

# BLOOD, SWEAT, AND TEARS: THE PATH TO MODERNIZING THE FRAGMENTED DNA EVIDENCE PROCEDURES IN INDIANA

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## INTRODUCTION

On April 21, 1992, a young woman was raped behind an abandoned building in Muncie, Indiana.<sup>1</sup> Soon after, police stopped thirty-five-year-old William Barnhouse and made him stand in front of several squad cars in an identification technique in which the victim identified him.<sup>2</sup> Based on this procedure, Barnhouse was arrested.<sup>3</sup> Known as a one-on-one show-up, this technique “has been described as the most suggestive identification procedure ever used.”<sup>4</sup>

At trial, the State’s case rested “on the show-up identification as well as the testimony of a forensic serologist” that Barnhouse could not be disqualified as a source of the semen recovered from the victim—evidence later disproven by DNA tests.<sup>5</sup> Moreover, a hair analyst testified that a hair recovered from the victim’s body “matched” Barnhouse because the analyst could not pick out the victim’s hair from “a pile of Barnhouse’s pubic hair.”<sup>6</sup> Though the State asserted that the hair analysis was a “silent witness” proving Barnhouse’s guilt,<sup>7</sup> the FBI has since acknowledged forensic hair analysis is flawed science.<sup>8</sup> Barnhouse was found guilty but mentally ill of rape and criminal deviate conduct and sentenced to eighty years in prison.<sup>9</sup>

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1. *Indiana Man Exonerated After Serving More Than 25 Years for a Rape DNA Testing Proves He Didn’t Commit*, INNOCENCE PROJECT (May 10, 2017), <https://www.innocenceproject.org/indiana-man-exonerated-after-serving-more-than-25-years-for-a-rape-dna-testing-proves-he-didnt-commit/> [<https://perma.cc/8X6K-3PKB>] [hereinafter *Indiana Man Exonerated*].

2. *Id.*

3. *Id.*

4. Michael D. Cicchini & Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, 100 J. CRIM. L. & CRIMINOLOGY 381, 389 (2010).

5. *Indiana Man Exonerated*, *supra* note 1.

6. *Id.*

7. *Id.*

8. Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, WASH. POST (April 18, 2015), [https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310\\_story.html](https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html) [<https://perma.cc/S6U7-BREM>].

9. *Barnhouse v. State*, 622 N.E.2d 247 (Ind. Ct. App. 1993) (affirming Barnhouse’s conviction); *Indiana Man Freed in 2017 Alleges Wrongful Rape Conviction*, ASSOCIATED PRESS (July 31, 2019), <https://apnews.com/article/18402d40d3df405ea02ad8141a2cc1ad> [<https://perma.cc/>

Ultimately, through a letter from prison, Barnhouse sought help from the Innocence Project—an organization that exonerates the wrongly convicted via DNA testing.<sup>10</sup> With the co-counsel of Professor Frances Watson and the Wrongful Conviction Clinic at Indiana University McKinney School of Law, the Innocence Project pursued DNA testing of the semen collected from the victim and her jeans.<sup>11</sup> The Delaware County prosecutor agreed to DNA testing<sup>12</sup> and the results excluded Barnhouse as the source of the semen.<sup>13</sup>

In May 2017, a Delaware County judge vacated Barnhouse's conviction due to the exculpatory DNA test results.<sup>14</sup> At sixty, Barnhouse, who has struggled his entire life with mental health conditions, finally ended his twenty-five-year fight for justice<sup>15</sup> and became the 350th person in the United States exonerated by DNA evidence.<sup>16</sup> Barnhouse's story highlights the importance of DNA evidence for correcting errors.

Since 1989, in the United States, 2,955 wrongfully convicted individuals have been exonerated after spending an average of nine years in prison for crimes they did not commit.<sup>17</sup> Forty-three percent of those wrongful convictions involved flawed forensic science,<sup>18</sup> and since the development of DNA testing, 551 exonerations have been based on DNA evidence.<sup>19</sup> With the exception of DNA analysis, “no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”<sup>20</sup> Accordingly,

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35MK-ZNYN].

10. Douglas Walker, *Bid Made to Clear Convicted Rapist*, INDIANAPOLIS STAR, February 26, 2017, at 15A [<https://perma.cc/3WVT-GVEG>].

11. *Indiana Man Exonerated*, *supra* note 1.

12. E-mail Interview with Eric Hoffman, Prosecuting Attorney, 46th Judicial Circuit of Indiana (Jan. 12, 2020) (on file with the Author and the *Indiana Law Review*).

13. *DNA Tests Show Imprisoned Indiana Man Didn't Commit '92 Rape*, INDIANA LAWYER (Mar. 2, 2017), <https://www.theindianalawyer.com/articles/42962-dna-tests-show-imprisoned-indiana-man-didnt-commit-92-rape> [<https://perma.cc/K5G5-86GU>].

14. Douglas Walker, *DNA Sets Convicted Muncie Man Free*, INDIANAPOLIS STAR, May 9, 2017, at 3A.

15. *Id.*

16. *Indiana Man Exonerated*, *supra* note 1.

17. *Exonerations in the United States*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> [<https://perma.cc/JH8V-NEHR>].

18. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [<https://perma.cc/T9LA-5UYU>].

19. *Exonerations By Year: DNA and Non-DNA*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx> [<https://perma.cc/AB3H-PVL6>].

20. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., NAT'L RES. COUNCIL, DOC. NO. 228091, STRENGTHENING FORENSIC SCI. IN THE U.S.: A PATH FORWARD 1, 7 (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [<https://perma.cc/MSX4-34X4>] [hereinafter

post-conviction litigation often hinges on re-examination of physical evidence subjected to outdated or faulty testing methods.<sup>21</sup> But DNA evidence can be destroyed in the time between a conviction and a petition for post-conviction testing.<sup>22</sup> If biological evidence is not retained, post-conviction DNA testing is impossible,<sup>23</sup> and law enforcement loses the potential to solve cold, current, and future cases.<sup>24</sup>

Three crucial actions made Barnhouse's exoneration possible: (1) preservation of the biological evidence in his case;<sup>25</sup> (2) prosecutorial consent to post-conviction DNA testing;<sup>26</sup> and (3) a profile comparison search of the DNA database.<sup>27</sup> Without the active participation of the State in these steps, Barnhouse may not have been exonerated.<sup>28</sup> Despite the importance of biological evidence preservation and DNA database comparisons in exonerating the wrongly convicted and identifying perpetrators,<sup>29</sup> current law only permits DNA testing (upon a prima facie showing).<sup>30</sup>

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STRENGTHENING FORENSIC SCIENCE Report].

21. Hsu, *supra* note 8.

22. *Preservation of Evidence*, INNOCENCE PROJECT, <https://innocenceproject.org/preservation-of-evidence/> [<https://perma.cc/ZM86-WMTM>].

23. DNA evidence played a role in the exoneration of eleven Hoosiers, who spent an average of sixteen years behind bars: Richard Alexander, William Barnhouse, Harold Buntin, David Camm, Keith Cooper, Glenn Roosevelt, Larry Mayes, Christopher Parish, Darryl Pinkins, Dwayne D. Scruggs, and Jerry Watkins. *See Browse Cases*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> [<https://perma.cc/UD8M-3V43>].

24. *Preservation of Evidence*, *supra* note 22.

25. State of Indiana's Motion to Dismiss at 1-2, *State v. Barnhouse*, No. 18D02-9204-CF-46, at (Del. Cir. Ct. No. 2 May 9, 2017) [<https://perma.cc/Z4JD-VZZF>].

26. Post-Conviction DNA Testing Agreement and Instructions to Testing Laboratory, *State v. Barnhouse*, No. 18D02-9204-CF-46 (Del. Cir. Ct. No. 2 Jan. 22, 2016) [<https://perma.cc/G8YF-6NDL>].

27. State of Indiana's Motion to Dismiss, *supra* note 25, at 3.

28. Order on Joint Motion for Release in Lieu of Posting Bail, *State v. Barnhouse*, No. 18D02-9204-CF-46 (Del. Cir. Ct. No. 2 Mar. 8, 2017) [<https://perma.cc/S8AU-WV44>]; Order on Motion to Dismiss at 1, *State v. Barnhouse*, No. 18D02-9204-CF-46, at (Del. Cir. Ct. No. 2 May 10, 2017) [<https://perma.cc/9UJZ-AW9S>]; *Indiana Man Exonerated*, *supra* note 1.

29. *DNA's Revolutionary Role in Freeing the Innocent*, INNOCENCE PROJECT (Apr. 18, 2018), <https://innocenceproject.org/dna-revolutionary-role-freedom/> [<https://perma.cc/Z2CK-L9G3>].

30. IND. CODE § 35-38-7-1 to 7-19 (2021). At the time of this Note's publication in March 2022, a bill pends in the Indiana General Assembly, which if enacted, will require uniform, statewide preservation of evidence of violent offenses potentially containing DNA. *See Senate Bill 263, 2022 Session*, IND. GENERAL ASSEMBLY, <http://iga.in.gov/legislative/2022/bills/senate/263> [<https://perma.cc/EL8S-7QHV>] (last updated Feb. 16, 2022) [hereinafter SB 263]. The result of efforts by Professor Frances Watson and the Innocence Project, among other stakeholders, SB 263 was authored by Sen. Blake Doriot and Sen. Eric Koch; co-authored by Sen. Mike Bohacek, Sen. Jack Sandlin, Sen. Rodney Pol, and Sen. Lonnie Randolph; and sponsored by Rep. Gregory Steuerwald and Rep. Donna Schaibley. *Id.* The legislation finished its third reading in the

To remedy miscarriages of justice, this Note proposes (1) implementation of a provisional forensic science task force, (2) enactment of an evidence retention statute,<sup>31</sup> (3) expansion of opportunities for post-conviction DNA testing, and (4) adoption of mandatory DNA database searches with all DNA tests.<sup>32</sup> Following a background on DNA evidence in Part I, Part II examines Indiana's procedures for evidence preservation, DNA testing, and database searches. Part III advocates to establish a forensic science task force to recommend best practices for Indiana and outlines the components of an effective DNA evidence statute. Finally, Part IV addresses the barriers to the statutory scheme and considers the availability of federal grants.

#### I. AN OVERVIEW OF DNA EVIDENCE, STORAGE, AND ACCESS

To lay the foundation for the DNA evidence statutory framework, Part I provides background on biological evidence, DNA databases, and types of database searches.

##### *A. Biological Evidence: Preserving the Possibility of DNA Identification*

Although forensic science is intended to solve crimes, its flaws have also led to wrongful convictions.<sup>33</sup> "Wide variability exists across forensic science disciplines with regard to techniques, methodologies, reliability, error rates, reporting, underlying research, general acceptability, and the educational background of its practitioners."<sup>34</sup> Some forensic disciplines are laboratory-based, like DNA analysis and toxicology, but others, like forensic feature-comparison methods, are subject to interpretation.<sup>35</sup> In terms of scientific validity, the analytically based disciplines hold an edge over disciplines founded on expert interpretation.<sup>36</sup> The opinion-based disciplines, in particular, are unreliable, pending further developments.<sup>37</sup>

To improve the accuracy of DNA analysis for samples that are degraded or contain a mixture of DNA from more than one person, researchers continue to

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Corrections and Criminal Law committee, chaired by Sen. Michael Young, and all proposed amendments were adopted.

31. SB 263, *supra* note 30; *see, e.g.*, 725 ILL. COMP. STAT. 5/116-4 (2021); MICH. COMP. LAWS ANN. § 770.16 (West 2021); WIS. STAT. ANN. §§ 165.81, 757.54, 968.205, 978.08 (West 2021).

32. *See, e.g.*, 725 ILL. COMP. STAT. 5/116-5 (2021); N.C. GEN. STAT. § 15A-269(a)-(b) (2021); OHIO REV. CODE ANN. § 2953.74(E) (West 2021).

33. *See* Kayleigh E. McGlynn, Note, *Remedying Wrongful Convictions Through DNA Testing: Expanding Post-Conviction Litigants' Access to DNA Database Searches to Prove Innocence*, 60 B.C. L. REV. 709, 715 (2019).

34. STRENGTHENING FORENSIC SCIENCE Report, *supra* note 20, at 182.

35. The subjective, feature-comparison methods include analyses of bitemarks, latent fingerprints, toolmarks, firearms, footwear and tire marks, hair, insects, and handwriting. *Id.* at 7.

36. *Id.*

37. *Id.* at 1, 7.

develop probabilistic genotyping—a method of DNA interpretation used to calculate the likelihood of identity.<sup>38</sup> Excluding the most difficult cases, DNA analysis is considered the gold-standard for forensic identification<sup>39</sup> due to its low, but nonzero, error rate.<sup>40</sup>

But DNA testing is dependent on preservation of evidence containing biological material “in the form of skin, hair, tissue, bones, teeth, blood, semen, or other bodily fluids.”<sup>41</sup> Because DNA analysis offers consistently accurate results<sup>42</sup> and often plays a role in exonerations,<sup>43</sup> retaining biological evidence is a paramount concern for the future of criminal justice.<sup>44</sup>

### *B. Where Are DNA Profiles Stored?: DNA Databases*

Only when evidence containing biological material is maintained through adequate storage practices is forensic analysis available to identify individual DNA profiles. These genetic profiles are cataloged in the National DNA Index System (“NDIS”),<sup>45</sup> governed by the federal DNA Act,<sup>46</sup> and the state-level DNA database.<sup>47</sup> The DNA Act<sup>48</sup> permits the disclosure of records at NDIS “to the Federal, State, and Local criminal justice agencies who participate in NDIS,”<sup>49</sup> but a defendant may access only “the DNA samples and analyses performed in

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38. KIRK E. LOHMEYER & KEITH INMAN, NAT’L CRIMINAL JUSTICE REFERENCE SERVICE, ADVANCING PROBABILISTIC APPROACHES TO INTERPRETING LOW-TEMPLATE DNA PROFILES AND MIXTURES: DEVELOPING THEORY, IMPLEMENTING PRACTICE 2 (2018), <https://www.ncjrs.gov/pdffiles1/nij/grants/251805.pdf> [<https://perma.cc/ST5X-DN3D>].

39. STRENGTHENING FORENSIC SCIENCE Report, *supra* note 20, at 5, 41.

40. *Id.* at 184.

41. *Id.* at 18.

42. *Id.* at 130.

43. *DNA Exonerations in the United States*, *supra* note 18.

44. TECH. WORKING GRP. ON BIOLOGICAL EVIDENCE PRES., NAT’L INST. OF STANDARDS AND TECH., NAT’L INST. OF JUS., BIOLOGICAL EVIDENCE PRESERVATION: CONSIDERATIONS FOR POLICYMAKERS I (2015) <https://nvlpubs.nist.gov/nistpubs/ir/2015/NIST.IR.8048.pdf> [<https://perma.cc/R5J5-Z5W6>] [hereinafter CONSIDERATIONS FOR POLICYMAKERS].

45. NDIS, which is part of the Combined DNA Index System, is a national DNA database that includes DNA profiles contributed by accredited laboratories at the federal, state, and local levels. *Frequently Asked Questions on CODIS and NDIS*, FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> [<https://perma.cc/Y34V-AG4K>].

46. DNA Identification Act of 1994, 42 U.S.C. § 14132, Pub. L. No. 103-322, § 210304, 108 Stat. 1796, 2069-70 (codified as amended at 34 U.S.C. § 12592 (2018)) (establishing NDIS).

47. 240 IND. ADMIN. CODE 8 (2021) (outlining governance of the Indiana DNA database).

48. 34 U.S.C. § 12592 (2018).

49. See FBI, NATIONAL DNA INDEX SYSTEM (NDIS) OPERATIONAL PROCEDURES MANUAL 36 (2021), <https://www.fbi.gov/file-repository/ndis-operational-procedures-manual.pdf/view> [<https://perma.cc/9E42-R669>] [hereinafter FBI OPERATIONAL PROCEDURES MANUAL].

connection with [his or her] case.”<sup>50</sup> Notably, the DNA Act<sup>51</sup> does not guarantee an NDIS search will be conducted with each DNA test conducted pursuant to state law.<sup>52</sup>

### *C. Types of DNA Database Searches Conducted by Law Enforcement*

The ability to analyze biological evidence and run searches of the databases significantly aids crime detection and prevention. One common type of search is a forensic offender DNA profile search, which occurs when law enforcement possesses the DNA profile of a person of interest and executes a search that compares that profile to all the profiles in the database.<sup>53</sup> If the suspect’s DNA sample matches a profile collected from a crime scene, police connect the individual genotype to an unsolved crime.<sup>54</sup>

Alternatively, a crime-scene DNA profile search occurs when law enforcement does not know the identity of the DNA profile.<sup>55</sup> In that case, an agency compares a crime-scene sample to known-identity profiles and to unidentified profiles in the database.<sup>56</sup> Law enforcement can connect individuals to crimes if the crime-scene profile matches an identified offender’s profile.<sup>57</sup> Or an agency can tie two crimes together and possibly identify a serial offender if the crime-scene DNA sample matches another unidentified DNA profile.<sup>58</sup>

However, the quality of a DNA sample impacts the potential database search methods.<sup>59</sup> If evidence is improperly stored or contains a combination of DNA from several people, the depth and accuracy of analysis is negatively impacted.<sup>60</sup> To maximize the benefits of forensic analysis, all jurisdictions should legislate comprehensive evidence preservation.

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50. *Id.*; 34 U.S.C. § 12592(b)(3) (2018).

51. 34 U.S.C. § 12592 (2018).

52. FBI OPERATIONAL PROCEDURES MANUAL, *supra* note 49, at 34, 36, 56.

53. *Id.* at 27.

54. Jason Kreag, *Letting Innocence Suffer: The Need for Defense Access to the Law Enforcement DNA Database*, 36 CARDOZO L. REV. 805, 816 (2015).

55. FBI OPERATIONAL PROCEDURES MANUAL, *supra* note 49, at 31, 55.

56. *Id.* at 54-55; McGlynn, *supra* note 33, at 726.

57. McGlynn, *supra* note 33, at 726.

58. Kreag, *supra* note 54, at 816 n.52.

59. There are two methods of DNA database searches: (1) adding a complete DNA profile to the database, which is preferable because profiles in the database are included in future searches; and (2) a manual keyboard search in cases of partial or degraded samples, which is problematic because the data is not saved in the database for future comparisons. *See* FBI OPERATIONAL PROCEDURES MANUAL, *supra* note 49, at 37, 40-42, 50, 56.

60. Michael P. Luongo, Note, *Post-Conviction Due Process Right to Access DNA Evidence: Dist. Attorney’s Office v. Osborne*, 129 S. Ct. 2308 (2009), 29 TEMP. J. SCI. TECH. & ENVTL. L. 127, 130 (2010).

## II. SHORTFALLS OF THE CURRENT PROCEDURES

Part II examines Indiana's DNA evidence practices. Section A overviews evidence preservation standards—both federal and local. Section B begins with the development of Indiana case law on post-conviction DNA analysis and ends with a breakdown of the DNA testing statute. Section C details the availability of DNA database searches post-conviction.

### *A. Evidence Preservation*

*1. Federal Standards: Post-Conviction Evidence Retention Practices are Left to the States.*—No federal statutes or regulations require states to retain DNA evidence after a conviction.<sup>61</sup> The length of time and the types of crimes for which preservation is required vary from state to state.<sup>62</sup> Federally, the DNA Identification Act of 1994<sup>63</sup> requires forensic laboratories managing DNA records on NDIS to comply with the quality assurance standards issued by the FBI<sup>64</sup> and to obtain accreditation from a professional association of forensic science<sup>65</sup> (e.g., ANSI National Accreditation Board (“ANAB”)).<sup>66</sup> To participate in NDIS, the FBI<sup>67</sup> and ANAB<sup>68</sup> both require labs to maintain evidence retention procedures. These national standards provide a benchmark to develop evidence preservation procedures at the state level.

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61. Biological evidence preservation is required in the federal system. *See* 18 U.S.C. § 3600A (2018); TECH. WORKING GRP. ON BIOLOGICAL EVIDENCE PRES., NAT'L INST. OF STANDARDS AND TECH., NAT'L INST. OF JUS., THE BIOLOGICAL EVIDENCE PRESERVATION HANDBOOK: BEST PRACTICES FOR EVIDENCE HANDLERS 1 (2013), <https://www.nist.gov/system/files/documents/forensics/NIST-IR-7928.pdf> [<https://perma.cc/6NTD-GB3S>] [hereinafter BEST PRACTICES FOR EVIDENCE HANDLERS].

62. Cristina Martin, Note, *DNA Storage Banks: The Importance of Preserving DNA Evidence to Allow for Transparency and the Preservation of Justice*, 91 CHI.-KENT L. REV. 1173, 1174 (2016); BEST PRACTICES FOR EVIDENCE HANDLERS, *supra* note 61, at iv.; The criminal justice system is fragmented into 12,656 law enforcement agencies with approximately 899,212 law enforcement employees. Table 74: Full Time Law Enforcement Employees, 2014 Crime in the United States, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-74> [<https://perma.cc/94D5-7JFL>]

63. 42 U.S.C. § 14132(b) (codified as amended at 34 U.S.C. § 12592 (2018)).

64. FBI, QUALITY ASSURANCE STANDARDS FOR FORENSIC DNA TESTING LABORATORIES (2020), <https://www.fbi.gov/file-repository/quality-assurance-standards-for-forensic-dna-testing-laboratories.pdf/view> [<https://perma.cc/AU7V-WTN6>] [hereinafter FBI QUALITY ASSURANCE STANDARDS].

65. ISO/IEC 17025:2017-FORENSIC SCIENCE TESTING & CALIBRATION LABS. ACCREDITATION REQUIREMENTS, ANSI NAT'L ACCREDITATION BD. (2019), <https://anab.qualtracxcloud.com/ShowDocument.aspx?ID=12371> [<https://perma.cc/NWM8-M2TX>] [hereinafter ANAB ACCREDITATION REQUIREMENTS].

66. *Frequently Asked Questions on CODIS and NDIS*, *supra* note 45.

67. FBI QUALITY ASSURANCE STANDARDS, *supra* note 64, at 12-13, 20-21.

68. ANAB ACCREDITATION REQUIREMENTS, *supra* note 65, at 10-11, 15.

For additional direction, policymakers should look to the Biological Preservation Handbook, issued by the National Institute of Standards and Technology and the National Institute of Justice,<sup>69</sup> and the evidence preservation requirements to qualify for federal grants.<sup>70</sup>

2. *Unless SB 263 Passes, Indiana Evidence Retention Protocol Varies by County.*—At last, pending legislation may displace Indiana’s fragmented evidence retention rules that have endured for far too long.<sup>71</sup> But until and unless SB 263 passes, Indiana remains one of fifteen states<sup>72</sup> without a statute delineating evidence preservation procedures after a conviction.<sup>73</sup> Prior to the introduction of SB 263, in Indiana, the only codified evidence preservation policies have been found within the post-conviction DNA testing statute.<sup>74</sup> Upon filing a petition for DNA testing, the court must “order the state to preserve during the pendency of the proceeding all evidence in the state’s possession or control that could be subjected to DNA testing[.]”<sup>75</sup> Thus, the duty to preserve evidence is triggered only by a petition to the court,<sup>76</sup> which may come years after conviction.<sup>77</sup> In essence, absent passage of SB 263, there is a period of time between evidence collection and a petition in which evidence could be destroyed.<sup>78</sup>

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69. BEST PRACTICES FOR EVIDENCE HANDLERS, *supra* note 61.

70. *See infra* Section IV.B.

71. SB 263, *supra* note 30.

72. Fifteen states lack an evidence preservation statute that meets the standards outlined by the Technical Working Group on Biological Evidence Preservation: Alabama, Delaware, Idaho, Indiana, Kansas, New York, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming. *Preservation of Evidence*, *supra* note 22.

73. The only published instruction the state gives to court reporters on the disposition of biological materials is the following:

Evidence containing biological materials

Two problems on disposition

a. proper, safe handling of such evidence;

b. maintenance of evidence for DNA and other analysis for extended periods of time.

*See* IND. OFFICE OF COURT SERV., COURT REPORTER’S HANDBOOK 104 (5th ed., 3d revision 2018), <https://www.in.gov/judiciary/iocs/files/ctr-handbook.pdf> [<https://perma.cc/2RHU-Q2V4>].

74. IND. CODE §§ 35-38-7-1 to 7-19 (2021).

75. *Id.* § 35-38-7-14.

76. *Id.* SB 263 would amend Indiana Code sections 34-24-1-2, -4.5, -9; 35-33-5-5; and 35-38-7-14 to provide for mandatory preservation of evidence containing biological material for violent crimes. *See* SB 263, *supra* note 30. Thus, in the future, SB 263 would prevent destruction or loss of evidence during the gap between a conviction and a petition for testing; however, SB 263 would not change the prima facie showing necessary to obtain post-conviction DNA testing under Indiana Code section 35-38-7-8. *Id.*

77. Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations*, 59 DRAKE L. REV. 799, 849-50 (2011).

78. *Id.*; CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at 5.

For decades, Indiana evidence retention procedures have been governed by local rules that vary by county.<sup>79</sup> Depending on the county or the type of evidence, evidence is managed by (1) the sheriff's department,<sup>80</sup> (2) the Indiana State Police labs<sup>81</sup> or county forensic agencies,<sup>82</sup> or (3) the courts.<sup>83</sup> The lack of uniformity in procedures leads to fragmentation and mistakes.<sup>84</sup>

In an attempt to guide the counties, the Records Access and Management Committee, which studies and provides the Indiana Supreme Court recommendations for the management of court records,<sup>85</sup> drafted a model local rule for evidence retention.<sup>86</sup> The model rule recommends time periods for storage based on the case type<sup>87</sup>:

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79. *Trial Courts & Clerks by County, Local Courts*, COURTS.IN.GOV, <https://www.in.gov/courts/local/> [<https://perma.cc/K3RD-HAAV>].

80. Memorandum from James Walker, Dir. of Trial Court Mgmt., Div. of State Court Admin., Survey of Law Enforcement (revealing half of the county sheriff's departments surveyed take custody of biological evidence after a trial) (on file with the Author and the *Indiana Law Review*).

81. LABORATORY DIVISION COMMANDER, IND. STATE POLICE LAB. DIV., QUALITY ASSURANCE MANUAL 32-33 (38th ed. 2020), [https://www.in.gov/isp/labs/files/Lab\\_QA\\_Manual\\_09-10-2020.pdf](https://www.in.gov/isp/labs/files/Lab_QA_Manual_09-10-2020.pdf) [<https://perma.cc/YH6M-DK84>].

82. *See, e.g., Marion County Forensic Services Agency*, INDY.GOV, <https://www.indy.gov/agency/marion-county-forensics-services-agency> [<https://perma.cc/3WZ8-HY4H>].

83. Memorandum from James Walker, Dir. of Trial Court Mgmt., Div. of State Court Admin., Survey of Court Reporters (Sept. 30, 2009) (on file with the Author and the *Indiana Law Review*); *see, e.g.,* Blackford LR 05-AR00-5(B); Hamilton LR29-AR07-113.20; Porter LR64-AR00-3900.20; and Whitley LR92-AR7-3.

84. Martin, *supra* note 62, at 1179.

85. *Records Access and Management Committee*, COURTS.IN.GOV, <https://www.in.gov/judiciary/iocs/3860.htm> [<https://perma.cc/4MUW-59DG>].

86. RETENTION OF EVIDENCE MODEL RULE (RECORDS MGMT. COMM. Apr. 2020) [<https://perma.cc/HLQ4-J29E>].

87. *Id.*

Type of Evidence	Time Period for Retention
Civil Cases, Non-criminal Proceedings	Dispose evidence four (4) months after the case is decided unless an appeal is taken. If an appeal is taken, evidence retained for two (2) years from termination of the proceedings.
Criminal Misdemeanor, Level 6 Felonies, and Attempts	Dispose evidence three (3) years after the case is dismissed, the defendant is found not guilty, or the defendant is sentenced, unless an appeal is taken. If appealed, retain evidence for three (3) years following termination of the appeal.
Level 1-5 Felonies and Attempts	Dispose evidence twenty (20) years after the case is dismissed, the defendant is found not guilty, or the defendant is sentenced, unless an appeal is taken. If an appeal is taken, retain evidence for twenty (20) years from termination of the appeal, retrial, or subsequent appeal and termination, whichever is later, unless an action challenging the conviction or sentence is pending.
Murder, Life without Parole, and Death Penalty Cases	Retain evidence for the lifetime of the defendant if (s)he is found guilty. All exhibits shall be taken away by the parties twenty (20) years after the case is dismissed or the defendant is found not guilty unless an appeal is taken. If an appeal is taken, retain all evidence for twenty (20) years from termination of all proceedings.

Table 1. Recommended Time Periods for Evidence Storage (by Author).

After evidence is held for the above stated periods, the model rule recommends that in all cases, “the Court shall provide actual notice, by mail . . . that the evidence will be destroyed by a date certain if not retrieved before that date. . . . [E]vidence which is not retaken after notice should be disposed of by the sheriff on the court’s order.”<sup>88</sup>

But this model rule is not published in a manual or distributed to counties. Rather, the rule is sent to court administrators upon a request for guidance on evidence retention.<sup>89</sup> At present, forty-nine of ninety-two counties have a local rule on criminal evidence retention.<sup>90</sup> Specifically, twenty-two counties have a

88. *Id.* Lastly, if evidence is not claimed, it is destroyed if its possession is illegal or if it has negligible value, and if valuable, evidence is auctioned by the sheriff for the county fund. *Id.*

89. E-mail Interview with Tom Jones, Records Manager, Office of Court Services (Jan. 14, 2020) (on file with the Author and the *Indiana Law Review*).

90. The following Indiana counties do *not* have a local rule addressing criminal evidence retention: Adams; Benton (*Civil* evidence retention rule found at TR04-TR-3); Boone; Brown (Proposed rule on Evidence Handling, Retention and Disposition pending approval found at LR07-AR00-28); Cass; Clark; Clay; Clinton; Crawford; Daviess; Delaware; Dubois; Franklin; Fulton; Greene; Hancock; Harrison; Jasper; Jefferson; Knox; Kosciusko; Martin; Miami; Newton; Orange;

local rule defining the duration for criminal evidence retention as at least ten years;<sup>91</sup> six counties have a local rule defining the duration for retention as greater than six months, but less than or equal to five years;<sup>92</sup> and twenty-one counties have a local rule setting the duration for retention as less than six months.<sup>93</sup>

The relevant rule in Marion County falls into the last category—rules that require retention for less than six months. The Marion County rule directs that for all cases, civil and criminal, “exhibits in the custody of the Court Reporter shall be removed by the offering parties four (4) months after the case is decided unless an appeal is taken. If not removed after four months, the Court Reporter may dispose of them without notice.”<sup>94</sup> In sum, no county has adopted the retention periods recommended by the Records Access and Management Committee for evidence in murder cases or cases involving sentences of death or life without parole.<sup>95</sup>

In addition to the county rules, the Indiana State Police (“ISP”) operate four nationally accredited crime labs<sup>96</sup> that maintain the quality assurance standards, including evidence preservation,<sup>97</sup> set forth by both ANAB<sup>98</sup> and the FBI.<sup>99</sup> The

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Perry; Posey; Pulaski; Putnam; Ripley; Rush; Scott; Spencer; Steuben; Sullivan; Switzerland; Tipton; Union; Warrick; Washington; Wayne; Wells; and White.

91. The Indiana counties with a local rule defining the duration for criminal evidence retention as at least ten years: Bartholomew LR03-AR7-1; Carroll LR08-AR7-16; Dearborn LR15-AR-9; Decatur LR16-AR7-1; Floyd LR22-AR7-1-119; Gibson LR26-AR7-008; Hamilton LR29-AR07-113.2; Jackson LR36-AR7-1; Jennings LR40-AR07-25; LaPorte LR 46-AR 00-11; Lawrence LR47-AR00-003; Madison LR48-AR7-06; Monroe LR53-TR53-0208; Ohio LR58-AR-10; Owen LR60-AR07-1; Parke LR61-AD00-AD-12.1-12.3; Shelby LR73-AR7-4; St. Joseph LR71-TR51-212; Tippecanoe LR79-AR00-17; Vermillion LR 83-AR00-6; Wabash LR85-AR00-8; and Whitley LR92-AR7-3.

92. The Indiana counties with a local rule defining the duration for criminal evidence retention as greater than six months, but less than or equal to five years: Allen LR02-AR00-15; Blackford LR 05-AR00-5(B); Johnson LR41-AR7-00163; Lake LR45-TR43-12; Pike LR63-TR00-7; and Warren LR86-AP29-001.

93. The Indiana counties with a local rule defining the duration for criminal evidence retention as less than six months: DeKalb LR17 AR 7-3; Elkhart LR20-TR00-NACE-11; Fayette LR21-TR00-TR-23; Fountain LR23-TR 26-FLR 10(a)-(e); Grant LR-27 AR10-16; Hendricks LR32-AR00-4; Henry LR33-AR00-3; Howard LR34-TR16-18; Huntington LR35-AD-00-13; Jay LR38-AR00-3; LaGrange LR44-AR 00-14; Marion LR49-TR00-220; Marshall LR50-JR01-MLR-015; Montgomery LR54-AR10-5; Morgan LR55-TR00-1.1-1.3; Noble LR57-AR 7-4; Porter LR64-AR00-3900; Randolph LR68-AR00-703; Starke LR75-TR00-15; Vanderburgh LR82-AR7-1.26; and Vigo LR84-TR00-19.

94. Marion LR50-JR01-MLR-015.

95. See *supra* notes 90-93 (listing the local rules for each county).

96. INDIANA STATE POLICE LAB. DIV., CERTIFICATE OF ACCREDITATION FOR FORENSIC TESTING BY ANSI NAT’L ACCREDITATION BD., [https://www.in.gov/isp/labs/files/Lab\\_Div\\_Accreditation\\_Cert\\_5-10-2017\\_to\\_6-30-2021\\_V3.pdf](https://www.in.gov/isp/labs/files/Lab_Div_Accreditation_Cert_5-10-2017_to_6-30-2021_V3.pdf) [<https://perma.cc/8GPE-4KH6>].

97. 34 U.S.C. § 12592 (2018); *Frequently Asked Questions on CODIS and NDIS*, *supra* note 45; Telephone Interview with Carl Sobieralski, Forensic Scientist at the Ind. State Police Lab’y,

ISP labs are an example of successful evidence retention practices in Indiana.<sup>100</sup> However, chain of custody problems<sup>101</sup> can arise when ISP labs transfer evidence to individual law enforcement agencies or to other regional forensic labs throughout the state.<sup>102</sup> While the evidence retained at the ISP labs is securely stored,<sup>103</sup> based on the varying county rules on evidence disposition,<sup>104</sup> local facilities may not meet the national accreditation standards. To safeguard evidence accessibility, Indiana should consider the national forensic laboratory standards in implementing uniform storage practices.<sup>105</sup>

### B. DNA Testing

To date, Indiana's only codified DNA evidence policy is found in the post-conviction DNA testing statute.<sup>106</sup> To provide context, this section first outlines the development of DNA evidence jurisprudence.

1. *Case Law Evolution: Tension Over Legislative Intent.*—“Indiana was an early and noteworthy participant in using its bill of rights to defend personal liberty.”<sup>107</sup> For example, in 1882, based on constitutional notions of due process and a fair trial, the Indiana Supreme Court recognized post-conviction procedures in *Sanders v. State*, concluding that “where a new fact is suggested which would have prevented judgment, the accused is entitled to the writ *coram nobis*.”<sup>108</sup>

Following the early recognition of post-conviction remedies, Indiana courts allowed defendants to admit DNA evidence long before the DNA testing statute

IUPUI Adjunct Instructor of Forensic Biology (Jan. 29, 2020) (transcript on file with the Author and the *Indiana Law Review*).

98. ANAB ACCREDITATION REQUIREMENTS, *supra* note 65.

99. FBI QUALITY ASSURANCE STANDARDS, *supra* note 64.

100. IND. STATE POLICE LAB. DIV., 2019 ANNUAL REPORT 15 (2019), [https://www.in.gov/isp/labs/files/2019\\_Annual\\_Report\\_ISP\\_Lab\\_Division.pdf](https://www.in.gov/isp/labs/files/2019_Annual_Report_ISP_Lab_Division.pdf) [<https://perma.cc/9K47-AZRW>]; For example, thanks to a search of the ISP DNA database which identified the actual perpetrator, Jerry Watkins was exonerated after spending fourteen years in prison for murder. *See Jerry Watkins*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3724> [<https://perma.cc/RL6D-4YVE>] (last updated Mar. 8, 2017).

101. BEST PRACTICES FOR EVIDENCE HANDLERS, *supra* note 61, at 25.

102. IND. STATE POLICE LAB. DIV., *supra* note 100.

103. LABORATORY DIVISION COMMANDER, *supra* note 81.

104. *See supra* notes 90-93.

105. FBI QUALITY ASSURANCE STANDARDS, *supra* note 64; ANAB ACCREDITATION REQUIREMENTS, *supra* note 65.

106. IND. CODE § 35-38-7-1 to 7-19 (2021). *See* SB 263, *supra* note 30.

107. Chief Justice Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 576 (1989).

108. 85 Ind. 318, 330 (1882); *Id.* at 322 (“An innocent man suffering from an illegal sentence, procured by fraud or extorted by violence, may desire a trial and an acquittal which shall remove from his character the stain of guilt . . . . An acquittal is the vindication of a right, the award of justice.”); *id.* at 324; IND. CONST. art. I, §§ 12, 13.

became law in 2001.<sup>109</sup> In 1992, the Indiana Court of Appeals decided *Sewell v. State*, which endorsed post-conviction DNA analysis.<sup>110</sup> There, the court permitted Sewell to access a rape kit for DNA testing ten years after his conviction.<sup>111</sup> The court concluded that *Brady v. Maryland*,<sup>112</sup> which held that federal due process requires the government to disclose exculpatory evidence to defendants *before* trial, “can operate to require disclosure of evidence not discoverable” at the time of trial.<sup>113</sup> In sum, “where the specified evidence is exculpatory, the defendant’s right to fundamental due process outweighs the State’s interest in nondisclosure.”<sup>114</sup> *Sewell* reveals that since the development of DNA technology, Indiana courts have recognized its exculpatory benefits.<sup>115</sup>

A decade after *Sewell*, the General Assembly enacted the first DNA testing statute in 2001,<sup>116</sup> and debate emerged over its intent. For example, in the controversial *Williams* case,<sup>117</sup> the Indiana Supreme Court grappled with the reach of the DNA testing statute<sup>118</sup> and a 2003 amendment to the death sentence statute<sup>119</sup> which allowed for petitions to consider new evidence.<sup>120</sup> Awaiting execution after conviction for murder, Darnell Williams began his pursuit of DNA analysis by filing a post-conviction petition for DNA testing of blood spots on the shorts he was wearing when arrested.<sup>121</sup> On review, the Supreme Court acknowledged that DNA testing can reveal “important information relating to a convicted person’s guilt or innocence,”<sup>122</sup> but denied the petition because “even a test result favorable to Williams would not . . . afford him relief . . . given the other evidence.”<sup>123</sup>

Then, only days before execution, Williams filed a petition for the consideration of new evidence pursuant to a new provision of the death sentence statute.<sup>124</sup> The section provides:

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109. *Hopkins v. State*, 579 N.E.2d 1297, 1302 (Ind. 1991) (recognizing the admissibility of DNA evidence in criminal proceedings).

110. 592 N.E.2d 705, 707-08 (Ind. Ct. App. 1992).

111. *Id.* at 706.

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

113. *Sewell*, 592 N.E.2d at 707.

114. *Id.* at 707 n.4.

115. *Id.* at 708.

116. 2001 Ind. Acts 262, 265, Pub. L. 49-2001 (codified at IND. CODE § 35-38-7-14).

117. *Williams v. State*, 793 N.E.2d 1019 (Ind. 2003).

118. IND. CODE § 35-38-7-14 (2021).

119. *Id.* § 35-50-2-9(k).

120. *Williams*, 793 N.E.2d at 1021-22.

121. *Williams v. State*, 791 N.E.2d 193, 193-94 (Ind. 2003); *see also* IND. CODE § 35-38-7-14 (2021).

122. *Williams*, 791 N.E.2d at 194.

123. *Williams v. State*, 808 N.E.2d 652, 655 (Ind. 2004).

124. *Williams*, 793 N.E.2d at 1021. The death sentence statute and the post-conviction DNA testing statutes set forth similar standards for relief; thus, *Williams* is relevant to the application of the DNA testing statute. *Compare* 2003 Ind. Acts 1115, 1119-20, Pub. L. 147-2003 (codified at

A person who has been sentenced to death . . . may file a written petition with the supreme court seeking to present new evidence challenging the person's guilt . . . . The supreme court shall determine . . . whether the . . . previously undiscovered evidence . . . undermines confidence in the conviction or the death sentence.<sup>125</sup>

In his petition, Williams once more requested DNA testing of the blood on his shorts.<sup>126</sup> On July 25, 2003, despite the fact that DNA analysis had never been performed, the Indiana Supreme Court again denied Williams's request.<sup>127</sup> In an "unprecedented move" on July 28, 2003, Governor O'Bannon granted a stay of execution to allow for DNA testing.<sup>128</sup> O'Bannon stated DNA testing was necessary "to permit all potentially relevant evidence to be discovered" in light of the "unique circumstances" of Williams's case.<sup>129</sup>

On May 21, 2004, the Indiana Supreme Court reviewed the test results—which excluded the victims as sources of the blood on Williams's shorts except as to one area which was inconclusive, but denied relief.<sup>130</sup> The court reasoned "what the DNA test results seem to show is not much different from what was presented at trial,"<sup>131</sup> even though the evidence offered at trial related only to the blood type of the samples. Once again disagreeing with the Supreme Court, on July 2, 2004, Governor Kernan commuted Williams's death sentence to life without possibility of parole<sup>132</sup> due to Williams's mental status, lesser degree of culpability compared to his co-defendant who was spared the death penalty, and "doubt as to Williams' direct participation" in the crime.<sup>133</sup> Governors O'Bannon and Kernan signaled that the post-conviction DNA testing statute should not be used to limit access to DNA testing, but rather, in the words

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IND. CODE § 35-50-2-9(k) (requiring a showing that "previously undiscovered evidence . . . undermines confidence in the conviction"), with IND. CODE § 35-38-7-8 (2021) (demanding proof that "a reasonable probability exists that the petitioner would not have been prosecuted, convicted, or received as severe a sentence," if DNA results had been obtained).

125. IND. CODE § 35-50-2-9(k) (2021).

126. *Williams*, 793 N.E.2d at 1024.

127. *Id.*

128. Fred Kelly, *Governor Stalls Execution; DNA Will Be Tested*, INDIANAPOLIS STAR, July 29, 2003, at A1 [<https://perma.cc/NX54-8RY7>]; see also Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 37 IND. L. REV. 1003, 1008 (2004).

129. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 38 IND. L. REV. 999, 1028 (2005).

130. *Williams v. State*, 808 N.E.2d 652, 660 (Ind. 2004). From the DNA tests, the male victim "could not be excluded as a source for the second spot of blood on the shorts," because the sample included a mixture of DNA types. *Id.* at 659-60.

131. *Id.* at 660.

132. See Mary Beth Schneider & Theodore Kim, *Governor Spares Life of Inmate; Convicted Killer of Gary Couple Was to be Executed Next Week*, INDIANAPOLIS STAR, July 3, 2004, at 1A [<https://perma.cc/KA47-NH4P>].

133. Schumm, *supra* note 129, at 1028 (citing Schneider & Kim, *supra* note 132).

of Governor O'Bannon, should be used to "permit all potentially relevant evidence to be discovered."<sup>134</sup>

Then in *Lacey v. State*,<sup>135</sup> the Indiana Supreme Court limited the reach of *Williams* by reversing a court's denial of post-conviction relief and ordering the State to deliver a hat from the crime scene to Lacey's counsel for DNA testing.<sup>136</sup> Notably, the court determined the DNA testing statute<sup>137</sup> did not control.<sup>138</sup> Rather the "normal rules of discovery"<sup>139</sup> in post-conviction proceedings, which "entitled [Lacey] to employ reasonable means . . . to obtain evidence in support of his petition,"<sup>140</sup> applied. The court furthered that the State's attempt to use the DNA testing statute to limit access to DNA analysis contravened the purpose of the legislation to provide "convicted felons *greater* access to DNA testing . . . to exonerate themselves."<sup>141</sup> Although *Lacey* reveals an unresolved tension between the post-conviction rules of court and the DNA testing statute,<sup>142</sup> the decision develops authority that post-conviction discovery rules should be used to facilitate, not restrict, DNA testing.<sup>143</sup>

In 2009, the Supreme Court of the United States decided to leave post-conviction evidence procedures to the states in *District Attorney's Office for the Third Judicial District v. Osborne*.<sup>144</sup> There, Osborne brought a Section 1983 claim proposing the recognition of a substantive due process right of access to post-conviction DNA testing.<sup>145</sup> Relying on *Brady v. Maryland*, the Court noted that federal due process requires prosecutors to disclose exculpatory evidence to the defendant *before* trial,<sup>146</sup> but that the duty does not extend to the post-conviction context.<sup>147</sup> *Osborne* held that due process was satisfied by the state statutes under review and the federal habeas remedies available to a defendant seeking post-conviction relief.<sup>148</sup> Despite recognizing that "[m]odern DNA testing can provide powerful new evidence unlike anything known before," the Court

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134. Schumm, *supra* note 128, at 1008 (citing Kelly, *supra* note 128).

135. *Lacey v. State*, 829 N.E.2d 518 (Ind. 2005).

136. *Id.* at 520.

137. Indiana Code §§ 35-38-7-1 to 7-19 (2021).

138. *Lacey*, 829 N.E.2d at 519.

139. *Id.*

140. *Id.*

141. *Id.* (quoting Joel M. Schumm, *Survey: Criminal Law and Procedure: Recent Developments in Indiana Criminal Law and Procedure*, 35 IND. L. REV. 1347, 1348 (2002) (emphasis added by the Indiana Supreme Court)).

142. *Id.*

143. *Id.* A petition for DNA testing of evidence, "whether denominated as a petition filed pursuant to Ind. Code § 35-38-7-5 or not, is considered a Petition for Post-Conviction Relief." IND. POST-CONVICTION RULE 1(1)(d).

144. 557 U.S. 52 (2009).

145. *Id.* at 55-56.

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

147. *Osborne*, 557 U.S. at 55-56.

148. *Id.*

rejected Osborne’s claim<sup>149</sup> because it would “thrust the Federal Judiciary into an area previously left to state courts and legislatures.”<sup>150</sup>

In the words of the former Chief Justice of the Indiana Supreme Court, Randall T. Shepard, the outcome in *Osborne* underscores:

[t]he rights of Americans cannot be secure if they are protected . . . only by one court. Civil liberties protected only by a U.S. Supreme Court are only as secure as the Warren Court or the Rehnquist Court wishes to make them. The protection of Americans against tyranny requires that state supreme courts and state constitutions be strong centers of authority on the rights of the people.<sup>151</sup>

Despite the crucial role states play in protecting civil liberties, for more than a decade after *Osborne*, Indiana has failed to take steps to develop meaningful standards to preserve biological evidence to remedy potential wrongful convictions.<sup>152</sup>

2. *Indiana’s DNA Testing Statute: An Insurmountable Burden.*—The common law of DNA access in Indiana provides the backdrop to the DNA testing statute itself.<sup>153</sup> Under the statute, a court *may*—not must—order DNA testing for petitioners convicted of a felony upon a prima facie showing on four elements.<sup>154</sup> First, a petitioner must establish the evidence sought to be tested is *material* to identifying the petitioner as the perpetrator of the offense that resulted in conviction.<sup>155</sup> Second, the evidence must meet a chain of custody standard to demonstrate its reliability.<sup>156</sup> Third, the petitioner must prove that the evidence sought to be tested was not previously tested, or was tested, but the requested DNA testing will provide results that will more likely identify the perpetrator or will have a reasonable likelihood of contradicting prior test results.<sup>157</sup> Lastly, a post-conviction litigant must show that a *reasonable probability* exists that the petitioner would not have been prosecuted, convicted, or received as severe a

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149. *Id.* at 69.

150. *Id.* at 56, 62, 73 n.4. *But see* *Skinner v. Switzer*, 562 U.S. 521, 525 (2011) (concluding a defendant’s complaint alleging a state post-conviction DNA testing statute violated *procedural* due process was “sufficient to cross the federal court’s threshold”); *Newton v. City of New York*, 779 F.3d 140, 153 (2d Cir. 2015) (finding that, because state “law provide[d] a convicted prisoner a liberty interest in demonstrating his innocence with newly available DNA evidence,” the city could be held liable in a Section 1983 action for its inadequate evidence management system that deprived the exonerated petitioner access to the state remedy).

151. Shepard, *supra* note 107, at 586.

152. *But see* SB 263, *supra* note 30.

153. 2001 Ind. Acts 262, Pub. L. 49-2001 (codified at IND. CODE §§ 35-38-7-1 to 7-19).

154. IND. CODE § 35-38-7-8 (2021). The pending legislation does not affect the burden of proof to access post-conviction DNA testing. *See* SB 263, *supra* note 30.

155. IND. CODE § 35-38-7-8(1) (2021).

156. *Id.* § 35-38-7-8(2).

157. *Id.* § 35-38-7-8(3).

sentence for the offense, if exculpatory DNA results had been obtained.<sup>158</sup> Although the statute permits post-conviction DNA testing, petitioners must overcome an incredibly high burden and the final decision is discretionary.

*C. Access to DNA Databases: Defense Counsel Must Obtain a Court Order*

A minority of jurisdictions provide DNA database searches to post-conviction litigants upon successful petitions for DNA testing—nine states<sup>159</sup> and the federal system.<sup>160</sup> But to reap the maximum benefits of evidence reform through biological evidence preservation and broadened DNA testing opportunities, DNA database comparison is pivotal.<sup>161</sup> In addition to excluding the victim or the defendant as a source of the DNA from the evidence, a DNA database search is necessary to realize the goal of DNA testing—identifying perpetrators.<sup>162</sup> For both victims and the wrongly convicted, determining the identity of the true offender is a final hurdle towards closure.<sup>163</sup>

Currently, Indiana enters DNA profiles into NDIS and the Indiana DNA database.<sup>164</sup> But when DNA testing is approved in the post-conviction setting, no statute *requires* the State run a database search and deliver the results to the defense.<sup>165</sup> When a petition for DNA testing is granted, the court must “order the production of any laboratory reports that are prepared in connection with the testing and analysis.”<sup>166</sup> In other words, the statute specifies that after testing, defense counsel is entitled only to the results of that specific DNA analysis, which may or may not include a database check.<sup>167</sup> To guarantee the State conducts a database search, defense counsel must obtain a separate court order.<sup>168</sup>

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158. *Id.* § 35-38-7-8(4); *cf. id.* § 35-50-2-9(k) (mirroring the DNA testing statute standard).

159. The nine states are Colorado, Georgia, Illinois, Maryland, Mississippi, New York, North Carolina, Ohio, and Texas. *See* COLO. REV. STAT. § 18-1-412(9) (2021); GA. CODE ANN. § 5-5-41(9) (2021); 725 ILL. COMP. STAT. ANN. 5/116-5 (West 2021); MD. CODE ANN., CRIM. PROC. § 8-201(d)(2) (West 2021); MISS. CODE ANN. § 99-39-11(10) (2021); N.Y. CRIM. PROC. LAW § 440.30.1-a(c) (McKinney 2021); N.C. GEN. STAT. § 15A-269 (2021); OHIO REV. CODE ANN. § 2953.74(E) (West 2021); TEX. CODE CRIM. PROC. ANN. art. 64.035 (West 2021).

160. 18 U.S.C. § 3600(e)(1)(B) (2018).

161. *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, <https://innocenceproject.org/causes/access-post-conviction-dna-testing/> [<https://perma.cc/89KJ-R77Z>] (recommending all DNA tests include database checks).

162. Kreag, *supra* note 54, at 810.

163. McGlynn, *supra* note 33, at 732.

164. 34 U.S.C. § 12592 (2018); *Combined DNA Index System (CODIS)*, FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis> [<https://perma.cc/PL2G-ABKW>]; 240 IND. ADMIN. CODE 8-1-2 (2021).

165. IND. CODE § 10-13-6-15(5) (2021) (Forensic labs “may disclose . . . DNA analysis results . . . [f]or purposes of postconviction DNA testing” under Ind. Code § 35-38-7.).

166. *Id.* § 35-38-7-13.

167. *Id.* § 10-13-6-15(5).

168. *Id.* § 35-38-7-13.

The DNA testing statute<sup>169</sup> does not include language explicitly addressing database searches. Nonetheless, DNA evidence advocates argue language contained in the statute's prima facie showing that the evidence sought to be tested is "probative of the identity of the *perpetrator*"<sup>170</sup> indicates legislative intent for DNA database comparisons. If the purpose of DNA testing is to identify the culprit, then database searches should be a routine aspect of DNA analysis. But absent an express statutory directive, state actors decide whether to run a search.<sup>171</sup>

### III. THE PROPOSAL: STATUTORY REFORM

Through a domino effect, by guaranteeing evidence is preserved, increased access to DNA technology will provide the truth for litigants whose convictions rested on flawed science. Biological evidence preservation is also crucial to identify perpetrators.<sup>172</sup> Of the 551 exonerations based on DNA evidence nationwide,<sup>173</sup> the true perpetrators were detected in thirty percent of cases totaling 165 actual assailants identified.<sup>174</sup>

Identifying perpetrators, biological evidence reform also benefits sexual assault victims. Experts estimate hundreds of thousands of rape kits sit untested in storage facilities across the country in the "rape kit backlog."<sup>175</sup> To ensure rape kits are analyzed and criminal actions commenced, the Sexual Assault Forensic Evidence Reporting Act Working Group recommends:

[J]urisdictions that do not have evidence retention laws should adopt biological evidence retention policies . . . that are victim-centered and preserve evidence from uncharged or unsolved reported cases for 50 years or the length of the statute of limitations, whichever is greater.<sup>176</sup>

Simply put, DNA evidence reform is essential to bring justice to sexual assault victims.

Without uniform storage and retention periods, DNA samples could be

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169. *Id.*

170. *Id.* § 35-38-7-8(1), (3) (emphasis added).

171. Kreag, *supra* note 54, at 818.

172. CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at iv.

173. *Exonerations By Year: DNA and Non-DNA*, *supra* note 19.

174. *DNA Exonerations in the United States*, *supra* note 18.

175. Because most states do not have systems that track rape kits and no federal law mandates tracking, there is no surety of the number of untested rape kits nationwide. *See What is the Rape Kit Backlog?*, END THE BACKLOG, <http://www.endthebacklog.org/backlog/what-rape-kit-backlog> [<https://perma.cc/4VSK-N7HJ>].

176. SEXUAL ASSAULT FORENSIC EVIDENCE REPORTING (SAFER) ACT WORKING GROUP, NAT'L INST. OF JUST., NATIONAL BEST PRACTICES FOR SEXUAL ASSAULT KITS: A MULTIDISCIPLINARY APPROACH 68-71 (2017), <https://www.ojp.gov/pdffiles1/nij/250384.pdf> [<https://perma.cc/N8H7-JGYH>].

“mishandled, misplaced, lost, or destroyed.”<sup>177</sup> To provide closure to victims, aid law enforcement in identifying and prosecuting perpetrators, and afford the wrongly convicted an avenue for relief, Indiana must take the next step in modernizing its criminal justice system: codify biological evidence procedures. An ideal statute would (1) establish a task force to ascertain best policies to resolve forensic science issues; (2) mandate evidence retention procedures; (3) amend the DNA testing statute to expand testing availability; and (4) codify DNA database searches as a standard feature of DNA analysis. These proposals are discussed in turn below.

#### *A. Institute a Task Force for Forensic Science Issues*

To date, eleven states have established state-level task forces or working groups to focus on forensic science issues.<sup>178</sup> These commissions develop best practices for the preservation of biological evidence, DNA testing, and database access.<sup>179</sup> Because of the varied resources and management of government entities, Indiana should commission a task force with statutory authority to “consult[] relevant stakeholders to strike a balance in creating DNA evidence standards that allow a degree of professional discretion . . . when necessary.”<sup>180</sup> The task force would survey the best methods to meet Indiana’s evidentiary needs, draft DNA evidence legislation, and aid in the implementation of new standards.

#### *B. Evidence Retention Statute*

In part based on the information provided in this Note, an evidence preservation bill—embracing many of this Note’s recommendations—was introduced in the 2022 session of the Indiana General Assembly.<sup>181</sup> Notwithstanding this development, the section below outlines the components of an ideal evidence preservation statute to serve as a resource for future amendments to SB 263, if enacted, and as a reference for other states.

First, pursuant to current best practices, a statute must stipulate the types of crimes for which biological evidence is preserved.<sup>182</sup> The majority of evidence retention statutes require preservation for felonies and violent offenses.<sup>183</sup> The legislature could adopt aspects of the model rule put forth by the Records

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177. BEST PRACTICES FOR EVIDENCE HANDLERS, *supra* note 61, at iv.

178. The eleven states are California, Connecticut, Florida, Illinois, Louisiana, Oklahoma, New York, North Carolina, Pennsylvania, Texas, and Wisconsin. See CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at 9.

179. *Id.*; see, e.g., OHIO REV. CODE ANN. § 2933.82(C) (West 2010); CAL. PENAL CODE § 11062 (West 2021); Ill. Exec. Order No. 2019-13 (Aug. 16, 2019).

180. CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at 9.

181. SB 263, *supra* note 30.

182. CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at 7.

183. See, e.g., ARIZ. REV. STAT. ANN. § 13-4221(A) (2022); ARK. CODE ANN. § 12-12-105(a); MONT. CODE ANN. § 46-21-111(1)(a) (2022).

Management Committee, which requires—in addition to shorter-term retention for lesser offenses—long-term evidence retention for level one to five felonies and for murder, life without parole, and death penalty cases.<sup>184</sup>

Second, consistent with expert recommendations, the statute must specify the time periods for retention.<sup>185</sup> Following the majority trend, an ideal statute would mandate the preservation of DNA evidence for the length of incarceration, or for death penalty cases, life.<sup>186</sup>

Third, an ideal statute should mandate the automatic preservation of biological evidence for the decided offenses from the time of collection through the defined periods.<sup>187</sup>

Fourth, the statute should enumerate standards for storage facilities to ensure biological evidence is kept in suitable environments, based on scientific practices, to prevent its loss, degradation, or contamination.<sup>188</sup>

Fifth, the statute must detail a formal process for the early disposition of evidence<sup>189</sup> of lesser crimes or offenses in which the statute of limitations has elapsed. The process should involve notification to relevant parties, including the convicted person, the prosecutor, and the victims.<sup>190</sup> The notification should

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184. RETENTION OF EVIDENCE MODEL RULE, *supra* note 86. SB 263 would require preservation of biological evidence for “violent offense[s] (as defined in IC 11-12-3.7-6),” which includes, among others, homicide, battery, sex crimes, burglary, kidnapping, arson, and “[a]ny other crimes evidencing . . . violence.” IND. CODE § 11-12-3.7-6; SB 263, *supra* note 30.

185. CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at 7.

186. The time period of incarceration is the standard in twenty-four states and the District of Columbia. Krista A. Dolan, *Creating the Best Practices in DNA Preservation: Recommended Practices and Procedures*, 49 NO. 2 CRIM. LAW BULLETIN ART 6 (2013). SB 263’s amendment to Indiana Code section 35-33-5-5(g) would mandate preservation of all evidence “in the law enforcement agency’s possession or control that could be subjected to DNA testing and analysis. . . for the latest of,” (1) twenty years “from the date the defendant’s conviction becomes final,” or (2) “[t]he period of the defendant’s incarceration.” SB 263, *supra* note 30.

187. CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at 18. SB 263 would require automatic retention through an amendment to Indiana Code section 35-33-5-5(g): “all evidence of a violent offense . . . in the law enforcement agency’s possession or control that could be subjected to DNA testing and analysis shall be preserved[.]” SB 263, *supra* note 30.

188. CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at 19. In its current form, SB 263 does not offer guidance on the methods or environments to maintain evidence, but hopefully relevant state agencies will promulgate specific statewide rules to ensure best storage practices. SB 263, *supra* note 30.

189. *See, e.g.*, WIS. STAT. ANN. §§ 165.81 (West 2022); OHIO REV. CODE ANN. § 2933.82(B)(6) (West 2022).

190. CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at 19. SB 263 provides disposal and notice procedures to be codified at Indiana Code section 35-33-5-5(l):

The law enforcement agency responsible for disposing of property under subsection (g), shall do the following:

- (1) Maintain a record of the preserved evidence.
- (2) Schedule a disposal date for the preserved evidence.

provide an opportunity for the parties to collect the evidence or to dispute the early disposition of the evidence.<sup>191</sup>

Sixth, the statute should include an annual disposition review process to help “avoid the need for additional storage space and staffing.”<sup>192</sup> The International Association for Property and Evidence recommends law enforcement agencies “have a systematic review process assuring that each item of property and evidence is evaluated for possible purging on an annual basis.”<sup>193</sup> To determine which evidence should be purged, agencies should consider whether the evidence relates to a serious offense and whether the statute of limitations has elapsed.<sup>194</sup>

Seventh, the statute must address the difficulty of storing bulky evidence items, which may contain biological material, like a car, walls of a house, carpet, or furniture.<sup>195</sup> Because the storage of such evidence can be impractical,<sup>196</sup> Indiana should establish standards for retaining the portions of bulk evidence that contain biological material.<sup>197</sup> In handling large items, ISP labs, which are nationally accredited, preserve “area(s) recognized as having evidentiary value” by swabbing or “cutting.”<sup>198</sup> The statute should adopt similar guidelines.<sup>199</sup>

Eighth, the statute must carefully define all relevant terms. The current DNA

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(3) Provide notice to the last known address of the defendant and the defendant’s attorney:

- (A) when the preserved evidence is removed from its secure location; or
- (B) of the date the preserved evidence has been marked for disposal.

SB 263, *supra* note 30.

191. CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at 14.

192. JOSEPH T. LATTA & ROBERT E. GILES, INTERNATIONAL ASSOCIATION FOR PROPERTY AND EVIDENCE, INC., PROFESSIONAL STANDARDS 69 (2016). Though SB 263 contains a process for disposing of biological evidence from violent offenses, it does not offer any annual or ongoing review process to ensure evidence of lesser offenses does not overcrowd storage facilities. SB 263, *supra* note 30.

193. LATTA & GILES, *supra* note 192, at 69.

194. *Id.*

195. BEST PRACTICES FOR EVIDENCE HANDLERS, *supra* note 61, at 3.

196. Further, if the origin of a DNA sample is well documented (e.g., through photographs or case files), it may not be necessary to store the entire piece of evidence. *Id.*

197. CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at 18.

198. IND. STATE POLICE LAB. DIV., PHYSICAL EVIDENCE BULLETIN: EVIDENCE PACKAGING AND SUBMISSION GUIDELINES 2 (2020), [https://www.in.gov/isp/labs/files/PEB-20\\_Evidence\\_Packaging\\_and\\_Submission\\_Guidelines\\_11-19-2020.pdf](https://www.in.gov/isp/labs/files/PEB-20_Evidence_Packaging_and_Submission_Guidelines_11-19-2020.pdf) [<http://perma.cc/5TP6-ZP55>].

199. SB 263 provides bulk evidence storage procedures, which if enacted, would be codified at Indiana Code section 35-33-5-5(g): “If the preservation of the evidence is impracticable, the law enforcement agency shall remove portions of the material evidence likely to contain biological evidence related to the offense, in a quantity sufficient to permit future DNA testing before returning or disposing of the physical evidence.” SB 263, *supra* note 30.

testing statute<sup>200</sup> defines “DNA,”<sup>201</sup> “offense,”<sup>202</sup> and “victim.”<sup>203</sup> In addition, the retention statute should explain key terms including “biological material,” “custody,” “profile,” and “state.”<sup>204</sup> For guidance on thorough definitions, Indiana should look to the Mississippi statute.<sup>205</sup>

Ninth, the statute should specify measures to prevent chain of custody problems and delineate procedures to rectify chain of custody issues that do arise. For instance, if evidence cannot be located, a provision could mandate courts to order the responsible agency to conduct a physical search for the evidence and file a report of the results.<sup>206</sup>

Lastly, the statute must contemplate sanctions for state actors who fail to comply and remedies for litigants who are wronged by the failure. Despite adopting statutory preservation requirements, denial of access to biological evidence could occur due to loss of evidence, contamination, or mistaken, negligent, or “bad faith” destruction.<sup>207</sup>

Two existing Indiana statutes include sanctions for evidence destruction in the post-conviction setting. First, the post-conviction DNA testing statute provides that if “evidence is *intentionally* destroyed after the court orders its preservation, the court may impose appropriate sanctions.”<sup>208</sup> Second, the Indiana obstruction of justice law prohibits evidence tampering.<sup>209</sup> A person commits obstruction of justice if he or she “alters, damages, or removes any record . . . with intent to prevent it from being . . . used as evidence in *any official proceeding*,”<sup>210</sup> which encompasses the post-conviction context.

In addition to these statutes, Indiana courts apply the “bad faith” destruction of evidence standard set forth by the Supreme Court of the United States in

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200. IND. CODE § 35-38-7-1 to 7-19 (2021).

201. *Id.* § 35-38-7-2 (defining DNA as “deoxyribonucleic acid”).

202. *Id.* § 35-38-7-3.

203. *Id.* § 35-38-7-4.

204. Dolan, *supra* note 186. SB 263 does not define any new terms. SB 263, *supra* note 30.

205. The Mississippi statute meticulously defines “biological evidence,” “custody,” “profile,” and “state.” MISS. CODE ANN. § 99-49-1 (2022). *See also* MASS. GEN. LAWS ch. 278A, § 1 (2022); OHIO REV. CODE ANN. § 2933.82 (West 2022).

206. CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at 20. Aside from a provision permitting courts to impose sanctions for statutory violations, SB 263 does not outline protocol applicable when evidence is lost due to chain of custody problems. SB 263, *supra* note 30.

207. CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at 15. SB 263 stipulates the following sanctions and remedies, which if enacted, would be codified at Indiana Code section 35-33-5-5(m): “Failure of a law enforcement agency to follow the procedures described in this section may constitute contempt of court. However, failure to follow the[se] procedures . . . shall not be grounds for reversal of a conviction unless the defendant proves a violation of the defendant’s due process rights.” SB 263, *supra* note 30.

208. IND. CODE § 35-38-7-14(3) (2021). SB 263 does not alter this provision. SB 263, *supra* note 30.

209. IND. CODE § 35-44.1-2-2 (2021).

210. *Id.* § 35-44.1-2-2(a)(3) (emphasis added).

*Arizona v. Youngblood*,<sup>211</sup> which provides that bad faith destruction of “potentially useful” evidence violates due process and may entitle a defendant to a remedy.<sup>212</sup> In Indiana, to prove bad faith “a defendant must show that the State failed to preserve the evidence pursuant to a ‘conscious doing of wrong because of dishonest purpose or moral obliquity.’”<sup>213</sup> However, *Youngblood* and the “Indiana cases following it all deal with the destruction of evidence prior to the conclusion of a defendant’s trial”;<sup>214</sup> whether *Youngblood* applies in the post-conviction setting is undecided. But even if applicable to the post-conviction context, the standard provides relief only in the most egregious cases.<sup>215</sup> Due to the unique role of DNA in exonerations, an evidence retention statute should specify a burden of proof<sup>216</sup> for inadvertent or negligent biological evidence destruction.<sup>217</sup>

Despite Indiana case law and the two statutes related to evidence destruction, the ability of wronged litigants to pursue sanctions is limited because the burden to prove intentional destruction of evidence is unrealistic. To protect litigants whose evidence is *unintentionally* lost or destroyed, the statute should set forth a separate standard. For example, if the responsible agency loses or destroys biological evidence in connection with a case, and “the court finds that biological evidence was destroyed in violation of . . . the statute,”<sup>218</sup> judges could have discretion to order appropriate sanctions and remedies. By adopting a standard for evidence loss or destruction that recognizes the justice system’s tilt in favor of law enforcement, the legislature would enact a flexible and realistic remedy.

In sum, an ideal evidence preservation statute should provide (1) the types of crimes for which evidence retention is required, (2) the time periods for preservation, (3) the standard to trigger retention (i.e., automatic), (4) adequate storage environments, (5) early disposition procedures, (6) annual disposition review processes, (7) best methods for bulk evidence storage, (8) clear definitions, (9) measures to prevent and resolve chain of custody problems, and

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211. 488 U.S. 51, 58 (1988).

212. *Id.* at 58.

213. *Terry v. State*, 857 N.E.2d 396, 408 (Ind. Ct. App. 2006).

214. *Id.* at 407; *see also* *Land v. State*, 802 N.E.2d 45, 49 (Ind. Ct. App. 2004); *Blanchard v. State*, 802 N.E.2d 14, 26 (Ind. Ct. App. 2004).

215. *See, e.g., Illinois v. Fischer*, 540 U.S. 544, 545 (2004) (concluding that defendant’s due process rights were not violated when police, in “good faith,” destroyed alleged cocaine evidence after defendant filed a discovery motion to retest the evidence).

216. Principles of federalism permit states to adopt more rigorous evidence preservation standards than those required by the federal constitution. *Youngblood*, 488 U.S. at 58.

217. *Fischer*, 540 U.S. at 549 (Stevens, J., dissenting) (quoting *Youngblood*, 488 U.S. at 61 (Stevens, J., concurring)) (“[T]here may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair.”).

218. *Preservation of Evidence*, *supra* note 22. The remedial provision included in SB 263 is a crucial advancement from the previously available sanctions because it does not require proof of *intentional* destruction of evidence. SB 263, *supra* note 30.

(10) sanctions and remedies for noncompliance.<sup>219</sup> By defining practices in these ten areas, the General Assembly would codify a clear, complete statute that achieves its purposes: to deter improper evidence management, to promote transparency in the justice system, to offer reprieve to victims, and to guarantee due process to defendants.

*C. Amend the Burden of Proof to Obtain DNA Testing*

In addition to an evidence retention statute, Indiana should amend the current DNA testing statute.<sup>220</sup> Although DNA testing is available in all U.S. jurisdictions upon meeting certain criteria,<sup>221</sup> Indiana should lessen the prima facie showing necessary to obtain DNA testing. Currently, DNA testing is available only to felony offenders who meet specific conditions and the ultimate decision is discretionary.<sup>222</sup> But the standard should not rest on showing the results be “material” or “probably impacted the verdict”; such standards allow the court to deny any testing request it considers doubtful to be favorable due to other evidence of guilt.<sup>223</sup> Rather, Indiana should mandate DNA testing upon a showing that the results of the testing would be *relevant* to identity of the perpetrator of the crime. Tracking the Massachusetts approach, Indiana should amend its statute such that a petitioner must establish “the testing results would bear on the identity of the perpetrator, not that the result will be favorable to the defendant[.]”<sup>224</sup> By amending the prima facie showing, the legislature will heed Governor O’Bannon’s instruction that the DNA testing statute should be used “to permit all potentially *relevant* evidence to be discovered.”<sup>225</sup>

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219. SB 263 adopts six of the ten features of an ideal evidence preservation statute. The bill lacks definitions of the terms “biological material,” “custody,” “profile,” or “state,” and although the bill states the evidence “shall be preserved by the law enforcement agency” in possession of the evidence, there is no direction on how or where exactly to maintain the evidence. Also, the bill does not provide a process for periodic reviews of all evidence in storage to ensure continued purging; rather, it only notes disposal process for the biological evidence contemplated in the bill. Lastly, the bill does not reflect any specific measures to prevent and resolve chain of custody problems aside from the remedial provision for noncompliance. SB 263, *supra* note 30.

220. IND. CODE §§ 35-38-7-1 to 7-19 (2022).

221. Ian J. Postman, Note, *Re-Examining Custody and Incarceration Requirements in Postconviction DNA Testing Statutes*, 40 CARDOZO L. REV. 1723, 1727 n.36 (2019).

222. IND. CODE §§ 35-38-7-1 to 7-19 (2022).

223. See discussion of *Williams v. State*, 808 N.E.2d 652, 663 (Ind. 2004) *supra* Section II.B.1.

224. Theodore Tibbits, *Post-Conviction Access to DNA Testing: Why Massachusetts’ 278A Statute Should Be the Model for the Future*, 36 B.C.J.L. & SOC. JUST. 355, 385 (2016) (citing *Commonwealth v. Wade*, 5 N.E.3d 816, 819 (Mass. 2014)); MASS. GEN. LAWS ch. 278A, § 2 (2021) (To obtain a post-conviction DNA test, a petitioner must show “the analysis has the potential to result in evidence that is material to [his or her] identification as the perpetrator.”).

225. Schumm, *supra* note 128, at 1008 (emphasis added).

*D. Provide Access to DNA Database Searches with All  
Post-Conviction DNA Tests*

Lastly, through a new provision to the post-conviction DNA testing statute, Indiana should mandate DNA database comparison searches as a part of all DNA analyses. Ideally, the database provision would include: definitions; standards for obtaining a database search (e.g., automatic upon DNA testing); defense counsel access to a report of the search;<sup>226</sup> and detailed instructions for law enforcement. For guidance, Indiana can look to the statutes of other states.

For the depth of a search, Indiana should look to Illinois' statute, which provides defendants—both pre-trial and post-conviction—the opportunity to motion for a DNA database search.<sup>227</sup> Though the statute requires only a minimal showing that DNA evidence is material or relevant to the defendant's case, the ultimate decision is discretionary: “a court *may* order a DNA database search.”<sup>228</sup> Despite its permissive nature, the Illinois statute affords a comprehensive search when one is ordered.<sup>229</sup> The searches may involve comparing a crime-scene DNA sample to both identified offender profiles and profiles from unsolved crimes stored in local and national databases.<sup>230</sup> Further, Illinois provides defense access to all documents generated in relation to the database analysis.<sup>231</sup> To afford a thorough search and increase the chance of identifying perpetrators, like Illinois, Indiana should prescribe the specific types of database comparisons.

To determine when a database search should accompany DNA testing, Indiana should model its approach after North Carolina. North Carolina mandates that, upon a post-conviction litigant's showing of five criteria, “the court shall grant the motion for DNA testing and . . . the run of any profiles obtained from the testing.”<sup>232</sup> Thus, when DNA analysis is ordered, the assessment must include a database search.<sup>233</sup> North Carolina illustrates the legislature's ability to guarantee database searches as a standard aspect of DNA analysis.

In delineating step-by-step procedures for database searches, Indiana should take note of Ohio's law.<sup>234</sup> In Ohio, if the court grants a petition for post-

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226. See Ethan Bronner, *Lawyers, Saying DNA Cleared Inmate, Pursue Access to Data*, N.Y. TIMES, Jan. 3, 2013, at A1, <https://www.nytimes.com/2013/01/04/us/lawyers-saying-dna-cleared-inmate-pursue-access-to-data.html> [<https://perma.cc/H64R-4CTZ>] (quoting then President of the National Association of Criminal Defense Lawyers, Steven Benjamin) (“Juries expect the defense to be able to prove that if your client didn't do it, who did? Science doesn't belong to the government, but they act like it does. Unless the defense is given access to this information, the playing field remains uneven in criminal justice.”).

227. 725 ILL. COMP. STAT. 5/116-5 (2021).

228. *Id.* (emphasis added).

229. *Id.*

230. *Id.*

231. *Id.* at 116-5(c).

232. N.C. GEN. STAT. § 15A-269(b) (2021).

233. *Id.* at 269(a)-(b); see also TEX. CODE CRIM. PROC. ANN. art. 64.035 (West 2021).

234. OHIO REV. CODE ANN. § 2953.74(E) (West 2021).

conviction DNA testing, the court may also order a database search.<sup>235</sup> Although Ohio sanctions judicial discretion, the statute provides detailed “instructions for law enforcement agencies conducting the DNA database searches.”<sup>236</sup> By providing uniform procedures, the Ohio justice system can promote fairness and transparency in the depth and quality of each database search.

In sum, Indiana should mandate DNA database searches as part of all post-conviction DNA tests. To encourage veracity, the provision should include detailed procedures for law enforcement and forensic laboratories and give defendants access to reports of the search.

#### IV. IMPLICATIONS OF THE PROPOSAL

Part IV addresses anticipated criticism by assessing the ramifications of implementing this proposal and offering approaches to mitigate adverse consequences.

##### *A. Constitutional Privacy Interests*

Privacy advocates argue uniform DNA storage infringes on the citizens’ right to be free from government intrusion guaranteed by the state<sup>237</sup> and federal<sup>238</sup> constitutions. Thus, Indiana must determine whether the interests in public safety, closure to victims, and crime detection and prevention outweigh personal privacy interests.

In spite of privacy concerns, Indiana already endorses DNA storage as law enforcement are mandated to collect two DNA cheek swabs from felony arrestees,<sup>239</sup> which are submitted to the ISP lab.<sup>240</sup> The lab undertakes DNA analysis on one cheek swab and catalogues the DNA profile into NDIS and the local database.<sup>241</sup> The second swab is retained in a storage facility for future use.<sup>242</sup> DNA collection enables law enforcement to check the databases for matches with DNA profiles gathered from other crimes.<sup>243</sup> By adopting a DNA collection statute for felony arrestees, Indiana joins the majority of states<sup>244</sup> and signals that the ability of DNA evidence to solve crimes outweighs the privacy

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235. *Id.*

236. *Id.*; McGlynn, *supra* note 33, at 736.

237. IND. CONST. art. I, § 11.

238. U.S. CONST. amend. IV; Ken Strutin, *DNA Without Warrant: Decoding Privacy, Probable Cause and Personhood*, 18 RICH. PUB. INT. L. REV. 319, 324-26 (2015); Martin, *supra* note 62, at 1189.

239. IND. CODE § 10-13-6-10 (2021) (mandating DNA collection for felony arrestees).

240. Telephone Interview with Carl Sobieralski, *supra* note 97.

241. IND. CODE §§ 10-13-6-8, -10 (2021).

242. Telephone Interview with Carl Sobieralski, *supra* note 97.

243. IND. CODE § 10-13-6-8 (2021).

244. Associated Press and Indiana Lawyer Staff, *Indiana law for felony arrest DNA collection takes effect*, IND. LAW. (Jan. 2, 2018) [<https://perma.cc/64X6-ABKG>].

interests at issue.<sup>245</sup>

Notwithstanding opposing DNA collection, privacy activists concede that if a state routinely collects DNA samples, uniform DNA evidence procedures are essential to minimize the risk of constitutional violations.<sup>246</sup> Because Indiana gathers DNA from felony arrestees, the state should take preventative measures—through the procedural framework set forth in this Note—to protect individual privacy after DNA is seized, tested, and stored.

### *B. The Fiscal Impact*

Critics will argue this Note's proposals are cost prohibitive, because government agencies often lack adequate funding to maintain operations.<sup>247</sup> Without funds, a statute forcing agencies to build evidence storage facilities or hire additional employees is not feasible.

But technology and systems are in place to store evidence containing biological material,<sup>248</sup> and Indiana can take steps to decrease or eliminate the need to build additional storage facilities. To minimize costs, agencies must reallocate space for evidence from the most serious offenses, maintain purging procedures, and retain “cuttings” of bulky evidence.<sup>249</sup>

Simply put, moving forward is impossible in the absence of uniform practices to store and maintain biological evidence. According to the International Association of Property and Evidence, anecdotally sixty-five to ninety percent of evidence in storage rooms is misdemeanor evidence.<sup>250</sup> If this estimate holds true for Indiana, the State has an option to redirect space.

In addition to implementing evidence room practices to alleviate spatial concerns, by codifying state-wide procedures for evidence retention, Indiana will become eligible for federal funds. A federal grant known as the Postconviction Testing of DNA Evidence Program<sup>251</sup> awards funds to states to “help defray the

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245. Those wrongfully arrested may request removal of their DNA profiles from the database. *Request for Removal from the DNA Database, FAQs, ISP Laboratory Division*, INDIANA.GOV, <https://www.in.gov/isp/labs/2544.htm> [<https://perma.cc/F2R8-7UNA>].

246. Gabrielle A. Sulpizio, *Your Body, Your DNA: Addressing the Constitutionality of Databanked DNA Under the Fourth Amendment*, 10 CHARLESTON L. REV. 417, 443 (2016).

247. CONSIDERATIONS FOR POLICYMAKERS, *supra* note 44, at 11.

248. Telephone Interview with Carl Sobieralski, *supra* note 97 (relaying that the ISP labs retain the vast majority of evidence submitted, either as a whole or a cutting).

249. Other agencies throughout the state should follow the lead of Indiana State Police labs, which continually audit storage rooms to dispose of unnecessary evidence and retain all biological material. INDIANA STATE POLICE LAB. DIV., *supra* note 96.

250. LT. JOSEPH T. LATTI & CHIEF GORDON A. BOWERS, PROPERTY AND EVIDENCE BY THE BOOK 263 (2d ed. 2011).

251. In 2004, Congress passed the Justice for All Act, which adopted the Kirk Bloodsworth Post Conviction DNA Testing Grant Program. Justice for All Act of 2004, Pub. L. No. 108-405, § 412, 118 Stat. 2260, 2284-85 (codified as amended at 34 U.S.C. § 40727 (2018)).

costs of post-conviction DNA testing”<sup>252</sup> and prevent wrongful convictions and the average award is nearly 500,000 dollars.<sup>253</sup>

To qualify for the program, applicants must submit a certification from the chief legal officer of the State, typically the Attorney General, that the State provides access to post-conviction DNA testing and that “reasonable measures are taken by all jurisdictions within the State to preserve [biological] evidence.”<sup>254</sup> Admittedly, a preservation law is not *required* for Attorney Generals to certify. The preservation prerequisite can be met through local ordinances, rules, or regulations, so long as *all* local jurisdictions take “reasonable measures” to preserve biological evidence.<sup>255</sup> At present, almost half of Indiana counties do not have evidence retention standards;<sup>256</sup> consequently, Indiana would not qualify for funding unless SB 263 passes.

Indiana should also encourage local governments with forensic science units to apply for the Paul Coverdell Forensic Sciences Improvements Grants Program,<sup>257</sup> which awards funding aimed “to improve the quality and timeliness of forensic science . . . services in the state,” and “to eliminate a backlog in the analysis of forensic science evidence.”<sup>258</sup> And since 2016, the Judiciary Courts of the State of Indiana, the Indiana Criminal Justice Institute, and the City of Fort Wayne have received a total of six Coverdell awards—over \$1,500,000.<sup>259</sup>

Financial concerns are addressed through best practices; by reallocating storage space and purging inventory, the State avoids the need to build additional storage facilities. Further, adopting statewide evidence retention procedures will allow Indiana to qualify for federal funds.

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252. 34 U.S.C. § 40727 (2018).

253. In 2019, neighboring states with evidence preservation laws were awarded grants: Kentucky Department of Public Advocacy, \$861,650; University of Illinois Springfield, \$304,626; Cook County (Illinois) State’s Attorney’s Office, \$816,325; Michigan Department of Attorney General, \$734,930; and Michigan State Appellate Defender Office, \$165,810. *See FY 2019 Postconviction Testing of DNA Evidence*, BUREAU OF JUSTICE ASSISTANCE, May 6, 2019, <https://bja.ojp.gov/funding/opportunities/bja-2019-15423> [<https://perma.cc/BG8S-9VD3>].

254. U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, POSTCONVICTION TESTING OF DNA EVIDENCE 5, 22 (2019), <https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/NIJ-2019-15423.pdf> [<https://perma.cc/49S2-CBBZ>].

255. *Id.* at 22.

256. *See supra* notes 90-93 (listing the local rules for each county).

257. 34 U.S.C. §§ 10561-10566 (2018).

258. BUREAU OF JUST. ASSISTANCE, PAUL COVERDELL FORENSIC SCIENCE IMPROVEMENT GRANTS PROGRAM – COMPETITIVE, FY 2020 COMPETITIVE GRANT SOLICITATION 5-6 (2020), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/bja-2020-18433.pdf> [<https://perma.cc/K86C-ATWG>].

259. *See Awards, Funding & Awards*, BUREAU OF JUST. ASSISTANCE, OFF. OF JUST. PROGRAMS, U.S. DEP’T OF JUST., [https://bja.ojp.gov/funding/awards/list?field\\_award\\_status\\_value=All&state=IN&field\\_funding\\_type\\_value=All&fiscal\\_year=&combine\\_awards=Coverdell&awardee=&city=](https://bja.ojp.gov/funding/awards/list?field_award_status_value=All&state=IN&field_funding_type_value=All&fiscal_year=&combine_awards=Coverdell&awardee=&city=) [<https://perma.cc/QA39-WAAH>].

### C. Absence of Unity in the Criminal Justice System

Potential funding aside, will executing uniform procedures be impracticable? Despite fragmentation in the criminal justice system, Indiana agencies have previously collaborated to advance public policies and could do the same in implementing DNA evidence practices.<sup>260</sup>

For example, in 2017, Chief Justice Loretta Rush of the Indiana Supreme Court co-founded the National Judicial Opioid Task Force in reaction to the opioid crisis.<sup>261</sup> In 2019, the task force issued a report delivering policy recommendations to state governments, highlighting the court system's responsibility to bring together "government agencies and community stakeholders to address the opioid epidemic and [its] causes."<sup>262</sup> The Indiana judiciary's response to the opioid epidemic shows that the courts are willing and able to work with the other branches to address issues that taint the credibility of the criminal justice system. A similar approach can be taken in response to antiquated evidence retention procedures destined to thwart justice.

### D. Judicial Economy: "Flooding" the Courts

Finally, critics will assert that reducing the prima facie showing in the DNA testing statute is unwarranted because the petitioners already "had their day in court." Will a decreased burden of proof open the floodgates for post-conviction cases and strain public resources?

The possibility of new claims is not a worthy excuse for the use of ill-defined procedures that yield preventable mistakes. Implementing uniform evidence procedures will promote equity in the criminal justice system by providing Hoosiers the opportunity to solve cold cases and prove innocence. At any rate, DNA testing is dependent on evidence retention. Assuming that evidence can be located, convicted persons that were never able to test evidence should be given the chance.<sup>263</sup> Additionally, DNA analysis has become increasingly accurate in the past fifteen years.<sup>264</sup> Thus, retesting evidence that produced inconclusive results many years ago is merited.

Because much of the DNA evidence from past convictions has either been

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260. For example, the Records Management Committee supervised the Language Access Task Force. See Order Amending Administrative Rule 4, No. 19S-MS-41 (Ind. Apr. 29, 2019), <https://www.in.gov/judiciary/files/order-rules-2019-admin4.pdf> [<https://perma.cc/8SN2-YZ33>].

261. NATIONAL JUDICIAL OPIOID TASK FORCE, CONVENING, COLLABORATING, CONNECTING: COURTS AS LEADERS IN THE CRISIS OF ADDICTION 5 (2019), [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0018/15840/njotf\\_final\\_report\\_111819.pdf](https://www.ncsc.org/__data/assets/pdf_file/0018/15840/njotf_final_report_111819.pdf) [<https://perma.cc/938L-RTDD>].

262. *Id.* at 4.

263. The *Teague v. Lane* standard for the retroactivity of procedural rules to final convictions is inapplicable because this Note proposes a statute. 489 U.S. 288 (1989).

264. Mary May, *Next Generation Forensics: Changing the role DNA plays in the justice system*, HARV. U.: SCIENCE IN THE NEWS (Nov. 9, 2018), <http://sitn.hms.harvard.edu/flash/2018/next-generation-forensics-changing-role-dna-plays-justice-system/> [<https://perma.cc/4XSG-S462>].

routinely destroyed or has already been tested, it is unlikely that the proposed statute's application will cause a "flood" of petitions. In large part, this proposal is a preventative measure to protect future claims and to "promote discovery of the truth."<sup>265</sup> Though it may not be feasible to right the injustices of each person whose evidence has been mishandled or destroyed, Indiana should nevertheless offer the benefits of the proposed statute to those already convicted.

#### CONCLUSION

*Osborne* left the individual states to define the contours of evidence access for post-conviction litigants.<sup>266</sup> But with the rise in media coverage on wrongful convictions,<sup>267</sup> the Supreme Court again may be inclined to address post-conviction relief issues through a federal due process lens. Until then, Indiana should keep pace with the procedural safeguards adopted by other states. To shield victims and prevent wrongfully convictions, Indiana should embrace the components outlined in this Note.

Fortunately, the evidence in William Barnhouse's case was preserved and the prosecutor consented to DNA testing.<sup>268</sup> But not all post-conviction litigants fare the same in a system characterized by law enforcement discretion.<sup>269</sup> Indiana's lack of evidence preservation procedures to date is inconsistent with the intent of the legislature to provide persons alleging wrongful convictions, upon a showing of certain criteria, with a chance to be exonerated through post-conviction DNA testing.<sup>270</sup> Without appropriate DNA evidence legislation in Indiana, the possibility remains that wrongly convicted persons, whose exoneration can be attained through DNA analysis, will be without an adequate opportunity for post-conviction relief.

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265. *Bedolla v. State*, 123 N.E.3d 661, 667 (Ind. 2019) (internal citation omitted).

266. *Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52 (2009).

267. *See, e.g.*, *THE CENTRAL PARK FIVE* (Sundance Selects 2012); *MAKING A MURDERER* (Netflix 2015); *13TH* (Netflix 2016); *BRIAN BANKS* (Hulu 2018); *THE INNOCENT MAN* (Netflix 2018); *TRIAL BY FIRE* (Hulu 2018); *WHEN THEY SEE US* (Netflix 2019); *JUST MERCY* (Warner Bros. Pictures 2019); *THE INNOCENCE FILES* (Netflix 2020); *TRIAL 4* (Netflix 2020).

268. E-mail Interview with Eric Hoffman, *supra* note 12.

269. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 526 (2001).

270. IND. CODE §§ 35-38-7-1 to 7-19 (2021); *Lacey v. State*, 829 N.E.2d 518, 520 (Ind. 2005).