

## **REPORT AND RECOMMENDATIONS**

### **Governor's DNA Work Group**

#### **CHARGE**

Governor Ritter's charge to the work group was to study how DNA evidence is collected, preserved and retained in Colorado presently. The charge also directed the group to study collection, preservation and retention of DNA other than in Colorado and to make any appropriate recommendations concerning collection, preservation and retention of such evidence for the future. This report outlines the work group's process, findings and recommendations concerning this charge from the Governor.

#### **PROCESS**

The DNA work group met six times and used a systematic approach in addressing the issues presented by the Governor. The work was divided into three parts. First the committee gathered information. The information gathered included but was not limited to Colorado. The committee drafted and sent out to all Colorado law enforcement agencies, police, sheriffs and CBI, a questionnaire designed to determine the present practices and procedures used in the handling and retention of DNA evidence in Colorado. The committee also reviewed statutory material from 25 sister states and two federal jurisdictions. ABA standards on the handling and retention of DNA evidence were reviewed together with pertinent law review articles in the area. In addition to these paper reviews the committee received presentations from a variety of persons who work with DNA evidence.

Representatives from the CBI and Denver Police Department addressed current practices in analysis and storage of DNA evidence. These presentations included best practices for the long term retention of DNA evidence. Representatives of the association of crime scene investigators, those persons who document crime scenes photographically and diagrammatically and who retrieve physical evidence, including DNA, were on the committee and explained what they can and cannot do. Representatives of the Innocence Project in New York made a presentation about their work and the necessity of preserving DNA evidence. That same group also responded to questions from the committee subsequent to their presentation.

The second and third parts of the work consisted of analyzing and discussing the information, which had been gathered, and reaching the recommendations, which are presented here. Discussions included not only the material gathered but also practical aspects of any proposed recommendations such as fiscal impacts. The last two meetings were devoted almost entirely to formulating these recommendations. Based on the work of the committee the following findings and recommendations are offered.

#### **FINDINGS:**

It was unanimously agreed that the goal of the criminal justice system is to insure that the truth is revealed in all criminal cases. All evidence should be collected, preserved and retained for the

purpose of insuring that that goal is achieved. A uniform statewide fair and just policy for that preservation and retention should be part of the criminal justice system. No innocent person should be deprived of evidence that would establish his or her innocence. Current technology allows for the preservation and retention of identification evidence from DNA. DNA technology continues to evolve and progress.

The committee has found that no uniform statewide policy currently exists for the preservation and retention of DNA evidence. The committee finds that such a policy for preservation and retention of DNA evidence is desirable for Colorado and would be welcomed by law enforcement agencies in Colorado.

The committee recognized the importance and use of DNA evidence. DNA evidence is evidence used to identify persons who deposited their DNA at a crime scene or on items found at a crime scene. As such it may be very important in linking a person to a crime scene. On the other hand, in cases where identification is not an issue, self-defense cases for example, DNA evidence may have little or no value in the trial of the case. Of course, DNA evidence can exclude persons who might otherwise be suspects.

### **RECOMMENDATIONS:**

Question: Should there be a duty to retain DNA and biological evidence in Colorado?

Recommendation: Yes there should be such a duty in Colorado in accord with the following recommendations.

Question: What should be retained?

Recommendation: The DNA and biological evidence, which is to be preserved, is evidence that is reasonable and relevant to the crime. This “reasonable and relevant” standard recognizes that in certain cases evidence may be of such size that it is impracticable to retain for extended periods. The committee understands that after evidence has been analyzed for DNA content it may be easily and conveniently retained for extended periods.

Question: What should be done when there is a great quantity of biological evidence found at a crime scene?

Recommendation: The committee distinguished between two types of evidence. The first type was discussed using the term “bulk” evidence. “Bulk evidence” as used by the committee is the totality of the evidence obtained at a crime scene, which has not been subjected to DNA analysis. The committee recognized that the amount of evidence at a crime scene may not be capable of being retained for long periods of time due to size or other reasons that make it impracticable to be held. As such, if certain evidence is too large to be retained, parts of that evidence may be selected and retained though not subjected to DNA analysis. “Bulk” evidence may be viewed as “raw” or “untested” evidence. For example, in a sexual assault case it may be fabric, which may contain bodily fluids with DNA. In any type of case it may include hair samples, which may come from the perpetrator.

The second type of evidence is referred to as “sample” evidence. Sample evidence is that part of the “bulk” evidence which has been subjected to DNA analysis and which may or may not produce a DNA identification.

The committee felt this “bulk” versus “sample” distinction to be important not only for persons charged with crimes but also for custodians obligated to retain the evidence subsequent to the crime and subsequent to conviction.

Question: How long is DNA and biological evidence to be retained?

Recommendation: Obviously all evidence, bulk and sample should be retained for trial. However, the committee recognized that in excess of 90% of all filed cases result in dispositions without trial. The committee felt there was a significant distinction to be drawn between convictions obtained at trial and convictions resulting from guilty pleas. Even after a conviction at trial a defendant may continue to assert his or her innocence and proceed with appeal or relief under Rule 35(c) of the Colorado Rules of Criminal Procedure. On the other hand, one who has pleaded guilty has admitted his or her guilt. The committee felt this guilty at trial versus pleading guilty distinction was significant enough to establish different time periods for retention of evidence depending how guilt was established.

The committee also recognized the range of potential penalties for felony offenses represented by the six classes of felony offenses in Colorado statutes. Class One felonies, murder in the first degree for example, carry sentences of death or life without parole. At the other end of the felony spectrum class six felonies carry a relatively short period of possible incarceration, and in reality frequently result in probation or community correction sentences. Because of this remarkably wide range of potential penalties the committee felt mandatory retention of DNA evidence should be adjusted based on class of felony.

Given the matters mentioned above the committee felt the period of retention ought to be based on whether the evidence is “bulk” or “sample”, and whether the conviction was after trial or as result of a guilty plea. In all cases it was agreed that the period of retention could be extended or shortened if a proper motion is granted by the court.

The following chart represents the consensus recommendations of the committee based on class of felony, type of evidence and the basis of conviction. The word “consensus” is used here because unlike the duty to preserve DNA evidence which was unanimously agreed to, the time periods below reflect a substantial majority of the member of the committee but less than unanimity.

Level of Felony	After Trial		After Plea	
	Bulk	Sample	Bulk	Sample
F-1	Retain until death of			

	Defendant	Defendant	Defendant	Defendant
F-2	10 years	Incarceration plus consequences	1 year	Incarceration plus consequences
F-3	10 years	Incarceration plus consequences	1 year	Incarceration plus consequences
**Sexual Assault	10 years	Incarceration plus consequences	1 year	Incarceration plus consequences
F-4	3 years		6 months	
F-5	3 years		6 months	
F-6	3 years		6 months	

\*\*Sexual assault charges that carry indeterminate sentences.

(The blank areas in the chart indicate that no final conclusion was reached on length of retention of sample evidence in F-4, F-5 and F-6 felony convictions either after trial or after guilty plea.)

Question: What process should be used to determine the portions of the bulk evidence to be retained if it is impracticable to retain the totality of the evidence?

Recommendation: The committee recommends that the best scientific practices at the time be the standard used for determining what portion of bulk evidence will be retained if it is of such size that it is impracticable to retain it in its entirety. Similarly the best scientific practices available at the time shall be the standard for retention of the bulk evidence in order to preserve any DNA, which may be contained in the bulk evidence.

Question: when may retain evidence, bulk or sample, be destroyed?

Recommendation: The retained evidence shall be destroyed automatically at the end of the retention periods unless a motion has been granted for extending the retention period. DNA evidence may not be destroyed prior to the expiration of the retention period unless a motion for early destruction has been granted by the court.

Question: May the period of retention after conviction be extended?

Recommendation: The period of retention may be extended if a motion seeking such relief has been granted by the court. Notice of such motion seeking an extension of the retention period shall be given to all parties and also to the custodian who possesses the evidence.

Question: May the period of retention be shortened?

Recommendation: The period of retention may be shortened if a motion seeking such relief has been granted by the court. As with motions to extend the retention period notice of motions seeking early destruction shall be provided to all parties and the evidence custodian.

Question: Should there be sanctions for destruction of evidence in violation of the recommended policy?

Recommendation: In the event of malicious or intentional destruction of retained evidence without court order the committee recommends that prosecution be available under C.R.S. 18-8-610, Tampering with Physical Evidence, a Class 6 Felony. In the event of a negligent destruction of retained evidence the committee recommends that such occurrence be analyzed by the court under the general area of due process violations.

Question: Who shall retain the DNA and biological evidence post conviction?

Recommendation: If a DNA profile from retained evidence has been developed by a governmental accredited laboratory it shall be retained by that laboratory. In the event that the evidence is tested by a private laboratory the sample will be maintained for long term storage by a governmental accredited laboratory.

It is recommended that post conviction evidence be retained in a central or regional warehouse under the auspices of the CBI or the state.

Question: What should be done with evidence obtained at a crime scene when a case concerning that crime has not been filed?

Recommendation: Although not part of the general charge to this committee, which related to post conviction retention of DNA evidence, the committee recommends that reasonable and relevant DNA and biological evidence be retained in uncharged cases for the period of the statute of limitations for the offense.

Respectfully submitted by the members of the work group this 18<sup>th</sup> day of December. 2007.

---

H. Jeffrey Bayless

Chairman