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Criminal Procedure—Preservation of Due Process When Evidence Is Destroyed or Tested—State v. Wright, 87 Wn. 2d 783, 557 P.2d 1 (1976)

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CRIMINAL PROCEDURE—PRESERVATION OF DUE PROCESS WHEN EVIDENCE IS DESTROYED OR TESTED—*State v. Wright*, 87 Wn. 2d 783, 557 P.2d 1 (1976).

The Washington Supreme Court reversed the first degree murder conviction of Andrew James Wright and dismissed the charges against him on the ground that due process of law had been violated "by the destruction of numerous items of material evidence prior to trial."[1] The police officers who removed the body of the victim from the room where it was discovered[2] left several items behind, including bedclothes which had been around and under the body and a man's coat found on a chair next to the body.[3] While Wright was in custody but without counsel, the police gave Wright's stepfather permission to destroy these items.[4] Without checking for blood on any of the items, the police destroyed the clothing which had been on the body, apparently because of the risk that storage in available facilities would have contaminated other evidence.[5]

More significant than the result in this case was the rule laid down in the penultimate paragraph of the court's opinion[6] requiring the state to give notice to the defendant or to petition the court "before any testing or disposition of evidence."[7] *State v. Wright*, 87 Wn. 2d 783, 557 P.2d 1 (1976). The purpose of this note is to identify uncer-

1. State v. Wright, 87 Wn. 2d 783, 783, 557 P.2d 1, 1–2 (1976).
2. A body alleged to be that of Wright's wife was found in the house where they had lived. *Id.* at 784–85, 557 P.2d at 2–3.
3. *Id.* at 785–86, 557 P.2d at 3. Along with the coat, the items left in the room included the "blanket, pillowcase, and sheet the body was wrapped in, the blanket and mattress the body lay on, [and] the rugs and pillows on the floor." *Id.* at 785, 557 P.2d at 3.
4. *Id.* at 786, 557 P.2d at 3. "His purpose was to 'clean the room up' " for Wright's great-grandmother, who owned the home. *Id.*
5. *Id.* at 785, 557 P.2d at 3.
The body, the surrounding bedclothes, and the bed were infested by maggots. As the court noted, "The testimony at trial indicated it would have been necessary to store the evidence in a small freezer in the [police] property room and that, if the containing package broke, it would probably contaminate other evidence in the freezer." *Id.*
Wright's attorney was informed of the destruction after requesting discovery of the evidence removed from the room where the body was found and thereupon moved for dismissal before trial. *Id.* at 786, 557 P.2d at 3.
6. The state moved for reconsideration and deletion of this paragraph. *See* Respondent's Motion for Reconsideration of Decision [hereinafter cited as Respondent's Motion]. The petition for rehearing was denied on May 5, 1977. 87 Wn. 2d at 795.
7. 87 Wn. 2d at 793, 557 P.2d at 7. The rule is fully set forth in the text accompanying note 37 *infra*.

tainties in the future application of the *Wright* rule and to predict their probable resolution. Analysis of *Wright* and the cases on which it relies leads to the conclusion that failure to use the notice-petition procedure before disposition or testing of evidence will result in sanctions only if the defense can show that evidence destroyed, or chemically changed in testing, was potentially material, and only if the state is unable to show that the failure to preserve was reasonable. In addition, the *Wright* rule implies a defense right to observe or participate in potentially destructive tests and independently to test items which are not consumed or whose chemical properties are not changed by the tests. The choice of sanctions for violation of the rule will not be limited to dismissal and will depend on the nature of the evidence involved and its degree of materiality.

I. BACKGROUND: PRE-EXISTING LAW ON THE DUTY TO PRESERVE

A. The Duty To Disclose

The duty to preserve material evidence recognized in *Wright* was derived from the duty to disclose, which has both a constitutional and a statutory basis. In *Brady v. Maryland,*[8] the United States Supreme Court imposed upon prosecutors an affirmative duty to disclose material evidence. *Brady* held that due process is violated when, following a request by the accused, the prosecution suppresses evidence which is material to issues of guilt or punishment. Good or bad faith of the prosecution was said to be irrelevant.[9] The duty to disclose has been

8. 373 U.S. 83 (1963).

9. *Id.* at 87. *Brady* builds on the foundation of Mooney v. Holohan, 292 U.S. 103, 112 (1935), and successor cases including Pyle v. Kansas, 317 U.S. 213, 215–16 (1942), and Napue v. Illinois, 360 U.S. 264, 269 (1959), all cited in *Brady,* 373 U.S. at 86–87. These cases establish that due process is violated by state authorities' knowing use of perjured testimony. *Brady's* rationale is that "[t]he principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." 373 U.S. at 87.

The *Brady* "rule" arguably is dictum because it is merely an explanation of why the Court agreed with the Maryland Court of Appeals decision to grant a new trial on the question of punishment. *See* Justice White's separate opinion, *id.* at 91–92. The question presented by Brady's petition for certiorari was whether he was denied a federal right when the Maryland court limited his retrial to the issue of punishment, *id.* at 85; the United States Supreme Court ruled that he was not, *id.* at 90.

Nevertheless, subsequent Supreme Court decisions have treated the *Brady* disclosure rule as precedent—for example, Giglio v. United States, 405 U.S. 150 (1972), and, more recently, United States v. Agurs, 427 U.S. 97 (1976). In *Agurs,* the issue was

extended to situations in which no defense request, or only a general request for anything exculpatory, was made.[10] Some showing of materiality is required, however, before nondisclosure results in sanctions.[11]

Rule 4.7 of the Washington Criminal Rules for Superior Court[12] provides a statutory basis, in this state, for the prosecution's duty to disclose material evidence to the defense. No later than the pretrial omnibus hearing,[13] the prosecutor must voluntarily disclose several specific categories of information relevant to the offense charged.[14] The rule also provides generally for disclosure by the prosecutor of material or information within her knowledge which tends to exculpate the defendant.[15] A specific request by the defendant for certain other types of information imposes further duties on the prosecutor.[16]

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whether the prosecution's failure to disclose information "deprived [the respondent] of a fair trial under the rule of *Brady v. Maryland*." *Id.* at 98–99.

10. United States v. Agurs, 427 U.S. 97, 107 (1976). The *Agurs* court reasoned that "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made." *Id.* at 107.

11. *Id.* at 103–13.

For suppression cases where actual materiality can be evaluated, *Agurs* identified three different materiality standards: (1) A conviction obtained by knowing use of false evidence "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103. (2) "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Id.* at 106. The standard to be applied was left unclear, though the Court stated that at least it must be shown that "the suppressed evidence might have affected the outcome of the trial." *Id.* at 104. (3) Where there was no request or only a general request for exculpatory evidence, the Court rejected the "customary harmless error standard," holding that "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *Id.* at 112.

12. The rules were promulgated by the Washington Supreme Court pursuant to WASH. REV. CODE § 2.04.190 (1976).

13. The omnibus hearing is conducted pursuant to WASH. CRIM. R. SUPER. CT. 4.5 in cases in which a plea of not guilty is entered. The parties ordinarily present all motions or requests which they may have in preparation for trial or plea. The court ascertains, among other things, whether there are any procedural or constitutional issues which should be considered and determines the extent of discovery to be granted to each party.

14. These include witnesses' and defendants' statements, experts' reports, real or documentary evidence intended for use by the prosecution or obtained from the defendant, and prior criminal records of defendants or intended witnesses. WASH. CRIM. R. SUPER. CT. 4.7(a)(1).

15. WASH. CRIM. R. SUPER. CT. 4.7(a)(3).

16. WASH. CRIM. R. SUPER. CT. 4.7(c) provides,

> Except as is otherwise provided as to matters not subject to disclosure the prosecuting attorney shall, upon request of the defendant, disclose any relevant material and information regarding:
>
> (1) specified searches and seizures;
>
> (2) the acquisition of specified statements from the defendant; and

The duty to produce is limited, however, to items and information known, possessed, or controlled by the prosecutor's staff,[17] although she also has a duty, upon request, to "attempt to cause" certain items or information held by other persons to be made available to the defendant.[18]

B. The Duty To Preserve

The duty to preserve derives from the duty to disclose and applies to government loss or destruction of potential evidence. The extension of the duty is logical, for if it applied " 'only when the exact content of the non-disclosed materials was known, the disclosure duty would be

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(3) the relationship, if any, of specified persons to the prosecuting authority. The "matters not subject to disclosure" (relating to work product and informants) are set forth in WASH. CRIM. R. SUPER. CT. 4.7(f).

The court has discretion to require further disclosures under WASH. CRIM. R. SUPER. CT. 4.7(e)(1): "Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information not covered by sections (a), (c) and (d)."

17. WASH. CRIM. R. SUPER. CT. 4.7(a)(4).

18. WASH. CRIM. R. SUPER. CT. 4.7(d) provides,

> Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant. If the prosecuting attorney's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

Wright imposed duties to preserve and disclose in situations where actual prosecution control is much more tenuous than that required by Rule 4.7. *See* text accompanying notes 88–94 *infra*.

Analogous federal statutory provisions include FED. R. CRIM. PRO. 16 and the Jencks Act, 18 U.S.C. § 3500 (1976). Rule 16 provides for pretrial disclosure, upon request, of statements made by the defendant and of documents and tangible objects which are material to preparation of his defense. The Jencks Act provides that after a government witness has testified, a defendant is entitled, upon request, to inspect all prior statements of that witness insofar as they relate to his testimony. These federal provisions are noteworthy here in that they have been partial grounds for federal court decisions which were relied on by the *Wright* court, the most important of these being United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971). That decision remanded the case with directions to weigh the degree of negligence or bad faith, importance of the evidence lost, and evidence of guilt adduced at trial. The convictions were affirmed on remand, 448 F.2d 1182 (D.C. Cir. 1971). The two decisions should be read together, because the second explains and supplements the first. The *Wright* court quotes the phrase "pragmatic balancing approach" from the second *Bryant* decision, 448 F.2d at 1184, incorrectly citing to the first *Bryant* decision, 439 F.2d at 653. *Wright*, 87 Wn. 2d at 792, 557 P.2d at 6. That phrase was the second *Bryant* court's description of the weighing process it had mandated, in the decision before remand, for pre-*Bryant* losses.

an empty promise, easily circumvented by means of destruction rather than mere failure to reveal.' "[19]

Destruction cases obviously differ from cases in which evidence still in existence has been suppressed. In the latter, the materiality of the evidence in question may be evaluated on appeal to determine whether and to what extent the defendant was prejudiced by nondisclosure. These cases have clearly established that even nondisclosure which is merely negligent, and not in bad faith, may violate due process if the evidence is sufficiently material.[20] In determining whether destruction or loss of evidence violated due process, however, decisions by other courts prior to *Wright* have split: some emphasize "materiality" and purportedly ignore good or bad faith;[21] others indicate that bad faith destruction is a necessary criterion for due process violation.[22]

19. 87 Wn. 2d at 788, 557 P.2d at 5 (quoting United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971)).

Bryant may have been decided not only on constitutional grounds, but alternatively on the basis of the Jencks Act, 18 U.S.C. § 3500 (1976), or FED. R. CRIM. PRO. 16. 439 F.2d at 647–50. The *Wright* court clearly uses *Bryant* as an application of the *Brady* constitutional duty. 87 Wn. 2d at 789, 557 P.2d at 5. *Accord,* United States v. Harrison, 524 F.2d 421, 429 (D.C. Cir. 1975).

Bryant was relied on heavily by the *Wright* court and is a key to analyzing the implications of the *Wright* notice-petition rule. *See* note 18 *supra.*

20. *E.g.,* United States v. Agurs, 427 U.S. 97, 110 (1976) ("If evidence highly probative of innocence is in [the prosecutor's] file, he should be presumed to recognize its significance even if he has actually overlooked it."); Giglio v. United States, 405 U.S. 150, 154 (1972) (government failure to disclose promise of leniency made to witness in exchange for testimony violated due process even though the U.S. attorney who tried the case did not know of the promise). Both cases rely on Brady v. Maryland, 373 U.S. 83 (1963). *Agurs,* 427 U.S. at 103–107; *Giglio,* 405 U.S. at 151, 153.

21. Trimble v. State, 75 N.M. 183, 402 P.2d 165 (1965), a leading destruction case using the suppression approach, cited *Brady* in explicitly rejecting the state's argument that because the loss of evidence was "negligent and not wilful, a different rule applies." *Id.* at 183, 402 P.2d at 166. The *Trimble* court stressed the potential materiality and usefulness of the missing evidence rather than the motives of the government agent or the circumstances of the loss. The court may, however, have believed that bad faith was involved in that case, because it characterized the defendant's reluctance to claim bad faith as "indeed charitable." *Id.* at 183, 402 P.2d at 165.

22. *E.g.,* United States v. Augenblick, 393 U.S. 348, 355–56 (1969) (government loss of a tape recording of an interview with the prime government witness was not constitutional error, though it may have been a violation of the Jencks Act, 18 U.S.C. § 3500 (1970)). The *Augenblick* Court noted that the government had made "an earnest effort . . . to locate" the tape. *Id.* at 355.

Another example is United States v. Sewar, 468 F.2d 236 (9th Cir. 1972), *cert. denied,* 410 U.S. 916 (1973), which reversed an order suppressing results of a blood test showing defendant's blood alcohol level, even though the blood sample had been thrown out by a technician who had found that his refrigerator was full and had not realized that the sample should be preserved. 468 F.2d at 237. The court in *Sewar* interpreted *Augenblick* to mean that evidence is not "suppressed" when lost in good faith and that such a case does not involve constitutional error. *Id.* at 238.

Cases which extend the duty to preserve and disclose to parties other than the prosecutor augment the idea that bad faith by the prosecutor is not a criterion for due process violation. The Supreme Court has suggested that the prosecutor is responsible for all information available to a member of his staff.[23] Most cases also extend the duty to disclose to the police of the prosecuting jurisdiction.[24]

II. REASONING OF THE *WRIGHT* COURT

In determining whether defendant Wright was denied due process, the Washington Supreme Court first rejected the approach utilized in cases involving government failure to disclose still-existing evidence. Such a distinction is proper because when the evidence sought in discovery no longer exists, the court is "unable to determine whether some or all of the evidence would have been favorable to the defendant and material to the issue of guilt or innocence."[25] The court then recognized and seemingly adopted the approach of *United States v. Bryant*[26] and *People v. Hitch*[27] in holding that the duty to disclose is operative before trial as a duty to preserve.[28] The duty was said to "apply equally to the prosecution, police, other investigatory agencies, and persons who handle evidence with the consent of such officials."[29]

Again following *Bryant* and *Hitch*, the *Wright* court held that evi-

23. Giglio v. United States, 405 U.S. 150 (1972). For the holding of *Giglio, see* note 20 *supra*. The Court stated,

> [W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. . . . To the extent this places a burden on large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

405 U.S. at 154.

24. Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 1271 (4th ed. 1974). *E.g.*, Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964) (holding that "[t]he police are also part of the prosecution, and the taint on the trial is no less if they rather than the State's Attorney, were guilty of the nondisclosure."). Although *Barbee* is a suppression case, United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971), applies the principle to destruction cases: "The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies." *Id.* at 650.

25. 87 Wn. 2d at 788, 557 P.2d at 4.

26. 439 F.2d 642, 651 (D.C. Cir. 1971), *cited in Wright*, 87 Wn. 2d at 788–89, 791–92, 557 P.2d at 5–7.

27. 12 Cal. 3d 641, 650, 527 P.2d 361, 367, 117 Cal. Rptr. 9, 15 (1974), *cited in Wright*, 87 Wn. 2d at 789, 791–92, 557 P.2d at 5–7.

28. 87 Wn. 2d at 789, 557 P.2d at 5.

29. *Id.* at 790 n.4, 557 P.2d at 6 n.4.

dence is sufficiently material to bring a case within the protection of the due process clause when there is a "reasonable possibility" that it was material to guilt or innocence and favorable to the appellant.[30] To determine whether that standard was met in *Wright,* the court reviewed the entire record, considering not only the evidence of guilt but also evidence favorable to the defense.[31] According to the court, the defendant met the reasonable possibility standard by enumerating "areas where the existence of the evidence destroyed could possibly have been of assistance to him."[32] Finally, while conceding that "good

30. *Id.* at 789–90, 557 P.2d at 5–6 (citing United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971), and People v. Hitch, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974)).

31. 87 Wn. 2d at 789, 557 P.2d at 5–6 (citing *In re* Ferguson, 5 Cal. 3d 525, 533, 487 P.2d 1234, 1240, 96 Cal. Rptr. 594, 600 (1971)).

Although the body, which had been dead two to three weeks, was found by police in the house where the Wrights had lived, it was in a room separate from their living quarters. 87 Wn. 2d at 784–86, 557 P.2d at 3–4. Facts not clearly proven at Wright's trial included the body's identity, the date of the killing, and the place of death. More importantly, evidence on whether the bullets in the body were fired from the defendant's gun was conflicting, and the presence of a circular chest wound along with three bullet wounds made the cause of death uncertain. *Id.* at 786, 557 P.2d at 4.

The court conceded that "there was evidence from which a jury could infer the defendant had, in fact, committed the crime." *Id.* Along with the questionable evidence that the bullets in the body were fired from Wright's gun, there was testimony that before the body was found Wright "had told his employer his wife had been killed in an automobile accident," *id.* at 784, 557 P.2d at 3, and that while "Kathleen had not been to work for approximately 3 weeks . . . appellant had been forging and cashing payroll checks." *Id.*

A reading of the majority and concurring opinions together suggests that persons other than the defendant had the opportunity to commit the crime, most notably Mrs. Kupoff, Wright's great-grandmother and the owner of the house, and Dale Morbeck, who had formerly occupied the room where the body was found. Mrs. Kupoff stated for the first time at trial that she had found the body on October 21, 1974, though the police did not discover it until November 21, when it was badly decomposed. She had access to Wright's gun and admitted returning the gun to the place where it was kept after finding the body. Morbeck had keys to the room in which the body was found and to the building at the time of the killing. The coat found in the room was his. Morbeck had owned a knife which he claimed to have lost at the time of the killing, and the autopsy indicated that the cause of death could have been a stab wound. *Id.* at 790, 557 P.2d at 6 (majority opinion); *id.* at 794–95, 557 P.2d at 8 (concurring opinion).

32. 87 Wn. 2d at 790, 557 P.2d at 6; *see* note 31 *supra.*

Discovery of blood on Morbeck's coat could have implicated him in the killing; if a knife had been found in the coat it might have proven to be a murder weapon; the amount of dirt, oil, mud, or other substances on the shoes, clothing, or items in which the body was wrapped could have helped determine the location of the killing—whether in the room where the body was found, some other room, or outside the house; the absence or presence of blood on the sheet or blanket in which the body was wrapped could have helped indicate whether she was killed with or without the sheet or blanket around her; ownership of the material in which the body was wrapped might have been established by a laundry mark or other identifying mark; examination of clothing and shoes could have been helpful in identifying the body; blood other than that of the deceased and of a type dissimilar to defendants might have been found on the deceased's clothing. *Id.* at 790–91, 557 P.2d at 6.

faith *loss*" might excuse noncompliance with the duty of preservation if the government made "earnest efforts" to preserve crucial materials,[33] the court determined that no effort to preserve the evidence was made in this case.[34]

The court then considered the question of appropriate sanctions in destruction cases, concluding that the choice of sanctions should be "guided by the 'pragmatic balancing approach,' enunciated in [*Bryant*]."[35] Using the balancing approach, the court ordered reversal and dismissal because there had been a serious violation of due process and a new trial would do nothing to remedy the constitutional violation.[36]

The penultimate paragraph of the majority opinion stated that the decision required preservation of all potentially material and favorable evidence. Noting the difficulties in identifying all such evidence at the scene of a crime and in preserving all potential evidence, the court laid down the following rule to alleviate these problems:

> [B]efore any testing or disposition of evidence occurs, the defendant should be given notice of the type of evidence involved and its planned disposition. If contact with the defendant is impossible or if the defendant is not yet represented by counsel, the state must petition the trial court which will determine an appropriate course of action consistent with the interests of both the prosecution and defense.[37]

III. FUTURE APPLICATION OF THE *WRIGHT* RULE

A. Operation of the Notice-Petition Procedure

The court did not elaborate on how the existence of a procedure for notice to the defendant or petition to the court before disposition or testing would change the duty to preserve. The notice-petition rule

33. *Id.* at 791, 557 P.2d at 6 (emphasis in original) (citing United States v. Bryant, 439 F.2d 642, 651 (D.C. Cir. 1971), and People v. Hitch, 12 Cal. 3d 641, 652, 527 P.2d 361, 369, 117 Cal. Rptr. 9, 17 (1974)).

34. 87 Wn. 2d at 791–92, 557 P.2d at 6–7.

35. *Id.* at 792, 557 P.2d at 7 (quoting *Bryant*, 448 F.2d 1182, 1184 (D.C. Cir. 1971), but incorrectly citing 439 F.2d 642, 653 (D.C. Cir. 1971)). *See* note 18 *supra*. The balancing approach is said to require "a weighing of 'the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial in order to come to a determination that will serve the ends of justice.' " 87 Wn. 2d at 792, 557 P.2d at 7 (quoting *Bryant*, 439 F.2d at 653).

36. 87 Wn. 2d at 792, 557 P.2d at 7.

37. *Id.* at 793, 557 P.2d at 7.

is apparently derived from two sources: Circuit Judge Merrill's concurring opinion in *United States v. Heiden*[38] and a *Columbia Law Review* note[39] which adopts and supplements Judge Merrill's suggestion.[40] These sources reveal that notice before disposition of evidence has the dual purpose of providing the defendant an "opportunity to petition for access to [evidence] which has been seized,"[41] and reducing evidence maintenance by police to a manageable level.[42] A defendant could prevent destruction by requesting discovery of some or all of the evidence involved, but if he agreed to destruction or failed to request discovery, he would probably be held to have waived any claim that the destruction was a violation of due process.[43]

Uncertainties about future application of the *Wright* notice-petition rule led the state to request that the court delete the penultimate paragraph of the opinion, because the rule would be unduly burdensome

38. 508 F.2d 898, 903 (9th Cir. 1974) (concurring opinion), *cited in Wright,* 87 Wn. 2d at 793, 557 P.2d at 7.

The concurring opinion states, "When . . . destruction is shown to have been prejudicial, reversal is called for. . . . I would urge that . . . destruction of evidence follow only after petition and order directed to the particular items to be destroyed, with notice to the defendant and opportunity to petition for access to that which has been seized." 508 F.2d at 903.

In *Heiden,* all but 24 kilo packages of a large marijuana seizure had been destroyed because of contraband storage problems. *Id.* at 902. The court refused to reverse the conviction, because the destruction was not prejudicial. *Id.* at 900–01, 903. Nevertheless, both the opinion of the court, *id.* at 903 n.1, and Judge Merrill's concurrence, *id.* at 903, strongly disapproved of the destruction, because of the potential for prejudice.

39. Note, *The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine,* 75 COLUM. L. REV. 1355 (1975) [hereinafter cited as *Testing*], *cited in Wright,* 87 Wn. 2d at 793, 557 P.2d at 7.

40. *Testing, supra* note 39, at 1377–80.

41. United States v. Heiden, 508 F.2d at 903 (concurring opinion).

42. *Testing, supra* note 39, at 1378.

Judge Merrill's suggestion was partially a response to the contraband storage problems which were the reason for the *Heiden* destruction discussed in note 38 *supra.*

Reduction of evidence maintenance is clearly a purpose of the *Wright* rule: its holding that a claim of inadequate facilities will not justify destruction unless facilities could not be obtained, 87 Wn. 2d at 792, 557 P.2d at 7, is footnoted with the statement: "The burden imposed by this rule is greatly minimized by the procedure for notice to the defendant and petition to the court which we adopt for use in the future." *Id.* at 792 n.5, 557 P.2d at 7 n.5.

43. According to the *Columbia Law Review* note, the notice "should indicate a reasonable time period in which the defendant must exercise his rights of access." *Testing, supra* note 39, at 1380.

The petition-to-the-court requirement in the event that the defendant is unrepresented or contact with him is impossible is also taken directly from the *Columbia Law Review* note. *Compare Wright,* 87 Wn. 2d at 793, 557 P.2d at 7, *with Testing, supra* note 39, at 1380. The intent is that the court "oversee—or at least recognize the occurrence" of the testing or disposition, the purpose being "simply to draw the individual . . . into the process at the earliest conceivable moment." *Id.* at 1378.

and unworkable.[44] It is unclear after *Wright* when failure to use the notice-petition procedure prior to disposition or testing requires sanctions, and how those sanctions are to be chosen. Specifically, *Wright* leaves the following issues open: (1) What degree of materiality, if any, is necessary for destruction of evidence to result in a due process violation? (2) When, if ever, can failure to preserve material evidence be excused? (3) What is the extent of a defendant's rights with respect to testing? (4) How is the choice of sanctions for violation of the duty to preserve to be determined? The remainder of this section analyzes these questions.

B. Materiality Requirement

1. Prerequisite to the duty to preserve

The initial issue is whether the defense must make *any* showing of materiality before destruction of evidence will result in sanctions. Arguably, *United States v. Bryant*[45] mandates automatic dismissal for noncompliance with its requirement that preservation rules be promulgated and enforced,[46] even without a showing that the evidence

44. Respondent's Motion, *supra* note 6, at 3–11.

The prosecutor had four main complaints: (1) The rule could be interpreted to require that investigating officers notify suspects or obtain court permission before termination of a crime scene investigation. Respondent's Motion, *supra* at 3. *But see* Part III–*C–1 infra*. (2) The rule could "require judicial approval before stolen property can be returned to its true owner even if no suspect has been identified and there is no reasonable expectation that the property will be destroyed." Respondent's Motion, *supra* at 7. *But see* Parts III–*B* and III–*C–4 infra*. (3) The rule could "require notice to a suspect or judicial approval prior to such routine field investigation techniques as dusting for fingerprints" or "field testing" for the presence of unlawful drugs. Respondent's Motion, *supra* at 8. *But see* Part III–*D infra*. (4) The rule could "require prior judicial approval for the thousands of tests conducted in crime laboratories even though the normal testing procedures would neither destroy, consume or render the item of evidence incapable of being subsequently tested." Respondent's Motion, *supra* at 10. *But see* Part III–*D infra*.

45. 439 F.2d 642 (D.C. Cir. 1971). *See* note 18 *supra*.

46. In the *Bryant* decisions, the District of Columbia Circuit Court of Appeals applied the "pragmatic balancing approach." *Id.* at 652–53; 448 F.2d 1182, 1184 (D.C. Cir. 1971) (discussed at note 35 *supra*). *See* note 18 *supra*. For future cases, however, the court laid down a prospective rule:

> [S]anctions for nondisclosure based on loss of evidence will be invoked . . . unless the Government can show that 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. . . . Negligent failure to comply with the required procedures will provide no excuse.

439 F.2d at 652 (emphasis in original).

lost would have been material and favorable to the defendant's case.[47] The *Wright* court relied heavily on *Bryant*[48] and *Wright*'s notice-petition requirement arguably parallels the *Bryant* court's rulemaking and enforcement requirement.[49] This position could be justified on the ground that the state would not rigorously follow the notice-petition procedure without the threat of sanctions.[50] The Washington court, however, will surely require a defense showing of materiality under *Wright*. The court might not accept the interpretation of *Bryant* just discussed, that is, it might not read *Bryant* as requiring automatic dismissal for noncompliance with the rule promulgation and enforcement mandate.[51] Decisions of several other courts claiming to follow *Bryant* still require a showing of materiality.[52] Alternatively, the court

47. On remand in *Bryant, see* note 18 *supra,* there was agent testimony that there had been a rule requiring preservation of the tape recording involved, but that the recording had been "almost completely unintelligible." 448 F.2d 1182, 1184 n.1 (D.C. Cir. 1971). The court held that, under the balancing approach, no sanction would be applied, but that in the future such conduct "would surely result in the imposition of full sanctions": "[I]nvestigative agencies will not be allowed to excuse nonpreservation of evidence by claiming that it contained nothing of interest to defendants." *Id.* at 1184. "It is the defendant's right to discover such evidence and decide for himself its usefulness." *Id.* at 1184 n.1.

48. *Bryant* is cited in *Wright,* 87 Wn. 2d at 788–89, 791–92, 557 P.2d at 5–7. *Wright* also cites United States v. Perry, 471 F.2d 1057, 1065 (D.C. Cir. 1972), in its discussion of sanctions. 87 Wn. 2d at 792, 557 P.2d at 7. The *Perry* court again applied the balancing approach, but noted that a different standard was to be applied to losses occurring after the *Bryant* decision. 471 F.2d at 1065 n.35. *See* notes 46–47 *supra.*

49. *Wright* recognized *Bryant*'s preservation-rules requirement and specifically left open the question whether it would require promulgation of such rules sometime in the future: "It is desirable that our consideration of such a rule be informed by extensive briefing by the parties and others interested and such is not available to us here." 87 Wn. 2d at 789 n.3, 557 P.2d at 5 n.3.

50. *See* Comment, *Judicial Response to Governmental Loss or Destruction of Evidence,* 39 U. CHI. L. REV. 542, 562–63 (1972) [hereinafter cited as *Governmental Loss*].

51. *See* United States v. Quiovers, 539 F.2d 744 (D.C. Cir. 1976). *Quiovers* held that, unless the loss of evidence is deliberate or results from the agency's failure to prescribe adequate preservation rules, *Bryant* requires dismissal only "where there is a substantial likelihood of serious prejudice to the defendant". *Id.* at 746–47.

The court in *Quiovers* admitted that the second *Bryant* decision, 448 F.2d 1182 (D.C. Cir. 1971), *could* be taken as requiring automatic dismissal for negligent nonpreservation, but held that it does not. 539 F.2d at 747 n.4. The distinction between the pre- and post-*Bryant* standards, according to *Quiovers,* is that lack of bad faith is not to be weighed as an excusing factor for post-*Bryant* losses. *Id.* at 746–47. *Quiovers* claims to reiterate "*Bryant*'s teaching that the total circumstances must be considered in determining what sanction to apply." *Id.* at 747.

52. For example, the court in United States v. Harris, 543 F.2d 1247 (9th Cir. 1976), while citing *Bryant, id.* at 1252, and admitting that the FBI has a duty to preserve original notes from interviews with prospective witnesses or with the accused, held that the trial judge's refusal to strike an FBI agent's testimony concerning his interview with the accused was "harmless error" because the defendant made no claim

might disregard *Bryant* entirely on this issue. It is unlikely that the court intends that sanctions be applied blindly without considering the materiality of evidence lost. Justice Wright's concurring statement, joined by four other justices, shows that the majority of the court is opposed to "freeing . . . obviously guilty persons on purely technical grounds."[53]

Requiring a showing of materiality is sensible because preventing "subversion of the truth-finding process"[54] is the real purpose of the *Wright* rule, and that purpose is achieved when the duty to preserve applies only to material evidence. Law enforcement agencies have sufficient incentive to use the notice-petition procedure because of the risk that a court may find that the evidence destroyed, or changed by testing, was potentially material and that the agency personnel should have anticipated materiality.[55]

2. *Degree of materiality required*

In *Wright,* the evidence destroyed was found to be sufficiently material to invoke sanctions because there was a "reasonable possibility that the evidence destroyed . . . was material to guilt or innocence and favorable to appellant."[56] The reasonable possibility standard is justified because even when destroyed evidence would have been exculpatory, it is impossible in many cases for the accused to state factu-

that the agent lied or that his written report was incomplete or inaccurate. *Id.* at 1253.

See also People v. Wright, 60 Cal. App. 3d 6, 15, 131 Cal. Rptr. 311, 317–18 (1976). In that case, the police officer had used a tape recording of an interview with the defendant as the basis for his report, and then erased the tape in accord with his usual practice. The court found no due process violation because the defendant could have made the testimonial assertion that he had made statements inconsistent with those attributed to him by the cross-examiner, but did not. The court held that when the loss or destruction does not involve bad faith, the defendant must make a showing of substantial materiality, at least where "[s]uch a showing was not beyond his means." *Id.* at 16, 131 Cal. Rptr. at 318. *People v. Wright* was decided under the rule of People v. Hitch, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974), which is cited in *Wright,* 87 Wn. 2d at 789, 791–92, 557 P.2d at 5, 7, and which relied heavily on *Bryant. See Hitch,* 12 Cal. 3d at 647–62, 527 P.2d at 366–69, 117 Cal. Rptr. at 14–17. *Accord,* Hale v. State, 248 Ind. 630, 230 N.E.2d 432, 435 (1967) (stating that in all cases the court had found in which negligent destruction resulted in reversal, either "materiality was self-evident or a showing of materiality was prevented by the destruction.").

53. 87 Wn. 2d at 793, 557 P.2d at 8 (concurring opinion).
54. *Id.* at 788, 557 P.2d at 5.
55. *See* Part III–*C–1 infra.*
56. 87 Wn. 2d at 789–90, 557 P.2d at 6.

ally what the evidence would have demonstrated.[57] In *Wright*, therefore, mere hypothesis by the defense of ways in which the destroyed evidence might have affirmatively pointed to someone else as the perpetrator of the crime satisfied the reasonable possibility standard.[58]

The issue left open after *Wright* is how directly relevant evidence must be to invoke the duty of preservation.[59] The decision, together with others, supports a rule that the duty applies whenever a reasonable possibility exists that the evidence destroyed or altered would have cast doubt on the defendant's guilt by tending to point to someone else as the perpetrator of the crime,[60] by tending to support an affirmative defense,[61] by tending to corroborate a crucial part of the defendant's version of facts showing his innocence,[62] or by tending to impeach prosecution evidence.[63] Although there is authority to the effect that potential usefulness for the defense in obtaining further evi-

57. *See* People v. Hitch, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974), *cited in Wright*, 87 Wn. 2d at 789, 557 P.2d at 5.

58. 87 Wn. 2d at 790–91, 557 P.2d at 6. Potential exculpatory value of the evidence destroyed in *Wright* is discussed in notes 31–32 *supra*. Other cases holding that bad faith in nondisclosure need not be shown are cited in note 69 *infra*.

A showing of bad faith in destruction may be said to establish a conclusive presumption of materiality. *See, e.g.*, People v. Hitch, 12 Cal. 3d 641, 653 n.7, 527 P.2d 361, 370 n.7, 117 Cal. Rptr. 9, 18 n.7 (1974); *Wright*, 87 Wn. 2d at 791–92, 557 P.2d at 6–7. *Cf.* United States v. Agurs, 427 U.S. 97, 103–04 (1976) (strict standard of materiality to be applied in cases which "involve a corruption of the truth-seeking function of the trial process").

59. The inquiry might be, for example, whether the claimed potential relevance of destroyed evidence is "crucial to the question of . . . guilt." United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971). The *Bryant* court found that, at least when that standard is met, the constitutional issue is raised. *Id.*

60. *Wright*, 87 Wn. 2d at 790–91, 557 P.2d at 6. *See* notes 31–32 *supra*.

61. *See, e.g.*, Trimble v. State, 75 N.M. 179, 402 P.2d 160, 165 (1965) (accused claimed that evidence lost by police would have corroborated his claim of self-defense).

62. *See, e.g.*, City of Seattle v. Fettig, 10 Wn. App. 773, 519 P.2d 1002 (1974) (man accused of driving while intoxicated claimed that negligently destroyed video tape would have shown his sobriety), *cited in Wright*, 87 Wn. 2d at 787, 557 P.2d at 4.

63. *See, e.g.*, People v. Hitch, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974). The holding in *Hitch* was seemingly endorsed by *Wright*, 87 Wn. 2d at 789–90, 557 P.2d at 5–6.

Hitch can be said to stand for the proposition that evidence may be sufficiently material without being "crucial" to guilt. *Hitch* found that destruction of test and reference ampoules used in breathalyzer tests to determine blood alcohol content violated due process, because the destroyed evidence could have been used to "impeach the accuracy and credibility of the results of the test." 12 Cal. 3d at 649, 527 P.2d at 367, 117 Cal. Rptr. at 15. Future preservation was ordered even though under the substantive law one could be convicted of drunk driving without evidence of a breathalyzer or other chemical test. *Id.* at 653, 527 P.2d at 370, 117 Cal. Rptr. at 18. The sanction for destruction, however, is merely to be suppression of the test results, rather than automatic dismissal. *Id.* at 654, 527 P.2d at 370, 117 Cal. Rptr. at 18.

dence[64] makes the duty to preserve operative,[65] this ground alone should not suffice. The defense should be required to show in addition a "reasonable possibility" that the further evidence would have been useful in one of the four ways listed above.[66]

The contention that destroyed evidence is sufficiently material when it is relevant only to the reasonableness of a search, but not to guilt,[67] should and probably will be rejected because the purpose of the *Wright* rule is "to prevent the subversion of the truth-finding process."[68]

C. *Excuse for Failure To Preserve Material Evidence*

When the failure to preserve material evidence can be excused is another issue left unclear by *Wright*. The absence of bad faith is clearly not enough by itself to excuse nonpreservation.[69] Nevertheless, the court in *Wright* did concede that "good faith *loss* may excuse non-

64. *See* Giles v. Maryland, 386 U.S. 66, 74 (1967) (plurality opinion).

65. According to United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971), this kind of potential use is "a component of the constitutional analysis recognized in *Giles v. Maryland*." *Bryant*, 439 F.2d at 648 n.10 (citing Giles v. Maryland, 386 U.S. 66, 74 (1967) (plurality opinion)). *Accord*, United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975). In *Harrison*, the court held that rough notes from any witness interview with law enforcement officials could prove to be *Brady* material, and are therefore to be preserved under *Bryant*, because "the notes could contain substantive information or leads which would be of use to the defendants on the merits of the case." *Id.* at 427.

66. *Cf.* United States v. Agurs, 427 U.S. 97 (1976) (involving suppression but not destruction of evidence, where no request, or only a general request for exculpatory evidence, was made). "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.* at 109–10. *Agurs* is discussed at note 11 *supra*.

67. United States v. Heiden, 508 F.2d 898 (9th Cir. 1974), leaves open the possibility that sufficient prejudice may result from destruction when the evidence is not crucial to guilt at all but only relevant to whether other evidence should be suppressed because a search was unreasonable. *Id.* at 903.

68. 87 Wn. 2d at 788, 557 P.2d at 5.

69. The *Wright* court noted that "[u]nder the rule governing suppression of evidence, the circumstances surrounding the nondisclosure, including the motivation of the party responsible for the suppression, are irrelevant. *See, e.g., Jackson v. Wainwright*, 390 F.2d 288, 295 (5th Cir. 1968); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 571 (2d Cir. 1961)." 87 Wn. 2d at 787, 557 P.2d at 4. The court asserted that because destruction cases "are closely analogous, the motive of those destroying the items is not determinative." *Id.* at 791, 557 P.2d at 7. The rationale is that the "purpose of the duty of preservation is not to punish the police but to insure a fair trial for the accused." *Id.* (citing *Brady*, 373 U.S. at 87).

Motive in destruction may, however, be relevant to the determination of materiality. *See* note 58 *supra*.

compliance with the duties of preservation and disclosure where the government makes 'earnest efforts' to preserve crucial materials."[70]

The court's definition of "earnest efforts" remains uncertain. On the one hand, its reliance on *Bryant* and *Hitch* indicates that "[n]egligent failure to comply with the required procedures will provide no excuse."[71] On the other hand, *Wright* clearly mandates that a failure to preserve material evidence is reasonable if the notice-petition procedure has been used.[72] The remaining question is whether reasonable, non-negligent failure to comply with the notice-petition procedure will be excused when there is a reasonable possibility that evidence destroyed was material.[73]

Assuming that under some circumstances failure to preserve could be excused as reasonable without use of the notice-petition procedure, the state would have the burden of showing that an excuse should be recognized.[74] Conceivably, excuses for failure to preserve could in-

70. 87 Wn. 2d at 791, 557 P.2d at 6 (emphasis in original) (citing United States v. Bryant, 439 F.2d 642, 651 (D.C. Cir. 1971), and People v. Hitch, 12 Cal. 3d 641, 652, 527 P.2d 361, 369, 117 Cal. Rptr. 9, 17 (1974)).

Bryant derived the "earnest efforts" standard from dictum in United States v. Augenblick, 393 U.S. 348 (1969), in which the Court noted that government agents had testified on their "routine in handling" the type of evidence lost and that the government had made "an earnest effort . . . to locate" the evidence. *Id.* at 355, *cited in Bryant,* 439 F.2d at 651–52. Although *Augenblick* did not explicitly require "earnest efforts," the *Bryant* court suggests that it requires the government to make " 'earnest efforts' to preserve crucial materials and to find them once a discovery request is made." 439 F.2d at 651.

71. United States v. Bryant, 439 F.2d 642, 652 (D.C. Cir. 1971), *quoted in* People v. Hitch, 12 Cal. 3d 641, 652, 527 P.2d 361, 369, 117 Cal. Rptr. 9, 17 (1974). *Bryant* defined earnest efforts "strictly" so that the exception for good faith loss would not "swallow the discovery rules." 439 F.2d at 651–52.

72. *See* notes 38–43 and accompanying text *supra.*

Also note that under both United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971), and People v. Hitch, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974), the earnest efforts standard is met and a nonmalicious loss may thereby be excused if the agency has made a good faith attempt to enforce adequate preservation rules. *Bryant,* 439 F.2d at 652; *Hitch,* 12 Cal. 3d at 652–53, 527 P.2d at 369, 117 Cal. Rptr. at 17.

73. United States v. Perry, 471 F.2d 1057 (D.C. Cir. 1972), *cited in Wright,* 87 Wn. 2d at 792, 557 P.2d at 7, holds that while the government duty to preserve, as enunciated in United States v. Bryant, 439 F.2d at 652–53, is a heavy one, it is not "an absolute duty." 471 F.2d at 1066. It is unclear, however, whether that qualification merely refers to the fact that materiality is prerequisite to due process violation, or whether it means that there can be a reasonable failure to preserve material evidence.

74. Under United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971), the burden is on the government to produce the evidence requested or explain why it cannot. *Id.* at 651 (citing United States v. Augenblick, 393 U.S. 348, 355–56 (1969)). This modifies *Augenblick,* in which the Court found that the "burden" was met when the government explained that it could not produce the evidence because "no one knew where it was or what had happened to it," 393 U.S. at 354; that is, loss was a sufficient explanation for failure to produce.

One commentator suggests logically that the defendant should have an initial bur-

clude (1) reasonable failure to anticipate potential materiality; (2) reasonable failure to prevent destruction by private persons; (3) reasonable failure to preserve caused by administrative inconvenience; (4) reasonable substitution for actual preservation. Each possibility will be analyzed to predict the likelihood of future acceptance by the court acting under the *Wright* rule.

1. Failure to anticipate potential materiality

The *Wright* notice-petition rule might not excuse reasonable failure to anticipate materiality,[75] because one of its purposes is to alleviate the problems involved in recognizing materiality at a crime scene.[76] Such an excuse is also negated by the court's statement that "neither the police nor the prosecution are to decide for the defense what is favorable or material evidence."[77] The court stated that " 'there is no exception for good faith administrative decisions that certain evidence is not discoverable and thus need not be preserved.' "[78] The " 'imbalance in investigative resources' "[79] which favors the government and the need to insure reliability in the trial process[80] may be

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den of showing the prior existence of the evidence requested unless he can "describe specifically the evidence he is seeking"; in that case, the government should have the burden of showing its "prior nonexistence." *Governmental Loss, supra* note 50, at 565.

75. This is the prime fear expressed in the state's brief requesting deletion of *Wright*'s notice-or-petition rule: "Many times an item near the scene will have no apparent relevance to any reasonable theory of the criminal investigation . . . . Yet such an item may later be considered material and favorable to a defense theory at trial, particularly an affirmative defense such as self-defense or diminished capacity." Respondent's Motion, *supra* note 6, at 5.

In its brief, the state hypothesizes a situation in which a partially filled bottle of liquor found in the same room with a homicide victim has no apparent relevance and thus is not noted in official reports, tested for fingerprints, or placed in evidence. If a defendant later "claims to have been so intoxicated that he could not form any criminal intent, the presence of that liquor bottle, the amount remaining in it and whether or not the defendant's fingerprints were on it are obviously material and potentially favorable to the defense." The state asked if it was to be held responsible for failure to preserve if the landlord disposes of the bottle after the crime scene investigation has been terminated. *Id.* at 5–6.

For a discussion of destruction by private persons, *see* Part III–*C–2 infra*.

76. 87 Wn. 2d at 793, 557 P.2d at 7.

77. *Id.* at 787, 557 P.2d at 4 (citing Barbee v. Warden, 331 F.2d 842, 845 (4th Cir. 1964), and Griffin v. United States, 183 F.2d 990, 993 (D.C. Cir. 1950)).

78. 87 Wn. 2d at 792, 557 P.2d at 7 (quoting United States v. Bryant, 439 F.2d 642, 652 n.21 (D.C. Cir. 1971)).

79. 87 Wn. 2d at 788, 557 P.2d at 5 (quoting United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971)).

80. The *Wright* court quoted *Bryant* for the proposition that the purpose of the

said to call for a standard of "perfect anticipation of possible eventualities."[81]

Conversely, *Wright*'s recognition of the difficulty in recognizing and preserving every piece of potential evidence,[82] along with its pragmatic balancing approach, may indicate that the court *would* excuse a reasonable failure to recognize materiality, especially if materiality is minimal.[83] Excusing such failure is not only consistent with the approach of other courts,[84] but is required by the interest in efficient administration of justice.[85] Defense interests are sufficiently pro-

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duty to disclose is to " 'make of the trial a search for truth informed by all relevant material.' " 87 Wn. 2d at 788, 557 P.2d at 5 (quoting *Bryant*, 439 F.2d at 648).

81. Brief of Amicus Curiae Opposing Motion for Reconsideration of Decision at 7 (asserting that the authorities need not be held to such a standard under *Wright*). *See* note 6 *supra*.

The amicus brief was responding to the apparent assumption by the state in its motion seeking deletion of the *Wright* notice-petition rule that the rule would hold police to a standard of perfect anticipation. *See* Respondent's Motion, *supra* note 6, at 3–7.

82. 87 Wn. 2d at 793, 557 P.2d at 7. The *Columbia Law Review* note cited in *Wright*, *id.*, calls the *Bryant* requirement that the prosecution preserve all discoverable evidence "troublesome" because of these difficulties. *Testing*, *supra* note 39, at 1375.

83. The authors of the amicus brief opposing the state's motion to delete the notice-petition requirement asserted that *Wright*'s recognition of these difficulties shows that "[t]he Court was not suggesting that law enforcement authorities would have to acquire and preserve all things that would help any possible defendant, only that it would be nice if it [*sic*] could." They contend that "preservation of all potentially material and favorable evidence," 87 Wn. 2d at 793, 557 P.2d at 7, is only "the ideal towards which" the court intended the "practical rule" in *Wright* to aim. Brief of Amicus Curiae Opposing Motion for Reconsideration of Decision at 7.

The amicus brief further stated,

> Law enforcement authorities would still have the right to make an initial determination as to the value of things as evidence and destroy or leave at the scene things that they are *convinced* are *useless*. With respect to objects or documents, the evidentiary value of which is not even contemplated at the time of the initial investigation, there can be no burden on the investigator because perfect anticipation is not possible.

Id. at 8 (emphasis added).

84. *E.g.*, Griffin v. United States, 183 F.2d 990 (D.C. Cir. 1950), *cited in Wright*, 87 Wn. 2d at 787, 557 P.2d at 4 (for its definition of materiality). *Griffin* holds that disclosure is necessary when evidence may "*reasonably* be considered useful and necessary to the defense" and that the prosecution is not to decide for the defense what is useful, "[w]hen there is *substantial* room for doubt." 183 F.2d at 993 (emphasis added). That approach could be used to suggest, for example, that when the prosecution shows that the police had no reason to suspect an item could be useful for the defense, failure to preserve should be excused. *Accord*, State v. Maloney, 105 Ariz. 348, 464 P.2d 793, 797–98, *cert. denied*, 400 U.S. 841 (1970) (no negligence and thus no due process violation was found because the agent discarding an item had no reason to know it could be used to help support the defendant's claim of self-defense).

85. The state's brief requesting deletion of the notice-petition rule asserted that law enforcement authorities should be allowed to destroy or leave at the scene things they reasonably believe to be useless. Otherwise, claimed the state, in situations when contact with the defendant is not possible or the defendant is not yet represented by counsel, the risk of violating the rule could be avoided only by requesting "a judge

tected so long as the court demands a very strong showing by the prosecution[86] of reasonableness in the failure to anticipate potential materiality. Fear that a court will find that the state should have anticipated materiality will provide incentive for caution to law enforcement officials. Moreover, the inference that destroyed evidence was actually and substantially exculpatory is weaker when failure to recognize potential materiality is reasonable than when it is either negligent or in bad faith.[87]

2. *Destruction by private persons*

Another potential excuse for failure to preserve is destruction by private persons without prior police or prosecution permisson. Among those to whom the duty to preserve applies, *Wright* includes "persons who handle evidence with the consent of" law enforcement officials.[88] One rationale for the duty to preserve is that much of the relevant material " 'will be exclusively in the hands of the Government.' "[89] But this rationale does not apply where the government has never acquired the evidence and it is destroyed without its consent.[90]

Nevertheless, *Wright* may imply a duty to acquire material

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to come to the scene of the investigation and make a determination, before the scene is abandoned, that '*all* potentially material and favorable evidence' . . . has been preserved and not disposed of." Respondent's Motion, *supra* note 6, at 7 (quoting *Wright*, 87 Wn. 2d at 793, 557 P.2d at 7 (emphasis in *Wright*)).

The state's brief claims that the result would be the conversion of the common law magistrate "as a neutral determiner of matters brought before him into an investigatory magistrate" of the civil law type. Respondent's Motion, *supra* at 7.

86. *See* note 74 and accompanying text *supra*.

87. The approach of the *Wright* court shows that a defendant need not show actual exculpatory value. Bearing that in mind, the more unreasonable a failure to anticipate materiality seems in retrospect, the more likely it is that materiality was recognized, even though the defense may not be able to prove bad faith.

88. 87 Wn. 2d at 790 n.4, 557 P.2d at 8 n.4 (emphasis added).

The extension of this duty to persons who merely handle evidence with the consent of law enforcement officials, so that the state is held responsible for destruction by a private person because he acted with police permission, goes farther than any case cited by *Wright*.

89. United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971), *quoted in Wright*, 87 Wn. 2d at 788, 557 P.2d at 5.

90. *See* People v. Norwood, 547 P.2d 273 (Colo. App. 1975) (*cert. denied*, Colo. S. Ct. 1976). The *Norwood* decision purports to follow the holding in United States v. Bryant, 439 F.2d 642, 652 (D.C. Cir. 1971), that failure to use earnest efforts to preserve may result in sanctions. However, it rejects a claim that due process was violated by the state's "investigative negligence" in failing "to fingerprint and preserve several items found at or near the scene of the shooting." 547 P.2d at 278–79. *But see* notes 92–93 *infra*.

evidence in order to prevent destruction by private persons.[91] A possible reason for *Wright*'s extension of the duty to preserve to those who handle evidence with law enforcement officials' consent is to prevent avoidance of the duty to preserve by mere inaction on the part of such officials.[92] It follows from *Wright* that if law enforcement officials should have anticipated materiality, failure to prevent unauthorized destruction by private persons should be excused only if the officials made reasonable efforts to secure and protect the particular item.[93] Allowing an excuse based upon reasonable efforts to protect, together with the excuse for reasonable failure to recognize materiality,[94] prevents imposition of an unreasonable burden on the state.

3. *Administrative inconvenience*

Considering *Wright*'s statement that "neither administrative convenience nor inadequate facilities, where it is not shown facilities could not be obtained, justifies a failure to preserve potential evidence,"[95]

91. The court in *Wright* ties the duty to preserve "*all* potentially material and favorable evidence" to "an officer . . . at the scene of a crime." 87 Wn. 2d at 793, 557 P.2d at 7 (emphasis in original). If the court was concerned only with destruction by the police, it could have referred only to the police generally.

Wright's counsel had moved prior to trial for " 'an order dismissing the charge . . . on the grounds that he has been denied due process of law in that the state has suppressed material evidence by causing it to be destroyed and/or by *allowing* it to be destroyed by private parties.' " *Id.* at 786, 557 P.2d at 3 (quoting defendant's motion to dismiss) (emphasis added).

92. *Cf.* Evans v. Superior Court, 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974) (defendant had a discovery right to pretrial lineup conducted by the police when eyewitness identification was in material issue and a reasonable likelihood of a mistaken identification existed which a lineup would tend to resolve). The *Evans* court held that the lineup sought by the defense fell within the prosecution's duty to disclose material evidence favorable to the accused. *Id.* at 622, 522 P.2d at 684, 114 Cal. Rptr. at 124. The court recognized a duty to acquire in stating:

> [W]e are not concerned that the petitioner's motion for a pretrial lineup sought the discovery of evidence not necessarily within the People's knowledge if within the People's reach. . . . [T]he People cannot escape a responsibility to disclose merely by passive conduct or the failure to acquire precise knowledge sought by but unavailable to an accused.

Id. at 623–24, 522 P.2d at 685, 114 Cal. Rptr. 125.

93. *See id.* at 625–26, 522 P.2d at 686–87, 114 Cal. Rptr. at 126–27. The state's duty to acquire lineup evidence was determined by considering not only benefits to be derived by the accused and the reasonableness of his request but also the burden to be imposed on the prosecution, the police, the court, and the witnesses. When the police have the facilities and resources to acquire the evidence and the "procedure is one which uniquely falls within police expertise and routine practices," the court judged the burden to be "nominal." *Id.*

94. *See* Part III-C-*1 supra*.

95. 87 Wn. 2d at 792, 557 P.2d at 7.

the state would have to meet a severe burden in order to excuse non-preservation on grounds of administrative inconvenience. Although a very costly or time-consuming administrative burden might be said to outweigh the values to be served by preservation,[96] the *Wright* notice-petition rule, by minimizing the burden of evidence maintenance,[97] appears to preclude such an approach,[98] unless the prosecution can show that it was impossible to obtain the necessary facilities.[99]

4. *Substitutes for preservation*

Failure to preserve material evidence may be excusable if the government has undertaken a reasonable substitute for preservation.[100] When the prior existence of the object but not the object itself is important to the defense, court testimony that the object was found at the scene may be sufficient.[101] Whether photographs or testimony

96. *See* United States v. Harrison, 524 F.2d 421, 429 (D.C. Cir. 1975), *cited in Wright,* 87 Wn. 2d at 792, 557 P.2d at 7. *Harrison* arguably suggested a weighing process, considering administrative burden along with other factors, though it held that the "minimal burden" of retaining rough notes of witness interviews with FBI agents "does not outweigh the significant values to be served by preservation." 524 F.2d at 429.

The *Harrison* court noted that "[a]dministrative convenience has traditionally fared poorly as an asserted justification for government action infringing important rights of individuals." *Id. See* cases cited *id.* at 429 n.20. *See also* note 93 *supra.*

97. 87 Wn. 2d at 792 n.5, 557 P.2d at 7 n.5.

98. *But see* People v. Vera, 62 Cal. App. 3d 293, 132 Cal. Rptr. 817 (1976). *Vera* limits the prosecution's duty under People v. Hitch, 12 Cal. 3d 641, 650, 527 P.2d 361, 368, 117 Cal. Rptr. 9, 16 (1974), to a duty to " 'undertake *reasonable* efforts to preserve material evidence.' " 62 Cal. App. 3d at 300, 132 Cal. Rptr. at 823 (quoting *Hitch*) (emphasis in *Vera*). One reason *Vera* gives for not requiring preservation of latent fingerprints in place is that there was nothing in the record "as to the nature and extent of the problems that would be faced by law enforcement agencies" if such a duty were to be imposed. *Id.* at 300, 132 Cal. Rptr. at 823.

99. *Wright,* 87 Wn. 2d at 792, 557 P.2d at 7.

100. For example, in United States v. Shafer, 445 F.2d 579 (7th Cir. 1971), the court held that destruction of live fuses and gun powder which were material to charges against the defendant did not warrant reversal because the live fuses and cans of powder were photographed and the photographs, along with residue from the detonated fuses and samples from each container of powder, were made available to the defense. *Id.* at 581–82.

This is, in a sense, a variant of the materiality requirement; the *Shafer* court found that the defendant had "pointed to no concrete area of prejudice due to disposition of these articles." *Id.*

101. *Governmental Loss, supra* note 50, at 565, *cited in Wright,* 87 Wn. 2d at 792, 557 P.2d at 10.

For example, in State v. Haynes, 16 Wn. App. 778, 559 P.2d 583 (1977), the defense sought confiscated marijuana in order to impeach the accuracy of a prosecution witness's testimony. The marijuana had been destroyed by the police. The court held

may be reasonable substitutes for actual preservation without use of the notice-petition procedure should depend on the need asserted by the defendant.

D. Extent of Defendants' Testing Rights

Two of the state's complaints against the *Wright* notice-petition procedure involved its application to testing. The state claimed that the *Wright* rule could require notice to a suspect or judicial approval prior to "routine field investigation techniques [such] as dusting surfaces for fingerprints, or testing suspected narcotics or drugs with 'field test' kits to initially determine the presence or absence of unlawful substances."[102] The state also expressed the fear that notice or petition would be required prior to "the thousands of tests conducted in crime laboratories even though the normal testing procedures would neither destroy, consume or render the item of evidence incapable of being subsequently tested."[103] However, the *Columbia Law Review* note—the apparent source of the requirement of notice or petition before testing—only suggests notice prior to tests which may be used as evidence against the defendant and which may consume the substance to be tested.[104] Thus, sanctions will not be applied unless the defense shows a reasonable possibility that exculpatory evidence was destroyed by the test. Destruction in testing would include a change in the substance tested rendering it incapable of subsequent independent tests.[105]

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that the destruction did not violate due process because the prosecutor offered to stipulate where the marijuana was found, the police detective was cross-examined fully on where it was found, and the defense counsel argued to the jury that the marijuana must have impaired the witness's faculties. *Id.* at 789, 559 P.2d at 590–91.

In State v. Maloney, 105 Ariz. 348, 464 P.2d 793 (1970), the police discarded a used condom sought by the defendant to support his claim that he killed his stepfather in self-defense after being found in bed with his mother. The court held that the destruction did not constitute suppression because "[t]he fact that the items were found, and the time and place of their discovery, were testified to at the trial." 464 P.2d at 796.

102. Respondent's Motion, *supra* note 6, at 8.

103. *Id.* at 10.

104. *Testing, supra* note 39, at 1378.

105. According to the amicus brief opposing deletion of the notice-petition rule, the government must use the procedure "only when it wishes to be certain that its contemplated test would not" result in sanctions for due process violation, and no due process violation would be found unless the testing "threatens to destroy the evidence or change its properties." Brief of Amicus Curiae Opposing Motion for Reconsideration of Decision at 9.

In addition, the *Wright* rule arguably imposes two requirements on the prosecution: first, if tests are potentially destructive, the defense must be allowed to participate in or observe the testing; second, if tests can be rerun, the defense must be allowed to test independently. The first requirement is proposed in the *Columbia Law Review* note.[106] A case cited in *Wright*[107] impliedly imposes the second requirement, and the state has acknowledged such a duty to criminal defendants.[108]

106. Because of the danger of errors in testing, the note asserts that when proof of guilt hinges upon a test which uses up the substance tested so that none of it "remains for independent evaluation," the defendant should be given the opportunity to participate in or observe the original testing process. *Testing, supra* note 39, at 1374. To provide for that opportunity is the clear purpose of the note's suggestion that notice or petition be required before testing. *Id.* at 1378.

Compare the decisions of some other courts which have recognized a defense right independently to test evidence, but have nevertheless held that due process is not violated by testing which exhausts the substance tested, even though the defendant was given no opportunity for inspection and analysis. For example, the court in Lee v. State, 511 P.2d 1076 (Alas. 1973), held that due process was not violated by admission of test results without permitting independent expert analysis when state analysis had exhausted the substance; the decision was distinguished in Lauderdale v. State, 548 P.2d 376, 382 (Alas. 1976) (*see* note 107 *infra*). Poole v. State, 291 So. 2d 723 (Miss. 1974), distinguished Jackson v. State, 243 So. 2d 396 (Miss. 1970) (*see* note 107 *infra*), and held that admission of evidence from a test which reasonably consumed all of the substance tested did not violate due process.

107. People v. Hitch, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974). *Wright* interprets *Hitch* as holding that due process requires preservation and disclosure of "those parts of the Breathalyzer which may be profitably retested prior to trial," 87 Wn. 2d at 789, 557 P.2d at 5. For further authority for a right to independent testing, *see, e.g.*, Lauderdale v. State, 548 P.2d 376 (Alas. 1976) (suppressing breathalyzer test where plausible evidence could have been derived from testing of ampoules destroyed by the state); Jackson v. State, 243 So. 2d 396, 398 (Miss. 1970) (due process requires, upon motion by the defendant, "that the analysis of the substance not be left totally within the province of the state chemist").

A stronger reason for preservation in the breathalyzer cases is for possible impeachment of the test's accuracy, People v. Hitch, 12 Cal. 3d at 645 n.1, 527 P.2d at 364 n.1, 117 Cal. Rptr. at 12 n.1, because the test cannot be accurately rerun. Lauderdale v. State, 548 P.2d at 379–80; *Hitch*, 12 Cal. 3d at 645 n.1, 527 P.2d at 364 n.1, 117 Cal. Rptr. at 12 n.1. *See also* State v. Bryan, 133 N.J. Super. 369, 336 A.2d 511, 513–14 (1974) (impossibility of accurate retest is one reason for holding that destruction of breathalyzer test ampoule does not violate due process).

108. In its brief requesting deletion of the notice-petition rule from *Wright*, the state asserted that "later testing by the defendant's expert can be ordered" when the test causes no physical change in the item tested and does not consume it. Respondent's Motion, *supra* note 6, at 11.

The state cited WASH. CRIM. R. SUPER. CT. 4.7(a)(1)(iv), which requires the prosecutor to disclose "[a]ny reports or statements of experts made in connection with the particular case, including results of . . . scientific tests, experiments and comparisons," and WASH. CRIM. R. SUPER. CT. 3.1(f), which provides for appointment of necessary defense experts if the defendant is financially unable to obtain them. Respondent's Motion, *supra* at 11 n.1.

However, the author of the *Columbia Law Review* note claims that logic requires that defendants rely on state tests when large quantities of the substance tested remain

E. Choice of Sanctions

The choice of sanctions for violation of the *Wright* notice-petition rule is not limited to automatic dismissal. The court stated, "The range of sanctions available in suppression and destruction of evidence cases should be broad and, of necessity, will be developed over time."[109] The sanction applied will vary with the nature of the evidence lost or destroyed and its degree of materiality. One commentator cited by the *Wright* court describes a range of sanctions including "missing-evidence" jury instructions and suppression of government evidence in addition to dismissal.[110] Dismissal might be required only where a new trial would do nothing to remedy the constitutional violation, that is, where the evidence suppressed is necessary for a prima facie case or where lost or destroyed evidence is potentially useful for directly establishing the innocence of the defendant.[111]

IV. CONCLUSION

Contrary to prosecutorial arguments, the *Wright* notice-petition requirement need not impose an unreasonable burden on the state. The *Wright* rule is workable so long as a prerequisite to sanctions for its violation is that the defense show a reasonable possibility that the evi-

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intact, because "the court may always order retesting" as a check on accuracy. *Testing, supra* note 39, at 1374.

109. 87 Wn. 2d at 792, 557 P.2d at 7.

110. *Governmental Loss, supra* note 50, at 564–65, *cited in Wright,* 87 Wn. 2d at 792, 557 P.2d at 7.

When the evidence is potentially relevant only for impeachment of a government witness or of the results of scientific testing, suppression of the witness's testimony or of the test results may suffice. *Governmental Loss, supra* note 50, at 564. *See also* People v. Hitch, 12 Cal. 3d 641, 653–54, 527 P.2d 361, 370, 117 Cal. Rptr. 9, 18 (1974).

When the evidence is sufficiently material to an affirmative defense or to support of the accused's general version of the occurrence, though not proving his innocence directly, trial courts could be required "to instruct the jury that that particular aspect of the defense's case must be taken as established fact." *Governmental Loss, supra* note 50, at 564. *But see* City of Seattle v. Fettig, 10 Wn. App. 773, 519 P.2d 1002 (1974). *Fettig* reversed a conviction on the ground that destruction of evidence had violated due process, but stated that the trial court had properly rejected the defendant's proposed jury instruction that the jury " 'may infer that' " a destroyed video tape " 'would have corroborated the testimony of the defendant, and rebutted that of the police officers, concerning the defendant's ability to perform sobriety tests . . . .' " *Id.* at 776–77, 519 P.2d at 1005 (quoting defendant's proposed instruction No. 9). The court said, "There is no rule of law or statute that requires a jury to presume that suppressed evidence is favorable to the accused." *Id.* at 777, 519 P.2d at 1005.

111. *See Governmental Loss, supra* note 50, at 564.

dence involved was material and favorable to the defendant. The burden on the state is further minimized by the possibility that reasonable failure to preserve will be excused. Future decisions regarding post-*Wright* disposition or testing should clarify the existence and degree of the materiality requirement; the conditions, if any, under which failure to preserve material evidence can be excused; and the extent of defense rights with respect to testing. Choice of sanctions will necessarily depend on the application of a pragmatic balancing approach in individual cases.

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