

## **Charleston County Coroner's Office Policy #33**

**Title:** Preservation of Evidence Act (The DNA Act) Policy      **Page:** 1 of 8

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### **33.1 POLICY**

It is the policy of this Office that every employee who handles or secures evidence read the Preservation of Evidence Act (the Act) outlined in South Carolina law 17-28-300 included in this policy. No item of evidence falling under this Act or potentially falling under this Act will be transferred or destroyed without the expressed, written consent of the Coroner. The requirements of the Act only apply upon conviction of an individual for one of the 24 offenses listed in the Act.

### **33.2 PRESERVATION OF EVIDENCE ACT**

The Act outlines the retention requirements for evidence collected related to the conviction of individuals under twenty-four felony offenses under South Carolina law. Retention requirements range from a few years up to several decades. The most common offenses that also come under the purview of this Office are murder, voluntary manslaughter, felony DUI resulting in death, homicide by child abuse, arson resulting in death, and abuse or neglect of a vulnerable adult resulting in death. The Act also requires evidence custodians to register with the Department of Corrections or the Department of Juvenile Justice to provide notification that items of evidence for these cases are in custody. The Act further holds evidence custodians criminally liable upon willful or malicious destruction, alteration, concealment, or tampering with physical evidence or biological material. The Preservation of Evidence Act is reprinted and included for reference.

# Preservation of Evidence Act (DNA Act) Policy

## ARTICLE 3.

### PRESERVATION OF EVIDENCE

#### **SECTION 17-28-300.** Citation of article.

This article shall be cited as the "Preservation of Evidence Act".

HISTORY: 2008 Act No. 413, Section 2, eff January 1, 2009.

#### **SECTION 17-28-310.** Definitions.

(1) "Biological material" means any blood, tissue, hair, saliva, bone, or semen from which DNA marker groupings may be obtained. This includes material catalogued separately on slides, swabs, or test tubes or present on other evidence including, but not limited to, clothing, ligatures, bedding, other household material, drinking cups, or cigarettes.

(2) "Custodian of evidence" means an agency or political subdivision of the State including, but not limited to, a law enforcement agency, a solicitor's office, the Attorney General's Office, a county clerk of court, or a state grand jury that possesses and is responsible for the control of evidence during a criminal investigation or proceeding, or a person ordered by a court to take custody of evidence during a criminal investigation or proceeding.

(3) "DNA" means deoxyribonucleic acid.

(4) "DNA profile" means the results of any testing performed on a DNA sample.

(5) "DNA record" means the tissue or saliva samples and the results of the testing performed on the samples.

(6) "DNA sample" means the tissue, saliva, blood, or any other bodily fluid taken at the time of arrest from which identifiable information can be obtained.

(7) "Incarceration" means serving a term of confinement in the custody of the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice and does not include a person on probation, parole, or under a community supervision program.

(8) "Law enforcement agency" means a lawfully established federal, state, or local public agency that is responsible for the prevention and detection of crime and the enforcement of penal, traffic, regulatory, game, immigration, postal, customs, or controlled substances laws.

(9) "Physical evidence" means an object, thing, or substance that is or is about to be produced or used or has been produced or used in a criminal proceeding related to an offense enumerated in Section 17-28-320, and that is in the possession of a custodian of evidence.

HISTORY: 2008 Act No. 413, Section 2, eff January 1, 2009.

#### **SECTION 17-28-320.** Offenses for which evidence preserved; conditions and duration of preservation.

(A) A custodian of evidence must preserve all physical evidence and biological material related to the conviction or adjudication of a person for at least one of the following offenses:

- (1) murder (Section 16-3-10);
- (2) killing by poison (Section 16-3-30);
- (3) killing by stabbing or thrusting (Section 16-3-40);
- (4) voluntary manslaughter (Section 16-3-50);
- (5) homicide by child abuse (Section 16-3-85(A)(1));
- (6) aiding and abetting a homicide by child abuse (Section 16-3-85(A)(2));
- (7) lynching in the first degree (Section 16-3-210);

## Preservation of Evidence Act (DNA Act) Policy

- (8) killing in a duel (Section 16-3-430);
- (9) spousal sexual battery (Section 16-3-615);
- (10) criminal sexual conduct in the first degree (Section 16-3-652);
- (11) criminal sexual conduct in the second degree (Section 16-3-653);
- (12) criminal sexual conduct in the third degree (Section 16-3-654);
- (13) criminal sexual conduct with a minor (Section 16-3-655);
- (14) arson in the first degree resulting in death (Section 16-11-110(A));
- (15) burglary in the first degree for which the person is sentenced to ten years or more (Section 16-11-311(B));
- (16) armed robbery for which the person is sentenced to ten years or more (Section 16-11-330(A));
- (17) damaging or destroying a building, vehicle, or property by means of an explosive incendiary resulting in death (Section 16-11-540);
- (18) abuse or neglect of a vulnerable adult resulting in death (Section 43-35-85(F));
- (19) sexual misconduct with an inmate, patient, or offender (Section 44-23-1150);
- (20) unlawful removing or damaging of an airport facility or equipment resulting in death (Section 55-1-30 (3));
- (21) interference with traffic-control devices or railroad signs or signals resulting in death (Section 56-5-1030(B)(3));
- (22) driving a motor vehicle under the influence of alcohol or drugs resulting in death (Section 56-5-2945);
- (23) obstruction of railroad resulting in death (Section 58-17-4090); or
- (24) accessory before the fact (Section 16-1-40) to any offense enumerated in this subsection.

(B) The physical evidence and biological material must be preserved:

- (1) subject to a chain of custody as required by South Carolina law;
- (2) with sufficient documentation to locate the physical evidence and biological material; and
- (3) under conditions reasonably designed to preserve the forensic value of the physical evidence and biological material.

(C) The physical evidence and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A). However, if the person is convicted or adjudicated on a guilty or nolo contendere plea for the offense enumerated in subsection (A), the physical evidence and biological material must be preserved for seven years from the date of sentencing, or until the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in subsection (A), whichever comes first.

HISTORY: 2008 Act No. 413, Section 2, eff January 1, 2009.

### **SECTION 17-28-330.** Registration as custodian of evidence.

(A) After a person is convicted or adjudicated for at least one of the offenses enumerated in Section 17-28-320, a custodian of evidence shall register with the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice, as applicable, as a custodian of evidence for physical evidence or biological material related to the person's conviction or adjudication.

(B) The South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice, as applicable,

# Preservation of Evidence Act (DNA Act) Policy

shall notify a custodian of evidence registered pursuant to subsection (A) if the person is released from incarceration, dies while incarcerated, or is executed for the offense enumerated in Section 17-28-320.

HISTORY: 2008 Act No. 413, Section 2, eff January 1, 2009.

**SECTION 17-28-340.** Petition for destruction of evidence prior to expiration of required time period.

(A) After a person is convicted or adjudicated for at least one of the offenses enumerated in Section 17-28-320, a custodian of evidence may petition the general sessions court or family court in which the person was convicted or adjudicated for an order allowing for disposition of the physical evidence or biological material prior to the period of time described in Section 17-28-320 if:

- (1) the physical evidence or biological material must be returned to its rightful owner, is of such size, bulk, or physical character as to make retention impracticable, or is otherwise required to be disposed of by law; or
- (2) DNA evidence was previously introduced at trial, was found to be inculpatory, and all appeals and post-conviction procedures have been exhausted.

(B) The petition must:

- (1) be made on such form as prescribed by the Supreme Court;
- (2) identify the proceedings in which the person was convicted or adjudicated;
- (3) give the date of the entry of the judgment and sentence;
- (4) specifically set forth the physical evidence or biological material to be disposed of; and
- (5) specifically set forth the reason for the disposition.

(C) The clerk of court shall file the petition upon its receipt and promptly bring it to the attention of the court and deliver a copy to the convicted or adjudicated person and the solicitor or Attorney General, as applicable. The victim shall be notified of the petition pursuant to Article 15, Chapter 3, Title 16.

(D) The convicted or adjudicated person and the solicitor or Attorney General, as applicable, shall have one hundred and eighty days to respond to the petition. The victim may respond within one hundred and eighty days in accordance with the provisions of Article 15, Chapter 3, Title 16.

(E) After a hearing, the court may order that the custodian of evidence may dispose of the physical evidence or biological material if the court determines by preponderance of evidence that:

- (1) the physical evidence or biological material must be returned to its rightful owner, is of such size, bulk, or physical character as to make retention impracticable, or is otherwise required to be disposed of by law, or DNA evidence was previously introduced at trial, was found to be inculpatory, and all appeals and post-conviction procedures have been exhausted;
- (2) the convicted or adjudicated person, the solicitor or Attorney General, as applicable, and the victim have been notified of the petition for an order to dispose of the physical evidence or biological material;
- (3) the convicted or adjudicated person did not file an affidavit declaring, under penalty of perjury, the person's intent to file an application for post-conviction DNA testing of the physical evidence or biological material pursuant to Article 1, Chapter 28, Title 17 within ninety days followed by the actual filing of the application;
- (4) the solicitor or the Attorney General, as applicable, and the victim have not filed a response requesting that the physical evidence or biological material not be disposed of; and
- (5) no other provision of federal or state law, regulation, or court rule requires preservation of the physical evidence or biological material.

(F) If the court issues an order for the disposition of the physical evidence or biological material, the court may require a custodian of evidence to take reasonable measures to remove and preserve portions of the physical evidence or biological material in a quantity sufficient to:

# Preservation of Evidence Act (DNA Act) Policy

(1) permit future DNA testing or other scientific analysis; or

(2) for other reasons, upon request and good cause shown, by the solicitor or Attorney General, as applicable, or the victim.

HISTORY: 2008 Act No. 413, Section 2, eff January 1, 2009.

## **SECTION 17-28-350.** Wilful destruction.

A person who wilfully and maliciously destroys, alters, conceals, or tampers with physical evidence or biological material that is required to be preserved pursuant to this article with the intent to impair the integrity of the physical evidence or biological material, prevent the physical evidence or biological material from being subjected to DNA testing, or prevent the production or use of the physical evidence or biological material in an official proceeding, is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars for a first offense, and not more than five thousand dollars or imprisoned for not more than one year, or both, for each subsequent violation.

HISTORY: 2008 Act No. 413, Section 2, eff October 21, 2008.

## **SECTION 17-28-360.** Failure to preserve; cause of action against responsible entity; right to release.

Unless there is an act of gross negligence or intentional misconduct this article may not be construed to give rise to a claim for damages against the State of South Carolina, a political subdivision of the State, an employee of the State, or a political subdivision of the State. Failure of a custodian of evidence to preserve physical evidence or biological material pursuant to this article does not entitle a person to any relief from conviction or adjudication but does not prohibit a person from presenting this information at a subsequent hearing or trial.

HISTORY: 2008 Act No. 413, Section 2, eff January 1, 2009.

## **Procedures**

### **A. Case Management/Review**

1. For deaths investigated by this office, which are likely the result of offenses outlined in the Act, items of evidence will be retained indefinitely.
2. Keeping in mind the requirements of the Act only apply upon conviction of an individual for one of the 24 offenses listed in the Act, the evidence technician is responsible for routinely checking the status of cases to see if an offender has been arrested and if a conviction has occurred and if the conviction was the result of a plea or a trial (which affects retention guidelines).

### **B. Updating Status Change**

Upon discovery of a conviction or plea for an offense listed in the Act, the evidence technician will update the evidence management computer records changing the physical storage location for the affected items to the appropriate DNA Act storage area. A new

## Preservation of Evidence Act (DNA Act) Policy

barcode label will be generated and affixed over the old sticker to indicate the changes.

### C. Storage

1. Items will be stored in separate, clearly marked, and designated places in the evidence room, or on a specially designated area in the refrigerators or freezers.
2. Evidence management computer records and barcode sticker locations will reflect the change. For example, a blood spot card's storage location would be "DNA Act – Blood Spot Cards Box 1"; blood tox tubes' storage location would be "DNA Act-Fridge".

### D. Registration with SWORD (State-Wide Offender Database)

#### 1. Requirement

Section 17-28-330 (A) requires that, after a defendant has been convicted or adjudicated for an offense listed in Section 17-28-320, a custodian of evidence ***shall*** register with the SCDOC or the SCDJJ, as applicable, as a custodian of evidence for physical evidence or biological material related to the defendant's conviction or adjudication.

2. The evidence technician will go online to <https://public.doc.state.sc.us/scdc-public/> and register as instructed to a particular inmate.
3. For juvenile offenders, Deputies holding evidence that qualifies under the DNA Act will call the Inspector General's Office at (803)896-9357 and register in writing as required via fax or email.
4. Update evidence management (Tracker) records and/or paper files or MDI records.

### E. Retention and Circumstances for Destruction

1. If the person is convicted or adjudicated on a guilty or nolo contendere plea for a qualifying offense, the physical evidence or biological material must be preserved for seven years from the date

## Preservation of Evidence Act (DNA Act) Policy

of sentencing or until the person is released from incarceration, dies while incarcerated, or is executed for the offense.

2. If the person is convicted by bench or jury trial for a qualifying offense, the physical evidence, and biological material must be preserved until the person is released from incarceration, dies while incarcerated, or is executed for the offense.
5. Upon written notification by the SC Dept. of Corrections (SCDOC) or Dept. of Juvenile Justice (SCDJJ) that a convicted or adjudicated person has been released (without provisions of parole), or the person has died in custody or the person has completed their sentence or has been executed AND the case Deputy has cleared the destruction with the 9<sup>th</sup> Circuit Solicitor's Office in writing AND upon specific, written authorization by the Coroner, the case Deputy may then destroy the items related to the case or may make arrangements for the transfer of the items to the Sheriff's Office for destruction or otherwise properly dispose of the items.
6. Use caution when a defendant is sentenced to probation or is released on parole or community supervision programs. Although they are not "incarcerated" as defined in the Act, they are subject to revocation from those programs and being returned to an incarcerated status. Items of evidence in those types of cases should be held until it is established in writing that the sentence has been completed, the person has died or the seven-year time minimum has passed where applicable.
7. Once the final approval is obtained, the evidence technician, case Deputy, or a designee and one other person will pull the items from their current storage location and destroy the items to a degree that renders them useless. Items will be discarded in the dumpster where possible and in accordance with state and federal regulations. Higher security items such as firearms, medication, and suspected illicit drugs will be destroyed as directed in their

## Preservation of Evidence Act (DNA Act) Policy

respective policies. Biohazard items will be bagged and sealed in red 'bio bags' and will be transported by the designated county contracted transport service (currently Stericycle) to a DHEC-approved destruction site.

8. The case Deputy or the evidence technician will update the evidence management computer records and paper/cloud case file to reflect the destruction.
9. The original written authorization to destroy the item(s) will be held in the case file.

### D. Criminal Liability for Custodians of Evidence

Deputies and employees handling or storing evidence should be aware that Section 17-28-350 provides that it is a misdemeanor offense for a custodian of evidence to willfully and maliciously destroy, alter, conceal, or tamper with physical evidence or biological material that is required to be preserved under the Act with the intent to impair the integrity, prevent testing or prevent the production or use of physical evidence or biological material in an official proceeding.