

**Enrolled**  
**Senate Bill 731**

Sponsored by COMMITTEE ON JUDICIARY

CHAPTER .....

AN ACT

Relating to deoxyribonucleic acid; creating new provisions; amending section 1, chapter 489, Oregon Laws 2009; repealing sections 2 and 3, chapter 489, Oregon Laws 2009; and declaring an emergency.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1.** Section 1, chapter 489, Oregon Laws 2009, is amended to read:

**Sec. 1.** (1) *[Except as provided in subsection (3) of this section,]* A custodian shall preserve biological evidence **in accordance with sections 2 to 6 of this 2011 Act if the evidence:**

(a) *[That]* Is collected as part of a criminal investigation into a covered offense; or

(b) *[(A) That]* **Is otherwise in the possession of the custodian and** reasonably may be used to incriminate or exculpate any person for a covered offense<sup>]</sup>; *and]*

*[(B) That is in the possession of the custodian before any person is convicted of a covered offense].*

(2) *[A custodian shall preserve biological evidence described in]* **When a custodian is required to preserve biological evidence under subsection (1) of this section, the custodian shall preserve the evidence** in an amount and manner that is sufficient to develop a DNA profile. **Except as otherwise provided in sections 2 to 6 of this 2011 Act, the biological evidence must be preserved:**

(a) **If the covered offense is aggravated murder, murder, rape in the first degree, sodomy in the first degree or unlawful sexual penetration in the first degree, for 60 years from the date each person is convicted of the offense or until each person convicted of the offense has died, whichever is earlier.**

(b) **If the covered offense is aggravated vehicular homicide, manslaughter in the first degree or manslaughter in the second degree, until each person convicted of the offense has served the person's sentence.**

(c) **If no person is convicted of the covered offense or the law enforcement agency investigating the covered offense closes the case for a reason other than the conviction of a person, until the expiration of the statute of limitations.**

(3) A custodian is not required to preserve physical evidence solely because the physical evidence contains biological evidence if the physical evidence is of such a size, bulk or physical character as to render retention impracticable. When the retention of physical evidence is impracticable, the custodian shall remove and preserve portions of the physical evidence likely to contain biological evidence in a quantity sufficient to permit future DNA testing before returning or disposing of the physical evidence.

*[(4) As used in this section:]*

*[(a) "Biological evidence" means a sample of an individual's blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other identifiable biological material or an item that contains such material, whether the material or item is stored or cataloged separately or the material is present upon other evidence. "Biological evidence" includes the contents of a sexual assault forensic evidence kit.]*

*[(b) "Convicted" includes a finding of guilty or responsible except for insanity, or a finding that a person is within the jurisdiction of the juvenile court under ORS 419C.005.]*

*[(c) "Covered offense" means:]*

*[(A) Aggravated murder;]*

*[(B) Murder;]*

*[(C) Manslaughter in the first or second degree;]*

*[(D) Criminally negligent homicide;]*

*[(E) Aggravated vehicular homicide; or]*

*[(F) A sex crime listed in ORS 181.594.]*

*[(d) "Custodian" means a law enforcement agency as defined in ORS 131.550 or any other person or public body as defined in ORS 174.109 that is charged with the collection, storage or retrieval of biological evidence in connection with a criminal investigation or criminal prosecution. "Custodian" does not include a court.]*

*[(e) "DNA" means deoxyribonucleic acid.]*

*[(f) "DNA profile" means the unique identifier of an individual that is derived from DNA.]*

**(4) Upon the conclusion of any trial or hearing involving a covered offense, the court shall return any biological evidence in the possession of the court to the custodian responsible for preserving the biological evidence under sections 2 to 6 of this 2011 Act, unless the evidence was collected by the defense. If the evidence was collected by the defense, the court shall return the evidence to the attorney for the defendant.**

**(5) If a custodian is required to preserve biological evidence under sections 2 to 6 of this 2011 Act and the custodian is unable to produce the evidence in a judicial proceeding, the individual to whom the custodian has delegated the duty to preserve the evidence shall prepare, sign and file with the court a sworn affidavit that indicates that the custodian is unable to produce the evidence and describes the efforts taken to locate the evidence.**

**(6) If a court finds that biological evidence was destroyed in violation of sections 2 to 6 of this 2011 Act, the court, after determining whether the evidence was destroyed maliciously, may impose appropriate sanctions and order appropriate remedies. The court may not order the reversal of a conviction under this subsection on the sole grounds that the biological evidence is no longer available.**

**(7)(a) The Attorney General shall adopt rules establishing:**

**(A) Standards for the proper collection, retention, preservation and cataloging of biological evidence applicable to criminal investigations into, and criminal prosecutions for, covered offenses; and**

**(B) A standard form for use by custodians in providing the written notice described in section 3 (1) of this 2011 Act.**

**(b) The Attorney General shall consult with the Department of State Police and custodians before adopting rules under this subsection.**

**SECTION 2. As used in sections 2 to 6 of this 2011 Act:**

**(1) "Biological evidence" means an individual's blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other identified biological material. "Biological evidence" includes the contents of a sexual assault forensic evidence kit.**

**(2) "Convicted" includes a finding of guilty or responsible except for insanity and a finding that a person is within the jurisdiction of the juvenile court under ORS 419C.005.**

**(3) "Covered offense" means:**

**(a) Aggravated murder under ORS 163.095;**

**(b) Murder under ORS 163.115;**

- (c) Manslaughter in the first degree under ORS 163.118;
- (d) Manslaughter in the second degree under ORS 163.125;
- (e) Aggravated vehicular homicide under ORS 163.149;
- (f) Rape in the first degree under ORS 163.375;
- (g) Sodomy in the first degree under ORS 163.405; or
- (h) Unlawful sexual penetration in the first degree under ORS 163.411.

(4) "Custodian" means a law enforcement agency as defined in ORS 131.550, or any other person or public body as defined in ORS 174.109, that is charged with the collection, preservation or retrieval of evidence in connection with a criminal investigation or criminal prosecution. "Custodian" does not include a court.

(5) "DNA" means deoxyribonucleic acid.

(6) "DNA profile" means the unique identifier of an individual that is derived from DNA.

(7) "Sentence" means a term of incarceration in a correctional or juvenile detention facility, a period of probation, parole or post-prison supervision and the period of time during which a person is under the jurisdiction of the Psychiatric Security Review Board.

(8) "Supervisory authority" has the meaning given that term in ORS 144.087.

(9) "Victim" has the meaning given that term in ORS 131.007.

**SECTION 3.** (1)(a) A custodian may seek to dispose of biological evidence before the period of time specified in section 1 (2), chapter 489, Oregon Laws 2009, by providing written notice, in the form developed under section 1 (7), chapter 489, Oregon Laws 2009, to the district attorney having jurisdiction over the prosecution of the covered offense. Upon receipt of the notice, the district attorney shall determine whether to object to the disposal of any of the biological evidence identified in the custodian's notice.

(b) If the district attorney objects to the disposal of any of the biological evidence identified in the custodian's notice, the district attorney shall provide written notice of the objection to the custodian that identifies the biological evidence that the district attorney determines must be preserved. The custodian shall preserve any biological evidence identified by the district attorney in the notice until the period of time specified in section 1 (2), chapter 489, Oregon Laws 2009, has elapsed.

(c) If the district attorney does not object to the disposal of all or a portion of the biological evidence identified in the custodian's notice, the district attorney shall provide written notice of the intent to dispose of biological evidence, identifying the biological evidence that the district attorney has determined may be disposed of, to:

- (A) The defendant;
- (B) The most recent attorney of record for the defendant; and
- (C) The Department of Justice.

(2) If evidence that is subject to section 1, chapter 489, Oregon Laws 2009, is the property of the victim, the victim may request that the district attorney determine whether the property may be returned to the victim. The request must be in writing and must identify the property that the victim seeks to have returned. If the district attorney:

(a) Objects to the return of any of the property to the victim, the district attorney shall notify the victim of that determination.

(b) Does not object to the return of all or a portion of the property, the district attorney shall provide written notice of the intent to dispose of biological evidence, identifying the property the district attorney has determined may be returned, to:

- (A) The victim;
- (B) The defendant;
- (C) The most recent attorney of record for the defendant; and
- (D) The Department of Justice.

(3)(a) Not later than 120 days after the date the district attorney provides written notice to the defendant under subsection (1)(c) or (2)(b) of this section, the defendant may file a motion to preserve biological evidence in the convicting court. The defendant shall provide

a copy of the motion to the district attorney and the custodian. If the motion is timely filed, the court shall enter an order as provided in section 4 of this 2011 Act.

(b) If the defendant fails to file a motion to preserve biological evidence before the expiration of the 120-day period specified in paragraph (a) of this subsection, the district attorney shall file with the court a copy of the notice of intent to dispose of biological evidence sent to the defendant under subsection (1)(c) or (2)(b) of this section. Following the filing of the notice, the court shall, without hearing, enter an order authorizing the disposal of the biological evidence described in the notice. The court shall provide a copy of the order to the custodian, the district attorney and each person or entity described in subsection (1)(c) or (2)(b) of this section, as applicable.

(c) The 120-day period specified in this subsection begins on the date the notice is mailed.

**SECTION 4.** (1) Upon receipt of a timely motion to preserve biological evidence under section 3 (3) of this 2011 Act, the court shall:

(a) Conduct a hearing to resolve the motion; or

(b) Enter an order directing the custodian to preserve the biological evidence.

(2)(a) In determining whether to order the preservation of biological evidence, the court shall consider, in addition to other factors the court considers appropriate, the following factors:

(A) Whether the identification of the offender was a disputed issue;

(B) Whether other biological evidence in the case contains DNA in an amount that is sufficient to develop a DNA profile and will not be disposed of;

(C) If the biological evidence has not previously been tested, whether it is possible to perform testing on the biological evidence;

(D) Whether the defendant has served all of the sentence imposed; and

(E) Whether the defendant has exhausted the defendant's appellate or post-conviction rights.

(b) If the defendant has not exhausted the defendant's appellate and post-conviction rights, there is a presumption that the biological evidence should be preserved.

(c) In making the determination described in this subsection, except as otherwise provided in paragraph (b) of this subsection, the court may assign the weight the court deems appropriate to the factors described in paragraph (a) of this subsection and to any other factor the court determines is appropriate.

(d) For purposes of subparagraph (2)(a)(A) of this section, the court need not presume that identification of the offender is not a disputed issue solely because the defendant has pleaded guilty or no contest to the crime, has confessed to the crime or has made an admission.

(3) If the court enters an order authorizing the disposal of biological evidence, the order may not authorize disposal to occur sooner than 45 days after the date the order is entered. The court shall provide a copy of the order to the custodian, the district attorney and the defendant.

(4) Either the state or the defendant may appeal from an order entered under this section in the manner provided in ORS chapter 19 for appeals from judgments. Notwithstanding ORS 19.330, the filing of a notice of appeal automatically stays an order entered under this section.

**SECTION 5.** (1) Upon written request by the defendant, the district attorney shall provide the defendant with an inventory of biological evidence that has been preserved under sections 2 to 6 of this 2011 Act and is related to the covered offense for which the defendant was convicted.

(2) A defendant or, if the defendant is represented by an attorney, the defendant's attorney has the right to reasonably review biological evidence that is the subject of a written notice of intent to dispose of biological evidence under section 3 of this 2011 Act for the purpose of preparing a motion to preserve biological evidence.

**SECTION 6.** When a provision of sections 2 to 6 of this 2011 Act requires a district attorney or the court to provide written notice or an order to the defendant and the defendant:

(1) Is incarcerated for any offense in a Department of Corrections institution, the notice must be sent by regular United States mail in an envelope prominently displaying the words "Legal Mail."

(2) Is supervised by a supervisory authority for any offense, the notice must be sent by regular United States mail to the defendant's last-known address on record with the supervisory authority.

(3) Is no longer supervised by a supervisory authority, the notice must be sent by certified mail to the defendant's last-known address.

**SECTION 7.** Section 1, chapter 489, Oregon Laws 2009, is added to and made a part of sections 2 to 6 of this 2011 Act.

**SECTION 8.** Sections 2 and 3, chapter 489, Oregon Laws 2009, are repealed.

**SECTION 9.** (1) Sections 2 to 6 of this 2011 Act and the amendments to section 1, chapter 489, Oregon Laws 2009, by section 1 of this 2011 Act become operative on January 1, 2012.

(2) The Department of Justice and any other public body as defined in ORS 174.109 may adopt rules or take any other action before the operative date specified in subsection (1) of this 2011 Act that is necessary to enable the department or public body to exercise, on and after the operative date specified in subsection (1) of this section, all the duties, functions and powers conferred on the department or public body by sections 2 to 6 of this 2011 Act.

(3) Sections 2 to 6 of this 2011 Act and the amendments to section 1, chapter 489, Oregon Laws 2009, by section 1 of this 2011 Act apply to biological evidence in the possession of a custodian on or after the operative date specified in subsection (1) of this section.

**SECTION 10.** This 2011 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect on its passage.

Passed by Senate April 4, 2011

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Robert Taylor, Secretary of Senate

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Peter Courtney, President of Senate

Passed by House May 25, 2011

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Bruce Hanna, Speaker of House

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Arnie Roblan, Speaker of House

Received by Governor:

.....M.,....., 2011

Approved:

.....M.,....., 2011

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John Kitzhaber, Governor

Filed in Office of Secretary of State:

.....M.,....., 2011

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Kate Brown, Secretary of State