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The Right to Independent Testing: Boon for Defendant--Burden for Prosecution?

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Comments

The Right to Independent Testing: Boon for Defendant—Burden for Prosecution?

The trial of a criminal case is not a game of fox and hounds in which the State attempts to outwit and trap a quarry. It is, instead, a sober search for the truth, in which not only the resources of the defendant, but those of the State, must be put to work in aid of that search.[1]

INTRODUCTION

Most jurisdictions[2] recognize the criminal[3] defendant's right to test independently evidentiary samples in the state's posses-

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[1] Garcia v. District Court, 589 P.2d 924, 930 (Colo. 1979) (en banc) (citing Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring)).

[2] *See, e.g.*, Warren v. State, 288 So. 2d 826, 830-31 (Ala. 1973); Lee v. State, 511 P.2d 1076, 1077 (Alaska 1973); Rogers v. Municipal Court, 531 S.W.2d 257, 258 (Ark. 1976); People v. Garries, 645 P.2d 1306, 1309 (Colo. 1982); State v. Clemons, 363 A.2d 33, 38 (Conn.), *cert. denied*, 423 U.S. 855 (1975); Deberry v. State, 457 A.2d 744, 751-52 (Del. 1983); Lee v. U.S., 385 A.2d 159, 163 (D.C. 1978); Stipp v. State, 371 So. 2d 712 (Fla. Dist. Ct. App. 1979), *cert. denied*, 383 So. 2d 1203 (Fla. 1980); People v. Taylor, 369 N.E.2d 573, 576 (Ill. App. Ct. 1977); State v. Brown, 337 N.W.2d 507, 510 (Iowa 1983); James v. Commonwealth, 482 S.W.2d 92, 93-94 (Ky. 1972); State v. Cloutier, 302 A.2d 84, 89 (Me. 1973); Commonwealth v. Walker, 441 N.E.2d 261, 263 (Mass. App. Ct. 1982); State v. Carlson, 267 N.W.2d 170, 175 (Minn. 1978); Love v. State, 441 So. 2d 1353, 1354 (Miss. 1983); Talancon v. State, 621 P.2d 1111, 1112 (Nev. 1981); State v. Berry, 470 A.2d 881, 885 (N.H. 1983); State v. Lovato, 617 P.2d 169, 171 (N.M. Ct. App. 1980); People v. White, 390 N.Y.S.2d 405, 406 (N.Y. 1976); State v. Kersting, 623 P.2d 1095, 1103 (Or. Ct. App. 1981), *aff'd*, 638 P.2d 1145 (Or. 1982); Commonwealth v. Arenella, 452 A.2d 243, 245-47 (Pa. Super. Ct. 1982); State v. Faraone, 425 A.2d 523, 525-26 (R.I. 1981); State v. Hanson, 278 N.W.2d 198, 200 (S.D. 1979); Latham v. State, 560 S.W.2d 410, 411-412 (Tenn. Crim. App. 1978); Detmering v. State, 481 S.W.2d 863, 864 (Tex. Crim. App. 1972); State v. Vaster, 659 P.2d 528, 531 (Wash. 1983) (en banc); State v. McCardle, 194 S.E.2d 174, 178-79 (W. Va. 1973); State v. Bailey, 475 A.2d 1045, 1049-50 (Vt. 1984). See also United States v. Doty, 714 F.2d 761, 764-65 (8th Cir. 1983); United States v. Baca, 687 F.2d 1356, 1359-60 (10th Cir. 1982); United States v. Traylor, 656 F.2d 1326, 1334-35 (9th Cir. 1981); Virgin Islands v. Testamark, 570 F.2d 1162, 1165-66 (3d Cir. 1978); United States v. Herndon, 536 F.2d 1027, 1029 (5th Cir. 1976), wherein the federal circuit courts have also recognized this right. *Contra* State v. Lightle, 502 P.2d 834, 836 (Kan. 1972), *cert. denied*, 410 U.S. 941 (1973); State v. Kaye, 423 A.2d 1002, 1005-06 (N.J. Super. Ct. App. Div. 1980), *cert. denied*, 434 A.2d 69 (N.J. 1981).

[3] Under common law, the criminal defendant had no right to pretrial discovery

sion.[4] The right to test is presently embodied in state[5] and federal[6] discovery rules—an outgrowth of Supreme Court decisions that recognize the prosecution's duty to disclose certain materials to the defense where non-disclosure would violate constitutional guarantees of due process.[7] The accused's right to test physical evidence that the state intends to subject to destructive scientific analysis, however, is a unique issue, and has been the

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or inspection. 2 F. WHARTON, CRIMINAL EVIDENCE, § 671 (12th ed. 1955). The extent of a criminal defendant's discovery rights has been a continuing source of controversy. *See generally* Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279 (1963); Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1959-60); Ginsburg, *Disclosure to the Defense in a Criminal Case*, 57 ILL. B.J. 194 (1968-69); Traynor, *Grounds Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964-65).

[4] Although various types of physical evidence gathered by the government are submitted to destructive testing, the cases cited in this Comment deal primarily with chemical tests on alleged narcotics or body substances. Cases involving breath samples are specifically excluded from this Comment. *See* note 25 *infra*.

[5] Most state discovery rules provide for inspection of "tangible objects." Some courts have interpreted their discovery rules to encompass disclosure of physical evidence for independent testing. *See, e.g.*, 457 A.2d at 751 (construing DEL SUPER. CT. CRIM. R. 16(b)); 371 So. 2d at 713 (construing FLA. R. CRIM P. 3.220(a)(l)(vi)); 302 A.2d at 87 (construing ME. R. CRIM. P. 16(a)); 452 A.2d at 245-46 (construing PA. R. CRIM. P. 310); 425 A.2d at 526 (construing R.I. R. CRIM. P. 16(a)(5)); 475 A.2d at 1049 (construing VT. R. CRIM. P. 16(b)(2)). *See also* ALA. R. CRIM. P. 18.1(c) (defendant may inspect documents and tangible objects); ARIZ. R. CRIM. P. 15.1(a)-(c) (providing that certain evidence be made available to the defendant for testing); IOWA R. CRIM. P. 13(2)(b)(1) (permitting the defendant to conduct scientific tests on items seized by the state in connection with the alleged crime); MINN. R. CRIM. P. 9.01(1)(3) (prosecutor may be required to permit defendant to test relevant material); NEB. REV. STAT. § 29-1913 (1979) (prosecutor may be required to make evidence available for independent testing when state's evidence consists of scientific tests); WIS. R. CRIM. P. 971.23(5) (defendant may obtain production of physical evidence for scientific analysis when state will offer physical evidence at trial).

[6] FED. R. CRIM. P. 16(a)(1)(C) provides for disclosure of tangible objects "within the possession, custody or control of the government." The government's duty to disclose is mandatory if the requested item is material to the preparation of the defense, or is intended for use by the government as evidence in chief at trial, or was obtained from or belongs to the defendant. *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 254 (1982); 8 MOORE'S FEDERAL PRACTICE ¶ 16.05(4) (2d ed. 1984). *See also* 8 MOORE'S FEDERAL PRACTICE ¶ 16.05(3) (pretrial discovery under FED. R. CRIM. P. 16 (a)(1)(D) enables defendant to conduct independent tests).

[7] *See, e.g.*, United States v. Agurs, 427 U.S. 97, 108-14 (1976) (prosecution has constitutional duty to disclose exculpatory evidence that would raise a reasonable doubt about defendant's guilt); Giglio v. United States, 405 U.S. 150, 153-55 (1972) (prosecution must reveal plea bargaining agreement with key government witness); Napue v. Illinois, 360 U.S. 264, 269-72 (1959) (government's knowing use of perjured testimony without disclosure to the defendant violates due process).

subject of much debate.[8] This Comment compares Kentucky's response to the issue, in *Green v. Commonwealth*,[9] with other jurisdictions. Additionally, a procedural rule is proposed for Kentucky which, unlike the narrow ruling in *Green*, would fully protect the needs of both prosecution and defense.

I. CONSTITUTIONAL PRECEDENTS

In *Brady v. Maryland*,[10] the Supreme Court established the principle that prosecutorial withholding of exculpatory evidence violates due process, regardless of good or bad faith on the part of the prosecution.[11] The nondisclosed evidence in *Brady*, however, was still in existence,[12] and its exculpatory value easily ascertained.

United States v. Bryant[13] was the first decision to extend the "Brady doctrine" to the *nonpreservation* of clearly discoverable physical evidence. In *Bryant*, the evidence the defense sought was mysteriously lost,[14] making its exculpatory value impossible to determine. The court ultimately found that the *Brady* due process requirement governed not only nondisclosure by failure to reveal, but also nondisclosure due to nonpreservation.[15] Furthermore, the court imposed a duty on the government to preserve all discoverable evidence,[16] including evidence that " 'might' be 'favorable' to the accused."[17]

While the "Brady doctrine" is now well-settled concerning evidence withheld, its application to nonpreservation cases re-

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[8] *See generally* Note, *Destruction of Criminal Evidence*, 23 ARIZ. L. REV. 460 (1981); Note, *The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine*, 75 COLUM. L. REV. 1355 (1975); Comment, *Criminal Procedure—Preservation of Due Process When Evidence is Destroyed or Tested*—State v. Wright, 53 WASH. L. REV. 573 (1977-78); Comment, *Judicial Response to Governmental Loss or Destruction of Evidence*, 39 U. CHI. L. REV. 542 (1971-72).

[9] 684 S.W.2d 13 (Ky. Ct. App. 1984).

[10] 373 U.S. 83 (1963).

[11] *Id.* at 87. Exculpatory evidence was held to be that which "is material either to guilt or to punishment." *Id.*

[12] *Id.* at 84. The prosecution failed to disclose that the defendant's companion had confessed to the murder with which the defendant was charged. *Id.*

[13] 439 F.2d 642 (D.C. Cir. 1971).

[14] *Id.* at 644. The evidence consisted of a tape containing recorded conversations made prior to and during an alleged drug sale. *Id.* at 645.

[15] *Id.* at 648.

[16] *Id.* at 652.

[17] *Id.* at 652 n. 21 (citation omitted).

mains unclear.[18] Some courts have found that due process guarantees are implicated when the government destroys potentially exculpatory evidence during the course of its own testing.[19] Other courts have flatly refused to extend *Brady* to cases of nonpreservation absent actual governmental suppression.[20]

The Supreme Court finally attempted to address the nonpreservation issue in *California v. Trombetta*.[21] Noting its own lack of guidance concerning the scope of the government's duty to preserve evidence, the Court recognized "the difficulty of developing rules to deal with evidence destroyed through prosecutorial neglect or oversight."[22] The Court limited the government's duty of preservation "to evidence that might be expected to play a significant role in the suspect's defense."[23] This elusive concept was further defined to require preservation of evidence that possesses an exculpatory value that is apparent before its destruction and is of such a nature that the defendant could not reasonably obtain access to comparable evidence.[24]

It is unlikely that the *Trombetta* decision, alone, will dispel the uncertainty that plagues courts on the preservation issue.[25]

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[18] The U.S. Supreme Court has never expressly held that nonpreservation of evidence, absent suppression, violates due process. State v. Berry, 470 A.2d 881, 885 (N.H. 1983).

[19] *See id. See also* State v. Lovato, 617 P.2d 169, 171 (N.M. Ct. App. 1980); State v. Hanson, 278 N.W.2d 198, 200 (S.D. 1979); State v. Bailey, 475 A.2d 1045, 1050 (Vt. 1984); State v. Wright, 557 P.2d 1, 4 (Wash. 1976).

[20] *See* Lee v. State, 511 P.2d 1076, 1077 (Alaska 1973); State v. Herrera, 365 So. 2d 399, 401 (Fla. Dist. Ct. App. 1978), *cert. denied,* 373 So. 2d 459 (Fla. 1979); State v. Pearson, 678 P.2d 605, 615 (Kan. 1984); State v. Carlson, 267 N.W.2d 170, 175 (Minn. 1978); Poole v. State, 291 So. 2d 723, 726 (Miss.), *cert. denied,* 419 U.S. 1019 (1974).

[21] 104 S. Ct. 2528 (1984).

[22] *Id.* at 2533. The difficulties arise when *potentially* exculpatory evidence is destroyed and courts must undertake the "treacherous task" of determining whether the destroyed evidence would have proven favorable to the defendant. *Id.*

[23] *Id.* at 2534.

[24] *Id.*

[25] The holding in *Trombetta* is extremely narrow. Justice Marshall, writing for the Court, held that due process guarantees do not mandate that states preserve breath samples of suspected drunk drivers to admit the test results at trial. *Id.* at 2535. In reaching this holding, the Court noted several factors that distinguish the reliability of breathalyzer tests from other tests. First, there is the extreme unlikelihood that a preserved breath sample would prove exculpatory. To ensure accurate results, the California testing procedure requires two independent measurements that must correlate for test results to be admissible. *Id.* at 2534. To guarantee the machine is working properly, defendants are given an opportunity to inspect the machine used to test their breath as

This uncertainty in constitutional analysis may explain why many state courts rely on their own constitutional and statutory safeguards when determining whether a defendant's rights have been violated.[26]

II. NECESSARY VS. UNNECESSARY DESTRUCTION

When the state exhausts evidence through testing, most jurisdictions permitting independent testing by a defendant draw a sharp distinction between "unnecessary or negligent" destruction and "necessary or unavoidable" destruction in determining whether the state's test results will be admissible at trial.[27] The Kentucky Court of Appeals utilized this distinction in *Green v. Commonwealth*.[28] In *Green*, the state entirely consumed a "sin-

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well as the calibration samples and results obtained. *Id.* at 2535. Second, the Court noted that, in California, drunk-driving suspects may elect to submit urine or blood samples for testing which *are* preserved for retesting purposes. *Id.* at 2535 n.11. (In this case, the defendants apparently were not informed of these alternatives.)

Despite the limiting language in *Trombetta*, at least one court has given the decision effect beyond its literal scope. See Tolen v. State, 477 A.2d 797 (Md. Ct. Spec. App.), *cert. denied*, 484 A.2d 274 (Md. 1984), where the court concluded, on the basis of *Trombetta*, that since the due process clause does not require that the state preserve breath samples, "[a] *fortiori*, the due process clause does not require preservation of blood samples in order to . . . [prosecute] for rape." *Id.* at 804. In *Tolen*, the blood samples, which were routinely destroyed by a hospital, were taken from the *victim*. They were not taken for the state's use, nor did they constitute state's evidence at trial. *See id.* at 799. The issue raised in *Tolen*—whether the state should collect potential evidence to preserve it for the defendant's use—is beyond the scope of this Comment.

[26] *See, e.g.*, Deberry v. State, 457 A.2d 744, 752 (Del. 1983) ("discovery under criminal procedure rules requires lesser showing of materiality than does discovery under [Brady]") (citing United States v. Felt, 491 F. Supp. 179 (D.D.C. 1979)); State v. Faraone, 425 A.2d 523, 525 (R.I. 1981) (discovery under SUPER. CT. R. CRIM. P. 16(a) "provides for extensive discovery on the part of a defendant in a criminal case going far beyond the requirements of due process"); State v. Bailey, 475 A.2d at 1049 (VT. R. CRIM. P. 16(b)(2) "has codified the *Brady* rule"). *See also* Love v. State, 441 So. 2d at 1355 (citing MISS. CONST. art. III, § 14); Green v. Commonwealth, 684 S.W.2d 13, 16 (Ky. Ct. App. 1984) (citing KY. CONST. § 11); State v. Hanson, 278 N.W.2d at 200 (citing S.D. CONST. art. VI, § 2). As the Court noted in *Trombetta*, "[s]tate courts and legislatures . . . remain free to adopt more rigorous safeguards governing the admissibility of scientific evidence than those imposed by the Federal Constitution." 104 S. Ct. at 2535 n.12.

[27] *See* State v. Herrera, 365 So. 2d 399, 401 (Fla. Dist. Ct. App. 1978), *cert. denied*, 373 So. 2d 459 (Fla. 1979). *See also* People v. Taylor, 369 N.E.2d 573, 574 (Ill. App. Ct. 1977); State v. Pearson, 678 P.2d 605, 615 (Kan. 1984); State v. Carlson, 267 N.W.2d 170, 175 (Minn. 1978); Poole v. State, 291 So. 2d 723, 725 (Miss.), *cert. denied*, 419 U.S. 1019 (1974).

[28] 684 S.W.2d 13 (Ky. Ct. App. 1984).

gle tablet"[29] of an alleged drug in the course of its testing. At trial, the chemist testified that he was following standard testing procedures, but conceded that consumption of the entire sample was unnecessary to acquire valid test results.[30] The court, noting that Kentucky does not have a procedural rule governing "preservation of test materials,"[31] held that, in some instances, depriving the defendant of his right to test violates constitutional guarantees.[32]

Prior to *Green*, the right to test evidence was confined to instances where the state had an available sample.[33] Alternatively, the defendant could inspect reports of the state's test results,[34] which are not susceptible of independent evaluation and therefore have little value to the defense.[35] Although Kentucky has now recognized the importance of the defendant's

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[29] *Id.* at 15.

[30] *Id.*

[31] *Id.* at 16. Although the court acknowledged that Kentucky lacks a "procedural rule," it held "the right to [test] is implicit under KY. R. CRIM. P. 7.24" [hereinafter cited as RCR]. *Id.*

[32] Specifically, the court found that "rights under the Fourteenth Amendment to the United States Constitution *and* Section 11 of the Kentucky Constitution may be infringed" (Emphasis added). *Id.* at 15-16. The full holding concludes:

> [T]he unnecessary (though unintentional) destruction of the total drug sample, after the defendant stands charged, renders the test results inadmissible, unless the defendant is provided a reasonable opportunity to participate in the testing, or is provided with the notes and other information incidental to the testing, sufficient to enable him to obtain his own expert evaluation.

Id. at 16. The court appears to have confused intentional destruction with suppression. The destruction of evidence in *Green was* intentional. It was not, however, accomplished with the intent to deprive the defendant of evidence. *See id.* at 15. (Commonwealth's forensic chemist "conceded that it was not necessary to consume the entire portion" of the evidence, but "indicated that the entire consumption was caused by the failure of anyone to advise him otherwise.").

[33] *See* James v. Commonwealth, 482 S.W.2d 92, 94 (Ky. 1972) (defendant entitled to sample of alleged narcotic when sample available and subsequently introduced at trial).

[34] *See id.* at 93-94 (citing RCR 7.24(1)(b)). RCR 7.24(1)(b) provides:

> On motion of a defendant the court may . . . permit [the] defendant to inspect and copy or photograph any relevant . . . results or reports . . . of scientific tests or experiments made in connection with the particular case. . . .

[35] *See* People v. White, 390 N.Y.S.2d 405, 406 (N.Y. 1976) ("defendant was conspicuously handicapped by his inability to refer to the results of any comparative testing"); State v. Hanson, 278 N.W.2d 198, 200 (S.D. 1979) (defendant cannot effectively cross-examine State's expert without independent test by expert).

right to conduct independent tests on evidence,[36] and that the unnecessary destruction of evidence may violate the defendant's constitutional rights,[37] Kentucky has failed to similarly protect the defendant in instances where exhaustion of the total evidentiary sample is necessary.[38]

Where unnecessary destruction of test materials has been held violative of a defendant's constitutional rights, the courts often rely on sixth amendment or fourteenth amendment due process analysis.[39] Without an independent chemical analysis, the defendant has no reasonable way of cross-examining the state's chemist or of challenging the test results.[40] Unnecessary destruction has been held to constitute an act of suppression[41] and a denial of due process, thereby denying a defendant access to relevant and material evidence necessary for the preparation of his defense.[42] Inherent in these assertions is "the right to know of adverse evidence and the opportunity to rebut it."[43]

The courts recognize that government tests are not infallible. "[E]xpert opinions as to accuracy and conclusiveness of tests can and do differ."[44] The ability to impeach the results of a

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[36] *See* 482 S.W.2d 92.

[37] 684 S.W.2d at 16.

[38] *See id. See also* note 27 *supra* and accompanying text.

[39] *See* Warren v. State, 288 So. 2d 826, 830 (Ala. 1973) (right of cross-examination and due process denied by failure to furnish defendant with a sample); Deberry v. State, 457 A.2d 744, 751-52 (Del. 1983) (duty to preserve evidence rooted in due process clause of fourteenth amendment); People v. Taylor, 369 N.E.2d at 576 (destruction of evidence deprived defendant of right to due process and meaningful confrontation); State v. Brown, 337 N.W.2d 507, 511 (Iowa 1983) (denial of access to evidence may violate due process); Love v. State, 441 So. 2d 1353, 1356-57 (Miss. 1983) (failure to permit independent analysis is inconsistent with due process right); State v. Wright, 557 P.2d 1, 7 (Wash. 1976) (en banc) (failure to preserve evidence deprived defendant of due process). *But see* United States v. Herndon, 536 F.2d 1027, 1029 (5th Cir. 1976) (sixth amendment right of confrontation is restricted to witnesses and does not apply to physical evidence).

[40] *See, e.g.*, People v. White, 390 N.Y.S.2d at 406; State v. Hanson, 278 N.W.2d at 200.

[41] *See* Garcia v. District Court, 589 P.2d 924, 929-30 (Colo. 1979) (en banc); State v. Lovato, 617 P.2d 169, 171 (N.M. Ct. App. 1980).

[42] *See* 278 N.W.2d at 201.

[43] 369 N.E.2d at 575.

[44] *Id.* The court refers to a nationwide study conducted on 37 crime laboratories including 135 drug analysts whom the authors concluded, " 'as a group suffer from a serious lack of specialized training in drug analysis . . . [and] are simply not adequately equipped to solve many drug identification problems.' " *Id.* (citing Stein, *An Evaluation of Drug Testing Procedures Used by Forensic Laboratories and the Qualifications of*

state's chemical analysis is often crucial to defense strategy, especially when the results constitute the only direct evidence against a defendant. Despite the courts' pronouncements on ensuring fundamental fairness,[45] however, the great weight of authority finds that the state's unavoidable consumption of evidence, through testing, does not violate constitutional guarantees.[46]

To justify excluding the state's test results at trial, some courts require the defendant to prove that total consumption was unnecessary.[47] The defendant, therefore, must offer proof of the state's culpability—the intentional or negligent destruction of evidence.[48] Other courts shift this burden to the prosecution and hold that "a heavy burden devolves upon the State either to produce a testable sample or to prove by clear and convincing evidence that the destruction of all of the [evidence] . . . was necessary."[49] Since the evidence is within the exclusive control of the state and is consumed by its processes, these courts take the position that it is more equitable to put the burden on the prosecution.[50]

Regardless of where the burden of proof lies, when the admissibility of evidence turns on whether a sample was necessarily or unnecessarily destroyed, a battle of experts at trial may result. When the quantity of material tested is small, the court ultimately must determine whether its destruction was necessary. Moreover, even judges may not agree among themselves on

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Their Analysts, 1973 WIS. L. REV. 727, 736 (1973)). See also United States v. Orzechowski, 547 F.2d 978 (7th Cir. 1976), *cert. denied*, 431 U.S. 906 (1977), where the government and defense experts disagreed on critical chemical analysis testimony. The court observed, "[t]he . . . informed defense helped educate the Government on what its laboratory evidence should have been if all doubt was to be resolved about the identity of substances." *Id.* at 981.

[45] *See* text accompanying notes 39-43 *supra*.

[46] *See* notes 20 & 27 *supra* and accompanying text.

[47] *See, e.g.*, Lee v. State, 511 P.2d 1076, 1077 (Alaska 1973); State v. Herrera, 365 So. 2d at 401; State v. Pearson, 678 P.2d at 615; State v. Carlson, 267 N.W.2d at 175; Poole v. State, 291 So. 2d at 726. *See also* Commonwealth v. Walker, 441 N.E.2d 261, 263 (Mass. App. Ct. 1982) (state's culpability is one factor in considering sanctions).

[48] *See* note 47 *supra*.

[49] 369 N.E.2d at 576. *See also* 457 A.2d at 753.

[50] *See* 457 A.2d at 753. *Accord* United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971) (noting that "relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government.").

whether destruction was necessary or unnecessary.[51] In any case, once the determination is made, some courts will admit the test results if consumption was necessary and exclude the results if consumption was unnecessary.[52] In these cases, the scope of a defendant's rights essentially rests upon the culpability of the state, not upon the defendant's right to fundamental fairness.

Other courts, however, recognize and enforce the defendant's *absolute* right to test.[53] When faced with the state's competing need to exhaust a sample, these courts compromise by allowing the accused to participate in testing.[54] Generally, a defendant participates by retaining an expert who is present during the state's analysis.[55] The defendant's expert can thoroughly evaluate testing procedures, laboratory equipment, chemist skill, integrity of the sample and, ultimately, the reliability of the results. This solution preserves any ground for impeachment the defense would have had by virtue of an independent test.

In some situations, the defendant may be unable to obtain an expert. Courts have resolved this problem by suggesting alternative methods by which a defendant may "participate."[56] The *Green* court suggests that disclosing the notes of the state's expert, in lieu of a sample, may be sufficient for independent evaluation.[57] This author, however, suggests that a mere report

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[51] *See, e.g.,* People v. Dodsworth, 376 N.E.2d 449 (Ill. App. Ct. 1978) (majority and dissenting opinions reflect disagreement on whether total consumption of an alleged narcotic was necessary).

[52] *See* State v. Herrera, 365 So. 2d at 401.

[53] *See* People v. Garries, 645 P.2d 1306, 1308 (Colo. 1982).

[54] *See id.* at 1309. *Accord* State v. Wright, 557 P.2d at 7 (Wash. 1976) (en banc).

[55] *See, e.g.,* State v. Cloutier, 302 A.2d 84, 89 (Me. 1973); State v. Faraone, 425 A.2d 523, 526 (R.I. 1981).

[56] *See* 645 P.2d at 1309 ("state's analyst might take photographs to preserve the results of his experiments so that at least an independent interpretation of the result is possible"). Some courts permit an indigent defendant to hire an expert for independent testing or to be present during the state's analysis. *See* State v. Clemons, 363 A.2d 33, 38 (Conn.), *cert. denied*, 423 U.S. 855 (1975) (state should provide access to indigent defendant when state itself has access and plans to utilize its own expert testimony); State v. Hanson, 278 N.W.2d at 200. *But see* Bright v. State, 293 So. 2d 818, 822 (Miss. 1974) (court would not permit an indigent defendant to hire expert for independent testing at state's expense).

[57] *See* Green v. Commonwealth, 684 S.W.2d at 16. The court specifically held that the notes *and other* testing information must be "sufficient to enable [defendant] to obtain his own expert evaluation." (Emphasis added). However, in ruling that the state's laboratory tests should have been suppressed at trial, the court noted only the state's failure to produce the laboratory notes. There is no discussion on whether this information alone would be adequate for a full independent evaluation. *Id.*

of the state's results will rarely, if ever, be capable of independent evaluation. Detailed notes of the entire test process may sometimes be an acceptable alternative, but the state's notes should not be unilaterally offered as a substitute for the defendant's right to test.[58] The defendant should be given the opportunity to exercise that right before an evidentiary sample is entirely exhausted.[59]

To fully protect the defendant's right to participate in testing, the state should give advance notice when it anticipates destruction of an entire sample.[60] Many types of evidence, particularly body fluids, cannot be preserved indefinitely, and even a timely motion for disclosure may be too late.[61] The state should not possess the prerogative to destroy evidence, even necessarily, merely because the defendant has not yet filed a motion for production under a discovery rule.[62] The state's unfettered discretion creates a risk that the state will consume a sample, or render the sample incapable of further testing, before the defendant requests disclosure[63]—a potential result in every instance of "necessary" destructive testing. If the state is permitted to cir-

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[58] The *Green* court inexplicably gives the state its choice. Presumably, the state may unnecessarily destroy evidence without fear of sanction when the laboratory notes are made available to the defendant. *Id.*

[59] *See* 645 P.2d at 1309-10.

[60] *See id.*; State v. Wright, 557 P.2d at 7. *See also* Stipp v. State, 371 So. 2d 712, 714 (Fla. Dist. Ct. App. 1979), *cert. denied*, 383 So. 2d 1203 (Fla. 1980) (better rule is to notify defendant and allow him to participate in testing); State v. Carlson, 267 N.W.2d at 175 n.4 ("better practice would dictate that the defendant be notified of the proposed testing"); State v. Kersting, 623 P.2d 1095, 1104 n.4 (Or. Ct. App. 1981) ("Questions concerning deprivation of those rights would be substantially obviated if the state adopted a procedure to notify the defendant that tests are about to be conducted.").

[61] Where evidence subject to testing consists of bodily substances, such as blood, it may become incapable of retesting after a period of time due to deterioration, even though a portion of the sample remains. *See, e.g.*, State v. Pearson, 678 P.2d at 611 (Kan. 1984); State v. Disch, 351 N.W.2d 492, 494-96 (Wis. 1984). Whether a request was timely may ultimately be another issue interjected at trial. If the defendant is given notice that the results of a chemical test will be introduced against him at trial, the "timeliness" issue may be avoided altogether.

[62] *See* United States v. Bryant, 439 F.2d at 651 (D.C. Cir. 1971); Commonwealth v. Walker, 441 N.E.2d at 263; State v. Bailey, 475 A.2d 1045, 1050 (Vt. 1984).

[63] *See* State v. Herrera, 365 So. 2d at 400 (blood sample destroyed one week after taken; request made forty days after destruction); State v. Lightle, 502 P.2d 834, 836 (Kan. 1972) (sample consumed by state analysis before information filed); Poole v. State, 291 So. 2d at 724 (state "necessarily" consumed samples of alleged narcotics before defendants' timely motions for production).

cumvent the defendant's right to participate in testing by destroying evidence before a request for disclosure, "the disclosure duty would be an empty promise."[64]

The preferred solution is to require advance notice. This practice has even been recommended by certain courts that do not recognize a defendant's absolute right to participate in testing.[65] A notice procedure does not create a windfall for the defendant. If notice is given and a timely request to participate in testing is not forthcoming, he has "waived" his right and cannot later complain.[66] The prosecution then will neither be subject to allegations of intentional suppression or unnecessary destruction nor face the possibility of having its most probative evidence rendered inadmissible. The issue of necessary versus unnecessary destruction will become irrelevant and will not be interjected at trial. Furthermore, if the defendant has opted not to participate in testing, it is unlikely that the trier of fact will draw an inference that the destroyed evidence was somehow favorable to the accused.[67] A procedure for advance notice serves the interests of the prosecution, the defense, and the court. It eliminates both adjudication of collateral issues at trial and endless appeals on constitutional grounds.

III. PRE-ARREST VS. POST-ARREST DESTRUCTION

The *Green* court held that the state cannot unnecessarily destroy evidence "after the defendant stands charged."[68] The court ignored countless instances where there is a lapse of time between a state's testing and an arrest or indictment. The prosecution of narcotics cases often involves extensive and prolonged undercover operations that result in arrests many months after

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[64] 439 F.2d at 648. *Accord* 475 A.2d at 1050.

[65] *See* 371 So. 2d at 714; 267 N.W.2d at 175 n.4; 623 P.2d at 1104 n.4.

[66] *Cf.* Wilhite v. Commonwealth, 574 S.W.2d 304, 306 (Ky. 1978) (defendant failed to request independent analysis prior to trial pursuant to pretrial order granting production of sample).

[67] *See* Deberry v. State, 457 A.2d at 754 (inference that evidence which defendant was not allowed to test was favorable to defendant); State v. Herrera, 365 So. 2d at 401 (credibility of state's chemist open to attack when defendant not allowed to test); 557 P.2d at 7.

[68] Green v. Commonwealth, 684 S.W.2d 13, 16 (Ky. Ct. App. 1984).

an alleged offense occurs.[69] When the defendant is eventually tried, the state's chemical analysis may provide the most incriminating evidence, and be the only basis for conviction.[70]

In *People v. Taylor*,[71] cited by the *Green* court,[72] the Illinois Court of Appeals addressed the admissibility of test results when an alleged heroin sample was subjected to destructive testing before the defendant was charged.[73] The court held that the state has a duty to preserve part of the evidence "in the event criminal prosecution is later instituted."[74] Noting that there was no evidence of intentional suppression, the *Taylor* court held the state's *unnecessary* destruction of the entire sample unconstitutional, reversed the conviction, and excluded the test results on retrial.[75]

In *People v. Garries*,[76] also cited in *Green*,[77] the results of blood stain tests conducted before the defendant was arrested were held inadmissible in a murder trial. "The testing procedures employed have deprived the defendant of important methods of checking the accuracy of test results on crucial evidence."[78] In *Garries*, the court affirmed the lower court's suppression ruling, even though total destruction of the evidence was necessary.[79] The Colorado court was highly critical of the government's failure to notify the suspect and allow him the opportunity to participate in the testing.[80]

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[69] *See, e.g.*, People v. Taylor, 369 N.E.2d 573, 574 (Ill. App. Ct. 1979) (over four months elapsed between time of testing and defendant's arrest); Poole v. State, 291 So. 2d 723, 724 (Miss.), *cert. denied*, 419 U.S. 1019 (1974) (defendant arrested "some months" after tests conducted on alleged narcotic sample); State v. Hanson, 278 N.W.2d 198, 199 (S.D. 1979) (five months elapsed between testing and filing of information).

[70] *See, e.g.*, Stipp v. State, 371 So. 2d 712, 713 (Fla. Dist. Ct. App. 1979), *cert. denied*, 383 So. 2d 1203 (Fla. 1980).

[71] 369 N.E.2d 573 (Ill. App. Ct. 1979).

[72] 684 S.W.2d at 16.

[73] *See* 369 N.E.2d at 574.

[74] *Id.* at 575. *Accord* Deberry v. State, 457 A.2d 744, 752 (Del. 1983).

[75] 369 N.E.2d at 576.

[76] 645 P.2d 1306 (Colo.), *cert. denied*, 423 U.S. 855 (1975).

[77] 684 S.W.2d at 16.

[78] 645 P.2d at 1310.

[79] *Id.* at 1308.

[80] The court took the state to task, saying:

> The state cannot simply present the defendant with an accomplished fact and then insulate its conduct from review by contending that the defendant would not have availed himself of the opportunity to participate in the testing of this admittedly crucial evidence.

Id. at 1310.

Although the *Green* court relied on *Taylor* and *Garries*,[81] it limited the application of its holding to instances in which evidence is destroyed after the defendant stands charged.[82] In other words, there is no duty to preserve until the duty to disclose attaches, and only an *accused* may request disclosure.[83] Some courts take this view based on their literal interpretation of an applicable discovery rule. Many state discovery rules are similar to RCR 7.24(2), which limits the *defendant's* right to inspect evidence to materials "in the possession, custody or control of the Commonwealth."[84] Where evidence is destroyed before an arrest, the evidence is literally no longer "in possession" of the state when the defendant is arrested and given the opportunity to request production.[85] Consequently, the state can freely destroy evidence, even unnecessarily, prior to an arrest, totally emasculating the purpose of the rule.[86]

In *United States v. Bryant*,[87] the court vehemently criticized such reasoning as "far too facile, and clearly self-defeating."[88] *Bryant* held that the "duty of disclosure attaches . . . once the Government has first gathered and taken possession of the evidence. . . . [T]he duty of disclosure is operative as a duty of preservation."[89] The fact that an investigative agency, as op-

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[81] *See* Green v. Commonwealth, 684 S.W.2d at 16. In *Green* the court noted, "It is wrong for the state to unnecessarily destroy the most critical inculpatory [sic] evidence in its case against an accused and then be allowed to introduce essentially irrefutable testimony of the most damaging nature against the accused." *Id.* (quoting Stipp v. State, 371 So. 2d at 713). It is unclear from the *Stipp* opinion whether the alleged narcotic was destroyed before or after the defendant was charged.

[82] *See* 684 S.W.2d at 16.

[83] This is implicit in the holding. The *Green* court carefully points out that *Taylor* and *Garries* involved testing prior to the arrest of suspects. *See id.* at 16. The court offered no reason for restricting the scope of its holding to those already charged when the evidence is destroyed.

[84] RCr. 7.24(2).

[85] *See, e.g.*, State v. Lightle, 502 P.2d 834, 836 (Kan.), *cert. denied*, 410 U.S. 941 (1972).

[86] *See* United States v. Bryant, 439 F.2d 642, 651 n.18.

[87] 439 F.2d 642 (D.C. Cir. 1971).

[88] *Id.* at 650.

[89] *Id.* at 651. Relying on *Brady*, the court dismissed the argument that "good faith administrative decisions that certain evidence is not discoverable and thus need not be preserved" excuse nonpreservation. *Id.* at 652 n.21. Under *Bryant*, all discoverable evidence gathered during a criminal investigation would be subject to the duty of preservation. *Id. Accord* Deberry v. State, 457 A.2d at 751-52; People v. Taylor, 369 N.E.2d at 575; Commonwealth v. Walker, 441 N.E.2d 261, 263 (Mass. App. Ct. 1982); State v. Bailey, 475 A.2d 1045, 1050 (Vt. 1984).

posed to the prosecution, has possession when the evidence is destroyed should not exonerate the prosecution.[90] If a rule of preservation attached only to the prosecution, the effectiveness of the rule would be undermined by the unrestricted actions of other governmental agencies.[91] As *Garries* demonstrates, evidence gathered at the investigative stage should not be subjected to destructive testing without prior notice to the person against whom the test results will be used.[92]

IV. SANCTIONS

The *Green*[93] decision poses one problem that falls squarely on the prosecution. In *Green*, highly probative evidence was excluded because the state breached its duty to preserve an alleged drug sample—a duty never before imposed.[94] Future litigation will undoubtedly produce the same result. To justify excluding state's evidence, a procedure for "preservation of test materials"[95] should be adopted that governs all instances of destructive testing.[96]

Most courts impose sanctions only when there is a showing either of bad faith suppression by the state or of prejudice to the defendant.[97] A bad faith requirement, however, is inconsist-

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[90] 439 F.2d at 650. The scope of the duty of preservation has been extended by some courts well beyond evidence within the possession of governmental agencies. *See, e.g.*, State v. Brown, 337 N.W.2d 507, 510 (Iowa 1983) (state never had possession of the sample, but police officer "personally directed acquisition of the physical evidence."). *See also* State v. Vaster, 659 P.2d 528, 533 (Wash. 1983) (en banc) (duty to preserve applies to all agents acting under prosecutorial authority, including private citizens).

[91] 439 F.2d at 650.

[92] *See* People v. Garries, 645 P.2d at 1310.

[93] Green v. Commonwealth, 684 S.W.2d 13, 16 (Ky. Ct. App. 1984).

[94] Prior to *Green*, the Kentucky courts had not imposed a duty on the state to preserve evidence susceptible of destructive testing and the narrow breadth of the holding in *Green* leaves the issue open given any change in facts. *See, e.g.*, Scott v. Commonwealth, No. 84-SC-71-MR (Ky. Nov. 15, 1984), 31 KY. L. SUMM. 15 at 18 (failure to preserve corpse not error).

[95] 684 S.W.2d at 16 (court acknowledged lack of such a procedural rule in Kentucky).

[96] See, e.g., STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) at § 11-2.1(b) (iii), which provides that the prosecution will notify the defendant when scientific tests are to be conducted which may exhaust the "subject of the test."

[97] In the federal circuit courts, a balancing test is employed. Although the tests are not identical, they each weigh the culpability of the government and the prejudice to the defendant. *See, e.g.*, United States v. Doty, 714 F.2d 761, 764 (8th Cir. 1983); United States v. Baca, 687 F.2d 1356, 1359 (10th Cir. 1982); United States v. Traylor,

ent with *Brady*, where good or bad faith was deemed irrelevant.[98] The rationale for excluding the evidence is to ensure a fair trial for the defendant, not to "punish" the prosecution.[99] Admittedly, most of the unnecessary destruction cases do not involve bad faith at all.[100] As in *Green*, the evidence is consumed not to deprive the defendant intentionally, "but rather from lack of sensitivity to defendant's right to perform independent tests."[101] Courts have struggled with various tests to determine if the defendant has been prejudiced.[102] When a sample is consumed before the defendant can independently conduct testing, the burden of showing prejudice may be impossible. Recognizing this dilemma, some courts have held that the defendant is not required to show actual prejudice[103] "because, in the absence of an independent test, the accused will usually not know whether the results of the State's test were inaccurate or incorrect."[104]

Some courts have applied *Bryant's* broad duty of preservation to cases in which evidence is unnecessarily consumed:

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656 F.2d 1326, 1334-35 (9th Cir. 1981); Virgin Islands v. Testamark, 570 F.2d 1162, 1165-68 (3d Cir. 1978). These courts use a two-part test, weighing governmental bad faith and prejudice to the defendant. See also United States v. Picariello, 568 F.2d 222, 227 (lst Cir. 1978), and United States v. Herndon, 536 F.2d 1027, 1029 (5th Cir. 1976), which apply a three-prong analysis: materiality of the nondisclosed evidence, prejudice to the defendant, and the reasons the evidence is unavailable. Many state courts use a similar balancing test. *See, e.g.*, Deberry v. State, 457 A.2d 744, 752 (Del. 1983); Lee v. United States, 385 A.2d 159, 163 (D.C. 1978); State v. Berry, 470 A.2d 881, 885 (N.H. 1983); State v. Lovato, 617 P.2d 169, 171 (N.M. Ct. App. 1980); State v. Bailey, 475 A.2d 1045, 1052 (Vt. 1984); State v. Vaster, 659 P.2d 528, 533 (Wash. 1983) (en banc).

[98] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

[99] *See* State v. Wright, 557 P.2d 1, 7 (Wash. 1976) (en banc).

[100] *See id.* at 6-7; People v. Dodsworth, 376 N.E.2d 449, 452 (Ill. App. Ct. 1978); People v. Taylor, 369 N.E.2d at 575; Commonwealth v. Walker, 441 N.E.2d 261, 263-64 (Mass. App. 1982).

[101] People v. Dodsworth, 376 N.E.2d at 452.

[102] *See, e.g.*, State v. Brown, 337 N.W.2d 507, 511 (Iowa 1983) ("where . . . there is the unavoidable possibility that the [evidence] might have been significantly favorable") (citing United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971)); 659 P.2d at 532 (defendant must show only a reasonable possibility that evidence was material and favorable); 475 A.2d at 1050 (defendant must show only a reasonable possibility that evidence was material and favorable). *See also* 617 P.2d at 171 (defendant must show materiality and prejudice from suppression of evidence).

[103] *See, e.g.*, 337 N.W.2d at 511. *Accord* State v. Amundson, 230 N.W.2d 775, 788 (Wis. 1975) (inability to show prejudice alone will not defeat claim that destruction deprived defendant of due process).

[104] 376 N.E.2d at 451.

> [S]anctions for non-disclosure based on loss of evidence will be invoked in the future unless the Government can show it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve *all* discoverable evidence gathered in the course of a criminal investigation.[105]

Such a standard, plus a procedure which provides the accused—or potential accused—advance notice when the state anticipates the need to consume evidence, more appropriately defines the scope of the state's duty while protecting a defendant's discovery rights. These procedures will neither conduce to fishing expeditions nor inhibit the state's ability to evaluate evidence thoroughly. The procedures limit the duty of preservation to discoverable evidence.

In Kentucky, "discoverable" evidence is defined under RCR 7.24(2) as "evidence that may be material to the preparation of [the] defense." After notice is given to the defendant that destructive testing will be conducted, the burden lies with the defense to show materiality.[106] Courts disagree on what constitutes "material" evidence.[107] Most states, however, limit "discoverable" evidence to either evidence introduced at trial by the prosecution or evidence obtained from or belonging to the defendant.[108] The prosecution's intent to offer the evidence at

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[105] United States v. Bryant, 439 F.2d at 652. *See* State v. Bailey, 475 A.2d at 1050; State v. Wright, 557 P.2d at 6; Deberry v. State, 457 A.2d at 752; State v. Brown, 337 N.W.2d at 509. *See also* State v. Vaster, 659 P.2d at 533 ("[I]n determining the appropriate sanction, a court should consider procedures established for preserving evidence.").

[106] *See* RCr 7.24(2).

[107] *See, e.g.,* Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966) (Material evidence is that which "might have led the jury to entertain a reasonable doubt about [defendant's] guilt."); Curran v. Delaware, 259 F.2d 707, 711 (3d Cir. 1958), *cert. denied,* 358 U.S. 948 (1959) (Material evidence comprises "pertinent facts relating to defense.").

[108] *See, e.g.,* ALA. R. CRIM. P. 18.1(c)(2)-(3); ALASKA CRIM. RULE 16; ARK. R. CRIM. P. 17.1(a)(v); COLO. R. CRIM. P. 16(a)(v); CONN. GEN. STAT. ANN. § 54-86a(a) (West supp. 1983); FLA. R. CRIM. P. 3.220(a)(1)(vi) & (xi); IDAHO C.R. 16(b)(4); ILL. SUP. CT. RULE 412(a)(v); IOWA R. CRIM. P. 13.2.b(1); MD. RULE 4-263(b)(5) & (6); MINN. R. CRIM. P. 9.01 § 1(3); MISS. R. CRIM. P. 25.03(A)(6); MONT. CODE ANN. § 46-15-302(1)-(3)(a); N.J. RULES CRIM. PRACTICE 3:13-3(a)(1); N.M.R. CRIM. P. 27(a)(3); N.C. GEN. STAT. § 15A-903(d) (Michie 1983); N.D.R. CRIM. P. 16(a)(1)(C) (Supp. 1983); OHIO CRIM. R. 16(B)(1)(c); R.I. SUPER. R. CRIM. P. 16(a)(4); S.D.R. CRIM. P. 16(a)(1)(C); TENN. R. CRIM. P. 16(1)(C); VT. R. CR. P. 16(a)(2)(D). Delaware, Nevada, Pennsylvania and Virginia each have discovery provisions similar to RCR 7.24.

trial should provide a sufficient showing of materiality.[109] Where the state intends to destroy evidence, and it is unsure of its materiality, advance notice will fully protect both parties.[110]

The test results should be inadmissible if the state fails to comply with these procedures. "Supression of relevant evidence is indeed lamentable, but the answer lies in the systematic institution of safeguards . . . rather than the approval of unfair procedures."[111] Limiting sanctions to instances in which there is actual proof that the destroyed evidence was exculpatory places an often insurmountable burden on the defendant.[112] If only "bad faith" suppression is penalized, the state has no incentive to adopt effective procedures to preserve evidence.[113]

CONCLUSION

Green v. Commonwealth[114] creates important discovery rights for criminal defendants in Kentucky. As the court conceded, however, Kentucky has no procedure governing the preservation of test materials.[115] Until such a procedure is adopted, the Kentucky courts, like other courts, will undoubtedly struggle with each new set of facts that involves pretrial discovery of evidence subjected to destructive testing.[116] The guidelines suggested herein are capable of broad application and represent the interests of both prosecution and defense. Unlike *Green*, these guidelines decide neither a defendant's discovery rights nor the state's duty to preserve according to a sample's quantity or time of seizure. They do, however, promote the fundamental objective, recently

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[109] *See* C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 254, at 69 (1982).

[110] *See* 557 P.2d at 7.

[111] People v. Garries, 645 P.2d 1306, 1310. But see STANDARDS FOR CRIMINAL JUSTICE § 11-4.7(a) (2d ed. 1980) and its commentary which cautions that exclusion of state's evidence may result in a windfall to a guilty defendant.

[112] *See* notes 102-104 *supra*; 337 N.W.2d at 510 ("[I]t would be unfair to require the defense to show favorableness when it is impossible to determine the nature of the evidence.").

[113] *See* 557 P.2d at 7.

[114] 684 S.W.2d 13 (Ky. Ct. App. 1984).

[115] *Id.* at 16. *See* note 31 *supra*.

[116] *See, e.g.*, Scott v. Commonwealth, 685 S.W.2d 184 (Ky. 1984) (failure to preserve murder victim's corpse after defendant's motion to conduct independent examination held not error where there was no suggestion of bad faith on the part of the prosecution).

reiterated by the United States Supreme Court, of affording criminal defendants "a meaningful opportunity to present a complete defense."[117]

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[117] California v. Trombetta, 104 S. Ct. 2528, 2532 (1984) (O'Connor, J., concurring).