

Biological Evidence Preservation

# CONSIDERATIONS FOR POLICY MAKERS

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## I. Introduction

Creating policies to support the proper packaging, labeling, storage, preservation, retrieval, and disposition of biological evidence is a critical component in the administration of criminal justice. In many jurisdictions, the state of property and evidence rooms has been subject to criticism. But recently, across the nation, states and localities have made major strides in devising and implementing policies regarding the preservation of biological evidence in criminal and post-convictions proceedings. Biological evidence refers to samples of biological material—such as hair, tissue, bones, teeth, blood, semen, or other bodily fluids—or to evidence items containing biological material.<sup>1</sup> While 43 states and the District of Columbia have enacted statutes related to the preservation of biological evidence, policies and procedures can be enacted in states that currently have no laws and for those states looking to make improvements.<sup>2</sup>

*Biological Evidence Preservation: Considerations for Policy Makers* is a policy brief intended to provide guidance to legislators, advocates, and managers within criminal justice agencies that influence policy. The content in this document is informed by an in-depth analysis of current state legislation in existence as of the date of this document's publication. Using examples from existing state statutes, and a thorough examination of current trends, law, scientific literature, and the expertise of the membership, the following report discusses key legislative provisions and recommends statutes, rules, or policies to be implemented by states to improve the preservation of biological evidence. The excerpts in this document are provided to illustrate examples of the way states have addressed these issues in existing legislation and may contain language that is not specifically supported by the Working Group as drafted. Throughout this document “policy makers” is used to describe any individual who is responsible for developing policy, including but not limited to legislators, judges, police chiefs, crime laboratory directors, and property and evidence managers.

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<sup>1</sup> Technical Working Group on Biological Evidence Preservation. 2013. *The Biological Evidence Handbook: Best Practices for Evidence Handlers*. NIST IR 7928. Gaithersburg, MD.: National Institute of Standards and Technology. <http://www.nist.gov/forensics/upload/NIST-IR-7928.pdf>; DNA Initiative. 2012. “Glossary.” Accessed July 5. <http://www.dna.gov/glossary>.

<sup>2</sup> (Alabama) Ala. Code § 15-18-200 (LexisNexis 2009); (Alaska) Alaska Stat. § 12.36.200 (LexisNexis 2010); (Arizona) Ariz. Rev. Stat. Ann. § 13-4221 (LexisNexis 2008); (Arkansas) A.C.A. § 12-12-104 (LexisNexis 2008 Supp. 2011); (California) Cal Pen Code § 1417.9 (LexisNexis 2000 & Supp.2015); (Colorado) Colo. Rev. Stat. Ann. § 18-1-1102 (LexisNexis 2008 & Supp. 2009); (Connecticut) Conn. Gen. Stat. § 54-102jj (LexisNexis 2004 & Supp. 2012); (District of Columbia) D.C. Code § 22-4134 (LexisNexis 2002 & Supp. 2013); (Florida) Fla. Stat. Ann. § 925.11 (LexisNexis 2001 & Supp. 2006); (Georgia) Ga. Code Ann. § 17-5-56 (LexisNexis 2003 & Supp. 2011); (Hawaii) Haw. Rev. Stat. § 710-1076 (LexisNexis 2005); (Illinois) Illinois 725 Ill. Comp. Stat. Ann. 5/116-4 (LexisNexis 2000 & Supp. 2012); (Indiana) Ind. Code Ann. § 35-38-7-14 (LexisNexis 2001); (Iowa) Iowa Code Ann. § 81.10 (LexisNexis 2005 & Supp. 2014); (Kansas) Kan. Stat. Ann. § 21-2152 (LexisNexis 2001 & Supp. 2013); (Kentucky) Ky. Rev. Stat. Ann. § 524.140 (LexisNexis 2002 & Supp. 2013); (Louisiana) La. Rev. Stat. Ann. § 15:621 (LexisNexis 2011); (Maine) Me. Rev. Stat. tit. 15, § 2138 (LexisNexis 2004 & Supp. 2013); (Maryland) Md. Criminal Procedure Code Ann. § 8-201 (LexisNexis 2001 & Supp. 2012); (Massachusetts) Mass. Gen. Laws. Ch. 278A § 16 (LexisNexis 2012); (Michigan) Mich. Comp. Laws. Ann. § 770.16 (LexisNexis 2000 & Supp. 2011); (Minnesota) Minn. Stat. Ann. § 590.10 (LexisNexis 2005); (Mississippi) Miss. Code Ann. § 99-49-1 (LexisNexis 2009); (Missouri) Mo. Rev. Stat. § 650.056 (LexisNexis 2001 & Supp. 2006); (Montana) Mont. Code Ann. 46-21-111 (LexisNexis 2003 & Supp. 2009); (Nebraska) Neb. Rev. Stat. Ann. § 29-4125 (LexisNexis 2001 & Supp. 2007); (Nevada) Nev. Rev. Stat. Ann. § 176.0912 (LexisNexis 2009 & Supp. 2013); (New Hampshire) N.H. Rev. Stat. Ann. § 651-D:3 (LexisNexis 2004); (New Mexico) N.M. Stat. Ann. § 31-1A-2 (LexisNexis 2003 & Supp. 2005); (North Carolina) N.C. Gen. Stat. Ann. § 15A-268 (LexisNexis 2001 & Supp. 2013); (Ohio) Ohio Rev. Code Ann. § 2933.82 (LexisNexis 2010 & Supp. 2015); (Oklahoma) Okla. Stat. Ann. Tit. 22 § 1372 (LexisNexis 2001 & Supp. 2015); (Oregon) ORS § 133.707 (LexisNexis 2009 & 2011); (Pennsylvania) 42 Pa. Cons. Stat. Ann. § 9543.1 (LexisNexis 2002); (Rhode Island) R.I. Gen. Laws Ann. § 10-9.1-11 (LexisNexis 2002); (South Carolina) S.C. Code Ann. § 17-28-340 (LexisNexis 2008); (South Dakota) S.D. Codified Laws § 23-5B-1 (LexisNexis 2009); (Tennessee) Tenn. Code Ann. § 40-30-309 (LexisNexis 2001); (Texas) Tex. Code Crim. Proc. art. 38.43 (LexisNexis 2005 & Supp. 2013); (Utah) Utah Code Ann. § 78B-9-301 (LexisNexis 2008 & Supp. 2010); (Virginia) Va. Code Ann. § 19.2-270.4:1 (LexisNexis 2001 & Supp. 2005); (Washington) Wash. Rev. Code Ann. § 10.73.170 (LexisNexis 2000 & Supp. 2005); (Wisconsin) Wis. Stat. Ann. § 978.08 (LexisNexis 2001 & Supp. 2005); (Wyoming) Wyo. Stat. Ann. § 7-12-304 (LexisNexis 2008).

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## **I.1 Technical Working Group on Biological Evidence Preservation**

The Technical Working Group on Biological Evidence Preservation, sponsored by The National Institute of Justice (NIJ) in collaboration with the National Institute of Standards and Technology (NIST), convened with the charge “to create best practices and guidance to ensure the integrity, prevent the loss, and reduce the premature destruction of biological evidence after collection through post-conviction proceedings.” [\*The Biological Evidence Preservation Handbook\*](#), published in April 2013, provides the law enforcement community with special storage considerations for biological evidence and guidance on evidence management practices. Although practical guidance on evidence management fills a critical gap, policy makers need to enact rules, policies, and laws to compel handlers of biological evidence to implement them.

## **I.2 Membership**

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### **I.3 Sponsorship**

The NIJ is the research, development, and evaluation agency of the U.S. Department of Justice and is dedicated to researching crime control and justice issues. NIJ provides objective, independent, evidence-based knowledge and tools to meet the challenges of crime and justice. The Office of Investigative and Forensic Sciences is the Federal Government's lead agency for forensic science research and development as well as for the administration of programs that provide direct support to crime laboratories and law enforcement agencies to increase their capacity to process high-volume cases, to provide needed training in new technologies, and to provide support to reduce backlogs. Forensic science program areas include Research and Development in Basic and Applied Forensic Sciences, Paul Coverdell Forensic Science Improvement Grants, DNA Capacity Enhancement and Backlog Reduction, Solving Cold Cases with DNA, Post-Conviction DNA Testing of DNA to Exonerate the Innocent, National Missing and Unidentified Persons System, and Using DNA to Identify the Missing.

A nonregulatory agency of the Department of Commerce, NIST promotes U.S. innovation and industrial competitiveness by advancing measurement science, standards, and technology in ways that enhance economic security and improve quality of life. It accomplishes these actions for the forensic science community through the Forensic Science Research Program, located within the SPO at NIST. The Forensic Science Research Program directs research efforts to develop performance standards, measurement tools, operating procedures, guidelines, and reports that will advance the field of forensic science.

### **I.4 Acknowledgments**

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## 2. Biological Evidence Definition

To ensure that biological evidence is properly preserved, all potential handlers must have a clear understanding of what types of evidence should be categorized as biological. Of the many state statutes that include definitions of biological evidence, three designate it as that which “may reasonably be used to incriminate or exculpate” any person.<sup>3</sup> This definition can create challenges for individuals responsible for biological evidence.<sup>4</sup> The determination of whether biological evidence is exculpatory depends on the role that it plays in a case. It should have no bearing on how biological evidence is defined. Defining biological evidence in a statute can prevent ambiguity within jurisdictions and among the various agencies that may potentially handle biological evidence.

### **Recommendation 1:**

Policy makers should define biological evidence as follows: “Evidence commonly recovered during a criminal investigation in the form of skin, hair, tissue, bones, teeth, blood, semen, or other bodily fluids, which may include samples of biological materials, or evidence items containing biological material.”<sup>†</sup>

## 3. Biological Evidence Storage and Disposition

### 3.1 Automatic Versus Qualified Retention

Once an item is identified as biological evidence, its handlers should have clear guidance on whether the evidence should be retained, and, if so, for how long. The majority of states statutes (31 out of 43) contain provisions that require states to automatically preserve biological evidence.<sup>5</sup> For example, the State of Mississippi’s evidence preservation statute requires not only that biological evidence be automatically stored, but the statute also specifies the period of time that the item should be retained. The Mississippi statute states the following:

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<sup>3</sup> (Louisiana) La. Rev. Stat. Ann. § 15:621(E)(1) (LexisNexis 2011); (North Carolina) N.C. Gen. Stat. Ann. § 15A-268(a) (LexisNexis 2001 & Supp. 2013); (Ohio) Ohio Rev. Code Ann. § 2933.82(ii) (LexisNexis 2010 & Supp. 2015).

<sup>4</sup> Technical Working Group on Biological Evidence Preservation. *The Biological Evidence Handbook: Best Practices for Evidence Handlers*. NIST IR 7928. Gaithersburg, MD.: National Institute of Standards and Technology. <http://www.nist.gov/forensics/upload/NIST-IR-7928.pdf>.

<sup>†</sup> Technical Working Group on Biological Evidence Preservation. *The Biological Evidence Handbook: Best Practices for Evidence Handlers*. NIST IR 7928. Gaithersburg, MD.: National Institute of Standards and Technology. <http://www.nist.gov/forensics/upload/NIST-IR-7928.pdf>; DNA Initiative. 2012. “Glossary.” Accessed July 5. <http://www.dna.gov/glossary>.

<sup>5</sup> (Alaska) Alaska Stat. § 12.36.200 (LexisNexis 2010); (Arizona) Ariz. Rev. Stat. Ann. § 13-4221 (LexisNexis 2008); (Arkansas) A.C.A. § 12-12-104 (LexisNexis 2008 Supp. 2011); (California) Cal Pen Code § 1417.9 (LexisNexis 2000 & Supp. 2015); (Colorado) Colo. Rev. Stat. Ann. § 18-1-1102 (LexisNexis 2008 & Supp. 2009); (District of Columbia) D.C. Code § 22-4134 (LexisNexis 2002 & Supp. 2013); (Florida) Fla. Stat. Ann. § 925.11 (LexisNexis 2001 & Supp. 2006); (Georgia) Ga. Code Ann. § 17-5-56 (LexisNexis 2003 & Supp. 2011); (Hawaii) Haw. Rev. Stat. § 710-1076 (LexisNexis 2005); (Illinois) Illinois 725 Ill. Comp. Stat. Ann. 5/116-4 (LexisNexis 2000 & Supp. 2012); (Kentucky) Ky. Rev. Stat. Ann. § 524.140 (LexisNexis 2002 & Supp. 2013); (Louisiana) La. Rev. Stat. Ann. § 15:621 (LexisNexis 2011); (Maryland) Md. Criminal Procedure Code Ann. § 8-201 (LexisNexis 2001 & Supp. 2012); (Massachusetts) Mass. Gen. Laws. Ch. 278A § 16 (LexisNexis 2012); (Michigan) Mich. Comp. Laws. Ann. § 770.16 (LexisNexis 2000 & Supp. 2011); (Minnesota) Minn. Stat. Ann. § 590.10 (LexisNexis 2005); (Mississippi) Miss. Code Ann. § 99-49-1 (LexisNexis 2009); (Missouri) Mo. Rev. Stat. § 650.056 (LexisNexis 2001 & Supp. 2006); (Montana) Mont. Code Ann. 46-21-111 (LexisNexis 2003 & Supp. 2009); (Nebraska) Neb. Rev. Stat. Ann. § 29-4125 (LexisNexis 2001 & Supp. 2007); (Nevada) Nev. Rev. Stat. Ann. § 176.0912 (LexisNexis 2009 & Supp. 2013); (New Hampshire) N.H. Rev. Stat. Ann. § 651-D:3 (LexisNexis 2004); (New Mexico) N.M. Stat. Ann. § 31-1A-2 (LexisNexis 2003 & Supp. 2005); (North Carolina) N.C. Gen. Stat. Ann. § 15A-268 (LexisNexis 2001 & Supp. 2013); (Ohio) Ohio Rev. Code Ann. § 2933.82 (LexisNexis 2010 & Supp. 2015); (Oklahoma) Okla. Stat. Ann. Tit. 22 § 1372 (LexisNexis 2001 & Supp. 2015); (Oregon) ORS § 133.707 (LexisNexis 2009 & 2011); (Rhode Island) R.I. Gen. Laws Ann. § 10-9.1-11 (LexisNexis 2002); (South Carolina) S.C. Code Ann. § 17-28-340 (LexisNexis 2008); (Texas) Tex. Code Crim. Proc. art. 38.43 (LexisNexis 2005 & Supp. 2013); (Wisconsin) Wis. Stat. Ann. § 978.08 (LexisNexis 2001 & Supp. 2005).

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The state shall preserve all biological evidence:

- (i) That is secured in relation to an investigation or prosecution of a crime for the period of time that the crime remains unsolved; or
- (ii) That is secured in relation to an investigation or prosecution of a crime for the period of time that the person convicted of that crime remains in custody.<sup>6</sup>

However, a few other state statutes require that biological evidence be retained with the qualification that some form of petition or court order is made.<sup>7</sup> For example, Utah's post-conviction statute reads as follows:

After a petition is filed under this section, prosecutors, law enforcement officers, and crime laboratory personnel have a duty to cooperate in preserving evidence and in determining the sufficiency of the chain of custody of the evidence which may be subject to DNA testing.<sup>8</sup>

Similarly, Washington's post-conviction biological evidence preservation statute requires that,

Notwithstanding any other provision of law, upon motion of defense counsel or the court's own motion, a sentencing court in a felony case may order the preservation of any biological material that has been secured in connection with a criminal case, or evidence samples sufficient for testing, in accordance with any court rule adopted for the preservation of evidence.<sup>9</sup>

In the absence of an automatic retention policy, however, there is a period of time in which the evidence can be legally destroyed before a petition for testing is filed. This time may last for years and can result in the unwarranted destruction of evidence that could be tested and found to be exculpatory.

### **Recommendation 2:**

Policy makers in each state should establish statutes, rules, or policies that require the automatic retention of biological evidence by government entities from the time of collection through the recommended timeframes set forth in Table 3-1 (Page 7).

## **3.2 Crime Categories and Case Status**

Potential sources of biological evidence vary widely from an item as small as a toothpick to something as large as a motor vehicle.<sup>10</sup> Despite DNA's powerful potential to identify a perpetrator, requiring the retention of items that may contain DNA for an indefinite period in each case would result in an

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<sup>6</sup> (Mississippi) Miss. Code Ann. § 99-49-1 (LexisNexis 2009).

<sup>7</sup> (Alabama) Ala. Code § 15-18-200 (LexisNexis 2009); (Connecticut) Conn. Gen. Stat. § 54-102jj (LexisNexis 2004 & Supp. 2012); (Indiana) Ind. Code Ann. § 35-38-7-14 (LexisNexis 2001); (Iowa) Iowa Code Ann. § 81.10 (LexisNexis 2005 & Supp. 2014); (Kansas) Kan. Stat. Ann. § 21-2152 (LexisNexis 2001 & Supp. 2013); (Maine) Me. Rev. Stat. tit. 15, § 2138 (LexisNexis 2004 & Supp. 2013); (Pennsylvania) 42 Pa. Cons. Stat. Ann. § 9543.1 (LexisNexis 2002); (South Dakota) S.D. Codified Laws § 23-5B-1 (LexisNexis 2009); (Tennessee) Tenn. Code Ann. § 40-30-309 (LexisNexis 2001); (Utah) Utah Code Ann. § 78B-9-301 (LexisNexis 2008 & Supp. 2010); (Virginia) Va. Code Ann. § 19.2-270.4:1 (LexisNexis 2001 & Supp. 2005); (Washington) Wash. Rev. Code Ann. § 10.73.170 (LexisNexis 2000 & Supp. 2005); (Wyoming) Wyo. Stat. Ann. § 7-12-304 (LexisNexis 2008).

<sup>8</sup> (Utah) Utah Code Ann. § 78B-9-301 (LexisNexis 2008 & Supp. 2010).

<sup>9</sup> (Washington) Wash. Rev. Code Ann. § 10.73.170 (LexisNexis 2000 & Supp. 2005).

<sup>10</sup> National Institute of Justice. 2000. "Crime Scene Investigation: A Guide for Law Enforcement." NCJ 178280. Washington, DC: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, Technical Working Group on Crime Scene Investigation, 58.

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unrealistic and unsustainable state of affairs for most law enforcement agencies.<sup>11</sup> Many states address this issue by specifying the offense categories for which evidence must be preserved; 17 states and the District of Columbia have statutory provisions that require the retention of biological evidence for felony offenses in criminal investigations or after a petition has been filed. Some states provide a statutory list of crimes, which may include: murder, manslaughter, assaults, or other violent felony offenses.<sup>12</sup> Nine states require that biological evidence be retained in all crime categories;<sup>13</sup> 22 states specify the length of time that biological evidence should be retained based on their categorization of criminal offenses.<sup>14</sup>

In determining the duration of time that biological evidence must be retained, policy makers should consider the case status and crime categories. Generally, there are four categories of case status:

- Open Cases (e.g., no suspect but investigation continuing)
- Charges Filed (e.g., suspect(s) charged, active arrest warrant)
- Adjudicated (e.g., conviction, dismissal, or acquittal)
- Unfounded/Refused/Denied/No Further Investigation (e.g., nolle prosequi, investigation no longer active)

Table 3-I contains guidance on the retention of biological evidence based on crime category, as defined by the National Incident-Based Reporting System (NIBRS),<sup>15</sup> and case status.

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<sup>11</sup> Technical Working Group on Biological Evidence Preservation. *The Biological Evidence Handbook: Best Practices for Evidence Handlers*. NIST IR 7928. Gaithersburg, MD.: National Institute of Standards and Technology. <http://www.nist.gov/forensics/upload/NIST-IR-7928.pdf>.

<sup>12</sup> (Colorado) Colo. Rev. Stat. Ann. § 18-1-1102(1)(a) (LexisNexis 2008 & Supp. 2009); (District of Columbia) D.C. Code § 22-4134(a) (LexisNexis 2002 & Supp. 2013); (Florida) Fla. Stat. Ann. § 925.11 (LexisNexis 2001 & Supp. 2006); (Indiana) Ind. Code Ann. § 35-38-7-14 (LexisNexis 2001); (Iowa) Iowa Code Ann. § 81.10(1) (LexisNexis 2005 & Supp. 2014); (Kansas) Kan. Stat. Ann. § 21-2152 (LexisNexis 2001 & Supp. 2013); (Kentucky) Ky. Rev. Stat. Ann. § 524.140(a) (LexisNexis 2002 & Supp. 2013); (Louisiana) La. Rev. Stat. Ann. § 15:621(a) (LexisNexis 2011); (Michigan) Mich. Comp. Laws. Ann. § 770.16(1) (LexisNexis 2000 & Supp. 2011); (Montana) Mont. Code Ann. 46-21-111(a) (LexisNexis 2003 & Supp. 2009); (New Mexico) N.M. Stat. Ann. § 31-1A-2 (A) (LexisNexis 2003 & Supp. 2005); (North Carolina) N.C. Gen. Stat. Ann. § 15A-268(a6)(3) (LexisNexis 2001 & Supp. 2013); (Oklahoma) Okla. Stat. Ann. Tit. 22 § 1372(A) (LexisNexis 2001 & Supp. 2015); (South Dakota) S.D. Codified Laws § 23-5B-1 (LexisNexis 2009); (Texas)Tex. Code Crim. Proc. art. 38.43(a)(2) (LexisNexis 2005 & Supp. 2013); (Utah) Utah Code Ann. § 78B-9-301(2) (LexisNexis 2008 & Supp. 2010); (Virginia) Va. Code Ann. § 19.2-270.4:1(A) (LexisNexis 2001 & Supp. 2005); (Washington) Wash. Rev. Code Ann. § 10.73.170 (LexisNexis 2000 & Supp. 2005).

<sup>13</sup> (California) Cal. Pen. Code § 1417.9(a) (LexisNexis 2000 & Supp.2015); (Georgia) Ga. Code Ann. § 17-5-56(a) (LexisNexis 2003 & Supp. 2011); (Massachusetts) Mass. Gen. Laws. Ch. 278A § 16(16)(a) (LexisNexis 2012); (Minnesota) Minn. Stat. Ann. § 590.10(1) (LexisNexis 2005); (Mississippi) Miss. Code Ann. § 99-49-1(3)(i) (LexisNexis 2009); (Nebraska) Neb. Rev. Stat. Ann. § 29-4125(1) (LexisNexis 2001 & Supp. 2007); (Rhode Island) R.I. Gen. Laws Ann. § 10-9.1-11(a) (LexisNexis 2002); (Wisconsin) Wis. Stat. Ann. § 978.08(2) (LexisNexis 2001 & Supp. 2005); (Wyoming) Wyo. Stat. Ann. § 7-12-304 (LexisNexis 2008).

<sup>14</sup> (Alaska) Alaska Stat. § 12.36.200(2)(a) (LexisNexis 2010); (Arizona) Ariz. Rev. Stat. Ann. § 13-4221(A)(1) (LexisNexis 2008); (Arkansas) A.C.A. § 12-12-104(b) (LexisNexis 2008 Supp. 2011); (Colorado) Colo. Rev. Stat. Ann. § 18-1-1102 (LexisNexis 2008 & Supp. 2009); (Connecticut) Conn. Gen. Stat. § 54-102jj(b) (LexisNexis 2004 & Supp. 2012); (District of Columbia) D.C. Code § 22-4134(a) (LexisNexis 2002 & Supp. 2013); (Florida) Fla. Stat. Ann. § 925.11(4)(b) (LexisNexis 2001 & Supp. 2006); (Hawaii) Haw. Rev. Stat. § 710-1076(a) (Lexis Nexis 2005); (Illinois) Illinois 725 Ill. Comp. Stat. Ann. 5/116-4(b) (LexisNexis 2000 & Supp. 2012); (Kentucky) Ky. Rev. Stat. Ann. § 524.140(7) (LexisNexis 2002 & Supp. 2013); (Maryland) Md. Criminal Procedure Code Ann. § 8-201(2) (LexisNexis 2001 & Supp. 2012); (Michigan) Mich. Comp. Laws. Ann. § 770.16(12) (LexisNexis 2000 & Supp. 2011); (Montana) Mont. Code Ann. 46-21-111(a) (LexisNexis 2003 & Supp. 2009); (Nevada) Nev. Rev. Stat. Ann. § 176.0912(1) (LexisNexis 2009 & Supp. 2013); (New Hampshire) N.H. Rev. Stat. Ann. § 651-D:3(1) (LexisNexis 2004); (New Mexico) N.M. Stat. Ann. § 31-1A-2(A) (LexisNexis 2003 & Supp. 2005); (North Carolina) N.C. Gen. Stat. Ann. § 15A-268(a6) (LexisNexis 2001 & Supp. 2013); (Ohio) Ohio Rev. Code Ann. § 2933.82(B) (LexisNexis 2010); (Oklahoma) Okla. Stat. Ann. Tit. 22 § 1372(A) (LexisNexis 2001 & Supp. 2015); (Oregon) ORS § 133.707 (2) (LexisNexis 2009 & 2011); (South Carolina) S.C. Code Ann. § 17-28-340 (LexisNexis 2008); (Texas)Tex. Code Crim. Proc. art. 38.43(c) (LexisNexis 2005 & Supp. 2013).

<sup>15</sup> For the purposes of illustration, this report will use the crime categories that are utilized in the Federal Bureau of Investigation's National Incident-Based Reporting System (NIBRS). This system classifies 22 types of offenses as Group "A" crimes and 11 types of lesser offenses as Group "B" crimes.

Table 3-1: Summary of Biological Evidence Retention Guidelines for Crime Categories

Crime Categories (NIBRS) <sup>16</sup>	CASE STATUS			
	Open <sup>17</sup>	Charges Filed	Adjudicated	Unfounded/Refused/Denied/No Further Investigation
Homicide Offenses	Retain indefinitely	Retain indefinitely	At a minimum, retain for the length of incarceration	Dispose of upon receipt of authorization <sup>18</sup>
Sexual Offenses	At a minimum, retain for the length of the statute of limitations	Retain pending adjudication	At minimum, retain for the length of incarceration	Dispose of upon receipt of authorization
Assault Offenses, Kidnapping/Abduction, Robbery			Dispose of upon receipt of authorization	
All Other Group A & B Offenses				

**Recommendation 3:**

Policy makers in each state should, at a minimum, require the retention of evidence according to timetables set forth in Table 3-1.

**3.3 Environmental Storage Conditions**

Among the states with biological evidence preservation laws, only 15 include a requirement that biological evidence be properly stored.<sup>19</sup> For example, North Carolina includes the following language concerning storage conditions for biological evidence:

Evidence shall be preserved in a manner reasonably calculated to prevent contamination or degradation of any biological evidence that might be present, subject to a continuous chain of custody, and securely retained with sufficient official documentation to locate the evidence.<sup>20</sup>

<sup>16</sup> The Federal Bureau of Investigation’s NIBRS’ classifies 22 types of offenses as Group “A” crimes and 11 types of lesser offenses as Group “B” crimes. See <http://www.fbi.gov/about-us/cjis/ucr/ucr> for more information.

<sup>17</sup> Cases in which investigative leads have been exhausted (cold cases) or in which someone was found not guilty after criminal proceedings and additional suspects have not yet been identified or charged should follow the same guidance as open cases.

<sup>18</sup> Section V of *The Handbook on Biological Evidence Preservation* provides further guidance regarding the disposition process.

<sup>19</sup> (Alabama) Ala. Code § 15-18-200 (LexisNexis 2009); (Alaska) Alaska Stat. § 12.36.200 (LexisNexis 2010); (Arizona) Ariz. Rev. Stat. Ann. § 13-4221(B) (LexisNexis 2008); (California) Cal. Pen. Code § 1417.9(a) (LexisNexis 2000 & Supp.2015); (Colorado) Colo. Rev. Stat. Ann. § 18-1-1102 (LexisNexis 2008 & Supp. 2009); (Hawaii) Haw. Rev. Stat. § 710-1076(b) (LexisNexis 2005); (Kentucky) Ky. Rev. Stat. Ann. § 524.140(7) (LexisNexis 2002 & Supp. 2013); (Mississippi) Miss. Code Ann. § 99-49-1(3)(h) (LexisNexis 2009); (Nevada) Nev. Rev. Stat. Ann. § 176.0912(3)(a) (LexisNexis 2009 & Supp. 2013); (North Carolina) N.C. Gen. Stat. Ann. § 15A-268(a1) (LexisNexis 2001 & Supp. 2013); (Ohio) Ohio Rev. Code Ann. § 2933.82(B)(3) (LexisNexis 2010); (Oregon) ORS § 133.707 (LexisNexis 2009 & 2011); (Utah) Utah Code Ann. § 78B-9-301 (LexisNexis 2008 & Supp. 2010); (Wisconsin) Wis. Stat. Ann. § 978.08 (LexisNexis 2001 & Supp. 2005); (Wyoming) Wyo. Stat. Ann. § 7-12-304 (LexisNexis 2008).

<sup>20</sup> (North Carolina) N.C. Gen. Stat. Ann. § 15A-268(a1) (LexisNexis 2001 & Supp. 2013).

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In *The Biological Evidence Handbook*, the Working Group outlined both temporary and long-term environmental storage requirements for multiple types of biological evidence based on an in-depth review of scientific literature.<sup>21</sup> While the body of scientific knowledge for the optimal preservation of biological evidence evolves over time, it is imperative that evidence handlers utilize current best practices based on sound research in determining those conditions.

**Recommendation 4:**

Policy makers in each state should establish statutes, rules, or policies that require biological evidence be stored in appropriate environmental conditions, based on known scientific practices, in order to prevent its loss, degradation, or contamination.

### 3.4 Biological Evidence Management

“Biological evidence management” refers to the handling of biological evidence from collection through final disposition of the evidence. This includes, but is not limited to, packaging, retention, tracking, training, analysis, communication among evidence handling agencies, storage accountability, and disposal. Of the 43 biological evidence preservation statutes examined, six states address the issue of evidence management in their statutes with mandates and/or directions relating to the promulgation of regulations and/or standards regarding preservation.<sup>22</sup>

Oregon, for example, has addressed the creation of evidence management standards with the following statutory language:

The Attorney General shall adopt rules establishing:

- (a) Standards for the proper collection, retention, preservation and cataloging of biological evidence applicable to criminal investigations into, and criminal prosecutions for, covered offenses; and
- (b) A standard form for use by custodians in providing the written notice described in section 3 (1) of this 2011 Act.
- (c) The Attorney General shall consult with the Department of State Police and custodians before adopting rules under this subsection.<sup>23</sup>

Massachusetts assigns the crime laboratory director with the responsibility to create regulations:

- (b)The director of the crime laboratory within the department of state police, in consultation with the forensic sciences advisory board established by section 184A of chapter 6, shall promulgate regulations governing the retention and preservation of evidence or biological material by any governmental entity. The regulations shall include standards for maintaining the integrity of the materials over time, the designation of officials at each governmental entity with

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<sup>21</sup> Technical Working Group on Biological Evidence Preservation. *The Biological Evidence Handbook: Best Practices for Evidence Handlers*. NIST IR 7928. Gaithersburg, MD.: National Institute of Standards and Technology. <http://www.nist.gov/forensics/upload/NIST-IR-7928.pdf>.

<sup>22</sup> (Massachusetts) Mass. Gen. Laws. Ch. 278A § 16(16)(b) (LexisNexis 2012); (Ohio) Ohio Rev. Code Ann. § 2933.82(B)(3) (LexisNexis 2010); (Oregon) ORS § 133.707 (LexisNexis 2009 & 2011); (South Carolina) S.C. Code Ann. § 17-28-340 (LexisNexis 2008); (Texas) Tex. Code Crim. Proc. art. 38.43(c) (LexisNexis 2005 & Supp. 2013); (Virginia) Va. Code Ann. § 19.2-270.4:1(C) (LexisNexis 2001 & Supp. 2005).

<sup>23</sup> (Oregon) ORS § 133.707 (LexisNexis 2009 & 2011).

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custodial responsibility and requirements for contemporaneously recorded documentation of individuals having and obtaining custody of any evidence or biological material.<sup>24</sup>

In Texas, the Department of Public Safety has the authority to create standards:

(g) The Department of Public Safety shall adopt standards and rules, consistent with best practices, relating to a person described by Subsection (b), that specify the manner of collection, storage, preservation, and retrieval of biological evidence.<sup>25</sup>

Due to the complexities involved in tracking and properly maintaining biological evidence, it is critical that states establish standards to ensure that it is properly managed and to assure continuity among the many handlers of biological evidence. However, because existing resources and management among governmental entities are so diverse, an authority, such as the attorney general, a particular government agency, or a state taskforce or commission, should be responsible for consulting relevant stakeholders to strike a balance in creating standards that allow a degree of professional discretion or judgment when necessary in individual cases.

### 3.5 Statutory Authorities

To date, 11 states (California, Connecticut, Florida, Illinois, Louisiana, Oklahoma, New York, North Carolina, Pennsylvania, Texas, and Wisconsin) have assembled state-level task forces, commissions or working groups to address forensic science issues.<sup>26</sup> In some instances, these entities have focused their work on evidence retention. In other instances, they have explored evidence preservation and other related criminal justice issues.<sup>27</sup> These entities can be used to facilitate the development of best practices, policy, standards, accountability, and training for the preservation of biological evidence in a particular region. The following example is an excerpt from the Ohio statute:

There is hereby established within the Bureau of Criminal Identification and Investigation a Preservation of Biological Evidence Task Force. The Task Force shall consist of officers and employees of the Bureau; a representative from the Ohio Prosecutors Association; a representative from the Ohio State Coroners Association; a representative from the Ohio Association of Chiefs of Police; a representative from the Ohio Public Defenders Office, in consultation with the Ohio Innocence Project; and a representative from the Buckeye State Sheriffs Association. The Task Force shall perform the duties and functions specified [relevant section of Ohio code].<sup>28</sup>

In October 2014 the Organization of Scientific Area Committees (OSAC) was assembled by NIST in collaboration with the Department of Justice to develop an infrastructure for the creation and dissemination of forensic science standards and guidelines. The OSAC is an organization in its early stages and has not yet formally addressed evidence storage, a cross- and inter- disciplinary matter, in any of the existing scientific area committees. Further, it remains to be seen if storage, maintenance, and disposition of evidence outside of the forensic laboratory will fall within its scope. Therefore, states should consider the development of an entity with statutory bound authority to develop standards and best practices in addition to developing plans for implementation, enforcement, and training in biological evidence preservation or evidence in general.

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<sup>24</sup> (Massachusetts) Mass. Gen. Laws. Ch. 278A § 16(b) (LexisNexis 2012).

<sup>25</sup> (Texas) Tex. Code Crim. Proc. art. 38.43(g) (LexisNexis 2005 & Supp. 2013).

<sup>26</sup> Innocence Project. (2013). *Criminal Justice Reform Commissions Case Studies*. Retrieved from: [http://www.innocenceproject.org/Content/Criminal\\_Justice\\_Reform\\_Commissions\\_Case\\_Studies.php](http://www.innocenceproject.org/Content/Criminal_Justice_Reform_Commissions_Case_Studies.php).

<sup>27</sup> *Ibid.*

<sup>28</sup> (Ohio) Ohio Rev. Code Ann. § 2933.82(C) (LexisNexis 2010).

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**Recommendation 5:**

Policy makers in each state should designate an authority with a statutory bound responsibility, such as a statewide commission(s) or working group(s), to establish and enforce standards consistent with best scientific practices for the proper retention, preservation, cataloging, and retrieval of biological evidence applicable to criminal investigations, criminal prosecutions, and post-conviction proceedings.

At a minimum, these groups should include representation from law enforcement agency management, property and evidence custodians, prosecutors, defense attorneys, crime laboratories, victim advocacy groups, innocence advocacy groups, hospitals, medical examiners, and court personnel. More specifically, the governing body established should have the following tasks:

**1) Improve Efficiency and Standardization**

- A. Establish regulations, standards, procedures, and protocols for the proper collection, retention, preservation, cataloging, retrieval and disposition of biological evidence (including bulk items). Make recommendations about possible remediation plans if the regulations standards, procedures, and protocols are not followed.
- B. Develop statewide standardized operating terminology related to the storage, cataloging, and retrieval of biological evidence.
- C. Establish guidelines for an annual audit and inventories.
- D. Develop protocols for the disposition of evidence containing biological evidence whose size or nature makes it impractical for long-term storage (See section 3.6 for more on bulk evidence).
- E. Develop a tracking system for biological evidence and its associated data from the time of collection to the disposition of the evidence, including all agencies and individuals responsible for its collection, preservation, and disposition of biological evidence.
- F. Explore evolving technologies that can improve existing evidence custodial processes.
- G. Explore the feasibility of creating and operating statewide and/or regional long-term storage facilities for specified categories of crime, e.g., homicide, sexual assault, etc.

Custodial responsibility for biological evidence often changes within a jurisdiction. Therefore, properly preserving, tracking, and disposing of such evidence can be challenging. All personnel charged with custodial responsibility over biological evidence should refer to a common set of standard operating procedures to ensure that evidence maintains its integrity. Mechanisms such as automated tracking technologies and centralized storage systems should be considered.

**2) Encourage Identification, Implementation, and Maintenance of Relevant Best Practices**

- A. Locate funding sources to implement the designated entity's charge.
- B. Develop county and/or regional working groups to standardize protocols, forms, reports, policies, and training on the collection, preservation, and disposition of biological evidence. To accomplish this, the designated entity may also need to standardize the interpretation of applicable laws. These groups should be comprised of individuals who have decision making authority. They should, at a minimum, include law enforcement agencies, crime laboratories, attorneys, hospitals, and courts. Pilot programs should be utilized to improve

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communication, networking, and storage practices and to help facilitate implementation of recommendations of the designated agency.

- C. Conduct an annual review of statute changes and scientific/technological advances to determine the efficacy of protocols and processes and their ability to meet established needs.

Due to lack of resources, information, and internal coordination, standard practices are sometimes not fully implemented. Although many states have biological evidence preservation statutes, their interpretation varies. This variability may result in procedures that are internally inconsistent or contradictory within a particular agency. Working groups of individuals from the designated biological preservation entity that has been established within a state should work to improve the standardization and efficiency of current operations. These groups should also work to ensure that local policies and procedures are based on the most current scientific and technological findings.

### **3) Increase Professional Development and Training Opportunities**

- A. Design, develop, and facilitate training programs for law enforcement and other relevant public sector employees, e.g., Clerks of the Court, related to the collection, retention, preservation, security, cataloging, retrieval, and disposition of biological evidence.
- B. Explore the development of professional accreditation and certification/recertification of law enforcement personnel, including crime scene personnel and evidence custodians, within the state.

Potential handlers of biological evidence must be adequately trained in order to properly implement new rules, policies, and procedures. Members of each designated biological evidence preservation entity in each state should also consider accreditation and certification as a means of establishing and maintaining a pool of highly qualified experts in the field.

### **3.6 Bulk Evidence**

As noted earlier, the items containing biological evidence are very diverse. Some can be very large and costly to store, such as “bulk” evidence. There are myriad challenges relating to the storage and disposition of bulk evidence. The first of these begins with the initial collection of evidence at the scene. For example, it is common for law enforcement agencies to seize bulk items, e.g., mattresses, sofas, carpets, etc. as evidence from a crime scene. However, only eight states and the District of Columbia provide any guidance and/or direction relating to large, bulk items of evidence.<sup>29</sup>

Additional challenges include assigning responsibility for properly documenting/photographing original bulk evidence, obtaining a representative sampling in sufficient quantity, and incorporating the best practices based upon current scientific methods. These challenges contribute to long-term storage problems and create a need for standards or rules concerning the appropriate retention period for evidentiary samples of biological evidence. For example, the State of Alaska requires:

- (a) Notwithstanding AS 12.36.010 - 12.36.090, the Department of Law, the Department of Public Safety, the Alaska Court System, or a municipal law enforcement agency shall preserve ...

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<sup>29</sup> (Alaska) Alaska Stat. § 12.36.200 (LexisNexis 2010); (Arizona) Ariz. Rev. Stat. Ann. § 13-4221(D) (LexisNexis 2008); (District of Columbia) D.C. Code § 22-4134(c) (LexisNexis 2002 & Supp. 2013); (Louisiana) La. Rev. Stat. Ann. § 15:621 (LexisNexis 2011); (Minnesota) Minn. Stat. Ann. § 590.10(1) (LexisNexis 2005); (Nevada) Nev. Rev. Stat. Ann. § 176.0912(3)(b) (LexisNexis 2009 & Supp. 2013); (Ohio) Ohio Rev. Code Ann. § 2933.82(B)(8) (LexisNexis 2010); (Virginia) Va. Code Ann. § 19.2-270.4:1(D) (LexisNexis 2001 & Supp. 2005).

(b) Under (a) of this section, an agency is not required to preserve physical evidence of a crime that is of a size, bulk, quantity, or physical character that renders preservation impracticable. When preservation of evidence of a crime is impracticable, the agency shall, before returning or disposing of the evidence, remove and preserve portions of the material likely to contain relevant evidence related to the crime in a quantity sufficient to permit future DNA testing. In making decisions under this section, an agency shall follow written policies on evidence retention.<sup>30</sup>

#### **Recommendation 6:**

A statewide commission, working group, or other authority, as described in Recommendation 5, should develop standards specifically pertaining to the disposition of bulk evidence (physical evidence that is of such a nature, size, or quantity that storage, preservation, or retention of all of the evidence is impractical). At a minimum, these standards should direct law enforcement agencies and/or crime laboratories to remove and preserve portions of the evidence likely to contain biological evidence related to the offense, based upon the best scientific practices at the time of collection, to permit future forensic testing including DNA in a timely manner.

*The Biological Evidence Preservation Handbook* explains further in Recommendation I-3 that consultation with investigators, laboratory analysts, and, when appropriate, prosecutors should be required and included in any bulk evidence disposition protocol.<sup>31</sup>

### **3.7 Early Disposition**

In addition to the challenge posed by bulk evidence, there are instances where evidence custodians may seek disposition at an earlier point in time than recommended in Table 3-1. While some evidence retention statutes articulate timeframes for which biological evidence must be retained, a number of states also have laws that allow for the early disposition of biological evidence by disposing of large, bulk items or after notice has been provided to the defendant and the court.<sup>32</sup> These laws usually require that the agency responsible for the retention of the evidence provide advance notice of the proposed disposition to the court and the relevant parties, affording them an opportunity to object or consent to its early disposition. In California, for example, a government entity can dispose of an item before its expiration period only when 1) relevant parties are informed; and 2) no motion for post-conviction DNA testing has been filed; a request to retain is made; or a declaration of post-conviction innocence is filed within a specified time period. The statute states:

<sup>30</sup> (Alaska) Alaska Stat. § 12.36.200 (LexisNexis 2010).

<sup>31</sup> Technical Working Group on Biological Evidence Preservation. *The Biological Evidence Handbook: Best Practices for Evidence Handlers*. NIST IR 7928. Gaithersburg, MD.: National Institute of Standards and Technology. <http://www.nist.gov/forensics/upload/NIST-IR-7928.pdf>.

<sup>32</sup> (Alaska) Alaska Stat. § 12.36.200(2)(b) (LexisNexis 2010); (Arizona) Ariz. Rev. Stat. Ann. § 13-4221(D) (LexisNexis 2008); (Arkansas) Ark. Code Ann. § 12-12-104(c)(2) (LexisNexis 2008 & Supp. 2011); (California) Cal. Pen. Code § 1417.9(b) (LexisNexis 2000 & Supp. 2015); (Connecticut) Conn. Gen. Stat. Ann. § 54-102j(c) (LexisNexis 2004 & Supp. 2012); (Colorado) Colo. Rev. Stat. Ann. § 18-1-1104(2) (LexisNexis 2008 & Supp. 2009); (District of Columbia) D.C. Code § 22-4134(c) (LexisNexis 2002 & Supp. 2013); (Illinois) 725 Ill. Comp. Stat. Ann. 5/116-4(c)(2) (LexisNexis 2000 & Supp. 2012); (Kentucky) Ky. Rev. Stat. Ann. § 524.140(2) (LexisNexis 2002 & Supp. 2013); (Maryland) Md. Criminal Procedure Code Ann. § 8-201(j)(5) (LexisNexis 2001 & Supp. 2012); (Minnesota) Minn. Stat. Ann. § 590.10(1) (LexisNexis 2005); (Mississippi) Miss. Code Ann. § 99-49-1(3)(h) (LexisNexis 2009); (Montana) Mont. Code Ann. 46-21-111(1)(b) (LexisNexis 2003 & Supp. 2009); (Nebraska) Neb. Rev. Stat. Ann. § 29-4125(2) (LexisNexis 2001 & Supp. 2007); (New Hampshire) N.H. Rev. Stat. Ann. § 651-D:3(II) (LexisNexis 2004); (North Carolina) N.C. Gen. Stat. Ann. § 15A-268(e) (LexisNexis 2001 & Supp. 2013); (Ohio) Ohio Rev. Code Ann. § 2933.82(B)(8) (LexisNexis 2010); (Oklahoma) Okla. Stat. Ann. Tit. 22 § 1372(C) (LexisNexis 2001 & Supp. 2015); (Oregon) ORS § 133.707 (LexisNexis 2009 & 2011); (Rhode Island) R.I. Gen. Laws Ann. § 10-9.1-11(b) (LexisNexis 2002); (South Carolina) S.C. Code Ann. § 17-28-340 (LexisNexis 2008); (Texas) Tex. Code Crim. Proc. art. 38.43(d) (LexisNexis 2005 & Supp. 2013); (Wisconsin) Wis. Stat. Ann. § 978.08 (LexisNexis 2001 & Supp. 2005).

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(b) A governmental entity may dispose of biological material before the expiration of the period of time described in subdivision (a) if all of the conditions set forth below are met:

(1) The governmental entity notifies all of the following persons of the provisions of this section and of the intention of the governmental entity to dispose of the material: any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case, any counsel of record, the public defender in the county of conviction, the district attorney in the county of conviction, and the Attorney General.

(2) The notifying entity does not receive, within 90 days of sending the notification, any of the following:

(A) A motion filed pursuant to Section 1405 [Post-conviction statute]. However, upon filing of that motion, the governmental entity shall retain the material only until the time that the court's denial of the motion is final.

(B) A request under penalty of perjury that the material not be destroyed or disposed of because the declarant will file within 180 days a motion for DNA testing pursuant to Section 1405 that is followed within 180 days by a motion for DNA testing pursuant to Section 1405, unless a request for an extension is requested by the convicted person and agreed to by the governmental entity in possession of the evidence.

(C) A declaration of innocence under penalty of perjury that has been filed with the court within 180 days of the judgment of conviction or July 1, 2001, whichever is later.

However, the court shall permit the destruction of the evidence upon a showing that the declaration is false or there is no issue of identity that would be affected by additional testing. The convicted person may be cross-examined on the declaration at any hearing conducted under this section or on an application by or on behalf of the convicted person filed pursuant to Section 1405.<sup>33</sup>

When policy makers are considering the creation of early disposition mechanisms for biological evidence for cases in which a sentence has been imposed, it is helpful to consider the severity of the offense, the defendant's sentence, and the relevance of the biological evidence to the case. For example, Colorado permits early disposition of biological evidence in all cases that are neither felonies nor sex offenses.<sup>34</sup> Colorado's presumption is that biological evidence in felonies or sex offenses will not be destroyed, but a legal provision permits special consideration of early disposition for non-class 1 felonies and certain designated sexual offenses. Language from the state's law reads as follows: "(1) A law enforcement agency may not request permission to dispose of DNA evidence in cases described in section 18-1-1102(1) (a) and (1) (b)."<sup>35</sup>

Generally, early disposition of evidence is not applicable to open or unsolved cases. However, there may be instances where early disposition may be warranted. The Working Group makes the following recommendations regarding the disposition of evidence before the expiration of time frames set forth by state law or agency policy.

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<sup>33</sup> (California) Cal. Retention of Biological Material Code § 1417.9(b) (2) (C) (West 2002).

<sup>34</sup> (Colorado) Colo. Rev. Stat. Ann. § 18-1-1104(2) (West 2009).

<sup>35</sup> (Colorado) Colo. Rev. Stat. Ann. § 18-1-1105 (1) (LexisNexis 2008 & Supp. 2009).

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**Recommendation 7:**

- I. Policy makers in each state should construct a formal early disposition process that includes the following elements:
  - a. A timeframe of at least 180 days for all relevant parties to respond to early disposition notice, unless otherwise specified by state law.
  - b. A “notification of early disposition” form which should minimally include the following elements:
    - I. Name and address of notifying agency;
    - II. Date;
    - III. Defendant’s name and any known aliases;
    - IV. Charges;
    - V. Trial court case number;
    - VI. Investigating agency case number;
    - VII. Court of appeals case number (if applicable);
    - VIII. Name and address of recipient of notice (parties listed below);
    - IX. A list of the evidence items, along with any unique identifiers, for which early disposition is sought; and
    - X. A statement explaining that in order for evidence to be retained, a response to the notice is required and must be received within the time frame specified in the notice.
  - c. A requirement that the evidence custodian contact appropriate internal authorities (which may include the lead detective, detective supervisor, etc.) prior to beginning the early disposition process.
  - d. A requirement that once the approval is received, the evidence custodian should contact a designated official in the prosecutor’s office who should be responsible for providing early disposition notice to the following parties:
    - I. Defendant and co-defendants;
    - II. Attorney of record for each person in custody resulting from the criminal conviction;
    - III. Office of the public Defender in the jurisdiction in which the defendant was convicted;
    - IV. The court in which the defendant was convicted; and
    - V. Attorney General’s Office (if applicable).
  - e. Verification of delivery and notification to the above parties. As a long-term goal/solution, jurisdictions should also take measures to automate this process and develop a common database to ease the burden of communicating with the relevant parties.
  - f. In cases where early disposition is approved, a requirement that evidence custodians should document the evidence in another format, such as a photograph, and maintain chain of custody records.

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## 4. Denial of Access to Biological Evidence

Post-conviction DNA exonerations have resulted in the enactment of DNA testing statutes in 50 states, some of which include provisions regulating biological evidence preservation. Other states regulate evidence retention practices through standalone laws that are not embedded in post-conviction DNA testing statutes, or through policies or regulations. Of those states that require preservation of evidence by law – either through post-conviction DNA testing laws or standalone preservation of evidence laws – some authorize a remedy or a sanction if evidence is destroyed in violation of the evidence preservation law. Other states are silent on what follows if evidence is wrongly destroyed.<sup>36</sup> A *sanction* is a punitive judicial action taken against an entity or an individual for a legal violation. A *remedy*, on the other hand, is not intended to punish, but rather to make whole or provide relief to an entity or an individual who has been harmed.

### 4.1 Bad Faith Destruction

Despite statutory preservation and retention requirements, *denial of access* to biological evidence can occur due to: loss of evidence; contamination; mistaken or negligent destruction; deleterious change; and a “bad faith” destruction or compromise of evidence. “Bad faith” is determined by the courts in each case based on the facts and jurisdictional law.

It is the experience of the Working Group that when access to biological evidence is denied, it is generally not done in bad faith. In *Arizona v. Youngblood*, the United States Supreme Court held that bad faith destruction of biological evidence violates the Due Process Clause of the 14<sup>th</sup> Amendment to the Constitution and may entitle the defendant to a new trial or other remedy.<sup>37</sup> The “bad faith” test is a federal constitutional standard. However, most states have adopted this framework under the due process clauses of their constitutions.<sup>38</sup> As a federal constitutional decision, the *Youngblood* decision has no applicability in determining whether the destruction of evidence violates a state preservation/retention statute, or whether a defendant is entitled to a remedy under a statute. Principles of federalism permit state courts and legislatures to adopt more rigorous evidence preservation standards than those imposed by the federal constitution.<sup>39</sup>

When evidence is destroyed in bad faith, the responsible party may be subject to statutorily-imposed sanctions, including criminal liability, in a particular state. Evidence retention laws in the following states impose some form of sanction: Arkansas, District of Columbia, Indiana, Kentucky, Louisiana, Maine, Minnesota, New Mexico, South Carolina, and Tennessee.<sup>40</sup> In the District of Columbia for example, the statute reads,

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Arizona v. Youngblood*, 488 U.S. 51, 58, (1988).

<sup>38</sup> This document serves as a resource to policy makers and legislators and does not address the constitutional rights of defendants when biological evidence has been destroyed. Those rights are governed by existing case law under the United States Constitution. *Arizona v. Youngblood*, governs federal due process rights. Under state constitutions most states have also adopted the *Youngblood* standard, with the exception of Alabama, Alaska, Connecticut, Delaware, Hawaii, Massachusetts, Tennessee, West Virginia, Vermont.

<sup>39</sup> *California v. Trombetta*, 469 U.S. 479, 491 n. 12 (1984); *Oregon v. Haas*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967).

<sup>40</sup> (Arkansas) Ark. Code Ann. § 5-53-111(b) (2004); (District of Columbia) D.C. Code Ann. § 22-723(b) (2005); (Indiana) Ind. Code Ann. § 35-38-7-1(3) (West 2001); (Kentucky) Ky.Rev.Stat.Ann. § 524.100(2) (2012); (Louisiana) La. Rev. Stat. Ann. § 926.1(2) (2011); (Maine) Rev. Stat. Ann. Tit 17, § 455(2) (West 2004); (Minnesota) Minn. Stat. Ann. § 590.10(1) (West 2005); (New Mexico) N.M. Stat. Ann. § 31-1A-2(F) (West 2005); (South Carolina) S.C. Code Ann. § 17-28-350 (LexisNexis 2008); and (Tennessee) Tenn. Code Ann. § 40-30-309 (2001).

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Whoever willfully or maliciously destroys, alters, conceals, or tampers with evidence that is required to be preserved under this section with the intent to (1) impair the integrity of that evidence, (2) prevent that evidence from being subjected to DNA testing, or (3) prevent the production or use of that evidence in an official proceeding, shall be subject to a fine of \$100,000 or imprisoned for not more than 5 years, or both.<sup>41</sup>

Evidence retention statutes, such as those in Mississippi, North Carolina, and Oregon include both sanctions and remedies.<sup>42</sup> For example, North Carolina's statute states;

Whoever knowingly and intentionally destroys, alters, conceals, or tampers with evidence that is required to be preserved under this section, with the intent to impair the integrity of that evidence, prevent that evidence from being subjected to DNA testing, or prevent production or use of that evidence in an official proceeding, shall be punished as follows: (1) If the evidence is for a noncapital crime, then a violation of this subsection is a Class I felony. (2) If the evidence is for a crime of first degree murder, then a violation of this subsection is a Class H felony....

If the evidence that is required to be preserved pursuant to this section has been destroyed, the court may conduct a hearing to determine whether obstruction of justice and contempt proceedings are in order. If the court finds the destruction violated the defendant's due process rights, the court shall order an appropriate remedy, which may include dismissal of charges.<sup>43</sup>

Sanctions also exist in other forms, such as laws that prohibit the tampering of evidence and obstruction of justice.<sup>44</sup> Possible offenses include obstruction of justice, interference with judicial proceedings, contempt for violation of a court order, and federal criminal violation of civil rights. Given existing sanctions for bad faith destruction of biological evidence, the Working Group does not recommend that additional sanctions be imposed for the bad faith destruction of evidence beyond those which are presently available under federal or state law. However, the Working Group does recommend that, in states where there is none, legislation should be enacted that provides an aggrieved party the opportunity to seek judicial relief when it has been determined that denial of access to biological evidence has occurred.

### **Recommendation 8:**

Policy makers in each state should create laws to provide a defendant or petitioner with the opportunity to seek a remedy in cases where it has been judicially determined that a denial of access to biological evidence has occurred.

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<sup>41</sup> (District of Columbia) D.C. Code Ann. § 22-723(d) (2005).

<sup>42</sup> (Mississippi) Miss. Code Ann. § 99-49-10.1 (West 2005); (North Carolina) N.C. Gen. Stat. Ann. § 15A-268(i) (West 2009); (Oregon) S. 731, 76th Leg., Reg. Sess.(6) (Or. 2011)

<sup>43</sup> N.C. Gen. Stat. Ann. § 15A-268(g) (West 2009).

<sup>44</sup> (Alabama) Ala. Code § 13A-10-129 (2004); (Alaska) Stat. § 11.56.610; (Arizona) Ariz. Rev. Stat. § 13-2809 (2004); (Arkansas) Ark. Code Ann. § 5-53-111(b) (2004); (Colorado) Colo. Rev. Stat. § 18-8-610 (2004); (Connecticut) Conn. Gen. Stat. § 53a-155 (2004); (District of Columbia) D.C. Code Ann. § 22-723(b) (2005); (Florida) Fla. Stat. Ann. § 918.13.(2) (West 2004); (Georgia) Ga. Code Ann. § 16-10-94 (2004); (Hawaii) Haw. Rev. Stat. § 710-1076(3) (2004); (Kentucky) Ky.Rev.Stat.Ann. § 524.100 (2012); (Maine) Me. Rev. Stat. Ann. Tit 17, § 455(2) (West 2004); (Missouri) Mo. Rev. Stat. § 575.100(2) (2004); (Montana) Mont. Code Ann. § 45-7-207(2) (2004); (Nebraska) Neb. Rev. Stat. § 28-922(3); (Nevada) Nev. Rev. Stat. § 199.220 (2004); (New Hampshire) N.H. Rev. Stat. Ann. § 641:6 (2004); (New Jersey) N.J. Stat. Ann. § 2C:28-6 (West 2005); (Ohio) Ohio Rev. Code Ann. § 2921.12(B) (West 2004); (Oregon) Or. Rev. Stat. § 162.295 (2003); (Pennsylvania) 18 Pa. Cons. Stat. § 4910 (2004); (Tennessee) Tenn. Code Ann. § 40-30-309 (2001); (Texas) Tex. Penal Code Ann. § 37.09 (Vernon 2004); (Utah) Utah Code Ann. § 76-9-510.5 (2004).

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## 4.2 Remedies Issued By Courts

When evidence has been destroyed, lost, or compromised before trial, the court has a range of sanctions and remedies that it can impose. These include the exclusion of evidence, special instructions to the jury, or—in appropriate cases—dismissal of some or all of the charges.<sup>45</sup> When evidence is lost, destroyed, or compromised during the post-conviction phase of a case, courts have granted a new trial,<sup>46</sup> dismissed charges related to the missing evidence,<sup>47</sup> reduced the sentence,<sup>48</sup> or—in very rare cases—vacated the conviction and ordered dismissal<sup>49</sup> of all charges. In both the pretrial and post-conviction phases, a court could also determine that no remedy is necessary.

A court could also order the government to conduct a diligent search for the missing evidence. It is the experience of the Working Group that missing evidence has been discovered on surrounding shelves or in other storage locations where it had been mistakenly placed. After the completion of a diligent search, if the evidence is not discovered, the court may impose a sanction, grant a remedy, or take no further action. If the court determines that there are additional locations where missing biological evidence may be discovered (e.g., court storage, prosecutor, or hospital) it may order that an additional search be conducted, or that the records of the police, prosecutor, law enforcement agency, or other relevant agency be examined to aid in determining the whereabouts of the missing evidence.

### **Recommendation 9:**

When appropriate, courts should consider issuing an order that directs evidence custodians or other relevant officials to conduct a physical search for biological evidence that cannot be located by an entity or agency responsible for its retention. The court should also consider ordering that a report of the result of the search be submitted that included details of the search such as:

- a. The nature of the search that was conducted;
- b. When the search occurred;
- c. Who conducted the search;
- d. The records showing that the evidence was lost or destroyed; and
- e. The signature of the official who supervised the search, attesting to the accuracy of the contents of the report within the law enforcement agency authorizing the submission of the report to the court.

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<sup>45</sup> Cynthia E. Jones, The Right Remedy for the Wrongly Convicted: Judicial Sanctions for the Destruction of DNA Evidence, 77 *Fordham L. Rev.* 2893, 2848-49 and accompanying notes (2009).

<sup>46</sup> *Id.* at 2948.

<sup>47</sup> *Id.* at 2949.

<sup>48</sup> *Id.* at 2946.

<sup>49</sup> *Id.* at 2949-53.

## 5. Summary of Recommendations

### Recommendation 1:

Policy makers should define biological evidence as follows: “Evidence commonly recovered during a criminal investigation in the form of skin, hair, tissue, bones, teeth, blood, semen, or other bodily fluids, which may include samples of biological materials, or evidence items containing biological material.”<sup>‡</sup>

### Recommendation 2:

Policy makers in each state should establish statutes, rules, or policies that require the automatic retention of biological evidence by government entities from the time of collection through the recommended timeframes set forth in Table 3-1.

### Recommendation 3:

Policy makers in each state should, at a minimum, require the retention of evidence according to timetables set forth in in Table 3-1.

Table 3-1: Summary of Biological Evidence Retention Guidelines for Crime Categories

Crime Categories (NIBRS)	CASE STATUS			
	Open <sup>50</sup>	Charges Filed	Adjudicated	Unfounded/ Refused/Denied/ No Further Investigation
Homicide Offenses	Retain indefinitely	Retain indefinitely	At a minimum, retain for the length of incarceration	Dispose of upon receipt of authorization <sup>51</sup>
Sexual Offenses	At a minimum, retain for the length of the statute of limitations <sup>§</sup>	Retain pending adjudication <sup>§</sup>	At minimum, retain for the length of incarceration	Dispose of upon receipt of authorization
Assault Offenses, Kidnapping/ Abduction, Robbery			Dispose of upon receipt of authorization	
All Other Group A & B Offenses			Dispose of upon receipt of authorization	

<sup>‡</sup> Technical Working Group on Biological Evidence Preservation. *The Biological Evidence Handbook: Best Practices for Evidence Handlers*. NIST IR 7928. Gaithersburg, MD.: National Institute of Standards and Technology. <http://www.nist.gov/forensics/upload/NIST-IR-7928.pdf>; DNA Initiative. 2012. “Glossary.” Accessed July 5. <http://www.dna.gov/glossary>.

<sup>50</sup> Cases in which someone was found not guilty after criminal proceedings and additional suspects have not yet been identified or charged should follow the same guidance as open cases.

<sup>51</sup> Section V of *The Handbook on Biological Evidence Preservation* provides further guidance regarding the disposition process.

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**Recommendation 4:**

Policy makers in each state should establish statutes, rules, or policies that require biological evidence be stored in appropriate environmental conditions, based on known scientific practices, in order to prevent its loss, degradation, or contamination.

**Recommendation 5:**

Policy makers in each state should designate an authority with a statutory bound responsibility, such as a statewide commission(s) or working group(s), to establish and enforce standards consistent with best scientific practices for the proper retention, preservation, cataloging, and retrieval of biological evidence applicable to criminal investigations, criminal prosecutions, and post-conviction proceedings.

**Recommendation 6:**

A statewide commission, working group, or other authority, as described in Recommendation 5, should develop standards specifically pertaining to the disposition of bulk evidence (physical evidence that is of such a nature, size, or quantity that storage, preservation, or retention of all of the evidence is impractical). At a minimum, these standards should direct law enforcement agencies and/or crime laboratories to remove and preserve portions of the evidence likely to contain biological evidence related to the offense, based upon the best scientific practices at the time of collection, to permit future forensic testing including DNA in a timely manner.

**Recommendation 7:**

- I. Policy makers in each state should construct a formal early disposition process that includes the following elements:
  - a. A timeframe of at least 180 days for all relevant parties to respond to early disposition notice, unless otherwise specified by state law.
  - b. A “notification of early disposition” form which should minimally include the following elements:
    - I. Name and address of notifying agency;
    - II. Date;
    - III. Defendant’s name, and any known aliases;
    - IV. Charges;
    - V. Trial court case number;
    - VI. Investigating agency case number;
    - VII. Court of appeals case number (if applicable);
    - VIII. Name and address of recipient of notice (parties listed below);
    - IX. A list of the evidence items, along with any unique identifiers, for which early disposition is sought; and
    - X. A statement explaining that in order for evidence to be retained, a response to the notice is required and must be received within the time frame specified in the notice.
  - c. A requirement that the evidence custodian contact appropriate internal authorities (which may include the lead detective, detective supervisor, etc.) prior to beginning the early disposition process.
  - d. A requirement that once the approval is received, the evidence custodian should contact a designated official in the prosecutor’s office who should be responsible for providing early disposition notice to the following parties:
    - I. Defendant and co-defendants;
    - II. Attorney of record for each person in custody resulting from the criminal conviction;

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- III. Office of the public Defender in the jurisdiction in which the defendant was convicted;
  - IV. The court in which the defendant was convicted; and
  - V. Attorney General's Office (if applicable).
- e. Verification of delivery and notification to the above parties. As a long-term goal/solution, jurisdictions should also take measures to automate this process and develop a common database to ease the burden of communicating with the relevant parties.
  - f. In cases where early disposition is approved, a requirement that evidence custodians should document the evidence in another format, such as a photograph, and maintain chain of custody records.

**Recommendation 8:**

Policy makers in each state should create laws to provide a defendant or petitioner with the opportunity to seek a remedy in cases where it has been judicially determined that a denial of access to biological evidence has occurred.

**Recommendation 9:**

When appropriate, courts should consider issuing an order that directs evidence custodians or other relevant officials to conduct a physical search for biological evidence that cannot be located by an entity or agency responsible for its retention. The court should also consider ordering that a report of the result of the search be submitted that included details of the search such as:

- a. The nature of the search that was conducted;
- b. When the search occurred;
- c. Who conducted the search;
- d. The records showing that the evidence was lost or destroyed; and
- e. The signature of the official who supervised the search, attesting to the accuracy of the contents of the report within the law enforcement agency authorizing the submission of the report to the court.

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## 6. Glossary

**Accreditation Bodies** – An authoritative body that performs assessments of conformity to established standards of management and practice.

**Audit** – A review of policies, procedures, processes, and functions of agencies responsible for the retention and management of biological evidence to determine the existence of conformity with recognized standards and best practices.

**Biological Evidence** – Biological material recovered from crime scenes commonly appears in the form of hair, tissue, bones, teeth, blood, semen, or other bodily fluids. Biological evidence refers to samples of biological materials or evidence items containing biological material.

**Compromised evidence** – Biological evidence that has undergone deleterious change.

**Disposition** – The ongoing process of determining what to do with evidence in a case. The process may entail retention and disposal, destruction, auction, diversion to governmental agency use, or return to owner.

**Deleterious change** – Change that occurs to biological evidence which may adversely impact a forensic examination of that evidence.

**Evidence custodian** – Any official responsible for the identification, collection, preservation, testing, and/or storage of biological evidence.

**Evidence handler** – Any official who has possession of biological evidence at any point in time from collection to disposal.

**Inventory** – The process of determining whether all, or a selected portion, of the biological evidence retained by the custodian responsible for such evidence is correctly located and stored under appropriate conditions.

**Nolle prosequi** – A Latin phrase meaning, “we shall no longer prosecute” which can be told to a judge by a prosecutor in a case when charges in a criminal case cannot be proved or if evidence demonstrates innocence or a fatal flaw in the prosecution’s claim.