



Commonwealth of Kentucky
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Subject: Whether biological evidence obtained during a criminal sexual assault investigation may be destroyed less than ten years after its collection because the alleged victim chooses not to proceed with criminal charges against the accused.

Requested by: Melvin C. Leonhart, Commonwealth's Attorney, Twentieth Judicial Circuit

Written by: Carmine G. Iaccarino and Marc Manley, Assistant Attorneys General

Syllabus: Under the plain language of KRS 524.140(2)(b), no biological evidence obtained during a criminal sexual assault investigation may be destroyed less than ten years following its collection into evidence, unless the provisions of KRS 524.140(3) apply.

Statute construed: KRS 524.140

Opinion of the Attorney General

Under KRS 524.140, may a law enforcement agency seek a court order to destroy biological evidence obtained from a criminal sexual assault investigation three years after its collection when the alleged victim has declined to press criminal charges? To answer this question, "[w]e start, of course, with the statutory text." *BP*

Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006). KRS 524.140 describes two instances in which “biological evidence”¹ may be destroyed:

No item of biological evidence . . . that may be subject to . . . (DNA) evidence testing and analysis in order to assist federal, state, and local criminal justice and law enforcement agencies within and outside the Commonwealth in the identification, detection, or exclusion of individuals who are subjects of investigation or prosecution, or to confirm the guilt or innocence of a criminal defendant, shall be disposed of prior to a criminal trial unless:

- (a) The evidence has been in custody not less than fifty (50) years; or
- (b) The evidence has been in custody not less than ten (10) years; and
 - 1. The prosecution has determined that the defendant will not be tried for the criminal offense; and
 - 2. The prosecution has made a motion, before the court in which the case would have been tried, to destroy the evidence.

First, these provisions apply if the biological evidence “may be subject to [DNA] evidence testing and analysis in order to assist federal, state, and local criminal justice and law enforcement agencies within and outside the Commonwealth in the identification, detection, or exclusion of individuals who are subjects of investigation or prosecution, or to confirm the guilt or innocence of a criminal defendant.” If this threshold requirement is met, such biological evidence may only be destroyed subject to the two specific statutory preconditions listed. The first provision simply requires that the evidence has been in custody not less than 50 years. The second requires that the evidence has been in custody not less than 10 years. Because the evidence you reference has been in custody for less than ten years, neither of the threshold requirements of KRS 524.140(2)(a) or (b) have been met and the evidence may not be destroyed—regardless of any other considerations.

According to the plain language of KRS 524.140(2), the General Assembly has determined a minimum of ten years must pass before it is appropriate to seek destruction of biological evidence obtained during the course of a sexual assault

¹ According to KRS 524.140(1)(a), biological evidence means “[t]he contents of a sexual assault evidence collection kit” or “[a]ny item, or representative sample taken from an item, that contains blood, saliva, sperm, hair, tissue, bones, teeth, or other bodily fluids that was collected as part of a criminal investigation and that reasonably may be used to incriminate or exculpate any person from an offense or delinquent act.”

investigation, unless the accused has already been tried. *See* KRS 524.140(3). In fact, the destruction of evidence in violation of these provisions is a Class D felony. KRS 524.140(6).

For these reasons, this Office must opine that under KRS 524.140, a law enforcement agency may not seek a court order to destroy biological evidence obtained from a criminal sexual assault investigation three years after its collection and when the alleged victim has declined to press criminal charges.

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