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The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence

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THE RIGHT REMEDY FOR THE WRONGLY CONVICTED: JUDICIAL SANCTIONS FOR DESTRUCTION OF DNA EVIDENCE

Cynthia E. Jones*

Many state innocence protection statutes give courts the power to impose appropriate sanctions when biological evidence needed for postconviction DNA testing is wrongly destroyed by the government. Constitutional claims based on wrongful evidence destruction are governed by the virtually insurmountable “bad faith” standard articulated in Arizona v. Youngblood. The wrongful destruction of DNA evidence in contravention of state innocence protection laws, however, should be governed by the standards used to adjudicate other “access to evidence” violations in criminal cases, including disclosures mandated by the rules of criminal procedure, the Jencks Act, and Brady v. Maryland. Under the “access to evidence” sanctions analysis, courts must balance the degree of government culpability in the destruction, the degree of prejudice to the defense, and the strength of the government’s case. In applying this analysis to the wrongful destruction of evidence needed for postconviction DNA testing, courts should give due weight to the exclusive power of DNA evidence to discredit other forms of evidence and prove identity to a scientific certainty. Further, in evaluating the strength of the government’s evidence at trial, courts must carefully scrutinize guilt determinations based largely or exclusively on evidence that has been the predominate cause of wrongful convictions, including stranger eyewitness identifications, non-DNA forensic evidence, uncorroborated confessions, and jailhouse informant testimony. Applying these critical lessons learned from over 200 exonerations to the sanctions determination, appropriate sanctions for the

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wrongful destruction of DNA evidence include a sentence reduction, a new trial, or dismissal.

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INTRODUCTION

Robin Lovitt was convicted of murder, sentenced to death, and scheduled to be executed on November 30, 2005.¹ Mr. Lovitt would have had the dubious distinction of being the one thousandth condemned prisoner executed in the United States under the modern death penalty.² On the eve of Lovitt's scheduled execution, Virginia Governor Mark Warner commuted Lovitt's death sentence to a sentence of life in prison without the

1. See *Lovitt v. True (Lovitt III)*, 330 F. Supp. 2d 603, 606 (E.D. Va. 2004); Press Release, Death Penalty Info. Ctr., U.S. Death Penalty Continues Steady Decline as 1000th Execution Approaches 3 (Nov. 9, 2005), available at <http://www.deathpenaltyinfo.org/documents/DPIC1000thPR.pdf>.

2. Press Release, Death Penalty Info. Ctr., *supra* note 1, at 3.

possibility of parole.³ Now Robin Lovitt will spend every day of his life in prison for a murder that he may have been able to prove he did not commit. We will never know for sure whether Mr. Lovitt is guilty because the only piece of credible evidence that could have established the true identity of the killer—blood left on the murder weapon—was destroyed before it could be subjected to definitive DNA testing.⁴

Following his conviction and death sentence, Lovitt was entitled under the Virginia innocence protection statute to challenge his conviction by having the biological evidence in his case retested using more advanced forensic testing than was available at the time of his trial.⁵ While Mr. Lovitt's case was pending before the U.S. Supreme Court, the state trial court clerk's office intentionally destroyed all of the biological evidence needed for DNA testing "to create additional [storage] space"⁶ in the courthouse evidence storage room. Moreover, the destruction was unlawful under a newly enacted Virginia statute that expressly requires preservation of biological evidence in death penalty cases until after the prisoner is executed.⁷ Although this new law was enacted nearly three weeks *before* the Lovitt evidence was destroyed,⁸ the court clerk responsible for the evidence destruction claimed that he was simply not aware of the new law at the time he arranged for the evidence to be destroyed.⁹

While Lovitt was harmed by the evidence destruction, incredibly, he was not entitled to any remedy under the law. The same Virginia statute that permits prisoners to seek postconviction DNA testing and mandates preservation of biological evidence also precludes prisoners from seeking legal relief if the evidence is destroyed in violation of the statute.¹⁰ The Virginia Supreme Court found that the evidence preservation law was

3. Press Release, Governor Mark R. Warner, Statement of Governor Warner on the Clemency Petition of Robin Lovitt (Nov. 29, 2005) [hereinafter Warner Press Release], available at http://wayback.archive-it.org/190/20051202214623/http://www.governor.virginia.gov/Press_Policy/Releases/2005/Nov05/1129c.htm.

4. See *Lovitt v. Warden (Lovitt II)*, 585 S.E.2d 801, 809 (Va. 2003).

5. VA. CODE ANN. § 19.2-327.3 (2008) (Petition for Writ of Actual Innocence).

6. *Lovitt III*, 330 F. Supp. 2d at 629.

7. This preservation statute states,

In the case of a person sentenced to death, the court that entered the judgment shall, in all cases, order any human biological evidence or representative samples to be transferred by the governmental entity having custody to the Department of Forensic Science. The Department of Forensic Science shall store, preserve, and retain such evidence until the judgment is executed.

VA. CODE ANN. § 19.2-270.4:1.B. The preservation statute became effective on May 2, 2001. *Id.* The evidence destruction order was signed on May 21, 2001, and the evidence was destroyed a few days later. *Lovitt III*, 330 F. Supp. 2d at 630.

8. *Lovitt II*, 585 S.E.2d at 809.

9. *Id.* at 809–10.

10. The Virginia evidence preservation statute states, in relevant part,

An action under this section . . . shall not form the basis for relief in any habeas corpus or appellate proceeding. Nothing in this section shall create any cause of action for damages against the Commonwealth, or any of its political subdivisions or officers, employees or agents of the Commonwealth or its political subdivisions.

VA. CODE ANN. § 19.2-270.4:1.E.

enacted solely to “protect the efficacy of the appellate process, as well as the need to preserve evidence for use in the event of a retrial or other proceeding allowed by law.”¹¹ The court concluded that the Virginia legislature, in enacting the statute, “recognized that noncompliance with those [evidence preservation] procedures may occur and provided statutory language plainly excluding any such noncompliance as a basis for appellate or habeas corpus relief.”¹² In granting Lovitt’s request for clemency, Governor Warner echoed the sentiment expressed by the court, stating, “I believe the courts have correctly ruled that the law requiring the maintenance of such evidence does not provide relief for a defendant in Mr. Lovitt’s circumstances.”¹³ Governor Warner further stated that clemency was nonetheless appropriate because “the actions of an agent of the Commonwealth, in a manner contrary to the express direction of the law,” caused the destruction of evidence before Lovitt “exhausted every legal post-trial remedy.”¹⁴

The destruction of evidence in *Lovitt v. True*¹⁵ illustrates how mismanagement of evidence in the criminal justice system conflicts with the legal reforms mandated by newly enacted “innocence protection” laws. In the wake of numerous DNA exonerations of the wrongly convicted,¹⁶ federal and state innocence protection statutes have been enacted in nearly every jurisdiction in the United States.¹⁷ These remedial laws seek to

11. *Lovitt II*, 585 S.E.2d at 816.

12. *Id.*

13. Warner Press Release, *supra* note 3.

14. *Id.*

15. 330 F. Supp. 2d 603 (E.D. Va. 2004). Robin Lovitt’s case produced multiple dispositions, *see Lovitt v. True (Lovitt IV)*, 403 F.3d 171 (4th Cir. 2005); *Lovitt III*, 330 F. Supp. 2d 603; *Lovitt II*, 585 S.E.2d 801; *Lovitt v. Commonwealth (Lovitt I)*, 537 S.E.2d 866, 870 (Va. 2000), but the case will be referred to in text as *Lovitt*.

16. *See* The Innocence Project, Facts on Post-conviction DNA Exonerations, <http://www.innocenceproject.org/Content/351.php> (last visited Mar. 29, 2009). The Innocence Project reports that 234 wrongly convicted people have been exonerated by DNA evidence. *Id.* In the last decade, there has been an average of fourteen exonerations each year in cases from almost every state in the country. THE INNOCENCE PROJECT, 200 EXONERATED: TOO MANY WRONGLY CONVICTED *passim* (n.d.), available at http://www.innocenceproject.org/200/ip_200.pdf. These individuals served an average of twelve years in prison before exoneration and release. The Innocence Project, News and Information, *supra*. Exonerations have been won in thirty-three states, and there have been 169 exonerations since the year 2000. *Id.*

17. Postconviction innocence protection laws or “DNA access” statutes now exist in the District of Columbia, D.C. CODE ANN. §§ 22-4131 to -4135 (LexisNexis Supp. 2008), in all federal prosecutions, 18 U.S.C. § 3600 (2006), and in forty-five states. *See* ARIZ. REV. STAT. ANN. § 13-4240 (2001); ARK. CODE ANN. §§ 16-112-201 to -208 (2006); CAL. PENAL CODE § 1405 (West Supp. 2009); COLO. REV. STAT. §§ 18-1-411 to -415 (2008); CONN. GEN. STAT. §§ 54-102jj to -102pp (Supp. 2009); DEL. CODE ANN. tit. 11, § 4504 (2007); FLA. STAT. ANN. § 925.11 (West Supp. 2009); GA. CODE ANN. § 5-5-41(c) (Supp. 2008); HAW. REV. STAT. §§ 844D-121 to -126 (2008); IDAHO CODE ANN. § 19-4902 (2004); 725 ILL. COMP. STAT. ANN. 5/116-5 (West 2008); IND. CODE ANN. §§ 35-38-7-1 to -19 (LexisNexis Supp. 2008); IOWA CODE § 810.10 (2007); KAN. STAT. ANN. § 21-2512 (2007); KY. REV. STAT. ANN. §§ 422.285, 422.287 (LexisNexis Supp. 2008); LA. CODE CRIM. PROC. ANN. art. 926.1 (2008); ME. REV. STAT. ANN. tit. 15, §§ 2136–2138 (2003 & Supp. 2008); MD. CODE ANN., CRIM. PROC. § 8-

protect the innocent by giving prisoners access to biological evidence (i.e., blood, saliva, semen, and vaginal swabs) in the possession of the government, the right to have the evidence subjected to DNA testing, and the right to present exculpatory test results in court to obtain relief from a wrongful conviction.¹⁸ While the law in some states still does not require the government to preserve evidence in criminal cases after the case is closed, a growing number of state laws now mandate that biological evidence be preserved for postconviction DNA testing.¹⁹

As *Lovitt* demonstrates, notwithstanding the new laws mandating evidence preservation, biological evidence is still routinely discarded in the criminal justice system. Compliance with innocence protection laws requires a major overhaul of current evidence management practices in order to ensure that biological evidence is available for postconviction DNA testing. With few notable exceptions, this reform has not yet occurred.²⁰ Thus, the widespread loss and destruction of biological evidence presents one of the greatest impediments to the use of DNA technology to exonerate the wrongly convicted in America.²¹

201 (LexisNexis 2008); MICH. COMP. LAWS ANN. § 770.16 (West 2006); MINN. STAT. ANN. §§ 590.01–590.06 (West 2000 & Supp. 2008); MO. REV. STAT. § 547.035 (2002); MONT. CODE ANN. § 46-21-110 (2003); NEB. REV. STAT. §§ 29-4116 to -4125 (2008); NEV. REV. STAT. ANN. § 176.0918 (LexisNexis 2006); N.H. REV. STAT. ANN. §§ 651-D:1 to 651-D:4 (LexisNexis 2007); N.J. STAT. ANN. § 2A:84A-32a (West Supp. 2008); N.M. STAT. ANN. § 31-1A-2 (LexisNexis 2003); N.Y. CRIM. PROC. LAW § 440.30(1-a)(a) (McKinney 2005); N.C. GEN. STAT. § 15A-269 (2007); N.D. CENT. CODE §§ 29-32.1-01 to -15 (2006); OHIO REV. CODE ANN. §§ 2953.71 to .81 (LexisNexis 2006 & Supp. 2008); OKLA. STAT. ANN. tit. 22, §§ 1371–1372 (West 2003); OR. REV. STAT. ANN. § 181.085(1)(e) (West 2007); 42 PA. CONS. STAT. ANN. § 9543.1 (West 2007); R.I. GEN. LAWS § 10-9.1-11 (Supp. 2008); S.C. CODE ANN. § 17-28-350 (Supp. 2008); TENN. CODE ANN. §§ 40-30-304 to -313 (2006); TEX. CODE CRIM. PROC. ANN. arts. 64.01 to .05 (Vernon 2006); UTAH CODE ANN. §§ 78B-9-300 to -304 (2008); VT. STAT. ANN. tit. 13, § 5561 (Supp. 2008); VA. CODE ANN. § 19.2-327.1 (2008); WASH. REV. CODE ANN. § 10.73.170 (West 2002); W. VA. CODE ANN. § 15-2B-14 (LexisNexis 2004 & Supp. 2007); WIS. STAT. ANN. § 974.07 (West 2007); WYO. STAT. ANN. §§ 7-12-302 to -315 (2008). Only five states—Alabama, Alaska, Massachusetts, Mississippi, and South Dakota—still do not have laws that expressly give prisoners the right to DNA testing.

18. See generally Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1248–52 (2005) (discussing the widespread adoption of innocence protection statutes as part of a national reform effort to protect the rights of prisoners seeking postconviction DNA exoneration).

19. Approximately half of all states with innocence protection laws mandate some form of postconviction evidence preservation. See The Innocence Project, Preservation of Evidence, <http://www.innocenceproject.org/Content/253.php> (last visited Mar. 29, 2009); see also Jones, *supra* note 18, at 1253–57 (evaluating the merits of the various evidence preservation provisions in state innocence protection statutes).

20. See *infra* note 185 and accompanying text.

21. See NAT'L COMM'N ON THE FUTURE OF DNA EVIDENCE, NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT. OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 46 (1999), available at <http://www.ncjrs.gov/pdffiles1/nij/177626.pdf> (stating that “[a] major barrier to conducting DNA testing is that . . . the evidence has been destroyed or cannot easily be found”); Teresa N. Chen, *The Youngblood Success Stories: Overcoming the “Bad Faith” Destruction of Evidence Standard*, 109 W. VA. L. REV. 421, 422 (2007) (noting that “[d]estruction of

This Article addresses the role courts should play in enforcing the evidence preservation requirements mandated by innocence protection laws and provides an analytical framework for the judicial determination of whether to impose sanctions and what sanction is appropriate when biological evidence has been destroyed. While a growing number of innocence protection laws give courts the broad authority to impose “appropriate sanctions”²² for the destruction of biological evidence,²³ these remedial statutes are still relatively new (most enacted since 2002) and courts have yet to exercise their sanctioning power. Part I discusses the “access to evidence” doctrine, which defines the scope of the government’s duty to preserve and disclose evidence to the defense in criminal cases. Provisions for access to evidence include pretrial disclosures mandated by Rule 16 of the Federal Rules of Criminal Procedure, the disclosure of witness statements pursuant to Jencks statutes, and the disclosure of material, exculpatory information under *Brady v. Maryland*.²⁴ An integral part of the access to evidence doctrine is the duty to preserve discoverable evidence and the court’s power to enforce preservation and disclosure

evidence is the number one problem faced by Innocence Project attorneys”); Jones, *supra* note 18, at 1242–46 (describing traditional state evidence preservation practices). See generally THE INNOCENCE PROJECT, LESSONS NOT LEARNED: AN INNOCENCE PROJECT REPORT 26 (n.d.), available at http://www.innocenceproject.org/docs/NY_innocence_report.pdf (stating that “[e]vidence that can be subjected to DNA testing . . . is often lost, destroyed or impossible to locate in New York State”).

22. See HAW. REV. STAT. § 844D-122 (“The intentional destruction of evidence after entry of the [court] order shall constitute grounds for appropriate sanctions, including contempt of court”); see also ARIZ. REV. STAT. ANN. § 13-4240; IND. CODE ANN. § 35-38-7-14; KY. REV. STAT. ANN. §§ 422.285, 422.287; ME. REV. STAT. ANN. tit. 15, § 2138.2; NEB. REV. STAT. § 29-4120; N.M. STAT. ANN. § 31-1A-2(F); TENN. CODE ANN. § 40-30-309.

23. The innocence protection statutes that have been enacted in some jurisdictions prescribe criminal penalties as the sole remedy for the wrongful destruction of biological evidence. *E.g.*, D.C. CODE ANN. § 22-4134(d) (LexisNexis Supp. 2008) (“Whoever willfully or maliciously destroys, alters, conceals, or tampers with evidence that is required to be preserved under this section with the intent to (1) impair the integrity of that evidence, (2) prevent that evidence from being subjected to DNA testing, or (3) prevent the production or use of that evidence in an official proceeding, shall be subject to a fine of \$100,000 or imprisoned for not more than 5 years, or both.”). In other jurisdictions, the statute has no enforcement provision for the duty to preserve evidence. See, *e.g.*, FLA. STAT. ANN. § 925.11(4)(a) (West Supp. 2009) (mandating that the government “maintain any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested” but providing no remedy if evidence is destroyed prior to DNA testing). Even in the absence of an express grant of statutory authority to impose sanctions, courts have the inherent supervisory power to impose sanctions on the government for the wrongful destruction of evidence in criminal cases. See, *e.g.*, *United States v. Baca*, 687 F.2d 1356, 1359 (10th Cir. 1982); *United States v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979) (en banc) (Kennedy, J., concurring); JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE 246 (1989); see also FELIX F. STUMPF, INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY 24–26, 37 (1994); Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1123–24 (1987). But see, *e.g.*, *Ali v. State*, No. M2005-01137-CCA-R3-PC, 2006 WL 1626652, at *2–3 (Tenn. Crim. App. June 2, 2006) (stating that in the absence of an express sanctions provision in the statute, there is no remedy for the petitioner when biological evidence is destroyed after conviction but before a postconviction DNA analysis petition).

24. 373 U.S. 83 (1963).

obligations with sanctions. As discussed in Part II, the evidence preservation and disclosure duties mandated by innocence protection laws impose a new postconviction discovery obligation on the government, which falls within the scope of the access to evidence doctrine. The well-established, flexible standards used by courts to adjudicate other access to evidence violations should likewise guide the determination of sanctions for the wrongful destruction of biological evidence needed for DNA testing. Part III uses the case of Robin Lovitt to illustrate the application of the access to evidence analysis to the wrongful destruction of DNA evidence in violation of postconviction innocence protection laws. Part IV discusses the three sanctions available to the court to remedy the wrongful destruction of DNA evidence: sentence reduction, new trial, and dismissal (vacating the conviction).

I. THE ACCESS TO EVIDENCE DOCTRINE²⁵

As one legal scholar aptly noted,

From the moment a criminal investigation begins, the accused is disadvantaged by lack of access to crime scene evidence and investigative resources. By the time a suspect is accused or charged, the crime scene has usually been fully processed by police and relevant evidence has been taken into police custody. Criminal defendants lack both access to the evidence and to police assistance in developing additional evidence. If the crime scene is to yield evidence of innocence, the defendant typically will have to rely on police and prosecutors to find, collect, develop, and disclose that evidence.²⁶

Because of this imbalance of access to relevant evidence, either before trial or during the adjudication phase of the case, the government is required to disclose to the defense certain evidence collected during the investigation of the crime. Prosecutors are ultimately responsible for ensuring that this discoverable evidence is properly preserved and can be produced in court.²⁷

25. The civil corollary to the disclosure provisions encompassed by the access to evidence doctrine is principally embodied in Rule 37 of the Federal Rules of Civil Procedure, which gives trial courts broad authority to impose a wide range of sanctions for discovery violations, including dismissal. FED. R. CIV. P. 37. When discoverable evidence has been destroyed in civil cases (also referred to as “spoliation of evidence”), courts have a flexible, discretionary sanctioning scheme to redress the discovery violations. See GORELICK ET AL., *supra* note 23, at 5; MARGARET M. KOESEL & TRACEY L. TURNBULL, *SPOILIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION passim* (Daniel F. Gourash ed., 2d ed. 2006); J. D. Page & Doug Sigel, *The Inherent and Express Powers of Courts to Sanction*, 31 S. TEX. L. REV. 43 (1990); *see also* Solum & Marzen, *supra* note 23, at 1085.

26. Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 898 (2008).

27. *E.g.*, United States v. Mannarino, 850 F. Supp. 57, 72 (D. Mass. 1994) (citing United States v. Osorio, 929 F.2d 753, 762 (1st Cir. 1991)) (noting that the ultimate responsibility for disclosure of discoverable material rests with the prosecutor and any failure to preserve evidence for disclosure will fall squarely on the shoulders of the prosecuting attorney); *see*

This obligation extends to law enforcement officers, property clerks, evidence custodians, lab technicians, and all others directly responsible for the storage and retention of evidence.²⁸ Most tangible evidence subject to disclosure is stored in government property rooms and maintained by low-level evidence handlers who lack resources to preserve the high volume of evidence and often operate without clear guidelines on how (and how long) to preserve evidence.²⁹ Too frequently, poor handling of evidence by untrained or undertrained evidence custodians results in the negligent loss or the premature destruction of evidence in the ordinary course of business.³⁰ At the other extreme, control of overcrowded evidence rooms has been accomplished by resort to massive “evidence purges” to create storage space. These purges have been instituted across the country and, by some estimates, have resulted in the premature destruction of biological evidence in six thousand rape and murder cases over the last decade.³¹ Moreover, as *Lovitt* illustrates,³² even after laws are enacted mandating evidence preservation, if evidence custodians are given no guidance on what evidence to preserve, they continue long-standing practices of destroying old evidence at will to create storage space. It is against this backdrop of miscommunication and disorganization that discoverable biological evidence needed for postconviction DNA testing is permanently lost or purposely destroyed.

Notwithstanding the pervasive problems with the proper storage and retention of evidence, a series of constitutional mandates, court rules, and state and federal statutes give courts the power to enforce the government’s

also *United States v. Bryant (Bryant I)*, 439 F.2d 642, 650 (D.C. Cir.), *aff’d*, 448 F.2d 1182 (D.C. Cir. 1971) (per curiam).

28. *Mannarino*, 850 F. Supp. at 64 (holding that a Maine state police officer was “functionally part of the United States Attorney’s prosecutorial team,” and his possession and destruction of a Jencks statement “must be imputed to the government”).

29. Without an efficient cataloging and tracking system, retrieval of evidence is virtually impossible in overcrowded property rooms filled to the brim with stockpiles of old evidence. The *Denver Post* national study of the problem of evidence destruction identified thirty-one innocent men who needlessly spent a total of over 166 years in prison because the DNA evidence in their cases was lost. Miles Moffeit & Susan Greene, *Trashing the Truth: Room for Error*, DENVER POST, July 23, 2007, at 1A; *Trashing the Truth: Prisoners Denied DNA Testing After Evidence Goes Missing*, DENVER POST, July 25, 2007, http://www.denverpost.com/evidence/ci_6453427; see also Jones, *supra* note 18, at 1245 nn.28–32 (discussing cases of “formerly lost” biological evidence later used to exonerate the wrongly convicted). The *Denver Post*’s extensive coverage of DNA evidence destruction, including copies of its print and online stories and documentary videos, are available at *Trashing the Truth (Evidence Project)*, DENVER POST, <http://www.denverpost.com/evidence> (last visited Apr. 9, 2009).

30. Jones, *supra* note 18, at 1243 nn.20–21 (discussing both pretrial and postconviction evidence destruction in criminal cases).

31. Moffeit & Greene, *supra* note 29. The jurisdictions that have instituted “evidence purges” include New York, New Orleans, Colorado Springs, Los Angeles, and Houston. *Id.* The full scope of lost evidence will never be known because state and local governments do not require police departments and other criminal justice evidence custodians to track and report the evidence they destroy. Miles Moffeit & Susan Greene, *Trashing the Truth: Foiled Justice*, DENVER POST, July 24, 2007, at 1A.

32. *Lovitt v. True (Lovitt III)*, 330 F. Supp. 2d 603, 631 (E.D. Va. 2004).

evidence disclosure obligations. These laws are collectively referred to as the “access to evidence” doctrine.³³ The three main tenets of the access to evidence doctrine are the right to pretrial discovery under Rule 16 of the Federal Rules of Criminal Procedure,³⁴ the right to disclosure of witness statements at trial pursuant to the Jencks Act,³⁵ and, under *Brady v. Maryland*,³⁶ the constitutional right to timely disclosure of exculpatory information.³⁷ Each of these disclosure provisions advances the goal of giving the defendant equal access to relevant information to ensure accuracy and promote fairness in the adversarial adjudication process.³⁸ Two cases define the scope of the access to evidence doctrine. First, in *United States v. Bryant*,³⁹ the court established baseline standards for the adjudication of access to evidence violations. Second, in *Arizona v. Youngblood*,⁴⁰ the Supreme Court placed significant restrictions on the scope of constitutional protection against the denial of access to evidence.⁴¹

33. *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988); *California v. Trombetta*, 467 U.S. 479, 485 (1984); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (discussing “constitutionally guaranteed access to evidence” under the due process clause); *United States v. Bryant (Bryant I)*, 439 F.2d 642, 647 (D.C. Cir.), *aff’d*, 448 F.2d 1182 (D.C. Cir. 1971) (per curiam) (stating that “[a]ccess by defense counsel to certain evidence gathered by the Government is protected by both constitutional and statutory safeguards,” including *Brady v. Maryland*, Rule 16 of the Federal Rules of Criminal Procedure, and the Jencks Act).

34. FED. R. CRIM. P. 16; *see infra* Part I.A.

35. Jencks Act, 18 U.S.C. § 3500 (2006); *see infra* Part I.B.

36. *See infra* Part I.C.

37. Other statutorily protected “access to evidence” provisions include the Bill of Particulars, FED. R. CRIM. P. 7(f), which allows the defense to obtain more detailed information related to the charges in the indictment, and Rule 17(c), which gives the defense the right to issue pretrial subpoenas to access documents and other materials needed properly to prepare a defense. *See* FED. R. CRIM. P. 17(c); *see also* *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (finding that other constitutionally protected “access to evidence” rights include the right to the disclosure of plea agreements with government witnesses); *Roviaro v. United States*, 353 U.S. 53, 64–65 (1957) (discussing the limited right to disclosure of the identity of undercover informants). *See generally* JAMES CISSELL, *FEDERAL CRIMINAL TRIALS* 187–227 (Matthew Bender & Co., Inc. 6th ed. 2003) (1983).

38. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (stating that “mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process” when the defendant is denied “the raw materials integral to the building of an effective defense”); *California v. Trombetta*, 467 U.S. 479, 485 (1984) (noting that the “access to evidence” doctrine was developed to allow criminal defendants “a meaningful opportunity to present a complete defense”); *Bryant I*, 439 F.2d at 648 (stating that the purpose of the disclosure duty is “not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government”); *see also* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1450 (1984) (noting that “the ends of justice are defeated if judgments are founded on a speculative, partial version of the facts”); *Solum & Marzen*, *supra* note 23, at 1138 (stating that “[o]ur legal system presupposes that accuracy of fact-finding is usually proportionate to the amount of relevant evidence considered”).

39. 439 F.2d 642.

40. 488 U.S. 51 (1988).

41. *Id.* at 58–59.

In *Bryant*, although the government secretly audiotaped the drug transaction between the defendant and an undercover officer, the officers intentionally did not preserve the recording because they did not realize the recording was discoverable evidence. The U.S. Court of Appeals for the District of Columbia Circuit noted at the outset of the opinion that “this is not a case of a good faith effort to preserve highly relevant evidence, frustrated only by inadvertent loss. Rather, it is a case of intentional non-preservation”⁴² The *Bryant* court first rejected the government’s contention that its disclosure obligation was alleviated by the fact that it was no longer in possession of the evidence. The court ruled that under the access to evidence doctrine, the government’s duty to disclose evidence encompasses a duty to preserve evidence.⁴³ The court reasoned that,

[T]he duty of disclosure attaches in some form once the Government has first gathered and taken possession of the evidence in question. Otherwise, disclosure might be avoided by destroying vital evidence before prosecution begins or before defendants hear of its existence. Hence we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation. Only if evidence is carefully preserved during the early stages of investigation will disclosure be possible later.⁴⁴

Next, the court in *Bryant* held that whether sanctions are to be imposed will depend upon an examination of the circumstances surrounding the loss or destruction of the material. In making this determination the lower court should weigh three factors: (1) “the degree of negligence or bad faith involved”; (2) “the importance of the evidence lost”; and (3) “the evidence of guilt adduced at trial.”⁴⁵ The analytical framework instituted by the *Bryant* court had a fundamental impact on the development of the access to evidence doctrine.⁴⁶ The *Bryant* court’s multipronged, balanced approach to determining whether to impose sanctions was widely embraced by state and federal courts⁴⁷ and continues to be the prevailing standard used by

42. *Bryant I*, 439 F.2d at 647.

43. *Id.* at 651.

44. *Id.* (citing *United States v. Lonardo*, 350 F.2d 523, 530 (6th Cir. 1965)).

45. *Id.* at 653.

46. See GORELICK ET AL., *supra* note 23, at 245 (claiming that *Bryant* “is noteworthy as the high-water mark of judicial attempts to establish clear limits” on destruction of evidence); Jean Wegman Burns, Comment, *Judicial Response to Governmental Loss or Destruction of Evidence*, 39 U. CHI. L. REV. 542, 562 (1972) (arguing that the *Bryant* approach “is an attempt to bring structure and systematic rules to the pretrial period, which the court saw to be ‘a dark no-man’s-land of unreviewed bureaucratic and discretionary decision making’” (quoting *Bryant I*, 439 F.2d at 644)); Comment, *Criminal Procedure: Government Has Duty to Implement Effective Guidelines to Preserve Discoverable Evidence*, 1971 DUKE L.J. 644, 652 (noting that *Bryant* “did provide a procedure which may significantly reduce the likelihood” of a loss of evidence).

47. See generally WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE 962 (4th ed. 2004).

courts in deciding whether to impose sanctions in criminal cases for the destruction of discoverable evidence.⁴⁸

Just as *Bryant* had a significant impact on the development of the access to evidence doctrine, the Supreme Court's holding in *Arizona v. Youngblood* severely restricted the constitutional remedies available when evidence is wrongly destroyed by the government. In *Youngblood*, the Court stated that the government's destruction of mere "potentially useful" evidence does not violate due process unless the evidence had an exculpatory value that was apparent before the evidence was destroyed and the government destroyed the evidence in "bad faith."⁴⁹ The Court described evidence that is merely "potentially useful" as "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."⁵⁰ The *Youngblood* Court described the "bad faith" requirement as mandating that the defendant demonstrate that "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant."⁵¹ Thus, the Court held that "[t]he presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."⁵² The Court emphasized that this stringent standard is necessary to avoid unreasonably "imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution."⁵³

The *Youngblood* bad faith requirement has posed a virtually insurmountable burden on defendants seeking to demonstrate that the government's destruction of evidence violated due process.⁵⁴ Although *Youngblood* has been both widely criticized by legal scholars⁵⁵ and

48. In *United States v. Bryant*, the court found that the government's failure to disclose the audiotape violated the Jencks Act, Rule 16, as well as the Due Process Clause. *Bryant I*, 439 F.2d at 647; see also *United States v. Bryant (Bryant II)*, 448 F.2d 1182, 1183 (D.C. Cir. 1971) (per curiam). After *Arizona v. Youngblood*, the *Bryant I* court's due process analysis is no longer valid. Although *Bryant* still governs nonconstitutional violations of Rule 16 and Jencks, the holding in *Youngblood* now governs "constitutionally guaranteed" access to evidence violations under the Due Process Clause.

49. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

50. *Id.* at 57.

51. *Id.* at 58.

52. *Id.* at 56 n.* (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

53. *Id.* at 58.

54. See JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE 342–53 (Supp. 2008); (stating that the *Youngblood* standard has proven to be "difficult, if not impossible, to meet" and citing numerous state and federal cases finding that the destruction of evidence did not meet the *Youngblood* bad faith standard); Chen, *supra* note 21, at 422 (stating that, of 1675 published cases citing *Youngblood*, in only seven reported cases did the court find that the bad faith standard had been met).

55. *E.g.*, Chen, *supra* note 21, at 422; see also GORELICK ET AL., *supra* note 54, at 319–53; Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 768–71 (1999); *id.* at 769 (arguing that destruction of evidence by the government under the *Youngblood* standard will not violate due process unless the exculpatory nature of

expressly rejected by state courts interpreting the due process requirements for preservation of evidence under state constitutions,⁵⁶ the vitality of the Court's holding in *Youngblood* was reaffirmed by the Court in *Illinois v. Fisher*.⁵⁷ In *Fisher*, the defendant was charged with possession of a controlled substance and filed a pretrial discovery request to gain access to the evidence for independent testing.⁵⁸ During the decade the defendant had absconded prior to trial, however, the government destroyed the evidence pursuant to its "established procedures."⁵⁹ The Court held that the *Youngblood* bad faith requirement is not met merely by showing that the defendant made discovery requests for the evidence prior to destruction.⁶⁰ Nor could the defendant prove bad faith simply because the destroyed evidence was central to the guilt/innocence determination and presented his "only hope for exoneration."⁶¹

The implications of *Youngblood* and *Fisher* are dire in the area of postconviction DNA testing. Destruction of old biological evidence usually occurs after the defendant has been convicted, but before the evidence is subjected to DNA testing. Untested biological evidence is quintessentially evidence that is only "potentially exculpatory."⁶² *Fisher* also seems to foreclose any notion that the Court might carve out an exception to the virtually insurmountable bad faith requirement for untested biological evidence because of the unique power of DNA evidence to prove guilt or innocence to a scientific certainty. The Court stated in *Fisher* that the bad faith requirement is not dependent on "the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the distinction between 'material exculpatory' evidence" protected by the *Brady* doctrine, and "'potentially useful'" evidence governed by *Youngblood*.⁶³

The resolution of the destruction of evidence issues in *Lovitt* further illustrates the extremely narrow scope of the constitutional protection against evidence destruction. At the *Lovitt* postconviction hearing on the destruction of evidence, Lovitt unsuccessfully tried to show bad faith with

the evidence is so apparent "that a court could infer the government knew that this particular evidence was required to mount a defense").

56. Several states (Alabama, Alaska, Connecticut, Delaware, Hawaii, Massachusetts, Tennessee, West Virginia, and Vermont) have rejected the *Youngblood* bad faith standard in interpreting the protection afforded to criminal defendants against the destruction of evidence under the due process clauses of their respective state constitutions. See *Illinois v. Fisher*, 540 U.S. 544, 549 n.* (2004) (Stevens, J., concurring) (listing state cases rejecting *Youngblood* standard). See generally GORELICK ET AL., *supra* note 23, at 342–53 (providing comprehensive, state-by-state analysis of cases applying and rejecting the *Youngblood* standard under state constitutions).

57. *Fisher*, 540 U.S. at 547–49.

58. *Id.* at 545.

59. *Id.* at 546.

60. *Id.* at 548.

61. *Id.* (internal quotation marks omitted).

62. *Id.* at 557–58.

63. *Id.* at 549 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1988)).

proof that the biological evidence was intentionally and recklessly destroyed by the evidence custodian. To that end, Lovitt presented evidence that Robert McCarthy, the senior court clerk in charge of preserving the evidence, knew prior to destruction that the evidence was required to be preserved. McCarthy, a twenty-seven-year veteran clerk and a seasoned supervisor, testified that for over twenty years he has been the person in the clerk's office charged with maintaining evidence presented in court.⁶⁴ Further, McCarthy testified that, prior to the newly enacted evidence preservation law, it was the longstanding policy of the clerk's office to preserve evidence in death penalty cases until after the prisoner had been executed.⁶⁵ McCarthy also testified that he nonetheless believed he could initiate the process to destroy the evidence once he received the mandate from the Virginia Supreme Court denying Lovitt's appeal.⁶⁶ McCarthy conceded, however, that prior to destruction of the evidence he did not check the case file to determine whether there was any additional litigation, nor did he consult with any of Lovitt's attorneys prior to drafting the order for a judge to authorize destruction of the evidence.⁶⁷

Significantly, before McCarthy submitted the evidence destruction order to the judge, two other deputy court clerks, one of whom was the clerk assigned to the Lovitt case, repeatedly informed McCarthy that the evidence should not be destroyed because there was biological evidence in the case, and because it was a death penalty case in which the prisoner had not been executed.⁶⁸ McCarthy testified that he did not specifically recall these conversations with his fellow clerks.⁶⁹ McCarthy acknowledged, however, that when the evidence was destroyed, there was plenty of other evidence in the evidence storage facility from older cases that could have been discarded to create storage space.⁷⁰

In reviewing this record, all state and federal courts unanimously concluded that, though McCarthy's actions were "erroneous" and "an exercise of bad judgment," his destruction of the evidence did not constitute

64. Transcript of Record (Vol. 1) at 45, *Lovitt v. True (Lovitt II)*, 585 S.E.2d 801 (Va. 2003) (No. 012663) (evidentiary hearing conducted by Circuit Court of Arlington County concerning issues raised in habeas case pending before Virginia Supreme Court); see *Lovitt II*, 585 S.E.2d at 805 & n.1 (noting that the court had ordered an evidentiary hearing before Judge F. Bruce Bach in the Circuit Court of Arlington County regarding "all issues raised in Lovitt's habeas corpus petition").

65. *Lovitt II*, 585 S.E.2d at 809–10; Transcript of Record, *supra* note 64, at 60.

66. *Lovitt II*, 585 S.E.2d at 809–10; Transcript of Record, *supra* note 64, at 53.

67. *Lovitt II*, 585 S.E.2d at 809; Transcript of Record, *supra* note 64, at 54–55 (stating that if Robert McCarthy had checked the case file he would have seen six separate documents reflecting the fact that the case was still being litigated).

68. *Lovitt II*, 585 S.E.2d at 809. This was further corroborated by a fourth clerk who testified that she heard the conversation in which one of the clerks informed McCarthy that the evidence in the Lovitt case should not be destroyed. Transcript of Record, *supra* note 64, at 38, 43, 62–63.

69. Transcript of Record, *supra* note 64, at 51.

70. *Id.* at 53.

“bad faith” under *Youngblood*.⁷¹ The Virginia Supreme Court found that McCarthy only sought removal of the evidence to create additional storage space and did not have the intent to destroy exculpatory evidence.⁷² The court further found that merely because the evidence in the case contained DNA evidence and the clerk was aware of that fact, without more, did not prove the clerk was aware “that an analysis of some of the DNA evidence had produced inconclusive results, or that such evidence may have been subject to further testing.”⁷³ The court found that the biological evidence destroyed was merely “potentially exculpatory” and there was but a “mere possibility” that further testing could have exculpated Lovitt.⁷⁴ Therefore, the court concluded that the intentional destruction of the biological evidence did not violate the Due Process Clause.⁷⁵

While the *Youngblood* bad faith standard restricts constitutional protection against evidence destruction, courts have expressly rejected the notion that a finding of bad faith is needed in order to impose sanctions on the government for other nondisclosure violations.⁷⁶ As discussed more fully below, the three-prong test articulated in *Bryant* is the standard used by courts in imposing sanctions for noncompliance with Rule 16, the Jencks Act, and the *Brady* doctrine.⁷⁷

71. *Lovitt v. True (Lovitt III)*, 330 F. Supp. 2d 603, 634 (E.D. Va. 2004) (upholding the decision of the Virginia Supreme Court on collateral attack and questioning whether the holding in *Youngblood* even applies to postconviction destruction of evidence); see *Lovitt v. True (Lovitt IV)*, 403 F.3d 171, 187–88 (4th Cir. 2005); *id.* at 187 n.3 (affirming the lower court ruling under *Youngblood* and noting that while the newly enacted Virginia state preservation of evidence law “strikes us as a very wise policy—one we expect clerks in the future will observe—it is not expressive of federal due process standards which govern Lovitt’s claim”).

72. *Lovitt II*, 585 S.E.2d at 816; see also *Lovitt III*, 330 F. Supp. 2d at 632.

73. *Lovitt II*, 585 S.E.2d at 816.

74. *Id.* at 814, 816.

75. *Id.* at 815; see also Susan Greene & Miles Moffeit, *Trashing the Truth: Destruction of Evidence*, DENVER POST, July 22, 2007, at 1A (discussing the case of Clarence Moses-EL in Colorado, where the evidence was destroyed despite a court order mandating preservation). In the case of Moses-EL, when he petitioned the court for a new trial, asserting that the intentional destruction of all testable DNA evidence violated his right to due process, the court found that law enforcement officers were “negligent” in destroying the evidence, but that there was no “bad faith.” *Id.*

76. See LAFAYE ET AL., *supra* note 47, at 1126 (stating that, while the U.S. Supreme Court sets forth the “minimum constitutionally compelled obligation of the government with respect to the preservation of potential defense evidence,” it is possible that “[a] greater obligation may flow from state law”).

77. See *id.* at 961–62 (noting that, while destruction of evidence under due process standards requires a showing of bad faith, states are free to apply a less rigorous standard in imposing sanctions when there has been a breach of discovery obligations imposed by state laws).

A. *Criminal Discovery: Rule 16 of the Federal Rules of Criminal Procedure*

Basic discovery in criminal cases is governed by the rules of criminal procedure set forth in court rules governing federal and state proceedings.⁷⁸ In federal prosecutions, pursuant to Rule 16 of the Federal Rules of Criminal Procedure, the government has a pretrial duty to disclose specific categories of evidence in the government's "possession, custody, or control" that the government intends to introduce at trial or which would be material to the preparation of the defense case.⁷⁹ The duty of disclosure mandated by Rule 16 also includes a duty to preserve discoverable evidence.⁸⁰ The evidence subject to disclosure under Rule 16 does not have to be exculpatory as long as the government intends to introduce it at trial.⁸¹ The goal of the discovery rules is to "contribute[] to the fair and efficient administration of criminal justice" by encouraging pleas, avoiding unfair surprise, and enabling "an accurate determination of the issue of guilt or innocence."⁸²

Chief among the disclosure requirements imposed by Rule 16 is disclosure of the defendant's statements⁸³ and the defendant's prior criminal record.⁸⁴ Rule 16 also requires disclosure of tangible objects,⁸⁵ reports of examinations and tests,⁸⁶ and the substance of testimony to be provided by expert witnesses.⁸⁷ Judges can impose sanctions to enforce the government's discovery obligations pursuant to section (d) of the rule.⁸⁸ In addition to the enumerated sanctions in section (d), the trial judge also has the broad discretionary authority to "enter any other order that is just under the circumstances."⁸⁹ Other sanctions that have been imposed by courts to redress discovery violations include ordering a new trial,⁹⁰ giving an

78. CISSELL, *supra* note 37, at 188–89.

79. *See* FED. R. CRIM. P. 16.

80. *See* LAFAVE ET AL., *supra* note 47, at 962.

81. 3C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 189 (2008) (Advisory Committee Notes to the Federal Rules of Criminal Procedure).

82. *Id.* at 186.

83. FED. R. CRIM. P. 16(a)(1)(A)–(B).

84. *Id.* 16(a)(1)(D).

85. *Id.* 16(a)(1)(E).

86. *Id.* 16(a)(1)(F).

87. *Id.* 16(a)(1)(G). Rule 16 also requires the defense to make reciprocal disclosures of specific categories of information. *See, e.g., id.* 12.1 (notice of alibi defense); *id.* 12.2 (notice of insanity defense). *See generally* CISSELL, *supra* note 37, at 194–205.

88. Rule 16(d)(2) states,

If a party fails to comply with this rule, the court may: (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.

FED. R. CRIM. P. 16(d)(2).

89. *Id.* 16(d)(2)(D).

90. *See, e.g.,* United States v. Camargo-Vergara, 57 F.3d 993, 999, 1001 (11th Cir. 1995) (ordering a new trial where government's discovery violation prejudiced the defendant's right to a fair trial); United States v. Alvarez, 987 F.2d 77, 86 (1st Cir. 1993)

adverse inference instruction,⁹¹ and complete dismissal of criminal charges.⁹² Absent egregious misconduct resulting in prejudice to the defense, dismissals are extremely rare for violations of the criminal discovery rules.⁹³ Discovery violations are usually litigated during pretrial proceedings or during the course of the trial and can generally be remedied by the court ordering disclosure, granting a continuance, or excluding evidence related to the discovery violation.⁹⁴ More severe sanctions are imposed, however, when discoverable evidence has been intentionally destroyed, albeit in good faith. As courts and commentators have noted, when evidence has been intentionally destroyed, it is usually difficult—if not impossible—for the court to ascertain the import of the evidence, and “[o]rdinarily, the only remedies available are dismissal of the prosecution or, if the nondisclosed evidence would have been relevant only to challenge particular evidence of the prosecution, exclusion of that evidence.”⁹⁵ For intentional destruction, courts have found that the defense need only show that the undisclosed evidence was material to a determination of guilt or innocence, and then the burden shifts to the government to show that the defense has suffered no prejudice.⁹⁶ If the government is unable to meet its burden, sanctions are normally imposed.⁹⁷

(holding that the government’s noncompliance with pretrial disclosure of the defendant’s statement was prejudicial and warranted reversal of the conviction and a new trial); *United States v. Sawyer*, 831 F. Supp. 755, 758 (D. Neb. 1993) (declaring a mistrial to remedy a discovery violation). *See generally* LAFAVE ET AL., *supra* note 47, at 957–58.

91. *E.g.*, *People v. Kelly*, 467 N.E.2d 498, 501 (N.Y. 1984) (finding dismissal to be an abuse of discretion where adverse inference instruction would have adequately cured prejudice caused by government’s destruction of evidence in violation of preservation requirement).

92. *E.g.*, *People v. Howard*, 469 N.Y.S.2d 871, 874 (Crim. Ct. 1983) (sanction of dismissal imposed where return of critical evidence to owner prior to trial violated defendant’s right to discovery); *People v. Davis*, 439 N.Y.S.2d 798, 799–800 (Onondaga County Ct. 1981) (finding that dismissal did not amount to an abuse of judicial discretion where prosecution failed to preserve critical evidence); *People v. Churba*, 353 N.Y.S.2d 130, 133–34 (Crim. Ct. 1974) (finding that the government’s loss of critical evidence warranted dismissal of criminal charges in the interests of justice where procedures employed to preserve evidence were “haphazard and careless”).

93. *E.g.*, *United States v. Grammatikos*, 633 F.2d 1013, 1022 (2d Cir. 1980) (holding that no discovery sanctions were warranted where defendant was not prejudiced by the government’s destruction of electronic recordings made by an informant).

94. *E.g.*, *United States v. Muessig*, 427 F.3d 856, 864 (10th Cir. 2005) (discussing exclusionary sanction where government failed to disclose document during pretrial discovery); *People v. Johns*, 784 N.E.2d 362, 366–67 (Ill. App. Ct. 2002) (excluding testimony relating to undisclosed videotape destroyed by the government despite defendant’s previous discovery request); *Mahrtdt v. State*, 629 N.E.2d 244, 249 (Ind. Ct. App. 1994) (applying exclusion as sanction for intentional good faith destruction of breathalyzer evidence); *see* LAFAVE ET AL., *supra* note 47, at 958–61.

95. *See* LAFAVE ET AL., *supra* note 47, at 962.

96. *E.g.*, *State v. Benton*, 737 N.E.2d 1046, 1049 (Ohio Ct. App. 2000) (recognizing that the burden shifts to the government to show destroyed evidence was not exculpatory once the defendant demonstrated that no substitute evidence was available).

97. ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY 109–10 (3d ed. 1996) (stating that imposing discovery sanctions is “essential to ensure that parties

Prior to imposing sanctions, the trial court is expected to conduct a hearing and make findings on the facts and circumstances surrounding noncompliance with discovery.⁹⁸ Following the factual inquiry, the trial court has broad discretion in determining what sanctions, if any, should be imposed to remedy the discovery violation. Consistent with the analytical framework set forth in *Bryant*, in deciding whether to impose sanctions, the trial court should balance (1) the government's stated reasons for nondisclosure; (2) the extent of the prejudice, if any, to the defendant; (3) the feasibility of rectifying the prejudice by granting a continuance; and (4) any other relevant factors.⁹⁹

B. *The Jencks Act*

Another arm of the access to evidence doctrine is the Jencks Act, enacted by Congress in 1957¹⁰⁰ in response to the Supreme Court's opinion in *Jencks v. United States*.¹⁰¹ The Jencks Act requires the government to disclose prior statements of a government witness after the witness testifies

and attorneys understand that these standards impose mandatory obligations, the breach of which may bring serious consequences").

98. *United States v. Alvarez*, 987 F.2d 77, 85 (1st Cir. 1993) (criticizing trial court's resolution of discovery violation and stating that the trial court "failed to make even a threshold inquiry into the circumstances leading to nondisclosure of the statement" and that "[t]he court neither heard evidence nor made factual findings concerning the potential prejudice flowing from a discovery violation"); *Putnam v. State*, 629 P.2d 35, 44 (Alaska 1980) (remanding the case for a hearing by the trial court on facts and circumstances surrounding destruction of evidence).

99. See WRIGHT ET AL., *supra* note 81, at 185, 193.

100. See Jencks Act, Pub. L. No. 85-269, 71 Stat. 595 (1957) (codified as amended at 18 U.S.C. § 3500 (2006)). 18 U.S.C. § 3500 provides, in relevant part,

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

....

(e) The term "statement" . . . means—

- (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
- (2) a . . . recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
- (3) a statement . . . made by said witness to a grand jury.

18 U.S.C. § 3500.

101. 353 U.S. 657 (1957).

at a criminal trial.¹⁰² A pretrial witness statement is a discoverable “Jencks statement” if the statement is written or adopted by the witness, or is a “substantially verbatim” account prepared by a third party that relates to the witness’s testimony.¹⁰³ Commonly, Jencks statements include grand jury testimony,¹⁰⁴ statements handwritten by a witness,¹⁰⁵ and interview notes written by prosecutors and law enforcement officers that constitute a “substantially verbatim” account of an oral statement made by a witness.¹⁰⁶

The purpose of the disclosure of Jencks statements is to promote greater fairness in the criminal justice system by enabling the defense to impeach witnesses with prior inconsistent statements if testimony at trial differs from any previous statement of the witness given to the government.¹⁰⁷ The Court explained in *Jencks*, “Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory.”¹⁰⁸

In the years following passage of the Jencks statute, law enforcement officers unfamiliar with the newly imposed preservation requirements continued to follow long-standing agency practices of destroying original witness statements and interview notes upon completion of official police reports.¹⁰⁹ Moreover, although production of Jencks statements at trial imposes an affirmative pretrial duty on prosecutors to identify and preserve

102. See 18 U.S.C. § 3500. In 1980, the Jencks Act was incorporated into Federal Rule of Criminal Procedure 26.2, which imposes a reciprocal requirement that the defense disclose to the government the Jencks statements of defense witnesses. FED. R. CRIM. P. 26.2 advisory committee’s note. Disclosure of prior statements of a testifying witness is also required pursuant to the rules of criminal procedure in various states. See, e.g., ALASKA STAT. § 12.45.060 (2008); KAN. STAT. ANN. § 22-3212 (2007); N.C. GEN. STAT. ANN. § 8C-1, Rules 613 (LexisNexis 2007); OKLA. STAT. ANN. tit. 12, §§ 2612–2613 (West 2006 & Supp. 2009).

103. See 18 U.S.C. § 3500(b), (e)(1) (defining a statement as one in which the witness adopted or approved as his own).

104. See *id.* § 3500(e)(3).

105. See *id.* § 3500(e)(1).

106. See *id.* § 3500(e)(2).

107. See *United States v. Jencks*, 353 U.S. 657, 667–68 (1957); see also *Campbell v. United States (Campbell II)*, 373 U.S. 487, 496 (1963) (noting that the Jencks Act was enacted to secure “fairness in federal criminal procedure”); *Campbell v. United States (Campbell I)*, 365 U.S. 85, 92 (1961) (stating that “[t]he command of the statute is thus designed to further the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian”); *Robinson v. United States*, 825 A.2d 318, 329 (D.C. 2003) (explaining that the purpose of the Jencks Act, which was designed to “safeguard the fairness of criminal trials by providing defendants with appropriate tools for cross-examination,” is to test the accuracy of the witness’s in-court testimony (quoting *Davis v. United States*, 641 A.2d 484, 489 (D.C. 1994))).

108. See *Jencks*, 353 U.S. at 667.

109. E.g., *United States v. Truong Dinh Hung*, 629 F.2d 908, 921 (4th Cir. 1980) (discussing reports prepared by witnesses and destroyed by the government “according to routine CIA procedures”); *United States v. Gantt*, 617 F.2d 831, 841 (D.C. Cir. 1980) (noting that testimony by a DEA agent that his “regular practice” of destroying witness interview notes “was in conformance with the regular practice of the agency at the time”); *United States v. Harris*, 543 F.2d 1247, 1251 (9th Cir. 1976) (criticizing the “routine” FBI practice of officers destroying notes made during witness interviews).

Jencks statements, prosecutors did not aggressively perform this discovery function.¹¹⁰ As a result, discoverable Jencks statements were either belatedly produced during trial or it was disclosed at trial that a previously existing Jencks statement had been destroyed.¹¹¹

One of the main tools available to courts to enforce the disclosure and preservation duties is section (d) of the Jencks statute, which grants courts the authority to strike testimony or declare a mistrial if the government “elects not to comply” with the disclosure requirements.¹¹² In many cases, the imposition of either of these sanctions would seriously impair the government’s ability to prosecute or effectively bar prosecution. As a result, despite the mandatory language in section (d), the proscribed Jencks sanctions have been limited by the court to those rare cases in which the government has made a conscious, intentional decision not to produce witness statements.¹¹³ The Jencks statute has been interpreted to give courts broad discretion to determine whether any sanctions should be imposed, and, if so, what sanction is appropriate and “consistent with the fair administration of justice.”¹¹⁴ If the government is able to belatedly produce the Jencks statement during trial, the court can craft a remedy to address the harm caused by the belated disclosure without striking testimony or ordering a new trial.¹¹⁵ Thus, in the overwhelming majority of

110. *See supra* note 109.

111. *See supra* note 109.

112. 18 U.S.C. § 3500(d) provides,

If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

18 U.S.C. § 3500(d) (2006).

113. *See, e.g.,* United States v. Taylor, 13 F.3d 986, 990 (6th Cir. 1994) (explaining that the court is restricted to “harsh remedies” of section (d) of the Jencks Act only when the government intentionally ignores the disclosure requirements of the Jencks Act). *But see* United States v. Reyes, 510 F. Supp. 150, 154 (D. Ariz. 1981) (concluding that the court can impose Jencks Act sanctions whether or not government’s noncompliance was intentional).

114. *See, e.g.,* Taylor, 13 F.3d at 990 (stating that the court is “entitled to craft and apply a remedy that would best serve the interests of justice”); *Gantt*, 617 F.2d at 841–42 (holding that sanctions for Jencks Act violations are not automatic).

115. *See, e.g.,* United States v. Wables, 731 F.2d 440, 445–48 (7th Cir. 1984) (finding that the trial court did not abuse its discretion in deciding not to impose Jencks sanctions where the government belatedly produced Jencks material); United States v. Peterson, 116 F. Supp. 2d 366, 367–68 (N.D.N.Y. 2000) (concluding that suppression of a Jencks statement by the government was inadvertent and the defendant was entitled to a new trial where the Jencks statements contained major discrepancies with the witness’s trial testimony and were not turned over to the defense until the conclusion of trial); United States v. Mannarino, 850 F. Supp. 57, 73 (D. Mass. 1994) (ordering a new trial with pretrial depositions of government witnesses because the destruction of a confidential informant’s handwritten narrative of his criminal history violated the Jencks Act); Reyes, 510 F. Supp. at 153–54 (ordering a new trial where “such a strong impression has been made on the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission”).

cases, the section (d) sanctions are not imposed if nondisclosure is due to negligence or inadvertence,¹¹⁶ if there is no bad faith on the part of the government,¹¹⁷ or if there is no prejudice to the defendant. Courts are more willing to strike testimony or declare a mistrial to sanction the government when Jencks material has been intentionally destroyed.¹¹⁸ Courts have explained that intentional destruction robs the trial judge of the ability to discern the import of the destroyed statement and assess the amount of prejudice to the defense, and that it is antithetical to the purpose of the Jencks disclosure requirements.¹¹⁹ Therefore, when the government is responsible for the intentional destruction of Jencks material, the government bears the “heavy burden” of explaining the loss and must be able to demonstrate that it has made earnest efforts to preserve crucial materials and that there is no resulting prejudice to the defense.¹²⁰

Moreover, most courts have held that while good faith is relevant to the imposition of sanctions when the government unintentionally destroys Jencks material, there is no good faith exception for the intentional destruction of Jencks statements.¹²¹ Good or bad faith is only relevant, if at

116. See, e.g., *United States v. Sanchez*, 635 F.2d 47, 66 (2d Cir. 1980) (finding that the trial court did not err in refusing to impose sanctions where Jencks statements were inadvertently lost). See generally Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 661–66 (1999) (discussing the federal courts’ use of sanctioning authority under the Jencks Act).

117. See, e.g., *Taylor*, 13 F.3d at 990 (stating that, “[w]hen there is no bad faith or motive to suppress, and when any prejudice is curable at trial, the government has not ‘elected not to comply’ and subsection (d) does not control”).

118. See *United States v. Bufalino*, 576 F.2d 446, 449 (2d Cir. 1978) (declaring that there will be sanctions when the destruction of a Jencks statement is deliberate); *United States v. Miranda*, 526 F.2d 1319, 1324 n.4 (2d Cir. 1975) (listing sanctions, including the exclusion or suppression of other evidence concerning the subject matter of the undisclosed material, the grant of a new trial, or, in exceptional circumstances, dismissal of the indictment or the direction of a judgment of acquittal); see also *United States v. Tincher*, Nos. 90-063, 90-4107, 90-4108, 90-4109, 1991 WL 175282, at *2 (6th Cir. Sept. 10, 1991) (finding that the prosecutor’s “deliberate misrepresentations” regarding the existence of grand jury testimony constituted an intentional violation of the Jencks Act and directing the trial court to strike the witness’s testimony and enter a judgment of acquittal if the remaining evidence was insufficient to support conviction); *United States v. Well*, 572 F.2d 1383, 1384–85 (9th Cir. 1978) (per curiam) (striking the testimony of witnesses where tape-recorded witness interviews were erased by a government agent after the interviews were summarized in case memoranda).

119. See generally LAFAYETTE ET AL., *supra* note 47, at 962.

120. See *United States v. Carrasco*, 537 F.2d 372, 377–78 (9th Cir. 1976) (finding reversible error where trial court refused to strike testimony of key government informant after DEA agent intentionally shredded informant’s Jencks statement).

121. See, e.g., *United States v. Riley*, 189 F.3d 802, 807–08 (9th Cir. 1999) (reversing the lower court’s denial of sanctions where the government intentionally destroyed the Jencks statement of a “key” government witness/informant); *Bufalino*, 576 F.2d at 449 (stating that, “[w]here, as here, destruction is deliberate, sanctions will normally follow, irrespective of the perpetrator’s motivation”); *Carrasco*, 537 F.2d at 376 (rejecting the argument that the DEA standard operating procedure mandating destruction of a document shielded the government from Jencks sanctions because the DEA agent acted in good faith); *United States v. Mannarino*, 850 F. Supp. 57, 71–72 (D. Mass. 1994) (stating that “establishing the ‘good faith’ of violations of Jencks Act obligations—while perhaps relevant to fashioning the appropriate remedy—is not sufficient to insulate the government from sanction for an

all, to the severity of the sanction to be imposed. Thus, in order to determine the appropriate sanction for intentional destruction of evidence, courts are first required to conduct a hearing to inquire into the circumstances surrounding the loss/destruction of evidence.¹²² Thereafter, in deciding what sanction should be imposed, trial courts weigh and evaluate (1) the circumstances surrounding the destruction and the degree of bad faith; (2) the prejudice to the defendant or the importance of the evidence lost; and (3) the strength of the evidence of guilt adduced at trial.¹²³

C. *The Brady Doctrine*

The third provision of the access to evidence doctrine originates in the Supreme Court's landmark holding in *Brady*. In *Brady*, the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."¹²⁴ The *Brady* doctrine applies to evidence that completely or partially absolves the defendant of criminal responsibility, information that relates to impeachment of government witnesses, and evidence that could favorably affect the sentence imposed on the defendant.¹²⁵ To establish a due process violation based on nondisclosure of *Brady* material, the burden is on the defense to show that (1) the prosecution suppressed evidence; (2) the evidence was favorable to the accused; and (3) the defense was prejudiced by the nondisclosure because the suppressed evidence was material.¹²⁶ The Supreme Court has held that in order to establish that nondisclosure of exculpatory evidence was material, the defense must demonstrate that there is a "reasonable probability" that had the suppressed evidence been disclosed to the defendant, the result of the proceeding would have been different.¹²⁷ The linchpin of this inquiry is whether suppression of the evidence denied the defendant a fair trial and undermined confidence in the verdict.¹²⁸

As with other access to evidence provisions, the *Brady* doctrine is based on the practical recognition that there is a gross disparity of investigative

established statutory violation" (citing *United States v. Truong Dinh Hung*, 629 F.2d 908, 921 (4th Cir. 1980); *Carrasaco*, 537 F.2d at 376)).

122. See *United States v. Wables*, 731 F.2d 440, 447 (7th Cir. 1984) (inquiring into the circumstances surrounding the government's nonproduction of a Jencks statement and finding that such an inquiry is critical to determining whether the government has "flouted the purpose of the Jencks Act"); *United States v. Johnson*, 521 F.2d 1318, 1319–20 (9th Cir. 1975) (noting that the trial court has the duty to inquire into the circumstances surrounding nondisclosure in order to determine the appropriate sanction to redress the violation).

123. See *Riley*, 189 F.3d at 806–07.

124. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

125. *Id.*; see also LAFAVE ET AL., *supra* note 47, at 1114–15.

126. See Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 694 (2006).

127. *United States v. Bagley*, 473 U.S. 667, 668 (1985).

128. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

resources and access to information between the defense and the prosecution in our criminal justice system.¹²⁹ The *Brady* disclosure requirements are necessary to compensate for some of those imbalances and “ensure that a miscarriage of justice does not occur” simply because the defense was unaware of material exculpatory information in the possession of the government.¹³⁰ As Justice Thurgood Marshall noted,

One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury [T]he prosecutor fulfills his most basic responsibility when he fully airs all the relevant evidence at his command.”¹³¹

The prosecutor plays a very expansive role in determining whether evidence falls within the scope of *Brady* and, if so, when the evidence will be disclosed to the defense.¹³² *Brady* does not mandate *pretrial* disclosure as long as the information is disclosed “in time for its ‘effective’ use at trial.”¹³³ This broad prosecutorial authority carries with it a concomitant affirmative duty to investigate.¹³⁴ It is now well-established that the government’s disclosure duty extends beyond evidence the prosecutor physically possesses and beyond evidence of which the prosecutor is personally aware.¹³⁵ The prosecutor is charged with constructive knowledge of information collected by all those acting on behalf of the government.¹³⁶ Moreover, nondisclosure of material exculpatory evidence violates *Brady* even if the prosecutor has acted negligently or inadvertently and not in bad faith in suppressing the evidence.¹³⁷ The Court has stated that “[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the

129. *Id.* at 437–38.

130. *Bagley*, 473 U.S. at 675.

131. *United States v. Agurs*, 427 U.S. 97, 116 (1976) (Marshall, J., dissenting); *see also* *Wade v. Brady*, 460 F. Supp. 2d 226, 247 (D. Mass. 2006) (stating that “[t]he original ‘access to evidence’ right in *Brady* derived from the Court’s recognition that defendants possess a substantial interest in obtaining favorable evidence, which outweighs the minimal adverse impact on prosecutors”).

132. *Agurs*, 427 U.S. at 107 (Stevens, J.) (noting that if evidence clearly supports a claim of innocence, the prosecutor’s duty to disclose the evidence should “equally arise even if no request is made” by defense counsel).

133. *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) (holding that the government’s disclosure of evidence on the eve of trial was “too little, too late” and amounted to suppression of the evidence); *United States v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988) (citing *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984); *United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983)) (finding that there is no constitutional violation if the defendant “is given impeachment material, even exculpatory impeachment material, in time for use at trial”).

134. *Kyles*, 514 U.S. at 437 (stating that prosecutors have a responsibility to “gauge the likely net effect” of all evidence and “make [a] disclosure when the point of ‘reasonable probability’ is reached”).

135. *Id.* at 437–38.

136. *Id.* at 437.

137. *Agurs*, 427 U.S. at 110.

prosecutor.”¹³⁸ The Court has recognized that the *Brady* doctrine places the prosecutor in the dual (and conflicting) role of being both an advocate on behalf of the government as well as a guardian of justice responsible for protecting the truth-seeking function of the trial process by disclosing information which helps the defense and undermines the government’s case.¹³⁹ The Court, however, reconciles this conflict with its command that prosecutors seek justice and not just convictions.¹⁴⁰ In the more than four decades since the Court’s landmark ruling, legal scholars have recognized that the implementation of *Brady* has been uneven at best and a complete failure at worst.¹⁴¹ Nonetheless, *Brady* remains a critical avenue for the defense to gain access to evidence that is in the possession of the government and not otherwise discoverable pursuant to other access to evidence provisions.

While the prosecutor retains discretion over the disclosure of *Brady* evidence, if the court finds that material, exculpatory evidence has been suppressed or destroyed, the court has broad discretion to impose sanctions on the government to remedy the violation. There is no automatic dismissal for a *Brady* violation.¹⁴² Also, a court has much greater latitude in fashioning a remedy when *Brady* violations are discovered prior to trial or during trial.¹⁴³ However, a posttrial finding that the government suppressed

138. *Id.*

139. *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that the interest of a U.S. Attorney is not to win a case, but to see “that justice shall be done”); see also Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN ST. L. REV. 1133, 1140–41 (2005) (arguing that it is perhaps unrealistic to expect prosecutors to be both zealous advocates in an intensely adversarial criminal justice system and to “do justice” by turning over exculpatory information in their possession).

140. *Berger*, 295 U.S. at 88.

141. *E.g.*, Gershman, *supra* note 126, at 687–90 (“*Brady* has failed as a discovery doctrine. *Brady* is insufficiently enforced when violations are discovered, and virtually unenforceable when violations are hidden.” (citing Scott F. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 645 (2002))); Hoeffel, *supra* note 139, at 1148 (stating that “[w]ithholding favorable evidence, however, seems to be the norm” and discussing the nationwide epidemic of *Brady* violations by prosecutors, including the large number of homicide convictions and wrongful convictions caused by nondisclosure of exculpatory information or knowing presentation of false testimony); Thomas F. Liotti, *The Uneven Playing Field, Part III, or What’s on the Discovery Channel*, 77 ST. JOHN’S L. REV. 67, 68 (2003) (noting that, “[s]ince courts rarely admonish prosecutors, dismiss cases, or make referrals to grievance committees for nondisclosure, the penalty for prosecutors for nondisclosure, aside from convicting the innocent, or at least those who might be found not guilty, is *de minimis*”); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 703–08 (1987) (asserting that prosecutors are rarely held accountable for *Brady* violations and rarely will courts reverse a conviction based on *Brady* violations); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 *passim* (1997) (discussing the persistence of prosecutorial misconduct and withholding of exculpatory evidence despite case law requiring disclosure of such evidence).

142. *United States v. Bagley*, 473 U.S. 667, 682 (1985) (noting that the prosecution’s failure to disclose *Brady* information does not automatically require a new trial).

143. *E.g.*, *People v. Campos*, 722 N.Y.S.2d 73, 74 (App. Div. 2001) (finding that, although the prosecutor failed to disclose exculpatory statements made by a prosecution

material exculpatory evidence in violation of *Brady* means the defendant was denied the due process right to a fair trial and the conviction cannot stand.¹⁴⁴ The usual remedy will, therefore, be to reverse the conviction and order a new trial,¹⁴⁵ or, in more extreme circumstances, to dismiss the charges (vacate the conviction).¹⁴⁶

In determining what sanction is appropriate, the trial court must conduct a hearing to inquire into the circumstances surrounding the violation, and the sanction imposed must be the least restrictive sanction to redress the violation and protect the rights of the defendant to a fair trial.¹⁴⁷ The trial court should also consider (1) the strength of the government's case; (2) the prejudice to the defense; and (3) the degree of negligence or bad faith on the

witness, instructions to the jury to disregard the testimony of this witness in its entirety cured any potential prejudice to the defendant); *People v. Jackson*, 637 N.Y.S.2d 158, 164 (Sup. Ct. 1995) (allowing witness statements to be introduced at trial and giving the jury an adverse inference instruction on the *Brady* violation, where nondisclosure of inconsistent pretrial statements of a key government witness was discovered pretrial).

144. *Bagley*, 473 U.S. at 682–83; *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

145. *See United States v. Boyd*, 55 F.3d 239, 246 (7th Cir. 1995) (explaining that the trial court did not abuse its discretion in granting new trials based on the government's failure to reveal to the defense drug use and drug dealings by prisoner witnesses or the unusual favors that the government granted those witnesses); *see, e.g., United States v. Lyons*, 352 F. Supp. 2d 1231, 1251 (M.D. Fla. 2004) (explaining that the usual remedy for a *Brady* violation is a new trial); *People v. Sheppard*, 701 P.2d 49, 54 (Colo. 1985); *People v. Harmes*, 560 P.2d 470, 474 (Colo. Ct. App. 1976); *People v. Springer*, 504 N.Y.S.2d 232, 235 (App. Div. 1986); *People v. Saddy*, 445 N.Y.S.2d 601, 605 (App. Div. 1981); *State v. Roughton*, 724 N.E.2d 1193, 1217 (Ohio Ct. App. 1999).

146. *See United States v. Jordan*, 316 F.3d 1215, 1248–49 (11th Cir. 2003) (noting that it is within a district court's inherent power to dismiss an indictment on grounds of prosecutorial misconduct); *Lyons*, 352 F. Supp. 2d at 1251 (finding that the prejudice caused by the government's numerous and flagrant *Brady* violations warranted dismissal, with prejudice, of the drug conspiracy count as well as the remaining counts of a multicount indictment); *Sheppard*, 701 P.2d at 54 (finding that the failure of the prosecution to prevent the destruction of the automobile in a vehicular homicide case not only left the defendant "without physical evidence of the cause of the accident, but also removed the opportunity for the defense's expert to examine the car," and thus dismissal of the case was appropriate); *Harmes*, 560 P.2d at 472–74 (dismissing the charge of second degree assault where the police negligently destroyed a videotape of the altercation between the defendant and the police that formed the basis of the charge); *Springer*, 504 N.Y.S.2d at 234–35 (holding that police destruction of surveillance photographs requires the reversal of a robbery conviction); *Saddy*, 445 N.Y.S.2d at 603–05 (reversing two convictions for criminal sale of a controlled substance because law enforcement officials, claiming reasons of economy, erased a series of tape recordings relating to the defendant's defense); *Roughton*, 724 N.E.2d at 1217 (concluding that the state's failure to turn genetic evidence over to the defendant undermined confidence in the outcome of the trial and thus required reversal).

147. *See United States v. Hanna*, 55 F.3d 1456, 1461 (9th Cir. 1995) (holding that an evidentiary hearing on a claim of a *Brady* violation was warranted, as "resolution of this matter is best served by the light of a hearing, not the darkness of an assumption on appeal" (quoting *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993))); *Perdomo v. State*, 565 So. 2d 1375, 1377 (Fla. Dist. Ct. App. 1990) (holding that, if the state fails to provide defense counsel with requested evidence on discovery, and the failure is brought to the trial court's attention, a hearing must be held to inquire into the potential discovery violation); *People v. Hogley*, 696 N.E.2d 313, 336 (Ill. 1998) (holding that the defendant was entitled to an evidentiary hearing on postconviction claims that the government's bad faith destruction of *Brady* evidence constituted a denial of due process).

part of the government.¹⁴⁸ While bad faith is required to find a *Brady* violation, the egregiousness or degree of fault of the government in causing the suppression of exculpatory information is directly relevant to the severity of the sanction to be imposed.¹⁴⁹ Courts have recognized that sanctions can be imposed to deter misconduct on behalf of the police and prosecutors.¹⁵⁰

II. FROM ACCESS TO EVIDENCE TO INNOCENCE PROTECTION

The evidence preservation and disclosure requirements imposed on the government by innocence protection laws fall squarely within the scope of the access to evidence doctrine. Innocence protection laws add biological material to the list of evidence already subject to disclosure by the government under Rule 16, the Jencks Act, and the *Brady* doctrine. Moreover, while other access to evidence provisions mandate disclosure of evidence during trial or pretrial, innocence protection laws extend the government's discovery obligations to the postconviction stage. As with the other disclosure provisions, these remedial statutes are designed to ensure that the defense has equal access to information to correct any imbalance of resources between the defense and prosecution, and to promote greater fairness in criminal proceedings. Thus, the wrongful destruction of biological evidence needed for postconviction DNA testing is as much an affront to the integrity of the judicial process as other access to evidence violations. Accordingly, the well-worn, flexible analysis developed by courts to adjudicate other evidence destruction violations should be used by courts when adjudicating violations of innocence protection laws. Specifically, when DNA evidence has been wrongly destroyed, courts should take into account (1) the circumstances surrounding the loss or destruction of evidence (or the degree of government culpability); (2) the prejudice to the defense (or the importance

148. See LAFAVE ET AL., *supra* note 47, at 960–63.

149. See *Lyons*, 352 F. Supp. 2d at 1251 (holding that, because “[t]he Government’s protracted course of misconduct caused extraordinary prejudice to Lyons, exhibited disregard of the Government’s duties, and demonstrated contempt for this Court,” it is only appropriate to dismiss the remaining counts, as a new trial would be an insufficient remedy); *Sheppard*, 701 P.2d at 54–55 (stating that the prosecution’s conduct may be taken into account when determining an appropriate remedy for the destruction of evidence); *People v. Sams*, 685 P.2d 157, 163 (Colo. 1984) (holding that in determining sanctions the degree of governmental culpability in causing the loss or destruction of evidence is an appropriate consideration); *Springer*, 504 N.Y.S.2d at 234 (noting that the loss of surveillance photographs was not the result of negligence or oversight, but rather they were deliberately discarded by a police detective based solely on his judgment that they were not useful, and thus the defendant’s conviction should be overturned); *Saddy*, 445 N.Y.S.2d at 604 (taking into account the fact that it was the deliberate actions of law enforcement officials, although not necessarily in bad faith, that resulted in the destruction of evidence in deciding what sanction is appropriate).

150. See, e.g., *People ex rel. Gallagher v. Dist. Court*, 656 P.2d 1287, 1293 (Colo. 1983) (stating that the sanction imposed for the destruction of evidence should serve “the dual purposes of protecting the integrity of the truth-finding process and deterring the prosecutor and the police from destroying material evidence”).

of the evidence); and (3) the strength of the government's evidence of guilt adduced at trial.

A. *Circumstances Surrounding the Destruction of Evidence*

The first prong of the access to evidence sanctions analysis focuses on the facts and circumstances that caused the destruction of evidence and the extent to which the government was at fault. One preliminary issue that frequently arises in postconviction litigation under innocence protection statutes is whether the biological evidence needed for DNA testing has *actually* been destroyed or whether it is simply lost in an overcrowded, mismanaged property room. Because most petitions for postconviction DNA testing are filed many years after the original criminal investigation,¹⁵¹ the government frequently moves to dismiss the petition on the grounds that all testable evidence was lawfully destroyed long before the innocence protection law mandated preservation.¹⁵² Some courts have simply accepted the government's perfunctory response and granted dismissal without a hearing or further inquiry.¹⁵³ Increasingly, however, before petitions for postconviction testing are dismissed, courts have placed the burden on the government to prove that all testable evidence has, in fact, been destroyed.¹⁵⁴

151. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 119 (2008) (finding that, on average, among the first 200 people exonerated with DNA testing, the prisoner served an average of twelve years before being exonerated); see also Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 535 (2005) (finding an average span of more than eleven years between the date of conviction and the date of exoneration in a study of all reported exonerations between 1989 and 2003).

152. See, e.g., *Arey v. State*, 929 A.2d 501 (Md. 2007); *Blake v. State*, 909 A.2d 1020 (Md. 2005).

153. E.g., *State v. Crawford*, Nos. CR.A.IN88-02-1007R2, CR.A.IN88-02-1008, CR.A.IN88-04-0845R2, 2005 WL 2841652, at *3 (Del. Super. Ct. Oct. 28, 2005) (stating that the decision to hold an evidence destruction hearing to inquire into the circumstances surrounding destruction is within the discretion of the trial court).

154. E.g., *Tyler v. Purkett*, 413 F.3d 696, 701 (8th Cir. 2005) (finding the evidentiary hearing on existence of biological evidence for DNA testing was sufficient where court "received live testimony and deposition transcripts from a variety of individuals involved in the retention and movement of evidence . . . as well as various exhibits," and concluding that biological evidence no longer existed and could not be subjected to DNA testing); *Carter v. State*, 913 So. 2d 701, 702-03 (Fla. Dist. Ct. App. 2005) ("[T]he record does not contain any documentary or testimonial evidence to support the state's assertions that there is no evidence to test or that the blood on the shirt belonged to the victim. We therefore reverse and remand for an evidentiary hearing . . ."); *People v. Pitts*, 828 N.E.2d 67, 72 (N.Y. 2005) ("[T]he People, and not defendant, had the burden of establishing with sufficient specificity whether the evidence existed and could be tested. The mere assertion that the evidence no longer exists based on a phone call to a police Property Clerk's office is insufficient as a matter of law . . ."). In *People v. Pitts*, the court then remanded the case with specific directions:

[The] Supreme Court should take steps to obtain from the People reliable information as to whether or not the evidence sought exists and the source of such information. Adequate information from the People might include, for example,

Maryland courts have recently articulated the scope of the government's due diligence obligation to thoroughly search for testable biological evidence. In *Blake v. State*,¹⁵⁵ the Maryland Court of Appeals found that before a petition for testing can be denied on the grounds that the evidence no longer exists, the government, as the custodian of the evidence, bears the burden of proving the evidence has been destroyed.¹⁵⁶ The court held that the government cannot meet this burden with an "unsworn, unverified memorandum" stating that the police department's evidence storage facility was searched and the evidence was not found.¹⁵⁷ Later, in *Arey v. State*,¹⁵⁸ the court found that even a sworn affidavit stating that the police department evidence database was checked and the evidence could not be located was insufficient to meet the government's burden.¹⁵⁹ The court explained in great detail that the government is required to perform a thorough and exhaustive search for the evidence throughout the criminal justice system in each place where the evidence could have been stored.¹⁶⁰ The court also mandated that the government identify the protocols that were in place for destruction of evidence at each location to determine whether proper procedures were followed in destroying the evidence and whether the destruction was documented.¹⁶¹ The court concluded that "[o]nce the State performs a reasonable search and demonstrates sufficiently a *prima facie* case, either directly or circumstantially, that the requested evidence no longer exists, the State will have satisfied its burden of persuasion."¹⁶²

After the trial court is sufficiently satisfied that all testable biological evidence has been destroyed, the court should then determine whether the evidence was destroyed after preservation was mandated by the innocence protection statute.¹⁶³ If so, the court should conduct the requisite fact-finding hearing to determine what steps, if any, the government took to

an affidavit from an individual with direct knowledge of the status of the evidence or an official record indicating its existence or nonexistence.

Pitts, 828 N.E.2d at 72.

155. 909 A.2d 1020 (Md. 2006).

156. *Id.* at 1031 ("It is only logical that this burden is upon the State, as the State gathered the evidence and was the custodian of the evidence. The information as to the location of the evidence and the manner of its destruction would not be within the knowledge of an inmate.").

157. *Id.*

158. 929 A.2d 501 (Md. 2007).

159. *Id.* at 506, 508.

160. *Id.* at 508 ("[T]he State needs to check any place the evidence could reasonably be found, unless there is a written record that the evidence had been destroyed in accordance with then existing protocol."). The court stated that this search should include the judge's chambers, court clerk's office, police departments, prosecutor's offices, hospitals, courthouse property rooms, and both state crime labs and independent forensic testing labs that might have been used by the government at the time the case was originally prosecuted. *Id.* at 508-09.

161. *Id.* at 508.

162. *Id.* at 509.

163. *See id.*

prevent destruction, or what actions of the government contributed to the destruction of the evidence.¹⁶⁴

In deciding whether the facts surrounding the destruction of evidence support the imposition of sanctions, courts have been more forgiving when the discovery violation was caused by an inadvertent error by an evidence custodian or an isolated act of negligence by a property clerk who, in “good faith,” destroyed evidence as part of the routine housekeeping of the property storage facility.¹⁶⁵ Conversely, courts have found the government’s actions are subject to sanctions when the circumstances surrounding the destruction of evidence suggest bad faith,¹⁶⁶ a flagrant pattern of noncompliance with mandated disclosure duties,¹⁶⁷ or a failure to take necessary steps to ensure that evidence is properly preserved.¹⁶⁸

In *United States v. Mannarino*,¹⁶⁹ the court found that a police officer’s destruction of a handwritten statement made by a key government witness was a Jencks violation, even though the officer testified that he was unaware of the disclosure requirements imposed by the Jencks Act and had incorporated the substance of the witness statement into his police report.¹⁷⁰ The court held the government responsible for the nondisclosure and stated,

The government’s calculated decision to leave the preservation of materials whose disclosure was plainly required to a person unprepared by disposition or training to perform that function cannot be dismissed as mere negligence. It represents a knowing failure to do what the law

164. *Id.* (noting the inherent power of the court to conduct evidentiary hearing and collecting authorities); see also *Tyler v. Purkett*, 413 F.3d 696, 698 (8th Cir. 2005) (summarizing the court’s prior en banc decision in a case directing the lower court “to order the evidence tested” if it still exists, and “to enter findings regarding the circumstances . . . of destruction” if the court finds that the evidence no longer exists).

165. See *Tyler*, 413 F.3d at 702 (noting that there was evidence of possible “negligence or lax record keeping” but no facts tending to suggest “the intentional destruction of the disputed evidence”).

166. *United States v. Mannarino*, 850 F. Supp. 57, 72 (D. Mass. 1994).

167. See ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 97, at 114 (“[W]here a pattern emerges of discovery violations . . . court[s] should also consider the need to impose sanctions that will deter future violations.”); 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 20.6(b), at 503 & n.42 (3d ed. 2007) (explaining that discovery violations that reflect a pattern of or recurring disregard for sanctions can support a finding of bad faith); see also *United States v. Davis*, 244 F.3d 666, 672–73 (8th Cir. 2001) (upholding the district court’s exclusion of DNA evidence when the government failed to comply with a discovery order); *People v. Morgan*, 606 P.2d 1296, 1298, 1300 (Colo. 1980) (en banc) (affirming the suppression of evidence related to a piece of biological evidence that was destroyed because of police “gross negligence and misfeasance”); *Mathis v. State*, 819 P.2d 1302, 1306 (N.M. 1991) (finding a sanction of dismissal appropriate when the government’s purposely “engag[ing] in a pattern of evasion” in not complying with its disclosure amounted to bad faith); *State ex rel. Rusen v. Hill*, 454 S.E.2d 427, 438 (W. Va. 1994) (upholding a sanction of dismissal based on pattern of noncompliance with court-ordered discovery because that noncompliance was disruptive to the efficient administration of justice).

168. *United States v. Bryant (Bryant I)*, 439 F.2d 642, 653 (D.C. Cir.), *aff’d*, 448 F.2d 1182 (D.C. Cir. 1971) (per curiam).

169. 850 F. Supp. 57.

170. *Id.* at 64, 71.

requires. . . . [I]t does not require any strain to find that the disclosure responsibilities were not undertaken in good faith.¹⁷¹

Citing a repeated pattern of discovery violations spanning over a decade, the court expressed frustration with the government's "sustained and obdurate indifference" to its discovery obligations.¹⁷² The court concluded that

it is an imperative duty on the part of government counsel to assure *all* involved in the disclosure chain are aware of their responsibilities. . . . If anything other than intentional flouting of a court order or a statutory command can be found to be bad faith, it is the unpoliced delegation of preservation and disclosure responsibilities to the unwilling and, perhaps, unknowing.¹⁷³

When the *Bryant* court likewise found a persistent pattern of destruction of discoverable evidence, rather than simply impose sanctions on the government for the individual violation in the case, the court took broad steps to impose systemic reforms in the government's evidence management practices. The court stated,

sanctions for non-disclosure based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve *all* discoverable evidence gathered in the course of the criminal investigation. . . . Negligent failure to comply with the required procedures will provide no excuse. Although we leave it up to the various investigative agencies to draft rules suited to their own method of operation, all such rules will be subject to review of their adequacy to the assigned task.¹⁷⁴

171. *Id.* at 71.

172. *Id.* at 59; *see also* *Virgin Islands v. Fahie*, 419 F.3d 249, 256 (3d Cir. 2005) (asserting that a pattern of recurring violations might warrant sanction of dismissal to deter further violations where misconduct is not an isolated incident); *Virgin Islands v. Testamark*, 570 F.2d 1162, 1168 (3d Cir. 1978) (finding that, with no "continuing course of errant conduct which might call for prophylactic sanctions," no sanctions were warranted); LAFAYETTE ET AL., *supra* note 167, § 20.6(b), at 508–09.

173. *Mannarino*, 850 F. Supp. at 72; *see id.* at 71 (citing *United States v. Kincaid*, 712 F.2d 1, 3 (1st Cir. 1983) (finding that no one in the prosecutor's office "took the steps necessary to preserve" evidence); *United States v. Ingraldi*, 793 F.2d 408, 413 (1st Cir. 1986) (finding that prosecutors repeatedly engaged in "sloppy" practices with respect to disclosure of discoverable materials)).

174. *United States v. Bryant (Bryant I)*, 439 F.2d 642, 652 (D.C. Cir.), *aff'd*, 448 F.2d 1182 (D.C. Cir. 1971) (per curiam); *see also* *People v. Churba*, 353 N.Y.S.2d 130, 133–34 (Crim. Ct. 1974) (granting a dismissal upon finding that "[t]he cumulative effect of the poor investigation and the ultimate loss of the evidence can only result in an irreparable denial of this defendant's right to adequately prepare for and maintain his own defense" where procedures employed to preserve evidence were "at best, haphazard and careless and, at worst, grossly negligent" and the loss of the evidence as a direct result of the prosecution's failure to adequately safeguard it placed the defendant "in an inferior position in presenting his defense, through no fault of his own").

The court reasoned that “[b]y requiring . . . regular procedures for preserving evidence, we intend to ensure that rights recognized at one stage of the criminal process will not be undercut at other, less visible, stages.”¹⁷⁵

Applying these standards to innocence protection laws, at a time when the use of biological evidence is now firmly established in the culture of our criminal justice system and innocence protection laws have been enacted in nearly every jurisdiction in the country, the continued “routine” destruction of biological evidence cannot be dismissed by courts as a simple act of “bad judgment.” Sanctions should be imposed where the government is fully aware of the rampant evidence mismanagement in the jurisdiction. There have been numerous cases where evidence needed for pending pretrial cases and postconviction cases is routinely lost,¹⁷⁶ prematurely destroyed,¹⁷⁷ or dangerously at risk for contamination based on the substandard conditions in the evidence storage facility.¹⁷⁸ Similarly, when evidence handlers are vested with the discretionary authority to destroy evidence, as in *Lovitt*, there should be greater government culpability when the prosecutor’s office fails to train evidence handlers on the postconviction evidence preservation requirements mandated by innocence protection laws. A court could find that the government’s knowledge of the poor state of evidence management, coupled with the government’s failure to put in place

175. *Bryant I*, 439 F.2d at 652.

176. See, Jones, *supra* note 18, at 1243 nn.20–21; Caren Burmeister, *Lawyer Says Evidence Lost in Murder Case*, FLA. TIMES-UNION, Aug. 31, 2002, at L-1, available at http://www.jacksonville.com/tu-online/stories/083102/nes_10315305.shtml (reporting that key murder scene DNA evidence is missing); Chris Dettro, *Missing DNA Leads to Acquittal in Battery, Home Invasion Case*, ST. J.-REG. (Springfield, Ill.), Apr. 2, 2005, at 9 (stating that a jury acquitted a man after the judge excluded DNA evidence because the accused’s blood sample and DNA extraction could not be located); Roma Khanna & Steve McVicker, *Crime Lab Evidence Missing in 21 Cases*, HOUSTON CHRON., Nov. 4, 2003, at A15 (reporting that the Houston Police Department’s crime lab is missing the physical evidence in at least twenty-one cases); S. U. Mahesh, *Santa Fe Police Can’t Find Evidence*, ALBUQUERQUE J., Apr. 26, 2000, at C3 (reporting that an internal audit of the Santa Fe Police Department’s evidence room shows that over 1300 pieces of evidence are missing from an unknown number of cases).

177. Jones, *supra* note 18, at 1243; see also Moffeit & Greene, *supra* note 31 (reporting that over the past decade 5515 rape evidence kits have been lost or destroyed).

178. See, e.g., CHARLES J. WILLOUGHBY, OFFICE OF THE INSPECTOR GEN., GOV’T OF D.C., OFFICE OF THE INSPECTOR GENERAL’S OBSERVATIONS AT THE METROPOLITAN POLICE DEPARTMENT’S EVIDENCE CONTROL BRANCH 2–4 (2008), available at http://oig.dc.gov/news/view2.asp?url=release07%2F010408_1.pdf&mode=audit&archived=0&month=20080. According to the audit of the District of Columbia evidence storage facility,

the facility disclosed problems such as an inadequate heating, ventilation, and air conditioning (HVAC) system, a poor electrical system, leaky pipes and roof, severe overcrowding in storage areas, and poor physical security. . . . These facility-related conditions increase the risk of theft, misuse, or loss of evidence, which may compromise the District’s ability to successfully prosecute criminal cases, thereby hindering the ECB’s [Evidence Control Branch’s] mission.

Id. at i. Further, “[b]iological materials . . . should be stored in a climate-controlled and moisture-free environment to properly preserve evidence. However, we found that biological materials stored in the warehouse are subject to extreme temperatures and humidity levels.” *Id.* at 4.

adequate safeguards to ensure that evidence would be properly preserved, amounts to a reckless disregard of discovery obligations and supports the imposition of sanctions.

Moreover, despite calls for comprehensive regulation and training for evidence handlers, few jurisdictions have undertaken this critical reform to prevent the loss and destruction of biological evidence.¹⁷⁹ While federal regulations were promulgated to implement the evidence preservation requirement of the federal innocence protection statute,¹⁸⁰ few states have adopted evidence preservation regulations to ensure proper preservation of biological evidence needed for postconviction DNA testing.¹⁸¹

Passage of evidence management regulations and procedures in some jurisdictions should give courts greater latitude to demand reform of evidence management practices throughout the criminal justice system. In fact, despite criticism by legal scholars regarding the *Bryant* court's purely

179. See THE JUSTICE PROJECT, IMPROVING ACCESS TO POST-CONVICTION DNA TESTING: A POLICY REVIEW 22–23 (2008), available at <http://www.thejusticeproject.org/wp-content/uploads/post-convictiondna-fin.pdf> (proposing the creation of a state-wide task force to create standards for the proper preservation of evidence, training for property clerks on retention of biological evidence, and a centralized tracking system for efficient retrieval of old evidence); see also THE INNOCENCE PROJECT, MODEL LEGISLATION, 2008 STATE LEGISLATIVE SESSIONS: AN ACT TO IMPROVE THE PRESERVATION AND ACCESSIBILITY OF BIOLOGICAL EVIDENCE § 5(A)–(B) (2007), available at http://www.innocenceproject.org/docs/Preservation_Evidence_Prescriptive_08.pdf (proposing standards for the proper collection and retention of biological evidence and training programs for law enforcement officers and other relevant employees charged with preservation of biological evidence).

180. The federal innocence protection statute mandated that the U.S. Attorney General “promulgate regulations to implement” the preservation of biological evidence mandated by the new law. Justice for All Act of 2004, 18 U.S.C. § 3600A(e) (2006); see 28 C.F.R. §§ 28.23–28.26 (2008) (implementing the preservation of evidence provisions contained in the Innocence Protection Act of 2004, a subset of the Justice for All Act of 2004). The Justice for All Act of 2004, codified in part at 18 U.S.C. § 3600A, defines “biological evidence”; sets forth the length of time such evidence must be preserved; explains when destruction is permitted and the procedures that must be followed prior to destruction; explains how to extract biological samples of evidence from large, bulky pieces of evidence (like automobiles) that cannot be retained; and explains the penalties for noncompliance, including employee disciplinary sanctions and criminal penalties (felony offense punishable by up to five years of imprisonment). 18 U.S.C. § 3600A.

181. Evidence preservation regulations have been developed for California, see OFFICE OF THE ATTORNEY GEN., STATE OF CAL., POST-CONVICTION DNA TESTING TASK FORCE REPORT (n.d.), available at <http://ag.ca.gov/publications/finalproof.pdf> (making recommendations on how biological evidence should be preserved and stored and explaining the length of retention mandated by the new law based in part on the “best practices among California law enforcement for evidence handling and storage”), and a model evidence management reform project was successfully implemented in Charlotte, North Carolina, see CHARLOTTE-MECKLENBURG POLICE DEP’T, BIOLOGICAL EVIDENCE CATALOGUE PROJECT (n.d.), available at <http://www.newenglandinnocence.org/site/content/documents/PreservationAccessIssues/Catalogue%20Project.pdf> (describing the Biological Evidence Catalogue Project, which, among other things, made a complete inventory of all old biological evidence, and explaining that the new reforms were implemented in part to comply with the new innocence protection laws and to “bolster the integrity of the criminal discovery process”). In addition, comprehensive reform proposals are being developed to reform evidence management practices in Colorado. See COLO. REV. STAT. § 18-1-414 (2008) (mandating preservation of evidence).

prospective remedy,¹⁸² the court's actions successfully forced the government to implement long overdue reforms of its evidence preservation practices.¹⁸³ Post-*Bryant*, law enforcement agencies adopted clear evidence preservation regulations and the court imposed sanctions when evidence was destroyed in violation of those procedures.¹⁸⁴ This approach was also adopted by other jurisdictions and resulted in improved evidence management practices.¹⁸⁵

In sum, once the court is satisfied that the evidence has been destroyed, in examining the facts and circumstances surrounding the destruction, the court should determine what steps, if any, were taken by the government to ensure that biological evidence needed for DNA testing was properly preserved. Specifically, the court should determine whether the government ensured that evidence handlers were properly trained in

182. See, e.g., Burns, *supra* note 46, at 559–61 (noting that under the *Bryant* approach the imposition of sanctions will depend largely on the conduct of the government agent regardless of whether there is any prejudice to the defense, and that, alternatively, the court could decline to impose sanctions for evidence destruction—even when the defense is prejudiced—if the government agent fully adhered to the requisite preservation rules adopted by the government agency); Comment, *supra* note 46, at 651–52 (criticizing the holding in *Bryant* because it fails to address what an appropriate sanction might be for destruction of evidence and because it does not fully address what courts should do when a government agency adopts appropriate procedures but a government agent negligently fails to adhere to those procedures and, as a result, evidence is lost).

183. United States v. Bryant (*Bryant II*), 448 F.2d 1182, 1184 n.1 (D.C. Cir. 1971) (noting that, less than one month after the court issued its first opinion in *Bryant*, law enforcement agencies instituted changes to reform evidence preservation procedures); Robinson v. United States, 825 A.2d 318, 330 n.14 (D.C. 2003) (“In direct response to *Bryant*, the Metropolitan Police Department issued instructions to members of the department on ‘Preservation of Potentially Discoverable Material’ . . .”).

184. E.g., United States v. Arriola, Nos. 91-3329, 91-3336, 92-3006, 94-3103, 1994 WL 709343, at *1 (D.C. Cir. Nov. 23, 1994) (applying the *Bryant* test and striking testimony related to destroyed Jencks statement).

185. In *United States v. Bufalino*, the court also confronted widespread, systemic problems of destruction of Jencks material and sent a strong message to the government regarding the standards the court would apply in future cases, stating,

[W]e will look with an exceedingly jaundiced eye upon future efforts to justify non-production of a [statement] by reference to “department policy” or “established practice” or anything of the like. *There simply is no longer any excuse for official ignorance regarding the mandate of the law.* Where, as here, destruction is deliberate, sanctions will normally follow, irrespective of the perpetrator’s motivation . . .

576 F.2d 446, 449 (2d Cir. 1978) (citing United States v. Miranda, 526 F.2d 1319, 1324 n.4 (2d Cir. 1975)). As in *Bryant*, this approach caused systemic reform of the evidence preservation procedures by law enforcement and halted intentional destruction of Jencks material. See, e.g., United States v. Sanchez, 635 F.2d 47, 66 (2d Cir. 1980) (declining to impose sanctions because the Jencks material was destroyed prior to the date of the court’s opinion in *Bufalino*); United States v. Paoli, 603 F.2d 1029, 1037 (2d Cir. 1979) (stating that “[n]o useful deterrent purpose would be served by penalizing the government for having followed a policy which we understand has since been abandoned”); see also *People v. Hitch*, 527 P.2d 361, 369 (Cal. 1974) (holding that, if “evidence cannot be disclosed because of its intentional but nonmalicious destruction,” sanctions shall be imposed “unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve the [evidence]”).

preservation procedures and whether it instituted strict enforcement of rigorous regulations for all those in the chain of custody to prevent loss or destruction of discoverable evidence. The government's failure to take these minimal steps to ensure that biological evidence is properly preserved could tilt the balance toward the imposition of sanctions under the first prong of the access to evidence sanctions analysis.

B. *Prejudice Resulting from Destruction of Evidence*

The second prong of the sanctions analysis is an assessment of the degree of prejudice caused by the wrongful destruction of discoverable evidence. In making this determination, the court considers, among other things, how important or relevant the evidence is to the guilt determination. As discussed above, when evidence cannot be disclosed because it has been completely destroyed, the government bears the "heavy burden" of demonstrating the defendant was not prejudiced and sanctions are not warranted.¹⁸⁶ While the government may be able to shoulder this burden in some cases, the task will be extremely difficult when a prisoner qualifies for DNA testing under innocence protection laws. To qualify for postconviction DNA testing, most innocence protection statutes mandate that prisoners prove that identity was a disputed issue at trial and demonstrate that DNA analysis on biological evidence would be either outcome determinative or have a significant impact on the verdict reached at trial.¹⁸⁷ If prisoners are unable to make this showing, the court could dismiss the petition. Thus, among the prisoners that meet the rigorous qualifications for postconviction DNA testing, the wrongful destruction of biological evidence will invariably result in a very high degree of prejudice.

Moreover, DNA evidence has achieved a unique stature in the criminal justice system above and beyond other forms of evidence. DNA evidence is now widely regarded as having superior probative value and credibility in proving identity in criminal cases.¹⁸⁸ In fact, a recent report issued by the National Academy of Sciences,¹⁸⁹ a comprehensive exploration of the use

186. See *United States v. Carrasco*, 537 F.2d 372, 377–78 (9th Cir. 1976); *supra* notes 116–20 and accompanying text.

187. *E.g.*, MO. ANN. STAT. § 547.035(4)–(5) (West 2002) (mandating that postconviction petitions for DNA testing must allege facts demonstrating, *inter alia*, that "[i]dentity was an issue [at] trial" and "[a] reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing"); see also *Jones*, *supra* note 18, at 1251–52.

188. See *Garrett*, *supra* note 151, at 64 & n.32 ("DNA testing provides the most accurate and powerful scientific proxy available to establish biological identity; it sets the 'gold standard' for other forms of forensic analysis."); Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 171 (2007) (describing DNA profiling as "the current gold standard in forensic science"); see also *People v. Pitts*, 828 N.E.2d 67, 71 (N.Y. 2005) ("These statutory requirements . . . reflect the vital importance and potential exonerating power of DNA testing.").

189. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIS. CMTY. ET AL., NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (forthcoming 2009) (manuscript at S-1 to S-3, on file with the Fordham Law

(and abuse) of forensic science in the justice system, found that DNA analysis has a “higher degree of reliability and relevance than any other forensic technique.”¹⁹⁰ Further, as is demonstrated with over 200 exonerations, DNA evidence, standing alone, has the persuasive force to prove that an innocent person has been wrongly convicted, notwithstanding all other evidence used at trial to prove guilt beyond a reasonable doubt.¹⁹¹ Thus, in cases where identity is a disputed issue, the wrongful destruction of DNA evidence will result in a heightened level of prejudice.

Finally, the prejudice caused by the loss of DNA evidence is manifested in the reality that, in many cases, relief from a wrongful conviction through the normal appellate process is virtually impossible without DNA evidence.¹⁹² Among the first 200 DNA exonerations, direct appeals were filed in the vast majority of cases, and additional collateral appeals were filed in many others.¹⁹³ In nearly every case, the convictions of innocent people were affirmed by courts.¹⁹⁴ Later, armed with exculpatory DNA evidence, these same prisoners were exonerated.¹⁹⁵ These findings, coupled with the superior persuasive power of DNA evidence, demonstrate

Review) [hereinafter STRENGTHENING FORENSIC SCIENCE]. Pursuant to Pub. L. No. 109-108, 119 Stat. 2290 (2005), Congress authorized the National Academy of Sciences to conduct a study of forensic science and directed the formation of a Forensic Science Committee to, among other things, study the range of forensic science technologies and make recommendations for the improvement and advancement of these technologies in solving crimes and protecting the public. Over more than two years, the committee reviewed volumes of research, received testimony from a broad spectrum of law enforcement, criminal justice, and medical experts, and then issued its long-awaited evaluation of the various forensic science technologies currently in use in the American justice system. See STRENGTHENING FORENSIC SCIENCE, *supra*.

190. STRENGTHENING FORENSIC SCIENCE, *supra* note 189 (manuscript at 1-5, 1-10); see also *id.* (manuscript at 5-5) (concluding that DNA is superior forensic evidence because “DNA analysis also has been subjected to more scrutiny than any other forensic science discipline, with rigorous experimentation and validation performed prior to its use in forensic investigations” and, “[a]s a result of these characteristics, the probative power of DNA is high”).

191. See *id.* (manuscript at 1-6) (noting that DNA analysis performed on old evidence has exposed the inaccuracies of other forms of evidence used to prove identity); see also *Wade v. Brady*, 460 F. Supp. 2d 226, 248 (D. Mass. 2006) (discussing cases where identity was a disputed issue and DNA evidence could have been used to exculpate the defendant, and commenting that “[t]he limits of human fallibility have advanced, making it possible to improve on earlier decisions, even after accounting for erosion of memory and dispersion of witness concerns,” and, “[a]s a result, the adjudication at trial is no longer the most reliable determination of guilt or innocence possible for this limited set of cases” (internal quotation marks omitted)).

192. See ABA CRIMINAL JUSTICE SECTION’S AD HOC INNOCENCE COMM. TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 1 (2006) [hereinafter ACHIEVING JUSTICE] (“[P]ost-trial appellate remedies, at their best, are not designed to correct wrongful convictions or prevent them from happening. . . . [DNA exonerations] question the assumption that the system our nation has so proudly developed sufficiently protects the innocent.”).

193. Garrett, *supra* note 151, at 94.

194. See *id.* at 110–13.

195. *Id.*

both the profound impact of the use of DNA evidence in a case and the vast void created when DNA evidence has been destroyed.

Thus, when the government cannot comply with the disclosure obligations imposed by innocence protection laws due to the destruction of DNA evidence, the heightened level of prejudice should militate in favor of the imposition of sanctions.

C. *An Assessment of the Strength of the Government's Case*

The third prong of the access to evidence sanctions analysis is the assessment of the strength of the government's case. While the prejudice prong of the analysis focuses on the import of the destroyed evidence, the evaluation of the strength of the government's case seeks to determine whether, in light of the other evidence of guilt, the destroyed evidence would have made a difference in the ultimate verdict.¹⁹⁶ If the conviction was based solely or largely on the uncorroborated testimony of a single witness who was thoroughly impeached at trial, the weakness of the government's proof of guilt could tilt the balance toward the imposition of sanctions. Alternatively, and more commonly, a reviewing court could conclude that the government's evidence so convincingly proved the defendant's guilt that the destroyed evidence would not have affected the outcome in the case and, therefore, sanctions are not warranted.

Although a posttrial merits analysis is common in appellate and other postconviction litigation,¹⁹⁷ DNA exonerations have exposed the unreliability of judicial assessments of the government's evidence. Specifically, reviewing courts tend to focus on the *perceived* persuasiveness of certain categories of evidence (e.g., a confession) or focus solely on the sheer volume of evidence presented at trial (e.g., the number of eyewitnesses). DNA exonerations have proven that this analysis can be fatally flawed and does not consistently expose wrongful convictions of innocent people. In numerous DNA exonerations, a reviewing court's assessment of the government's case as "strong" or even "overwhelming," was later proven to be inaccurate when subsequent DNA testing proved to a scientific certainty that the defendant was factually innocent.¹⁹⁸

196. See *United States v. Mannarino*, 850 F. Supp. 57, 69 (D. Mass. 1994) (stating that the loss of evidence "undermines [the court's] confidence in the outcome of the trial").

197. Garrett, *supra* note 151, at 107–08.

198. E.g., *Holdren v. Legursky*, 16 F.3d 57, 63 (4th Cir. 1994) ("[T]he evidence overwhelmingly [was] sufficient to support the jury's verdict."); *Godschalk v. Montgomery County Dist. Attorney's Office*, 177 F. Supp. 2d 366, 367 (E.D. Pa. 2001) (denying petition for postconviction DNA testing and finding that defendant's confession, which contained details of the rapes that were not available to the public, represented "overwhelming evidence of the appellant's guilt," completely separate from the identification of the defendant by the rape victim (citation omitted) (internal quotation marks omitted)); *People v. Daye*, 223 Cal. Rptr. 569, 580 (Ct. App. 1986) (depublished by order of California Supreme Court) ("The People's case against Daye was strong. There was overwhelming direct evidence of his guilt."); *People v. Cruz*, No. 70407, 1992 Ill. LEXIS 221, at *2 (Ill. Dec. 4, 1992) ("The evidence adduced at trial implicating the defendant in the murder . . . was overwhelming."); *People v. Deskovic*, 607 N.Y.S.2d 957, 958 (App. Div. 1994) ("There was

Prior to the success of DNA analysis in proving actual innocence, courts were perhaps justified in accepting admissible evidence at face value and assuming that all admissible evidence was reliable and accurate. Today, after DNA evidence has proven that over 200 people have been convicted in our justice system by admissible evidence, this assumption is no longer valid. It is now clear that evidence can be both legally admissible and completely unreliable. Based on numerous national¹⁹⁹ and state-wide²⁰⁰ studies conducted since 1996, four categories of admissible evidence have emerged as the leading causes of wrongful convictions: (1) eyewitness identifications; (2) non-DNA forensic analysis of physical evidence; (3) testimony of jailhouse informants; and (4) confessions obtained during custodial interrogations.²⁰¹ As discussed more fully below, from the tainted procedures used to secure the evidence to the manner in which this evidence is presented at trial, each of these categories of evidence are potentially

overwhelming evidence of the defendant's guilt . . ."); *State v. Brown*, No. L-82-297, 1983 WL 6945, at *10 (Ohio Ct. App. Sept. 16, 1983) ("[T]he evidence overwhelmingly support[ed] appellant's guilt."); *see also* *People v. McSherry*, 14 Cal. Rptr. 2d 630, 636 (Ct. App. 1992) (depublished by order of California Supreme Court) (even after DNA evidence excluded the defendant, the court characterized the government's evidence as "overwhelmingly identifying appellant as the perpetrator"); Garrett, *supra* note 151, at 107–09 & n.198 (citing numerous other DNA exoneration cases where the court's pre-DNA assessment of the merits of the case characterized the proof of guilt as "overwhelming").

199. *E.g.*, ACHIEVING JUSTICE, *supra* note 192, at 11–78; CTR. ON WRONGFUL CONVICTIONS, NW. UNIV. SCH. OF LAW, THE SNITCH SYSTEM 3 (2005), available at <http://72.3.233.244/pdfs/drugpolicy/cntronwrongfulconvictionsthesnitchsystem.pdf>; EDWARD CONNORS ET AL., NAT'L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, 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 (1996), available at <http://www.ncjrs.gov/pdffiles/dnaevid.pdf> (one of the first studies examining twenty-eight of the earliest DNA exonerations); JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000) (examining the first sixty-eight DNA exonerations); Garrett, *supra* note 151; Gross et al., *supra* note 151 (examining the first two hundred DNA exonerations).

200. *E.g.*, CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT (n.d.), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>; INNOCENCE COMM'N FOR VA., A VISION FOR JUSTICE: REPORT AND RECOMMENDATIONS REGARDING WRONGFUL CONVICTIONS IN THE COMMONWEALTH OF VIRGINIA (2005), available at www.exonerate.org/ICVA/full_r.pdf; COMM'N ON CAPITAL PUNISHMENT, STATE OF ILL., REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT (2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf; THE INNOCENCE PROJECT, *supra* note 21 (discussing the DNA exonerations in the state of New York); Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1 (2002) (discussing the history of wrongful convictions cases in Massachusetts with detailed case profiles); John T. Rago, *A Fine Line Between Chaos & Creation: Lessons on Innocence Reform from the Pennsylvania Eight*, 12 WIDENER L. REV. 359 (2006) (discussing the history of wrongful convictions cases in the Commonwealth of Pennsylvania); North Carolina Innocence Inquiry Commission, <http://www.innocencecommission-nc.gov> (last visited Mar. 29, 2009).

201. Among the first 200 DNA exonerations, in some cases the government used two or more of these categories of evidence to secure a conviction. *See* Garrett, *supra* note 151, at 78–91. Other factors that have played a significant role in causing wrongful convictions include police and prosecutorial misconduct and ineffective assistance of counsel. *See id.* at 85.

fraught with serious deficiencies that can lead to wrongful convictions. In response to DNA exonerations, there have been reforms implemented in several jurisdictions across the country.²⁰² Thus, when evaluating the strength of the government's case, courts should subject these specific categories of evidence to greater scrutiny before concluding that they add strength to the government's case.²⁰³ Without implementation of the safeguards dictated by "post-DNA" reforms, eyewitness identifications, non-DNA forensic evidence, jailhouse informant testimony, and uncorroborated confessions, though admissible, may be unreliable evidence that dilutes the strength of the government's case and militates in favor of imposing sanctions for the wrongful destruction of DNA evidence.

1. Eyewitness Identifications

Every major study of wrongful convictions in the last decade has concluded that eyewitness misidentification is the most common cause of wrongful convictions in America.²⁰⁴ Of the first 200 DNA-based exonerations, 79% of the cases involved an eyewitness misidentification.²⁰⁵ One of the flaws of eyewitness identifications is caused by the way the human brain stores and retrieves information.²⁰⁶ Well-intentioned crime victims and other eyewitnesses simply make honest mistakes when attempting to identify strangers encountered under the rapid, unanticipated, and stressful circumstances of a criminal act.²⁰⁷ Studies have shown that the problem is exacerbated when the witness is tasked with accurately identifying a person of a different race, also known as a "cross-racial"

202. See *infra* Part II.C.1–4. See generally Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133 (2008).

203. See D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1331–32 (2004) (discussing the proposed "unsafe verdict" standard in use in Britain for review of factual innocence claims in criminal cases). Under this unsafe verdict standard, the judicial review would

carry a special obligation when a conviction is undergirded primarily with evidence known to be of questionable reliability, such as stranger-on-stranger eyewitness identification or "jailhouse snitch" testimony. . . . [I]t would oblige a court to consider any relevant fresh evidence, including research results casting doubt on the kind of evidence relied upon at trial

Id. at 1332.

204. E.g., ACHIEVING JUSTICE, *supra* note 192, at xvii; DWYER ET AL., *supra* note 199, at 73; Garrett, *supra* note 151, at 78–79; Gross et al., *supra* note 151, at 542.

205. Garrett, *supra* note 151, at 60; see also INNOCENCE COMM'N FOR VA., *supra* note 200, at 32 (stating that eyewitness misidentification led to the wrongful conviction of nine of the eleven cases reviewed by the Commission).

206. See Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 195 (2006) (explaining that "human memory is more selective than a video camera" and "human memory can change in dramatic and unexpected ways because of the passage of time or subsequent events").

207. *Id.* at 179 (discussing research on the negative effect of stress on the accuracy of eyewitness identifications).

identification.²⁰⁸ Among the first 200 DNA-based exonerations, almost all involved “stranger” misidentifications, and nearly 48% of the misidentifications were made by a witness of a different race than the suspect.²⁰⁹

Another factor contributing to inaccurate eyewitness testimony is the flawed pretrial identification procedures used by law enforcement officers. Prior to the witness taking the stand at trial and pointing the accusatory finger at the defendant, the defendant’s image is frequently presented to the witness in an array of photographs or in a live lineup. Actions taken by law enforcement officers before, during, and after these procedures can purposely or unwittingly prompt or encourage the witness to identify a specific person.²¹⁰ As a result, witnesses guess which person they believe police want them to select, or they select the person who most resembles the perpetrator.²¹¹

There is no longer much serious debate that these procedures, without proper safeguards, can yield unreliable evidence and lead to wrongful convictions.²¹² Following extensive research and evaluation, “best practices” standards for law enforcement have been developed by researchers and legal scholars.²¹³ These eyewitness identification reform

208. David E. Aaronson, *Cross-Racial Identification of Defendants in Criminal Cases: A Proposed Model Jury Instruction*, CRIM. JUST., Spring 2008, at 4, 4; see ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 4-13, at 105 (4th ed. 2007) (offering several explanations for “cross-race effects” including limited contact with individuals of other races and a lack of attention paid to individuals of other races).

209. Garrett, *supra* note 151, at 78–79.

210. See also Schmechel et al., *supra* note 206, at 203–04 (citing authorities).

211. ACHIEVING JUSTICE, *supra* note 192, at 32–40 (discussing the shortcomings of lineups, photo spreads, and show-ups, and exploring ways to reduce suggestion by police).

212. CONNORS ET AL., *supra* note 199, at 39–44, 49–51, 53–59, 67–68 (discussing eyewitness misidentification based on lineup and photo array procedures that led to wrongful convictions among the first twenty-eight DNA exonerations, e.g., Ronnie Bullock (lineup), Leonard Callace (photo array), Terry Leon Chalmers (photo array), Ronald Cotton (lineup), Frederick Rene Daye (lineup), Edward Green (photo array and lineup), Ricky Hammond (photo array), William O’Dell Harris (lineup), Edward Honaker (photo lineup), Brian Piszczek (photo array)); see also INNOCENCE COMM’N FOR VA., *supra* note 200, at 13–24 (discussing wrongful convictions of Marvin Anderson, Troy Webb, and Arthur Lee Whitfield, all based on eyewitness misidentification during photographic array or photographic line-up procedures).

213. Nearly a decade ago, the U.S. Department of Justice took the lead on eyewitness identification reform by proposing, among other things, double-blind sequential identification procedures, which require (1) the conducting of identification procedures by an officer unfamiliar with the identity of the suspect to eliminate the possibility of contamination or coaching; and (2) the presentation of the suspects to the witness one at a time (not in a group) to discourage “comparison shopping.” NAT’L INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 8–9 (1999), available at www.ncjrs.gov/pdffiles1/nij/178240.pdf; see, e.g., CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 200, at 24–34; INNOCENCE COMM’N FOR VA., *supra* note 200, at 36–42; VT. HOUSE & SENATE JUDICIARY COMM., REPORT OF THE EYEWITNESS IDENTIFICATION AND CUSTODIAL INTERROGATION STUDY COMMITTEE (2007), available at <http://www.leg.state.vt.us/reports/2008ExternalReports/228563.pdf>. These standards have also been endorsed by the American Bar Association. ACHIEVING JUSTICE, *supra* note 192, at 23–26. See generally Sandra Guerra Thompson,

laws have been enacted or implemented in several jurisdictions.²¹⁴ Courts have allowed the defense to introduce expert testimony to educate the jury on problems with eyewitness identifications²¹⁵ and/or special jury instructions on the specific challenges with cross-racial identifications.²¹⁶

When assessing the strength of the government's case, if the proof of guilt is based largely or exclusively on eyewitness identification evidence, particularly a "stranger" and/or cross-racial identification, courts should not automatically accord great weight to this evidence without careful scrutiny of the facts surrounding the identification.²¹⁷ In cases where the witness

What Price Justice? The Importance of Costs to Eyewitness Identification Reform, 41 TEX. TECH L. REV. 33, 40–55 (2008) (discussing the various eyewitness identification reforms proposed and adopted across the country).

214. *E.g.*, N.C. GEN. STAT. §§ 15A-284.50 to .53 (2007) (mandating, among other things, double-blind sequential identification procedures for lineups); WIS. STAT. ANN. § 175.50(5) (West 2006) (requiring "[t]o the extent feasible" double-blind sequential identification procedures); N.J. ATTORNEY GEN., GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (2001), available at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf> (recommending double-blind sequential lineups); see THE JUSTICE PROJECT, EYEWITNESS IDENTIFICATION: A POLICY REVIEW 16 (n.d.), available at http://www.thejusticeproject.org/wp-content/uploads/polpack_eyewitness_id-fin21.pdf (stating that double-blind sequential identification procedures have been implemented in several municipal jurisdictions, including Boston, Massachusetts, Virginia Beach, Virginia, and Santa Clara, California); see also THE INNOCENCE PROJECT, *supra* note 21, at 5 (stating that seventeen states have considered eyewitness identification reform legislation and that bills have passed in five states).

215. See *Ferensic v. Birkett*, 501 F.3d 469, 483–84 (6th Cir. 2007) (holding that the erroneous exclusion of expert testimony on the unreliable nature of eyewitness identification prejudiced the defendant); see also ACHIEVING JUSTICE, *supra* note 192, at 41–42 & nn.73–74 (listing cases where courts have approved expert testimony on the deficiencies in eyewitness identification testimony); Aaronson, *supra* note 208, at 11–12 (collecting authorities); Findley, *supra* note 26, at 922–23 & n.132 (noting that courts have become increasingly more receptive to expert testimony on eyewitness identifications and citing federal and state cases allowing expert eyewitness identification testimony, including courts in Montana, California, and Wisconsin); see also Schmechel et al., *supra* note 206, at 185–88 (listing jurisdictions where courts have given trial judges varying degrees of discretion to decide whether to allow expert eyewitness identification testimony).

216. See ACHIEVING JUSTICE, *supra* note 192, at 43–44 (citing authorities). In *State v. Long*, the court cited with approval the following special jury instruction on cross-racial misidentification:

In considering whether the prosecution has proved beyond a reasonable doubt that the defendant is the person who committed the crime, you should consider . . . whether the witness is of a different race than the criminal actor. *Identification by a person of a different race may be less reliable than identification by a person of the same race.*

721 P.2d 483, 494 n.8 (Utah 1986) (emphasis added); see also *United States v. Telfaire*, 469 F.2d 552, 560 (D.C. Cir. 1972) (Bazelon, J., concurring) (advocating for jury instructions on interracial identification); *Garden v. State*, 815 A.2d 327, 340 (Del. 2003) (refusing to reverse trial court's decision to give a jury instruction regarding cross-racial identification); Aaronson, *supra* note 208, at 8–10 (citing cross-racial identification jury instructions approved by courts in California, Utah, New Jersey, Maryland, and Massachusetts).

217. *Cf.* Risinger, *supra* note 203, at 1316–18 (stating that the "unsafe verdict" grounds for granting a new trial in criminal cases in the British legal system is usually invoked when factual innocence is asserted and the conviction was based on weak eyewitness identification).

made a pretrial identification at a lineup or through a photo array, the court should also examine whether best practices were followed pretrial or whether other precautionary measures were taken at trial to reduce the serious risk of misidentification and wrongful conviction.

2. Forensic Science Errors

An examination of the first 200 DNA exonerations reveals that the use of faulty forensic evidence is the second leading cause of wrongful convictions.²¹⁸ In 113 DNA exonerations, the government introduced some form of non-DNA forensic evidence to link the defendant to the crime.²¹⁹ Non-DNA forensic evidence includes the analysis of hair, fibers, bite marks, fingerprints, handwriting, blood, and tool marks.²²⁰ While DNA testing is used in about five percent of criminal cases,²²¹ the most common types of forensic evidence used to establish identity are serological evidence (the analysis of bodily fluids)²²² and microscopic hair comparison analysis.²²³ Until DNA exonerations exposed the inaccuracies of several forms of traditionally admissible forensic evidence, the reliability of this evidence was largely *assumed* without serious exploration of whether there was a sound scientific foundation to support the conclusions reached by forensic experts at trial.²²⁴ The full extent of the inaccuracy and unreliability of non-DNA forensic evidence was disclosed in the National Academy of Sciences report.²²⁵ The report appropriately acknowledges that forensic science errors have led to wrongful convictions and levels sharp criticism on the forensic science community for the profound lack of scientific research or protocols to support the analytical procedures it uses

218. Garrett, *supra* note 151, at 81.

219. *Id.*; see ACHIEVING JUSTICE, *supra* note 192, at 48 (establishing that one-third of the first sixty-two DNA exonerations involved “‘tainted or fraudulent science’” (quoting DWYER ET AL., *supra* note 199, at 246)).

220. See Giannelli, *supra* note 188, at 166 (providing statistics on the number of wrongful convictions for different types of non-DNA forensic evidence).

221. ACHIEVING JUSTICE, *supra* note 192, at 49.

222. Among the first twenty-eight DNA exonerations, serological evidence was used in several cases, for instance, Mark Diaz Bravo (“Blood tests done on a blanket near the crime scene showed a blood type consistent with Bravo’s blood type”); Charles Dabbs (ABO typing of semen stain consistent with defendant); Gerald Wayne Davis (chemist testified that defendant “could not [be] exclude[d]” as source of semen); and Edward Green (defendant had same blood type as assailant). CONNORS ET AL., *supra* note 199, at 37–38, 46–49, 53.

223. Several of the first twenty-eight DNA exonerations relied on this type of comparison. See *id.* at 38–39, 51–55, 57–58. For example, in Dale Brison’s case, hair from the crime scene was “consistent” with the defendant. In Gary Dotson’s case, pubic hair at the crime scene was “similar to” the defendant. In Ricky Hammond’s case, hairs found in the defendant’s car were “similar” to the victim’s hair. In Edward Honaker’s case, the hair sample was “unlikely to match anyone” other than the defendant. *Id.*

224. STRENGTHENING FORENSIC SCIENCE, *supra* note 189 (manuscript at 3-2) (noting that the greatest problem with “heavy reliance” on forensic evidence is “whether—and to what extent—there is *science* in any given ‘forensic science’ discipline”).

225. See generally *id.*

and the conclusions it reaches.²²⁶ The report found that there is little or no “science” to confirm the validity of several commonly used forms of forensic evidence, including fingerprints,²²⁷ human hair,²²⁸ handwriting,²²⁹ and bite marks.²³⁰ The report also criticizes the criminal justice system for allowing forensic evidence of dubious validity to be admitted at trial and finds that courts across the country have been “utterly ineffective” in addressing the “serious shortcomings” of non-DNA forensic evidence.²³¹

The report finds that the existing legal regime—including the rules governing the admissibility of forensic evidence, the applicable standards governing appellate review of trial court decisions, the limitations of the adversary process, and judges and lawyers who often lack the scientific expertise necessary to comprehend and evaluate forensic evidence—is inadequate to the task of curing the documented ills of the forensic science disciplines. . . . [E]very effort must be made to limit the risk of having the reliability of certain forensic science methodologies judicially certified before the techniques have been properly studied and their accuracy verified.²³²

226. *Id.* (manuscript at 3-1 to 3-2).

227. *Id.* (manuscript at 5-7 to 5-14) (finding that the ACE-V analytical technique for fingerprint or Friction Ridge analysis is “not specific enough to qualify as a validated method” and there is no universal standard protocol in place to ensure consistency and accuracy). The report also found that the persistent claims that fingerprint analysis has a zero error rate are “not scientifically plausible.” *Id.* (manuscript at 5-12). The report concludes that there is “considerable room” for additional research to validate the long-held “presumption” that each person has unique fingerprints. *Id.* (manuscript at 5-13 to 5-14).

228. *Id.* (manuscript at 5-22 to 5-26). This report found that, while microscopic hair comparison analysis can be useful to narrow the field of potential donors, there is “no scientific support” for using this technique to isolate and identify a specific person as the source of an unknown sample of hair. *Id.* (manuscript at 5-26). The report also found that forensic hair analysis is unsupported by any “scientifically accepted statistics” or the existence of any uniform standards regarding the number of consistent features that must be present before an examiner can reasonably opine that two hairs likely originated from the same person. *Id.* (manuscript at 5-25 to 5-26).

229. *Id.* (manuscript at 5-27 to 5-30) (noting that handwriting analysis (also known as forensic document examination) is based on the “high likelihood that no two persons write the same way” and concluding that, while “there may be a scientific basis for handwriting comparison,” more research is needed to quantify the reliability of the methodology and determine the error rate).

230. *Id.* (manuscript at 5-35 to 5-37) (concluding that there is “no evidence of an existing scientific basis for identifying an individual to the exclusion of all others” using forensic odontology, or the comparison of bite marks or dental impressions left on evidence). The report also noted that several innocent people convicted based on forensic odontology evidence have been exonerated by subsequent DNA tests. *Id.* (manuscript at 5-37).

231. *Id.* (manuscript at 1-14).

232. *Id.* (manuscript at 3-1); *see also id.* (manuscript at 1-4) (noting that there are “serious questions and concerns about the validity and reliability of some forensic methods and techniques and how forensic evidence is reported to juries and courts”); *id.* (manuscript at 3-3) (noting that “the interpretation of forensic evidence is not infallible” and that “[t]his reality is not always fully appreciated or accepted by many forensic science practitioners, judges, jurors, policymakers or lawyers and their clients”); *infra* notes 237–40 and accompanying text.

Even assuming the validity and accuracy of some forms of non-DNA forensic evidence, another problem exposed by DNA exonerations is the extent of the misrepresentation of the forensic findings by forensic science professionals and the lack of standards governing the operations at crime labs. In numerous cases, forensic professionals have testified and attempted to make their forensic findings into dispositive proof of guilt by exaggerating and misrepresenting the significance of their conclusions or engaging in other forms of misconduct, including perjury.²³³ In addition, crime labs in several jurisdictions have been plagued by scandals involving numerous employees and affecting hundreds of cases.²³⁴

Legal scholars and researchers have proposed broad, sweeping reforms designed to decrease reporting errors by forensic professionals and improve the overall quality and accuracy of work performed in crime labs.²³⁵ A few jurisdictions have implemented these reforms, which include compliance with national accreditation standards, mandatory certification for forensic science professionals, and regular independent reviews of the work performed by the lab.²³⁶ In most jurisdictions, however, forensic labs remain largely unregulated.

Finally, certain categories of forensic evidence have recently been discredited or seriously questioned by courts across the country, including the analysis of the lead content in bullets,²³⁷ handwriting samples,²³⁸ audio

233. *E.g.*, Giannelli, *supra* note 188, at 166–70 (discussing problems at numerous crime labs across the country, including staff incompetence, sloppy procedures, fraud, perjured testimony, false laboratory reports, and faked autopsies); *see also* Findley, *supra* note 26, at 935–37 (providing examples of overstatement or misrepresentation of forensic evidence uncovered by DNA exonerations).

234. Findley, *supra* note 26, at 936–37; Giannelli, *supra* note 188, at 166–68 & nn.14–27 (detailing scope of forensic laboratory scandals at FBI crime laboratory, the state crime labs in West Virginia, Oklahoma, Montana, and Virginia, as well as the crime labs in major metropolitan areas, including Chicago and Houston); *see also* Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 754–56 (2007); Ben Schmitt & Joe Swickard, *Troubled Crime Lab Shuttered*, DETROIT FREE PRESS, Sept. 26, 2008, at B1.

235. STRENGTHENING FORENSIC SCIENCE, *supra* note 186 (manuscript at 7-1 to 7-19) (proposing accreditation and quality control standards for crime labs and the creation of a code of ethics, proficiency testing, and mandatory certification for forensic science professionals); *see* Giannelli, *supra* note 188, at 211–27 (discussing specific quality assurance measures and protocols to be followed to prevent erroneous test results and/or fraud); *id.* at 212 (detailing that across the country over 240 crime labs are now accredited by the American Society of Crime Lab Directors/Laboratory Accreditation Board (ASCLD/LAB) and noting that New York, Oklahoma, and Texas require their labs to be accredited); *see also* ACHIEVING JUSTICE, *supra* note 192, at 121–22 (ABA resolution recommending accreditation standards).

236. Giannelli, *supra* note 188, at 212; *supra* note 235.

237. Bullet Lead Analysis or Comparative Bullet Lead Analysis was a technique used by forensic scientists in criminal cases where no weapon was recovered or when the bullet recovered from the crime scene was too mutilated for standard ballistics analysis of physical markings. Applying the scientific theory of Bullet Lead Analysis, the crime scene bullet would be compared to bullets recovered from the defendant to determine whether the bullets “match” based on their purported unique chemical composition. After use of this technique from 1980–2004 in approximately 2500 cases, the FBI permanently discontinued its use

voice recordings,²³⁹ and fingerprints.²⁴⁰ As most petitions for DNA testing are usually filed several years after the original conviction, it is likely that courts will confront cases involving prisoners convicted several years before based on the weight of these types of forensic evidence.

Therefore, when evaluating the strength of the government's evidence, a reviewing court should carefully scrutinize non-DNA forensic evidence and make an independent determination of whether the science is reliable and whether the scientific analysis is accurately reported. In light of the fatal weaknesses that have been exposed in this evidence in recent years, the court must determine whether this evidence should be accorded any weight in the assessment of the strength of the government's case.

after an outside review by the National Academy of Science concluded that there was an "inability of scientists and manufacturers to definitively evaluate the significance of an association between bullets made in the course of a bullet lead examination." Press Release, Fed. Bureau of Investigation, FBI Laboratory to Increase Outreach in Bullet Lead Cases (Nov. 17, 2007), available at <http://www.fbi.gov/pressrel/pressrel07/bulletlead111707.htm>; see also Paul C. Giannelli, *Comparative Bullet Lead Analysis: An Update*, CRIM. JUST., Summer 2008, at 24, 26–27 (summarizing the National Academy of Sciences study, the FBI response, and the subsequent cases where Comparative Bullet Lead Analysis evidence was excluded).

238. Following the Supreme Court's rulings in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), a minority of courts have flatly rejected handwriting comparison analysis expert testimony. *E.g.*, *United States v. Brewer*, No. 01 CR 892, 2002 WL 596365, at *7 (N.D. Ill. Apr. 16, 2002) (excluding the government's handwriting analysis evidence because the government failed to "prove the reliability of the handwriting comparison testimony"); *United States v. Saelee*, 162 F. Supp. 2d 1097, 1105 (D. Alaska 2001) (rejecting government's proffered expert handwriting analysis testimony as unreliable); *United States v. Fujii*, 152 F. Supp. 2d 939, 940 (N.D. Ill. 2000) ("Handwriting analysis does not stand up well under the *Daubert* standards."). See generally D. Michael Risinger, *Appendix: Cases Involving the Reliability of Handwriting Identification Expertise Since the Decision in Daubert*, 43 TULSA L. REV. 477 (2007) (providing comprehensive analysis of state and federal cases decided since 1993). Other courts have allowed limited expert testimony but precluded handwriting experts from testifying that there was a match between the defendant's handwriting and the disputed sample. *E.g.*, *United States v. Rutherford*, 104 F. Supp. 2d 1190, 1193 (D. Neb. 2000); *United States v. Hines*, 55 F. Supp. 2d 62, 69 (D. Mass. 1999); *United States v. Santillan*, No. CR-96-40169, 1999 WL 1201765, at *5 (N.D. Cal. Dec. 3, 1999); see also *supra* note 230.

239. Findley, *supra* note 26, at 965 n.347 (explaining that five states have rejected voiceprint evidence).

240. Giannelli, *supra* note 188, at 203–08 (citing the lack of scientific support for the accuracy of fingerprint analysis and discussing fingerprint identification errors in the FBI laboratory); see also State v. Bryan Rose, No. K06-0545, slip. op. (Balt. County Cir. Ct. Oct. 19, 2007), available at http://www.nlada.org/Defender/forensics/for_lib/Documents/1193671274.47/document_info (rejecting fingerprint evidence in death penalty case under the *Frye* standard); Simon A. Cole, *More than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985, 999 (2005) (citing twenty-two cases of errors and false matches in forensic fingerprint analysis); Nathan Benedict, Note, *Fingerprints and the Daubert Standard for Admission of Scientific Evidence: Why Fingerprints Fail and a Proposed Remedy*, 46 ARIZ. L. REV. 519, 519–20 (2004) (discussing the Brandon Mayfield case, where a Portland lawyer was wrongly arrested and detained based on an error matching his fingerprints to a latent fingerprint found in connection with a bombing in Spain); see also *supra* note 228.

3. Jailhouse Informant Testimony

The third category of evidence that has been consistently identified as a leading cause of wrongful convictions is the testimony of a jailhouse informant, commonly referred to as a “snitch” or “cooperating witness.”²⁴¹ While it is not uncommon for the government to rely on the testimony of accomplices, informants, and others associated with the defendant for insider information about the defendant’s criminal acts, it has been noted that “[t]he most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him.”²⁴² The heightened unreliability of jailhouse informant testimony stems from the fact that, unlike the accomplice or conspirator, the jailhouse informant is not implicated in the crime being reported to police. Thus, in giving incriminating testimony against a defendant in exchange for leniency or other considerations, the jailhouse informant has “nothing to lose and everything to gain.”²⁴³ The concern over the accuracy and reliability of this testimony is well justified. Among the first 200 DNA exonerations, 35 innocent people were wrongly convicted based, in part, on false testimony provided by these “incentivized” government witnesses.²⁴⁴ Moreover, a comprehensive study of 111 death row exonerations over a 30-year period found that jailhouse snitch testimony figured prominently in nearly 50% of all death row exonerations.²⁴⁵

241. See ACHIEVING JUSTICE, *supra* note 192, at 67 (defining the jailhouse snitch as “someone who is purporting to testify about admissions made to him or her by the accused while incarcerated in a penal institution contemporaneously”) (quoting 725 ILL. COMP. STAT. ANN. 5/11J-21(a) (West 2004)).

242. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1394 (1996). Judge Stephen S. Trott of the U.S. Court of Appeals for the Ninth Circuit wrote,

Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else’s expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration.

. . . [E]ach contract for testimony is fraught with the real peril that the proffered testimony will not be truthful

North Marina Islands v. Bowie, 243 F.3d 1109, 1123–24 (9th Cir. 2001); CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 200, at 48 (“The Commission concluded that the testimony of in-custody informants potentially presents even greater risks than the testimony of accomplices, who are incriminating themselves as well as the defendant.”); THE JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW 1 (2007), available at <http://www.thejusticeproject.org/wp-content/uploads/snitch-lr.pdf> (stating that, “[b]ecause jailhouse snitches are so desperate to attain sentence reductions, snitch testimony is widely regarded as the least reliable testimony encountered in the criminal justice system”).

243. THE JUSTICE PROJECT, *supra* note 242, at 1.

244. Garrett, *supra* note 151, at 86; see also *State v. Fain*, 774 P.2d 252 (Idaho 1989) (discussed *infra* at text accompanying notes 327–33).

245. CTR. ON WRONGFUL CONVICTIONS, *supra* note 199, at 3 (reporting that of the 111 persons released from death row from 1973–2004, jailhouse informant testimony was a contributing factor in the wrongful conviction in 45.9% of the cases).

Despite the instinctive distaste for testimony from jailhouse informers, this evidence is legally admissible.²⁴⁶ Since the proliferation of DNA-based exonerations that have consistently proven this evidence to be unreliable, several jurisdictions have proposed or enacted reforms to restrict the use of this testimony at trial. In Illinois, a statute was enacted that prevents a conviction based solely on the uncorroborated testimony of a jailhouse informant in death penalty cases.²⁴⁷ Also, some district attorneys' offices have developed written policies and stringent approval procedures to restrict the use of "in-custody informants" as witnesses.²⁴⁸ Other reforms that have been both proposed and enacted include requiring pretrial disclosure of agreements with jailhouse informants, mandatory pretrial "reliability" hearings, and independent corroboration of the testimony as a prerequisite to admissibility.²⁴⁹ Some jurisdictions also require standard cautionary instructions to the jury at trial to view the testimony of a jailhouse informant with great caution or "with greater care than the testimony of an ordinary witness."²⁵⁰ These reforms are specifically designed to prevent the jury from relying on potentially unreliable evidence. Thus, when proof of guilt is based largely on the testimony of a jailhouse informant and safeguards were not taken to ensure the reliability of the testimony, the court should accord little or no weight to this notoriously unreliable evidence in assessing the strength of the government's case.

4. False Confessions

The use of the defendant's own incriminating words is one of the most powerful and most persuasive forms of evidence of guilt. In some cases, the prosecution is based almost exclusively on the defendant's uncorroborated confession.²⁵¹ Although many people may still believe that

246. See *ACHIEVING JUSTICE*, *supra* note 192, at 76–77 (discussing various attempts by courts to address the unreliable nature of informant testimony with cautionary jury instructions); *THE JUSTICE PROJECT*, *supra* note 242, at 6–7 (discussing cases where courts admit informant testimony with cautionary jury instructions).

247. 725 ILL. COMP. STAT. ANN. 5/115-21(c)–(d) (West 2008) (requiring a showing by a preponderance of evidence that the informant's testimony is reliable); CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 200, at 49 (proposing enactment of statute mandating corroboration of in-custody informant testimony); see also *ACHIEVING JUSTICE*, *supra* note 192, at 63 (reporting that, according to the 2005 ABA Resolution 108B, "the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent . . . by ensuring that no prosecution should occur based solely upon uncorroborated jailhouse informant testimony").

248. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 200, at 47.

249. See, e.g., 725 ILL. COMP. STAT. ANN. 5/115-21(d) (mandating pretrial reliability hearings as a prerequisite to admissibility of informant testimony in capital cases).

250. *Dodd v. State*, 993 P.2d 778, 784 (Okla. Crim. App. 2000); see also CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 200, at 49–50 (proposing standard jury instruction on reliability of jailhouse informant testimony).

251. *Garrett*, *supra* note 151, at 89 (reporting that in 7 wrongful convictions cases among the first 200 DNA exonerations, the false confession was the "central evidence of guilt," and in 9 other cases, the false confession was "bolster[ed]" by jailhouse snitch testimony, an eyewitness misidentification, or faulty forensic science evidence).

a truly innocent person would never falsely confess to a crime—particularly a serious crime—numerous national and state studies have shown that false confessions, particularly in murder cases, are one of the leading causes of wrongful convictions in America.²⁵² Among the first 200 DNA-based exonerations, the government introduced false confessions in 31 cases.²⁵³ The rate of false confessions is higher among juveniles (39%),²⁵⁴ and people suffering from mental illness or mental disability (35%).²⁵⁵ Another factor that increases the likelihood of false confessions is the length of the interrogation.²⁵⁶ Research shows that 75% of false confessions were the product of interrogation sessions that lasted 6 to 24 hours.²⁵⁷ In many cases, the confession was due to police coercion, either psychological or physical.²⁵⁸ In other cases, police officers testified falsely that the defendant confessed to the crime during a closed interrogation session when, in fact, the defendant never uttered the incriminating statements.²⁵⁹

252. See, e.g., Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 933–43 tbl.2, 946 (2004) (finding that, of 125 wrongful convictions based on false confessions between 1972 and 2000, 81% of false confessions occurred in murder cases); Garrett, *supra* note 151, at 88–99; Gross et al., *supra* note 151, at 524 (studying 340 exonerations: 144 DNA-based and 196 non-DNA-based); see also CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 200, at 35; THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW 2 (n.d.), available at http://www.thejusticeproject.org/wp-content/uploads/polpack_recording-fin2.pdf.

253. Garrett, *supra* note 151, at 73, 88.

254. *Id.* at 89; see also THE INNOCENCE PROJECT, *supra* note 21, at 23 (discussing the case of fifteen-year-old Jeffrey Deskovic, who falsely confessed to a murder after being interrogated by police officers for more than six hours); THE JUSTICE PROJECT, *supra* note 252, at 10–12 (discussing the infamous “Central Park Jogger Case,” in which five juveniles (ages fourteen to sixteen) were wrongly convicted of the high-profile, brutal rape and vicious beating of a woman in Central Park in New York on the strength of their confessions during custodial interrogations, which the youths claimed included coercive and aggressive police actions, such as slapping, yelling, cursing, and false promises).

255. Garrett, *supra* note 151, at 89 (in eleven exoneration cases, false confessions were admitted at trial despite the fact that the defendants were mentally ill at the time of the confession); see also THE INNOCENCE PROJECT, *supra* note 21, at 22 (discussing the case of Douglas Warney, a person with a history of mental issues, who confessed falsely to his involvement in a murder after twelve hours of interrogation); THE JUSTICE PROJECT, *supra* note 252, at 13–15 (reporting that Earl Washington, a mildly mentally retarded man, gave a false confession that led to his wrongful conviction).

256. Drizin & Leo, *supra* note 252, at 948–49; see also Gross et al., *supra* note 151, at 544.

257. See Drizin & Leo, *supra* note 252, at 948–49 (explaining that 16% of the interrogation sessions lasted less than 6 hours, 34% lasted 6 to 12 hours, and 39% lasted 12 to 24 hours).

258. *Id.*

259. See Garrett, *supra* note 151, at 89–90 (explaining that in several cases courts have found confessions to be reliable because they were bolstered by nonpublic details of the crime). When DNA evidence subsequently proved the confession to be false, it became clear that the nonpublic details were the product of police action, e.g., “police fed facts, asked leading questions, supplied details,” or simply lied in reporting that the defendant confessed. *Id.*; see MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON JR. *passim* (2003) (telling the story of a mentally retarded man who was convicted based largely on the alleged confession made to police during custodial

While coerced confessions are not admissible evidence in criminal trials,²⁶⁰ a defendant without independent proof of coercive police conduct faces a steep uphill battle in trying to prove the confession was coerced. Consequently, few of the wrongly convicted defendants prevailed in their attempts to challenge the admissibility of confessions, even though DNA would later prove their confessions were false.²⁶¹ To address the problem of coerced false confessions, many jurisdictions across the country now require the recording of the entire interrogation session as well as the confession in homicides and other serious cases.²⁶² This reform has been imposed by judicial mandate²⁶³ and by state statute²⁶⁴ and is now standard police procedure in over 400 local police departments in all fifty states.²⁶⁵ Therefore, in assessing the strength of the government's case, if the government's proof of guilt was based largely or exclusively on the defendant's confession, the court should determine whether there is any corroboration of the incriminating statements attributed to the defendant. In light of the comprehensive research and national reforms that have been implemented across the country, the court should give less weight to unrecorded or otherwise uncorroborated confessions, especially when the confession was obtained during a lengthy custodial interrogation, involved

interrogation); THOMAS FRISBIE & RANDY GARRETT, VICTIMS OF JUSTICE: REVISITED 56–75 (2005); SCOTT TUROW, ULTIMATE PUNISHMENT: A LAWYER'S REFLECTION ON DEALING WITH THE DEATH PENALTY 30–31 (2003) (discussing the Rolando Cruz cases, where police testified to a fabricated confession).

260. See *Brown v. Mississippi*, 297 U.S. 278, 286–87 (1936) (holding that confessions extracted by police brutality or violence violate the Due Process Clause).

261. Garrett, *supra* note 151, at 90–91 (noting that, of the wrongly convicted defendants who challenged false, coerced confessions, none were successful on appeal).

262. *E.g.*, ACHIEVING JUSTICE, *supra* note 192, at 11 (discussing ABA Resolution 8A, which urges law enforcement agencies to “videotap[e] the entirety of custodial interrogations of crime suspects” and urges legislatures and courts to “enact laws” requiring such videotaping); CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 200, at 40 (recommending electronic recording of videotaping); INNOCENCE COMM’N FOR VA., *supra* note 200, at 54–58 (recommending videotaped interrogations).

263. See, *e.g.*, *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (ruling that recording of interrogations was mandated by the due process clause of the Alaska state constitution); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (mandating statewide recording of interrogations); SUPREME COURT OF N.J., ADMINISTRATIVE DETERMINATION: RE: REPORT OF THE SPECIAL COMMITTEE ON THE RECORDATION OF CUSTODIAL INTERROGATIONS (2005), available at <http://www.judiciary.state.nj.us/notices/reports/recording.pdf> (requiring interrogations to be recorded statewide, effective January 2006, for all homicide offenses).

264. In 2003, Illinois became the first state to pass legislation mandating the recording of interrogations. See 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2006) (adults); 705 ILL. COMP. STAT. ANN. 405/5-401.5 (West 2006) (juveniles); see also N.M. STAT. ANN. § 29-1-16 (2008), available at <http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0>; TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3 (Vernon 2005); WIS. STAT. ANN. § 968.073 (West 2008).

265. See THOMAS P. SULLIVAN, CTR. ON WRONGFUL CONVICTIONS, NW. UNIV. SCH. OF LAW, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS app. A (2004), available at <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/falseconfessions/sullivanreport.pdf> (compiling a comprehensive listing of law enforcement agencies in each U.S. city that has implemented videotaped interrogations).

a juvenile, or involved a person who was mentally impaired at the time of the alleged confession.

D. *Summary*

The access to evidence sanctions analysis provides a useful and effective paradigm for the judicial determination of whether to impose sanctions for the wrongful destruction of DNA evidence. The same concerns about the presentation of all relevant evidence to enhance the truth-seeking function of the court that justify imposing sanctions for other evidence destruction violations likewise support sanctions when DNA evidence is wrongly destroyed. The flexible three-prong test allows the court to take into account all relevant considerations when determining whether to impose sanctions. While negligent or inadvertent loss of evidence might not warrant sanctions in every case, the government's failure to take any steps to ensure that discoverable evidence is properly preserved, as well as the government's failure to impose and enforce regulations for evidence handlers on how to maintain and preserve DNA evidence, tilts the balance toward imposing sanctions. Further, given the extremely probative value of DNA evidence, the destruction of all testable biological evidence will usually result in extreme prejudice to prisoners who seek testing under innocence protection statutes. Finally, the proper assessment of the strength of the government's case cannot be divorced from the collective wisdom gained from over 200 DNA exonerations. If the government's evidence was based largely or exclusively on the types of evidence that have been a major factor in past wrongful convictions, the court must carefully scrutinize this evidence to determine its reliability. The application of the access to evidence sanctions analysis guides the court to a just and fair determination of whether sanctions should be imposed when DNA evidence is wrongly destroyed by the government.

III. FROM ACCESS TO EVIDENCE TO THE CASE OF ROBIN LOVITT

Whether or not Robin Lovitt is actually innocent, the judicial system should have been able to address the government's destruction of discoverable evidence and provide a legal remedy. While Lovitt could not assert a basis for relief under the specific and unique provisions of the Virginia statute or the Due Process Clause,²⁶⁶ the *Lovitt* case provides a useful vehicle to illustrate the effective application of the access to evidence sanctions analysis to the wrongful destruction of DNA evidence in violation of innocence protection laws.

A. *The Facts*

At trial, the government set out to prove that in the early morning hours of November 18, 1998, Robin Lovitt was at the Champions Billiards pool

266. See *supra* notes 5–17 and accompanying text.

hall when all other patrons had left and Clayton Dicks was the sole employee on the premises.²⁶⁷ The government's theory was that Lovitt and Dicks argued when Dicks attempted to stop Lovitt from stealing the cash drawer.²⁶⁸ According to the government, the argument escalated and Lovitt fatally stabbed Dicks with a pair of orange-handled scissors.²⁶⁹ Lovitt then fled the bar with the cash drawer, dropping the bloody scissors in the woods behind the pool hall as he made his escape.²⁷⁰

When Lovitt turned himself in to the police a few days after the murder, he admitted that he had stolen the cash drawer, but denied killing Dicks.²⁷¹ Lovitt told police that he was in the bathroom of the pool hall using drugs at the time Dicks was killed. When Lovitt came out and saw the killer fighting with Dicks, he retreated back into the bathroom out of fear.²⁷² When the killer fled, Lovitt came out and saw that Dicks was dead. According to Lovitt, he then took the cash drawer and fled to his cousin's house where they pried it open and divided up the money.²⁷³

The identity of the person who killed Clayton Dicks was the central issue in the case. To prove that Lovitt was the killer, the government relied on an eyewitness identification, testimony from a jailhouse snitch, and inconclusive DNA evidence. First, the government presented the tepid testimony of two eyewitnesses, both of whom consistently admitted—pretrial, during trial, and posttrial—that they did not know Lovitt prior to the murder, did not get a good look at the killer's face, and were not sure of their identification of Lovitt as the assailant.²⁷⁴ In fact, even though one of the eyewitnesses was unable to identify Lovitt at the preliminary hearing, he later testified at trial that he was “80% certain” Lovitt was the man he saw stab Clayton Dicks.²⁷⁵ He admitted, however, that he only saw the killer's face for a few seconds, and only from the side.²⁷⁶

267. See *Lovitt v. Commonwealth (Lovitt I)*, 537 S.E.2d 866, 870 (Va. 2000).

268. See *id.* at 870–71.

269. *Id.* at 871.

270. *Id.* at 870–72.

271. Petition for Clemency Submitted to Gov. Mark R. Warner on Behalf of Robin M. Lovitt and His Family 4–6 (July 5, 2005) [hereinafter *Lovitt Clemency Petition*] (on file with the Fordham Law Review); see also *Lovitt v. Warden (Lovitt II)*, 585 S.E.2d 801, 813 (Va. 2003).

272. *Lovitt II*, 585 S.E.2d at 813; *Lovitt Clemency Petition*, *supra* note 271, at 5–6.

273. *Lovitt II*, 585 S.E.2d at 813.

274. *Id.*; see also *Lovitt Clemency Petition*, *supra* note 271, at 6.

275. *Lovitt I*, 537 S.E.2d at 871. There was no pretrial lineup or photo array identification procedure. In fact, one of the witnesses, José N. Alvarado, informed the police during a pretrial interview that he was not sure he would be able to recognize the killer if he saw him again and could not remember whether the killer had a beard or mustache. *Lovitt Clemency Petition*, *supra* note 271, at 19. The other eyewitness, Carlos Clavell, was never asked at trial to identify Lovitt. *Id.* Following Lovitt's conviction, Alvarado gave a statement to a defense investigator admitting candidly that he felt confused and pressured to be more definitive in identifying Lovitt and admitted that he was not sure whether he was “60% or 80% or 90% or 50% sure” that Robin Lovitt was the person he saw stab Clayton Dicks. Letter from Thomas Yannucci, Kirkland & Ellis LLP, to Robert Crouch, Counsel for Gov. Mark Warner 2–3 (Nov. 29, 2005) (on file with the Fordham Law Review).

276. *Lovitt Clemency Petition*, *supra* note 271, at 19.

The government also proffered the testimony of Casel Lucas, a “seasoned” jailhouse informant and career criminal with thirteen prior felony convictions.²⁷⁷ According to Lucas, while he was serving a twenty-year sentence for violent and sex-related crimes, he befriended Lovitt at the Arlington County Jail while Lovitt was awaiting trial, and Lovitt confessed to killing Dicks.²⁷⁸ Posttrial, Lovitt’s attorneys learned that Lucas had given the government a series of wildly inconsistent and incredible versions of Lovitt’s purported confession.²⁷⁹

Next, the government called a state forensic scientist who analyzed two spots of blood on the orange-handled scissors—one on the tip and another near the handle—and three small spots of blood on Lovitt’s jacket.²⁸⁰ The expert analysis could only definitively establish that the victim’s blood was on the tip of the scissors, making the scissors the likely murder weapon.²⁸¹ Significantly, using the limited DNA analysis available in 1998, testing was “inconclusive” on the second spot of blood located in the midsection of the scissors and the blood found on Lovitt’s jacket.²⁸² Thus, there was no physical evidence linking Lovitt to the crime.²⁸³ Notwithstanding, the prosecutor argued to the jury that there was reason to believe that the victim’s blood was on Lovitt’s jacket and that Lovitt’s blood was on the orange-handled scissors.²⁸⁴

277. *Lovitt II*, 585 S.E.2d at 819; *Lovitt I*, 537 S.E.2d at 872.

278. *Lovitt I*, 537 S.E.2d at 877. Casel Lucas was housed with Lovitt at the county jail for two months prior to Lovitt’s trial. *Lovitt II*, 585 S.E.2d at 807. According to Lucas, Lovitt stated that he stayed in the bathroom until all the customers left the pool hall and then attempted to open the cash register drawer. *Id.* Lovitt told Lucas that when Dicks confronted him, Lovitt killed Dicks because Dicks could identify him. *Id.* Prior to trial, the defense was unaware of the fact that every year for the four years leading up to the Lovitt trial, Lucas had either reported a “jailhouse confession” by another inmate, testified against another inmate in exchange for a lighter sentence, or gave statements to the police regarding different homicides and other serious crimes. *Id.* at 812.

279. At one postconviction hearing, Lovitt’s trial counsel testified that Lucas signed an affidavit stating that he first told prosecutors that Lovitt “used a gun to shoot Dicks” and then “discarded the weapon in a drain” and was driven from the scene of the crime by his cousin. *Lovitt II*, 585 S.E.2d at 812–13.

280. *Id.* at 807.

281. Lovitt Clemency Petition, *supra* note 271, at 13–14.

282. *Id.* at 13. It was this biological evidence—blood on the scissors and on Lovitt’s jacket—that Lovitt was precluded from having analyzed under more advanced DNA testing under the Virginia innocence protection statute due to the premature destruction by the court clerk. *See id.* at 10–11; *supra* note 67 and accompanying text.

283. There were no fingerprints on the scissors, *Lovitt I*, 537 S.E.2d at 871–72, and all other evidence presented by the government merely showed that Lovitt was at the bar, needed money, and stole the cash box. *Id.* at 870–71. These facts are largely consistent with Lovitt’s version of the events, but do not directly identify Lovitt as the person who killed Dicks.

284. Lovitt Clemency Petition, *supra* note 271, at 7, 12–13. Significantly, the evidence showed that Dicks was stabbed six times in the chest and back at very close range, yet Lovitt only had these three small spots of blood on the jacket he was wearing. Also, there was no evidence presented at trial that Lovitt had cuts or injuries to his hands that would have been consistent with his bleeding during the stabbing and the depositing of his blood on the scissors, as the government contended.

B. Access to Evidence Analysis

As a preliminary matter, there was never any dispute in *Lovitt* that the government had a duty to preserve the biological evidence for postconviction DNA testing under the Virginia statute. Nor was there any dispute that this duty was breached when the evidence was destroyed by the court clerk. If the court had the authority to impose sanctions under Virginia law, the access to evidence analysis would have been a useful and effective model.

With respect to the first prong of the access to evidence analysis, the circumstances surrounding the destruction and degree of government culpability, *Lovitt* convincingly established that the evidence was intentionally destroyed by a government employee charged with maintaining the evidence. While the court found that the evidence destruction was not initiated or approved by the prosecutor's office, there was also no evidence that prosecutors took any steps to ensure proper preservation of the evidence after the new law was enacted. The record shows that the government made no effort to educate the court clerks on the new preservation law or to institute any regulations or procedures to ensure that the biological evidence would be preserved as mandated by the innocence protection statute. In fact, the court clerk directly responsible for evidence preservation testified that he was completely unaware of the new evidence preservation requirements. *Lovitt* did not, however, present evidence to show that the intentional destruction of evidence in his case was part of a pattern of government misconduct. Given that the statute had only recently been enacted, *Lovitt* probably would not have been able to make this showing.

The fact that the prosecutor's office failed to take steps to ensure preservation of the evidence by overseeing the work of the clerk's office or by providing the clerk's office with regulations or guidelines on compliance with the new law weakens the government's position on the first prong of the analysis. Conversely, the fact that the new postconviction evidence preservation law was in effect for less than one month would not likely give rise to the level of reckless noncompliance with preservation and disclosure duties that courts have found sanctionable. On balance, the government's conduct and involvement in the circumstances surrounding the destruction, standing alone, do not strongly support the imposition of sanctions.

As to the prejudice prong of the sanctions analysis, however, *Lovitt's* inability to seek more definitive DNA testing on the biological evidence severely undercut his ability to prove his actual innocence and seek relief under the Virginia innocence protection law. A subsequent, more advanced DNA analysis of the blood on *Lovitt's* jacket and the blood on the scissors could have disproved the government's argument at trial that there was physical evidence linking *Lovitt* to the crime. First, analysis of the blood on the jacket could have excluded the victim as the source. Second, at trial the government's theory was that a lone killer committed the crime and the killer left his blood on the murder weapon during the violent fatal

encounter. Subsequent DNA analysis on the spot of blood near the handle of the scissors might have revealed that the unidentified spot of blood belonged to a third person, not Lovitt. This evidence would have strongly supported Lovitt's misidentification defense, severely weakened the government's case, and cast serious doubt on the verdict at trial. At a minimum, the presence of another's blood on the murder weapon might have warranted a new trial. The government also could have used the DNA profile developed from blood on the scissors to correctly identify the real killer and exonerate Lovitt.

As for the final prong of the analysis, the strength of the government's case, the facts demonstrate that the government's case at trial was weak. This was a prosecution based on (1) an uncertain eyewitness identification from a witness who previously could not identify the defendant at all and who could not make a strong identification at trial; (2) uncorroborated testimony from a jailhouse snitch; and (3) the results of largely inconclusive scientific evidence that did not link the defendant to the crime. The sum total of this evidence is far from overwhelming. The single "tentative" eyewitness identification and the "incentivized" testimony of the jailhouse informant are the very forms of notoriously unreliable evidence that have led to many wrongful convictions over the last decade, especially where, as in Lovitt's case, there is no evidence that any of the safeguards were in place to ensure the accuracy of this evidence. In the end, the destruction of the biological evidence prevented Lovitt from attacking the most persuasive evidence presented by the government at trial. The overall weaknesses of the government's case should tilt the balance in favor of the court imposing sanctions for the wrongful destruction of DNA evidence.

In sum, using the access to evidence analysis, a reviewing court could find that a sanction was warranted in *Lovitt* because the wrongful destruction of evidence by the government was intentional, there was a heightened level of prejudice because identity was a disputed issue in the case, and the government's evidence at trial was not particularly strong or overwhelming.

IV. APPROPRIATE SANCTIONS

After a court makes the determination to impose sanctions for the wrongful destruction of evidence, the judge must then decide which sanction among the range of possible sanctions is appropriate. Ideally, the sanction imposed will cure the harm caused by the evidence destruction and return the parties to the position they would have been in had the evidence been disclosed. One judge observed,

When criminal evidence is lost or destroyed, the court must protect a complex of interests, some conflicting. Our principal concern is to provide the accused an opportunity to produce and examine all relevant evidence, to insure a fair trial. . . . Other considerations which bear upon the right to a fair trial are also present if intentional or culpable government action has caused the loss or destruction. The significant

interest in such cases is to avoid the impairment of judicial integrity that would occur if the prosecution were allowed to manipulate court processes, and protective rulings or sanctions may be required both to insure a fair trial in a specific case and to deter future violations.²⁸⁵

Thus, imposing sanctions for the wrongful destruction of discoverable evidence advances three fundamental principles. First, sanctions protect the right of litigants to present all relevant facts before the fact-finder and ensure that the defendant in a criminal case has “an equal opportunity to seek justice.”²⁸⁶ Sanctions also protect the “truth seeking” function of the court; evidence destruction impairs the search for the truth because “[t]he less evidence available, the less certain are the findings upon which a judgment must rest.”²⁸⁷ Finally, sanctions are imposed to vindicate the affront to judicial integrity that occurs if litigants are permitted to manipulate the judicial process through nondisclosure.²⁸⁸ Sanctions provide a vehicle for courts to punish such misconduct and deter future violations.²⁸⁹

While trial courts have the power to craft a remedy to advance these goals, judges do not have unfettered discretion in sanctioning evidence destruction violations. Trial courts are specifically cautioned that a “sanction should not be more punitive than is necessary to remedy the discovery violation.”²⁹⁰ Courts are similarly warned to avoid, if possible, imposing sanctions that have a fundamental impact on the outcome of the

285. *United States v. Loud Hawk*, 628 F.2d 1139, 1151 (9th Cir. 1979) (en banc) (Kennedy, J., concurring).

286. *Solum & Marzen*, *supra* note 23, at 1139; *see GORELICK ET AL.*, *supra* note 23, at 15.

287. *Solum & Marzen*, *supra* note 23, at 1138, 1166.

288. *See GORELICK ET AL.*, *supra* note 23, at 16 (emphasizing the importance of sanctions to “preserve[] the integrity of the judicial process”); *see also Beale*, *supra* note 38, at 1452–54; *id.* at 1452 (“[C]ourts have an interest in judicial integrity that is distinct from their duty to enforce the rights of the litigants.”).

289. *See GORELICK ET AL.*, *supra* note 23, at 17 (maintaining that the court must sanction evidence destruction to preserve the legitimacy of the judicial process); *id.* at 114 (cautioning of the “need to control evidence destruction ‘lest the fact-finding process in our courts be reduced to a mockery’” (quoting *Bowmar Instrument Corp. v. Tex. Instruments, Inc.*, 25 Fed. R. Serv. 2d (Callaghan) 423, 427 (N.D. Ind. 1977))); *id.* at 116 (explaining that individuals that destroy evidence demonstrate “a desire to manipulate the judicial process”).

290. ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 97, § 11-7.1(a) commentary, at 114 (citation omitted); *see United States v. Mannarino*, 850 F. Supp. 57, 69 (D. Mass. 1994) (seeking “to tailor the sanction to redress the prejudice experienced by the defendants”); ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 97, § 11-7.1(b), at 115 (maintaining that courts should have the “power to impose whatever sanction is necessary to return the parties to a ‘level playing field’”). The *American Bar Association Standards for Criminal Justice Discovery and Trial by Jury* advise that courts imposing discovery sanctions should take a “flexible approach which fully cures the harm caused by the failure to disclose, while not creating an undue advantage to the opposing side.” *Id.* § 11.7.1(a) commentary, at 114; *see also LAFAVE ET AL.*, *supra* note 167, at 961 (explaining that a sanction should not be regarded as “a bonus awarded without regard to its need in the furtherance of fair trial rights”) (quoting *Miller v. State*, 405 N.E.2d 909, 912 (Ind. 1980)).

litigation.²⁹¹ Against this backdrop, when the government's postconviction destruction of all testable biological evidence thwarts DNA testing, there are three appropriate sanctions available to the court: (1) sentence reduction; (2) new trial; or (3) dismissal (i.e., vacating the conviction). Because nondisclosure violations are generally discovered and cured pretrial or during the adjudication stage, courts usually have a wider range of sanctions available, ranging from striking testimony to granting a continuance or giving an adverse inference instruction. During the postconviction stage, however, these lesser sanctions are no longer an option. Moreover, while the Federal Rules of Criminal Procedure severely restrict the trial court's power to disturb a guilty verdict or alter the original sentence,²⁹² courts are not bound by these same restrictions when sanctioning the wrongful destruction of discoverable evidence.

A. Sentence Reduction

One appropriate sanction that courts can impose to redress wrongful evidence destruction during the postconviction stage of a case is a sentence reduction. Courts have generally only imposed a sentence reduction sanction when the impact of the destroyed evidence was limited to individual charges in a multicount indictment or when the destroyed evidence was relevant to the more serious charge in the indictment, but did not affect the lesser-included offense.²⁹³ Reducing the original sentence

291. LAFAYE ET AL., *supra* note 167, at 960 (maintaining that courts should seek to impose sanctions that, to the greatest extent possible, do not affect the evidence at trial and the merits of the case).

292. See FED. R. CRIM. P. 33(a) ("Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires."); FED. R. CRIM. P. 35(a) ("Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error."); see, e.g., *United States v. Galvan-Perez*, 291 F.3d 401, 406–07 (6th Cir. 2002) (rejecting the trial court's reduction in sentence as an impermissible "change of heart"); *United States v. Ferguson*, 246 F.3d 129, 131 (2d Cir. 2001) (characterizing the granting of a new trial as "a rarely used power"); see also *Herrera v. Collins*, 506 U.S. 390, 408–12 (1993) (discussing state procedural restrictions on postconviction requests for a new trial); *Risinger*, *supra* note 203, at 1315 nn.168–70 (discussing the limitations on the power of a court to grant a new trial on the grounds of insufficiency of the evidence).

293. *People v. Sheppard*, 701 P.2d 49, 55 (Colo. 1985); *People ex rel. Gallagher v. Dist. Court*, 656 P.2d 1287, 1293 (Colo. 1983); *People v. Saddy*, 445 N.Y.S.2d 601, 605 (App. Div. 1981); *People v. White*, 604 N.Y.S.2d 688, 692 (Sup. Ct. 1993). In *People v. Sheppard*, the Colorado Supreme Court upheld the dismissal of a vehicular manslaughter count of an indictment as a sanction for a *Brady* violation. *Sheppard*, 701 P.2d at 55. The government's destruction of defendant's car prior to trial prevented the defendant from establishing that the car accident was caused by mechanical failure. *Id.* Nevertheless, the court allowed the government to proceed on the lesser, included charge of driving under the influence. *Id.* In *People ex rel. Gallagher v. District Court*, the Colorado Supreme Court found that a reduction of a first-degree charge to a second-degree charge was an appropriate sanction where the nonpreservation of evidence prevented the defendant from proving that the victim was armed prior to the fatal encounter. *Gallagher*, 656 P.2d at 1293. In *People v. Saddy*, a New York court vacated the defendant's convictions for sale of controlled substances and remanded the case to the trial court for resentencing solely on lesser, included drug possession charges unaffected by the destroyed evidence. *Saddy*, 445 N.Y.S.2d at 605. In

imposed to sanction evidence destruction has not been upheld when there was not a close nexus between the specific charges and the evidence destroyed²⁹⁴ or when a less drastic remedy was available to cure the harm caused by nondisclosure.²⁹⁵

The use of a sentence reduction as a sanction in postconviction DNA cases will likely be an appropriate sanction only in a very limited number of cases. In cases like *Lovitt*, a sentence reduction might be an appropriate sanction when the DNA evidence, had it been preserved, would not have provided dispositive evidence of factual innocence, but could have severely weakened the government's case.²⁹⁶ This is especially true in death penalty cases where courts would have the option of reducing the death sentence to life without the possibility of parole. Since 1973, there have been 130 exonerations of death row inmates.²⁹⁷ Of these, there have been seventeen cases in which DNA was a "substantial factor" in the exoneration.²⁹⁸ Given the number of exonerations in capital cases and the greater degree of certitude demanded in these cases, a court should, at a minimum, strongly consider reducing the death sentence to life in prison when the condemned prisoner is wrongly denied access to DNA evidence. By contrast, in the majority of cases, the prisoner seeking DNA testing on biological evidence has been convicted of rape, and the biological evidence, if preserved, would prove factual innocence of all charges. Thus, imposing a sentence reduction to sanction the wrongful destruction of DNA evidence would not cure the harm caused by the destruction.

People v. White, a New York trial court held that the destruction of a stolen car by the government prevented the defendant from contesting an element of the offense—that the value of car exceeded \$3000—but a lesser charge of fourth-degree criminal possession—requiring that the stolen goods have a value over \$100—was allowed since the establishment of this element was unaffected by the government's loss of evidence. *White*, 604 N.Y.S.2d at 692.

294. See, e.g., *People v. Corso*, 521 N.Y.S.2d 773, 775 (App. Div. 1987) (finding trial court error for the dismissal of a drug charge as a sanction for a *Brady* violation where undisclosed evidence related only to a separate murder count).

295. *People v. Roan*, 685 P.2d 1369, 1371 (Colo. 1984) (holding that the court abused its discretion in reducing a vehicular homicide charge to DUI as a sanction for failure to preserve evidence related to blood-alcohol level where a less drastic remedy was available to cure prejudice to the defense).

296. In fact, the granting of clemency by Governor Mark Warner was a form of sentence reduction in *Lovitt*. As discussed *infra*, the biological evidence that was wrongly destroyed, standing alone, would not have completely exonerated Robin Lovitt, but could have undermined the strength of the government's key argument at trial that there was reason to believe that Lovitt was the source of the "inconclusive" blood deposited on the murder weapon and that the "inconclusive" blood on Lovitt's jacket was the victim's blood. See *supra* notes 274–83 and accompanying text.

297. Death Penalty Information Center, Innocence: List of Those Freed from Death Row, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Mar. 29, 2009) (reporting information as of September 2008); see also Gross et al., *supra* note 151, at 529 (noting that sixty-one out of seventy-four death row exonerations were non-DNA).

298. Death Penalty Information Center, *supra* note 297 (noting the seventeen exonerations based substantially on DNA evidence).

B. *New Trial*

Another postconviction sanction for the wrongful destruction of DNA evidence is granting a new trial.²⁹⁹ Like the sentence reduction sanction, granting a new trial likely will be an appropriate remedy in a very limited number of cases. As one court observed, when the evidence has been completely destroyed, “[a] new trial would be simply a repetition of the first trial, similarly infected by non-disclosure of discoverable evidence.”³⁰⁰ In some cases, however, a new trial might be an appropriate sanction if the court concurrently imposes other remedial measures to compensate for the loss of evidence. First, the court would have the discretion to prevent the government from introducing any forensic evidence to prove identity at the retrial, including all previously conducted DNA tests and all non-DNA forensic analysis.³⁰¹ At a time when juries sometimes have unrealistic expectations of cutting-edge, scientific proof of guilt, the so-called “CSI Effect,”³⁰² excluding forensic evidence could have a significant impact, especially where the government relied heavily on forensic evidence to prove identity at the initial trial. In *Lovitt*, for example, although DNA testing was inclusive with respect to some of the blood on the knife and all of the blood on Robin Lovitt’s jacket, these inconclusive DNA results gave the government leeway to argue that Lovitt’s blood *might* have been on the knife and the victim *could* have been the source of the blood on Lovitt’s jacket. If all of the forensic evidence was excluded at a new trial as a sanction for the government’s failure to preserve biological evidence, the government’s case at retrial would rest largely on the tepid eyewitness identification and the questionable testimony of the jailhouse informant.

In addition to excluding forensic evidence, a new trial sanction could also include a strongly worded adverse inference or “missing evidence” instruction.³⁰³ Courts have crafted adverse evidence instructions that simply inform the jury of missing evidence,³⁰⁴ inform the jury that the

299. See *supra* notes 92, 115, 146, and accompanying text.

300. *United States v. Bryant (Bryant I)*, 439 F.2d 642, 653 (D.C. Cir.), *aff’d*, 448 F.2d 1182 (D.C. Cir. 1971) (per curiam). *But see* *United States v. Mannarino*, 850 F. Supp. 57, 59 (D. Mass. 1994) (finding that Jencks evidence was wrongly destroyed and ordering a new trial because the court found that the evidence could be reconstructed at retrial).

301. See *State v. Mitchell*, 683 P.2d 750, 754–55 (Ariz. Ct. App. 1984) (finding that the proper remedy for the state’s destruction of semen samples in a rape case was the exclusion of blood-grouping evidence derived from a prior analysis of destroyed evidence); *Tinsley v. Jackson*, 771 S.W.2d 331 (Ky. 1989) (ruling that, on remand, the trial court should determine whether the government’s presentation of evidence should be limited or prohibited as a sanction for its failure to properly preserve discoverable evidence).

302. See STRENGTHENING FORENSIC SCIENCE, *supra* note 189 (manuscript at 1-10 to 1-11); see also Wendy Brickell, *Is It the CSI Effect or Do We Just Distrust Juries?*, CRIM. JUST., Summer 2008, at 10, 11.

303. See *supra* note 91 and accompanying text.

304. See, e.g., *State v. Fain*, 774 P.2d 252 (Idaho 1989). In *Fain*, the court suggested the following sample jury instruction for a case involving missing evidence:

You may take note of the fact that the state had obtained bodily fluid samples from the body of the victim, that such samples are, as a matter of law, material evidence in that scientific tests are available which may exclude an individual from that

evidence was wrongly destroyed,³⁰⁵ or even direct the jury to assume adverse facts based on the wrongful destruction of evidence by the government.³⁰⁶ While trial courts have great discretion in determining whether to give a missing evidence or adverse inference instruction, and even greater discretion in selecting the language of the instruction, specifically tailored instructions can serve to ameliorate some of the prejudice caused by the loss of DNA evidence.³⁰⁷

C. Vacating the Sentence/Dismissal

The broad authority given to state courts under innocence protection laws to impose “appropriate sanctions” to redress evidence destruction includes the authority to vacate a conviction.³⁰⁸ While it is clear that courts have this sanctioning authority, dismissal is the most severe sanction and is regarded as a “disfavored remedy” that should not be imposed when a less

class of persons who could have committed the crime, that the state lost or destroyed the samples, and that the defendant therefore did not have an opportunity to conduct such tests. The fact that the state lost or destroyed the samples does not, in itself, require that you acquit the defendant. It is, however, one factor for you to consider in your deliberations.

Id. at 266.

305. *See, e.g.,* Lolly v. State, 611 A.2d 956, 962 n.6 (Del. 1992). The missing evidence instruction in *Lolly v. State* stated, in part,

In this case the court has determined that the State failed to collect/preserve certain evidence which is material to the defense. The failure of the State to collect/preserve such evidence entitles the defendant to an inference that if such evidence were available at trial it would be exculpatory. This means that, for purposes of deciding this case, you are to assume that the missing evidence, had it been collected/preserved, would not have incriminated the defendant and would have tended to prove the defendant not guilty.

Id.

306. *See, e.g.,* People v. Zamora, 615 P.2d 1361, 1370 (Cal. 1980). In *People v. Zamora*, government records concerning past complaints of abuse filed against police officers were destroyed intentionally. *Id.* The California Supreme Court reversed the defendant’s conviction, and, as a sanction, mandated an adverse inference instruction that informed the jury (1) that the police officers had used excessive force in the past, (2) that the records of the officers’ past misconduct were destroyed by the government, (3) that the jury could infer that these officers were “prone to use excessive or unnecessary force,” and (4) that the officers’ testimony regarding these past incidents “may be biased.” *Id.*

307. *See generally* 4 TOM LUNDY, NATIONAL CRIMINAL JURY INSTRUCTIONS COMPENDIUM § 36.1.1 (2008), available at <http://www.juryinstruction.com/toc.shtml> (password and paid registration required) (on file with the Fordham Law Review) (listing numerous sample instructions from various jurisdictions). One such example is the following:

[C]onsider any evidence that the government or its agents either failed to preserve or destroyed or discarded relevant evidence as affirmative evidence of the weakness of the government’s case. This evidence, alone or in combination with other matters, may leave you with a reasonable doubt entitling the defendant to an acquittal.

Id.

308. *See* N.M. STAT. ANN. § 31-1A-2(F) (LexisNexis 2003) (“The district court may impose appropriate sanctions, including dismissal of the petitioner’s conviction or criminal contempt, if the court determines that evidence was intentionally destroyed after issuance of the court’s order to secure evidence.”).

drastic sanction would redress the disclosure violation.³⁰⁹ In postconviction litigation, however, dismissal may be the only appropriate sanction available to the court when dispositive DNA evidence is destroyed. A major concern with dismissal, however, is the risk of “freeing the guilty.” In light of the fact that postconviction DNA testing confirms the guilt of the prisoner in fifty percent of the cases,³¹⁰ this concern is justified. Also, DNA evidence is generally only available in rape and murder cases, both of which carry sentences of twenty or more years in prison.³¹¹ Thus, even when evidence has been wrongly destroyed and postconviction DNA testing is no longer possible, judges may be reluctant to exercise their discretion to vacate the conviction if there is a chance that a guilty person might be released.

The risk of potentially “freeing the guilty,” however, must yield to the paramount goal of “freeing the innocent.” As Justice John Marshall Harlan recognized long ago, “In a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.”³¹² To underscore the fundamental value of protecting the rights of the innocent, Justice Harlan also famously stated, “[I]t is far worse to convict an innocent man than to let a guilty man go free.”³¹³ Given the now undisputed fact that factually innocent people are convicted in our justice system,³¹⁴ the risk of “convicting the innocent” can

309. *State v. DiPrete*, 710 A.2d 1266, 1273 n.2 (R.I. 1998) (quoting *United States v. Jacobs*, 855 F.2d 652, 655 (9th Cir. 1988)); see *People v. Kelly*, 62 N.Y.S.2d 516, 520 (City Ct. 1984) (stating that the “drastic remedy of dismissal should not be invoked where less severe measures can rectify the harm done by the loss of evidence”).

310. Garrett, *supra* note 151, at 109; Jones, *supra* note 18, at 1267 n.132. The case of Roger Coleman provides a poignant illustration of this point. Coleman steadfastly maintained his innocence after being convicted of capital murder for the extremely brutal rape and murder of his sister-in-law. Due to the intense public pressure from the media and Coleman’s advocates for nearly a decade after his conviction, Virginia Governor Mark Warner ordered a DNA analysis of the biological evidence in the case after Coleman’s execution that confirmed Coleman’s guilt. See Maria Glod & Michael D. Shear, *DNA Tests Confirm Guilt of Man Executed by Va.*, WASH. POST, Jan. 13, 2006, at A1.

311. Of the first 200 DNA exonerations, 77% were in cases involving rape or murder. In fact, only 3 cases did not involve a charge of rape, murder, or both. Garrett, *supra* note 151, at 73–74. Of 340 DNA and non-DNA exonerations from 1989–2003, 96% were for rape, murder, or both. Gross, *supra* note 151, at 529.

312. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

313. *Id.*; see also *Boon v. State*, 1 Ga. 618, 631 (1846) (“[H]owever unwilling we may be to see the guilty escape, we are still more so to establish a precedent, which would jeopardize the safety of the innocent.”); Findley, *supra* note 202, at 135 (stating that, to advance the ideal of protecting the innocent over convicting the guilty, “our constitutional scheme purports to put most of the risk of error on the prosecution”).

314. See *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (recognizing that a state prisoner could mount an effective collateral attack on a state court conviction by presenting evidence that establishes a “truly persuasive demonstration of ‘actual innocence’”); see also *House v. Bell*, 126 S. Ct. 2064, 2076 (2006) (reaffirming the miscarriage-of-justice exception to the procedural restrictions on habeas corpus petitions when state court prisoners present sufficient evidence of actual innocence).

no longer be dismissed as a remote possibility or theoretical notion.³¹⁵ Therefore, the sanction of dismissal is justified when DNA evidence is destroyed in violation of innocence protection laws.

Moreover, the risk of “freeing the guilty” is significantly reduced in many cases involving factual innocence claims due to the presence of strong, independent evidence of innocence. Among the first 200 DNA exonerations, in many cases, years before obtaining exculpatory DNA results, prisoners presented credible, non-DNA evidence of actual innocence that cast serious doubt on the guilty verdict. This exculpatory evidence included credible confessions to the crime by third parties, recantations of testimony by victims and key witnesses, and various acts of prosecutorial and police misconduct.³¹⁶ Although courts have found this exculpatory evidence insufficient to grant postconviction relief under postconviction review standards, this evidence should provide the court with a solid basis for vacating the conviction as a sanction when DNA evidence has been destroyed. Two cases provide a brief illustration of this point. In *People v. Dotson*,³¹⁷ the very first postconviction DNA exoneration,³¹⁸ Gary Dotson was convicted of a brutal rape of a teenage girl.³¹⁹ Years later, the victim, now a mature woman, recanted her fabricated trial testimony under oath. Despite numerous postconviction hearings and other proceedings, Mr. Dotson was unable to obtain relief from his wrongful conviction until several years later when DNA testing proved his actual innocence.³²⁰ Similarly, in *People v. Cruz*,³²¹ Rolando

315. *Herrera*, 506 U.S. at 420 (O’Connor, J., concurring) (“Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.”); *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (Hand, J.) (“Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”); see also Risinger, *supra* note 203, at 1334–35 & n.297.

316. See, e.g., THE JUSTICE PROJECT, *supra* note 252. The wrongful conviction of Christopher Ochoa and Richard Danziger was based, in part, on the coerced confession of Ochoa. *Id.* at 9–10. Achim Marino, a convicted felon serving three life sentences, wrote letters confessing to the crime and directing police to the hidden location of evidence related to the crime, including the murder weapon. *Id.* Despite this evidence, Ochoa and Danziger were not exonerated until six years later when DNA analysis of biological evidence collected from the rape victim excluded Ochoa and Danziger and identified Marino. *Id.* In *State v. Elkins*, an appellate court upheld the trial court’s finding that a child rape victim’s posttrial recantation was not credible and denied the defendant a new trial. No. 21380, 2003 WL 22015409, at *3–4 (Ohio Ct. App. Aug. 27, 2003). Three years after the recantation by the victim, who was also the sole eyewitness, the defendant and his wife obtained DNA testing on the crime scene evidence that excluded the defendant and inculpated Earl Mann, a convicted rapist who lived near the victim at the time of the crime. See The Innocence Project, Know the Cases: Clarence Elkins, <http://www.innocenceproject.org/Content/92.php> (last visited Mar. 29, 2009).

317. 516 N.E.2d 718 (Ill. App. Ct. 1987).

318. Gross et al., *supra* note 151, at 523.

319. *Dotson*, 516 N.E.2d at 720 (explaining that complainant testified that she falsely reported being raped because she had a sexual relationship with her boyfriend and believed she was pregnant).

320. *Id.* at 722 (upholding the denial of the motion to vacate the sentence and finding the complaining witness not credible in recanting her trial testimony).

Cruz and Alejandro Hernandez were both wrongly convicted and sentenced to death for the rape and murder of Jeanine Nicarico, a ten-year-old girl.³²² Postconviction, Brian Dugan, a convicted sex offender and serial killer, came forward and confessed to the Nicarico murder and confessed to two other rape-murders and three other rapes.³²³ Dugan also gave details about the various crimes, many of which had a very similar modus operandi and were corroborated by testimony from other witnesses.³²⁴ Despite this evidence, the defendants were not exonerated until DNA analysis excluded Cruz and Hernandez and implicated Dugan as the perpetrator.³²⁵

The dismissal remedy should not, however, be restricted to cases where there is independent exculpatory evidence. Two other cases illustrate this point. In *State v. Fain*,³²⁶ Charles Fain was convicted of capital murder for the brutal rape, kidnapping, and drowning of a nine-year-old girl.³²⁷ Pretrial, during trial, and on appeal, Fain steadfastly argued that he was denied due process because the government failed to preserve potentially exculpatory swabs of bodily fluid taken from the victim during the autopsy.³²⁸ The trial court found that the swabs containing semen from the victim's assailant were inadvertently discarded by the pathologist, and that, if preserved, the evidence could have been subjected to serological testing to exclude Fain.³²⁹ Despite these findings, the Idaho Supreme Court upheld the denial of the motion to dismiss based on the destruction of the evidence, finding that dismissal would be "an overly severe sanction" in light of the "significant and weighty" circumstantial evidence of guilt presented at trial.³³⁰ Principally, the evidence of guilt adduced at trial consisted of the testimony of two jailhouse informants and inculpatory forensic analysis of the pubic hair found on the victim's underwear.³³¹ By 2000, DNA analysis could be performed on the pubic hairs removed from the victim's clothing. DNA analysis revealed that Charles Fain was not the source of the pubic

321. 643 N.E.2d 636 (Ill. 1994).

322. *Id.* at 666–67.

323. *Id.* at 645–46.

324. *Id.* at 645–48.

325. Center on Wrongful Convictions, Meet the Exonerated: Rolando Cruz, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilCruzSummary.html> (last visited Mar. 29, 2009); see also FRISBE & GARRETT, *supra* note 259, at 56–75; TUROW, *supra* note 259, at 3–8.

326. 774 P.2d 252 (Idaho 1989).

327. *Id.* at 254–55, 268.

328. *Id.* at 257–61.

329. *Id.* at 261.

330. *Id.* at 267.

331. *Id.* at 255, 267.

hairs.³³² In 2001, after eighteen years on death row, Fain was exonerated and released from prison.³³³

Perhaps no case is a more apt and ironic illustration of the injustice that can result from the failure to use the dismissal sanction than the case of Larry Youngblood, the litigant at the center of the landmark Supreme Court case, *Arizona v. Youngblood*.³³⁴ Larry Youngblood was convicted of kidnapping, molesting, and repeatedly sodomizing a ten-year-old boy. Following the brutal assault, the young victim was taken to the hospital, where biological evidence (seminal fluid) was collected from the child's body and clothing.³³⁵ The child later made a photo identification of Larry Youngblood as the assailant.³³⁶ The government never conducted serological tests on the biological evidence, and it was later discovered that, due to improper storage, the samples had deteriorated to the point where scientific analysis was no longer possible.³³⁷ At trial, Youngblood denied involvement and maintained that, if the evidence had been properly preserved, serological testing could have excluded Youngblood as the perpetrator.³³⁸ Following his conviction, Youngblood was sentenced to more than ten years in prison. Youngblood unsuccessfully litigated whether the government's failure to preserve the evidence constituted a due process violation.³³⁹ Although the original biological evidence was deemed too degraded for serological analysis, by 2000, DNA analysis on the evidence revealed that Youngblood was not the perpetrator.³⁴⁰

In sum, imposing a sentence reduction or granting a new trial will likely serve as an appropriate sanction in a small minority of cases to address the wrongful destruction of DNA evidence. In most cases, the sanction of dismissal will be the appropriate remedy. In fact, given the superior persuasive power of DNA evidence and the paramount goal of protecting the innocent from the fate of a wrongful conviction, dismissal should be the presumptive remedy when the court determines that DNA analysis of biological evidence, if preserved, could have exonerated the defendant.

332. See case profiles at The Center on Wrongful Convictions, Charles I. Fain, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/idFainSummary.html> (last visited Mar. 29, 2009); The Innocence Project, Know the Cases: Charles Irvin Fain, <http://www.innocenceproject.org/Content/149.php> (last visited Mar. 29, 2009).

333. See The Center on Wrongful Convictions, *supra* note 332; The Innocence Project, *supra* note 332.

334. 488 U.S. 51, 52 (1988); see also *supra* notes 50–54 and accompanying text.

335. *Youngblood*, 488 U.S. at 52–53.

336. *Id.* at 53.

337. *Id.* at 53–54.

338. *Id.* at 54.

339. *Id.* at 56.

340. The Innocence Project, Know the Cases: Larry Youngblood, <http://www.innocenceproject.org/Content/303.php> (last visited Mar. 26, 2009). Not only did the DNA analysis exonerate Larry Youngblood, it also matched another man, Walter Cruise, who was subsequently convicted of the crime and sentenced to twenty-four years in prison. *Id.*

CONCLUSION

In the wake of well over 200 DNA exonerations and the passage of innocence protection laws in nearly every jurisdiction in the country, courts have a definite role to play in ensuring that biological evidence needed for DNA testing is properly preserved and available for disclosure. The use of judicial sanctions to redress the wrongful destruction of biological evidence can serve as a catalyst to usher in systemic reforms in the criminal justice system. Sanctions will also advance the goal of correcting wrongful convictions and repairing the tarnished integrity of an imperfect criminal justice system.