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American Criminal Law Review

Fall, 2005

42 Am. Crim. L. Rev. 1239

LENGTH: 13689 words

ARTICLE: EVIDENCE DESTROYED, INNOCENCE LOST: THE PRESERVATION OF BIOLOGICAL EVIDENCE UNDER INNOCENCE PROTECTION STATUTES

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BIO:

* Professor Cynthia Ellen Jones is an Assistant Professor of Law at the American University, Washington College of Law. Professor Jones is a former staff attorney and the former Executive Director of the Public Defender Service for the District of Columbia. I would like to dedicate this article to the memory of my wonderful mother, Ernestine C. Jones, who continues to inspire me. Also, it "takes a village" to create a law review article, and I would like to thank all of my "village people": a very special thanks to my colleague, my mentor, and very dear friend, Professor Angela J. Davis, who continually motivated me in this creation; Professor Tamar Meekins, for her incredible friendship and support; my dedicated research assistants who gave me invaluable assistance on this journey: Addy Schmidt, Rolaine Bancroft, Joseph Caleb, Nana Amoako, Keir Bancroft, Holly Daee, Natalia Wilson and Michael Collins, Frank Pigott. I would also like to thank my many colleagues at the Washington College of Law for their on-going encouragement and support, especially Dean Claudio Grossman, Associate Dean Andy Pike, and Professors Ira Robbins, Bob Dinerstein, Jamin Raskin and Binny Miller.

LEXISNEXIS SUMMARY:
... At the time of Mr. Byrd's trial in 1985, DNA technology was not yet available for forensic analysis of biological evidence. ... Innocence protection statutes also authorize the court to order the government to make the still-existing biological evidence available for DNA testing if the prisoner meets the statutory qualifications. ... All innocence protection statutes fall into one of three categories with respect to preservation of biological evidence needed for DNA testing: no duty to preserve evidence, a "qualified" duty to preserve evidence, or a "blanket" duty to preserve evidence. ... While many state innocence protection statutes will likely meet the "reasonable process" requirement, jurisdictions that impose no duty to preserve biological evidence will not likely meet the preservation requirement. ... The requirement of a pre-existing court order is an unnecessary restriction because there would be no need for a court to issue an order mandating preservation of evidence if the innocence protection statute in the jurisdiction imposed a blanket duty to preserve evidence or if a petition for testing was filed and the government's qualified duty to preserve evidence was triggered. ... If there was no realistic probability that DNA analysis of biological evidence could prove actual innocence, the government's opposition to a duty to preserve biological evidence for post-conviction DNA testing

would have some legitimacy. ...

TEXT:
[*1239] In 1997, Texas governor George W. Bush issued a pardon to Kevin Byrd, a man convicted of sexually assaulting a pregnant woman while her two-year old daughter lay asleep beside her. n1 As part of the original criminal investigation, a medical examination was performed on the victim and bodily fluids from the rapist were collected for forensic analysis in a "rape kit." At the time of Mr. Byrd's trial in 1985, DNA technology was not yet available for forensic analysis of biological evidence. n2 In 1997, however, a comparison of Mr. Byrd's DNA with the bodily fluid in the rape kit established that Mr. Byrd was not the rapist. n3 After serving twelve years in prison, Mr. Byrd finally was exonerated because of the scientific advancements in DNA technology and the fact that, by "pure luck," the sample of biological material collected in the rape kit had been preserved at the Harris County Clerk's Office in Houston, Texas for over a decade. n4

After the DNA tests excluded Kevin Byrd as the perpetrator, the prosecution and the police were convinced that Mr. Byrd was innocent. n5 When Governor Bush issued the pardon, he predicted that Mr. Byrd's case would be the "first of many" in Texas to use the new DNA technology to re-examine old cases. n6 The same week of Mr. Byrd's pardon, however, the evidence custodians at the Harris County Clerk's [*1240] office began to systematically destroy old rape kits in its evidence storage facility. n7 In one fell swoop, fifty rape kits were discarded, n8 virtually guaranteeing that Kevin Byrd would not be the "first of many" in Harris County to benefit from DNA technology as was predicted by Governor Bush.

The sole reason given by Harris County for the destruction of this potentially exculpatory evidence was a simple lack of storage space. n9 While it seemed more than a little coincidental that evidence kept for a decade or longer was suddenly destroyed on the immediate heels of Mr. Byrd's exoneration, evidence custodians were quick to point out that destruction of the evidence was legal. n10 In fact, local law gave Harris County the complete discretion to either retain or destroy old evidence from closed cases, regardless of any potential value the evidence might have in establishing the actual innocence of a prisoner. n11

To date, 163 innocent people in nearly every jurisdiction in the country have been wrongly convicted and later exonerated, many as a result of DNA analysis performed on old evidence retained by the government. n12 A major impediment to the use of DNA evidence to exonerate the wrongly convicted has been -- and continues to be -- the destruction of evidence, such as rape kits, by the government. n13 Innocence Project attorneys and others working on behalf of the convicted describe the problem as a race to see how many people can be proven innocent before the evidence samples are lost or destroyed. n14 In fact, the Innocence Project [*1241] of the Benjamin Cardozo School of Law, the national leader in the use of DNA to exonerate wrongly convicted prisoners, reports that 75% of the cases it accepts cannot go forward because the evidence has been lost or destroyed. n15

While the practice of destroying old evidence in closed criminal cases was a routine and benign practice prior to the widespread forensic use of DNA, the current practice of destroying biological evidence, with full knowledge of its potential use to exonerate the wrongly convicted, is a cruel and callous injustice.

This article provides a critical analysis of the government's duty to preserve potentially exculpatory evidence under innocence protection statutes, newly enacted laws that allow prisoners to pursue DNA testing on biological evidence to establish their actual innocence. Part I examines the scope of the government's duty to preserve evidence under state law, the United States Constitution and innocence protection statutes. While innocence protection statutes have advanced the efforts of prisoners to utilize DNA testing to establish actual innocence, the vast majority of these statutes do not mandate that the government preserve the biological evidence needed for DNA analysis. Thus, the right to post-conviction DNA testing created by the overwhelming majority of innocence protection statutes is purely illusory. Moreover, even when innocence protection statutes impose a duty on the government to preserve evidence, the statutes do not include any remedy for convicted prisoners if all testable evidence is nonetheless destroyed and DNA testing is no longer possible. In order to truly protect the innocent -- the group of people for whom these remedial statutes were

enacted -- innocence protection statutes must recognize and remedy the harm suffered by prisoners who have been permanently deprived of the only avenue for establishing actual innocence.

Part II discusses the resistance of criminal justice officials to the duty to preserve evidence. The most frequently cited reasons for opposing prisoner requests for DNA testing -- cost, administrative burden and finality of judgments -- are largely unfounded and mask a more fundamental disagreement over the core values of our criminal justice system. Opponents of the duty to preserve evidence maintain that the slim margin of error resulting in the wrongful conviction of innocent people proves that the system, though imperfect, operates fairly and should not be further taxed with an evidence preservation burden. Advocates of a statutory duty to preserve evidence contend that our criminal justice system does not achieve justice or fairness if we ever convict an innocent person and then forever foreclose the only avenue to correct the error, even if correcting the error would be costly, difficult to manage and contrary to the interest in finality of judgments. The analysis concludes that the majority of innocence protection statutes are flawed [*1242] and fail to adequately protect the right of convicted prisoners to post-conviction DNA testing.

I. THE LAW OF EVIDENCE PRESERVATION

A. Traditional State Evidence Preservation Practices

Every jurisdiction has some form of evidence management policy or practice that establishes the procedures for storing physical evidence collected by the government in criminal cases, including various forms of biological evidence like rape kits, samples of hair, saliva, and semen. Commonly, evidence management policies designate an evidence custodian, set forth how long evidence must be preserved, and establish the procedures to be followed before destroying old evidence in closed criminal cases. n16 Evidence management policies are a vital tool in the justice system for ensuring that physical evidence can be retrieved and used at trial and will be available if there is a re-trial or other post-conviction litigation. As well, evidence management policies promote administrative efficiency by ridding overcrowded evidence storage facilities of old evidence from closed cases and in creating space for new evidence collected in open investigations and pending pretrial cases. n17

Prior to the 1990s when advancements in DNA technology first made it possible to extract and analyze biological material from old pieces of evidence, n18 rape kits and blood-stained clothing had minimal use after the defendant was convicted and the litigation was concluded in the case. n19 As a result, there was no compelling [*1243] reason to preserve physical evidence, and not much attention was paid to how and where evidence was kept in the criminal justice system. In the last decade, however, formerly useless physical evidence from closed criminal cases has become vitally important in proving, to a scientific certainty, that innocent people have been wrongly convicted. This has resulted in an increased focus on evidence management practices across the country by innocence projects and other advocates seeking to use the new DNA technology on old evidence to exonerate wrongly convicted prisoners. In searching evidence storage facilities across the country, prisoner advocates have found that the actual "management" of evidence is, at best, inefficient and, at worst, nonexistent. Over the last few years, there have been numerous reports from all across the country of lost or destroyed evidence in both pretrial, open criminal cases, n20 and in post-conviction, closed cases where the missing evidence might have been used to exonerate a wrongly convicted prisoner. n21

Because there are no uniform, national standards governing the retention of evidence, evidence management policies vary widely from state to state and from [*1244] courthouse to courthouse within each state. n22 Evidence management policies can be governed by state statutes, local court rules, police department operating procedures, and unwritten practices and customs. n23 In some jurisdictions, the evidence management practice mandates retention of old evidence at the court-house and designates court clerks or court reporters to serve as the custodians of the evidence until a judge signs an order authorizing destruction. n24 Other jurisdictions, like Harris County, Texas, require that the evidence be maintained by the police department or at the state forensics lab until the proscribed retention period has lapsed, after which time a prosecutor or a police official can make the discretionary choice to retain the evidence or authorize destruction. n25

[*1245] Even when a jurisdiction has an established evidence management policy in place, the retention of physical evidence is still largely a function of luck and happenstance. n26 Prisoner advocates have discovered that, contrary to the evidence management policy, some evidence within the same facility is kept for decades and other evidence is destroyed weeks after the case is closed. n27 Moreover, without an efficient system for cataloging and tracking evidence, it is often nearly impossible to locate evidence years after the case is closed. "Formerly lost" biological evidence subsequently used to exonerate innocent prisoners has been fortuitously discovered years later at various locations inside the courthouse, n28 in closed files at the state forensics lab, n29 in a storage closet in the prosecutor's office, n30 and even in a garbage dumpster. n31 In the case of Kirk Bloodsworth, the first death row inmate exonerated with DNA evidence, the biological evidence of the rape-murder that could have been legally destroyed after his conviction was affirmed had been saved by the judge in his chambers to prevent destruction. n32

In sum, although it is now well-established that old, formerly useless biological evidence is now essential in post-conviction DNA testing to establish actual innocence, the government is not required under most state laws to preserve [*1246] biological evidence collected in criminal cases. n33 Without an innocence protection statute mandating retention of evidence, critical biological evidence can be legally destroyed pursuant to the evidence management policies in the jurisdiction. n34

B. The Constitutional Duty to Preserve Evidence

While state laws traditionally have not mandated preservation of biological evidence, the Supreme Court has recognized that intentional destruction of evidence collected in criminal cases could potentially violate the constitutional right to due process. In a series of cases that fall under the umbrella of "constitutionally guaranteed access to evidence," n35 the United States Supreme Court has held that destruction or non-disclosure of evidence that the government knows to be exculpatory and material to the defense violates due process. n36 The Supreme Court has articulated a very different standard, however, when the defendant seeks the protection of the due process clause for "potentially exculpatory" evidence. In *Arizona v. Youngblood,* n37 the Court in 1989 recognized that "whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." n38 The Court stated that "the failure of the State to preserve 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" does not establish a due process violation unless the defendant can show bad faith on the part of the police in destroying the evidence. n39 The Court further held that a due process violation will only be found where the exculpatory value of the evidence was "apparent before the evidence was destroyed." n40

In the years since *Youngblood*, the requirement of demonstrating "bad faith" has proven to be an almost insurmountable burden in establishing a due process violation based on the destruction of evidence. n41 A few courts have found a due process violation when the government has destroyed the only evidence of the [*1247] defendant's guilt before trial and still proceeds with the prosecution. n42 Other courts have found that the government did not act in bad faith even when evidence is destroyed in violation of the local evidence management policy. n43 Courts have also refused to find bad faith where, notwithstanding the existence of independent exculpatory evidence, the government authorizes the destruction of all remaining biological evidence. n44 As a result, legal commentators have not been optimistic that the government's failure to preserve untested, "potentially exculpatory" biological evidence needed for post-conviction DNA analysis will constitute a violation of due process. n45

More recently, however, there has been a growing consensus and optimism among legal scholars that the widespread use of DNA evidence in criminal cases over the last decade will persuade courts to find due process violations when the government intentionally destroys evidence that could have been subjected to DNA analysis. n46 Other scholars have opined that the intentional destruction of biological evidence in direct violation of an evidence preservation law or an [*1248] innocence protection statute should be sufficient to establish bad faith. n47 To date, courts applying the *Youngblood* standard in post-conviction DNA testing cases have generally not adopted either approach. n48 Thus, post-*Youngblood* the government has no constitutional obligation to preserve biological evidence that could be subjected to post-conviction testing unless it is apparent prior to destruction that the evidence is