this division to determine whether an offender is an eligible offender and whether an eligible offender's application for DNA testing satisfies the acceptance criteria described in division (A)(4) of this section and whether the application should be accepted or rejected, that if the court of common pleas rejects an eligible offender's application, the offender may seek leave of the supreme court to appeal the rejection to that court if the offender was sentenced to death for the offense for which the offender is requesting the DNA testing and, if the offender was not sentenced to death for that offense, may appeal the rejection to the court of appeals, and that no determination otherwise made by the court of common pleas in the exercise of its discretion regarding the eligibility of an offender or regarding postconviction DNA testing under those provisions is reviewable by or appealable to any court;

(9) That the manner in which *sections 2953.71 to 2953.81 of the Revised Code* with respect to the offering of postconviction DNA testing to offenders are carried out does not confer any constitutional right upon any offender, that the state has established guidelines and procedures relative to those provisions to ensure that they are carried out with both justice and efficiency in mind, and that an offender who participates in any phase of the mechanism contained in those provisions, including, but not limited to, applying for DNA testing and being rejected, having an application for DNA testing accepted and not receiving the test, or having DNA testing conducted and receiving unfavorable results, does not gain as a result of the participation any constitutional right to challenge, or, except as provided in division (A)(8) of this section, any right to any review or appeal of, the manner in which those provisions are carried out;

(10) That the most basic aspect of *sections 2953.71 to 2953.81 of the Revised Code* is that, in order for DNA testing to occur, there must be an offender sample against which other evidence may be compared, that, if an eligible offender's application is accepted but the offender subsequently re-

fuses to submit to the collection of the sample of biological material from the offender or hinders the state from obtaining a sample of biological material from the offender, the goal of those provisions will be frustrated, and that an offender's refusal or hindrance shall cause the court to rescind its prior acceptance of the application for DNA testing for the offender and deny the application.

(B) The attorney general shall prescribe a form to be used to make an application for DNA testing under division (A) of this section and *section 2953.73 of the Revised Code* and a form to be used to provide the acknowledgment described in division (A) of this section. The forms shall include all information described in division (A) of this section, spaces for an offender to insert all information necessary to complete the forms, including, but not limited to, specifying the offense or offenses for which the offender is an eligible offender and is requesting the DNA testing, and any other information or material the attorney general determines is necessary or relevant. The attorney general shall distribute copies of the prescribed forms to the department of rehabilitation and correction, the department shall ensure that each prison in which offenders are housed has a supply of copies of the forms, and the department shall ensure that copies of the forms are provided free of charge to any offender who requests them.

(C) (1) An offender is eligible to request DNA testing to be conducted under *sections 2953.71 to 2953.81 of the Revised Code* only if all of the following apply:

(a) The offense for which the offender claims to be an eligible offender is a felony, and the offender was convicted by a judge or jury of that offense.

(b) One of the following applies:

(i) The offender was sentenced to a prison term or sentence of death for the felony described in division (C)(1)(a) of this section, and the offender is in prison serving that prison term or under that sentence of death, has been paroled or is on probation regarding that felony, is under post-release control regarding that felony, or has been released from that prison term and is under a community control sanction regarding that felony.

(ii) The offender was not sentenced to a prison term or sentence of death for the felony described in division (C)(1)(a) of this section, but was sentenced to a community control sanction for that felony and is under that community control sanction.

(iii) The felony described in division (C)(1)(a) of this section was a sexually oriented offense or child-victim oriented offense, and the offender has a duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code* relative to that felony.

(2) An offender is not an eligible offender under division (C)(1) of this section regarding any offense to which the offender pleaded guilty or no contest.

(3) An offender is not an eligible offender under division (C)(1) of this section regarding any offense if the offender dies prior to submitting an application for DNA testing related to that offense under *section 2953.73 of the Revised Code*.

HISTORY:

150 v S 11, § 1, eff. 10-29-03; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

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ORC Ann. 2953.73 (2012)

§ 2953.73. Submission of application; response; court determination as to whether to accept or reject application; appeals

(A) An eligible offender who wishes to request DNA testing to be conducted under *sections 2953.71 to 2953.81 of the Revised Code* shall submit an application for DNA testing on a form prescribed by the attorney general for this purpose and shall submit the form to the court of common pleas that sentenced the offender for the offense for which the offender is an eligible offender and is requesting DNA testing.

(B) If an eligible offender submits an application for DNA testing under division (A) of this section, upon the submission of the application, all of the following apply:

(1) The eligible offender shall serve a copy of the application on the prosecuting attorney and the attorney general.

(2) The application shall be assigned to the judge of that court of common pleas who was the trial judge in the case in which the eligible offender was convicted of the offense for which the offender is requesting DNA testing, or, if that judge no longer is a judge of that court, it shall be assigned according to court rules. The judge to whom the application is assigned shall decide the application. The application shall become part of the file in the case.

(C) If an eligible offender submits an application for DNA testing under division (A) of this section, regardless of whether the offender has commenced any federal habeas corpus proceeding relative to the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting DNA testing, any response to the application by the prosecuting attorney or the attorney general shall be filed not later than forty-five days after the date on which the eligible offender submits the application. The prosecuting attorney or the attorney general, or both, may, but are not required to, file a response to the application. If the prosecuting attorney or

the attorney general files a response under this division, the prosecuting attorney or attorney general, whoever filed the response, shall serve a copy of the response on the eligible offender.

(D) If an eligible offender submits an application for DNA testing under division (A) of this section, the court shall make the determination as to whether the application should be accepted or rejected. The court shall expedite its review of the application. The court shall make the determination in accordance with the criteria and procedures set forth in *sections 2953.74 to 2953.81 of the Revised Code* and, in making the determination, shall consider the application, the supporting affidavits, and the documentary evidence and, in addition to those materials, shall consider all the files and records pertaining to the proceedings against the applicant, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript and all responses to the application filed under division (C) of this section by a prosecuting attorney or the attorney general, unless the application and the files and records show the applicant is not entitled to DNA testing, in which case the application may be denied. The court is not required to conduct an evidentiary hearing in conducting its review of, and in making its determination as to whether to accept or reject, the application. Upon making its determination, the court shall enter a judgment and order that either accepts or rejects the application and that includes within the judgment and order the reasons for the acceptance or rejection as applied to the criteria and procedures set forth in *sections 2953.71 to 2953.81 of the Revised Code*. The court shall send a copy of the judgment and order to the eligible offender who filed it, the prosecuting attorney, and the attorney general.

(E) A judgment and order of a court entered under division (D) of this section is appealable only as provided in this division. If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code* and the court of common pleas rejects the application under division (D) of this section, one of the following applies:

(1) If the offender was sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing, the offender may seek leave of the supreme court to appeal the rejection to the supreme court. Courts of appeals do not have jurisdiction to review any rejection if the offender was sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing.

(2) If the offender was not sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing, the rejection is a final appealable order, and the offender may appeal it to the court of appeals of the district in which is located that court of common pleas.

(F) Notwithstanding any provision of law regarding fees and costs, no filing fee shall be required of, and no court costs shall be assessed against, an eligible offender who is indigent and who submits an application under this section.

(G) If a court rejects an eligible offender's application for DNA testing under division (D) of this section, unless the rejection is overturned on appeal, no court shall require the state to administer a DNA test under *sections 2953.71 to 2953.81 of the Revised Code* on the eligible offender.

HISTORY:

150 v S 11, § 1, Eff 10-29-03; 150 v H 525, § 1, eff. 5-18-05; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

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ORC Ann. 2953.74 (2012)

§ 2953.74. Grounds for accepting or rejecting application; comparing test results to federal combined DNA index system

(A) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code* and a prior definitive DNA test has been conducted regarding the same biological evidence that the offender seeks to have tested, the court shall reject the offender's application. If an eligible offender files an application for DNA testing and a prior inconclusive DNA test has been conducted regarding the same biological evidence that the offender seeks to have tested, the court shall review the application and has the discretion, on a case-by-case basis, to either accept or reject the application. The court may direct a testing authority to provide the court with information that the court may use in determining whether prior DNA test results were definitive or inconclusive and whether to accept or reject an application in relation to which there were prior inconclusive DNA test results.

(B) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code*, the court may accept the application only if one of the following applies:

(1) The offender did not have a DNA test taken at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing regarding the same biological evidence that the offender seeks to have tested, the offender shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject offender's case as described in division (D) of this section would have been outcome determinative at that trial stage in that case, and, at the time of the trial stage in that case, DNA testing was not generally accepted, the results of DNA testing were not generally admissible in evidence, or DNA testing was not yet available.

(2) The offender had a DNA test taken at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA

testing regarding the same biological evidence that the offender seeks to have tested, the test was not a prior definitive DNA test that is subject to division (A) of this section, and the offender shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject offender's case as described in division (D) of this section would have been outcome determinative at the trial stage in that case.

(C) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code*, the court may accept the application only if all of the following apply:

(1) The court determines pursuant to *section 2953.75 of the Revised Code* that biological material was collected from the crime scene or the victim of the offense for which the offender is an eligible offender and is requesting the DNA testing and that the parent sample of that biological material against which a sample from the offender can be compared still exists at that point in time.

(2) The testing authority determines all of the following pursuant to *section 2953.76 of the Revised Code* regarding the parent sample of the biological material described in division (C)(1) of this section:

(a) The parent sample of the biological material so collected contains scientifically sufficient material to extract a test sample.

(b) The parent sample of the biological material so collected is not so minute or fragile as to risk destruction of the parent sample by the extraction described in division (C)(2)(a) of this section; provided that the court may determine in its discretion, on a case-by-case basis, that, even if the parent sample of the biological material so collected is so minute or fragile as to risk destruction of the parent sample by the extraction, the application should not be rejected solely on the basis of that risk.

(c) The parent sample of the biological material so collected has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing, and the parent sample otherwise has been preserved, and remains, in a condition that is scientifically suitable for testing.

(3) The court determines that, at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing, the identity of the person who committed the offense was an issue.

(4) The court determines that one or more of the defense theories asserted by the offender at the trial stage in the case described in division (C)(3) of this section or in a retrial of that case in a court of this state was of such a nature that, if DNA testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative.

(5) The court determines that, if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding that offender.

(6) The court determines pursuant to *section 2953.76 of the Revised Code* from the chain of custody of the parent sample of the biological material to be tested and of any test sample extracted from the parent sample, and from the totality of circumstances involved, that the parent sample and the extracted test sample are the same sample as collected and that there is no reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected.

(D) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code*, the court, in determining whether the "outcome determinative" criterion described in divisions (B)(1) and (2) of this section has been satisfied, shall consider all available admissible evidence related to the subject offender's case.

(E) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code* and the court accepts the application, the eligible offender may request the court to order, or the court on its own initiative may order, the bureau of criminal identification and investigation to compare the results of DNA testing of biological material from an unidentified person other than the offender that was obtained from the crime scene or from a victim of the offense for which the offender has been approved for DNA testing to the combined DNA index system maintained by the federal bureau of investigation.

If the bureau, upon comparing the test results to the combined DNA index system, determines the identity of the person who is the contributor of the biological material, the bureau shall provide that information to the court that accepted the application, the offender, and the prosecuting attorney. The offender or the state may use the information for any lawful purpose.

If the bureau, upon comparing the test results to the combined DNA index system, is unable to determine the identity of the person who is the contributor of the biological material, the bureau may compare the test results to other previously obtained and acceptable DNA test results of any person whose identity is known other than the eligible offender. If the bureau, upon comparing the test results to the DNA test results of any person whose identity is known, determines that the person whose identity is known is the contributor of the biological material, the bureau shall provide that information to the court that accepted the application, the offender, and the prosecuting attorney. The offender or the state may use the information for any lawful purpose.

HISTORY:

150 v S 11, § 1, Eff 10-29-03; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

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ORC Ann. 2953.75 (2012)

§ 2953.75. Determinations by prosecuting attorney as to whether biological material was collected and whether parent sample still exists

(A) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code*, the court shall require the prosecuting attorney to use reasonable diligence to determine whether biological material was collected from the crime scene or victim of the offense for which the offender is an eligible offender and is requesting the DNA testing against which a sample from the offender can be compared and whether the parent sample of that biological material still exists at that point in time. In using reasonable diligence to make those determinations, the prosecuting attorney shall rely upon all relevant sources, including, but not limited to, all of the following:

- (1) All prosecuting authorities in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing and in the appeals of, and postconviction proceedings related to, that case;
- (2) All law enforcement authorities involved in the investigation of the offense for which the offender is an eligible offender and is requesting the DNA testing;
- (3) All custodial agencies involved at any time with the biological material in question;
- (4) The custodian of all custodial agencies described in division (A)(3) of this section;
- (5) All crime laboratories involved at any time with the biological material in question;
- (6) All other reasonable sources.

(B) The prosecuting attorney shall prepare a report that contains the prosecuting attorney's determinations made under division (A) of this section and shall file a copy of the report with the court and provide a copy to the eligible offender and the attorney general.

HISTORY:

150 v S 11, § 1, Eff 10-29-03; 153 v S 77, § 1, eff. 7-6-10.

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ORC Ann. 2953.76 (2012)

§ 2953.76. Findings and determinations concerning quantity, quality, chain of custody, and reliability of parent sample

If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code*, the court shall require the prosecuting attorney to consult with the testing authority and to prepare findings regarding the quantity and quality of the parent sample of the biological material collected from the crime scene or victim of the offense for which the offender is an eligible offender and is requesting the DNA testing and that is to be tested, and of the chain of custody and reliability regarding that parent sample, as follows:

(A) The testing authority shall determine whether there is a scientifically sufficient quantity of the parent sample to test and whether the parent sample is so minute or fragile that there is a substantial risk that the parent sample could be destroyed in testing. The testing authority may determine that there is not a sufficient quantity to test in order to preserve the state's ability to present in the future the original evidence presented at trial, if another trial is required. Upon making its determination under this division, the testing authority shall prepare a written document that contains its determination and the reasoning and rationale for that determination and shall provide a copy to the court, the eligible offender, the prosecuting attorney, and the attorney general. The court may determine in its discretion, on a case-by-case basis, that, even if the parent sample of the biological material so collected is so minute or fragile as to risk destruction of the parent sample by the extraction, the application should not be rejected solely on the basis of that risk.

(B) The testing authority shall determine whether the parent sample has degraded or been contaminated to the extent that it has become scientifically unsuitable for testing and whether the parent sample otherwise has been preserved, and remains, in a condition that is suitable for testing. Upon making its determination under this division, the testing authority shall prepare a written document that contains its determination and the reasoning and rationale for that determination and

shall provide a copy to the court, the eligible offender, the prosecuting attorney, and the attorney general.

(C) The court shall determine, from the chain of custody of the parent sample of the biological material to be tested and of any test sample extracted from the parent sample and from the totality of circumstances involved, whether the parent sample and the extracted test sample are the same sample as collected and whether there is any reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected. Upon making its determination under this division, the court shall prepare and retain a written document that contains its determination and the reasoning and rationale for that determination.

HISTORY:

150 v S 11, § 1, Eff 10-29-03; 153 v S 77, § 1, eff. 7-6-10.

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ORC Ann. 2953.77 (2012)

§ 2953.77. Precautions concerning chain of custody and against contamination during transport or testing; documentation

(A) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code* and if the application is accepted and DNA testing is to be performed, the court shall require that the chain of custody remain intact and that all of the applicable following precautions are satisfied to ensure that the parent sample of the biological material collected from the crime scene or the victim of the offense for which the offender is an eligible offender and requested the DNA testing, and the test sample of the parent sample that is extracted and actually is to be tested, are not contaminated during transport or the testing process:

(1) The court shall require that the chain of custody be maintained and documented relative to the parent sample and the test sample actually to be tested between the time they are removed from their place of storage or the time of their extraction to the time at which the DNA testing will be performed.

(2) The court, the testing authority, and the law enforcement and prosecutorial personnel involved in the process, or any combination of those entities and persons, shall coordinate the transport of the parent sample and the test sample actually to be tested between their place of storage and the place where the DNA testing will be performed, and the court and testing authority shall document the transport procedures so used.

(3) The testing authority shall determine and document the custodian of the parent sample and the test sample actually to be tested after they are in the possession of the testing authority.

(4) The testing authority shall maintain and preserve the parent sample and the test sample actually to be tested after they are in the possession of the testing authority and shall document the maintenance and preservation procedures used.

(5) After the DNA testing, the court, the testing authority, and the original custodial agency of the parent sample, or any combination of those entities, shall coordinate the return of the remaining parent sample back to its place of storage with the original custodial agency or to any other place determined in accordance with this division and *section 2953.81 of the Revised Code*. The court shall determine, in consultation with the testing authority, the custodial agency to maintain any newly created, extracted, or collected DNA material resulting from the testing. The court and testing authority shall document the return procedures for original materials and for any newly created, extracted, or collected DNA material resulting from the testing, and also the custodial agency to which those materials should be taken.

(B) A court or testing authority shall provide the documentation required under division (A) of this section in writing and shall maintain that documentation.

HISTORY:

150 v S 11, § 1, Eff-10-29-03; 153 v S 77, § 1, eff. 7-6-10.

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ORC Ann. 2953.78 (2012)

§ 2953.78. Selection of testing authority; effect of offender's objection; approval or designation of testing authorities

(A) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code* and if the application is accepted and DNA testing is to be performed, the court shall select the testing authority to be used for the testing. A court shall not select or use a testing authority for DNA testing unless the attorney general approves or designates the testing authority pursuant to division (C) of this section and unless the testing authority satisfies the criteria set forth in *section 2953.80 of the Revised Code*.

(B) If a court selects a testing authority pursuant to division (A) of this section and the eligible offender for whom the test is to be performed objects to the use of the selected testing authority, the court shall rescind its prior acceptance of the application for DNA testing for the offender and deny the application. An objection as described in this division, and the resulting rescission and denial, do not preclude a court from accepting in the court's discretion, a subsequent application by the same eligible offender requesting DNA testing.

(C) The attorney general shall approve or designate testing authorities that may be selected and used to conduct DNA testing, shall prepare a list of the approved or designated testing authorities, and shall provide copies of the list to all courts of common pleas. The attorney general shall update the list as appropriate to reflect changes in the approved or designated testing authorities and shall provide copies of the updated list to all courts of common pleas. The attorney general shall not approve or designate a testing authority under this division unless the testing authority satisfies the criteria set forth in *section 2953.80 of the Revised Code*. A testing authority that is equipped to handle advanced DNA testing may be approved or designated under this division, provided it satisfies the criteria set forth in that section.

(D) The attorney general's approval or designation of testing authorities under division (C) of this section, and the selection and use of any approved or designated testing authority, do not afford an offender any right to subsequently challenge the approval, designation, selection, or use, and an offender may not appeal to any court the approval, designation, selection, or use of a testing authority.

HISTORY:

150 v S 11, § 1, Eff 10-29-03; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

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ORC Ann. 2953.79 (2012)

§ 2953.79. Obtaining biological material from offender; offender's refusal or hindrance

(A) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code* and if the application is accepted and DNA testing is to be performed, a sample of biological material shall be obtained from the offender in accordance with this section, to be compared with the parent sample of biological material collected from the crime scene or the victim of the offense for which the offender is an eligible offender and requested the DNA testing. The offender's filing of the application constitutes the offender's consent to the obtaining of the sample of biological material from the offender. The testing authority shall obtain the sample of biological material from the offender in accordance with medically accepted procedures.

(B) If DNA testing is to be performed for an offender as described in division (A) of this section, the court shall require the state to coordinate with the department of rehabilitation and correction or the other state agency or entity of local government with custody of the offender, whichever is applicable, as to the time and place at which the sample of biological material will be obtained from the offender. If the offender is in prison or is in custody in another facility at the time the DNA testing is to be performed, the sample of biological material shall be obtained from the offender at the facility in which the offender is housed, and the department of rehabilitation and correction or the other state agency or entity of local government with custody of the offender, whichever is applicable, shall make the offender available at the specified time. The court shall require the state to provide notice to the offender and to the offender's counsel of the date on which, and the time and place at which, the sample will be so obtained.

The court also shall require the state to coordinate with the testing authority regarding the obtaining of the sample from the offender.

(C) (1) If DNA testing is to be performed for an offender as described in division (A) of this section, and the offender refuses to submit to the collection of the sample of biological material

from the offender or hinders the state from obtaining a sample of biological material from the offender, the court shall rescind its prior acceptance of the application for DNA testing for the offender and deny the application.

(2) For purposes of division (C)(1) of this section:

(a) An offender's "refusal to submit to the collection of a sample of biological material from the offender" includes, but is not limited to, the offender's rejection of the physical manner in which a sample of the offender's biological material is to be taken.

(b) An offender's "hindrance of the state in obtaining a sample of biological material from the offender" includes, but is not limited to, the offender being physically or verbally uncooperative or antagonistic in the taking of a sample of the offender's biological material.

(D) The extracting personnel shall make the determination as to whether an eligible offender for whom DNA testing is to be performed is refusing to submit to the collection of a sample of biological material from the offender or is hindering the state from obtaining a sample of biological material from the offender at the time and date of the scheduled collection of the sample. If the extracting personnel determine that an offender is refusing to submit to the collection of a sample or is hindering the state from obtaining a sample, the extracting personnel shall document in writing the conditions that constitute the refusal or hindrance, maintain the documentation, and notify the court of the offender's refusal or hindrance.

HISTORY:

150 v S 11, § 1, Eff 10-29-03; 153 v S 77, § 1, eff. 7-6-10.

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ORC Ann. 2953.80 (2012)

§ 2953.80. Criteria for approval, designation, selection, or use of testing authority

(A) The attorney general shall not approve or designate a testing authority for conducting DNA testing under *section 2953.78 of the Revised Code*, and a court shall not select or use a testing authority for DNA testing under that section, unless the testing authority satisfies all of the following criteria:

(1) It is in compliance with nationally accepted quality assurance standards for forensic DNA testing or advanced DNA testing, as published in the quality assurance standards for forensic DNA testing laboratories issued by the director of the federal bureau of investigation.

(2) It undergoes an annual internal or external audit for quality assurance in conformity with the standards identified in division (A)(1) of this section.

(3) At least once in the preceding two-year period, and at least once each two-year period thereafter, it undergoes an external audit for quality assurance in conformity with the standards identified in division (A)(1) of this section.

(B) As used in division (A) of this section:

(1) "External audit" means a quality assurance review of a testing authority that is conducted by a forensic DNA testing agency outside of, and not affiliated with, the testing authority.

(2) "Internal audit" means an internal review of a testing authority that is conducted by the testing authority itself.

HISTORY:

150 v S 11, § 1, Eff 10-29-03; 151 v S 262, § 1, eff. 7-11-06.

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ORC Ann. 2953.81 (2012)

§ 2953.81. Maintaining of results and samples; access to results and distribution of copies; use as evidence

If an eligible inmate submits an application for DNA testing under *section 2953.73 of the Revised Code* and if DNA testing is performed based on that application, upon completion of the testing, all of the following apply:

(A) The court or a designee of the court shall require the state to maintain the results of the testing and to maintain and preserve both the parent sample of the biological material used and the offender sample of the biological material used. The testing authority may be designated as the person to maintain the results of the testing or to maintain and preserve some or all of the samples, or both. The results of the testing remain state's evidence. The samples shall be preserved during the entire period of time for which the offender is imprisoned or confined relative to the sentence in question, is on parole or probation relative to that sentence, is under post-release control or a community control sanction relative to that sentence, or has a duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code* relative to that sentence. Additionally, if the prison term or confinement under the sentence in question expires, if the sentence in question is a sentence of death and the offender is executed, or if the parole or probation period, the period of post-release control, the community control sanction, or the duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code* under the sentence in question ends, the samples shall be preserved for a reasonable period of time of not less than twenty-four months after the term or confinement expires, the offender is executed, or the parole or probation period, the period of post-release control, the community control sanction, or the duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code* ends, whichever is applicable. The court shall determine the period of time that is reasonable for purposes of this division, provided that the period shall not be less than twenty-four months after the term or confinement expires, the offender is executed, or the parole or probation period, the period

of post-release control, the community control sanction, or the duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code* ends, whichever is applicable.

(B) The results of the testing are a public record.

(C) The court or the testing authority shall provide a copy of the results of the testing to the prosecuting attorney, the attorney general, and the subject offender.

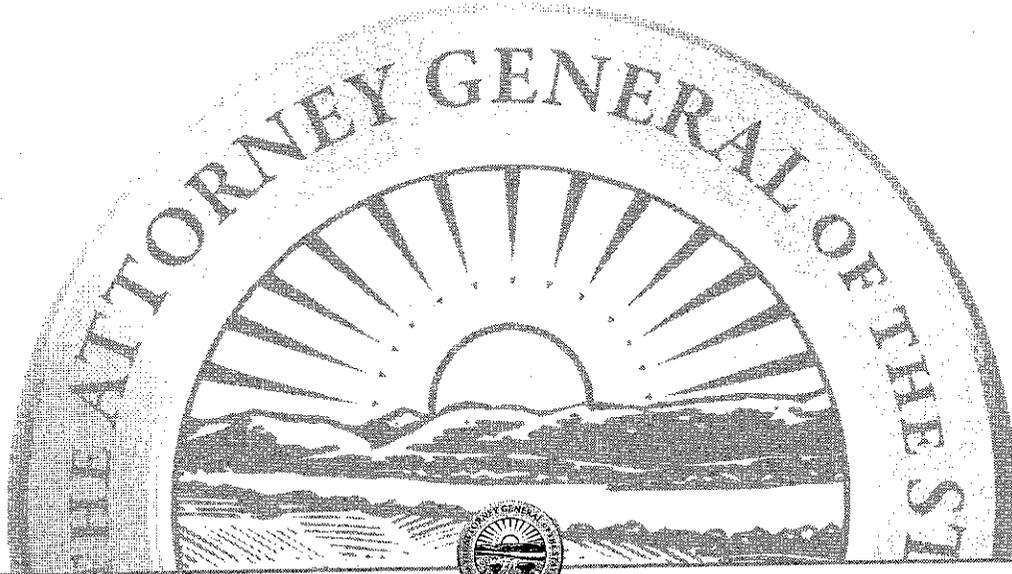
(D) If the postconviction proceeding in question is pending at that time in a court of this state, the court of common pleas that decided the DNA application or the testing authority shall provide a copy of the results of the testing to any court of this state, and, if it is pending in a federal court, the court of common pleas that decided the DNA application or the testing authority shall provide a copy of the results of the testing to that federal court.

(E) The testing authority shall provide a copy of the results of the testing to the court of common pleas that decided the DNA application.

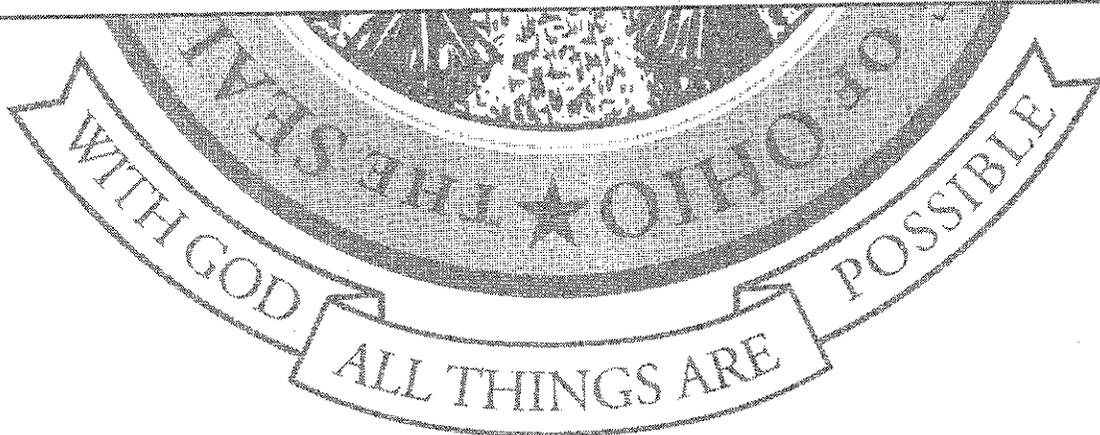
(F) The offender or the state may enter the results of the testing into any proceeding.

HISTORY:

150 v S 11, § 1, Eff 10-29-03; 153 v S 77, § 1, eff. 7-6-10.



RICHARD CORDRAY
OHIO ATTORNEY GENERAL



Guidelines for Preservation and
Retention of Biological Evidence
November 2010

Released by the Preservation of
Biological Evidence Task Force

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November 2010

Dear Colleague,

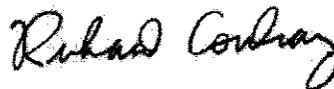
The passage of Senate Bill 77 earlier this year has created new requirements for the collection, retention and cataloging of biological evidence in many types of cases. These new legal mandates apply to law enforcement, prosecutors, courts, public hospitals, crime laboratories, coroners and other governmental entities responsible for the collection, storage or retrieval of biological evidence.

I appreciate the work of members of the Preservation of Biological Evidence Task Force who examined the law and developed this document, which presents accepted best practices regarding evidence collection, handling, storage, retention and cataloging. It is important to remember that because of the unique nature of every investigation, the methods discussed in this document may not be applicable or practical in every field circumstance. The specific crimes for which these requirements must be applied also are clearly outlined in the report.

The Ohio Peace Officer Training Academy will administer and conduct training programs for law enforcement officers and other employees charged with preserving and cataloging biological evidence. I encourage you to monitor the academy's online course catalog for updates. Both traditional and online courses are planned. Details on all course offerings will be posted at www.OhioAttorneyGeneral.gov/OPOTA.

Thank you for the work you do every day to keep our communities safe.

Sincerely,



Richard Cordray
Ohio Attorney General

Introduction

The Preservation of Biological Evidence Task Force was created pursuant to Ohio Revised Code § 109.561, which was enacted as part of Senate Bill 77 and amended by Senate Bill 58 during the 128th General Assembly.

Pursuant to Ohio Revised Code § 2933.82(C), the task force was charged with establishing a system regarding the proper preservation of biological evidence in Ohio. In establishing the system, the task force was required to:

- Devise standards regarding the proper collection, retention and cataloging of biological evidence for ongoing investigations and prosecutions.
- Recommend practices, protocols, models and resources for cataloging and making accessible preserved biological evidence already in the possession of governmental evidence-retention entities.

In consultation with the task force, the Ohio Peace Officer Training Academy will administer and conduct training programs for law enforcement officers and other employees who are charged with preserving and cataloging biological evidence.

The standards presented in this document are not intended to be all-inclusive. They are set forth as required by SB 77 and are recommended for the crimes outlined in ORC § 2933.82. The standards also may be applied to the investigation of other alleged violations of the Ohio Criminal Code.

Models and resources recommended by the task force represent accepted industry standards. The recommendations do not expand a governmental evidence-retention entity's responsibility to collect evidence nor do they require a forensic laboratory to determine what items may contain biological evidence. Due to the unique nature of every investigation, the methods discussed here may not be applicable or practical in every field circumstance. Advances in technology also may alter what are currently considered to be industry best practices.

ORC § 2933.82: When to Apply Standards

The standards in this document for the collection, retention and cataloging of biological evidence are recommended primarily for crimes covered under ORC § 2933.82. These are:

2903.01	Aggravated murder
2903.02	Murder
2903.03	Voluntary manslaughter
2903.04	Involuntary manslaughter, if a felony of the first or second degree
2903.06	Aggravated vehicular homicide, if a felony of the first or second degree
2903.06	Vehicular homicide, if a felony of the first or second degree
2903.06	Vehicular manslaughter, if a felony of the first or second degree
2907.02	Rape
2923.02/2907.02	Attempted rape
2907.03	Sexual battery
2907.05	Gross sexual imposition: division (A)(4) or (B)

Who is Responsible for Retaining Biological Evidence?

Senate Bill 77 defines which types of agencies are responsible for maintaining and retaining biological evidence. The statute refers to those responsible as "governmental evidence-retention entity." A governmental evidence-retention entity means all of the following:

- Law enforcement agency
- Prosecutor's office
- Court
- Public hospital
- Crime laboratory
- Other governmental or public entity or individual within Ohio charged with the collection, storage or retrieval of biological evidence (such as a coroner's office or other agency performing autopsies).

A governmental evidence-retention entity that possesses biological evidence is required to retain the biological evidence in the amount and manner sufficient to develop a DNA profile from the biological material contained in or included on the evidence.

Overview of Biological Evidence

Definitions of Biological Evidence and Biological Material

“Biological evidence” was defined in Senate Bill 77, ORC § 2933.82, as follows:

- 1) The contents of a sexual assault examination kit.
- 2) Any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or any other identifiable biological material that was collected as part of a criminal investigation or delinquent child investigation and that reasonably may be used to incriminate or exculpate any person for an offense or delinquent act.

The definition of “biological evidence” applies whether the material in question is cataloged separately, such as on a slide or 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 or containers, or cigarettes.

“Biological material” is defined in ORC § 2953.71 as any product of a human body containing DNA.

Important note for coroners: A coroner is required to collect and retain a known DNA standard (blood, oral swab) during autopsy for crimes covered under ORC § 2933.82.

Items to Consider as Sources of Biological Evidence or Materials

The following list is meant only as a general guide for use in the investigation of crimes in which biological evidence and materials may have evidentiary value. These are:

- Sexual assault examination kits, both victim and suspect kits
- Slides, swabs, test tubes or the proximate container for each from sexual assault examination kits, autopsies or skin stains
- Clothing, hats, masks, eyeglasses, jewelry, gloves from any involved individuals
- Ligatures such as rope, belts, tape and cords
- Bedding such as sheets, blankets, comforters, pillow cases, pillows and mattress pads
- Other household materials such as towels, used tissues, toilet paper and paper towels
- Drinking containers such as cups, cans and bottles
- Cigarette butts or other smoking devices
- Drug paraphernalia such as pipes and syringes
- Handled items such as weapons and tools

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- Licked items such as envelopes and stamps
- Samples of items retained by a coroner or forensic or toxicology laboratory
- Biological reference standards from known individuals such as buccal swabs from a victim, suspect, consent partner or elimination standards
- Secondary reference standards from missing persons such as a toothbrush or hair brush

The above list is not exhaustive. There are many other possible sources of biological evidence or materials.

Training on these and other topics can provide further insight as to the item types and locations of possible biological material.

Evidence Collection and Handling Safety Concerns

Universal Precautions

Universal precautions provide the first line of defense against risk of exposure to bloodborne pathogens and must be consistently followed for all activities involving contacts with blood, tissue, body fluids or other potentially infectious materials.

These are work practices that help prevent contact with blood and other body fluids that might spread disease. To be effective, universal precautions must be practiced in every situation in which there is a possibility of exposure.

All body fluids, tissues and body fluid stains must be treated as if they are contaminated with a bloodborne pathogen. It is not possible to determine by observation if a body fluid or stain is contaminated. Individuals should be conscious of possible contact with tools or items such as scissors, pens and tape measures as well as contaminated surfaces.

Personal protective equipment (PPE) — such as disposable gloves, disposable coveralls, lab coats, masks and eye protection — helps prevent contact with bloodborne pathogens.

- PPE should be used when there is a reasonable chance of contact with blood or other potentially infectious materials. Gloves should be worn when providing first aid or medical care, handling soiled materials or equipment, and cleaning up spills of risky materials. Protective clothing should be worn when splashes or spills are likely and also when working with unsafe materials. Face protectors such as splash goggles should be worn to protect against items that may splash, splatter or spray.
- PPE must be clean and in good repair. PPE that is torn, punctured or has lost its ability to function as an effective barrier should not be used. Disposable PPE should not be reused under any circumstances. While using PPE, individuals should not touch their eyes or nose with gloves.
- Do not assume that dried blood or other potentially infectious materials that are dry are safe. PPE should be used when handling these items.
- For cleanup of wet material, cover the area containing blood or other potentially infectious materials with paper towels or rags, pour a disinfectant solution over the towels, leave for at least ten (10) minutes and remove. When finished, place materials in a waste disposal bag. Appropriate PPE should be used throughout this process.

Common Bloodborne Diseases

Hepatitis B (HBV), Hepatitis C (HCV) and Human Immunodeficiency Virus (HIV) are the most common bloodborne-caused diseases to which a person may be exposed.

HBV, HCV and HIV are the most concerning diseases because of the potential for lifelong infection once exposed and, more importantly, because of the risk of death associated with infection.

Hepatitis B (HBV)

Hepatitis is an inflammation of the liver. It is the most prevalent bloodborne pathogen hazard facing law enforcement and health care professionals on the job. A person infected with HBV may feel no symptoms or may suffer from flu-like symptoms so severe that hospitalization is required. However, it may take up to nine (9) months before symptoms become noticeable.

Blood, semen or other body fluids, especially those containing blood, may be infectious. HBV can survive in dried blood for up to seven (7) days, making it a significant concern.

A Hepatitis B vaccination is available and also can be effective after exposure.

Hepatitis C (HCV)

Like HBV, Hepatitis C (HCV) is a virus that affects the liver. Nearly 4 million Americans are infected with HCV. However, only 25% are diagnosed. On average, 75% of patients with HCV infection later develop chronic hepatitis, cirrhosis or liver cancer. HCV can be chronic and fatal. It is responsible for 8,000 to 10,000 deaths annually.

Unlike HBV, there is no effective vaccine to prevent HCV.

Human Immunodeficiency Virus (HIV)

This virus attacks the body's immune system, causing Acquired Immune Deficiency Syndrome (AIDS). An individual infected with this virus can carry it for several years without developing symptoms, but eventually will develop AIDS. A person infected may suffer from flu-like symptoms, fatigue, fever and diseases that normally could be fought by the immune system. Although HIV can be transmitted through blood and some body fluids, it is not transmitted by touching, feeding or working with individuals who carry the disease.

HIV survives for a shorter period of time on a dry surface than HBV and HCV, but it is more life threatening.

There is no vaccine to prevent HIV or AIDS, nor is there a cure.

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Transmission of Bloodborne Pathogens

The pathogens that transmit these diseases may be present in body fluids such as blood, semen, blood-contaminated saliva and vaginal secretions. Pathogens also can be present in cerebrospinal, synovial, amniotic and any other body fluids that are contaminated with blood. Tissue and body organ material that is deposited on evidence also may be a source of pathogens.

These pathogens can enter and infect the human body through openings in the skin, including lacerations, abrasions and dermatitis or acne. Infections also may occur via punctures or cuts caused by sharp contaminated objects such as syringe needles, scalpels, broken glass or other objects sharp enough to penetrate the skin. Infections also can enter the body through mucous membranes of the eyes, nose or mouth when these areas are touched with contaminated hands or implements.

Activities Involving Possible Exposure to Bloodborne Pathogens

The following activities may put a person at risk of exposure to bloodborne pathogens:

- The collection, storage, examination and processing of physical evidence that contains blood, semen or other potentially infectious agents
- The act of cleaning possibly contaminated work areas and/or work surfaces, including vehicles
- The preparation and packaging of blood, semen or other potentially contaminated items for presentation in court or shipment
- The handling of stains/standards containing blood or biological extracts that are utilized for testing procedures
- The collection and packaging of physical evidence containing blood, semen or other potentially contaminated evidence from crime scenes
- Searches of people and locations for weapons and/or contraband
- The handling of biological stains/standards obtained from suspects and victims

Evidence Collection

Biological evidence and materials should be collected in a manner that prevents contamination and degradation and ensures integrity during all phases of the investigation and litigation. To avoid contamination, sample collection tools and materials must be free from human DNA. The incidental presence of microorganisms does not harm properly stored human DNA samples. Disposable latex examination gloves, individually wrapped swabs or other individually wrapped items are free of human DNA by virtue of the process of sterilization.

Not all germicidal treatments destroy DNA. Alcohol and hydrogen peroxide, for instance, do not destroy DNA. The most effective way to clean collection equipment is to wipe it with a fresh 10% bleach solution of 10:1 water to bleach. (Any commercially available bleach is adequate for this purpose.)

Clean Collection Practices

Here are examples of ways to prevent contamination and degradation of biological evidence:

1. Use disposable latex gloves to handle evidence rather than uniform/tactical gloves. Do not touch the outside of gloves to face or hands, and change gloves after contact with potential biological evidence.
2. When field testing evidence, swab the stain and test the swab rather than directly testing the stain. If the stain is small, consider testing it in a lab rather than in the field.
3. Fingerprint powder and brushes may carry biological material from one item to the next. Collect DNA samples before powdering or use disposable brushes and sterile powder.
4. Clean tools between samples. For example, dip forceps in a fresh 10% bleach solution of 10:1 water to bleach and thoroughly dry prior to reuse.
5. When it is necessary to dampen a swab to collect a dried stain, any source of water that does not contain human DNA is acceptable. Sterile water, distilled water, saline solution and tap water meet this definition.
6. Dry damp items and swabs. When it is not practical to thoroughly dry the item, packaging such as paper bags will allow the drying process to continue.
7. Wet items may be dried by hanging or by laying out on a clean surface indoors away from the scene.

8. Package each item separately.

9. The use of personal protective equipment (disposable clothing, gloves, masks, etc.) both protects the individual from biohazard exposure and prevents transfer of the investigator's DNA to the evidence.

To implement these provisions, these tools are useful:

- Latex or similar gloves
- Sterile swabs
- Water
- Paper containers such as bags, envelopes, boxes
- Tape
- A permanent marker

Packaging

These are best practices to keep in mind when packaging biological evidence at a crime scene:

- Package evidence and seal the container to protect it from loss, cross transfer, contamination and/or deleterious change.
- Seal the package in such a manner that opening it causes obvious damage or alteration to the container or its seal.
- Package evidence for safety by using boxes or breathable tubes for sharp items, marking items and informing the laboratory if a biohazard is present.
- Package firearms in clean, unused boxes when submitting them for biological analysis. Mark the packaging and inform the laboratory if a biohazard is present.
- Use paper bags, envelopes, boxes and similar materials for all biological evidence.
- Avoid plastic packaging as an inner or outer package.
- Avoid the use of pill tins due to possible rust.
- Ensure that all swabs and evidence are dry.
- Package each item separately; avoid commingling items to prevent cross contamination.
- Swabs collected from a single item may be packaged in the same container.
- Mark each package with a detailed description that includes the item, location where it was collected, name of the person who collected it and date of collection.

- Seal each package with tape. (For safety reasons, do not use staples.) All seals must be marked to identify the person making the seal. Mark through the seal with name or initials and date.
- The integrity of the item often is maintained through the package's documentation. That documentation includes all markings, seals, tags and labels that have been used by all of the involved agencies. Therefore, it is critical to preserve or document all packaging and labels received by or returned to your agency.

Note: If an item (such as a used condom or fetus/product of conception) cannot be dried, it may be placed in plastic and frozen. The laboratory should be contacted as soon as possible for further guidance.

Document Evidence

During the collection process, it can be useful to record the location of evidence collected at a crime scene. These are effective methods to do this:

- Use photographs and placards to document the location of each item.
- Develop detailed documentation that describes the item, location where it was collected, name of the person who collected it and date of collection.
- Make a sketch of the scene that includes distances and a legend.

Contamination Prevention

To limit the potential for outside contamination of evidence prior to and during the collection process, consider these steps:

- Secure and limit the scene to essential personnel.
- Change disposable gloves if there is contact with biological material.
- Avoid glove-to-skin contact that can occur by rubbing eyes or nose or wiping perspiration.
- Avoid talking, coughing, sneezing, perspiring on or over evidence.
- Avoid walking on or over evidence.
- Avoid hair loss at scene from head, arms or face.
- Leave the scene if you become injured. Do not return until any blood loss has been stopped and clothing is clean.
- Do not eat, drink, chew gum or use tobacco at a scene.
- Consider the use of disposable personal protective equipment (PPE) such as gloves, masks, shoe covers, coveralls and hair covers when appropriate.
- Avoid skin and oral contact with investigatory tools such as measuring tapes or pens that may have contacted contaminated surfaces.

Storage of Biological Evidence (Short-Term)

The storage of biological evidence in this section pertains to the short-term storage that is necessary during all phases of investigation and litigation.

Each governmental evidence-retention entity should establish a policy for all evidence control that includes designating a secured location as the property room.

A case numbering system should be used. The system should utilize numbers that include both unique case identifiers and unique property identifiers. A case number might include such elements as the year of the offense, county of jurisdiction, governmental evidence-retention entity identifier and sequential number such as 10-48-1-0001. If agencies do not have a case numbering system, one system that can be used by multiple agencies within a county may be practical.

Biological evidence that has been dried should be stored, if possible, in a facility that minimizes extreme heat and humidity, which can cause DNA to degrade.

Biological evidence that cannot feasibly be dried should be stored frozen. However, items returned to the law enforcement governmental evidence-retention entity after laboratory analysis that are no longer frozen may be stored as dry material in a designated property room with little fluctuation in temperature and humidity.

All packages should be stored in a sealed condition that does not allow for cross contamination, loss or deleterious change. All seals must be marked to identify the person making the seal.

Packages from the same case should be stored in the fewest number of containers using boxes or large bags. For both storage and retention, boxes provide the most efficient use of space.

Retention of Biological Evidence (Long-Term)

Retention of biological evidence and/or material pertains to long-term storage of evidence from inactive cases, cold cases or after litigation.

Long-term evidence retention should be part of the governmental evidence-retention entity's evidence control policy.

Whenever possible, all evidence from a case should be retained by one governmental evidence-retention entity.

All packages should be stored in a sealed condition that does not allow for cross contamination, loss or deleterious change. All seals must be marked to identify the person making the seal.

Packages from the same case should be stored in the fewest number of containers possible, such as boxes or large bags needed for that case, with care taken to avoid contamination of evidence. For storage and retention, boxes provide the most efficient use of space.

Items that are dried and extremely odorous may be retained in a sealed plastic bag.

Agency case numbers and identifiers must never be removed by another agency unless documented.

A container such as a box or bag containing multiple items or packages must only be used to store evidence from a single case and should be marked to reflect the contents of that container.

Any governmental evidence-retention entity retaining biological evidence must be able to produce an inventory of the evidence. It is best to maintain an evidence inventory in a computer management system that can be backed up. In the absence of such a system, an inventory based on chain-of-custody records must be maintained. It must list the item and its current location as well as document receipt and transfer of the evidence. It is recommended that the original investigating agency maintain the inventory for each case.

Biological Evidence Retention Timeline

The retention schedule provided in ORC § 2933.82 uses a very specific definition of “in custody” as that term pertains to the offenses listed in § 2933.82. Any time the term “in custody” is used in this document, it refers to the following conditions (unless otherwise noted).

“In custody” includes any or all of the following:

1. Incarcerated (adult or any juvenile facility), or
2. Under community control sanction, or
3. Under any order of disposition for the offense, or
4. Under judicial or supervised release for the offense, or
5. On probation or parole for the offense, or
6. Under post-release control for the offense, or
7. Involved in civil litigation in connection with that offense or act, or
8. Subject to any kind of sex offender registration and other duties imposed as required by ORC §§ 2950.04, 2950.041, 2950.05, 2950.06.

It is important to note that the following retention schedules apply to both adult and juvenile offenders.

Important Note for Coroners: Blood, vitreous and urine specimens collected by a coroner during autopsy and used for diagnostic purposes are not considered DNA standards and may be destroyed per the coroner’s approved retention schedule.

The retention schedules for biological evidence and materials related to SB 77 crimes are provided below.

UNSOLVED CRIMES:

- ORC §§ 2903.01 Aggravated murder or 2903.02 Murder — Must secure evidence for as long as the crime remains unsolved
- All other SB 77 unsolved crimes — Must secure the evidence for a period of thirty (30) years. This 30-year retention timeframe includes ORC §§:
 - 2903.03 Voluntary manslaughter
 - 2903.04 Involuntary manslaughter, if a felony of the first or second degree
 - 2903.06 Aggravated vehicular homicide, if a felony of the first or second degree
 - 2903.06 Vehicular homicide, if a felony of the first or second degree
 - 2903.06 Vehicular manslaughter, if a felony of the first or second degree
 - 2907.02 Rape*
 - 2923.02/2907.02 Attempted rape*
 - 2907.03 Sexual battery*
 - 2907.05(A)(4) or (B) Gross sexual imposition*

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***Important note for public hospitals and other governmental evidence-retention entities handling biological evidence related to a sexual assault:** This thirty (30) year retention timeframe on unsolved crimes requires that any sexual assault kit (also known as a “rape kit”) that may contain biological evidence and is performed in response to an SB 77 crime (for example, rape or attempted rape) must be maintained for that entire time period. *This means if the crime was unsolved, the sexual assault kit must be retained for thirty (30) years.*

CONVICTIONS:

If a person accused of an SB 77 crime is convicted of that SB 77 crime, the biological evidence **must** be secured for the latest period of time that the offender is “in custody” (as defined above) or for thirty (30) years, whichever comes first. This means that if the person “in custody” is released from that form of “custody” prior to thirty (30) years, the governmental evidence-retention entity retaining the evidence may destroy it when “custody” has been completed, even if it is prior to thirty (30) years. It is important to keep in mind that if the crime was one which required the offender to register as a sex offender, any biological evidence must be retained for as long as the offender is required to register, which may mean his or her lifetime.

If the offender remains incarcerated after thirty (30) years, the biological evidence shall be secured until the person is released from incarceration or dies.

The conviction retention timeline applies to all SB 77 crimes:

- 2903.01 Aggravated murder
- 2903.02 Murder
- 2903.03 Voluntary manslaughter
- 2903.04 Involuntary manslaughter, if a felony of the first or second degree
- 2903.06 Aggravated vehicular homicide, if a felony of the first or second degree
- 2903.06 Vehicular homicide, if a felony of the first or second degree
- 2903.06 Vehicular manslaughter, if a felony of the first or second degree
- 2907.02 Rape*
- 2923.02/2907.02 Attempted rape*
- 2907.03 Sexual battery*
- 2907.05(A)(4) or (B) Gross sexual imposition*

Example 1: An offender is convicted of ORC § 2907.02 Rape. The offender is sentenced to serve (8) years in prison. The offender is released after serving seven (7) years and is placed on one (1) year of post-release control. Based upon the offender’s crime and classification, the offender must register as a sex offender for fifteen (15) years after his release. The biological evidence related to the offender’s crime must be retained for the entire fifteen (15) years after his release. Since the offender is a registered sex offender, the time served or post-release control does not factor into the retention schedule. The only time period that is important is the one that lasts the longest from the time of the conviction.

Example 2: An offender is convicted of 2903.06 Vehicular manslaughter as a felony of the second degree. The offender is sentenced to serve six (6) years in prison, but is released after four (4) years and placed on post-release control for the remainder of his sentence. Once post release control is complete, if there are no other court orders, the biological evidence related to this offender's case may be destroyed.

However, if in Example 2 there is a court order requiring the offender to pay restitution to the victim's family, until the restitution is complete, the biological evidence may not be destroyed. If it takes the offender four (4) additional years after his release to complete that restitution, the biological evidence must be retained for that entire time period while restitution is pending, even if all other court sanctions have been completed.

GUILTY PLEA OR NO CONTEST PLEA:

The governmental evidence-retention entity must secure the biological evidence for five (5) years after the plea **and** any appeals from the plea have been exhausted, **unless** the person who pleaded guilty or no contest, or the person's attorney, requests retention **and** a court finds good cause to retain the evidence.

In the case of a guilty or no contest plea, the person who pleaded guilty or no contest or their attorney **must notify** the following that they are requesting the evidence not be destroyed:

1. Each person who is "in custody" for a crime related to the biological evidence in question
2. The attorney of record for each person who is "in custody" related to the biological evidence in question
3. The state public defender
4. The office of the prosecutor of record in the case that resulted in the person being "in custody"
5. The attorney general

EXCEPTIONS TO RETENTION TIMELINE

Biological material may be destroyed prior to the time periods above **only** if all of the following procedures have been complied with:

1. Notice is sent by certified mail, return receipt requested, notifying of the intent to destroy the evidence. Notice must be sent to all of the following:
 - a. All persons who remain "in custody" as a result of a criminal conviction, delinquency adjudication or commitment related to the evidence in question
 - b. The attorney of record for each person who is in custody in any circumstance described above if the attorney of record can be located
 - c. The state public defender
 - d. The office of the prosecutor of record in the case that resulted in the custody of the person as described above
 - e. The attorney general

2. One (1) year after the latest date on which the person(s) described above in (a)-(e) receives the notice, the biological evidence may be destroyed, **ONLY IF**:
 - a. No motion has been filed for testing of evidence under ORC §§ 2953.71, 2953.81 or 2953.82, **AND**
 - b. No written request for retention of the evidence has been provided to the entity that sent the certified letter containing notification of its intent to destroy the biological evidence.

3. If any person who received the certified letter notifying him or her of intent to destroy the evidence files a motion for testing of evidence **OR** provides a written request to the entity sending the certified letter, the biological evidence must be retained while the person remains "in custody."

Destruction of Retained Evidence

To augment the available storage space for retained biological or other evidence required by statute, it is recommended that each governmental evidence-retention entity routinely inventory its property room for evidence that could possibly be destroyed.

Evidence collected from crimes that are not enumerated in the statute (as listed below) is not required to be preserved under this law. Thus, if additional space is needed to preserve evidence, evidence from non-enumerated crimes should be considered for destruction unless preservation of such evidence is mandated from some other source, such as court order.

Evidence being held for cases on appeal should be referred to the county prosecutor for an updated status and the possibility of seeking a destruction order.

Cases that are open or unsolved should be referred to the county prosecutor to determine the statute of limitations and the possibility of future litigation or the possibility of seeking a destruction order.

Crimes that require adherence to the biological evidence retention standards are:

- 2903.01 Aggravated murder
- 2903.02 Murder
- 2903.03 Voluntary manslaughter
- 2903.04 Involuntary manslaughter, if a felony of the first or second degree
- 2903.06 Aggravated vehicular homicide, if a felony of the first or second degree
- 2903.06 Vehicular homicide, if a felony of the first or second degree
- 2903.06 Vehicular manslaughter, if a felony of the first or second degree
- 2907.02 Rape
- 2923.02/2907.02 Attempted rape
- 2907.03 Sexual battery
- 2907.05(A)(4) or (B) Gross sexual imposition

Cataloging of Retained Evidence

A governmental evidence-retention entity must have a system to catalog evidence so it is possible to locate any retained biological evidence.

A cataloging system would make use of a unique case numbering system, a documented procedure for property room organization and the evidence inventory developed for each case.

Evidence control should include a case numbering system. The case numbering system should include unique case identifiers with unique property identifiers. Those identifiers might include such elements as the year of the offense, county of jurisdiction, agency identifier and sequential number such as 10-48-1-0001. If agencies do not have a case numbering system, one system that can be used by multiple agencies within a county may be practical.

The organization of the property room should be determined by the governmental evidence-retention entity's ability to locate the evidence through a computerized barcode system or hand written record. A computerized barcode system will allow the evidence to be stored based on available locations within the property room. If a handwritten record is used, all evidence should be stored and maintained in chronological order by case number within the property room.

Evidence Control

Each governmental evidence-retention entity should have a policy on evidence control that includes case tracking and property room management.

Case Tracking

Each governmental evidence-retention entity should have a written policy regarding case tracking that includes how evidence is to be documented on agency-approved forms. It is recommended that any time evidence is collected, a chain of custody form be immediately initiated and follow that evidence item up to and including disposal or long-term retention.

To ensure the evidence and chain of custody form will be definitively linked, each item of evidence and chain of custody must be marked/labeled with the same unique identifier that includes the assigned case number. However, the evidence item and the original chain of custody form must never be stored together. Rather, the original chain of custody form and evidence must be stored in separate locations.

The chain of custody form should contain, at a minimum, the unique case identifier; a description of the corresponding evidence item; who collected it; when and where it was collected; and to whom, when and where it was transferred.

Property Room Management

Each governmental evidence-retention entity should have a policy regarding the management of its property room(s) that includes how and where evidence is to be stored and/or retained. The security of and access to the property rooms also are essential components to a successful policy.

Property rooms should be managed by a limited number of people who are granted access only by the governmental evidence-retention entity's executive officer. Individuals assigned to these duties should receive training in the area of property room management.

Each evidence item within a property room must be packaged to ensure its integrity and to prevent contamination, and marked or labeled with a unique identifier.

If possible, separate locations for the short-term storage of active cases and long-term storage for retained evidence are advisable. Also, within each long-term and short-term storage location(s), it is preferable to have separate secured areas for drugs and firearms evidence.

A property room should have sufficient capacity and shelving to facilitate the storage, inventory and retrieval of evidence items.

Audits of property rooms should be conducted on a scheduled basis to ensure routine compliance with the governmental evidence-retention entity's property room policy. Unannounced audits also should be conducted.

Task Force Members

Statutory Members

- Ohio Attorney General's Office
 - D. Steven Greene, Bureau of Criminal Identification and Investigation (BCI) Laboratory, Chair
- Ohio Prosecuting Attorneys Association
 - Jonathan Blanton, Jackson County Prosecutor
- Ohio State Coroners Association
 - Ken Betz, Montgomery County Coroner's Office
- Ohio Association of Chiefs of Police
 - Tony Tambasco, Mansfield Police Department
- Office of the Ohio Public Defender (in consultation with Ohio Innocence Project)
 - Professor Mark Godsey, University of Cincinnati
- Ohio Department of Public Safety, Office of Criminal Justice Services
 - Nicole Scozzie, Chief Policy Advisor
- Buckeye State Sheriffs' Association
 - Detective Sergeant Chris Slayman, Licking County Sheriff's Office

Non-Statutory Members

- Cleveland Police Department
 - Deputy Chief Edward Tomba
- Montgomery County Prosecutor's Office
 - Erin Claypoole, Assistant Prosecuting Attorney
- Ohio Attorney General's Office
 - Bridget Coontz, Task Force Parliamentarian
 - Pam Reay, Task Force Secretary
 - Todd Dieffenderfer, Special Advisor to the Ohio Attorney General
 - Elizabeth Benzinger, BCI Laboratory
 - Michael Velten, BCI Laboratory
- Ohio Clerk of Courts Association
 - Gregory A. Brush, Montgomery County Clerk of Courts
 - Daniel M. Horrigan, Summit County Clerk of Courts
- Ohio Department of Public Safety
 - James Luebbers, Office of Criminal Justice Services
 - Michael McCann, Office of Criminal Justice Services
 - Captain J.D. Brink, Ohio State Highway Patrol Crime Laboratory
- Ohio Innocence Project
 - Jodi Shorr, Administrative Coordinator and Policy Analyst

Resources

Ohio Attorney General's Office

<http://www.ohioattorneygeneral.gov/>

Ohio Law Enforcement Gateway

<http://www.ohioattorneygeneral.gov/OHLEG>

Ohio Peace Officer Training Academy

<http://www.ohioattorneygeneral.gov/OPOTA>

<http://www.ohioattorneygeneral.gov/Enforcement/OPOTA/Course-Catalog/Course-Categories/Crime-Scene-Courses>

Ohio Revised Code

<http://codes.ohio.gov/>

<http://codes.ohio.gov/orc/2901.07>

<http://codes.ohio.gov/orc/2933.82>

<http://codes.ohio.gov/orc/2950.01>

<http://codes.ohio.gov/orc/2953.71>

National Institute of Justice

<http://www.ojp.usdoj.gov/nij/>

<http://www.ojp.usdoj.gov/nij/training/welcome.htm>

<http://www.ojp.usdoj.gov/ovc/publications/infores/sane/saneguide.pdf>

DNA Initiative

<http://www.dna.gov/>

<http://www.dna.gov/training/resources/>

<http://www.dna.gov/audiences/investigators/know/>

International Association for Property and Evidence

<http://iape.org/>

<http://iape.org/resourcesPages/downloads.html>

Occupational Safety and Health Programs

<http://osha.gov/>

<http://osha.gov/Publications/osha3186.html>

Centers for Disease Control and Prevention

<http://www.cdc.gov/>

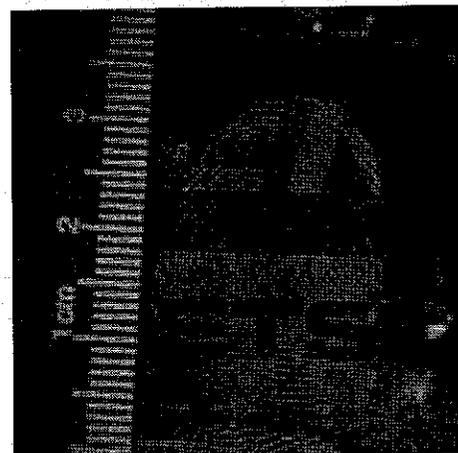
<http://www.cdc.gov/ncidod/dhqp/bp.html>

Ohio Department of Health

<http://www.odh.ohio.gov/odhPrograms/hpr/sadv/sadvprev1.aspx>

<http://www.odh.ohio.gov/odhPrograms/hpr/sadv/sadvprot.aspx>

Guidelines for the Preservation and Retention of Evidence



Recommended by

**Ohio's Preservation of
Evidence Task Force**



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

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MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Dear Colleagues,

Legislation enacted during the 128th General Assembly brought about the Preservation of Biological Evidence Task Force, which was charged with establishing a system to preserve biological evidence in Ohio.

Through the system, standards were determined, and practices, protocols, and resources were recommended for the collection, retention, cataloging, and accessibility of biological evidence. The standards and recommendations are outlined in the guidelines that follow.

The Ohio Peace Officer Training Academy, part of the Ohio Attorney General's Office, conducts training programs for law enforcement and other professionals responsible for preserving and cataloging biological evidence.

The standards and recommendations set forth in these guidelines were required by specific legislation and are not meant to be definitive. For additional information about these guidelines, please contact Assistant Attorney General Bridget Coontz at Bridget.Coontz@OhioAttorneyGeneral.gov or 614-752-4797.

Very respectfully yours,

Mike DeWine
Ohio Attorney General

Introduction

The Preservation of Biological Evidence Task Force was created pursuant to Ohio Revised Code Section 109.561, which was enacted as part of Senate Bill 77 and amended by Senate Bill 58 during the 128th General Assembly.

Pursuant to RC 2933.82(C), the task force was charged with establishing a system regarding the proper preservation of biological evidence in Ohio. In establishing the system, the task force was required to:

- Devise standards regarding the proper collection, retention and cataloging of biological evidence for ongoing investigations and prosecutions.
- Recommend practices, protocols, models and resources for cataloging and making accessible preserved biological evidence already in the possession of governmental evidence-retention entities.

In consultation with the task force, the Ohio Peace Officer Training Academy conducts training programs for law enforcement officers and other employees who are charged with preserving and cataloging biological evidence.

The standards presented in this document are not intended to be all-inclusive. They are set forth as required by SB 77 and are recommended for the crimes outlined in RC 2933.82. The standards also may be applied to the investigation of other alleged violations of the Ohio Criminal Code.

Models and resources recommended by the task force represent accepted industry standards. The recommendations do not expand a governmental evidence-retention entity's responsibility to collect evidence nor do they require a forensic laboratory to determine what items may contain biological evidence. Due to the unique nature of every investigation, the methods discussed here may not be applicable or practical in every field circumstance. Advances in technology also may alter what are currently considered to be industry best practices.

Ohio Revised Code Section 2933.82: When to Apply Standards

The standards in this document for the collection, retention and cataloging of biological evidence are recommended primarily for crimes covered under RC 2933.82. These are:

2903.01	Aggravated murder
2903.02	Murder
2903.03	Voluntary manslaughter
2903.04	Involuntary manslaughter, if felony of first or second degree
2903.06	Aggravated vehicular homicide, if felony of first or second degree
2903.06	Vehicular homicide, if felony of first or second degree
2903.06	Vehicular manslaughter, if felony of first or second degree
2907.02	Rape
2923.02/2907.02	Attempted rape
2907.03	Sexual battery
2907.05	Gross sexual imposition: division (A)(4) or (B)

Who is Responsible for Retaining Biological Evidence?

Senate Bill 77 defines which types of agencies are responsible for maintaining and retaining biological evidence. The statute refers to those responsible as “governmental evidence-retention entity.” A governmental evidence-retention entity means all of the following:

- Law enforcement agency
- Prosecutor’s office
- Court
- Public hospital
- Crime laboratory
- Other governmental or public entity or individual within Ohio charged with the collection, storage or retrieval of biological evidence (such as a coroner’s office or other agency performing autopsies).

A governmental evidence-retention entity that possesses biological evidence is required to retain the biological evidence in the amount and manner sufficient to develop a DNA profile from the biological material contained in or included on the evidence.

Overview of Biological Evidence

Definitions of Biological Evidence and Biological Material

“Biological evidence” was defined in Senate Bill 77, RC 2933.82, as follows:

- 1) The contents of a sexual assault examination kit.
- 2) Any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or any other identifiable biological material that was collected as part of a criminal investigation or delinquent child investigation and that reasonably may be used to incriminate or exculpate any person for an offense or delinquent act.

The definition of “biological evidence” applies whether the material in question is cataloged separately, such as on a slide or 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 or containers, or cigarettes.

“Biological material” is defined in RC 2953.71 as any product of a human body containing DNA.

Important note for coroners: A coroner is required to collect and retain a known DNA standard (blood, oral swab) during autopsy for crimes covered under RC 2933.82.

Items to Consider as Sources of Biological Evidence or Materials

The following list is meant only as a general guide for use in the investigation of crimes in which biological evidence and materials may have evidentiary value. These are:

- Sexual assault examination kits, both victim and suspect kits
- Slides, swabs, test tubes or the proximate container for each from sexual assault examination kits, autopsies or skin stains
- Clothing, hats, masks, eyeglasses, jewelry, gloves from any involved individuals
- Ligatures such as rope, belts, tape and cords
- Bedding such as sheets, blankets, comforters, pillow cases, pillows and mattress pads
- Other household materials such as towels, used tissues, toilet paper and paper towels
- Drinking containers such as cups, cans and bottles
- Cigarette butts or other smoking devices
- Drug paraphernalia such as pipes and syringes
- Handled items such as weapons and tools
- Licked items such as envelopes and stamps
- Samples of items retained by a coroner or forensic or toxicology laboratory

- Biological reference standards from known individuals such as buccal swabs from a victim, suspect, consent partner or elimination standards
- Secondary reference standards from missing persons such as a toothbrush or hair brush

The above list is not exhaustive. There are many other possible sources of biological evidence or materials.

Training on these and other topics can provide further insight as to the item types and locations of possible biological material.

Evidence Collection and Handling Safety Concerns

Universal Precautions

Universal precautions provide the first line of defense against risk of exposure to bloodborne pathogens and must be consistently followed for all activities involving contacts with blood, tissue, body fluids or other potentially infectious materials.

These are work practices that help prevent contact with blood and other body fluids that might spread disease. To be effective, universal precautions must be practiced in every situation in which there is a possibility of exposure.

All body fluids, tissues and body fluid stains must be treated as if they are contaminated with a bloodborne pathogen. It is not possible to determine by observation if a body fluid or stain is contaminated. Individuals should be conscious of possible contact with tools or items such as scissors, pens and tape measures as well as contaminated surfaces.

Personal protective equipment (PPE) — such as disposable gloves, disposable coveralls, lab coats, masks and eye protection — helps prevent contact with bloodborne pathogens.

- PPE should be used when there is a reasonable chance of contact with blood or other potentially infectious materials. Gloves should be worn when providing first aid or medical care, handling soiled materials or equipment, and cleaning up spills of risky materials. Protective clothing should be worn when splashes or spills are likely and also when working with unsafe materials. Face protectors such as splash goggles should be worn to protect against items that may splash, splatter or spray.
- PPE must be clean and in good repair. PPE that is torn, punctured or has lost its ability to function as an effective barrier should not be used. Disposable PPE should not be reused under any circumstances. While using PPE, individuals should not touch their eyes or nose with gloves.
- Do not assume that dried blood or other potentially infectious materials that are dry are safe. PPE should be used when handling these items.
- For cleanup of wet material, cover the area containing blood or other potentially infectious materials with paper towels or rags, pour a disinfectant solution over the towels, leave for at least ten (10) minutes and remove. When finished, place materials in a waste disposal bag. Appropriate PPE should be used throughout this process.

Common Bloodborne Diseases

Hepatitis B (HBV), Hepatitis C (HCV) and Human Immunodeficiency Virus (HIV) are the most common bloodborne-caused diseases to which a person may be exposed.

HBV, HCV and HIV are the most concerning diseases because of the potential for lifelong infection once exposed and, more importantly, because of the risk of death associated with infection.

Hepatitis B (HBV)

Hepatitis is an inflammation of the liver. It is the most prevalent bloodborne pathogen hazard facing law enforcement and health care professionals on the job. A person infected with HBV may feel no symptoms or may suffer from flu-like symptoms so severe that hospitalization is required. However, it may take up to nine (9) months before symptoms become noticeable.

Blood, semen or other body fluids, especially those containing blood, may be infectious. HBV can survive in dried blood for up to seven (7) days, making it a significant concern.

A Hepatitis B vaccination is available and also can be effective after exposure.

Hepatitis C (HCV)

Like HBV, Hepatitis C (HCV) is a virus that affects the liver. Nearly 4 million Americans are infected with HCV. However, only 25% are diagnosed. On average, 75% of patients with HCV infection later develop chronic hepatitis, cirrhosis or liver cancer. HCV can be chronic and fatal. It is responsible for 8,000 to 10,000 deaths annually.

Unlike HBV, there is no effective vaccine to prevent HCV.

Human Immunodeficiency Virus (HIV)

This virus attacks the body's immune system, causing Acquired Immune Deficiency Syndrome (AIDS). An individual infected with this virus can carry it for several years without developing symptoms, but eventually will develop AIDS. A person infected may suffer from flu-like symptoms, fatigue, fever and diseases that normally could be fought by the immune system. Although HIV can be transmitted through blood and some body fluids, it is not transmitted by touching, feeding or working with individuals who carry the disease.

HIV survives for a shorter period of time on a dry surface than HBV and HCV, but it is more life threatening.

There is no vaccine to prevent HIV or AIDS, nor is there a cure.

Transmission of Bloodborne Pathogens

The pathogens that transmit these diseases may be present in body fluids such as blood, semen, blood-contaminated saliva and vaginal secretions. Pathogens also can be present in cerebrospinal, synovial, amniotic and any other body fluids that are contaminated with blood. Tissue and body organ material that is deposited on evidence also may be a source of pathogens.

These pathogens can enter and infect the human body through openings in the skin, including lacerations, abrasions and dermatitis or acne. Infections also may occur via punctures or cuts caused by sharp contaminated objects such as syringe needles, scalpels, broken glass or other objects sharp enough to penetrate the skin. Infections also can enter the body through mucous membranes of the eyes, nose or mouth when these areas are touched with contaminated hands or implements.

Activities Involving Possible Exposure to Bloodborne Pathogens

The following activities may put a person at risk of exposure to bloodborne pathogens:

- The collection, storage, examination and processing of physical evidence that contains blood, semen or other potentially infectious agents
- The act of cleaning possibly contaminated work areas and/or work surfaces, including vehicles
- The preparation and packaging of blood, semen or other potentially contaminated items for presentation in court or shipment
- The handling of stains/standards containing blood or biological extracts that are utilized for testing procedures
- The collection and packaging of physical evidence containing blood, semen or other potentially contaminated evidence from crime scenes
- Searches of people and locations for weapons and/or contraband
- The handling of biological stains/standards obtained from suspects and victims

Evidence Collection

Biological evidence and materials should be collected in a manner that prevents contamination and degradation and ensures integrity during all phases of the investigation and litigation. To avoid contamination, sample collection tools and materials must be free from human DNA. The incidental presence of microorganisms does not harm properly stored human DNA samples. Disposable latex examination gloves, individually wrapped swabs or other individually wrapped items are free of human DNA by virtue of the process of sterilization.

Not all germicidal treatments destroy DNA. Alcohol and hydrogen peroxide, for instance, do not destroy DNA. The most effective way to clean collection equipment is to wipe it with a fresh 10% bleach solution of 10:1 water to bleach. (Any commercially available bleach is adequate for this purpose.)

Clean Collection Practices

Here are examples of ways to prevent contamination and degradation of biological evidence:

1. Use disposable latex gloves to handle evidence rather than uniform/tactical gloves. Do not touch the outside of gloves to face or hands, and change gloves after contact with potential biological evidence.
2. When field testing evidence, swab the stain and test the swab rather than directly testing the stain. If the stain is small, consider testing it in a lab rather than in the field.
3. Fingerprint powder and brushes may carry biological material from one item to the next. Collect DNA samples before powdering or use disposable brushes and sterile powder.
4. Clean tools between samples. For example, dip forceps in a fresh 10% bleach solution of 10:1 water to bleach and thoroughly dry prior to reuse.
5. When it is necessary to dampen a swab to collect a dried stain, any source of water that does not contain human DNA is acceptable. Sterile water, distilled water, saline solution and tap water meet this definition.
6. Dry damp items and swabs. When it is not practical to thoroughly dry the item, packaging such as paper bags will allow the drying process to continue.
7. Wet items may be dried by hanging or by laying out on a clean surface indoors away from the scene.
8. Package each item separately.

9. The use of personal protective equipment (disposable clothing, gloves, masks, etc.) both protects the individual from biohazard exposure and prevents transfer of the investigator's DNA to the evidence.

To implement these provisions, these tools are useful:

- Latex or similar gloves
- Sterile swabs
- Water
- Paper containers such as bags, envelopes, boxes
- Tape
- A permanent marker

Packaging

These are best practices to keep in mind when packaging biological evidence at a crime scene:

- Package evidence and seal the container to protect it from loss, cross transfer, contamination and/or deleterious change.
- Seal the package in such a manner that opening it causes obvious damage or alteration to the container or its seal.
- Package evidence for safety by using boxes or breathable tubes for sharp items, marking items and informing the laboratory if a biohazard is present.
- Package firearms in clean, unused boxes when submitting them for biological analysis. Mark the packaging and inform the laboratory if a biohazard is present.
- Use paper bags, envelopes, boxes and similar materials for all biological evidence.
- Avoid plastic packaging as an inner or outer package.
- Avoid the use of pill tins due to possible rust.
- Ensure that all swabs and evidence are dry.
- Package each item separately; avoid commingling items to prevent cross contamination.
- Swabs collected from a single item may be packaged in the same container.
- Mark each package with a detailed description that includes the item, location where it was collected, name of the person who collected it and date of collection.
- Seal each package with tape. (For safety reasons, do not use staples.) All seals must be marked to identify the person making the seal. Mark through the seal with name or initials and date.
- The integrity of the item often is maintained through the package's documentation. That documentation includes all markings, seals, tags and labels used by all of the involved agencies. Therefore, it is critical to preserve or document all packaging and labels received by or returned to your agency.

Note: If an item (such as a used condom or fetus/product of conception) cannot be dried, it may be placed in plastic and frozen. The laboratory should be contacted as soon as possible for further guidance.

Document Evidence

During the collection process, it can be useful to record the location of evidence collected at a crime scene. These are effective methods to do this:

- Use photographs and placards to document the location of each item.
- Develop detailed documentation that describes the item, location where it was collected, name of the person who collected it and date of collection.
- Make a sketch of the scene that includes distances and a legend.

Contamination Prevention

To limit the potential for outside contamination of evidence prior to and during the collection process, consider these steps:

- Secure and limit the scene to essential personnel.
- Change disposable gloves if there is contact with biological material.
- Avoid glove-to-skin contact that can occur by rubbing eyes or nose or wiping perspiration.
- Avoid talking, coughing, sneezing, perspiring on or over evidence.
- Avoid walking on or over evidence.
- Avoid hair loss at scene from head, arms or face.
- Leave the scene if you become injured. Do not return until any blood loss has been stopped and clothing is clean.
- Do not eat, drink, chew gum or use tobacco at a scene.
- Consider the use of disposable personal protective equipment (PPE) such as gloves, masks, shoe covers, coveralls and hair covers when appropriate.
- Avoid skin and oral contact with investigatory tools such as measuring tapes or pens that may have contacted contaminated surfaces.

Storage of Biological Evidence (Short-Term)

The storage of biological evidence in this section pertains to the short-term storage that is necessary during all phases of investigation and litigation.

Each governmental evidence-retention entity should establish a policy for all evidence control that includes designating a secured location as the property room.

A case numbering system should be used. The system should utilize numbers that include both unique case identifiers and unique property identifiers. A case number might include such elements as the year of the offense, county of jurisdiction, governmental evidence-retention entity identifier and sequential number such as 10-48-1-0001. If agencies do not have a case numbering system, one system that can be used by multiple agencies within a county may be practical.

Biological evidence that has been dried should be stored, if possible, in a facility that minimizes extreme heat and humidity, which can cause DNA to degrade.

Biological evidence that cannot feasibly be dried should be stored frozen. However, items returned to the law enforcement governmental evidence-retention entity after laboratory analysis that are no longer frozen may be stored as dry material in a designated property room with little fluctuation in temperature and humidity.

All packages should be stored in a sealed condition that does not allow for cross contamination, loss or deleterious change. All seals must be marked to identify the person making the seal.

Packages from the same case should be stored in the fewest number of containers using boxes or large bags. For both storage and retention, boxes provide the most efficient use of space.

Retention of Biological Evidence (Long-Term)

Retention of biological evidence and/or material pertains to long-term storage of evidence from inactive cases, cold cases or after litigation.

Long-term evidence retention should be part of the governmental evidence-retention entity's evidence control policy.

Whenever possible, all evidence from a case should be retained by one governmental evidence-retention entity.

All packages should be stored in a sealed condition that does not allow for cross contamination, loss or deleterious change. All seals must be marked to identify the person making the seal.

Packages from the same case should be stored in the fewest number of containers possible, such as boxes or large bags needed for that case, with care taken to avoid contamination of evidence. For storage and retention, boxes provide the most efficient use of space.

Items that are dried and extremely odorous may be retained in a sealed plastic bag.

Agency case numbers and identifiers must never be removed by another agency unless documented.

A container such as a box or bag containing multiple items or packages must only be used to store evidence from a single case and should be marked to reflect the contents of that container.

Any governmental evidence-retention entity retaining biological evidence must be able to produce an inventory of the evidence. It is best to maintain an evidence inventory in a computer management system that can be backed up. In the absence of such a system, an inventory based on chain-of-custody records must be maintained. It must list the item and its current location as well as document receipt and transfer of the evidence. It is recommended that the original investigating agency maintain the inventory for each case.

Biological Evidence Retention Timeline

The retention schedule provided in RC 2933.82 uses a very specific definition of "in custody" as that term pertains to the offenses listed in 2933.82. Any time the term "in custody" is used in this document, it refers to the following conditions (unless otherwise noted).

"In custody" includes any or all of the following:

1. Incarcerated (adult or any juvenile facility), or
2. Under community control sanction, or
3. Under any order of disposition for the offense, or
4. Under judicial or supervised release for the offense, or
5. On probation or parole for the offense, or
6. Under post-release control for the offense, or
7. Involved in civil litigation in connection with that offense or act, or
8. Subject to any kind of sex offender registration and other duties imposed as required by Ohio Revised Code Sections 2950.04, 2950.041, 2950.05, 2950.06.

It is important to note that the following retention schedules apply to both adult and juvenile offenders.

Important Note for Coroners: Blood, vitreous and urine specimens collected by a coroner during autopsy and used for diagnostic purposes are not considered DNA standards and may be destroyed per the coroner's approved retention schedule.

The retention schedules for biological evidence and materials are provided below.

UNSOLVED CRIMES:

- RC 2903.01 Aggravated murder or 2903.02 Murder — Must secure evidence for as long as the crime remains unsolved
- All other SB 77 unsolved crimes — Must secure the evidence for a period of thirty (30) years. This 30-year retention timeframe includes:
 - 2903.03 Voluntary manslaughter
 - 2903.04 Involuntary manslaughter, if felony of first or second degree
 - 2903.06 Aggravated vehicular homicide, if felony of first or second degree
 - 2903.06 Vehicular homicide, if felony of first or second degree
 - 2903.06 Vehicular manslaughter, if felony of first or second degree
 - 2907.02 Rape*
 - 2923.02/2907.02 Attempted rape*
 - 2907.03 Sexual battery*
 - 2907.05(A)(4) or (B) Gross sexual imposition*

*** Important note for public hospitals and other governmental evidence-retention entities handling biological evidence related to a sexual assault: This thirty (30) year**

retention timeframe on unsolved crimes requires that any sexual assault kit (also known as a "rape kit") that may contain biological evidence and is performed in response to an SB 77 crime (for example, rape or attempted rape) must be maintained for that entire time period. **This means if the crime was unsolved, the sexual assault kit must be retained for thirty (30) years.**

CONVICTIONS:

If a person accused of an SB 77 crime is convicted of that SB 77 crime, the biological evidence **must** be secured for the latest period of time that the offender is "in custody" (as defined above) or for thirty (30) years, whichever comes first. This means that if the person "in custody" is released from that form of "custody" prior to thirty (30) years, the governmental evidence-retention entity retaining the evidence may destroy it when "custody" has been completed, even if it is prior to thirty (30) years. It is important to keep in mind that if the crime was one which required the offender to register as a sex offender, any biological evidence must be retained for as long as the offender is required to register, which may mean his or her lifetime.

If the offender remains incarcerated after thirty (30) years, the biological evidence shall be secured until the person is released from incarceration or dies.

The conviction retention timeline applies to all SB 77 crimes:

- 2903.01 Aggravated murder
- 2903.02 Murder
- 2903.03 Voluntary manslaughter
- 2903.04 Involuntary manslaughter, if a felony of the first or second degree
- 2903.06 Aggravated vehicular homicide, if a felony of the first or second degree
- 2903.06 Vehicular homicide, if a felony of the first or second degree
- 2903.06 Vehicular manslaughter, if a felony of the first or second degree
- 2907.02 Rape*
- 2923.02/2907.02 Attempted rape*
- 2907.03 Sexual battery*
- 2907.05(A)(4) or (B) Gross sexual imposition*

Example 1: An offender is convicted of RC 2907.02 Rape. The offender is sentenced to serve (8) years in prison. The offender is released after serving seven (7) years and is placed on one (1) year of post-release control. Based upon the offender's crime and classification, the offender must register as a sex offender for fifteen (15) years after his release. The biological evidence related to the offender's crime must be retained for the entire fifteen (15) years after his release. Since the offender is a registered sex offender, the time served or post-release control does not factor into the retention schedule. The only time period that is important is the one that lasts the longest from the time of the conviction.

Example 2: An offender is convicted of 2903.06, vehicular manslaughter as a felony of the second degree. The offender is sentenced to serve six (6) years in prison, but is released after four (4) years and placed on post-release control for the remainder of his sentence. Once post release control is complete, if there are no other court orders, the biological evidence related to this offender's case may be destroyed.

However, if in Example 2 there is a court order requiring the offender to pay restitution to the victim's family, until the restitution is complete, the biological evidence may not be destroyed. If it takes the offender four (4) additional years after his release to complete that restitution, the biological evidence must be retained for that entire time period while restitution is pending, even if all other court sanctions have been completed.

EXCEPTION TO THE CONVICTIONS RETENTION TIMELINE

The retention timelines for biological material related to a conviction to which the thirty (30) year or "in custody" timeline applies may be destroyed early **only** if all of the following procedures have been complied with:

1. Notice is sent by certified mail, return receipt requested, notifying of the intent to destroy the evidence. Notice must be sent to all of the following:
 - a. All persons who remain "in custody" as a result of a criminal conviction, delinquency adjudication or commitment related to the evidence in question
 - b. The attorney of record for each person who is in custody in any circumstance described above if the attorney of record can be located
 - c. The state public defender
 - d. The office of the prosecutor of record in the case that resulted in the custody of the person as described above
 - e. The attorney general
2. One (1) year after the latest date on which the person(s) described above in (a)-(e) receives the notice, the biological evidence may be destroyed, **ONLY IF:**
 - a. No motion has been filed for testing of evidence under ORC §§ 2953.71, 2953.81 or 2953.82, **AND**
 - b. No written request for retention of the evidence has been provided to the entity that sent the certified letter containing notification of its intent to destroy the biological evidence.
3. If any person who received the certified letter notifying him or her of intent to destroy the evidence files a motion for testing of evidence **OR** provides a written request to the entity sending the certified letter, the biological evidence must be retained while the person remains "in custody."

GUILTY PLEA OR NO CONTEST PLEA:

The governmental evidence-retention entity must secure the biological evidence for five (5) years after the plea **and** any appeals from the plea have been exhausted, **unless** the person who pleaded guilty or no contest, or the person's attorney, requests retention **and** a court finds good cause to retain the evidence. There is **no** exception that allows for the early destruction of evidence that is subject to the guilty or no contest plea timeline.

In the case of a guilty or no contest plea, the person who pleaded guilty or no contest or their attorney **must notify** the following that they are requesting the evidence not be destroyed:

1. Each person who is "in custody" for a crime related to the biological evidence in question
2. The attorney of record for each person who is "in custody" related to the biological evidence in question
3. The state public defender
4. The office of the prosecutor of record in the case that resulted in the person being "in custody"
5. The attorney general

Destruction of Retained Evidence

To augment the available storage space for retained biological or other evidence required by statute, it is recommended that each governmental evidence-retention entity routinely inventory its property room for evidence that could possibly be destroyed.

Evidence collected from crimes that are not enumerated in the statute (as listed below) is not required to be preserved under this law. Thus, if additional space is needed to preserve evidence, evidence from non-enumerated crimes should be considered for destruction unless preservation of such evidence is mandated from some other source, such as court order.

Evidence being held for cases on appeal should be referred to the county prosecutor for an updated status and the possibility of seeking a destruction order.

Cases that are open or unsolved should be referred to the county prosecutor to determine the statute of limitations and the possibility of future litigation or the possibility of seeking a destruction order.

Crimes that require adherence to the biological evidence retention standards are:

- 2903.01 Aggravated murder
- 2903.02 Murder
- 2903.03 Voluntary manslaughter
- 2903.04 Involuntary manslaughter, if a felony of the first or second degree
- 2903.06 Aggravated vehicular homicide, if a felony of the first or second degree
- 2903.06 Vehicular homicide, if a felony of the first or second degree
- 2903.06 Vehicular manslaughter, if a felony of the first or second degree
- 2907.02 Rape
- 2923.02/2907.02 Attempted rape
- 2907.03 Sexual battery
- 2907.05(A)(4) or (B) Gross sexual imposition

Cataloging of Retained Evidence

A governmental evidence-retention entity must have a system to catalog evidence so it is possible to locate any retained biological evidence.

A cataloging system would make use of a unique case numbering system, a documented procedure for property room organization and the evidence inventory developed for each case.

Evidence control should include a case numbering system. The case numbering system should include unique case identifiers with unique property identifiers. Those identifiers might include such elements as the year of the offense, county of jurisdiction, agency identifier and sequential number such as 10-48-1-0001. If agencies do not have a case numbering system, one system that can be used by multiple agencies within a county may be practical.

The organization of the property room should be determined by the governmental evidence-retention entity's ability to locate the evidence through a computerized barcode system or hand written record. A computerized barcode system will allow the evidence to be stored based on available locations within the property room. If a handwritten record is used, all evidence should be stored and maintained in chronological order by case number within the property room.

Evidence Control

Each governmental evidence-retention entity should have a policy on evidence control that includes case tracking and property room management.

Case Tracking

Each governmental evidence-retention entity should have a written policy regarding case tracking that includes how evidence is to be documented on agency-approved forms. It is recommended that any time evidence is collected, a chain of custody form be immediately initiated and follow that evidence item up to and including disposal or long-term retention.

To ensure the evidence and chain of custody form will be definitively linked, each item of evidence and chain of custody must be marked/labeled with the same unique identifier that includes the assigned case number. However, the evidence item and the original chain of custody form must never be stored together. Rather, the original chain of custody form and evidence must be stored in separate locations.

The chain of custody form should contain, at a minimum, the unique case identifier; a description of the corresponding evidence item; who collected it; when and where it was collected; and to whom, when and where it was transferred.

Property Room Management

Each governmental evidence-retention entity should have a policy regarding the management of its property room(s) that includes how and where evidence is to be stored and/or retained. The security of and access to the property rooms also are essential components to a successful policy.

Property rooms should be managed by a limited number of people who are granted access only by the governmental evidence-retention entity's executive officer. Individuals assigned to these duties should receive training in the area of property room management.

Each evidence item within a property room must be packaged to ensure its integrity and to prevent contamination, and marked or labeled with a unique identifier.

If possible, separate locations for the short-term storage of active cases and long-term storage for retained evidence are advisable. Also, within each long-term and short-term storage location(s), it is preferable to have separate secured areas for drugs and firearms evidence.

A property room should have sufficient capacity and shelving to facilitate the storage, inventory and retrieval of evidence items.

Audits of property rooms should be conducted on a scheduled basis to ensure routine compliance with the governmental evidence-retention entity's property room policy. Unannounced audits also should be conducted.

Acknowledgements

The Attorney General's Office acknowledges the work of the Biological Evidence Retention Task Force members and thanks them for their service:

Statutory Members

- Ohio Attorney General's Office
 - D. Steven Greene, Bureau of Criminal Identification and Investigation (BCI) Laboratory, Chair
- Ohio Prosecuting Attorneys Association
 - Jonathan Blanton, Jackson County Prosecutor
- Ohio State Coroners Association
 - Ken Betz, Montgomery County Coroner's Office
- Ohio Association of Chiefs of Police
 - Tony Tambasco, Mansfield Police Department
- Office of the Ohio Public Defender (in consultation with Ohio Innocence Project)
 - Professor Mark Godsey, University of Cincinnati
- Ohio Department of Public Safety, Office of Criminal Justice Services
 - Nicole Scozzie, Chief Policy Advisor
- Buckeye State Sheriffs' Association
 - Detective Sergeant Chris Slayman, Licking County Sheriff's Office

Non-Statutory Members

- Cleveland Police Department
 - Deputy Chief Edward Tomba
- Montgomery County Prosecutor's Office
 - Erin Claypoole, Assistant Prosecuting Attorney
- Ohio Attorney General's Office
 - Bridget Coontz, Task Force Parliamentarian
 - Pam Reay, Task Force Secretary
 - Todd Dieffenderfer, Special Advisor to the Ohio Attorney General
 - Elizabeth Benzinger, BCI Laboratory
 - Michael Velten, BCI Laboratory
- Ohio Clerk of Courts Association
 - Gregory A. Brush, Montgomery County Clerk of Courts
 - Daniel M. Horrigan, Summit County Clerk of Courts
- Ohio Department of Public Safety
 - James Luebbers, Office of Criminal Justice Services
 - Michael McCann, Office of Criminal Justice Services
 - Captain J.D. Brink, Ohio State Highway Patrol Crime Laboratory
- Ohio Innocence Project
 - Jodi Shorr, Administrative Coordinator and Policy Analyst

Resources

Ohio Attorney General's Office

<http://www.ohioattorneygeneral.gov/>

Ohio Law Enforcement Gateway

<http://www.ohioattorneygeneral.gov/OHLEG>

Ohio Peace Officer Training Academy

<http://www.ohioattorneygeneral.gov/OPOTA>

<http://www.ohioattorneygeneral.gov/Enforcement/OPOTA/Course-Catalog/Course-Categories/Crime-Scene-Courses>

Ohio Revised Code

<http://codes.ohio.gov/>

<http://codes.ohio.gov/orc/2901.07>

<http://codes.ohio.gov/orc/2933.82>

<http://codes.ohio.gov/orc/2950.01>

<http://codes.ohio.gov/orc/2953.71>

National Institute of Justice

<http://www.ojp.usdoj.gov/nij/>

<http://www.ojp.usdoj.gov/nij/training/welcome.htm>

<http://www.ojp.usdoj.gov/ovc/publications/infores/sane/saneguide.pdf>

DNA Initiative

<http://www.dna.gov/>

<http://www.dna.gov/training/resources/>

<http://www.dna.gov/audiences/investigators/know/>

International Association for Property and Evidence

<http://iape.org/>

<http://iape.org/resourcesPages/downloads.html>

Occupational Safety and Health Programs

<http://osha.gov/>

<http://osha.gov/Publications/osha3186.html>

Centers for Disease Control and Prevention

<http://www.cdc.gov/>

<http://www.cdc.gov/hai/>

Ohio Department of Health

<http://www.odh.ohio.gov/odhPrograms/hpr/sadv/sadvprev1.aspx>

<http://www.odh.ohio.gov/odhPrograms/hpr/sadv/sadvprot.aspx>

**Appendix A: Sample Letter Giving
Notice of Intent to Destroy Biological Evidence**

RE: NOTICE OF INTENT TO DESTROY BIOLOGICAL EVIDENCE

[Insert date]

To Whom It May Concern:

Pursuant to Ohio Revised Code Section 2933.82(B)(5), I am hereby notifying your office that [insert name of governmental evidence retention entity] intends to destroy the biological evidence listed below.

This evidence will be destroyed on or about **one year from the date that you received this letter** unless the defendant files a motion requesting the testing of evidence under RC 2953.71 to 2953.81 or 2953.82, or you, or any other person notified in this manner, submits a written request for retention of the evidence listed below to [insert name of governmental evidence retention entity] at the address listed below.

Defendant's name: _____
Victim's name: _____
Evidence items: _____ [List or include attachment] _____

Conviction offense(s): _____
Conviction date: _____
Court: _____
Case number: _____

Sincerely,

[Insert Governmental Evidence Retention Entity]
[Address]
[City, State, Zip]
[Phone Number]

Ohio Attorney General Mike DeWine

[Briefing Room](#) > [News releases](#) > [February 2012](#) > Attorney General DeWine Announces Progress Made with SB 77 Connecting DNA with Unsolved Crimes

NEWS RELEASES

Attorney General DeWine Announces Progress Made with SB 77 Connecting DNA with Unsolved Crimes

2/15/2012

(LONDON, Ohio)—Ohio Attorney General Mike DeWine today announced 132 cold case crimes now have a prime suspect through a DNA match made possible only because of Senate Bill 77. SB 77, which took effect July 1, 2011, requires DNA collection on all felony arrestees. All DNA profiles in Ohio are housed within the Ohio Attorney General's Bureau of Criminal Investigation (BCI).

"Finding someone's DNA at a crime scene is often times the piece of evidence that makes the case and lands the criminal in prison, where he or she belongs," said Attorney General DeWine. "With seven months of data, we now see how SB 77 is helping us identify more bad guys, who just might have gotten away with their crimes had it not been for the new law."

Because of SB 77, law enforcement agencies across Ohio are required to collect DNA samples from adults arrested on felony charges. The samples are then processed and DNA profiles are developed. The DNA profiles are entered into the Ohio DNA database at BCI. The database uses the Combined DNA Index System (CODIS) software to search for matches with Ohio and U.S. unsolved and solved crimes. Currently, BCI's Ohio DNA database holds 421,584 DNA records from convicted offenders and arrestees.

After tracking more than one hundred leads that went cold, Englewood Police Sergeant Mike Lang finally got the break he was looking for in a ten-year-old rape case when an Ohio man had to submit a DNA sample following the new law. The 2001 rape victim was a 14-year-old girl.

"Informing the victim and her family that this long torturous mystery was finally moving towards closure was one of the happiest moments of my career," said Sgt. Lang. "SB 77 connected dots in a case that might have never been connected. For this, I know a family and a certain young woman, now 25, who are very, very thankful."

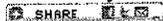
"Our BCI scientists are processing 63 percent more DNA profiles because of SB 77. We simply have more data in our system," said DeWine. "And that has led to more 'hits' to unsolved crimes. We hit to an average 127 unsolved crimes per month now, giving law enforcement agencies around the state and the country the break in their cold case that will hopefully lead to more victims finding justice."

-30-

Media Contacts

Lisa Hackley: 614-466-3840

Dan Tierney: 614-466-3840





Senator David Goodman
3rd Ohio Senate District

FOR IMMEDIATE RELEASE

April 6, 2010
Contact: Jim Laipply
(614) 466-8064

**GOODMAN'S BILL EXPANDING THE USE OF DNA TESTING
SIGNED INTO LAW BY GOVERNOR**

COLUMBUS— State Senator David Goodman (R- New Albany) announced that Senate Bill 77, legislation he sponsored that expands the use of DNA testing and establishes a biological evidence retention policy in order to better preserve and maintain evidence, has been signed into law by Governor Ted Strickland.

“Advancements in DNA testing in recent years have demonstrated the need to refine our policies regarding these procedures, and the changes made in Senate Bill 77 will allow our criminal justice system to take full advantage of these improvements to protect Ohio families,” Goodman said. “I want to thank everyone who worked with us throughout the legislative process to craft a bill that will protect Ohioans’ rights while ensuring the guilty are placed behind bars and the innocent go free.”

In 2003, Goodman sponsored legislation that established procedures for DNA testing of inmates who pleaded not guilty to their crimes. Following a series of articles in the Columbus Dispatch that revealed uneven evidence retention and other problems with Ohio’s DNA testing laws, he introduced Senate Bill 77 to strengthen the law and ensure the integrity of the state’s justice system.

Senate Bill 77 expands the use of DNA testing to post-conviction offenders who are on probation or parole, are under supervised judicial release, are under post-release control or community control or are on the sex offender registry. It also requires law enforcement agencies to establish a biological evidence retention policy in order to ensure that evidence is readily available for testing purposes.

Senate Bill 77 will become effective Ohio law in 90 days.

-30-



Senator David Goodman
3rd Ohio Senate District

FOR IMMEDIATE RELEASE

Wednesday, June 24, 2009

Contact: Jim Laipply
(614) 466-8064

OHIO SENATE APPROVES GOODMAN'S LEGISLATION THAT EXPANDS DNA TESTING AND IMPROVES SYSTEM OF MAINTAINING EVIDENCE

COLUMBUS—State Senator David Goodman (R- New Albany) today announced the Ohio Senate has voted to approve Senate Bill 77, legislation he introduced that would expand the use of DNA testing, help to better preserve biological evidence and provide for blind line-ups to ensure unbiased witness identification.

Goodman sponsored legislation in 2003 that established procedures for the DNA testing of inmates who pleaded not guilty to their crime. However, a recent series of stories in the *Columbus Dispatch* demonstrated that uneven evidence retention, in addition to other problems, revealed the need to strengthen Ohio's DNA testing laws and ensure the integrity of the justice system.

"As we work to protect Ohioans and their families from those who would do them harm, it is essential that we take the necessary steps to ensure that everyone's rights are protected, the guilty are convicted and the innocent vindicated," Goodman said. "This bill will enact simple yet meaningful changes to our system of justice that will modernize Ohio's best practices so that the best interests of justice can be served."

Under Senate Bill 77, post-conviction DNA testing would be made available to those offenders who are on probation or parole, are under supervised judicial release, are under post-release control or community control or are on the sex offender registry. The bill also requires law enforcement agencies to establish a biological evidence retention policy in order to ensure that evidence is readily available for testing purposes.

A Preservation of Biological Evidence Task Force would also be created within the Ohio Bureau of Criminal Identification and Investigation to devise standards regarding the proper collection, retention and cataloguing of biological evidence for ongoing investigations and prosecutions. The task force would also make recommendations for the cataloguing and accessibility of preserved biological evidence already in the possession of law enforcement.

In addition, Goodman's bill also requires that custodial interrogations be recorded, beginning when a person is read his or her Miranda rights. The bill also seeks to ensure lineups are

impartial and unbiased by requiring the blind administration and recording of investigation lineups.

Senate Bill 77 was approved by a 31-1 vote. The bill now moves to the Ohio House of Representatives for further consideration.

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DNA testing becomes law in Ohio

COLUMBUS - Legislation to require DNA testing of all felons upon arrest was signed into law Monday by Gov. Ted Strickland.

Cincinnati Enquirer - Cincinnati, Ohio
Author: Jon Craig
Date: Apr 6, 2010
Start Page: n/a
Section: NEWS
Text Word Count: 458

Document Text

Existing law requires DNA testing after felony convictions. Senate Bill 77 is expected to help catch serial offenders and free wrongly convicted inmates by expanding DNA testing.

A half-dozen ex-convicts later found innocent through DNA tests, as well as a former Clifton area rape victim, were at Monday's Statehouse bill-signing ceremony.

Amy, a 36-year-old graduate of the University of Cincinnati, hopes the man who raped her and at least two other UC students 15 years ago will be caught soon after changes are made to state law. But new DNA collection after felony arrest won't take effect until at least July 1, 2011, because of the expected annual cost of nearly \$2 million.

The bill evolved from work by students from the Ohio Innocence Project, based at the University of Cincinnati. They drafted legislation three years ago aimed at preventing wrongful convictions. Mark Godsey, a UC law professor and director of the Innocence Project, helped students draft the legislation with Michele Berry, a Cincinnati lawyer.

Former state Rep. Tyrone Yates, a Democrat from Evanston, introduced the House version of the bill. Yates is now a Hamilton County municipal judge.

The bill was introduced in the Ohio Senate in March 2009 by Republican Sens. Bill Seitz of Green Township and David Goodman of New Albany.

"There is a percentage of people in our prisons who are innocent of crimes," said Strickland, who counseled one of the freed inmates when Strickland worked as a prison psychologist. "The new procedures will help improve criminal investigations and save lives."

"I'm sorry for what you experienced," Strickland said to Joseph Fears Jr. of Columbus, putting his arm around Fears for a photograph after signing the bill into law.

Fears was released from prison in March 2009 after serving more than 25 years for two rapes that DNA tests later found he didn't commit.

Fears thanked Strickland for his help decades ago at Southern Ohio Correctional Facility in Lucasville.

"The more knowledge you've got, the more power you've got," Fears said.

Legislation requiring DNA testing upon conviction of felony crimes became law last year in Kentucky. Indiana also requires DNA testing upon conviction.

New law

Senate Bill 77, signed into law Monday, also:

Requires biological evidence including DNA to be saved in all serious crimes for five years in plea bargain cases and for 30 years, or until a person gets out of prison, if a person is found guilty at trial for murder or sexual assault.

Opens DNA testing to parolees and those on the state sex-offender registry.

Provides new incentives for police to record interrogations from start to finish.

Requires police lineups and eyewitness photo identifications to be "double blind," meaning the officer handling the lineup doesn't know who the suspect is.

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Abstract (Document Summary)

A half-dozen ex-convicts later found innocent through DNA tests, as well as a former Clifton area rape victim, were at Monday's Statehouse bill-signing ceremony.

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