COMMENT

THE REJECTION OF "GOOD FAITH" RIGHTS VIOLATIONS: THE CASE FOR A NEGLIGENT STANDARD IN DEATH PENALTY SPOLIATION ISSUES*

ABSTRACT

This Comment seeks to show the deficiencies of the *Youngblood* bad faith doctrine, particularly when applied to death row cases. Then it proposes a new method for dealing with spoliation issues in death penalty cases that introduces a negligent standard that can provide relief for many inmates as compared to the current small number that are successful under the current bad faith analysis. To accomplish these goals, this Comment examines the facts of *Youngblood*, how the opinion set current law, how it has been largely applied on the federal and state levels with a heavy focus on Texas law, and then starts looking at possible alternatives. Lastly, this Comment recommends a two-part test for death penalty cases that can help alleviate at least some of the issues that have arisen out of the *Youngblood* decision and the resulting bad faith doctrine.

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I. INTRODUCTION

Robert Pruett spent every day of his life in prison since he was fifteen years old.[1] He grew up poor—frequently evicted from trailer parks and motels.[2] His siblings were molested and raped.[3] His drug addiction started at the age of five "when he was offered a huff of gasoline."[4] At the age of fifteen, he was convicted as an accomplice for a murder his father actually committed.[5] He consequently received a sentence of ninety-nine years in prison.[6] A court later sentenced him to death for the 1999 murder of a correctional facility officer all while he proclaimed his innocence.[7]

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1. Nathan J. Robinson, *The Autobiography of Robert Pruett*, CURRENT AFF. (Oct. 9, 2017), https://www.currentaffairs.org/2017/10/the-autobiography-of-robert-pruett [https://perma.cc/P8M3-RGQU].

2. Zaid Jilani, *As Texas Prepares to Kill Robert Pruett, He Leaves Behind a Literary Indictment of Us All*, INTERCEPT (Oct. 10, 2017), https://theintercept.com/2017/10/10/as-texas-prepares-to-kill-robert-pruett-he-leaves-behind-a-literary-indictment-of-us-all/ [https://perma.cc/RX2J-XD5W]. Numerous studies describe socioeconomic status as a "consistent and reliable predictor of a vast array of outcomes," including "exposure to violence." This finding could indicate sentencing someone to death for crimes they committed because they were set on a predetermined path by their environment has no societal merit. *Violence & Socioeconomic Status*, AM. PSYCHOL. ASS'N, https://www.apa.org/pi/ses/resources/publications/violence.aspx (last visited Mar. 5, 2019).

3. Jilani, *supra* note 2.

4. *Id.*

5. Robinson, *supra* note 1.

6. *Id.*

7. Jolie McCullough, *Texas Executes Robert Pruett, Who Insisted on Innocence in*

In 2015, a court granted his motion to test parts of the murder weapon that were not originally tested to possibly find exculpatory DNA evidence.[8] A partial female DNA profile was found on the weapon.[9] That new profile was either not found or was not there before trial.[10] The State argued that the weapon was not held securely by the Bee County Courthouse and was easily accessible for people to have touched it without gloves.[11]

In a BBC documentary over the case and Pruett's defense team, the murder weapon briefly appears falling out of a brown paper bag that the courthouse secured and apparently normally handled in that manner.[12] The evidence was in the possession and care of the State. The fact that they did not hold it securely benefitted the State's legal position in the case and harmed any potential exculpatory value for the inmate. His lawyer, David Dow, argued that "[e]ven if there were contamination, that conclusion would only demonstrate that the State had violated another provision of state law by failing to ensure the weapon is properly preserved."[13] The appeal was denied, and no relief was granted.[14] The State executed Robert Lynn Pruett on October 12, 2017, with no actual answer as to whose DNA profile was on the

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Prison Guard's Murder, TEX. TRIB. (Oct. 12, 2017), https://www.texastribune.org/2017/10/12/texas-executes-robert-pruett-who-insisted-innocence-prison-guards-murd [https://perma.cc/PAN8-EWKS].

8. Pruett v. State, No. AP-77,065, 2017 WL 1245431, at *3, *5 (Tex. Crim. App. Apr. 5, 2017) (not designated for publication).

9. McCullough, *supra* note 7.

10. *Pruett*, 2017 WL 1245431, at *6–7. The forensic scientist, who performed both DNA tests, provided testimony during the appeals process that may contradict earlier testimony from trial. Her original trial testimony and Pruett's motion for new testing both indicated that the adhesive tape location on the murder weapon was never tested. *Id.* at *3, *6. For this appeal, the forensic scientist claimed she had swabbed the entire weapon before trial, and thus the new profile could not have been there originally. *Id.* at *7. In 2018, parties sought dismissal of roughly 30,000 drug convictions tainted by crime lab chemists; their bad faith was readily apparent, but negligent handling of DNA evidence can still produce similar results and the justice system needs to be aware of that. *See* Matthew Segal & Daniel Marx, *30,000 Tainted Convictions, One Path Forward*, ACLU (Jan. 8, 2018, 10:15 AM), https://www.aclu.org/blog/criminal-law-reform/30000-tainted-convictions-one-path-forward [https://perma.cc/6EY2-DYX3].

11. *Pruett*, 2017 WL 1245431, at *7–8.

12. *See Life and Death Row, Series 1, Crisis Stage*, 6:16–6:40 (BBC Three television broadcast Mar. 31, 2014), https://vimeo.com/118837945 [https://perma.cc/J4GW-NSS7] (showing Pruett's student attorney handling case evidence given to her by the court).

13. Jolie McCullough, *Days from Execution, Man Convicted in Prison Guard's Murder Insists on Innocence*, TEX. TRIB. (Oct. 10, 2017), https://www.texastribune.org/2017/10/10/days-execution-man-convicted-prison-guards-murder-insists-innocence [https://perma.cc/QR5P-DAHW].

14. *Pruett*, 2017 WL 1245431, at *14.

murder weapon.[15] If the DNA profile matched one of the known women on the documentary or defense teams, that could have been tested to help provide at least part of an answer.

In this Comment, I examine the failures of applying *Arizona v. Youngblood*[16] to death penalty cases and offer a two-part method of analysis that might better protect inmates' constitutional rights. The Comment proceeds as follows. Part II examines *Youngblood*, its history, its inherent barriers to obtaining relief, and why it particularly fails when applied to death penalty cases. Part III illustrates how Texas law has developed in the wake of *Youngblood* within the realm of post-conviction DNA testing and the State's evidence handling requirements. Part IV argues that the bad faith standard is inadequate and that a negligence standard should be adopted in place of *Youngblood* generally. Part V lays out the argument that imposing the death penalty requires a higher standard than life imprisonment and examines the holdings and dicta of several Supreme Court cases. Part VI introduces a two-part test for death penalty cases that can help alleviate at least some of the issues that have arisen out of the *Youngblood* decision and the resulting bad faith doctrine. Part VII concludes the Comment.

II. *YOUNGBLOOD* AND THE BAD FAITH STANDARD

A. The Background and History of Youngblood

In 1985, Larry Youngblood was convicted of kidnapping, sexual assault, and child molestation.[17] The Arizona Court of Appeals originally reversed the conviction on due process grounds, making a point to clarify that it was not accusing the State of bad faith or ill intent, but that "the dismissal [was] necessary . . . to avoid an unfair trial . . . ."[18] Yet when the case went to the

15. McCullough, *supra* note 7.

16. 488 U.S. 51 (1988).

17. *Larry Youngblood*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/larry-youngblood [https://perma.cc/GCG8-YR5X] (last visited Apr. 16, 2019) (noting he was convicted "largely on the eyewitness identification" by the ten-year-old victim and by the fact that the actual perpetrator had a similarly bad left eye); *see also* Marc Bookman, *Does an Innocent Man Have the Right to be Exonerated?*, ATLANTIC (Dec. 6, 2014), https://www.theatlantic.com/national/archive/2014/12/does-an-innocent-man-have-the-right-to-be-exonerated/383343 [https://perma.cc/QZR2-BHA8] (describing the difficulties of eyewitness identification and quoting Youngblood who said, "Any black man with a bad eye would have been found guilty . . . .").

18. State v. Youngblood, 734 P.2d 592, 596–97 (Ariz. Ct. App. 1986) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)) (holding that when the police recover a sample, "the

Supreme Court, the Court reversed the dismissal and reinstated Youngblood's conviction.[19] Youngblood's primary complaint was that the police department failed to properly refrigerate the victim's confiscated clothing, ruining any chance of a DNA test finding exculpatory evidence.[20] The Court stated that the police's failure "[could] at worst be described as negligent."[21] However, the Court upheld the conviction and stated that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[22] *Youngblood*'s bad faith standard is the precedent upon which all federal DNA evidence spoliation cases rest.[23] *Youngblood* remains good law to this day, which is remarkable considering that DNA testing was invented after the original trial and only a year or so before the Supreme Court issued their opinion.[24] Negligent spoliation is explicitly not a due process violation, but courts can still impose sanctions, typically by way of jury instructions.[25]

Youngblood's story was not over there, however. DNA testing greatly improved by 2000, so he finally successfully tested the deteriorated evidence and proved his innocence—sixteen years later.[26] To add insult to injury, he "had to sign releases agreeing not to sue" and "would not be compensated for his years of wrongful incarceration."[27] Not only did Youngblood have to suffer through the negligent tampering of evidence that could have exonerated him years sooner, but he was also refused an apology or admittance of being wrong by the justice system that kept him

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authorities must take reasonable measures to adequately preserve this evidence"), *rev'd*, 488 U.S. 51 (1988).

19. *Youngblood*, 488 U.S. at 58–59; Bookman, *supra* note 17.

20. *Youngblood*, 488 U.S. at 53, 58 (describing the collection of the evidence and how the collected clothing "was not refrigerated or frozen").

21. *Id.* at 58.

22. *Id.*

23. *See* Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893, 2903–04 (2009) (explaining *Youngblood*'s significance in post-conviction DNA testing cases).

24. *See id.* ("[T]he vitality of the Court's holding in *Youngblood* was reaffirmed by the Court in *Illinois v. Fisher*. . . . The implications of *Youngblood* and *Fisher* are dire in the area of postconviction DNA testing." (footnote omitted) (citing Illinois v. Fisher, 540 U.S. 544, 547–49 (2004))); *see also infra* note 46 and accompanying text.

25. *See* David J. Kessler, *Spoliation in Capital Post-Conviction Proceedings: Theory of Spoliation in Habeas Corpus – Part 1*, CHAMPION, Nov. 2005, at 14, 14; *see also* Jones, *supra* note 23, at 2907–08 (noting that adverse jury instructions are one of several types of court-imposed sanctions).

26. Bookman, *supra* note 17.

27. *Id.*

falsely imprisoned.[28]

In his dissent in *Youngblood*, Justice Blackmun argued, "The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial."[29] If the majority opinion had adopted that aim, Youngblood would not have been "denied the opportunity to present a full defense" by "nothing more than police ineptitude."[30] Instead, defendants must now prove bad faith in the spoliation of evidence, leaving authorities with no constitutional requirement to "use due diligence to preserve evidence."[31] This doctrine, as laid out originally in *Youngblood*, ironically rests "on the shoulders of an innocent man,"[32] which has led to much criticism, including being called one of the worst judicial decisions of modern times.[33] The prosecution refused to acknowledge any wrongdoing when it moved to have his conviction set aside.[34] In its motion, the prosecution noted that "the State is not conceding that the defendant was wrongly arrested" and that "[a] jury duly convicted Defendant of the charges."[35]

B. The Bad Faith Standard, Explained

After examining the facts of *Youngblood*, let us delve deeper into the bad faith standard, what it is, and how it is actually applied. "It's frightening how easy it is to convict an innocent person in this country . . . . And it's overwhelmingly difficult to release an innocent person."[36] The *Youngblood* doctrine is a large reason for that overwhelming difficulty. Proving bad faith has created an almost functionally impossible burden except in the

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28. *Id.*

29. Arizona v. Youngblood, 488 U.S. 51, 61 (1988) (Blackmun, J., dissenting).

30. *Id.*

31. Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG. L. REV. 639, 646 (2001).

32. *Id.*

33. *See* Susan Greene & Miles Moffeit, *Bad Faith Difficult to Prove*, DENVER POST (July 20, 2007), http://www.denverpost.com/2007/07/20/bad-faith-difficult-to-prove [https://perma.cc/C89K-5J5J] (quoting a forensic scientist who referred to *Youngblood* as "the Dred Scott decision of modern times"); *see also* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 768–71 (1999) (examining aspects of the *Youngblood* decision critically).

34. Bookman, *supra* note 17.

35. *Id.*

36. Noah Remnick, *Brooklyn Man Is Exonerated After 25 Years in Prison for Murder*, N.Y. TIMES (Mar. 10, 2016), https://www.nytimes.com/2016/03/11/nyregion/brooklyn-man-is-exonerated-after-25-years-in-prison-for-murder.html [https://perma.cc/74LZ-4E63] (quoting Seema Saifee, a staff attorney at the Innocence Project).

most egregious examples of police and government misdeeds.[37] As of August 2006, courts found that defendants met the bad faith standard in only 7 of 1,675 published cases citing *Youngblood*.[38] Part of that result stems from the fact that the Court's definition of bad faith is ambiguous.[39] The Court did not explicitly define bad faith in *Youngblood*—only that bad faith does not include negligence.[40] However, the Court explained that "[t]he presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."[41] Thus, the inmate must prove not only intent to destroy the evidence but specific intent to spoil possible exculpatory evidence.[42] In other words, the destroyed evidence must shout "Save me!" to prove its exculpatory nature before its destruction becomes a due process violation under *Youngblood*.[43]

C. Why Youngblood *Fails Death Penalty Cases*

Youngblood is the principal case for spoliation issues in all criminal cases, including death penalty cases, despite Youngblood ultimately being exonerated of the crime.[44] There are, however, multiple reasons why *Youngblood* should be distinguished from and not applied directly to death penalty cases. First, it was not a

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37. *See* Teresa N. Chen, *The* Youngblood *Success Stories: Overcoming the "Bad Faith" Destruction of Evidence Standard*, 109 W. VA. L. REV. 421, 456 (2007) (observing that the *Youngblood* bad faith standard "is a difficult standard to satisfy" except in a minority of cases).

38. *Id.* at 422 & n.7.

39. *See Developments in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1566 (1995) [hereinafter *Confronting the Challenges*] (pointing out the lack of clarity provided in *Youngblood* regarding what "bad faith" means).

40. *See* Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (finding no evidence of bad faith despite the police's negligence).

41. *Id.* at 57 n.*.

42. *See* Henning, *supra* note 33, at 769 (explaining that bad faith requires a showing of exculpatory evidence from which a court can infer the government knew of its use as a defense). The court in *Lovitt v. True* found that there was "a serious error in judgment in destroying the evidence." Lovitt v. True, 403 F.3d 171, 187 (4th Cir. 2005). However, the court held that the error "cannot be attributed to the police or prosecution, and there is certainly no evidence that the prosecutors did away with anything in an attempt to prevail or foreclose further judicial review." *Id.*

43. Henning, *supra* note 33, at 769.

44. *See* Norman C. Bay, *Old Blood, Bad Blood, and* Youngblood*: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 309 (2008); *see also* Bookman, *supra* note 17 (quoting Youngblood's lawyer as saying it was "astounding" the Court still relied on *Youngblood* because "so many people have been cleared with DNA evidence since then").

death penalty case, and the Supreme Court has ruled that death penalty cases are "different" and require a higher showing of reliability to carry out the sentence.[45] Second, *Youngblood* is a case from the 1980s, and DNA testing and forensic science have dramatically improved since then.[46] Finally, precedent should be weakened, or at the very least reexamined, when the convicted person in the principal case was ultimately found innocent decades later.[47] It is hard to find value in a standard that allowed an innocent person to remain in prison, especially in light of the technologically advanced DNA testing of today.

It is true that "[b]ad facts do not always result in bad law," and the doctrine is defensible even though Youngblood himself was found innocent.[48] However, this argument is weakened by the fact that *Youngblood* was decided at the very dawn of DNA testing. The Court, despite access to drastically improved forensic science, has essentially "refused to 'leap ahead' into a more scientific age, to fundamentally change the trial system by making DNA testing into a constitutional right."[49] The Court did acknowledge that the criminal justice system, "like any human endeavor, cannot be perfect," and how "DNA evidence shows that it has not been."[50] This apparent hesitation to embrace factual and peer-reviewed science is a problem that seems endemic to the justice system, largely occupied by people with little to no background in science.[51] Nevertheless, judges do not hesitate to apply scientific evidence from the prosecution—even when it turns out to be junk science.[52]

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45. *See generally Youngblood*, 488 U.S. 51; *see also infra* notes 116–17 and accompanying text.

46. Bay, *supra* note 44, at 279 (discussing how DNA typing did not exist when the case was decided and how new developments have "been nothing short of extraordinary").

47. *See supra* note 26 and accompanying text.

48. Bay, *supra* note 44, at 297–300 (listing reasons in defense of *Youngblood*).

49. Bookman, *supra* note 17.

50. Dist. Attorney's Office v. Osborne, 557 U.S. 52, 75 (2009); *see also* Bookman, *supra* note 17 (noting that this "brief admission of fallibility was as close as the U.S. Supreme Court ever came to acknowledging Youngblood's innocence").

51. *See* Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert *World*, 25 LAW & HUM. BEHAV. 433, 444–47 (2001) (describing a survey that found most judges lacked a scientific understanding of falsifiability).

52. Erin Murphy, *Neuroscience and the Civil/Criminal* Daubert *Divide*, 85 FORDHAM L. REV. 619, 624 (2016); Adam B. Shniderman, *Prosecutors Respond to Calls for Forensic Science Reform: More Sharks in Dirty Water*, 126 YALE L.J.F. 348, 353–54, 356 (2017); NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 106 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf [https://perma.cc/5NB6-HQAB] (observing that "forensic science evidence is not routinely scrutinized pursuant to the standard of reliability" required).

Post-conviction DNA testing access laws, which arose after the rise of DNA exonerations, mostly focus on the most reliable form of forensic science, single-source or simple mixture DNA analysis.[53] However, if evidence is lost or spoiled, the inmate must turn to other ways to prove their innocence, from scientific disciplines with "serious flaws" or reliance on a judge to issue a rare spoliation sanction in the inmate's favor.[54] As Teresa N. Chen remarked about her past work experience at the Innocence Project: "[T]here was nothing more heart-breaking than the cases where I believed that the client was innocent but could not find the DNA evidence to support that claim."[55] Surely this must be more frustrating when you know the evidence existed at one time but the State lost or tampered with it while they were supposed to have been safeguarding it in the name of justice.

D. The Impossibly High Bar of Proving Bad Faith

As of August 2006, in 1,675 published cases citing *Youngblood*, bad faith was found in only 7.[56] *Youngblood* itself does not expressly define "bad faith."[57] The Court does, however, list two criteria that must be met in order to find bad faith. First, the police must "by their conduct indicate that the evidence could form a basis for exonerating the defendant."[58] Second, bad faith "must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."[59] This means that the defendant must prove the police or state actor knew that the evidence could be exculpatory in nature, and that they knew this when the evidence was lost or destroyed. The Court explicitly rules out negligence from falling under the bad faith standard.[60] Negligent spoliation thus typically offers no relief for inmates already convicted.[61] Furthermore, a strong correlation exists between a high level of publicity and the

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53. *See* PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 25–26, 69–73 (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [https://perma.cc/XDS7-QMPL].

54. *Id.* at 126; *see also supra* note 25 and accompanying text.

55. Chen, *supra* note 37, at 422 (footnote omitted).

56. *See supra* note 38 and accompanying text.

57. *See supra* notes 39–40 and accompanying text.

58. Arizona v. Youngblood, 488 U.S. 51, 58 (1988).

59. *Id.* at 57 n.*.

60. *See id.* at 58 (stating the police's failure "can at worst be described as negligent").

61. *See infra* notes 91–101 and accompanying text.

few cases in which bad faith was found.[62] That external factor should have no statistical correlation with the level of scrutiny applied to the State's actions, but the successful cases factually mirror many of the thousands of cases in which no relief was granted.[63]

As these facts illustrate, *Youngblood* should be overturned. Critics have decried it since the opinion was first announced,[64] and criticism has increased as science has improved and the effects of *Youngblood* on the criminal justice system have become apparent.[65] While the use of junk science has led to false convictions, increased use of reliable forensic methods has generally improved the criminal justice system; however, it simply cannot solve all of the issues inherent in the system.[66] These shortcomings are what led Justice Blackmun to famously declare that he would no longer "tinker with the machinery of death."[67] He further noted that "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."[68] "[F]actual, legal, and moral error" is inevitable in the criminal justice system, and thus innocent people will be sentenced to death.[69] Yet, *Youngblood*

62. *See* Chen, *supra* note 37, at 441–43 (analyzing the role of publicity in helping a defendant win his case).

63. Chen notes that the "successful cases are not so different from cases with similar facts or reasoning that were unsuccessful in establishing bad faith." *Id.* at 426. In fact, "[e]ach successful case [in her article] is juxtaposed with a factually similar case" to highlight this issue. *Id.*

64. *Recent Developments*, 24 HARV. C.R-C.L. L. REV. 529, 529 (1989) (describing the bad faith standard as "both theoretically unsound and a serious erosion of protections for criminal defendants"); Bookman, *supra* note 17; *see also supra* note 33 and accompanying text (noting criticism of *Youngblood*).

65. *See* Bay, *supra* note 44, at 279–83 (detailing various advances in DNA typing technologies since the *Youngblood* decision); *see also infra* notes 78–79 (showing the need for post-conviction access to DNA testing in exonerating those wrongfully convicted).

66. *See supra* notes 52–53 and accompanying text; *see also infra* note 154 and accompanying text (discussing the Supreme Court's inaction in revisiting *Youngblood*).

67. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

68. *Id.*

69. *Id.* at 1145–46. *But see id.* at 1142–43 (Scalia, J., concurring) (criticizing Blackmun's dissent by referencing a prior case of a brutal rape and murder in which Blackmun did not dissent). Scalia's criticism refers to the case of McCollum, who was ultimately exonerated after serving 30 years by using post-conviction DNA testing; even examples of horrible crimes that may deserve the death penalty can demonstrate the fallibility of the justice system. Bookman, *supra* note 17; *see also Exoneration Detail List*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx [https://perma.cc/ANT4-QSPU] (last visited Apr. 16, 2019) (listing exonerations from around the nation including that of McCollum).

shows no signs of being overturned or narrowed.[70]

Instead, this Comment argues for a narrow exception: to further distinguish death penalty cases and follow *Youngblood*'s holding, while respecting the Supreme Court's holding that the death penalty is unique and requires a higher bar of certainty.[71] If *Youngblood* shows no signs of being overturned, then we need to find another way to encourage equity in the adjudication of death penalty cases. By creating a finer distinction, courts may administer capital punishment more fairly without drastically changing the status quo.

III. TEXAS'S POST-CONVICTION DNA TESTING STATUTES AND REQUIREMENTS

Having examined the bad faith doctrine and its application, let us take a closer look at how Texas has handled post-conviction DNA testing issues in its application of the bad faith standard and spoliation.

A. Chapter 64: The Right to Post-Conviction DNA Testing

The first DNA exoneration was in 1989.[72] Since then, there have been 365 DNA exonerations nationwide and 53 in Texas.[73] In 2001, as the Texas legislature considered creating a right to post-conviction DNA testing, 103 convictions had been overturned by post-conviction DNA testing, 11 of which faced death sentences.[74] In 2014, a Department of Justice study "found that the conviction or sentence was overturned at some stage of review in 2,671 of the 8,466 cases in which a death sentence was imposed in the United States between 1973 and 2013," a rate of 31.5%.[75] In

70. The Supreme Court cited *Youngblood* in 2009 and 2011 but avoided overturning it. *See* Connick v. Thompson, 563 U.S. 51, 77–78 (2011) (Scalia, J., concurring) (noting that "[p]erhaps one day we will recognize a distinction between good-faith failures to preserve from destruction evidence . . . and good-faith failures to turn such evidence over to the defense"); *see also* Dist. Attorney's Office v. Osborne, 557 U.S. 52, 74 (2009) (contemplating the difficulties in "decid[ing] if there is a constitutional obligation to preserve forensic evidence that might later be tested"); Bay, *supra* note 44, at 297 (pointing out that while ten states have rejected *Youngblood* under their constitutions, "most states have reached a contrary result" by adopting it).

71. *See infra* note 116 and accompanying text.

72. *Exoneration Detail List*, *supra* note 69 (filtered by date).

73. *Id.* (filtered for DNA exonerations, filtered for state, organized by date).

74. *Id.* (filtered for DNA exonerations, filtered by sentence, organized by date); *see infra* notes 78–79 and accompanying text.

75. Brief for Nat'l Ass'n of Criminal Def. Lawyers & Am. Civil Liberties Union as Amici Curiae Supporting Petitioner at 10, Davila v. Davis, 137 S. Ct. 2058 (2017) (No. 16-

Texas, specifically, 194 out of 1,075 death penalty cases were overturned.[76] Given the seriousness of sentencing someone to death, the error rate needs to be as close to zero as possible; in fact, anything above zero might be unacceptable.[77]

In 2001, Governor Rick Perry, as a result of DNA testing, issued his first pardon to a wrongfully-convicted man.[78] Concerned by the possibility of wrongful convictions, the Texas legislature passed into law S.B. 3; this law created a statutory procedure for requesting post-conviction DNA testing.[79] Chapter 64 of the Texas Code of Criminal Procedure (Code), codified by S.B. 3, was enacted in large part because "DNA advancements have made the use of DNA more precise for identification purposes, and therefore the use of postconviction DNA testing can increase the ability to prevent wrongful convictions."[80] Senator Robert Duncan, a Republican who introduced the bill, stated: "[T]he goal is certainly worth the cost, even for the most conservative staunch criminal justice advocates . . . . Those [conservatives] certainly can't disagree that our system fails if we are convicting innocent people."[81] Governor Rick Perry declared S.B. 3's passage an emergency in light of his first pardon.[82]

B. Texas's Requirements for Evidence Storage

Texas protects the right created in Chapter 64's access to post-conviction DNA testing by providing storage and maintenance programs, but the resource is underutilized. Article 64 of the Code defines "biological material" as "an item that is in possession of the

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6219) (citing TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2013 – STATISTICAL TABLES 19 tbl.16 (2014)), https://www.bjs.gov/content/pub/pdf/cp13st.pdf [https://perma.cc/UH4L-CV77].

76. *Id.* at 10 n.4.

77. *See supra* note 66 and accompanying text (arguing that more than science is needed to solve issues within the criminal justice system).

78. *Perry Declares DNA Bill on Capitol Fast Track,* HOUS. CHRON. (Feb. 9, 2001, 6:30 AM), http://www.chron.com/news/houston-texas/article/State-briefs-2002676.php [https://perma.cc/6EXM-44NM?type=image] [hereinafter *Perry Declares Bill on Fast Track*] (noting that the man, David Shawn Pope, faced conviction in 1986 and was serving a forty-five-year sentence).

79. *See* H. COMM. CRIM. JURIS., BILL ANALYSIS, Tex. S.B. 3, 77th Leg., R.S. (2001).

80. TEX. CODE CRIM. PRO. ANN. art. 64.01; H. COMM. CRIM. JURIS., BILL ANALYSIS, Tex. S.B. 3, 77th Leg., R.S. (2001).

81. *See* John Council, *Convicts and the Code*, TRUTH JUST. (Nov. 13, 2001), http://truthinjustice.org/texas-dna.htm [https://perma.cc/6DCB-V9WK] (providing Senator Duncan's insight into the purpose of the bill); *Perry Declares Bill on Fast Track*, *supra* note 78.

82. *See Perry Declares Bill on Fast Track*, *supra* note 78.

state and that contains blood, semen, hair, saliva, skin tissue or cells, fingernail scrapings, bone, bodily fluids, or other identifiable biological evidence that may be suitable for forensic DNA testing."[83] Article 38—relating to collection and storage requirements—defines "biological evidence" synonymously.[84] The Texas Department of Public Safety (DPS) has published a document detailing the best practices for collecting, packaging, storing, preserving, and retrieving biological evidence.[85] The Code requires that all biological evidence in capital murder convictions be retained and preserved "until the inmate is executed, dies, or is released on parole . . . ."[86] To help incentivize compliance and reduce costs for smaller and poorer counties, DPS allows counties with a population under 100,000 to "deliver biological evidence to the Texas Department of Public Safety for storage" on their behalf.[87] In fact, DPS expressly intends to store evidence long-term after conviction.[88] Local storage of biological evidence is only recommended for smaller counties "until cases are adjudicated, so that the evidence is available for the pending trial."[89] This measure helps alleviate budgeting and storage concerns. Despite the availability of semi-permanent storage, loss of evidence is effectively excusable for good faith spoliation of evidence.[90] If central storage was required by law and enforced with a good faith standard of spoliation by the courts, more counties would make use of the program and less evidence would be discarded, lost, or rendered useless.

Justice Stevens, in his *Youngblood* concurrence, referenced a similar incentive: "[E]ven without a prophylactic sanction such as dismissal of the indictment, the State has a strong incentive to preserve the evidence."[91] Justice Stevens's statement seems to be

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83. TEX. CODE CRIM. PRO. ANN. art. 64.01(a)(1).

84. Two different terms are used to refer to functionally the same thing in two different articles of the Texas Code. TEX. CODE CRIM. PRO. ANN. art. 38.43(a)(2).

85. TEX. DEP'T OF PUB. SAFETY, BEST PRACTICES FOR COLLECTION, PACKAGING, STORAGE, PRESERVATION, AND RETRIEVAL OF BIOLOGICAL EVIDENCE (2012), https://www.crime-scene-investigator.net/collection-packaging-storage-preservation-and-retrieval-of-biological-evidence-TX-2012.pdf [https://perma.cc/W7EH-APAM].

86. TEX. CODE CRIM. PRO. ANN. art. 38.43(c)(2)(A); *see also* TEX. DEP'T OF PUB. SAFETY, *supra* note 85, at 6 (providing the retention and preservation schedule within article 38.43).

87. *See* TEX. DEP'T OF PUB. SAFETY, *supra* note 85, at 5.

88. *Id.*

89. *Id.* at 5–6.

90. *See, e.g.*, *infra* note 137 (discussing the story of a man whose retrial lacked any of the physical evidence from his original trial).

91. Arizona v. Youngblood, 488 U.S. 51, 59 (1988) (Stevens, J., concurring).

a commonly held belief.[92] Despite that sentiment and despite these statutes, guidelines, and incentives, prosecutors and police departments continuously lose, throw away, or negligently spoil post-conviction evidence.[93] These occurrences are in large part due to a lack of adequate relief for the defendant and a lack of an appropriate punishment for the party that damages the evidence.[94] Most sanctions stem from state laws and constitutions[95] because *Youngblood* holds that spoliation of evidence is not normally a constitutional due process violation without proof of bad faith.[96] Spoliation sanctions are typically imposed during the trial phase and range from suppression of evidence, jury instructions for an adverse inference against the prosecutor, to tossing the case entirely.[97] However, there are fewer available sanctions post-conviction, and they are typically only available if the destruction of evidence was intentional.[98] Even then, judges are usually "warned to avoid, if possible, imposing sanctions that have a fundamental impact on the outcome of the litigation."[99]

Another problem with Texas's Chapter 64 post-conviction DNA testing statute is that it lacks teeth. Before an inmate is allowed to have their evidence retested, a court must find that the evidence "has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect."[100] The statute makes no attempt to give that requirement teeth, therefore providing no

92. *See infra* notes 133–37 (addressing the difficulties in conducting new trials with lost or tampered evidence).

93. *See* Greene & Moffeit, *supra* note 33 (discussing one of 141 prisoners whose "bids for freedom have stalled because officials lost or destroyed DNA"); *see also Confronting the Challenges*, *supra* note 39, at 1575 (explaining that prosecutors may feel pressured to destroy evidence after the appeals process ends).

94. *See* Bay, *supra* note 44, at 270–72 (noting the high standards that must be met to receive any remedies or sanctions).

95. *See id.* at 246–47 (recognizing that forty-three states have passed innocence protection acts and that ten state supreme courts have rejected the bad faith standard under their state constitutions); *see also* Jones, *supra* note 23, at 2898 (explaining that innocence protection laws grant courts broad sanctioning powers).

96. *See Youngblood*, 488 U.S. at 58.

97. Kessler, *supra* note 25, at 16; *see, e.g.*, Jones, *supra* note 23, at 2898 n.23 (collecting statutes from various states).

98. *See* Jones, *supra* note 23, at 2944, 2946 (explaining that the three post-conviction sanctions available to the court include: (1) sentence reduction, (2) new trial, or (3) dismissal); *id.* at 2944 ("[A] reviewing court could find that a sanction was warranted . . . because the wrongful destruction of evidence by the government was intentional . . . .").

99. *Id.* at 2945–46.

100. TEX. CODE CRIM. PRO. ANN. art. 64.03(a)(1)(A)(ii).

incentive for state officials to keep the evidence safe and secure. Instead of being used as a tool to help protect an inmate's right to post-conviction DNA testing, the statute is used as a tool to restrict access to DNA testing.[101] In multiple cases where the courts denied motions for post-conviction DNA testing, findings that evidence was unsecure or tampered with led to a denial of relief for the inmate or sanctions against those responsible for the state of the evidence.[102]

IV. WHY A NEGLIGENCE STANDARD SHOULD BE ADOPTED GENERALLY

Now that we have examined *Youngblood* and the post-conviction DNA testing world that has spawned since *Youngblood's* decision, I will now discuss why a negligence standard for spoliation should be adopted. Because bad faith is the current standard for a constitutional violation regarding lost or stolen evidence, relief is often limited or nonexistent.[103] Ten states have flat out rejected the bad faith standard for state law either via statute or state constitution,[104] but Texas is not one of them.[105] However, despite the passing of Chapter 64 to allow access to post-conviction DNA testing, "Texas has achieved an international reputation for its flawed crime lab processes,

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101. *See* Larson v. State, 488 S.W.3d 413, 421–22 (Tex. App.—Texarkana 2016, pet. ref'd) (rejecting—without any discussion of the state's responsibility and stewardship over the evidence—a motion for post-conviction DNA testing because one blood sample was destroyed "during or after testing" and a separate blood specimen from a piece of sheetrock was never submitted to the DPS lab); Reed v. State, 541 S.W.3d 759, 769–70, 780 (Tex. Crim. App. 2017) (holding that numerous items of evidence that were handled "ungloved" and "not separately packaged, but instead commingled in a common repository" meant that the inmate's motion for post-conviction DNA testing would be denied with no discussion of the state's responsibility or stewardship).

102. *See supra* notes 91–101 and accompanying text.

103. *See supra* notes 95–97 and accompanying text (illustrating that spoliation remedies are inconsistently applied and, even when applied, are largely limited to pre-trial, trial, and civil cases).

104. *See* Bay, *supra* note 44, at 297; *Ex Parte* Gingo, 605 So.2d 1237, 1241 (Ala. 1992); Gurley v. State, 639 So.2d 557, 565–67 (Ala. Crim. App. 1993); Thorne v. Dep't Pub. Safety, 774 P.2d 1326, 1330–32 (Alaska 1989); State v. Morales, 657 A.2d 585, 592–94 (Conn. 1995); Lolly v. State, 611 A.2d 956, 959–60 (Del. 1992); Hammond v. State, 569 A.2d 81, 85–87 (Del. 1989); State v. Okumura, 894 P.2d 80, 98–99 (Haw. 1995); Commonwealth v. Henderson, 582 N.E.2d 496, 496–97 (Mass. 1991); State v. Smagula, 578 A.2d 1215, 1217 (N.H. 1990); State v. Ferguson, 2 S.W.3d 912, 915–17 (Tenn. 1999); State v. Delisle, 648 A.2d 632, 642–43 (Vt. 1994); State v. Osakalumi, 461 S.E.2d 504, 508–12 (W. Va. 1995).

105. *See* State v. Vasquez, 230 S.W.3d 744, 750 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (holding that the state constitution's "due course" clause "does not provide a greater level of protection than the Due Process Clause regarding the State's loss or destruction of evidence in a criminal prosecution").

misrepresented results, and lost or destroyed evidence."[106] Thus, a judicial concern has been voiced regarding the limited relief available in spoliation cases when a negligence standard is not constitutionally required.[107] The statutory authorization to obtain DNA testing does not provide incentives for the State "to prevent accidental loss or destruction" of evidence a defendant might want to test.[108] That means that currently there is a right to post-conviction DNA testing while simultaneously no right to any relief or remedy if the State negligently loses or tampers with the DNA evidence.

How is something a right if it cannot be legally protected? The Supreme Court posed that very question in *District Attorney's Office v. Osborne* where they examined whether or not "there is a constitutional obligation to preserve forensic evidence that might later be tested."[109] The Court refused to answer, avoiding the slippery slope of questions such as "how long" forensic evidence needs to be preserved and other ramifications that would inevitably result.[110] But the answer regarding whether there is a constitutional obligation to preserve forensic evidence must assuredly be yes, especially when it comes to DNA evidence, which is known to be the most reliable scientific discipline in forensic science.[111] As the reliability of forensic science rises, physical evidence is an ever more vital part of the criminal justice system and deserves real protection.

V. IMPOSING THE DEATH PENALTY REQUIRES A HIGHER STANDARD THAN DOES LIFE IMPRISONMENT

Youngblood has set the bad faith doctrine precedent for most spoliation issues, but does that mean that it should apply with equal force to death penalty cases as well? To answer that question, we need to look at what the Court has said specifically about the death penalty and how it is the same or different than other forms of punishment in criminal law. The Supreme Court has held that, under the Eighth Amendment, the imposition of a death penalty, as opposed to life imprisonment, requires the

106. *Id.* at 752 (Seymore, J., concurring).

107. *Id.* at 753.

108. *Id.* at 752–53 (noting that this case is more in reference to spoliation instructions during actual trial proceedings rather than post-conviction relief, which is even harder to obtain).

109. 557 U.S. 52, 74 (2009).

110. *Id.*

111. *See supra* note 53 and accompanying text.

satisfaction of a heightened reliability requirement.[112] That requirement is now a principle of our legal system so ingrained that "it is as firmly established as any in our Eighth Amendment jurisprudence."[113]

Texas codified such a right under state law, in Chapter 64 of the Texas Code of Criminal Procedure.[114] Even though Texas was not required to give such defendants the right to seek post-conviction DNA testing to challenge their death sentences, it did codify such a right by law and must follow due process procedures.[115] Furthermore, the Supreme Court has recognized that "death is different," which implies a different, higher, standard for evaluating death penalty cases, including possible due process violations.[116]

Supreme Court precedent suggests a heightened concern for reliability and confidence in capital cases. For death-sentenced defendants, the conviction must satisfy the heightened reliability requirement of the Eighth Amendment.[117] This means, "as much as is humanly possible, that the sentence [be] not imposed out of whim, passion, prejudice, or mistake."[118] The Supreme Court's "principal concern has been more with the procedure by which the State imposes the death sentence than with the substantive factors" in "ensuring that the death penalty is not meted out arbitrarily or capriciously."[119]

In *Gilmore v. Taylor*, the Supreme Court held that in capital cases, "the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case."[120] In *Burger v. Kemp*, the Court held that the "duty to search for constitutional error with painstaking care is never more

112. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Because of the qualitative difference [between death and life imprisonment] there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

113. Barefoot v. Estelle, 463 U.S. 880, 924 (1983) (Blackmun, J., dissenting).

114. TEX. CODE CRIM. PRO. ANN. art. 64.

115. Dist. Attorney's Office v. Osborne, 557 U.S. 52, 67–72 (2009).

116. Ring v. Arizona, 536 U.S. 584, 587 (2002).

117. *See* Lockett v. Ohio, 438 U.S. 586, 605 (1978) (calling "for individualized consideration as a constitutional requirement in imposing the death sentence" and holding that a statute that prevents "giving independent mitigating weight" creates a "risk that the death penalty will be imposed" incorrectly).

118. Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring).

119. California v. Ramos, 463 U.S. 992, 999 (1983) (emphasis omitted).

120. 508 U.S. 333, 342 (1993) (citing Herrera v. Collins, 506 U.S. 390, 399 (1993); Beck v. Alabama, 447 U.S. 625, 637–38 (1980)).

exacting than it is in a capital case."[121] Together, *Gilmore* and *Burger* imply that the Supreme Court's believes that the heightened punishment in a capital case resulting in a death sentence requires a heightened standard of care in every aspect of a capital punishment conviction.

In Texas, specifically, the death penalty is only allowed if the jury finds beyond a reasonable doubt that there is a probability the defendant will commit future acts of violence.[122] This forward-thinking analysis relies on what is essentially expert testimony and already carries the risk of "creat[ing] an intolerable danger that death sentences will be imposed erroneously."[123] Because this predictive analysis is allowed when deciding whether or not to apply the death penalty, the defendant needs every opportunity possible to attempt to prove his or her past innocence. DNA exoneration via solid and verifiable science helps mitigate the dangers of attempting to accurately predict someone's future actions.

Further, in *Ake v. Oklahoma*, Justice Marshall wrote that a State "must take steps to assure that the defendant has a fair opportunity to present his defense," and described this principle as "grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness."[124] Under a *Youngblood*-type standard, the State, as custodian of the evidence, merely required to refrain from "bad faith" actions, can effectively rob an applicant of a fair opportunity to present a defense through its negligent, but not "bad faith," custody of evidence.[125] If evidence was used to convict the inmate, it must be ready and available to be used to possibly exonerate the inmate as well.[126] As the importance of forensic evidence to a guilty verdict increases, one can argue that the requirement to keep the evidence secured

121. 483 U.S. 776, 785 (1987).

122. TEX. CODE CRIM. PRO. ANN. art. 37.071; *see also* Lisa L. Bell Holleran, Future Dangerousness in Texas Death Penalty: A Content Analysis 10–12 (December 2016) (unpublished Ph.D. dissertation, Texas State University) (on file with the Texas State University Digital Collections repository).

123. Barefoot v. Estelle, 463 U.S. 880, 924 (1983) (Blackmun, J., dissenting); *see also* Eric F. Citron, *Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty*, 25 YALE L. & POL'Y REV. 143, 156—61 (2006) (explaining the dangers of focusing on future criminal behavior).

124. 470 U.S. 68, 76 (1985).

125. *See supra* Section II.D; *see also* Chen, *supra* note 37, at 426.

126. *See* Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (stating in the Act's preamble that the purpose of the new post-conviction laws were "to provide post-conviction testing of DNA evidence to exonerate the innocent").

and stored rises dramatically, to a point analogous to the constitutional right to face your accuser; in many cases, the evidence essentially plays the role of accuser against the alleged perpetrator.

VI. THE ADOPTION OF A NEGLIGENT SPOLIATION STANDARD AND A TWO-PRONG TEST FOR DEATH PENALTY CASES

When recommending possibilities for relief for negligent spoliation, we quickly come up against the biggest problem in these post-conviction death penalty cases: a guilty beyond a reasonable doubt verdict has already been issued.[127] That makes possible solutions harder to choose. Outside of civil cases, there are generally three main types of relief available in these situations: sentence vacation, a new trial, and sentence reduction.[128] Each one carries its own advantages and disadvantages which will be discussed, in relation to death penalty cases, below.

One possible form of relief is the vacating of the sentence entirely.[129] Lost or tampered evidence during pre-trial proceedings may result in the entire case being dropped by the prosecution or thrown out by the court.[130] And while, technically, it may be possible in a post-conviction scenario to have the prior conviction vacated,[131] that is essentially unheard of in post-conviction death penalty scenarios. The truth of the matter is, without exculpatory evidence, these inmates have already been found guilty beyond a reasonable doubt. What they need to exonerate themselves now no longer exists thanks solely to the state's actions or inactions. And, although we historically understand that the risk of convicting an innocent man is worse than releasing a guilty one, the thought of freeing the guilty makes this option a far less tenable one, politically.[132]

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127. *See* Jones, *supra* note 23, at 2926 (pointing out that DNA evidence, when used during the appeals process, "has the persuasive force to prove that an innocent person has been wrongly convicted, notwithstanding all other evidence used at trial to prove guilt beyond a reasonable doubt").

128. *Id.* at 2946.

129. *Id.* at 2949.

130. *See* Kessler, *supra* note 25, at 16; St. John Barned-Smith & Lise Olsen, *Nearly 100 Drug Cases Dismissed After Evidence Destroyed*, HOUS. CHRON. (August 26, 2016), https://www.houstonchronicle.com/news/houston-texas/houston/article/Nearly-100-drug-cases-dismiessed-after-evidence-9187644.php [https://perma.cc/PA58-Z784] (detailing an infamous example of spoliation in Texas).

131. *See* Jones, *supra* note 23, at 2949–50.

132. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); *see also* 2

Another possible form of relief is a new trial, but a new trial is not always appropriate and would primarily be the same trial as before but without the disclosure of the spoliated evidence.[133] However, there are scenarios where a new trial would be the fairest and most just solution.[134] For example, if DNA evidence was crucial to the prosecution's case and the spoliated evidence could have exculpated the defendant, the court could prevent the prosecution from introducing any forensic evidence at all to prove identity.[135] In the new trial, depending on the circumstances, the court could also introduce an adverse inference instruction to the jury stating the evidence is missing or that it was wrongly destroyed.[136] This can help ensure that the possible exculpatory value of the lost or tampered evidence is not lost completely by alerting the jury that the evidence was spoliated before it could be tested and was done so by the state or the prosecution. However, new trials years later are typically disfavored by all parties involved and are not without their own issues. In fact, new trials years after the original can be fraught with difficulties and constitutional issues.[137] Essentially, once an execution date is set, the appeals process worked through, and years after the original trial, a new trial may not be the best choice, for either the inmate or the state.

The third option for relief is the reduction of the sentence in

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WILLIAM BLACKSTONE, COMMENTARIES *358 (noting that "the law holds that it is[] better that ten guilty persons escape than that one innocent suffer"); *Genesis* 18:23–32 (describing God's deal with Abraham to spare Sodom if ten righteous people are found).

133. *See* Jones, *supra* note 24, at 2948.

134. *Id.* (listing the ways that a new trial can be appropriate if the court "imposes other remedial measures to compensate for the loss of evidence" to help ensure the prosecution does not still have an advantage from the lost or tampered evidence).

135. *Id.* (noting that this is an important step that courts need to take because in the example case, *Lovitt*, the evidence was not completely barred, which allowed the government "to argue that Lovitt's blood *might* have been on the knife and the victim *could* have been the source of the blood on Lovitt's jacket," which allowed the prosecution to still use the evidence even though it no longer could verify their claims).

136. *Id.*

137. *See* Andrew Cohen, *The Man Who Spent 35 Years in Prison Without a Trial*, MARSHALL PROJECT (Jun. 12, 2017), https://www.themarshallproject.org/2017/06/12/the-man-who-spent-35-years-in-prison-without-a-trial [https://perma.cc/AGH5-V89Y] (describing the story of Jerry Hartfield who was finally released after waiting 35 years between trials). Hartfield was originally "supposed to get a new trial in 1980" but, "after a series of misunderstandings and miscommunications by lawyers, judges, and jailers — who all thought Hartfield was someone else's problem — he never got that second day in court." *Id.* Also, as related to spoliation, the attempted retrial in 2015 included none of the physical evidence from the original crime, despite the fact that he was originally on death row until a governor commuted his sentence. *Id.*

normal criminal convictions.[138] Typically, this relief is reserved for instances where the inmate had multiple indictments, and the spoliated evidence only applied to one or more, but not all, of the convictions, or when the evidence was connected to the highest charge but not a lesser-included offense.[139] If there is a chance that someone could be innocent of a crime, a mere sentence reduction would not be preferable to the courts for reasons of equity, so this is generally reserved for when the convicted person is still believed to be guilty of other crimes. However, I think this option might be the most useful to apply to death penalty cases.

Youngblood is still good law and shows no signs of being overturned.[140] One of the main advantages of keeping *Youngblood* is that it is relatively easy to apply.[141] If it were overturned, many "line-drawing issues" would arise and any replacement test could be more complicated.[142] Not to mention several questions would arise about what evidence should be more important to save: (1) If all criminal evidence should be preserved indefinitely? (2) Just more serious crimes? (3) If so, how serious should the crime be to mandate a higher level of scrutiny for spoliation?

Instead of overturning *Youngblood*, I propose adding a test specific to death penalty cases before applying the *Youngblood* analysis. *Youngblood* is not a death penalty case and is thus not completely on point.[143] Further, the Supreme Court time and time again distinguishes the death penalty from other punishments and holds that there is a higher standard of reliability required to put someone to death as opposed to life in prison.[144] Instead of relying on incentives to motivate police and prosecutors to hold the evidence secure—especially in light of evidence that such incentives do not work—the requirement to maintain evidence should be considered a constitutional minimum for death penalty cases.[145]

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138. *See* Jones *supra* note 24, at 2946.

139. *Id.* (noting that "the impact of the destroyed evidence was limited to individual charges in a multicount indictment or when the destroyed evidence was relevant to the more serious charge in the indictment, but did not affect the lesser-included offense").

140. *See supra* note 70 and accompanying text.

141. Bay, *supra* note 44, at 298 (noting that "*Youngblood*'s bright-line test has the advantage of being easy to apply and minimizes the need for protracted pre-trial evidentiary hearings").

142. *Id.*

143. *See supra* note 45 and accompanying text.

144. *See supra* Part V.

145. *See supra* notes 86–93 and accompanying text; *see also* Greene & Moffeit, *supra*

The political interest to get elected or re-elected is a strong incentive in the opposite direction that applies "institutional pressure" to destroy samples when they can, even if there was no "bad faith" intent.[146] Other factors leading to the destruction of evidence are simple negligence, laziness, and incentives to cut cost.[147] In theory, the incentive of doing the right thing rings true, but in practice, is outnumbered by the above-listed institutional incentives to not safeguard evidence. The number of those sentenced to death that have been exonerated could potentially be even higher if not for the "good faith" losing or destruction of evidence.[148]

I propose to add a level of analysis to death penalty due process questions relating to access to post-conviction DNA testing. Under this heightened reliability standard, if possible exculpatory evidence is not held secure, there is a bright-line test that the courts can use to find that the death penalty is impermissible under the Eighth Amendment.[149] Because, "death is different" and requires the highest possible standard of reliability,[150] the confidence the current legal framework places on the original conviction is untenable where post-conviction DNA testing can no longer be performed to help inculpate the conviction or provide exculpatory evidence due to spoliation. With no way to verify the verdict or exonerate the inmate, the possibility of executing an innocent person becomes untenable to the legal foundations of our society.[151] A complete legal exoneration, in the face of that unknowability, is equally untenable for other reasons, especially since post-conviction DNA testing seems to confirm guilt in fifty percent of cases and has only exonerated a small percentage of cases since the arrival of DNA testing.[152]

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note 33 (noting that because of the bad faith standard, despite other legal incentives, prosecutors have an incentive to discard the evidence "to defend the finality of their convictions").

146. Greene & Moffeit, *supra* note 33.

147. *Id.* (noting it would be "too expensive and cumbersome"); Bookman, *supra* note 17 (pointing out thousands of rape kits that were destroyed in New York, Houston, and New Orleans, all blamed on space limitations).

148. *See* Greene & Moffeit, *supra* note 33 (stating that The Denver Post found 141 prisoners "whose bids for freedom have stalled because officials lost or destroyed DNA").

149. *See* U.S. CONST. amend. VIII.

150. *See supra* note 116 and accompanying text.

151. *Supra* notes 109–11 and accompanying text. For centuries of jurisprudence, the reality that the guilty may walk free has outweighed the fear of convicting the innocent. Never is this principle more appropriate than when the result of a conviction is an execution.

152. *See infra* notes 158, 161–63 and accompanying text (using the number of DNA exonerations on death row and the total number of actual executions as a rough guideline).

As such, a sentence reduction is likely the best compromise and form of relief. Thus, when potential exculpatory evidence is found to have been negligently lost, the court should change the sentence from death to life in prison. This, of course, only applies in cases where the expoliated evidence could have exonerated the inmate or led the court to a different result. For cases where evidence was expoliated, but there still remains a mountain of unexpoliated evidence that still clearly shows guilt when presented to a finder of fact, this bright-line test would not apply.

If, after applying this bright-line test, the inmate can additionally prove "bad faith," they should pursue further relief. Such misconduct from law enforcement might make available other remedies upon appellate review, including vacating the sentence entirely. After the reduction to a life sentence, then the second level of analysis would be applied, the current bad faith standard as laid out in *Youngblood*.

In short, for all death penalty cases, a strict spoliation standard should apply to good and bad faith spoliation, without regard to negligence or intent. If spoliation occurs and removes the ability of the inmate to possibly exonerate him or herself using post-conviction DNA testing, the sentence should be automatically reduced to life (so long as the spoiled evidence could be found to have possibly led to exculpatory results). This solution is similar to current statutes that must be met before post-conviction DNA testing can occur.[153] Once the sentence is reduced the courts apply the *Youngblood* analysis using the bad faith standard as the standard for more powerful forms of relief.

The Supreme Court has stated that science and the changing world may have them revisit *Youngblood*. The Court claims that it may consider the idea of good faith mistakes violating due process rights, but it shows no signs of actually doing so anytime soon.[154] The proposed two-prong test will operate in the interim until the Supreme Court decides to revisit the doctrine in the wake of ever more increasing reliance on DNA testing and forensic science. Likewise, the executive branch has largely pushed this

153. *See* TEX. CODE CRIM. PRO. ANN. art. 64.03(a)(1)(B)–(C), (2)(A) (requiring that "there [be] a reasonable likelihood that the evidence contains biological material suitable for DNA testing," identity was an issue, and "the convicted person establishes by a preponderance of the evidence that the person would not have been convicted if exculpatory results had been obtained through DNA testing").

154. *See supra* note 70 and accompanying text; Dist. Attorney's Office v. Osborne, 557 U.S. 52, 73–74 (2009) (opining that "[e]stablishing a freestanding right to access DNA evidence for testing would force us to act as policymakers").

issue towards the future and has refused to act.[155] Although Congress passed the Innocence Protection Act mandating the federal government to keep biological evidence in federal cases, the Act does not mandate appropriate relief for good faith failure to comply.[156] It appears it will be up to the courts to start holding these death penalty cases up to the higher standard they allegedly require.[157] This higher standard to preserve DNA evidence should also be in the state's interest as well because it can help preserve the integrity of correct guilty convictions. Post-conviction DNA testing confirms the guilty verdict in fifty percent of cases.[158] It helps exonerate the innocent and confirm the guilty while simultaneously quelling criticisms of injustice. The right to post-conviction DNA testing is toothless and unjust without more strict rules to protect said DNA evidence. Rights are meaningless without the legal tools to protect them.

VII. CONCLUSION

As long as there is a death penalty, innocent people will inevitably be executed.[159] Even under the limited forms of relief currently available to inmates, there have been 351 exonerations since the birth of DNA testing,[160] 121 of which were originally sentenced to death.[161] This is an especially large number when we consider this nation has only executed 1,389 in that same timespan, from 1989 through March 2019.[162] Texas, specifically,

155. Greene & Moffeit, *supra* note 33 (describing a conversation with the Justice Department where they refused to take a position or even acknowledge they would take a position).

156. *Id.*; *see* 18 U.S.C. § 3600(a), (b)(1)–(2) (2012).

157. *See* Louisa Marion & Megan Maitia, *Good Faith Not Good Enough? Ninth Circuit May Require a Remedial Jury Instruction After Government Spoliation in a Criminal Case*, CROWELL MORING (May 23, 2013), https://www.crowelldatalaw.com/2013/05/good-faith-not-good-enough-ninth-circuit-may-require-a-remedial-jury-instruction-after-government-spoliation-in-a-criminal-case [https://perma.cc/642E-7NRD] (questioning the legitimacy of a bad faith standard as "simply inequitable" and noting that *United States v. Sivilla* and other case holdings are a small movement away from that by attempting to "soften the blow of Youngblood[]"); United States v. Sivilla, 714 F.3d 1168, 1170 (9th Cir. 2013) (holding that although "Supreme Court precedent demands that a showing of bad faith is required for dismissal, it is not required for a remedial jury instruction" thus indicating some movement away from *Youngblood*).

158. Jones, *supra* note 24, at 2950.

159. *See supra* note 69 and accompanying text; Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. U.S.A. 7230, 7230–35 (2014).

160. *See supra* note 73 and accompanying text.

161. NAT'L REGISTRY OF EXONERATIONS, *supra* note 72.

162. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO.

has had 13 death row exonerations while also executing 531 human beings since 1989.[163] A wrongful execution is something our justice system cannot take back. There is no relief or remedy available to the person harmed. Studies have already argued that a significant number of people would additionally be exonerated if given enough time and legal recourse.[164] And this is ignoring the executions that took place before the rise of DNA testing.

As long as we sentence people to death, we must strictly and resolutely hold the carrying out of each and every one of those sentences to the highest standard of reliability possible.

Is there a better way, one that provides a chance for people to attempt to become productive members of society, a way that recognizes that the person about to be executed is not the same person that committed the crime after years have passed between the crime, the trial, and the exhaustive appeals process?[165]

The Supreme Court attempted to find out in 1972 but quickly backtracked by 1976.[166] Perhaps—as Texas has done—the Court will try again one day.[167] In 2015, Justice Breyer wrote that the death penalty suffers from "serious unreliability," "arbitrariness in application," and "unconscionably long delays that undermine the death penalty's penological purpose," leading him to proclaim that the death penalty now constitutes "a legally prohibited 'cruel and unusual punishmen[t].'"[168] Until such a day comes, each and every mistake is on our hands as a society and if we choose to

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CTR., https://deathpenaltyinfo.org/number-executions-state-and-region-1976 [https://perma.cc/3N4P-3TQS] (last updated Mar. 1, 2019).

163. *Id.*; *Innocence: List of Those Freed From Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/innocence-list-those-freed-death-row [https://perma.cc/K8CE-S9TH] (noting that Texas has had thirteen death row exonerations) (last visited Apr. 16, 2019); *see also Texas Death Penalty Facts*, TCADP, https://tcadp.org/get-informed/texas-death-penalty-facts [https://perma.cc/QEC7-7WFN] (last visited Apr. 16, 2019).

164. *See supra* note 159 and accompanying text.

165. *See* Jilani, *supra* note 2 (quoting Robert Pruett as saying "they aren't killing the same people who committed the crimes. It takes years . . . and in that time people change . . . [e]ven with a life in prison, these guys had much to offer humanity, not to mention the loved ones left with the scars of their murders").

166. The Supreme Court abolished capital punishment nationwide in Furman v. Georgia, 408 U.S. 238, 239–40 (1972) and reinstated it in Gregg v. Georgia, 428 U.S. 153, 168–69 (1976); incidentally, this is also what brought about the future dangerousness requirement of Texas's death penalty.

167. *See supra* note 122 and accompanying text (noting that Texas has a requirement that the defendant will commit future acts of violence); *see also* Citron, *supra* note 123, at 162–63 (discussing the legislative history behind the future dangerousness requirement in Texas and noting that the Texas legislature created the requirement in direct response to the Furman decision in an attempt to remove arbitrary and discriminatory effects).

168. Glossip v. Gross, 135 S. Ct. 2726, 2755–56 (2015) (Breyer, J., dissenting) (alteration in original) (quoting U.S. CONST. amend. VIII).

continue down this path, it is our utmost responsibility to get it right.

In the meantime, this proposal can lead to upholding the Supreme Court's dicta of death sentences being different and requiring a higher standard of reliability without drastically changing the status quo and institutions of our criminal justice system. We have to live up to the Supreme Court's statements that "the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case,"[169] and the "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case."[170] If we are to continue in the "tinker[ing] with the machinery of death" then we must, despite Justice Blackmun's argument that it is impossible, find a "combination of procedural rules or substantive regulations" to "save the death penalty from its inherent constitutional deficiencies."[171] Meting out death is a grave duty and one that our society might best attempt to avoid at all costs. "Many that live deserve death. And some that die deserve life. Can you give it to them? Then do not be too eager to deal out death in judgement. For even the very wise cannot see all ends."[172]

Joseph Hays

169. Gilmore v. Taylor, 508 U.S. 333, 342 (1993) (citing Herrera v. Collins, 506 U.S. 390, 399 (1993); Beck v. Alabama, 447 U.S. 625 (1980)).

170. Burger v. Kemp, 483 U.S. 776, 785 (1987).

171. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

172. J.R.R. TOLKIEN, *The Fellowship of the Ring*, *in* THE LORD OF THE RINGS 21, 59 (50th Anniversary ed., Houghton Mifflin Co. 2004) (1954).