

Memorandum

To: The California Commission on the Fair Administration of Justice

From: Julie Goldberg, Law Student, Wrongful Convictions: Causes and Remedies seminar,  
Golden Gate University School of Law

Re: Remedies for the Wrongfully Convicted When Potentially Exculpatory Evidence Has Been  
Destroyed.

Date: December 4, 2007

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## INTRODUCTION

**The California Commission on the Fair Administration of Justice posed the following question: Are current California laws adequate to assure the preservation of evidence that may be relevant to establish future claims of innocence with the use of advancing technology? Are storage facilities available to preserve such evidence. [See California Penal Code §§ 1417 – 1417.9]**

**The answer is no.**

It's hard to imagine a greater injustice than when that last bit of exculpatory DNA material vanishes, forever sealing the fate of a wrongfully imprisoned man. California laws are not adequate to assure the preservation of evidence that may be relevant to establishing future claims of innocence. Enacted in 2000, California's post-conviction DNA testing statute, Penal Code 1405, contains many praiseworthy features, including the absence of a statute of limitations period.. With the enactment of Penal Code 1417.9, California offers statutory safeguards for the retention of biological evidence after trial; the government must preserve all such evidence for the duration of a defendant's incarceration unless it gives the inmate notice of its intent to destroy the items and an opportunity to respond. Cal. Pen. Code § 1417 – 1417.9 (2001). By enacting these statutes California emerged as a leader in recognizing and legislating the importance of preservation of biological evidentiary matter. These progressive laws provide both an avenue of redress for the countless "actual innocents" still incarcerated and the potential to prohibit further wrongful convictions. However, the statutes do not go far enough. There is no statutory remedy in place for those whose hopes for exoneration vanish instantaneously with the destruction of the physical evidence which may be their last chance at freedom. Innocence

protection statutes are nothing more than an empty promise and do little to actually protect innocence unless these statutes impose a blanket duty to preserve evidence and empower the court to impose sanctions that meaningfully address the harm suffered by the wrongly convicted when evidence is intentionally destroyed.<sup>1</sup>

This paper will take a historical look at the law of remedies for the destruction of or failure to preserve evidence and discuss appropriate sanctions to be considered in light of Penal Code §1417.9's complete silence on the subject of remedies, illuminating the dire need for new legislation regarding remedies specific to this issue. While the practice of destroying old evidence in closed criminal cases was routine and benign 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.<sup>2</sup> While some legal commentators have suggested that the threat of criminal penalties might deter government actors from intentionally destroying evidence in violation of the statute, the use of criminal penalties is both inadequate and impractical as the sole remedy for the intentional destruction of evidence.<sup>3</sup> These "right-without-a-remedy" statutes have created a gap in the law that allows the government to violate evidence preservation requirements with impunity.<sup>4</sup> Courts have very narrowly interpreted these deficient innocence protection statutes as mere procedural rules that entitle prisoners to no legal remedy when the destruction of evidence by the government has completely eliminated the possibility of DNA testing.<sup>5</sup>

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<sup>1</sup> Jones, Cynthia E. Evidence Destroyed, Innocence Lost: The Preservation Of Biological Evidence Under Innocence Protection Statutes. The American Criminal Law Review, October 1 2005. (Accessed October 14, 2007). <http://www.allbusiness.com/legal/laws/1047368-1.html>.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

In 1963, in the landmark case of Brady v. Maryland, the Court held that the suppression by the prosecution of evidence favorable to the 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.<sup>6</sup> The Brady line of cases introduced the constitutional requirement that the prosecution alert the defense to all exculpatory evidence and make material evidence favorable to the defendant available upon request.<sup>7</sup> The Supreme Court has twice declined to interpret the Brady protection to encompass duties of preservation.<sup>8</sup>

People v. Hitch, a 1974 California case, addressed the issue of failure to preserve evidence addressing both the nonmalicious destruction of evidence and “bad-faith” destruction of evidence.<sup>9</sup> The Government bears the burden of demonstrating that its duty to preserve evidence has been fulfilled.<sup>10</sup> The Government’s failure to preserve evidence is tantamount to an affirmative decision by the Government to suppress potentially exculpatory evidence. If the Government fails to meet its burden, the intentional suppression of material evidence favorable to an accused who has requested it constitutes a violation of due process, irrespective of the prosecution's good or bad faith.<sup>11</sup> Where evidence cannot be disclosed because of its intentional but nonmalicious destruction by the investigative officials, sanctions shall be imposed for such nonpreservation and nondisclosure 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.<sup>12</sup> The United States Supreme Court has held that the imposition and

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<sup>6</sup> Brady v. Maryland, 83 S. Ct. 1194, 1196, 1197 (1963)

<sup>7</sup> 24 A.L.R.6th (2007)

<sup>8</sup> Confronting The New Challenges Of Scientific Evidence v. DNA Evidence And The Criminal Defense, 108 Harv. L. Rev.1557, 1565 (1995)

<sup>9</sup> People v. Hitch, 12 Cal.3d 641 (1974)

<sup>10</sup> Hitch, at 652

<sup>11</sup> Hitch, at 645

<sup>12</sup> Hitch, at 652

mode of sanctions depends upon the particular circumstances attending such loss or destruction.<sup>13</sup>

In U. S. v. Agurs, the United States Supreme Court held that where a specific request for a piece of evidence is made, the test for reversal is whether the suppressed evidence might have affected the outcome of the trial, but where a more general request for exculpatory information is made, the standard is whether the omission of evidence by the prosecution resulted in the denial of a fair trial.<sup>14</sup> The court in Agurs defined the proper standard of materiality of undisclosed evidence is that if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist, constitutional error has been committed.<sup>15</sup> 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; more particularly, it is that the State in its zeal to convict a defendant not suppress evidence that might exonerate him.<sup>16</sup> If there is a significant chance that the withheld evidence...would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, then the judgment of conviction must be set aside.<sup>17</sup> Asymmetrical access to evidence is particularly problematic in the DNA context, given the overpowering rhetorical force of putative genetic matches, the enhanced risk of inaccuracy, and the fact that DNA evidence is typically presented in prosecutions for crimes such as rape or murder, in which the stakes are very high.<sup>18</sup>

In 1984, the United States Supreme Court again addressed the issue of whether failure to preserve evidence constituted a due process violation. In California v. Trombetta, a unanimous United States Supreme Court declined to find a constitutional error in the state's failure to take

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<sup>13</sup> Hitch, at 650

<sup>14</sup> U.S. v. Agurs, 96 S. Ct. 2392, 2399 (1976)

<sup>15</sup> Agurs, at 2402

<sup>16</sup> Agurs, at 2403

<sup>17</sup> Agurs, at 2405

<sup>18</sup> Id.

and preserve evidentiary samples.<sup>19</sup> The court specified that the State's duty to preserve evidence is limited to evidence that might be expected to play a role in the suspect's defense.<sup>20</sup> The Court went on to explain that the evidence must possess an exculpatory value that was apparent before it was destroyed and must be of such a nature that defendant would be unable to obtain comparable evidence by other reasonable means.<sup>21</sup> Herein lies the problem; under this traditional view, untested evidence such as blood or semen may seem to lack both apparent and exculpatory value.<sup>22</sup> Such evidence may have exculpatory value, but this value is not apparent: it only reveals itself upon testing.<sup>23</sup>

Nearly twenty years ago, in 1988, the Supreme Court in Arizona v. Youngblood focused specifically on the bad faith failure to preserve potentially exculpatory evidence, holding that there is no Constitutional violation of a defendant's due process rights unless the police acted in bad faith.<sup>24</sup> While courts in several states have adopted this bad-faith standard, other jurisdictions hold that good or bad faith is not dispositive of whether a defendant received due process of law.<sup>25</sup> The court recognized that failure of the State to preserve evidentiary material of which no more can be said that *it could have been* subjected to testing, the results of which might have exonerated the defendant requires a different result in a Due Process Analysis.<sup>26</sup> The court, citing Trombetta, recognized that whenever potentially exculpatory evidence is permanently lost, the courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.<sup>27</sup> Yet the court still requires that a defendant must show that bad faith on the part of the police resulted in destruction of evidence in order for

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<sup>19</sup> California v. Trombetta, 467 U.S. 479, 488 (1984)

<sup>20</sup> Trombetta, at 479

<sup>21</sup> Id.

<sup>22</sup> 108 Harv. L. Rev. 1557, 1568

<sup>23</sup> Id.

<sup>24</sup> Arizona v. Youngblood, 109 S.Ct 333, 338 (1988)

<sup>25</sup> 40 A.L.R.5th 113 (1996)

<sup>26</sup> Youngblood, at 337

<sup>27</sup> Id.

a due process violation to be found.<sup>28</sup> Ultimately in Youngblood, the court found the police only acted negligently, but not in bad faith, in failing to preserve biological evidence and therefore, there was no due process violation.<sup>29</sup>

We can distinguish the preservation issues addressed in Hitch, Trombetta and Youngblood from one of the more pressing issues being addressed by the CCFAJ; what sanctions should be available under 1417.9 when evidence is destroyed because of the State's non-compliance with the standards set forth therein? In most wrongful conviction cases, it is the actions of evidentiary custodians and their systematic purging of case evidence files that creates the failure to preserve violation. We need not assume bad faith conduct on the part of the lab technicians, but it is important to recognize that the issue originates with current systematic procedures that allow biological evidence to be discarded at all. It is the court's treatment of the issue of destruction of evidence and remedies appropriate for the nonmalicious destruction that need to be further examined, legislated and codified. In the contemporary evidentiary context, failure to develop express guidelines for routine preservation and storage of physical evidence should now be taken to indicate bad faith on the part of the state in an attempt to manipulate the pool of available evidence.<sup>30</sup>

It's necessary to acknowledge the inherent conflict that criminal penalty provisions will create for the government.<sup>31</sup> When a prisoner files a petition for DNA testing, innocence protection statutes give the local prosecuting authority the right to oppose the petition and ask the court to deny DNA testing of biological evidence.<sup>32</sup> In addition, if an evidence custodian

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<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> 108 Harv. L. Rev. 1557,1567

<sup>31</sup> Jones, Cynthia E. Evidence Destroyed, Innocence Lost: The Preservation Of Biological Evidence Under Innocence Protection Statutes. The American Criminal Law Review, October 1 2005. (Accessed October 14, 2007). <http://www.allbusiness.com/legal/laws/1047368-1.html>.

<sup>32</sup> Id.

destroys the very biological evidence that the government did not want tested, the same prosecutor's office would be responsible for deciding whether to file criminal charges against the custodian under the innocence protection statute, a decision that is largely unreviewable due to the discretion vested with the prosecution.<sup>33</sup> A district attorney's office has the right to decide for any reason, or for no reason at all, not to prosecute an evidence custodian for intentionally destroying evidence in violation of the statute.<sup>34</sup>

Hitch was among the first of the California cases to allow for sanctions for nonmalicious destruction of evidence by investigative officials. The court held that in all future cases where destruction of evidence was intentional but nonmalicious, 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.<sup>35</sup> The prosecution shall bear the burden of demonstrating that such duty to preserve the evidence has been fulfilled.<sup>36</sup> If the prosecution meets its burden, then the *results* of previous testing are admissible.<sup>37</sup> Again, the Hitch rule presumes that the evidence has already been tested and results are available for presentation to the court.

In 1980, The Supreme Court of California in People v. Zamora, a case in which destruction of police records was at issue, noted that courts enjoy a large measure of discretion in determining the appropriate sanction that should be imposed because of the destruction of discoverable evidence emphasizing that not every suppression requires dismissal of charges, but requires whatever remedy is appropriate to assure defendant's fair trial.<sup>38</sup> As a general rule, the

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<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> People v. Hitch, 2 Cal.3d 641, 652

<sup>36</sup> Hitch, at 653

<sup>37</sup> Id.

<sup>38</sup> People v. Zamora, 28 Cal.3d 88, 99 (1980)

particular sanction to be imposed is committed to the sound discretion of the trial court.<sup>39</sup> Ordinarily, the sanction imposed, at least in the absence of egregious governmental misconduct, should be no more restrictive than is necessary to protect the defendant's constitutional rights.<sup>40</sup> The Zamora court's review of prior "destruction of evidence" cases provided the basis for the enumeration of factors that should guide the court's exercise of discretion when imposing sanctions.<sup>41</sup> Illustrating the polar extremities of sanctions that may be imposed, the court held that the imposition and mode of sanctions depends upon the particular circumstances attending such loss or destruction.<sup>42</sup> Lawful and proper destruction requires no sanction, illegal and malicious suppression of evidence may result in dismissal.<sup>43</sup> Consideration of the materiality of the evidence suppressed, will affect the sanction as well.<sup>44</sup> The bad faith destruction of evidence in Hitch, which might have conclusively demonstrated innocence, could have required dismissal.<sup>45</sup> Other factors for consideration when determining whether sanctions apply are the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial in order to come to a determination that will serve the ends of justice.<sup>46</sup>

Sanctions may be imposed even where the loss was unintentional or inadvertent or negligent, and there is no intimation that it was destroyed with an ulterior motive.<sup>47</sup> As illustrated by Youngblood, a breach of the duty to preserve evidence does not necessarily warrant the imposition of sanctions against the State as where the accused retains other

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<sup>39</sup> 22A C.J.S. Criminal Law § 774 (2007)

<sup>40</sup> Id.

<sup>41</sup> People v. Zamora, 28 Cal.3d 88, 100 (1980).

<sup>42</sup> Id.

<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> 22A C.J.S. Criminal Law § 774 (2007)

protections, such as the ability to have the substance of the missing evidence supplied through other means.<sup>48</sup>

In selecting a remedy where an accused is prejudiced by the failure to preserve, or the loss or destruction of, evidence the trial court must consider the totality of the circumstances, with the paramount concern being the preservation of the integrity of the truth-finding process and the deterrence of the destruction of material evidence by the police or the prosecution as well as the elimination of any ensuing prejudice to a defendant from the wrongful failure to preserve evidence, while protecting the interests of society.<sup>49</sup> While statutes allow for “appropriate sanctions” provisions to enforce the duty to preserve evidence, these broad statutory provisions have yet to be interpreted by any court and the plain language gives a judge discretion to fashion a remedy to redress intentional evidence destruction based on the facts of each case.<sup>50</sup>

Justice Steven’s concurring opinion in Youngblood touched on the scope of remedies available for the defendant in situations where there has been a failure to preserve evidence that may have exonerated the defendant.<sup>51</sup> The most extreme remedy is a prophylactic sanction of dismissal of the indictment altogether while the more commonly employed use of a jury instruction turns the uncertainty of what might have been undisputed proof of innocence and exoneration to the defendant’s advantage.<sup>52</sup> An example of such an instruction is: “If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or equality are in issue, you may infer that the true fact is against the State’s interest.”<sup>53</sup> Ultimately, in both

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<sup>48</sup> Id.

<sup>49</sup> Id.

<sup>50</sup> Jones, Cynthia E. Evidence Destroyed, Innocence Lost: The Preservation Of Biological Evidence Under Innocence Protection Statutes. The American Criminal Law Review, October 1 2005. (Accessed October 14, 2007). <http://www.allbusiness.com/legal/laws/1047368-1.html>.

<sup>51</sup> Arizona v. Youngblood, 109 S.Ct 333, 338(1988)

<sup>52</sup> Id.

<sup>53</sup> Id.

Youngblood and Trombetta, the jurors did not draw the permissive inference that missing evidence would have been exculpatory.<sup>54</sup>

To preserve the issue on appeal, counsel should clearly and unequivocally assert a denial of the defendant's due process rights under the state constitution, in addition to any other federal due process claims.<sup>55</sup> By alleging only a violation of the Federal Constitution at trial for a failure to preserve potentially exculpatory evidence, counsel may not preserve a point of error under the applicable state constitution.<sup>56</sup>

Prosecutors should understand that a properly crafted instruction to the jury on the failure of the police to preserve potentially helpful evidence may resolve in the State's favor a due process claim by the defendant.<sup>57</sup> That is, if the jury is instructed in accordance with state law concerning the loss of the evidence, such an instruction may constitute sufficient due process for the defendant and avoid reversal of the conviction on appeal.<sup>58</sup> If the evidence is expected to be consumed in the first round of testing, the defense should be notified in advance and should have the right to observe the testing to ensure that proper procedures are followed; the jury should also be instructed about the importance and desirability of a second round of testing.<sup>59</sup>

An appropriate sanction may be the suppression of evidence introduced in the absence of the primary evidence, particularly where dismissal of the indictment is not an appropriate sanction.<sup>60</sup> However, the destruction or nonretention of evidence does not automatically entitle the accused to the suppression of the remaining evidence.<sup>61</sup> Other appropriate sanctions include the making of a stipulation informing the jury of the circumstances and results of the lost

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<sup>54</sup> Id.

<sup>55</sup> 40 A.L.R.5th 113 (1996)

<sup>56</sup> Id.

<sup>57</sup> Id.

<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> 22A C.J.S. Criminal Law § 775 (2007)

<sup>61</sup> Id.

evidence, permitting an inference to be drawn by the jury with respect to the missing evidence. In Youngblood, the trial court instructed the jury that if it found that the state had destroyed or lost evidence, it should infer that the evidence would have been favorable to the defendant.<sup>62</sup>

When initial testing has been performed, it is less clear that the defendant should be constitutionally entitled to a jury instruction directing the inference that defense testing would have undermined the state's conclusions.<sup>63</sup> The state court in Youngblood ruled that judges must instruct juries to draw an inference that evidence would have been unfavorable to the state if the state cannot adequately explain the state's loss of, destruction of, or failure to preserve material evidence that might have aided the defendant.<sup>64</sup> A court could conclude that the destruction of evidence warrants criminal contempt charges against persons responsible for the evidence destruction.<sup>65</sup> The court could also decide that an additional sanction is "appropriate" to address the harm suffered by the prisoner, e.g., dismissal of the indictment (vacating the conviction), a sentence reduction, or the grant of a new trial.<sup>66</sup>

As the judicial system increasingly accepts and relies upon this sort of evidence, it must install adequate protections to ensure its soundness and the aptness of the uses to which it is put. Furthermore, the legal system should adjust to allow defendants as well as the state to take advantage of this technological progress both at trial and in post-conviction appeals. The advances in evidentiary accuracy achieved by the continuing progress in forensic science should be used to benefit the wrongly accused and the wrongly convicted, and to enhance our

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<sup>62</sup> Arizona v. Youngblood, 109 S.Ct 333, 338 (1988)

<sup>63</sup> 22A C.J.S. Criminal Law § 775 (2007)

<sup>64</sup> Youngblood, at 335

<sup>65</sup> Jones, Cynthia E. Evidence Destroyed, Innocence Lost: The Preservation Of Biological Evidence Under Innocence Protection Statutes. The American Criminal Law Review, Saturday, October 1 2005. (Accessed October 14, 2007). <http://www.allbusiness.com/legal/laws/1047368-1.html>.

<sup>66</sup> Id.

knowledge of the accuracy of the system of criminal justice.<sup>67</sup> We must have zero tolerance for even honest mistakes that result in the conviction of the innocent, especially when we can identify the mistakes and correct them. Whatever our sense of justice and fairness is, we can achieve neither if we lock up innocent people and then, quite literally, throw away the key to their freedom.<sup>68</sup>

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<sup>67</sup> 108 Harv. L. Rev. 1557,1582

<sup>68</sup> Jones, Cynthia E. Evidence Destroyed, Innocence Lost: The Preservation Of Biological Evidence Under Innocence Protection Statutes. The American Criminal Law Review, Saturday, October 1 2005. (Accessed October 14, 2007). <http://www.allbusiness.com/legal/laws/1047368-1.html>.