

1 S.153

2 Introduced by Senator Sears

3 Referred to Committee on Judiciary

4 Date: January 5, 2010

5 Subject: Criminal procedures; innocence protection

6 Statement of purpose: This bill proposes to establish the following innocence  
7 protection measures to protect against wrongful criminal convictions:

8 (1) The bill requires law enforcement agencies to make video or audio  
9 recordings of custodial interrogations of criminal suspects. A recording is not  
10 required if exigent public safety circumstances or any other good cause exists.  
11 If a recording is required and not made, statements made during the  
12 interrogation are inadmissible in court proceedings.

13 (2) The bill requires biological evidence secured in connection with a  
14 criminal case to be retained by the government for the period of time that any  
15 person remains incarcerated, on probation or parole, or subject to registration  
16 as a sex offender in connection with the case.

17 (3) The bill creates a forensic laboratory oversight commission to oversee  
18 and investigate independently the department of public safety's forensic  
19 laboratory.

1 An act relating to preventing conviction of innocent persons

2 It is hereby enacted by the General Assembly of the State of Vermont:

3 ~~Sec. 1. 13 V.S.A. § 5565 is added to read:~~

4 ~~§ 5565. PRESERVATION OF EVIDENCE~~

5 ~~(a)(1) Notwithstanding any other provision of law, any item of physical~~  
6 ~~evidence containing biological material that is secured in connection with a~~  
7 ~~criminal case shall be retained by the government entity having custody of the~~  
8 ~~evidence for the period of time that any person remains incarcerated, on~~  
9 ~~probation or parole, or subject to registration as a sex offender in connection~~  
10 ~~with the case.~~

11 ~~(2) This section shall apply whether or not a petition for postconviction~~  
12 ~~DNA testing is filed under this subchapter.~~

13 ~~(3) If a petition is filed under this subchapter:~~

14 ~~(A) this section shall apply until proceedings on the petition are~~  
15 ~~concluded;~~

16 ~~(B) the state shall prepare an inventory of the evidence related to the~~  
17 ~~case and submit a copy of the inventory to the petitioner and the court.~~

18 ~~(4) If evidence is intentionally destroyed after a petition is filed under~~  
19 ~~this subchapter, the court may impose on the responsible party any penalty~~  
20 ~~provided by law.~~

1 ~~(b) For purposes of this section, "biological evidence" means:~~

2 ~~(1) a sexual assault forensic examination kit; or~~

3 ~~(2) semen, blood, saliva, hair, skin tissue, or other identified biological~~  
4 ~~material.~~

5 Sec. 2. 13 V.S.A. chapter 182, subchapter 3 is added to read:

6 Subchapter 3. Prevention of Wrongful Convictions

7 § 5581. DEFINITIONS

8 As used in this chapter:

9 (1) "Custodial interrogation" means an interrogation by a law  
10 enforcement officer or an agent of a law enforcement agency of a person  
11 suspected of committing a crime from the time the suspect is or should be  
12 informed of his or her rights to counsel and to remain silent until the  
13 questioning ends, during which the officer or agent asks a question that is  
14 reasonably likely to elicit an incriminating response and during which a  
15 reasonable person in the suspect's position would believe that he or she is in  
16 custody or otherwise deprived of his or her freedom of action in any significant  
17 way.

18 (2) "Law enforcement agency" shall have the same meaning as in  
19 subsection 3019(a) of this title.

20 (3) "Law enforcement officer" shall have the same meaning as in  
21 subdivision 3501(a)(4) of this title.

1 ~~(4) "Statement" means an oral, written, sign language, or other~~  
2 ~~nonverbal communication.~~

3 § 5582. RECORDING CUSTODIAL INTERROGATIONS;

4 ADMISSIBILITY OF DEFENDANT'S STATEMENT

5 (a) Unless subsection (b) of this section applies:

6 (1) A law enforcement agency shall make an audio or an audio and  
7 visual recording of any custodial interrogation related to the investigation or  
8 prosecution of a felony; and

9 (2) A statement made during a custodial interrogation is not admissible  
10 in any court proceeding against the person who made the statement unless an  
11 audio or an audio and visual recording of the interrogation was made and is  
12 available.

13 (b) An audio or an audio and visual recording of a custodial interrogation is  
14 not required, and a statement made during a custodial interrogation shall not be  
15 inadmissible, if any of the following apply:

16 (1) The person refused to respond or cooperate in the interrogation, and  
17 a law enforcement officer or agent of a law enforcement agency made a  
18 contemporaneous audio or audio and visual recording or written record of the  
19 person's refusal.

20 (2) The statement was made in response to a question asked as part of  
21 the routine processing of the person.

1 ~~(3) The law enforcement officer or agent of a law enforcement agency~~  
2 ~~conducting the interrogation in good faith failed to make an audio or an audio~~  
3 ~~and visual recording of the interrogation because the recording equipment did~~  
4 ~~not function, the officer or agent inadvertently failed to operate the equipment~~  
5 ~~properly, or, without the officer's or agent's knowledge, the equipment~~  
6 ~~malfunctioned or stopped operating.~~

7 ~~(4) The statement was made spontaneously and not in response to a~~  
8 ~~question by a law enforcement officer or agent of a law enforcement agency.~~

9 ~~(5) Exigent public safety circumstances existed that prevented the~~  
10 ~~making of an audio or an audio and visual recording or rendered the making of~~  
11 ~~such a recording impracticable.~~

12 ~~(6) The law enforcement officer conducting the interrogation or the law~~  
13 ~~enforcement officer responsible for observing an interrogation conducted by an~~  
14 ~~agent of a law enforcement agency reasonably believed at the commencement~~  
15 ~~of the interrogation that the offense for which the person was taken into~~  
16 ~~custody or for which the person was being investigated was not a felony.~~

17 ~~(7) Any other good cause exists for not requiring the recording or the~~  
18 ~~suppression of the statement.~~

19 ~~(c) A law enforcement officer or agent of a law enforcement agency~~  
20 ~~conducting a custodial interrogation is not required to inform the subject of the~~

1 ~~interrogation that the officer or agent is making an audio or an audio and visual~~  
2 ~~recording of the interrogation.~~

3 ~~(d) A defendant's lack of consent to having an audio or an audio and visual~~  
4 ~~recording made of a custodial interrogation does not affect the admissibility in~~  
5 ~~evidence of the recording.~~

6 ~~(e) An audio or an audio and visual recording of a custodial interrogation~~  
7 ~~shall not be open to public inspection before either of the following occurs:~~

8 ~~(1) The person interrogated is convicted or acquitted of an offense that~~  
9 ~~is a subject of the interrogation.~~

10 ~~(2) All criminal investigations and prosecutions to which the~~  
11 ~~interrogation relates are concluded.~~

12 ~~(f)(1) The department of public safety shall award grants to law~~  
13 ~~enforcement agencies for the purchase, installation, or maintenance of digital~~  
14 ~~recording equipment for making audio or audio and visual recordings of~~  
15 ~~custodial interrogations or for training personnel to use such equipment. The~~  
16 ~~department shall develop criteria and procedures to administer this subsection~~  
17 ~~and may award more than one grant to a law enforcement agency.~~

18 ~~(2) A law enforcement agency shall include the following information in~~  
19 ~~an application for a grant under this subsection:~~

20 ~~(A) How the agency proposes to use the grant funds.~~

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1 ~~(B) Procedures to be followed when recording equipment fails to~~  
2 ~~operate correctly, including procedures for reporting failures, using alternative~~  
3 ~~recording equipment, and repairing or replacing the equipment.~~

4 ~~(C) Procedures for storing recordings of custodial interrogations,~~  
5 ~~including storage format, storage location, and indexing of recordings for~~  
6 ~~retrieval.~~

7 ~~(D) Measures to prevent or detect tampering with recordings of~~  
8 ~~custodial interrogations.~~

9 ~~(E) Any other information required by the department.~~

10 Sec. 3. 20 V.S.A. § 1947 is added to read:

11 § 1947. FORENSIC LABORATORY OVERSIGHT COMMISSION

12 (a) There is created the forensic laboratory oversight commission. The  
13 commission shall comprise the following members:

14 (1) one member appointed by the governor;

15 (2) one member of the senate appointed by the committee on  
16 committees;

17 (3) one member of the house of representatives appointed by the speaker  
18 of the house of representatives;

19 (4) one member who has expertise in the field of forensic science  
20 appointed by the attorney general;

1 ~~(5) one member appointed by the board of trustees of the University of~~  
2 ~~Vermont who is a faculty member of the medical school and who specializes in~~  
3 ~~clinical laboratory medicine;~~

4 ~~(6) one member appointed by the dean of Vermont Law School who is a~~  
5 ~~faculty or staff member and who specializes in criminal justice;~~

6 ~~(7) one member appointed by the executive director of the department of~~  
7 ~~state's attorneys and sheriffs; and~~

8 ~~(8) one member appointed by the defender general.~~

9 ~~(b) Each member of the commission shall serve for a two-year term. The~~  
10 ~~governor shall designate a member to serve as chair of the commission.~~

11 ~~(c) The commission shall:~~

12 ~~(1) develop and implement:~~

13 ~~(A) an accreditation process for all laboratories, facilities, or entities~~  
14 ~~that conduct forensic analyses; and~~

15 ~~(B) a reporting system through which accredited laboratories,~~  
16 ~~facilities, or entities report professional negligence or misconduct;~~

17 ~~(2) require all laboratories, facilities, or entities that conduct forensic~~  
18 ~~analyses to:~~

19 ~~(A) become accredited by the commission; and~~

20 ~~(B) report professional negligence or misconduct to the commission;~~

21 ~~and~~



1 ~~(3) investigate, in a timely manner, any allegation of professional~~  
2 ~~negligence or misconduct that would substantially affect the integrity of the~~  
3 ~~results of a forensic analysis conducted by an accredited laboratory, facility, or~~  
4 ~~entity.~~

5 (d) An investigation under subdivision (c)(3) of this section:

6 (1) shall include the preparation of a written report that identifies and  
7 describes the methods and procedures used to identify:

8 (A) the alleged negligence or misconduct;

9 (B) whether negligence or misconduct occurred;

10 (C) any corrective action required of the laboratory, facility, or entity;

11 and

12 (2) may include one or more of the following:

13 (A) retrospective reexaminations of other forensic analyses  
14 conducted by the laboratory, facility, or entity that may involve the same kind  
15 of negligence or misconduct; and

16 (B) follow-up evaluations of the laboratory, facility, or entity to  
17 review:

18 (i) the implementation of any corrective action required under  
19 subdivision (1)(C) of this subsection; or

20 (ii) the conclusion of any retrospective reexamination under  
21 subdivision (A) of this subdivision (2).

1 ~~(c) The commission by contract may delegate the duties described by~~  
2 ~~subdivisions (c)(1) and (3) of this section to any person the commission~~  
3 ~~determines to be qualified to assume those duties.~~

4 ~~(f) As part of the accreditation process developed and implemented under~~  
5 ~~subdivision (c)(1) of this section, the commission may:~~

6 ~~(1) establish minimum accreditation standards and mandatory training~~  
7 ~~requirements for individuals employed by a laboratory, a facility, or an entity~~  
8 ~~that conducts forensic analyses;~~

9 ~~(2) validate or approve specific forensic methods or methodologies; and~~

10 ~~(3) establish procedures, policies, and practices to improve the quality of~~  
11 ~~forensic analyses conducted in this state.~~

12 ~~(g) The commission may require that a laboratory, a facility, or an entity~~  
13 ~~required to be accredited under this section pay any costs incurred to ensure~~  
14 ~~compliance with this section.~~

15 ~~(h) The commission shall make all accreditation reviews conducted under~~  
16 ~~subdivision (c)(2) of this section and investigation reports completed under~~  
17 ~~subdivision (d)(1) available to the public. A report completed under~~  
18 ~~subdivision (d)(1) of this section, in a subsequent civil or criminal proceeding,~~  
19 ~~shall not be prima facie evidence of the information or findings contained in~~  
20 ~~the report.~~

1 ~~(i) For attendance at meetings during adjournment of the general assembly,~~  
2 ~~legislative members of the committee shall be entitled to compensation and~~  
3 ~~reimbursement for expenses as provided in 2 V.S.A. § 406. Members of the~~  
4 ~~committee who are not employees of the state of Vermont shall be reimbursed~~  
5 ~~at the per diem rate set in 32 V.S.A. § 1010.~~

6 ~~(j) The commission shall submit any report received under subdivision~~  
7 ~~(c)(2) of this section and any report prepared under subdivision (d)(1) to the~~  
8 ~~governor, clerk of the house of representatives, and secretary of the senate not~~  
9 ~~later than December 1 of each even-numbered year.~~

10 ~~(k) In this section, "forensic analysis" means a medical, chemical,~~  
11 ~~toxicological, ballistic, or other expert examination or test performed on~~  
12 ~~physical evidence, including DNA evidence, for the purpose of determining~~  
13 ~~the connection of the evidence to a criminal action.~~

*Sec. 1. LEGISLATIVE INTENT; FORENSIC LABORATORY OVERSIGHT*

*The general assembly finds that at this time, there is not sufficient need for a forensic laboratory oversight commission, provided the Vermont crime laboratory continues to be properly accredited.*

*Sec. 2. PRESERVATION OF EVIDENCE*

*(a)(1) The general assembly finds that it is in the interest of justice that Vermont establish a system for the preservation of any item of physical evidence containing biological material that is secured in connection with a criminal case or investigation by the government entity having custody of the evidence for the period of time that:*

*(A) the statute of limitations has not expired for a crime that remains unsolved; and*

*(B) a person remains incarcerated, on probation or parole, or subject to registration as a sex offender in connection with a criminal case.*

(2) For purposes of this section, criminal case or investigation shall include only the following offenses:

(A) arson causing death as defined in 13 V.S.A. § 501;

(B) assault and robbery with a dangerous weapon as defined in 13 V.S.A. § 608(b);

(C) assault and robbery causing bodily injury as defined in 13 V.S.A. 608(c);

(D) aggravated assault as defined in 13 V.S.A. § 1024;

(E) aggravated murder as defined in 13 V.S.A. § 2311 and murder as defined in 13 V.S.A. § 2301;

(F) manslaughter as defined in 13 V.S.A. § 2304;

(G) kidnapping as defined in 13 V.S.A. § 2405;

(H) unlawful restraint as defined in 13 V.S.A. § 2406 or 2407;

(I) maiming as defined in 13 V.S.A. § 2701;

(J) sexual assault as defined in 13 V.S.A. § 3252(a)(1) or (a)(2);

(K) aggravated sexual assault as defined in 13 V.S.A. § 3253.

(L) burglary into an occupied dwelling as defined in 13 V.S.A. § 1201(c); and

(M) lewd and lascivious conduct with a child as defined in 13 V.S.A. § 2602.

(3) For purposes of this section, “biological evidence” means:

(A) a sexual assault forensic examination kit; or

(B) semen, blood, saliva, hair, skin tissue, or other identified biological material.

(b) The Vermont law enforcement advisory board shall develop a proposal for implementation of this section and present it to the senate and house committees on judiciary no later than January 15, 2011.

(c) The department of public safety, the department of buildings and general services, the police chiefs’ association, and the sheriffs’ association shall develop a proposal for establishing one or more facilities for retention of items of physical evidence containing biological material that is secured in connection with a criminal case or investigation. Such facilities would be available for use by all Vermont law enforcement agencies. The proposal shall be presented to the senate and house committees on judiciary, the house

committee on corrections and institutions, and the senate committee on institutions no later than January 15, 2011.

**Sec. 3. RECORDING CUSTODIAL INTERROGATIONS; ADMISSIBILITY OF DEFENDANT'S STATEMENT**

(a) It is the intent of the general assembly that on and after July 1, 2012, a law enforcement agency shall make an audio or an audio and visual recording of any custodial interrogation of a person when it is conducted in a place of detention after the person is arrested in relation to the investigation or prosecution of a felony.

(b) The Vermont law enforcement advisory board shall develop a proposal for implementation of this section and present it to the senate and house committees on judiciary, the house committee on corrections and institutions, and the senate committee on institutions no later than January 15, 2011. The proposal shall address the costs associated with purchasing, installing, and maintaining audio and visual recording as required by this section.

(c) In the first year of the 2011–2012 biennium, the senate and house committees on judiciary shall consider the proposal required by subsection (b) of this section for the purpose of enacting statutes by the date of adjournment in 2012 to implement a plan for audio and visual recording of any custodial interrogation of a person when it is conducted in a place of detention after the person is arrested in relation to the investigation or prosecution of a felony.

**Sec. 4. EYEWITNESS IDENTIFICATION BEST PRACTICES**

(a) The general assembly finds that eyewitness misidentification remains the single largest contributing factor to wrongful conviction. According to the Innocence Project, there are currently 249 DNA exonerations across the nation, and in nearly 80 percent of them, there was at least one misidentification.

(b) A statewide study committee created by No. 60 of the Acts of 2007 reported that the Vermont police academy currently teaches best practices regarding eyewitness identification.

(c) To ensure that law enforcement agencies statewide are employing best practices with regard to eyewitness identification, the Vermont law enforcement advisory board shall develop a proposal to establish best practices that are well suited for Vermont and its many, small rural law enforcement agencies, including consideration of conditions for the use and administration of show-ups, use of blind administrators for lineups, proper filler selection in live or photo lineups, instructions for eyewitnesses prior to a live or photo lineup, and confidence statements from eyewitnesses. The Vermont law enforcement advisory board shall present its proposal to the

senate and house committees on judiciary, the house committee on corrections and institutions, and the senate committee on institutions no later than January 15, 2011. The proposal shall address the costs associated with purchasing, installing, and maintaining audio and visual recording as required by this section.

*Sec. 5. 13 V.S.A. § 4010 is amended to read:*

*§ 4010. GUN SILENCERS*

*A person who manufactures, sells ~~or~~ uses, or possesses with intent to sell or use, an appliance known as or used for a gun silencer shall be fined \$25.00 for each offense. The provisions of this section shall not prevent the use or possession of gun silencers ~~for military purposes when so used or possessed under proper military authority and restriction~~ by:*

*(1) a certified, full-time law enforcement officer or department of fish and wildlife employee in connection with his or her duties and responsibilities and in accordance with the policies and procedures of that officer's or employee's agency or department; or*

*(2) the Vermont National Guard in connection with its duties and responsibilities.*

*Sec. 6. EFFECTIVE DATE*

*This act shall take effect upon passage.*