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NOTE

NO STATUTE, NO SANCTIONS, NO SAMPLE?: EXPLORING AND REFORMING OKLAHOMA'S POSTCONVICTION DNA PRESERVATION LAW

Timmi Kline*

INTRODUCTION

A bloody windbreaker that went missing in a storage facility. An envelope of exculpatory DNA results abandoned on a too-high shelf.[1] A court clerk's disregard for the murder weapon.[2] Under many of our

* Juris Doctor Candidate, Oklahoma City University School of Law, May 2023. I want to thank Andrea Miller, Legal Director for the Oklahoma Innocence Project, for her knowledge and guidance throughout this entire process—along with Professor Barry Johnson, my Note advisor. Additionally, I want to thank the following people for their saintly and enduring patience and support: my parents Timothy and Alyssa, my sister Lucy, the wonderful members of Law Review, and all of my friends who put up with my rambling about the law (with special mention to my partner-in-crime Kate). Go Stars!

1. Matthew Clarke, *Lost and Improperly Destroyed Evidence Thwarts Post-Conviction DNA Testing,* PRISON LEGAL NEWS(Apr. 7, 2015), https://www.prisonlegalnews.org/news/2015/apr/7/lost-and-improperly-destroyed-evidence-thwarts-post-conviction-dna-testing/.
2. *Preservation of Evidence*, THE INNOCENCE PROJECT, https://innocenceproject.org/

country's current preservation procedures, whether DNA evidence is stored and subsequently successfully retrieved can seem almost entirely arbitrary; a mere matter of luck and chance. However, any sensational "true crime" Netflix serial can illustrate how crucial DNA evidence has become for exonerating the innocent. Even by mere anecdote, it is obvious that postconviction exonerations have captured the entire nation's imagination in the last several years, and so the relevance of DNA evidence in these conversations has loomed ever-larger. In fact, according to The National Registry of Exonerations, there have been 551 (DNA-based) exonerations since 1989.[3] Technology has largely risen to meet this challenge; DNA-testing has advanced so significantly in the last two or three decades that physical evidence that would have been considered useless at one time can now be probed with exponentially more sensitive technology. Blood profiles which, in living memory, had been constrained to simple A/B/O blood typing can now generate correlations along several dozen loci pairs to produce near-certainty that an individual does or does not strongly correspond to a given serological sample.[4]

One issue remains: what are states doing to preserve that crucial evidence? None of this matters if the windbreaker, or the envelope, or the murder weapon is missing. Unfortunately, this is no hypothetical; perhaps one of the most infamous examples played out in the highest court of the land. In *Arizona v. Youngblood*, a man was convicted of a heinous act of child abuse.[5] The State did not adequately preserve the relevant evidence and instead grounded its case-in-chief on the child's identification, ultimately resulting in a conviction. The Supreme Court decided that the government was not acting maliciously, and therefore the merely negligent destruction of biological evidence—even before the trial stage, where the presumption of innocence is at its strongest—was not grounds for postconviction relief.[6] As technology advanced, however, Youngblood was vindicated by the very DNA testing that he had been deprived of.[7]

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preservation-of-evidence/ (last visited July 9, 2022).

3. *Exonerations By Year: DNA and Non-DNA*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx (last visited July 9, 2022).

4. Penelope R. Haddrill, *Developments in Forensic DNA Analysis*, EMERGING TOPICS LIFE SCI., Apr. 1, 2021, at 381. Out of respect for Caitlin Porterfield, a forensics professor from UCO, I have declined to use the overbroad and less accurate term "DNA match."

5. Arizona v. Youngblood, 488 U.S. 51, 52 (1988).

6. *Id.* at 58.

7. *Larry Youngblood*, THE INNOCENCE PROJECT, https://innocenceproject.org/

This story is not unique, though it is impossible to systematically screen for these kinds of failures in procedure—if no testing has ever been done in a case, people like Youngblood slip our notice entirely. We will never be able to appreciate the full scope of the damage dealt by flawed evidence preservation procedures.

This has not escaped the attention of the rest of the country, and progress has been made towards a better system. States are increasingly trying to avoid this kind of tragedy—all fifty of them, with Oklahoma coming in last, have some kind of postconviction DNA testing procedure, and an increasing number of them have some kind of associated preservation statute.[8] The Justice For All Act of 2004 is a federal initiative meant to reward that sort of progress.[9] There are also organizations—public and private—that are trying to encourage better preservation practices, such as the National Institute of Standards and Technology (NIST) Technical Working Group on Biological Evidence Preservation issuing standards for states who want to voluntarily comply.[10]

Local policy, national legislative incentives, and voluntary standards, however, can feel maddeningly theoretical for convicted inmates. This Note seeks to explore not just the theoretical background underlying Oklahoma's postconviction preservation statute, but also how effective it is in practice.

Part I is a survey of existing postconviction DNA preservation statutes, including their scope and enforcement provisions. This includes a constitutional background, and a brief foray into statutes on both a state and federal level. Part II will put Oklahoma's statute in the context of its companions. Part III will examine how Oklahoma's statute functions in case law—or, rather, how it does not seem to function in case law at all—including the difficult ambiguities provided by a sunset provision that applies to either part or all the statute. Lastly, Part IV will speculate on why the statute does not seem to have much of an impact on Oklahoma's

cases/larry-youngblood/ (last visited July 9, 2022).

8. Paul Cates & David Dodge, *Oklahoma Becomes 50th States to Guarantee Wrongly Convicted Access to DNA Testing to Prove Innocence*, THE INNOCENCE PROJECT, https://innocenceproject.org/oklahoma-becomes-50th-state-to-guarantee-wrongly-convicted-access-to-dna-testing-to-prove-innocence/ (last visited July 9, 2022).

9. Innocence Protection Act of 2004, 18 U.S.C.S. § 3600 (LEXIS through Pub. L. No. 117-166, approved Aug. 5, 2022).

10. NIST/NIJ Technical Working Group on Biological Evidence Preservation, NAT'L INST. OF STANDARDS & TECH., (Apr. 5, 2022), https://www.nist.gov/forensic-science/nistnij-technical-working-group-biological-evidence-preservation.

legal system and will propose possible remedies based off the survey from Part I.

I. OVERVIEW OF CURRENT DNA PRESERVATION LAWS: A NATIONAL SURVEY

The first step in understanding Oklahoma's preservation statute—and, by extension, understanding ways in which it could be improved—is examining the national stage upon which Oklahoma plays its own part. Constitutional interpretation, sister statutes in neighboring states, and broad federal action all must inform an attorney's reading (or, for that matter, a pro se petitioner's reading) of Oklahoma's preservation laws.

1. Common law and the Constitution

The Supreme Court of the United States has declined to broadly mandate the preservation of biological evidence (not to mention postconviction evidence, where defendants no longer enjoy the presumption of innocence) as a matter of constitutional law. The Court has interpreted the Due Process Clause as being silent on the issue of destruction of biological evidence that was merely negligent, as opposed to malicious.[11] *Arizona v. Youngblood* constructs the almost insurmountable hurdle of bad faith; unless a petitioner can affirmatively prove that the State intentionally destroyed potentially useful evidence before the trial, there is no violation of constitutional rights.[12] Critics argue that this had immediate, negative consequences on our jurisprudence—in part due to the outcome of the case itself.

The titular Youngblood was charged with child molestation, sexual assault, and kidnapping, after a 10-year-old boy was taken from a church carnival and returned an hour and a half later.[13] The police did not adequately preserve the clothing that the child was wearing at the time of his assault, instead relying on a positive identification in a photo lineup which was presented to the victim well over a week after the crime.[14] After losing decades of his life behind bars, Youngblood was added to the list of exonerees when technological strides meant that the previously-

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11. *Youngblood*, 488 U.S. at 58.
12. *Id.*
13. *Id.* at 52.
14. *Id.* at 53.

inadequate samples were able to be tested using more sensitive methods.[15] Yet, his name remains synonymous with the State's lack of obligation to preserve the very evidence that would have vindicated him decades prior.

Some state courts have interpreted *Youngblood's* constitutional standard of bad faith to be so high that even in instances where evidence was destroyed despite a local policy of preservation, the demands of *Youngblood* were not met.[16] There is some sense to this; if local policy governs the standard of bad faith, then that heightened set of expectations may negatively shape public policy. The risk of disincentivizing local agencies from setting strict preservation policies if they come with potential judicial consequences is in tension with the risk of hamstringing the policies altogether in the absence of those consequences.

What this means, largely, is that petitioners cannot rely on the common law or the Constitution itself for the preservation of potentially exculpatory DNA—especially in the realm of postconviction, where new DNA evidence may be crucial for overcoming procedural hurdles. The treatment of such evidence is instead left in the hands of individual state statutes.

2. State statutes

Advancements in the world of DNA testing in the mid 1990s necessitated the passage of a sweeping number of innocence protection statutes in the early 2000s on both a state and federal level.[17] Previously useless biological samples could suddenly be analyzed for DNA, which gave new hope to those with credible claims of factual innocence. While some states saw the writing on the wall in the late 1990s and moved to enact legislation to protect this new wellspring of evidence, a vast majority of reforms occurred after the turn of the century.

In her article *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, Cynthia E. Jones takes a scalpel to many of these reforms—as they existed in 2005—in order to dissect and examine which of these reforms had been effective, and which had not been. There are two broad types of classifications which

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15. *Larry Youngblood*, *supra* note 7.
16. Guzman v. State, 868 So. 2d 498, 509 (Fla. 2003).
17. Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1242 (2005).

Jones uses: the varying scope of evidence preservation statutes, and the various enforcement provisions within those statutes.[18]

a. Scope

The first categorization scheme which Jones employs is the scope of individual DNA preservation statutes.[19] She identifies three categories across a sliding scale. At one extreme lies states which have no statutory duty to preserve postconviction DNA evidence, and at the other extreme lies states which have a sweeping blanket statute. In 2005, eight states occupied the former category, with nineteen states in the latter—alongside the District of Columbia and the federal innocence protection statute, called the Innocence Protection Act (IPA). Eleven states found themselves somewhere in between. These eleven states generally allow law enforcement to destroy potentially exculpatory evidence postconviction in the absence of a petition requesting its preservation. Predictably, therefore, evidence is sometimes carelessly destroyed soon after the conclusion of a trial—or, in some cases, evidence is destroyed while petitioners are inquiring about necessary chain of custody requirements, before the petitioner has a chance to formally request that the evidence be preserved.[20] Jones thus makes the argument that only blanket-duty statutes are sufficient to protect biological evidence. This is an exacting standard that, at the time of her publication, twenty-one jurisdictions failed to meet.[21]

b. Enforcement

The second categorization scheme is the presence or absence of enforcement provisions.[22] Some state statutes are all gums and no teeth; there is no preservation statute, and no tangible reason for agencies to comply with what the statute demands of them. Jones observes that even when there is a policy in place to protect evidence in theory, as long as there is no enforcement mechanism, the actual practice of preservation remains capricious: "some evidence within the same facility is kept for

18. *Id.* at 1241.
19. *Id.* at 1253.
20. *Id.* at 1254-55.
21. *Id.* at 1257.
22. *Id.*

decades and other evidence is destroyed weeks after the case is closed."[23] On the other hand, when the statutes do have some bite in the form of an enforcement provision, they take one of two forms: criminal penalties, or nebulously defined "appropriate sanctions" which are decided at the discretion of the state court.

Only four states impose criminal penalties upon the intentional destruction of biological evidence, and they are joined, again, by the IPA. Jones, however, is more than skeptical of this approach. This is for four reasons: 1) existing statutes dealing with the tampering of evidence have been insufficient to deter negligent, or even malicious, evidence custodians; 2) putting criminal justice agencies in charge of regulating themselves creates a conflict of interest; 3) singling out one bad actor amid a negligent chain of custody can be excruciatingly difficult; 4) though this may act as a deterrent, or, at the very least, a punishment, it does nothing to help the petitioner directly harmed by the destruction of evidence.[24] Though reasons one through three are compelling, Jones identifies the fourth reason as crucial: "An effective remedy for the violation of a statute designed to protect the rights of the wrongly convicted must address the harm suffered by the wrongly convicted when the statute is violated."[25]

Perhaps for this very reason, five jurisdictions instead employ the "appropriate sanctions" approach. This leaves broad discretionary power in the hands of the judiciary, a theoretically neutral party at the head of the justice system.[26] Some possible remedies that Jones envisions include imposition of sanctions (or, indeed, the imposition of criminal charges against individual bad actors in addition to other, more restitution-oriented remedies), dismissal of the indictment, reduction of the petitioner's sentence, or the scheduling of an entirely new trial.[27]

These sanctions are most effective, Jones argues, in jurisdictions with blanket preservation provisions—there is clearly no use for them in states with no duty to preserve biological evidence, and, as explored previously, limited-duty jurisdictions often have broad swathes of time during which they are able to negligently destroy evidence. Therefore, the provisions dealing with the scope of the evidence in question and the provisions

23. *Id.* at 1245.
24. *Id.* at 1259-60.
25. *Id.* at 1260.
26. *Id.* at 1261.
27. *Id.*

dealing with enforcement go hand in hand.[28]

There is one thing that Jones does not mention, however. Though she names three states which meet her recommended criteria of both blanket preservation and "appropriate sanctions," even those three states—Maine, Nebraska, and the 10th Circuit's very own New Mexico—do not enforce those provisions in the absence of a court order.[29] Even though there is the possibility of those statutes having bite, none of them can be fully realized in the absence of a looming action. Arguably, this is not a true blanket preservation provision. Agencies must be affirmatively alerted to impending litigation via the court, otherwise they may still be able to dispose of the evidence with appropriate notice.

Nearly two decades later, as postconviction DNA exonerations continue to make headlines, states have continued to feel the pressure of civil rights advocates and self-proclaimed "true crime junkies" alike. Now, in 2022, there is the enduring benefit of hindsight. Jones, writing from 2005, was either in the midst of—or glancing immediately back towards—most of these statutory provisions. Her article predated further legislative expansion of postconviction reform. However, even in the most progressive states, legislation dealing with preservation of postconviction evidence still falls far below Jones' recommendations and the recommendations issued by The Innocence Project, discussed further below. In the absence of stronger state legislation, preservation policies are still left largely in the hands of individual agencies. All fifty states now have some avenue through which to test postconviction DNA. Yet, unless they have similarly robust standards regulating its preservation, it is of limited utility.

3. Federal statutes

Questions of innocence are not the sole province of the states. This is an issue that the federal government is both cognizant of and concerned with. The IPA was enacted in 2004, granting broad rights of DNA preservation and testing to federal inmates for the length of their incarceration.[30] As Cynthia Jones indicated, the federal-level preservation

28. *Id.* at 1269.
29. ME. REV. STAT. ANN. tit. 15, § 2138(2) (2004); NEB. REV. STAT. § 29-4120(4) (2004); N.M. STAT. ANN. § 31-1A-2(F) (2005).
30. Innocence Protection Act of 2004, 18 U.S.C.S. § 3600 (LEXIS through Pub. L. No. 117-166, approved Aug. 5, 2022).

provisions are among the most sweeping and comprehensive. Initially, in its fledgling days, the IPA—as it was introduced in 2000—was even more radical in its reforms. It had no time limit for when federal inmates could seek to have DNA evidence which led to their conviction reexamined, and it contained mandatory competent counsel standards for defense attorneys.[31] Still, regardless of the compromises which the bill's key champions had to concede to, the end result is stronger than most of its state-level counterparts. The IPA mandates blanket preservation for the length of an inmate's incarceration and imposes criminal sanctions for noncompliance.

However, Congress's aim was more ambitious than just a reform of federal DNA preservation—they wanted to have a direct impact on the states as well. Congress hoped to, directly or indirectly, encourage states to either adopt the IPA as a universal standard of evidence preservation, or formulate clear evidence preservation mandates of their own.[32] Because more coercive provisions did not garner bipartisan support, especially with direct pushback from the Department of Justice, the main enforcement mechanism within the IPA was the carrot-stick incentive of federal funding.[33] There were two grants available for states found to be in compliance. The first was the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program (Bloodsworth Grant), named after the first inmate on death row exonerated via DNA testing.[34] Fourteen million dollars were allotted for states to conduct post-conviction DNA testing.[35] The second grant was the Paul Coverdell Forensic Science Improvement Grants Program (Coverdell Grant), which requires, among other things, "that States must have a qualified, independent entity to investigate allegations of lab misconduct."[36]

This was not the roaring, immediate success that Congress had hoped for. Four years after the enactment of the IPA, the Senate held a hearing to determine whether the Department of Justice had properly

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31. Ronald Weich, *The Innocence Protection Act of 2004: A Small Step Forward and a Framework for Larger Reforms*, 29 CHAMPION 28, *29 (Mar. 2005).
32. *Id.*
33. *Id.*
34. *Oversight of the Justice For All Act: Has the Justice Department Effectively Administered the Bloodsworth and Coverdell DNA Grant Programs?: Hearing Before the Comm. on the Judiciary*, 110th Cong. 2 (2008).
35. *Id.* at 3.
36. *Id.* at 4.

administrated these two grant programs.[37] The Hon. Patrick J. Leahy, who had initially introduced the IPA, claimed that only three states had applied for the Bloodsworth Grant.[38] All of them were denied, often without explanation. This led to the misappropriation of all fourteen million dollars by the Department of Justice.[39] Additionally, he claimed that the requirements of the Coverdell Grant had not been suitably enforced—so even when grantees did get grant money for investigations, there was no independent investigation confirming that they were using the funds appropriately.[40] While the existence of the twin grants had (arguably) encouraged a majority of states to pass legislation that concerns DNA testing, there had been little improvement when it came to preservation.

Another senator, Mr. Richard Neufeld, summarized the relative failure of the grants in accomplishing the spirit of the IPA:

> The whole point of Coverdell was to make sure that if something goes wrong, there'sgoing to be an investigation into what went wrong, how we can fix it so it won't happenagain. I think the most mean-spirited thing that the General Counsel at OJP did was to tell a grantee that, hey, just certify that you got an entity, just certify that you've got a process, but you don't have to use that process. Don't bother with it. I consider that an obstruction of the will of Congress. To me, Senator, that's no different than if this Congress passed a bill requiring the CIA to preserve videotapes of interrogation and the CIA said, OK, we'll preserve them, we'll keep them in a garbage dump, because no one told us how to preserve them, no one told us where to preserve them. That's in bad faith. The Senate has to do something to make sure that these external audits go forward.[41]

While Neufeld expressed his frustration at the lack of enforcement, the bill's original sponsor—Chairman Leahy—was more concerned that

37. *See id.*
38. *Id.* at 8.
39. *Id.* at 3.
40. *Id.* at 4.
41. *Id.* at 17.

perhaps the requirements were too strict to be practical.[42] This seems to have foreshadowed the future of both grants—especially the Bloodsworth Grant, which focused on the standardization of state postconviction evidence preservation procedures.

Both grants still exist today. In fact, according to the National Institute of Justice (NIJ), as of 2019, at least fifty-one state-level exonerations were made possible through the funding passed in the IPA.[43] However, in browsing the grant application forms from the last several years, one thing is clear: the eligibility for the grant has expanded, and the requirements have become less strict. Rather than focusing on state-level legislation and practices, now counties—or even educational institutions—can apply for funding for postconviction DNA testing, and it is unclear what preservation standards those entities must meet in order to qualify. The 2021 application only reads:

> If an award is made, prior to receiving the award funds, an award recipient must submitan express certification from the chief legal officer of the state (typically the Attorney General) that the state:
>
> Provides postconviction DNA testing of specified biological evidence under a state statute, or under state rules, regulations, or practices, for persons convicted after trial and under a sentence of imprisonment or death for a state offense of murder or forcible rape, in a manner intended to ensure a reasonable process for resolving claims of actual innocence.
>
> Preserves biological evidence secured in relation to the investigation or prosecution of a state offense of murder or forcible rape, under a state statute, local ordinances, or state or local rules, regulations, or practices, in a manner intended to ensure that reasonable measures are taken by all jurisdictions within the state to preserve such

42. *Id.* at 9.

43. *Exonerations Resulting from NIJ Postconviction DNA Testing Funding*, NAT'L INST. OF JUST. (Oct. 24, 2019), https://nij.ojp.gov/topics/articles/exonerations-resulting-nij-postconviction-dna-testing-funding.

evidence.[44]

If the purpose of the IPA was to secure individual exonerations, it was a success; dozens of people, some saved from death row, now walk free as a result of federal funding.[45] If the purpose of the IPA was to encourage systematic change among the states, however, its success is far more dubious. Oklahoma, for example, falls far short of the federal standard of a blanket preservation statute with criminal sanctions for noncompliance. Even though Oklahoma's statute is surprisingly progressive—on paper—when compared to many other states, it would be an entirely different world in the Sooner State had the federal government been more aggressive in its preservation reform efforts.

OKLAHOMA'S DNA PRESERVATION LAWS AS WRITTEN

In the state of Oklahoma, petitions for post-conviction relief are governed by the Uniform Post-Conviction Procedure Act.[46] Because the finality of jury verdicts is considered nigh-sacred in our legal system, this is not just another chance for a direct appeal; a petitioner has to meet one of the very specific categories set forth in § 1080.[47] One especially pertinent example is when there is "evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice."[48] This is where colorable claims of factual innocence can shoulder their way back into the state court system. This also means, generally, the claims litigated at this phase are limited to newly discovered evidence, ineffective assistance of counsel, or prosecutorial misconduct.

Oklahoma's original legislation dealing with the preservation and retention of biological evidence is included in the DNA Forensic Testing Act. The Act largely focused on making DNA evidence available for the use of the Oklahoma Indigent Defense System DNA Forensic Testing

44. *BJA FY 21 Postconviction Testing of DNA Evidence*, U.S. DEP'T OF JUST., https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/O-BJA-2021-104003.pdf (last visited July 9, 2022).
45. *Exonerations Resulting from NIJ Postconviction DNA Testing Funding*, *supra* note 43.
46. OKLA. STAT. tit. 22, §§ 1080-1089 (2003). What date; pull book! (these are Lexis cites).
47. *Id.* § 1080.
48. *Id.* § 1080(d).

Program (OIDS), which expired in 2005.[49] Later, Oklahoma also became the last state to pass a more comprehensive DNA testing act when Mary Fallon signed the Postconviction DNA Testing Act into law in 2013, making testing available to prisoners who have been wrongfully convicted of violent felonies or who are serving a sentence in excess of twenty-five years.[50] The Post-Conviction Procedure Act, the DNA Forensic Testing Act, and the Postconviction DNA Testing Act, in combination, allow for the submission of new DNA results into postconviction proceedings, which is theoretically excellent news for petitioners with colorable claims of factual innocence.

The Oklahoma Legislature passed the DNA Forensic Testing Act in 2001, early in this initial wave of postconviction reforms—in fact, this preceded the final enactment of the federal incentives of the IPA by three years. Nestled within the DNA Forensic Testing Act is an evidence preservation statute—which is, as written, a relatively progressive piece of legislation, especially for a state such as Oklahoma which prides itself on conservative values. Section 1372 in particular deals with the postconviction preservation of evidence. Though the later act—the Postconviction DNA Testing Act—supplements the DNA Forensic Testing Act, it does not have its own preservation provision.

Assuming that § 1372 functions as it should, what are the plain text features which mark it as a comparatively progressive reform? First, the timing of its existence is worth noting. As stated previously, its codification in 2001 made Oklahoma one of the frontrunners in the initial sweep of evidence preservation reform. Second, Oklahoma charges any "criminal justice agency having possession or custody of biological evidence from a violent felony offense" with the task of its preservation.[51] Third, where the statute applies, the agency must retain the evidence for the entire duration of the individual's incarceration.[52] This comes with a notice requirement; if the criminal justice agency is to set to destroy the evidence earlier than the statute demands, it has to notify both the incarcerated individual and their counsel.[53] The agency is also forbidden from doing so if someone who receives this notification submits a written

49. *Id.* § 1371.
50. Cates & Dodge, *supra* note 8.
51. OKLA. STAT. tit. 22, § 1372(A).
52. *Id.*
53. *Id.* § 1372(C)(1).

objection within ninety days.[54]

The scope of the statute, however, is relatively narrow. In contrast with the blanket preservation states, the Oklahoma statute has strict parameters when it comes to which individuals it will encompass in its protection. The crime involved must have been a violent felony.[55] Additionally, the protection will not inherently extend beyond the length of incarceration. The statute does not provide protection for the time a potentially innocent person may spend on the sex offender registry, for example, which is a consequence which lingers long after a person may walk free from a prison cell. Lastly, the statute only preserves biological evidence. "Biological evidence" is defined in subsection B as "physical evidentiary material originating from the human body from which a nuclear DNA profile or mitochondrial DNA sequence can be obtained or representative or derivative samples of such physical evidentiary material collected by a forensic DNA laboratory."[56] This notably excludes other kinds of physical evidence, such as fingerprints.

The most glaring omission is the lack of an enforcement clause. As discussed previously, this is hardly surprising, or unusual. Nothing in the statute itself gestures towards any sort of repercussions; there is no suggestion that agencies in noncompliance will receive so much as a verbal slap on the wrist from other law enforcement agencies, or the judiciary. So, while petitioners theoretically have a right to exculpatory DNA evidence, it is unclear how they are expected to vindicate that right. This leaves the entire statute without teeth.

Additionally, Jones had asserted that a criminal enforcement clause in a preservation statute might be duplicative of existing laws dealing with destruction of evidence. In Oklahoma, this is simply not the case. The law which governs destruction of evidence only deals with that which is "about to be produced . . . upon any trial, proceeding, inquiry or investigation."[57] Nothing in the language of the statute deals with evidence after the conclusion of the trial—so petitioners who have been spurned by a violation of § 1372 do not have it as an alternate recourse.

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54. *Id.* § 1372(C)(2).
55. *Id.* § 1372(A).
56. *Id.* § 1372(B)(1).
57. OKLA. STAT. tit. 21, § 454 (2021).

OKLAHOMA'S DNA PRESERVATION LAWS IN PRACTICE

Though Oklahoma's DNA preservation statute celebrated its twenty-first birthday this year, it has been conspicuously scarce in litigation. Every so often, an attorney will assert it on appeal; there are just shy of a dozen publicly available briefs which peppers it in among a list of other evidentiary grievances.[58] However, it does not seem to have played a meaningful role in the opinion of state courts, or in federal courts drawing on state law. It is alluded to in *Kibbe v. Williams*, but even there, the merits of the claim are never reached—the Oklahoma Eastern District Court insists that the petitioner did not establish that the § 1372 claim as articulated was a "proper subject of an application for post-conviction relief."[59]

Why the silence? In the rising tide of popular culture, where attention paid to DNA-based exonerations is snowballing, it would not be unreasonable to expect that there would be greater attention paid to the provision which necessitates the preservation of crucial evidence. There is a handful of possibilities as to why § 1372 is glaringly absent from effective postconviction claims. The first possibility is that something has happened to nullify the statute; the second possibility is that agencies are in perfect compliance with the statute and so it does not need to be enforced; and the third possibility is that the statute itself is inherently flawed.

1. Theory one: Nullification

The most extreme possibility is that the statute simply does not exist anymore. OKLA. STAT. tit. 22, § 1371(B) contains a sunset provision, with the deadline set for four years past the original 2001 enactment: "There is hereby created the Oklahoma Indigent Defense System DNA Forensic Testing Program to continue until July 1, 2005."[60] This references a program which earned modest local attention for its exoneration of a handful of erroneously convicted defendants in rape cases in the early

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58. *See, e.g.*, Petitioner's Brief in Support of Post-Conviction Appeal Pursuant to 22 O.S. § 1087 Arising from an April 23, 2019, Order Denying Post-Conviction DNA Testing in the District Court of Oklahoma County CF-2004-1212, Morris v. Oklahoma, No. F-2006-428, 2019 WL 6047222 (Okla. Crim. App. 2007).

59. Kibbe v. Williams, No. CIV 06-478-RAW-KEW, 2010 U.S. Dist. LEXIS 47566, at *30 (E.D. Okla. 2010).

60. OKLA. STAT. tit. 22, § 1371(B).

2000s.[61] Some legal scholars take this sunset provision further, however, arguing that it applies to the entire Act rather than merely a program within it. Justin Brooks and Alexander Simpson—Cofounder and Litigation Coordinator of the California Innocence Project, respectively—wrote in 2011 that this sunset provision sounded the death knell for the state's entire original DNA testing statute.[62] This would have been remedied, in large part, by the passage of § 1373 in 2013, otherwise known as the Postconviction DNA Act. However, the Postconviction DNA Act lacks a preservation provision of its own, meaning that—if Brooks and Simpson are correct—Oklahoma currently lacks a preservation provision entirely.[63]

Perhaps fortunately, this reading of § 1371 seems to be a minority opinion. Most secondary sources—primarily, state surveys regarding related statutes—treat the statute as good law.[64] More significantly, so do the courts—when they deal with the issue at all. In *Kibbe v. Williams*, the Oklahoma Eastern District Court spared a nod towards § 1371 without at any point questioning its validity, though it said the defendant had not adequately met its requirements.[65] Furthermore, Andrea Fielding, the Director of the Forensic Science Services at the Oklahoma State Bureau of Investigation (OSBI), has stated that as of 2022, the OSBI still operates under the directives of the DNA Forensic Testing Act.[66] According to its Evidence Collection Manual, the OSBI returns evidence to the submitting agency at the conclusion of testing.[67] Fielding said that when this evidence

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61. Daine Baldwin, *Board Honors Attorneys for Conviction's Reversal*, THE OKLAHOMAN (June 16, 2001, 12:00 AM), https://www.oklahoman.com/story/news/2001/06/16/board-honors-attorneys-for-convictions-reversal/62142422007/.

62. Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review Of Postconviction DNA Testing Statutes And Legislative Recommendations*, 59 DRAKE L. REV. 799, 845 (2011).

63. In fact, the language of the latter statute seems to acknowledge the potential evidentiary issues that might arise. Though it does not address preservation directly, there is a chain of custody requirement that acknowledges that evidence in the custody of law enforcement should be presumptively seen as preserved. OKLA. STAT. tit. 22, § 1373.4(A)(5) (2022).

64. *See, e.g.*, *Post-Conviction Relief Through DNA Testing*, THOMPSON REUTERS (Oct. 2021),https://1.next.westlaw.com/Document/Ieb275c115b0611de9b8c850332338889/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default) (last visited July 10, 2022).

65. *Williams*, 2010 U.S. Dist. LEXIS 47566, at *30.

66. E-mail from Andrea Fielding, Dir. of the Forensic Science Serv. at the Okla. State Bureau of Investigation, to author. (March 1, 2022, 11:05 CST) (on file with author).

67. OKLAHOMA STATE BUREAU OF INVESTIGATION, *Evidence Collection Manual*, 104

falls under the purview of § 1372, the OSBI will place "a bright sticker" on it to indicate to the agency that the evidence must be preserved.[68] However, this policy seems to be conspicuously absent in manuals where postconviction DNA preservation is addressed directly. The Oklahoma City Police Operations Manual, for example, does not address § 1372 or its mandates.[69] This makes it difficult to know whether criminal justice agencies actually listen to the preservation directed by the OSBI. What it does imply, however, is that there seems to be a conspicuous amount of discretion left in the hands of individual agencies in regards to how evidence is preserved.

However, if the DNA Forensic Testing Act is in fact still in effect, it explains why the Postconviction DNA Act does not include a postconviction preservation provision. A preservation statute in the Postconviction DNA Act would have been rendered redundant if § 1372 is still controlling. That being said, even if Brooks and Simpson were wrong to assert that the sunset provision rendered the entire Act defunct, their misunderstanding is not insignificant. The fact that this ambiguity exists at all underscores exactly how infrequently the issue is litigated, how little influence it currently has on claims of factual innocence, and the flaws in the way the statute is written.

2. Theory two: Compliance

Another extreme possibility for why that might be is that all the agencies simply work in perfect compliance. This can be decisively dismissed, without looking much further than several controversies which Oklahoma has recently been embroiled in. The state made national headlines three years ago for the ignoble distinction of having over seven-thousand untested kits.[70] CNN reported that Oklahoma is hardly unique in this sense; law enforcement agencies across over forty-seven states reported the destruction of kits.[71] This poses a massive barrier to claims of

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(1st ed. 2011), https://osbi.ok.gov/sites/g/files/gmc476/f/documents/crime_scene_manual.pdf (last visited July 10, 2022).

68. E-mail from Andrea Fielding, *supra* note 66.

69. *See* OKLA. CITY POLICE DEP'T, *Operations Manual*, (5th ed. 2014), https://www.okc.gov/home/showdocument?id=5026 (last visited July 10, 2022).

70. Michelle Malkin, *Lost, Buried, Burned: Oklahoma's Rape Kit Scandal*, A.P. NEWS (February 17, 2019), https://apnews.com/article/982af74867984478bc2bf7b9a4bf76f0.

71. Ashley Fantz et al.,, *Destroyed: How the Trashing of Rape Kits Failed Victims and Jeopardizes Public Safety*, CNN (November 29, 2018) https://www.cnn.com/

factual innocence, since the testing and re-testing of these sorts of kits has led to the overturn of "at least 195 convictions since 1992."[72] A year after CNN handed down this veritably damning article, the Oklahoma Legislature passed a swathe of laws focused entirely on the preservation and testing of rape kits.[73] This implicitly conceded that § 1372 had failed both survivors of sexual assault and those who were wrongfully convicted for assault. Among the provisions in the new assault-focused laws include mandatory retention for fifty years regardless of whether a petitioner has requested the retention, which again implies that the structure of § 1372 is insufficient for its purpose. This begs the question: if the legislation has realized that § 1372 is insufficient in sexual assault cases, why does it think that it is sufficient for other heinous crimes?

When it comes to identifying specific defendants that § 1372 has failed, the task is much harder. It is difficult to ascertain who was failed by missing evidence if the evidence was never tested. One such case is that of Sedrick Courtney, who was convicted of robbery in 1996 and exonerated in 2012.[74] While his initial conviction predated the passage of § 1372, it was in 2000 and then again in 2008 that the Tulsa Police Department reported that all relevant DNA evidence had been destroyed. Yet, in 2011—with further prodding from a student working for the Innocence Project—Tulsa miraculously produced hairs with exculpatory DNA testing.[75] By 2008, the DNA Forensic Testing Act had been in full force for seven years. There seems to be no adequate explanation for why the department seemed wholly unaware of what evidence it had retained and what evidence had been destroyed. This is an imperfect example, since the DNA was eventually recovered, but it highlights the arbitrariness of recovering evidence—and the lack of consequences for doing so—even in a post-§ 1372 world.

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interactive/2018/11/investigates/police-destroyed-rapekits/index.html.

72. Ashley Fantz et al., *Where Police Failed Rape Victims*, CNN (November 29, 2018), https://www.cnn.com/interactive/2018/11/investigates/police-destroyed-rapekits/springfield.html.

73. *See* OKLA. STAT. tit. 74, § 150.28a (2021).

74. Maurice Possley, *Sedrick Courtney*, THE NAT'L REGISTRY OF EXONERATIONS (August 30, 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3958 (last visited July 10, 2022).

75. *Id.*

3. Theory three: The language of the statute itself

If the statute is still in effect, and if it is still being violated by agencies, then there is a more likely explanation for why the statute remains absent in case law. The statute is simply unenforceable, and therefore marginally relevant. Ambiguities created by the confusing sunset provision aside, the Act seems to lack any teeth. There are no criminal penalties attached, nor, even, is there the threat of "appropriate sanctions." Even if individual bad actors, or the systematic policies of a given criminal justice agency, run afoul of the statutory provisions, there is not much to be done. In the absence of a punishment, even a discretionary judicial one, there is not much reason to heed § 1372. Instead, this small, esoteric, and yet potentially crucial provision gets overshadowed by other evidentiary concerns, such as the petitioner's obligation to establish the chain of custody themself before submitting evidence into testing.

Therefore, as illustrated in *Kibbe v. Williams*, it seems less that the statute has been laid low by a sunset provision and more that the courts which have interpreted it might not consider it a sufficient basis for postconviction relief. The biological evidence at issue was blood on the "victim's knife, the petitioner's jeans, and the petitioner's sandals."[76] Allegedly, the prosecution and the State of Oklahoma either negligently lost or destroyed these items. At the very least, the Oklahoma Eastern District Court and the Sequoyah County District Court agreed that the petitioner could and should have raised any evidentiary issues on appeal and that failing to do so constituted a waiver. Therefore, they found that there was an adequate and independent state procedural bar.[77] Consequently, the court never reached the issue of whether the statute was violated and, if a violation had been found, what the implications might be.

There are no published opinions from the Oklahoma Court of Criminal Appeals addressing this issue directly, which makes speculation difficult. This is not for lack of trying on the part of defense attorneys—numerous briefs in the last several years have attempted to assert a § 1372 claim.[78] However, the highest criminal court in the Sooner State has offered no

76. *Williams*, 2010 U.S. Dist. LEXIS 47566, at *29.

77. *Id.* at *29-30.

78. Petitioner's Brief in Support of Post-Conviction Appeal Pursuant to 22 O.S. § 1087 Arising from an April 23, 2019, Order Denying Post-Conviction DNA Testing in the District Court of Oklahoma County CF-2004-1212, *supra* note 58.

guidance. Another thing that is difficult to speculate on is whether this comes from a lack of statutory empowerment, or a lack of interest. Even if Oklahoma legislators rewrote § 1372 to include a discretionary judicial remedy, it is hard to tell how individual judges in a state that largely disfavors postconviction remedies would wield that newfound power.

There are two opinions—one unpublished and nonbinding—from the Oklahoma Court of Criminal Appeals within the last two decades that deal with poorly preserved evidence, but neither of them directly nod towards § 1372. In fact, in the absence of any sort of meaningful incentive for agencies to preserve potentially exculpatory evidence, the Court has suggested that any failure to do so should directly burden the petitioner's request for postconviction DNA testing, pursuant to the chain of custody requirement of § 1373.4(A)(1). What seems to emerge then is a regime that is nominally meant to hold criminal justice agencies accountable for poor evidence preservation and yet instead directly punishes petitioners when they are unable to produce spotless chains of custody and unspoliated evidence.

The first of these two cases—the unpublished one—actually predates the enactment of § 1373.4 by three years, having been handed down in the latter half of 2010.[79] Donald Ray Wackerly II was on his third application for postconviction relief and seeking a stay of his execution. He was convicted of murder but alleged that his ex-wife was actually the culprit. Wackerly wanted to submit fishing poles discovered near the body to a new, more advanced sort of DNA testing. However, the Court found that, after the OSBI had finished testing the poles, "nothing was done over the years to preserve any forensic evidence."[80] The Court observed that the poles were not so much as wrapped in anything to keep them out of the elements, and that they were handled by numerous people. It is unclear, exactly, who is to blame for this shoddy preservation, but the fact that they were in the OSBI's hands at one time suggests that they must have at least been in the custody of a criminal justice agency. Yet, the Court does not fault the agency for failing to preserve the potentially exculpatory evidence, only chiding Wackerly for making a "last minute attempt to delay . . . [his] execution."[81] Donald Ray Wackerly II was executed later

79. Wackerly v. Oklahoma, PCD-2010-0998 (Okla. Crim. App. October 14, 2010) (unpublished), https://oklegal.onenet.net/oklegal-cgi/isearch.
80. *Id.*
81. *Id.*

that day.[82]

The second case was decided soon after the enactment of the Post-Conviction Procedure Act, so it makes specific mention of the chain of custody requirement. David Payne (presumably unrelated) was convicted of brutally murdering his mother in 1993.[83] Following the enactment of the Post-Conviction DNA Act on November 1, 2013, Payne requested DNA testing of evidence from the scene. It was granted, and then vacated, following an appeal by an assistant district attorney. In the opinion vacating the district court's grant of his request, the Oklahoma Court of Criminal Appeals cited, among other things, that "[t]he chain of custody must be preserved and the evidence protected from spoliation."[84] It does not address who should be preserving said evidence or what the consequences—other than to the petitioner—should be in the absence of such preservation. Interestingly, it does cite one section of the Post-Conviction Procedure Act that could be reasonably construed to deal with preservation:

> F. If an accredited laboratory other than the OSBI or one under contract with the OSBI performs the DNA testing, the court shall impose reasonable conditions on the testing of the evidence to protect the interests of the parties in the integrity of the evidence and testing process and to preserve the evidence to the greatest extent possible.[85]

However, even in this limited circumstance—when someone not contracted with the OSBI conducts the testing—the Court declined to extend lower courts' obligations beyond imposing "reasonable conditions on the *testing* of the evidence."[86] Not, as the language may suggest, preserving the evidence to the greatest extent possible.

Undoubtedly, the chain of custody requirement is necessary for accurate DNA results. Attempting to conduct testing on evidence which has been tampered with is certainly a useless endeavor. However, the chain of custody requirement—in conjunction with the lack of meaningful

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82. *Id.*
83. Oklahoma *ex rel.* Smith v. Neuwirth, 2014 OK CR 16, ¶ 3, 337 P.3d 763, 764 (Okla. Crim. App.).
84. *Id.* ¶ 12, 337 P.3d 766.
85. *Id.* ¶ 14, 337 P.3d 766.
86. *Id.* (emphasis added).

incentive for criminal justice agencies to preserve said evidence—places the burden entirely on the petitioner, which certainly runs counterintuitive to the demands of § 1372. After all, in the above cases the judges almost seem to be chiding the petitioners for something they cannot feasibly control—nor, under the law, are the they ones that are obligated to make that effort.

POSSIBLE REFORMS

Where do we go from here? Systematic reform in the area of postconviction DNA preservation is going to require either the cooperation and interplay of all three branches of government on a state level, or broad federal intervention. There can be some hostility towards the concept of postconviction remedies. Critics see postconviction proceedings as undermining confidence in our justice system, and, as was the case with *Wackerly*, even judges often feel that petitioners are making a desperate bid to delay the inevitable by wasting valuable resources. That being said, change is necessary to vindicate the rights of innocent petitioners, and it is going to require bipartisan support—not only for the sake of the petitioners who have been wrongfully convicted, but for the sake of the victims, and for the sake of those who could be further victimized by the true perpetrators. Either the Oklahoma Court of Criminal Appeals must take the initiative in reinterpreting the statute, Oklahoma's legislative branch must revise existing laws or instate entirely new ones, or (as a last resort, and most unpopularly among federalist-minded Oklahomans), the national government must redouble its efforts to bring the states' preservation statutes under compliance itself. Each of these potential solutions has its benefits and drawbacks, and it is likely that some combination may be necessary.

1. Statutory interpretation

Theoretically, the Supreme Court could always intervene. It is possible that some day at least five justices will concede that *Youngblood* represents a grave constitutional error. In that theoretical future, the Supreme Court could reverse its ruling and decide that the Due Process Clause necessitates affirmative preservation of evidence, and specifically set destruction of evidence—even in the absence of bad faith—apart as grounds for some sort of postconviction relief. This future, should it exist

at all, is likely many years away. The current composition of the Supreme Court seems to disfavor postconviction remedies, as seen most recently in *Shinn v. Ramirez*.[87] It is unlikely that a dramatic expansion of those remedies will happen in their lifetimes.

On the other hand, the Oklahoma Court of Criminal Appeals could address this issue directly and interpret the statute in a published opinion. This could take one of two forms: either they could decide that the Oklahoma Constitution necessitates preservation of evidence in a way that the United States Constitution does not, or they could interpret § 1374 as imposing some kind of implicit consequence for noncompliance. Either option, however, would involve a fairly radical reading of the source. Additionally, the Oklahoma Court of Criminal Appeals notoriously hesitates to overturn the convictions of its lower courts. It is likely incredibly disinclined to read § 1372—a statute that the Court itself almost never invokes—as imposing a duty upon the lower courts to force sanctions upon criminal agencies for noncompliance.

2. Statutory reform

Ideally, this sort of reform should largely be a creature of the legislature. The Innocence Project has made several legislative recommendations in this vein; this Note will be endorsing those, in conjunction with observations from Jones' article discussed previously.[88]

It is clear that, first and foremost, there should be a complete omission of the sorts of sunset provisions that cast these sorts of ambiguities on entire acts like this to begin with. If the legislation issued a new DNA preservation law on a "clean slate" with no apparent expiration date to cause confusion, petitioners—especially working pro se, though frankly even legal professionals grapple with this sort of wording—would have a much firmer grasp on what their rights are.

Additionally, a workable enforcement provision has proven to be absolutely necessary. Jones has expressed skepticism regarding criminal sanctions for the reasons discussed above. Existing ineffective statutes dealing with the destruction of evidence, self-regulation by criminal justice agencies and the conflict of interest that it entails, the identification of a single bad actor among an entire chain of flawed custody, and the lack

87. Shinn v. Ramirez, 142 S. Ct. 1718, 1724 (2022) (where the Court overturned a relatively narrow ineffective of counsel exception for postconviction relief).

88. *Preservation of Evidence*, *supra* note 2.

of meaningful remedy for the affected petitioner all plague well-intentioned criminal sanction provisions. Though Oklahoma could strengthen its existing statute dealing with the destruction of evidence—perhaps simply expanding it to cover postconviction destruction of evidence—the other three reasons are compelling, even though the IPA has adopted criminal sanctions as its preferred method of enforcement on a federal level.

What is the alternative? The Innocence Project endorses the more nebulous "appropriate sanctions" approach as decided on a case-by-case level by the judiciary. The inherent drawback here is, frankly, potential unwillingness on the part of the courts to exercise this discretion in the furtherance of postconviction remedies. However, the Innocence Project provides a laundry list of examples, some of which courts may find more palatable than others: they can instruct the jury that the evidence was destroyed in violation of the law; they can instruct the jury to presume that the destroyed DNA evidence was favorable; and, most extremely, they can vacate the sentence and grant the petitioner a new trial.[89]

There are a number of other miscellaneous suggestions that could prove advantageous to the statute as a whole. Firstly, the statute should be broadened on several fronts. There are too many possible exceptions; allowing the categorical destruction of evidence as long as the petitioner receives some sort of notice is inadequate. Agencies may certainly need to destroy evidence in their considerable backlog for practical reasons—storage space and resources are not infinite—but it should be more difficult than simply providing the petitioner with a letter. The informality of this process seems to leave itself open to abuse. Perhaps a hearing should be necessary prior to the destruction, or some other similarly robust requirement.

There are other ways that the statute needs to be broadened as well. Firstly, it involves just biological evidence, which expressly excludes fingerprinting. Some states, such as North Carolina, require the retention of fingerprint preservation as well.[90] Secondly, the scope of crimes which Oklahoma preserves DNA evidence for is far too narrow—harkening back to Jones' recommendations, Oklahoma should strive to be a blanket preservation state, perhaps even one without a requirement that the petitioner should provide formal notice in order to prevent the destruction of potentially exculpatory evidence. Lastly—though perhaps more

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89. *Id.*
90. *See* N.C. GEN. STAT. § 15A-268 (2022).

unrealistically—it would be worth considering statutory adoption of the guidelines established by the NIST Technical Working Group on Biological Evidence Preservation.[91] If not uniform statutory adoption, then perhaps something that would be more binding on individual agencies than a mere recommendation. A grant, possibly, or another additional allocation of resources.

3. Federal intervention

Lastly, it is theoretically possible that the federal government could revisit its grant programs. In the years since the passing of the IPA, Congress has notably loosened the reigns when it comes to the requirements of its twin set of grants: the Bloodsworth Grant and the Coverdell Grant. It could be that strengthening those requirements in order to bring states into stricter compliance—or even attempting to pass a uniform DNA preservation statute on a national level—would fix the widespread issues in many states' evidence preservation policies. However, this is likely the weakest of all available suggestions for a number of reasons. First, the initial iteration of the IPA seems to have been a resounding failure. Those stricter requirements almost entirely throttled the grant programs to begin with—as evidenced by the fact that only three states were interested in applying for the Bloodsworth Grant in the first place. Second, even if the grants have not necessarily spurred the national change in preservation statutes that Congress was hoping for, they have still made a world of difference to those fifty-one petitioners that the grants have ultimately helped. Third, the most extreme option—the theoretical nuclear option in which Congress mandates a federal-level preservation requirement that is binding on the states—likely lacks a compelling constitutional hook.

If anything, involvement from the federal government should likely take the form of continued monetary support where possible. Oklahoma's smaller counties especially currently lack the resources necessary to fully comply with the legislative recommendations above. Perhaps continued support through the Bloodsworth Grant and the Coverdell Grant would help continue to ease the sting of these resource-burdening initiatives.

91. NIST/NIJ Technical Working Group on Biological Evidence Preservation, *supra* note 10.

4. Combined efforts and conclusion

It seems that, in order to most effectively preserve postconviction evidence, the state judiciary, the state legislature, and the federal government must focus their efforts on meaningful reform in Oklahoma. The state legislature must pass another statute which reaffirms its commitment to the preservation of evidence, perhaps limiting the discretion of individual agencies by mandating broader preservation requirements and imposing some sort of sanctions for noncompliance. The state judiciary must be the ones committed to utilizing and respecting that statute, including appropriate sanctions when necessary in order to provide relief to spurned petitioners. Lastly, the federal government must continue its efforts in funding grantees where possible, hopefully lessening the necessary burdens imposed on smaller counties by the new legislation. There may not be much we can do for the nameless men and women who currently languish in our prisons and who do not belong there, but, looking forward, we may find a combination of deterrence and remedy to help innocent individuals in the future.