

**PRESERVING INNOCENCE: BIOLOGICAL EVIDENCE
PRESERVATION AND SYSTEMATIC REFORM**

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I. INTRODUCTION

On the morning of January 14, 1985, a young pregnant woman was assaulted and raped at knifepoint in her bed, while her two-year-old daughter slept beside her.¹ Four months after the rape, the victim spotted her alleged assailant, Kevin Byrd.² Her identification of him led to a rape conviction with a life sentence.³ At the time of Mr. Byrd’s trial, DNA technology, using forensic testing and analysis of biological evidence, was not standard practice.⁴ In 1997, while the case was on appeal, a comparison of Mr. Byrd’s DNA with the bodily fluid found in the rape kit established that Mr. Byrd could not have committed the rape.⁵ After serving 12 years in prison, Mr. Byrd was exonerated as a result of the scientific advancements in DNA technology.⁶

Mr. Byrd’s case is unsettling because it was by pure luck that the evidence containing biological material (“biological evidence”) collected in the victim’s rape kit had been preserved for over a decade at the Harris County Clerk’s Office in Houston, Texas.⁷ In Texas, evidence custodians were given

¹ *Kevin Byrd*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/552/> (last visited Apr. 12, 2018).

² *Id.*

³ *Id.*

⁴ *See id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

“complete discretion to either retain or destroy old evidence from closed cases, regardless of any potential value the evidence might have in establishing the actual innocence of a prisoner.”⁸

Physical evidence is paramount for prosecuting and defending criminal cases, yet the practice of preserving and maintaining that evidence is often underfunded or poorly managed.⁹ While the practice of destroying biological evidence in closed cases was routine prior to the widespread use of post-conviction DNA testing, “the current practice of destroying biological evidence, with full knowledge of its potential use to exonerate the wrongfully convicted, is a cruel and callous injustice.”¹⁰

To date, there have been 356 prisoners exonerated in the United States through the use of DNA analysis performed on biological evidence retained by the government.¹¹ Those individuals served an average sentence of 14 years prior to being released from prison.¹² Of those exonerees, 20 of them served time on death row.¹³ While other factors undoubtedly contribute to these convictions, the preservation and destruction of biological evidence have been—and continue to be—the two that significantly exacerbate this problem.¹⁴

The Innocence Project of the Benjamin Cardozo School of Law¹⁵ reported that 75% of its cases were closed because of lost or destroyed evidence.¹⁶ “Often the blame for these mishaps is directed toward . . . evidence custodians [or court clerks] housed in [local] law enforcement agencies.”¹⁷ While

⁸ Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1240 (2005).

⁹ COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS., NAT’L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 36–37 (2009) [hereinafter NAS REPORT].

¹⁰ Jones, *supra* note 8, at 1241.

¹¹ *Exonerate the Innocent*, INNOCENCE PROJECT, <https://www.innocenceproject.org/exonerate/> (last visited Apr. 13, 2018).

¹² *Id.*

¹³ *Id.*

¹⁴ Krista A. Dolan, *Creating the Best Practices in DNA Preservation: Recommended Practices and Procedures*, 49 CRIM. L. BULL. 319, 319–20 (2013); *see also* Jones, *supra* note 8, at 1240.

¹⁵ The Innocence Project of the Benjamin Cardozo School of Law is recognized as “the national leader in the use of DNA to exonerate [the] wrongfully convicted.” Jones, *supra* note 8, at 1240–41.

¹⁶ *Id.* (citing EDWARD CONNORS ET AL., U.S. DEP’T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 2 (1996), <https://www.ncjrs.gov/pdffiles/dnaevid.pdf>).

¹⁷ SUSAN BALLOU ET AL., NAT’L INST. OF STANDARDS AND TECH. & NAT’L INST. OF JUSTICE, THE BIOLOGICAL EVIDENCE PRESERVATION HANDBOOK: BEST PRACTICES FOR EVIDENCE HANDLERS iv (2013), https://www.wsp.wa.gov/forensics/docs/crimelab/handbook/nist_biological_evidence_preservation_handbook.pdf.

these individuals are responsible for “maintaining the integrity of the evidence,” the source of the problem lies within “systemic failure to properly account for evidence from collection through final disposition.”¹⁸ Further, this problem is compounded because operational procedures for evidence preservation lack standardization and uniformity across jurisdictions.¹⁹

All 50 states provide prisoners with the right to post-conviction DNA testing.²⁰ However, many states’ laws lack uniformity in their standards for preserving evidence and often are vague and not enforced.²¹ Moreover, six states, including West Virginia, do not mandate that the government preserve biological evidence needed for DNA testing and analysis, rendering the avenue for post-conviction DNA testing fruitless.²² In order to protect the individuals for whom these remedial statutes were enacted, policy makers must “remedy the harm suffered by prisoners who have been permanently deprived of the only avenue for establishing actual innocence.”²³

While states with evidence preservation statutes are ahead of the rest, unfortunately, their statutes are flawed and fail to adequately protect the rights of the wrongfully convicted. The introduction of this paper provided an outline of the problem set. Part II will provide an overview of evidence preservation. Part III will examine the challenges and policy considerations regarding the implementation of an evidence preservation statute. Lastly, Part IV will propose an evidence preservation statute for West Virginia that requires the government to preserve biological evidence needed for post-conviction DNA testing and analysis.²⁴

¹⁸ *Id.*

¹⁹ NAS REPORT, *supra* note 9, at 6.

²⁰ *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, <https://www.innocenceproject.org/access-post-conviction-dna-testing/> (last visited Apr. 12, 2018).

²¹ *See id.*

²² *Delaware*, INNOCENCE PROJECT, <https://www.innocenceproject.org/policy/delaware/> (last visited Apr. 12, 2018); *Idaho*, INNOCENCE PROJECT, <https://www.innocenceproject.org/idaho/> (last visited Apr. 12, 2018); *New York*, INNOCENCE PROJECT, <https://www.innocenceproject.org/new-york/> (last visited Apr. 12, 2018); *North Dakota*, INNOCENCE PROJECT, <https://www.innocenceproject.org/north-dakota/> (last visited Apr. 12, 2018); *Vermont*, INNOCENCE PROJECT, <https://www.innocenceproject.org/vermont/> (last visited Apr. 12, 2018); *West Virginia*, INNOCENCE PROJECT, <https://www.innocenceproject.org/policy/west-virginia/> (last visited Apr. 12, 2018).

²³ Jones, *supra* note 8, at 1241.

²⁴ The language in the proposed statute is also useful for policy makers in other states looking to optimize and improve their current evidence preservation statutes.

II. BACKGROUND

Evidence management policies establish the procedures for storing physical evidence²⁵ and serve as a vital implementation tool in the criminal justice system for ensuring access to physical evidence during trial and post-conviction litigation.²⁶ While all 50 states follow some form of evidence preservation policy, the specific language in these policies varies within each state.²⁷ Section II.A will discuss biological evidence preservation with regard to storage, preservation, and disposition. Section II.B will discuss evidence preservation statutes.

A. *What Is Biological Evidence Preservation?*

Biological evidence is routinely used in criminal proceedings.²⁸ Biological evidence, “provided by specimens of a biological origin[,] . . . may be found at the scene of a crime or on a person, clothing, or weapon.”²⁹ The most common types of biological evidence are blood, semen, and saliva.³⁰ Human biological evidence that contains DNA is valuable because “the possibility exists to associate that [piece of] evidence with one individual with a degree of reliability that is acceptable for criminal justice.”³¹ For example, in a sexual assault case, swab samples collected from areas of the victim’s body thought to contain traces of DNA may be tested and compared to the DNA profile of the accused party to look for a match.³² In order to produce valid and reliable DNA testing results, the biological evidence must be properly collected, stored, and preserved.³³

²⁵ Jones, *supra* note 8, at 1242. Common forms of biological evidence include rape kits, samples of hair, saliva, and semen. *See id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ NAS REPORT, *supra* note 9, at 9. Biological evidence in each particular case must be properly collected, processed, and tracked “to avoid contamination, premature destruction, or degradation.” BALLOU ET AL., *supra* note 17, at iv.

²⁹ NAS REPORT, *supra* note 9, at 128. Biological evidence found at the crime scene includes botanical remnants such as pet hairs, insects, or seeds. *Id.* “Other biological evidence comes from specimens obtained directly from the victim or suspect . . .” *Id.* Such specimens include “blood, semen, saliva, vaginal secretions, sweat, epithelial cells, vomitus, feces, urine, hair, tissue, bones, and microbiological and viral agents.” *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *See id.* at 9. A match between two DNA profiles does not confirm that the accused party is identified as the true perpetrator. *See id.*

³³ *See id.*

Prior to the 1990s, samples of hair and blood-stained clothing were deemed useless after the defendant was convicted.³⁴ With the implementation of post-conviction DNA testing, as well as technological advancements that made it possible to extract and analyze biological material from old pieces of evidence, evidence that was once lost, destroyed, or deemed useless became vitally important in proving that an innocent person was wrongfully convicted.³⁵ This resulted in an increased focus on evidence management policies and procedures for retaining and preserving physical evidence.³⁶ Without an efficient evidence management system, mandating the retention and preservation of biological evidence, it will be extremely difficult, if not impossible, to locate old evidence during post-conviction proceedings.³⁷

The Biological Evidence Preservation Handbook provides guidance to the law enforcement community with appropriate standards and protocols on evidence management practices.³⁸ Currently, states are not required to implement such guidelines into their evidence management policies.³⁹ While practical guidance on the best evidence management practices fills a critical gap, policy makers should enact laws to require law enforcement and biological evidence handlers to implement such laws.⁴⁰ Although the majority of states have some form of an evidence management policy in place, such management policies often fail to meet the bare minimum of what is needed for evidence preservation.⁴¹

This Section will begin with a discussion of the proper practices for retaining and preserving biological evidence. Specifically, it will discuss identifying and retaining biological evidence; storing biological evidence;⁴² and recommendations for best practices, policies, and procedures for the retention of biological evidence.

³⁴ See Jones, *supra* note 8, at 1242–43. At the time, “there was no compelling reason to preserve [such] physical evidence, and not much attention was paid to how and where evidence was” stored. *Id.*

³⁵ *Id.* at 1243.

³⁶ *Id.*

³⁷ *Id.* at 1245.

³⁸ See generally BALLOU ET AL., *supra* note 17.

³⁹ Jones, *supra* note 8, at 1243–44; see also *Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1567 (1995) (stating that evidence preservation policies and protocols vary among jurisdictions).

⁴⁰ SUSAN BALLOU ET AL., NAT’L INST. OF STANDARDS AND TECH. & NAT’L INST. OF JUSTICE, BIOLOGICAL EVIDENCE PRESERVATION: CONSIDERATIONS FOR POLICY MAKERS 1 (2015), <http://nvlpubs.nist.gov/nistpubs/ir/2015/NIST.IR.8048.pdf>.

⁴¹ Jones, *supra* note 8, at 1245.

⁴² While packaging is an extremely vital part in the evidence retention process, this paper focuses on the storage of biological evidence.

To ensure biological evidence is properly preserved, evidence retention laws must provide evidence handlers a clear understanding of what types of evidence constitute biological evidence.⁴³ A clearly defined biological evidence law would prevent ambiguity and promote efficiency from the start.⁴⁴

In the criminal justice system, biological evidence refers to substances that are biological in nature such as skin, hair follicles, blood, and semen, all of which could be tested for deoxyribonucleic acid, or DNA.⁴⁵ Potential sources of biological evidence at a crime scene include, but are not limited to, the following sources of biological evidence: (1) sweat, hair, semen, or saliva located on the surface area of a blanket; (2) sweat, hair, or dandruff located on the inside of a hat, bandanna, or mask; (3) saliva located on the licked area of a stamp or an envelope; and (4) blood, sweat, or tissue located in the scrapings of a person's fingernail.⁴⁶

To facilitate forensic testing for trial and post-conviction proceedings, it is essential to properly package and store evidence to prevent contamination and ensure reliable analysis in the future.⁴⁷ Biological evidence must be stored in proper environmental conditions to protect it from degradation and to ensure easy retrieval and identification.⁴⁸ Proper storage conditions depend on the type of evidence but typically include protection from moisture, sunlight, and excessive

⁴³ BALLOU ET AL., *supra* note 40, at 4.

⁴⁴ *Id.* (providing the following recommendation for a definition: “[e]vidence commonly recovered during a criminal investigation in the form of skin, hair, tissue, bones, teeth, blood, semen, or other bodily fluids, which may include samples of biological materials, or evidence items containing biological material”).

⁴⁵ DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: FORENSICS § 2:1 (2008). DNA is a complex molecule that contains the genetic information in all living organisms, which is passed down from generation to generation. *Id.* In the criminal justice system, samples of human DNA are used primarily in rape and murder cases. *Id.* Further, the objective of DNA analysis is to detect variations in the genetic material that differentiate individuals from one another. *See, e.g.*, NAT’L RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 27–28, 28 tbl.1.1 (1992), <https://www.nap.edu/read/1866/chapter/1>.

⁴⁶ BALLOU ET AL., *supra* note 17, at 2 tbl.1–1; *see, e.g.*, *People v. Soto*, 981 P.2d 958, 960–61 (Cal. 1999) (discussing the admissibility of DNA found in a semen stain on the victim’s bedspread).

⁴⁷ Mariya Goray et al., *DNA Transfer Within Forensic Exhibit Packaging: Potential for DNA Loss and Relocation*, 6 FORENSIC SCI. INT’L: GENETICS 158, 158 (2012). There is need for improvements in the collection and packaging of biological evidence. *Id.* Using the common packaging methods, various samples of saliva gathered from a mock crime scene were packaged and transported to a laboratory for DNA analysis. *Id.* at 160. While in transit, packaged saliva samples potentially transferred DNA containing material to the inside of their packaging, to other parts of the sample exhibit, and to other exhibits within the same package, all of which increase the chance of failing to generate adequate profiles in situations where the DNA content may otherwise would have been adequate. *Id.* at 166.

⁴⁸ BALLOU ET AL., *supra* note 17, at 16.

heat.⁴⁹ For example, blood-drawn samples submitted in a tube or vile should be stored in a refrigerator, whereas dry biological stains are best preserved when stored in a temperature controlled environment.⁵⁰

Disposition of evidence is the ongoing process of determining what to do with biological evidence in any given case.⁵¹ For example, this process typically involves the retention and disposal of biological evidence.⁵² It is done by the agency or evidence custodian responsible for the final determination of the need to retain evidence.⁵³ Depending on the jurisdiction, the disposition process may begin upon the completion of all judicial proceedings and/or the procedures regarding notification of disposal.⁵⁴ To properly notify the individual receiving the evidence and to mitigate the risk of liability, policy makers should require evidence custodians to include a “release-of-liability” document.⁵⁵ In sum, evidence that is properly packaged, stored, preserved, and disposed can mitigate future wrongful convictions, help solve closed cases, and exonerate the innocent.

B. *Biological Evidence Preservation Statutes*

Currently, 43 states and the District of Columbia require the preservation of biological evidence.⁵⁶ Only Delaware, Idaho, New York, North Dakota,

⁴⁹ *Id.* at 16–17.

⁵⁰ *Id.* at 20 tbl.III–2. A temperature controlled environment is maintained thermostatically between 60 to 75 degrees Fahrenheit, with less than 60% humidity. *Id.* at 17.

⁵¹ BALLOU ET AL., *supra* note 17, at 37.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ ALA. CODE § 15-18-200 (2018); ALASKA STAT. ANN. § 12.36.200 (West 2018); ARIZ. REV. STAT. ANN. § 13-4221 (2018); ARK. CODE ANN. § 12-12-104 (West 2018); CAL. PENAL CODE § 1417.9 (West 2018); COLO. REV. STAT. ANN. §§ 18-1-1101 to -1108 (West 2018); CONN. GEN. STAT. ANN. § 54-102jj (West 2018); D.C. CODE ANN. § 22-4134 (West 2018); FLA. STAT. ANN. § 925.11 (West 2018); GA. CODE ANN. § 17-5-56 (West 2018); HAW. REV. STAT. ANN. § 844D-126 (West 2018); 725 ILL. COMP. STAT. ANN. 5/116-5 (West 2018); IND. CODE ANN. § 35-38-7-14 (West 2018); IOWA CODE ANN. § 81.10 (West 2018); KAN. STAT. ANN. § 21-2512 (West 2018); KY. REV. STAT. ANN. § 524.140 (West 2018); LA. CODE CRIM. PROC. ANN. art. 926.1 (2018); ME. REV. STAT. ANN. tit. 15, § 2138 (2018); MD. CODE ANN., CRIM. PROC. § 8-201 (West 2018); MASS. GEN. LAWS ANN. ch. 278A, § 16 (West 2018); MICH. COMP. LAWS ANN. § 770.16 (West 2018); MINN. STAT. ANN. § 590.10 (West 2018); MISS. CODE ANN. § 99-49-1 (West 2018); MO. ANN. STAT. § 650.056 (West 2018); MONT. CODE ANN. § 46-21-111 (West 2018); NEB. REV. STAT. ANN. § 29-4125 (West 2018); NEV. REV. STAT. ANN. § 176.0912 (West 2018); N.H. REV. STAT. ANN. § 651-D:3 (2018); N.J. STAT. ANN. § 52:17B-106 (West 2018); N.M. STAT. ANN. § 31-1a-2 (West 2018); N.C. GEN. STAT. ANN. § 15A-268 (West 2018); OHIO REV. CODE ANN. § 2933.82 (West 2018); OKLA. STAT. ANN. tit. 22 § 1372 (West 2018); OR. REV. STAT. ANN. § 133.707 (West 2018); 42 PA. STAT. AND CONS. STAT. ANN § 9543.1 (West 2018); 10 R.I. GEN.

Vermont, and West Virginia do not require preservation of biological evidence. This Section will discuss the four issues most frequently debated regarding evidence preservation statutes: (1) the duty to preserve biological evidence; (2) crime categories and the duration of preservation; (3) premature disposal of biological evidence; and (4) ambiguous statutory language.

Although post-conviction statutes in these states provide a right to DNA testing, without a statute establishing a duty to preserve evidence, post-conviction DNA testing statutes are rendered useless.⁵⁷ All of these statutes fall into one of three categories with respect to preserving biological evidence needed for DNA testing: (1) statutes with a blanket duty to preserve evidence; (2) statutes with an automatic duty to preserve evidence; and (3) statutes with no duty to preserve evidence.⁵⁸

Thirty-three states require automatic preservation of all biological evidence gathered during the initial criminal investigation.⁵⁹ This automatic qualification, triggered once there is a conviction, insulates biological evidence from inefficient evidence management policies that typically result in the discretionary disposal of such valuable evidence.⁶⁰ Here, the government has an obligation to preserve all biological evidence that was collected during the initial criminal investigation.⁶¹

In contrast to the automatic duty to preserve evidence, eight states impose a qualified duty, which requires the preservation of biological evidence

LAWS ANN. § 10-9.1-11 (West 2018); S.C. CODE ANN. § 17-28-320 (2018); S.D. CODIFIED LAWS § 25-5B-5 (2018); TENN. CODE ANN. § 40-30-309 (West 2018); TEX. CODE CRIM. PROC. ANN. arts. 38.43 (West 2018); UTAH CODE ANN. § 78B-9-301 (West 2018); VA. CODE ANN. § 19.2-270.4:1 (West 2018); WASH. REV. CODE ANN. § 10.73.170 (West 2018); WIS. STAT. ANN. § 968.205 (West 2018); WYO. STAT. ANN. § 7-12-304 (West 2018).

⁵⁷ Jones, *supra* note 8, at 1253–54.

⁵⁸ *Id.* at 1252–53.

⁵⁹ ALASKA STAT. ANN. § 12.36.200 (West 2018); ARIZ. REV. STAT. ANN. § 13-4221 (2018); ARK. CODE ANN. § 12-12-104 (West 2018); CAL. PENAL CODE § 1417.9 (West 2018); COLO. REV. STAT. ANN. § 18-1-1103 (West 2018); D.C. Code Ann. § 22-4134 (West 2018); FLA. STAT. ANN. § 925.11 (West 2018); GA. CODE ANN. § 17-5-56 (West 2018); HAW. REV. STAT. ANN. § 844D-126 (West 2018); 725 ILL. COMP. STAT. ANN. 5/116-4 (West 2018); KY. REV. STAT. ANN. § 524.140 (West 2018); LA. STAT. ANN. § 15:621 (West 2018); MD. CODE ANN. CRIM. PROC. § 8-201 (West 2018); MASS. GEN. LAWS ANN. ch. 278A, § 16 (West 2018); MICH. COMP. LAWS ANN. § 770.16 (West 2018); MINN. STAT. ANN. § 590.10 (West 2018); MISS. CODE ANN. § 99-49-1 (West 2018); MO. ANN. STAT. § 650.056 (West 2018); MONT. CODE ANN. § 46-21-111 (West 2018); NEB. REV. STAT. ANN. § 29-4125 (West 2018); NEV. REV. STAT. ANN. § 176.0912 (West 2018); N.H. REV. STAT. ANN. § 651-D:3 (2018); N.J. STAT. ANN. § 52:17B-106 (West 2018); N.M. STAT. ANN. § 31-1A-2 (West 2018); N.C. GEN. STAT. ANN. § 15A-268 (West 2018); OHIO REV. CODE ANN. § 2933.82 (West 2018); OKLA. STAT. ANN. tit. 22, § 1372 (West 2018); OR. REV. STAT. ANN. § 133.707 (West 2018); 10 R.I. GEN. LAWS ANN. § 10-9.1-11 (West 2018); S.C. CODE ANN. § 17-28-320 (2018); TEX. CODE CRIM. PROC. ANN. art. 38.43 (West 2018); WIS. STAT. ANN. § 978.08 (West 2018).

⁶⁰ Jones, *supra* note 8, at 1256.

⁶¹ *Id.*

with the qualification of some form of petition or court order.⁶² For example, Utah's statute provides that "[a]fter a petition is filed under this section, prosecutors, law enforcement officers, and crime laboratory personnel have a duty to cooperate in preserving evidence"⁶³ Although not as comprehensive as the automatic duty to preserve, the qualified duty does provide some form of protection against evidence destruction.

The remaining six states impose no duty and remain silent on preservation of biological evidence for post-conviction DNA testing.⁶⁴ While these states provide prisoners a right to post-conviction DNA testing, they fail to mandate preservation of such evidence needed to give that right any real meaning.⁶⁵ Statutes that fail to impose a clear duty to preserve biological evidence give government officials full discretion to nullify a post-conviction DNA testing statute "by systematically destroying all biological evidence in every closed criminal case pursuant to the local evidence management policy."⁶⁶

In conclusion, jurisdictions with either a qualified duty to preserve biological evidence or no duty provide prisoners with "an illusory right to post-conviction DNA testing."⁶⁷ In contrast, automatic duty statutes provide the most comprehensive protection for post-conviction DNA testing. Policy makers looking to create or improve their qualified duty statutes should "require the automatic retention of biological evidence by government entities from the time of collection"⁶⁸

The majority trend is to only require preservation for violent offenses, such as homicide and sexual assault cases.⁶⁹ Many states specify the particular offenses that require the preservation of evidence.⁷⁰ Seventeen states and the District of Columbia require biological evidence preservation for felony offenses.⁷¹ Other states statutorily define which crimes should require evidence

⁶² See, e.g., UTAH CODE ANN. § 78B-9-301 (West 2018).

⁶³ *Id.* § 78B-9-301(5).

⁶⁴ See sources cited *supra* note 22.

⁶⁵ Jones, *supra* note 8, at 1253–54; see generally *People v. Trama*, 636 N.Y.S.2d 982, 985 (N.Y. Ct. Ct. 1995) (holding that the state could discard the rape kit and victim's clothing in absence of a request for evidence made within 30 days of last appellate determination).

⁶⁶ Jones, *supra* note 8, at 1253.

⁶⁷ *Id.* at 1257.

⁶⁸ BALLOU ET AL., *supra* note 40, at 5.

⁶⁹ See *id.* at 6.

⁷⁰ *Id.*

⁷¹ COLO. REV. STAT. ANN. § 18-1-1102(1) (West 2018); D.C. CODE § 22-4134(a) (West 2018); FLA. STAT. ANN. § 925.11 (West 2018); IND. CODE ANN. § 35-38-7-14 (West 2018); IOWA CODE ANN. § 81.10(1) (West 2018); KAN. STAT. ANN. § 21-2512 (West 2018); KY. REV. STAT. ANN. § 524.140(1)(a) (West 2018); LA. CODE CRIM. PROC. ANN. art. 926.1(A)(1) (2018); MICH. COMP. LAWS ANN. § 770.16(1) (West 2018); MONT. CODE ANN. 46-21-111(1)(a) (West 2018); N.M. STAT. ANN. § 31-1A-2(A) (West 2018); N.C. GEN. STAT. ANN. § 15A-268(a6)(3) (West 2018); OKLA.

preservation,⁷² with nine states requiring evidence preservation in all crime categories.⁷³

In determining the duration of time for retention of biological evidence, the majority of states require retention for the period of the time that the individual is incarcerated.⁷⁴ However, this time limit depends on the type of crime. Twenty-one states and the District of Columbia have a provision that provides the specific length of time that biological evidence should be retained based on each individual jurisdiction's categorization of criminal offenses.⁷⁵ For example, in North Carolina, for a conviction resulting in a sentence of death, the biological evidence must be retained until the defendant is executed, whereas, for a "conviction of any homicide, sex offense, assault, kidnapping, burglary, robbery, arson or burning, for which a Class B1-E felony punishment is imposed, the evidence shall be preserved during the period of incarceration and mandatory supervised release, including sex offender registration"⁷⁶

In determining the duration of time for the retention of biological evidence, states should consider the status of the particular case.⁷⁷ Generally, the case status falls into one of four categories: (1) open cases, where the investigation is on-going; (2) charges filed, where a suspect has been charged or arrested; (3) adjudicated, where there is either a conviction, dismissal, or

STAT. ANN. tit. 22, § 1372(A) (West 2018); S.D. CODIFIED LAWS § 23-5B-1 (2018); TEX. CRIM. PROC. CODE ANN. art. 38.43(a)(2) (West 2018); UTAH CODE ANN. § 78B-9-301(2) (West 2018); VA. CODE ANN. § 19.2-270.4:1(A) (West 2018); WASH. REV. CODE ANN. § 10.73.170(1) (West 2018).

⁷² See, e.g., S.C. CODE ANN § 17-28-320(A)(1)–(24) (2018) (enumerating 24 distinct offenses for which evidence should be preserved).

⁷³ CAL. PENAL CODE § 1417.9(a) (West 2018); GA. CODE ANN. § 17-5-56(a) (West 2018); MASS. GEN. LAWS ANN. ch. 278A, § 16(a) (West 2018); MINN. STAT. ANN. § 590.10 (West 2018); MISS. CODE ANN. § 99-49-1(3) (West 2018); NEB. REV. STAT. ANN. § 29-4125(1) (West 2018); 10 R.I. GEN. LAWS ANN. § 10-9.1-11(a) (West 2018); WIS. STAT. ANN. § 978.08 (West 2018); WYO. STAT. ANN. § 7-12-304 (West 2018).

⁷⁴ *Preservation of Evidence, INNOCENCE PROJECT*, <https://www.innocenceproject.org/preservation-of-evidence/> (last visited Apr. 12, 2018).

⁷⁵ ALASKA STAT. ANN. § 12.36.200(2)(a) (West 2018); ARIZ. REV. STAT. ANN. § 13-4221(A)(1) (West 2018); ARK. CODE ANN. § 12-12-104(b) (West 2018); COLO. REV. STAT. ANN. § 18-1-1102 (West 2018); CONN. GEN. STAT. ANN. § 54-102jj(b) (West 2018); D.C. CODE ANN. § 22-4134(a) (West 2018); FLA. STAT. ANN. § 925.11(4)(b) (West 2018); HAW. REV. STAT. ANN. § 844D-126 (West 2018); 725 ILL. COMP. STAT. ANN. 5/116-4(b) (West 2018); KY. REV. STAT. ANN. § 524.140(7) (West 2018); MD. CODE ANN. CRIM. PROC. § 8-201(j)–(k) (West 2018); MICH. COMP. LAWS ANN. § 770.16(12) (West 2018); MONT. CODE ANN. 46-21-111(1)(a) (West 2018); NEV. REV. STAT. ANN. § 176.0912(1) (West 2018); N.H. REV. STAT. ANN. § 651-D:3(I) (2018); N.M. STAT. ANN. § 31-1A-2(L) (West 2018); N.C. GEN. STAT. ANN. § 15A-268(a6) (West 2018); OHIO REV. CODE ANN. § 2933.82(B) (West 2018); OKLA. STAT. ANN. tit. 22 § 1372(A) (West 2018); OR. REV. STAT. ANN. § 133.707(2) (West 2018); S.C. CODE ANN. § 17-28-340 (2018); TEX. CRIM. PROC. CODE ANN. art. 38.43(c) (West 2018).

⁷⁶ N.C. GEN. STAT. ANN. § 15A-268(a6)(3) (West 2018).

⁷⁷ BALLOU ET AL., *supra* note 40, at 6.

acquittal; and (4) unfounded, refused, or denied, where there is no longer an active investigation.⁷⁸ The National Institute of Standards and Technology recommends that policy makers in each state should, at a minimum, require the retention of biological evidence for homicide offenses, in which the case status is open or charges have been filed, indefinitely, whereas, if the case status is adjudication, the biological evidence should be retained for at least the length of incarceration.⁷⁹

In addition to the challenges posed by defining what crimes should require evidence preservation and how long such evidence should be retained, there are also challenges involving the premature disposal of biological evidence. Among the states that have evidence retention statutes, the majority of them allow for early disposition of biological evidence.⁸⁰ Generally, these laws require the evidence custodian responsible for the retention of the biological evidence to provide advance notice to the defendant and the court.⁸¹

While 43 states and the District of Columbia have implemented preservation of biological evidence statutes,⁸² many are severely limited.⁸³ “Existing state laws vary in their definitions of what constitutes biological evidence in the context of evidence retention.”⁸⁴ For example, three states define biological evidence as that which may reasonably “be used to incriminate or exculpate any person.”⁸⁵ Ambiguous definitions create challenges for individuals responsible for biological evidence.⁸⁶ A more encompassing statute would define biological evidence as “[e]vidence commonly recovered during a criminal investigation in the form of skin, hair, tissue, bones, teeth, blood, semen, or other bodily fluids, which may include samples of biological materials, or evidence items containing biological material.”⁸⁷ To guarantee that biological evidence is properly preserved, evidence handlers should provide a clear understanding of what types of evidence should be categorized as biological.⁸⁸

“‘Biological evidence management’ refers to the handling of biological evidence from collection through final disposition of the evidence” and is vital

⁷⁸ *Id.*

⁷⁹ *Id.* at 7 tbl.3-1.

⁸⁰ *Id.* at 12.

⁸¹ *Id.*

⁸² See statutes cited *supra* note 56 and accompanying text.

⁸³ See Dolan, *supra* note 14, at 321.

⁸⁴ BALLOU ET AL., *supra* note 17, at 1.

⁸⁵ LA. STAT. ANN. § 15:621(E)(1) (West 2018); N.C. GEN. STAT. ANN. § 15A-268(a) (West 2018); OHIO REV. CODE ANN. § 2933.82(A)(1)(ii) (West 2018).

⁸⁶ BALLOU ET AL., *supra* note 40, at 4.

⁸⁷ *Id.*

⁸⁸ *Id.*

to the preservation of biological evidence.⁸⁹ The proper environmental storage condition, such as retaining the appropriate temperature, helps prevent loss, degradation, or contamination.⁹⁰ Thus, evidence handlers must utilize the best practices when storing biological evidence.⁹¹ Only a minority of states include in their statutes a provision requiring that biological evidence be properly stored.⁹²

It is imperative that policy makers in the six remaining states join the majority by requiring the preservation of biological evidence. Similarly, states with a qualified duty to preserve biological evidence should implement an automatic duty to preserve biological evidence. These actions will lead to increased exonerations for the wrongfully convicted.⁹³

III. POLICY CONSIDERATIONS

Despite the reliability and validity of using DNA evidence in post-conviction cases, criminal justice officials strongly oppose a statutory duty to preserve biological evidence. They argue that the financial and administrative costs related to long-term storage, existing from the initial collection of evidence through assigning responsibility for properly documenting the larger items of evidence containing biological material, are overly burdensome.⁹⁴

Even if officials agreed to impose the blanket duty to preserve biological evidence, the limited storage space in the already overcrowded evidence storage facilities would not protect against degradation of such evidence.⁹⁵ Additionally, criminal justice officials argue that most states lack the proper funding to preserve all biological evidence in the required temperature-controlled facilities.⁹⁶

While there is merit to these officials' concerns, the 2008 National Statistics Survey revealed that more than 76% of all crimes reported in the United States are property offenses, which generally do not involve biological

⁸⁹ *Id.* at 8.

⁹⁰ *See id.* at 7–8.

⁹¹ *Id.* at 8.

⁹² *See, e.g.,* ALA. CODE § 15-18-200 (2018); ALASKA STAT. ANN. § 12.36.200 (West 2018); ARIZ. REV. STAT. ANN. § 13-4221(B) (2018).

⁹³ *Preserving DNA Evidence Preserves the Ability to Prove Innocence*, INNOCENCE PROJECT, <https://www.innocenceproject.org/preservation-of-evidence/> (last visited Apr. 5, 2018).

⁹⁴ Jones, *supra* note 8, at 1262–63.

⁹⁵ Dolan, *supra* note 14, at 335; Jones, *supra* note 8, at 1263; *see also* Lauren Kern, *Waivering Rights*, HOUS. PRESS (July 12, 2001, 4:00 AM), <http://www.houstonpress.com/content/printView/6561209> (quoting a Texas judge that saving biological evidence in every case is a “gross waste of resources”).

⁹⁶ *See* Dolan, *supra* note 14, at 335.

evidence.⁹⁷ Such evidence is more likely to be recovered in rape and sexual assault cases, which account for less than 1% of all reported crimes.⁹⁸ For this reason, any automatic duty to preserve biological evidence will likely lead to a miniscule percentage of cases requiring space in these allegedly overcrowded evidence facilities.⁹⁹

Similarly, government officials would not need to retain large, oversized items of evidence that contain biological material.¹⁰⁰ For long-term preservation, the government need only to extract a small sample of biological material from the large or bulky item sufficient to retain representative samples of evidence.¹⁰¹ Once the extraction of biological material is complete, and depending on the jurisdiction, the government can discard or return the large, oversized physical evidence to the rightful owner.¹⁰² To this end, policy makers in each state should develop standards that specifically address the disposition pertaining to larger items of evidence containing biological material.¹⁰³

Furthermore, recent technological advancements in DNA testing demonstrate that DNA analysis can be successfully performed on biological material, so long as the biological evidence is protected from water and oxygen and stored in a room temperature environment, negating the assertion that such evidence requires refrigeration.¹⁰⁴ Nevertheless, even if the automatic duty to

⁹⁷ JAYNE E. ROBINSON ET AL., U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES: 2008 – STATISTICAL TABLES, at tbl.1 (Mar. 2010), <https://www.bjs.gov/content/pub/pdf/cvus08.pdf>; see also John T. Rago, “*Truth or Consequences*” and *Post-Conviction DNA Testing: Have You Reached Your Verdict?*, 107 DICK. L. REV. 845, 851–52 (2003).

⁹⁸ ROBINSON ET AL., *supra* note 97, at tbl.1 (reporting that there were approximately 21,312,400 crimes reported nationally in 2008, of which approximately 16,319,180 were property crimes such as theft, burglary, and motor vehicle theft, and approximately 203,830 were cases of rape and sexual assault).

⁹⁹ Jones, *supra* note 8, at 1264.

¹⁰⁰ *Id.*

¹⁰¹ See S. REP. NO. 107-315, at 20 (2002). Passing its biological evidence preservation statute, the United States Judiciary Committee, in its final report on the legislation, reported that “while it has been suggested that preserving biological evidence requires costly freezer space, experience demonstrates that as long as such evidence is stored in a dark dry room, air conditioned in the summer, it will remain robust for years.” *Id.*

¹⁰² See, e.g., VA. CODE ANN. § 19.2-270.4:1(D) (West 2018) (“[T]he court, upon a finding that the physical evidence is of such a nature, size or quantity that storage, preservation or retention of all of the evidence is impractical, may order the storage of only representative samples of the evidence. The Department of Forensic Science shall take representative samples, cuttings, or swabbings and retain them.”); see also ARK. CODE ANN. § 12-12-104(c)-(d) (West 2017); 725 ILL. COMP. STAT. ANN. 5/116-4(c)(1)–(2) (West 2018); N.M. STAT. ANN. § 31-1A-2(M)(3)-(4) (West 2018).

¹⁰³ BALLOU ET AL., *supra* note 40, at 12.

¹⁰⁴ Jacques Bonnet et al., *Chain and Conformation Stability of Solid-State DNA: Implications for Room Temperature Storage*, 38 NUCLEIC ACIDS RES. 1531, 1543–44 (2009) (demonstrating

preserve biological evidence would require additional resources, this cost outweighs the amount it takes to incarcerate an individual.¹⁰⁵

Furthermore, if evidence were preserved at the outset of a case, the government would actually preserve its resources because an appeal would not require it to collect new evidence beyond what was recovered for its own investigative use.¹⁰⁶ In sum, financial and limited storage space concerns “[should] not dictate whether the criminal justice system preserves biological evidence needed to prosecute the guilty and should not dictate whether evidence is preserved to exonerate the innocent.”¹⁰⁷

IV. PROPOSED EVIDENCE PRESERVATION BILL

West Virginia is one of six states that currently does not mandate that the government preserve biological evidence needed for post-conviction DNA testing and analysis. In the absence of a meaningful evidence preservation statute, the wrongfully convicted will continue to be deprived of any adequate post-conviction remedy. Section IV.A provides an overview of West Virginia’s post-conviction DNA statute. Section IV.B provides a summary for the proposed evidence preservation bill.

A. *West Virginia’s Post-Conviction DNA Statute*

Post-conviction DNA exonerations have resulted in the enactment of mandatory DNA testing statutes in all 50 states.¹⁰⁸ In 2004, the West Virginia Legislature passed a law granting access to post-conviction DNA testing in order “to assist federal, state, and local criminal justice and law-enforcement agencies in the identification, detection and exclusion of individuals who are subjects of the investigation or prosecution of violent crimes, sex-related crimes and other crimes against the person” through the use of DNA analysis.¹⁰⁹ An inmate must demonstrate that “[t]he evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion.”¹¹⁰

that “atmospheric water and oxygen are detrimental to DNA preservation at room temperature.” If protected from both water and oxygen, DNA “should maintain its primary and secondary structure for periods of time beyond the most demanding needs of conservation, thus validating the possibility of long-term room-temperature storage.”); *see also* Jones, *supra* note 9, at 1264.

¹⁰⁵ Jones, *supra* note 9, at 1269–70.

¹⁰⁶ *Id.* at 1264–65.

¹⁰⁷ *Id.*

¹⁰⁸ *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, <https://www.innocenceproject.org/access-post-conviction-dna-testing/> (last visited Apr. 12, 2018).

¹⁰⁹ W. VA. CODE ANN. § 15-2B-2 (West 2018).

¹¹⁰ W. VA. CODE ANN. § 15-2B-14(f)(1) (West 2018).

The effectiveness of any testing statute inherently relies on preservation of DNA evidence. Currently, section 57-5-11 of the West Virginia Code is the only statute that addresses the retention of evidence.¹¹¹ As it stands, section 57-5-11 only requires retention of evidence used in the prosecution or investigation of a crime no more than 30 days after a defendant's conviction.¹¹² In order to make a meaningful impact on the wrongfully accused, this paper submits for consideration a biological evidence preservation rule to the state policy makers of the six states that currently do not require preservation of biological evidence.

The purpose of the biological evidence preservation ("B.E.P.") statute is to improve the preservation and accessibility of evidence after a defendant is convicted. It would require the preservation of physical evidence, reasonably likely to contain semen, blood, saliva, hair, skin tissue, or other biological material, secured in the investigation or prosecution of a felony or sex-related crime, for the period of time that the person convicted of the crime remains incarcerated, on probation or parole, or subject to registration as a sex offender. In passing the B.E.P. statute, West Virginia would join the majority of other states that have adopted similar legislation requiring the preservation of evidence post-conviction. While every state in the country now has a standing post-conviction DNA testing law, "without a preservation requirement [it] provides little opportunity, if any, for a defendant to present persuasive evidence of his or her innocence to the court."¹¹³ Section 57-5-11 lacks a procedure ensuring that evidence previously collected in connection with a prisoner's criminal case is actually preserved.¹¹⁴

Furthermore, any circuit court in West Virginia has full discretion to dispose of any evidence used in the prosecution of a criminal defendant 30 days following the defendant's direct appeal.¹¹⁵ Such a brief period of time reduces the probability that an inmate could effectively demonstrate in his post-conviction DNA testing motion that certain evidence is still "available and in a condition that would permit the DNA testing requested in the motion."¹¹⁶ That, in conjunction with no requirement to provide notice of an intent to destroy evidence, gives the wrongfully convicted little hope of a remedy, under section 57-5-11, to overturn their conviction.

¹¹¹ See W. VA. CODE ANN. § 57-5-11 (West 2018).

¹¹² *Id.*

¹¹³ Karen Christian, "And the DNA Shall Set You Free": Issues Surrounding Post-Conviction DNA Evidence and the Pursuit of Innocence, 62 OHIO ST. L. J. 1195, 1237 (2001).

¹¹⁴ See W. VA. CODE ANN. § 57-5-11 (West 2018).

¹¹⁵ *Id.*

¹¹⁶ *Id.* § 15-2B-14(f)(1) (West 2018).

B. A Summary of the Proposed Legislation

The proposed B.E.P. statute would ensure that biological evidence is preserved after a defendant is convicted in the state of West Virginia. It would require “the appropriate governmental entity”¹¹⁷ to preserve any physical evidence that is reasonably likely to contain semen, blood, saliva, hair, skin tissue, or other biological material that was secured in the investigation or prosecution of a felony or sex-related crime for the period of time that the person convicted of the crime remains incarcerated, on probation or parole, or subject to registration as a sex offender.¹¹⁸

Further, it would define “appropriate governmental entity” as “any investigating law enforcement agency, the Clerk of the Circuit Court, or the prosecuting attorney.”¹¹⁹ Lastly, it would amend section 57-5-11 of the West Virginia Code so biological evidence would not be destroyed 30 days after a defendant’s final appeal, while still allowing circuit courts to dispose of any other kinds of evidence that do not contain biological material after 30 days.

The proposed B.E.P. statute would codify the biological evidence definition as being “any sexual assault forensic examination kit; or any physical evidence that is reasonably likely to contain semen, blood, saliva, hair, skin tissue, or other biological material.”¹²⁰ Further, it would allow entities to dispose of biological evidence before its expiration period, provided that the evidence custodian gives advance notice to the defendant and the defendant does not file a motion to retain the evidence, thereby relieving officials of onerous preservation requirements.¹²¹

In the event that the size or physical character of the preserved biological evidence makes preservation impractical, the proposed B.E.P. statute would allow the evidence custodian to remove and preserve only the portion of that evidence sufficient for future testing. Moreover, the governmental entity would be provided full discretion on how to preserve the biological evidence, so long as the evidence remains in a condition for future DNA testing and analysis.¹²²

¹¹⁷ The proposed preservation rule uses the catchall term “appropriate government entity” in order to avoid a situation in which a governmental agency in possession of the biological evidence would not be required under the law to preserve the evidence.

¹¹⁸ While a handful of states only require preservation for a specific time period, the majority of states require preservation for the duration of a defendant’s incarceration. *See, e.g.*, VA. CODE ANN. § 19.2-270.4:1 (West 2018) (requiring preservation for up to 15 years); 725 ILL. COMP. STAT. 5/116-4 (West 2018).

¹¹⁹ *See, e.g.*, GA. CODE ANN. § 17-5-56(a) (2018) (using “governmental entities” defined as “including, but not limited to, a law enforcement agency or a prosecuting attorney”).

¹²⁰ *See, e.g.*, MD. CODE ANN. CRIM. PROC. § 8-201(a)(2) (West 2018) (defining biological material as “any blood, hair, saliva, semen, epithelial cells, buccal cells, or other bodily substances from which genetic marker grouping may be obtained”).

¹²¹ *See, e.g.*, CAL. PENAL CODE § 1417.9(b) (West 2018).

¹²² *See, e.g.*, N.C. GEN. STAT. ANN. § 15A-268 (West 2018).

While West Virginia has enacted a right to post-conviction DNA testing, it lacks legislation requiring the preservation of any biological evidence associated with a defendant's conviction. Without such a statute, the Legislature's clear intention to provide state prisoners redress will be largely frustrated because there will likely be no evidence available for such testing to occur. As a result, West Virginia's right to post-conviction DNA testing is little more than an empty promise. The proposed B.E.P. statute remedies the problem by requiring any biological evidence obtained in connection with a defendant's case to be preserved for a specific length of time, resulting in an opportunity for those incarcerated to utilize their right to post-conviction DNA testing.

V. CONCLUSION

The West Virginia Legislature should join the majority of states by enacting a biological evidence preservation statute similar to the one proposed in this paper. West Virginia's 30-day retention requirement in conjunction with no requirement to provide notice of an intent to destroy evidence gives the wrongfully convicted little hope of a remedy to overturn their conviction. In the absence of a meaningful evidence preservation statute in West Virginia, the appalling possibility persists that innocent individuals wrongfully convicted, whose exoneration can undoubtedly be achieved through DNA testing, will be deprived of any adequate post-conviction remedy.

While West Virginia does in fact provide prisoners with the right to post-conviction DNA testing, it does not mandate that the government preserve biological evidence needed for DNA testing and analysis. Further, if the perpetrator remains at large, the victim is deprived of justice and there remains an ongoing risk of victimization to the public.¹²³ Therefore, enactment of an evidence preservation statute such as the one proposed in this paper would rectify the deficiencies of the post-conviction DNA testing statute to promote justice and free the wrongfully convicted.

*Marjon Creel Stephens**

¹²³ See Ted S. Reed, *Freeing the Innocent: A Proposed Forensic Evidence Retention Statute to Optimize Utah's Post-Conviction DNA Testing Act for Claims of Actual Innocence*, 2004 UTAH L. REV. 877, 885 (2004).

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APPENDIX A: PROPOSED RULE

West Virginia's Proposed Evidence Preservation Bill

Chapter [insert number].[insert chapter name]

Article [insert number].[insert article name]

§ [insert number].Preservation of Biological Evidence

(a) The appropriate governmental entity, including, but not limited to, any investigating law enforcement agency, the Clerk of the Circuit Court, or the prosecuting attorney shall preserve any physical evidence that at the time of conviction was reasonably likely to contain semen, blood, saliva, hair, skin tissue, or other biological material that was secured in the investigation or prosecution of a felony or sex-related crime for the period of time that the person convicted of the crime remains incarcerated, on probation or parole, or subject to registration as a sex offender.

(b) The state may destroy evidence that includes biological material before the expiration of the time period specified in subsection (a) if:

(1) After a conviction becomes final and the defendant has exhausted all opportunities for direct review of the conviction, the appropriate governmental entity sends certified delivery of notice of intent to destroy evidence to the defendant and the attorney of record and the defendant or attorney of record does not file a motion to retain the evidence within 180 days of receipt of the notice;

(2) The evidence is of such a size, bulk, or physical character as to render retention impracticable. When such retention is impracticable, the appropriate governmental entity takes reasonable measures to remove and preserve portions of the material evidence likely to contain biological evidence sufficient to permit future DNA testing;

(c) If, after providing notice under subsection (b)(1) of its intent to destroy evidence, the appropriate governmental entity receives a motion to preserve the evidence, the evidence shall be retained while the defendant remains in custody.

(d) The appropriate governmental entity shall have the discretion to determine how the biological evidence is preserved pursuant to this section, provided that the evidence is preserved in a condition that would permit future DNA testing and analysis.

(e) Remedies for Noncompliance. If the court finds that biological evidence was destroyed in violation of the provisions of this section, it may impose appropriate sanctions and order appropriate remedies.