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Disposition of Physical Exhibits Used in Criminal Trials

NOTE

DISPOSITION OF PHYSICAL EXHIBITS USED IN CRIMINAL TRIALS

The retrial of an accused person when his original conviction has been set aside many years later, as in a federal habeas corpus proceeding, presents a developing problem in criminal law. The prosecution may face virtually insurmountable difficulties in retrying the defendant, if, for example, the physical evidence on which the original conviction was based has been destroyed in the interim. This situation was recently presented in Pennsylvania, when the state undertook to retry James Morris Fletcher after the United States Court of Appeals for the Third Circuit voided his conviction seven years after the original trial[1]

The Case

Fletcher was found guilty of first degree murder and on February 14, 1956, sentenced to life imprisonment.[2] This conviction was affirmed in the Pennsylvania Supreme Court on November 12, 1956.[3] The United States Supreme Court denied certiorari on June 10, 1957.[4] On petition of the county prosecutor, the court on July 16, 1957, ordered destruction of the physical exhibits which had been used in the trial.[5] Fletcher filed a petition for writ of habeas corpus in the

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[1]Commonwealth ex rel. Fletcher v. Toothman, 407 Pa. 146, 180 A.2d 3 (1962). Mr. A. J. Waycoff, Atty., Waynesburg, Pa., served as defense counsel for Fletcher and provided much of the background information about the case. His aid is here acknowledged.

[2]Fletcher was actually convicted on December 23, 1954. Although it appears that a long period of time elapsed between the conviction and sentence, no reason for this gap is indicated in the official record or opinions.

[3]Commonwealth v. Fletcher, 387 Pa. 602, 128 A.2d 897 (1956).

[4]Fletcher v. Pennsylvania, 354 U.S. 913 (1957).

[5]The order read as follows:

ORDER

"And now this 16th, [sic] day of July, 1957, it appearing to the court that the defendant in the above styled case was sentenced on the 14th day of February, 1956, for life in Western Penitentiary at Pittsburgh, Alleghany County, Pennsylvania, and pursuant to an appeal taken by defendant to Pennsylvania Supreme Court at No. 117, March term, 1956, said court upheld the conviction and sentence of the lower court; and that at No. 698, Miscellaneous, October term, 1956, in the Supreme Court of the United States, writ of certiorari on behalf of defendant was denied,

Federal District Court for Western Pennsylvania on September 20, 1957. He contended that his petition should be granted because two of the petit jurors should have been disqualified. Juror number one was a son-in-law of the county detective who had conducted the investigation for the Commonwealth and number 7 was related to Gerald Tanner, the victim of the murder. Because the Supreme Court of Pennsylvania had not yet considered the habeas corpus question, the proceeding in the Federal District Court was stayed.[6] Habeas corpus was denied in the Pennsylvania court on March 20, 1959,[7] and subsequently certiorari to the United States Supreme Court was denied on October 12, 1959.[8] The Federal District Court then held a hearing on the stayed proceeding and denied the petition for habeas corpus on May 3, 1960,[9] but on February 23, 1961, the United States Court of Appeals for the Third Circuit reversed the decision of the District Court and remanded the case to the District Court with instructions to issue the writ which would allow the prisoner a retrial on the merits.[10] The prisoner then filed a new series of habeas corpus petitions in the Pennsylvania trial court contending that the murder indictment should be quashed and he should be given an absolute discharge. Fletcher claimed that for the retrial of the case the Commonwealth did not have all of the evidence presented in the original trial. He further

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upon motion of Glen R. Toothman, Jr., District Attorney of Greene County, Pennsylvania, it is hereby ordered, adjudged and decreed, that disposition be made as follows of the matters of evidence used in such case, that they be disposed forthwith by Charles P. Meighen, County Detective.

(a) two (2) shot gun shell wads found at scene.
(b) four (4) shot gun shells, Western Expert 12 guage.
(c) one (1) pair of oxford shoes, from home of accused.
(d) one (1) white shirt, from home of accused.
(e) five (5) plaster casts taken of footprints in garden.
(f) one (1) jar containing earth sample from garden.
(g) one (1) piece of right rear fender.
(h) one (1) Winchester, 12 guage, shot gun,, Model No. 37.
(i) Clothing of the victim, Gerald Tanner, consisting of the following items: pair of brown oxford shoes, pair of blue socks, green shorts, white under shirt, overall pants and gray shirt.
(j) Clothing of accused, James Morris Fletcher, consisting of the following items, blue work shirt, gray pants, white shorts and one pair gray socks, that the $4.00 be paid over to the treasurer's office of Greene County, Pennsylvania, and that the 1950 Ford sedan, bearing Pennsylvania registration No. 9H037, Manufacturer's No. BOCS 127352 be delivered to the Capital Mutual Fire Insurance Company.

[6]United States ex rel. Fletcher v. Cavell, 162 F.Supp. 3 (W.D. Pa. 1958).
[7]Commonwealth ex rel. Fletcher v. Cavell, 395 Pa. 134, 149 A.2d 434 (1959).
[8]Pennsylvania ex rel. Fletcher v. Cavell, 361 U.S. 847 (1959).
[9]United States ex rel. Fletcher v. Cavell, 183 F. Supp. 335 (W.D. Pa. 1960).
[10]U.S. ex rel. Fletcher v. Cavell, 287 F.2d 792 (3d Cir. 1961).

claimed that the destruction of the evidence without his knowledge was prejudicial to his rights and violated due process of law. The implications of this argument were rejected by the trial court and in the Pennsylvania Supreme Court in its holding that:

> It has not been shown that the elimination or absence of a part of the commonwealth's evidence would prejudice defendant; on the contrary, it appears that it will, if it has any relevancy, weaken the commonwealth's case in the new trial.[11]

Subsequently the retrial of James Fletcher did take place and on June 26, 1962, he was acquitted, by a jury.[12]

The Problem

In light of the extensive post-conviction proceedings now available in state and federal courts, the question arises as to whether it is ever safe to destroy or otherwise dispose of evidence, at least, until a prisoner has died or been released from incarceration. In *Reck v. Pate*,[13] for example, the United States Supreme Court in 1961 set aside a 1936 conviction and remanded the case to the federal district court with directions to discharge the prisoner, unless the state of Illinois should undertake to retry the prisoner. Illinois, having no evidence, could not do so.[14] The possible retroactive implications of *Mapp v. Ohio*[15] may present further problems in this area. Retrial of defendants whose original conviction had been based on illegally-seized evidence may be very difficult, and so the preservation of admissible items of evidence, those not excluded by *Mapp*, becomes of greater importance. It is thus essential that precaution be taken *now* to insure the preservation of all exhibits used during the trial. Certainly future extension of the provisions of the Federal Bill of Rights to the states will result in more and more habeas corpus petitions and more and more new trials. Indications are that the right to assigned counsel may soon be absorbed under the fourteenth amendement's due process clause.[16] Such recognition would bring forth many new hearings and

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[11]Fletcher v. Toothman, supra Note 1 at 4.

[12]Defense Counsel A. J. Waychoff, Waynesburg, Pennsylvania, provided this information.

[13]367 U.S. 433 (1961).

[14]Ritz, State Criminal Confession Cases: Subsequent Developments in Cases Reversed by the U.S. Supreme Court and Some Current Problems, 19 Wash. & Lee L. Rev. 201, 217 (1962).

[15]367 U.S. 643 (1961).

[16]Betts v. Brady, 316 U.S. 455 (1942) has been subjected to serious criticism for the past 20 years. Its validity is to be determined in the case of Giddeon v. Cochran,

new trials. The lack of evidence essential at the prior trial and prematurely destroyed or not available at a second trial might well mean the state would have a weak case against a defendant at the second trial. Briefly, the broad implications of the federal habeas corpus act as well as the many state post-conviction remedies indicate that problems similar to those presented in the *Fletcher* case may present a frustrating stumbling block to the prosecutor who must retry the case. In light of these problems then, it is worthwhile surveying the procedures followed in the various states and in the federal judicial and military systems in caring for and disposing of real and other evidence after an initial criminal trial is concluded.

Sources of Information

This comment is based on information compiled from replies received from clerks of courts, prosecuting attorneys, and others in response to some one hundred and thirty-five letters of inquiry sent, on a random basis, throughout the country. Seventy-six replies were received from forty-six states, the Attorney General of the United States and military officers.[17] Replies from states with statutory guides for the disposition of the evidence indicate state-wide procedure. A reply from one or two communities or areas in a state, without legislation only indicates the procedure carried out in one or more sections of the state, procedures which may be dictated by local custom or tradition. Essentially, this article presents a sampling of the various methods of disposition of evidence which are used throughout the United States.

General

Evidence seized for use as an exhibit in criminal proceedings is generally held by the police or prosecuting attorney until the time when it is formally introduced into evidence during the trial of a prisoner. Such evidence is then considered to be *custodia legis* or in custody of the court. Generally, the clerk of the court handles the evidence from the time it is entered as an exhibit until the final disposition of the case,[18] but in a few states the clerk keeps the exhibits

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370 U.S. 908 (1962) now before the Supreme Court of the United States. If Betts is overruled, the right to assigned counsel will no longer rest on the capital-non-capital distinction.

[17]See appendix for complete tabulation.

[18]Alabama, Alaska, California, Colorado, District of Columbia, Florida, Hawaii, Illinois, Idaho, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Montana, Nevada, New Hampshire, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin,

only until the trial is over, at which time they are given to the prosecuting attorney.[19] In other states, the court reporter, whose function differs from that of the clerk, is held responsible for the proper maintenance of exhibits, which are, in effect considered as much a part of the official trial proceedings as his shorthand notes.[20] No matter which person receives the exhibits after the trial, each exhibit has been tagged and given an identification number which it retains throughout the trial and at all appellate proceedings.

Statutes

After the reason for the legal custody of the exhibits has passed, the clerk, court reporter, or other custodian is presented with the problem of the disposition of the exhibits. In fourteen states, statutes specify how long the exhibits must be kept.[21] Any time stated in a statute is, however, relative to the phrase, "final determination or disposition of the case." It is only after the final determination that the statutory time begins running. Generally this term means that all appeals have been exhausted and that the effective appellate channels are closed. However, as has been pointed out, the possibility of a federal habeas corpus proceeding is always present no matter how long the man has been in prison or how many appeals he has taken. It is, however, speculative from a reading of the statutes as to whether or not their framers had federal habeas corpus proceedings in mind. Such proceedings tend to vitiate the certainty of any "final determination." Generally, however, when appeals have been exhausted, the final determnation is considered to have taken place and the statutory time limits take effect.

The time periods vary a great deal:[22] fifteen days in Delaware; thirty days in West Virginia; six months in Iowa, Kansas, Minnesota, and Washington; one year in Hawaii and California; three years in Connecticut; five years in Louisiana; six years in Nevada and Wisconsin; ten years in Oregon and Vermont. These time limits are merely the mandatory minimum standards which must be adhered to before exhibits may be released or destroyed. Indications are, however, that many exhibits, especially weapons, are kept years in excess of the

[19]Connecticut, Georgia, Missouri, New Jersey, Pennsylvania.

[20]Arkansas, Indiana, Kansas, Maryland, North Carolina, Wyoming.

[21]See Appendix. Six other states have statutes which in some way cover the subject, but no time limits are prescribed. They are: Florida, Illinois, Kentucky, Mississippi, New York, and Oklahoma.

[22]See statutes as cited in appendix.

limits actually prescribed by the statutes. In thirteen of the fifteen states, it is still necessary for the custodian of the exhibits to petition the court for an order authorizing the disposition of the exhibits after the statutory provisions are satisfied.[23] Connecticut and Vermont do not require a court order. although Vermont does require the sanction of the public records commission.[24] Iowa, Kansas and Nevada required approval of the prosecuting attorney in addition to the order of the court.[25]

Practice in Jurisdictions Without Statutes

Where no statute covers the subject, the disposition of the exhibits is largely a matter of discretion for the clerk or other custodian. He is often guided by custom in his locality, personal experience or a historical predilection to preserve such articles. Sectional replies from nine of the twenty-six states which have no statutes indicate that generally exhibits are kept until the time for any further appeal has passed or the clerk believes the case has reached its final determination.[26]

Such a time period will of necessity, vary according to the states' regulation of the time allowed for perfecting an appeal. With no statutory sanction for releasing exhibits, custodians tend to keep them longer than necessary. The exhibits are kept for an indefinite period in various sections of nine states[27] and in Alfred, Maine, exhibits have been kept in storage since Maine became a state in 1820.[28] Likewise, in Brigham City, Utah, exhibits have been retained since the late 1800's.[29]

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[23]This is not necessarily a part of the particular code provision in those states. The letters indicate that such a practice is followed in Delaware, West Virginia, New Jersey, Iowa, Kansas, Minnesota, Washington, Hawaii, California, Louisiana, Nevada, Orgeon, Wisconsin.

[24]Letter from Alma F. Sherwin, Clerk, Addison County Court, Middlebury, Vermont (no date); Letter from John D. Labelle, States Attorney, Hartford, Connecticut, Aug. 10, 1962.

[25]See Appendix. In the Fletcher case, approval was given by the prosecuting attorney, but the defense attorney claimed he should have been notified of the pending destruction of the exhibits.

[26]Pine Bluff, Arkansas; Twin Falls and Boise, Idaho; Elkhart and Indianapolis, Indiana; Kansas City and St. Louis, Missouri; Lewistown, Montana; Greensboro, North Carolina; Oklahoma City, Oklahoma; Alexandria, Culpeper, Lexington, Spotsylvania, Virginia; Cheyenne, Wyoming.

[27]Nome, Alaska; Colorado Springs and Denver, Colorado; Macon, Georgia; Alfred, Maine; Lisbon and Valley City, North Dakota; Brigham City, Utah; Sioux Falls, South Dakota; McCormick, South Carolina; Laramie, Wyoming.

[28]Letter from Ralph H. Ross, Clerk, Superior Court, Alfred, Maine, July 12, 1962.

[29]Letter from K. B. Olsen, Clerk, County Court, Brigham City, Utah, July 31, 1962.

Unique sectional practices are also in force. If no agreement is made between the prosecuting and defense attorneys regarding the exhibits, the clerk in Birmingham, Alabama, keeps them in his files for an indefinite period.[30] Some exhibits are kept by the court reporter who, upon the completion of the trial, turns them over to the clerks,[31] and others are kept by the clerk until the appeal period is over, at which time they are returned to the attorneys.[32] The storage problem created by the exhibits prompted the clerk in Concord New Hampshire, to adopt a procedure whereby exhibits which are kept longer than six years may be destroyed,[33] and the clerks in Ohio and Pennsylvania maintain the exhibits until they receive an order from the court authorizing final disposition.[34] As in the *Fletcher* case, this order may be made by an ex parte motion by the prosecutor who feels the exhibits are no longer of any legal or evidential value. Rhode Island, by statute, authorizes the superior courts to adopt their own court rules.[35] The rules of the Superior Court in Providence authorize the withdrawal of the exhibits by the attorneys after the final disposition,[36] while exhibits in Newport are kept for twenty years.[37] Court rules established in Denver, Colorado, require evidence to be kept a minimum period of thirty days before being disposed of,[38] while the procedure in Colorado Springs is not based on any time limit.[39]

Of twenty-six states without statutory provisions covering disposition, the practice in twenty-two is to dispose of physical exhibits only under court order.[40]

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[30]Letter from Julian Swift, Clerk, Tenth Judicial Circuit of Alabama, Birmingham, Alabama, July 5, 1962.

[31]Letter from Frank W. Hales, Clerk, Circuit Court for Worchester County, Snow Hill, Maryland, July 9, 1962.

[32]Letter from Wm. A. Bliar, Clerk, Atlantic County Court, Atlantic City, New Jersey, July 10, 1962.

[33]Letter from S. Callahan, Clerk, Superior Court, Concord, New Hampshire, received July 10, 1962.

[34]Letter from Wm. Luke Leonard, Chief Deputy, County of Hamilton, Cincinnati 2, Ohio, July 6, 1962. See court order in Fletcher case supra at note 5.

[35]R. I. Gen. Laws Ann. § 8-6-2 (1956).

[36]Letter from Robert A. Coogan, Administrative Clerk, Providence County Court House, Providence, Rhode Island, Sept. 12, 1962.

[37]Letter from Chester A. Oakley, Jr., Clerk, Superior Court, Newport County Court, Newport, Rhode Island, received Aug. 1, 1962.

[38]Letter from Thomas B. Finn, Jr., Chief Deputy Clerk, District Court, Second Judicial District of the State of Colorado, Denver, Colorado, July 6, 1962.

[39]Letter from Francis J. Cuckow, reporter, District Court for Fourth Judicial Circuit, Colorado Springs, Colorado, Aug. 13, 1962.

[40]Alaska, Alabama, Arkansas, Colorado, Idaho, Indiana, Maine Maryland, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, North Dakota,

Disposition proceedings in the four states in which the official sanction of the court is not required are very much a matter in the discretion of the custodian.[41] Detroit, Michigan, follows an exacting procedure in determining which exhibits are of no judicial value.[42] In this city, no court order being required, the objects are held until the detective in charge of the case indicates that he has no further use for them. If a case has not been solved, the items obtained by the investigating officers, are kept by the police property clerk until the statute of limitations on the crime has run. If there is no statute of limitations concerning a particular crime, they are kept until the crime is solved. In order to prevent the useless accumulation of exhibits, a modern procedure is carried out by the Detroit Police Property Lieutenant:

> All Items are described on I.B.M. cards and every six months these cards are sent out to the detective in charge of the case, and, if he has no further use for the article and cannot locate the rightful owner or (as in the case of weapons, return them to the owner), the detective signs the article off as no longer needed and it is turned over to the property office for disposition.[43]

Methods of Disposition

After the physical exhibits have been kept the required statutory or customary time period, they are disposed of in various ways. The nature of the exhibit, its inherent value, its prior owner, and the possible historical crime detecting value are all indicators which guide the custodian's final disposition of the articles. The letters from a few of the sources present a sampling of the methods of general disposition:

(1) Los Angeles, California:

> Another successful county clerk's annual auction of criminal exhibits was held on May 19, 1962, in the basement of the Hall of Justice. This auction takes place on the 3rd Sat. of May each year. The articles sold consist of any saleable item which has been received into evidence as an exhibit and which has not been claimed by the owner within one year following the disposition of a criminal case.[44]

Oklahoma, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia.

[42]Georgia, Michigan, Missouri, Wyoming.

[43]Letter from Gerald Perman, Detroit, Michigan Police Department, Aug. 8, 1962.

[44]Ibid.

[44]Letter from E. G. Hatcher, Chief Criminal Division, County Courthouse, Los Angeles, California, July 13, 1962.

(2) Denver, Colorado:

As a practical matter, such real evidence has a habit of accumulating. Therefore, periodically due to the problem of storage we dispose of such accumulation in the best way possible. Less than a year ago approximately fifteen dump loads of exhibits were hauled to the city dump.[45]

(3) Kent County, Delaware:

He [the clerk]informs me that all exhibits are held until the time for appeal expires. Then the state exhibits are immediately turned over to the attorney general. The Defendant's exhibits are held for the same length of time, but no letter is sent requesting defendant to pick up his exhibits. If the defendant fails to pick up his exhibits, they are not disposed of by court order, but are kept indefinitely.[46]

(4) Honolulu, Hawaii:

The usual procedure in First Circuit Court is to have either the prosecutor's office or defendant's counsel request a withdrawal of the evidence, which must be approved by the presiding judge. However, Rule 7 requires counsel to withdraw all exhibits within one year.[47]

(5) Decatur, Illinois:

The clerk makes a list of all exhibits eligible to be destroyed with their case number and exhibit number. Photos of all exhibits to be destroyed are taken, and then filed in the individual files pertaining to the exhibits. The court orders those exhibits destroyed by burning or burying. The sheriff is instructed to do this with the circuit clerk and state's attorney as witnesses. This certification is filed in the clerk's office.[48]

(6) Des Moines, Iowa:

After the case is disposed of and the property is unclaimed, the clerk is to turn over to the county auditor any evidence he has, and the auditor, along with the Board of Supervisors, sells the items and applies the proceeds to the county poor fund. Some of the items I turned over to the auditor not long ago were sold by our board; the big share of it was burned.[49]

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[45]Letter from Thomas B. Finn, Jr., supra note 38.

[46]Letter from Nicholas H. Rodriguez, Esq., Dover, Delaware, Aug. 20, 1962.

[47]Letter from Lawrence R. Holt, Chief Circuit Court Clerk, First Circuit Court, Honolulu, Hawaii, Aug. 7, 1962.

[48]Letter from John T. Curry, Circuit Clerk, Macon County, Decatur, Illinois, July 12, 1962.

[49]Letter from Michael H. Doyle, Clerk of the District Court, Polk County, Des Moines, Iowa, July 17, 1962.

Property of Third Parties

Exhibits belonging to a third party generally are returned to the owner.[50] Because the continuity of the evidence must be preserved, he must normally wait until all possible appeals are over. Generally he only needs to present proper identification and proof of ownership, but the consent of the prosecuting attorney is also required in Alaska, Louisiana, Minnesota, and Missouri.[51] If the owner fails to claim his property at the proper time or within prescribed statutory limits, sixty days in Oregon and six months in Washington, the articles may be sold.[52] However, the owner may recover the value of the property sold if he makes satisfactory proof of ownership within six years in the former state or three years in the latter state.[53] In spite of time-tested procedures the seemingly routine process of returning evidence to a third-party owner still presents problems.[54]

Money belonging to third parties is in form of real evidence which should be returned as soon as possible. If it is marked at the time it is admitted into evidence, its return is no problem. The serial numbers are retained and its is returned to the lawful owner. Unclaimed money is generally placed in county funds.[55] Problems arise when the money used as evidence is possibly the property of several victims of the same criminal. If the money is not easily identifiable, the victims must file attachment proceedings and litigate their rights to the money.[56] As has been noted, the Oregon and Washington statues provide for the owners' recovery of previously forfeited money.

A letter from Kansas presents an interesting commentary on the problems inherent in returning property to third parties:

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[50]This question was given consideration by twenty-six of the custodians who responded to the inquiry. Each indicated the owner of such property will normally get it back.

[51]It must be borne in mind that this may not be the statewide procedure.

[52]See Appendix where statutes are listed.

[53]Ibid.

[54]Letter from Ralph T. Ross, note 28 supra.

"Only three or four weeks ago we had the occasion of returning money and diamonds to the estate of a deceased, following a murder trial. Since this was a novel question, the matter was taken up by and between numerous justices of our Superior Court and the Chief Justice of our Supreme Judicial Court. The serial numbers were taken from all of the bills and photographs of the diamonds were taken at Headquarters of the Maine State Police, and same were placed on file. Following this procedure, the bills, coins and diamonds were properly returned to the heirs of the deceased who had been murdered."

[55]Covered by statutory provisions in Louisiana, Oregon and Washington. See Appendix.

[56]Letter from Elmo M. Hargrave, Supervisor, Police Legal Section, Kansas City, Missouri, Aug. 15, 1962.

> You might be interested to know the source from which most requests for evidence to be disposed of come. The first sources are the police departments or sheriff's department, because they have a storage problem and they cannot indefinitely keep large bulky items. We ordinarily then have requests from victims for the return of their property. Then we have insurers of property taken by burglaries who wish to salvage the property and recover their loss. Next we have requests from people who have had automobiles stolen. Strangely, the automobiles themselves, probably because they are very bulky, unless they have some special use as evidence are ordinarily returned to the owner almost immediately upon recovery.[57]

Property of the Accused

Generally when a criminal is convicted, his personal property and other possessions which have been used as evidence are not returned to him.[58] They are either sold, destroyed, or kept until such time as the prisoner is released from incarceration. If he is acquitted, his property will be returned.[59] In many cases, whether or not the property is returned to the prisoner depends on its nature. If it is a deadly weapon or is contraband, as a matter of general policy, it is not released. If it is used only for purposes of identification with the scene of the crime, it may be returned.[60]

Disposition According to the Nature of the Article

Specifically, different articles of evidence are handled according to the nature of the articles involved. Weapons are either destroyed,[61] turned over to the various law enforcement agencies for use in training,[62] turned over to laboratories for study,[63] sold at public auctions

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[57]Letter from Keith Sanborn, County Attorney, Sedgwick County, Wichita, Kansas, August 8, 1962.

[58]This question was given consideration in eleven replies. Replies from Colorado, Connecticut, Illinois, Kansas, Virginia, and West Virginia indicated that the property is not returned to the accused during his confinement after conviction. Items are returned to defense counsel in Kentucky, Louisiana, Missouri, North Carolina and South Dakota.

[59]Generally returned on acquittal in: Colorado, Connecticut, Illinois, Iowa, Kentucky, Louisiana, Missouri, North Carolina, South Dakota, Virginia, West Virginia.

[60]Letter from Edward K. Washington, Solicitor, Twelfth Solicitorial District, Greensboro, North Carolina, July 5, 1962.

[61]California, Colorado, Connecticut, Michigan. Letter from Gerald Perman, supra note 42, indicates weapons are melted in furnaces of Ford Plant in Detroit.

[62]Colorado, Hawaii, Kentucky, Louisiana, North Carolina, Virginia.

[63]North Carolina.

to help defer government costs,[64] or returned to the owner if he can prove that he had nothing to do with the instrument's use in the crime.[65] An added problem is sometimes encountered concerning weapons, because detectives and police officers like to keep them as mementoes of the crimes they have solved.[66] Liquor which is open is destroyed, or turned over to the Sheriff's department.[67] Unopened bottles may be given for use in hospitals.[68] If it is saleable liquor, it may be sold and the proceeds paid to a school or other local fund.[69] Narcotics are turned over to state and federal narcotics agents.[70] As has been noted, many unclaimed articles with no inherent value are destroyed by being burned, buried or thrown in nearby rivers. The method of destruction depends mainly upon the destructive processes most accessible to the custodian. Items such as footprints, fingerprints and other exhibits prepared by law enforcement agencies are either returned to the agency for maintenance or destroyed.

Federal Courts

The Federal District Courts are not constrained to follow any specific regulation concerning disposition of exhibits.[71] Congress has authorized the District Courts to adopt their own rules of court. Once the jury has returned a verdict, the property is surrendered to the United States Attorney and the disposition normally rests in the exercise of his discretion. The United States Attorney may move or petition the court to enter an order for the disposition of the exhibits. The court may direct the United States Marshall to destroy the evidence or return it to its rightful owner. Where federal agencies are involved, evidence submitted by them is returned and final disposition is made by the agency.[72]

The Federal District Court for the District of Columbia has no set procedure. However, consideration is being given to a recommendation of the court for the adoption of a rule similar to that in force in

[64]Idaho, Kansas, Oregon, South Carolina.
[65]Kansas.
[66]Kansas.
[67]North Carolina.
[68]Iowa.
[69]North Carolina.
[70]California and New Hampshire.
[71]Letter from Herbert J. Miller, Jr., Assistant Attorney General, Dept. of Justice, Washington, D.C., Aug. 31, 1962.
[72]Ibid.

the United States Circuit Court of the District of Columbia.[73] The Circuit Court rule provides:

> Models, diagrams, and exhibits of material must be removed within 30 days after decision. All models, diagrams and exhibits of material placed in the custody of the clerk for the inspection of the court on the hearing of a case must be removed by the parties within thirty days after the case is decided. When this is not done, it shall be the duty of the clerk to notify counsel in the case, by mail or otherwice of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, the clerk shall destroy them or make such other disposition of them as to him may seem best.[74]

Similar rules are in effect in each of the federal circuit courts, but the time limits are different in each circuit; fifteen days after notice,[75] thirty days,[76] one month,[77] or a reasonable time.[78] Exhibits which have been presented to the United States Supreme Court must be taken away by the parties within forty days after the case is decided.[79]

The clerks in the state courts indicated that generally those exhibits which are sent on for state appellate or federal proceedings are returned to the local court house and disposed of in accordance with the state statute or local custom.

Military Courts

Property which has ben used as evidence in a military trial has usually been acquired by the military police as a result of an investigation.[80] It is their duty to carefully list all such articles promptly after acquisition and in the presence of a third party witness. The property is then turned over to the custodian who is responsible for its safekeeping and maintenance both before and after the trial. When the property has been used in a legal proceeding and is no longer

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[73]Letter from Harry M. Hull, Clerk, United States District Court for the District of Columbia, Washington, D.C., July 5, 1962.

[74]General Rules of the U.S. Court of Appeals for the District of Columbia, 28 U.S.C.D.C. Cir. R. 22 (b).

[75]Eighth Cir. R. 9(b). This rule and those which follow are in 28 U.S.C. Rules.

[76]D. C. Cir. R. 22 (b).

[77]2nd Cir. R. 16; 4th Cir. R. 26; 5th Cir. R. 34; 7th Cir. R. 18 (c); 9th Cir. R. 16; 10 Cir. R. 30.

[78]1st Cir. R. 36; 3rd Cir. R. 37; 6th Cir. R. 28.

[79]Sup. Ct. Rules, R. 38.

[80]AR-190-22. The material for the discussion of the military procedure is based on the provisions of this regulation.

useful or needed as evidence, the custodian must make a written request to the appropriate commander for its disposition. As in the state courts, the final determination of the case marks the time when the custodian may proceed with the disposition proceedings.

Property which belongs to a third party is kept for 120 days after written notice of the pending disposition has been made to the owner or his legal representative.[81] If the owner does not acknowledge the notice, the property is disposed of after the expiration of one year from the time it came into the possession of the last custodian. Claims for property may be made prior to disposal and claims for funds may be made to the finance officer one year after disposal. Claims thereafter must be made to the General Accounting Office. After the expiration of five years from the date of disposal, all such claims are barred.

Property which belongs to the accused, other than government property, is kept in safekeeping and transferred with him from one confinement facility to another.[82] It may, however, be disposed of in other ways, as directed by the prisoner. If requested by the prisoner, the property may be shipped to a person designated by him, sold and the money paid into an account for the prisoner, donated to a charity, or destroyed.

As in the state courts, some property is disposed according to the nature of the article. United States weapons and other government property are returned to the general property depot. Private weapons and contraband property, such as counterfeit bills and narcotics, are turned over to the appropriate federal agency. Generally the procedure is the same as that already noted in the discussion of state disposition according to the nature of the exhibit.

Conclusion

Although showing an awareness of the need for maintaining physical exhibits for possible use in a future trial, the custodians indicate that there are difficult problems involved. The storage burden is constantly increasing and a need for more storage facilities has been expressed. The establishment of a regional warehouse exclusively for the storage of criminal exhibits or the use of more photographs are possible solutions.

Somewhat different from the maintenance problem is one which arises when valuable property belonging to a victim of a theft is

[81]AR 633-5.
[82]AR 643-40.

maintained for many years. If there is any likelihood of a new trial, the continuity of possession must be preserved. A State's Attorney in Connecticut writes:

> "As a matter of fact, that evidence which we hold, but which is actually the property of a person who desires its return must be returned at the conclusion of the expiration of the appeal following trial. Consequently, the return of it will immediately stop any continuity of the condition of same. That would make it inadmissible in a new trial."[83]

A third problem arises from the need to store exhibits which should have been withdrawn by the parties. In Oregon, the attorneys are authorized to withdraw their exhibits soon after the time for appeal has expired. If they fail to do so, the clerk is faced with a storage burden for ten years.[84] Of course the clerk should maintain exhibits where the peculiar circumstances of the case indicate long-time storage is necessary, but the storage burden is not really alleviated when exhibits are kept longer than necessary. There is little sense in keeping exhibits used to convict a man who has since died— other than those exhibits which may be of historical significance such as the exhibits used in the trials of Aaron Burr, the assassins of Lincoln and McKinley, or Alger Hiss. When such items are involved, it would, of course, be worthwhile checking with an historical records commission as is the practice in Vermont.

The important problem discussed here, however, is the need for preserving the exhibits for a future trial. If the exhibits are not available for a future trial, an unmerited acquittal may well result.[85] It is, of course, impossible to anticipate those cases which will never be contested. It is not at all uncommon today for a man to assert his constitutional rights through a habeas corpus proceeding many years after his conviction. It would seem, then, that in order to alleviate the problems inherent in the proper maintenance of physical exhibits there are two alternatives. Either all exhibits must be kept and properly maintained until the prisoner has died, or some sort of limitation

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[83]Letter from Arthur T. Gorman, State's Attorney, New Haven County, New Haven, Connecticut, Aug. 3, 1962.

[84]Letter from Si Cohn, County Clerk, Multnomah County, Portland, Oregon, July 12, 1962.

[85]The preservation of such exhibits would also, of course, protect the rights of an accused if any subsequent retrial were to take place. The exhibits in the custody of the clerk would also undoubtedly include some which might well establish the innocence of an accused. This was in fact one of the basic points raised by Fletcher's attorney when he moved to quash the indictment.

must be imposed regarding appeals which would insure the safe destruction of exhibits after a certain time period has elapsed. What is needed then is a statute of limitations which would limit the time within which a habeas corpus proceeding could be brought. An amendment to chapter 153 of Title 28 of the United States Code could provide that no such petition for a writ of habeas corpus could be made unless initiated within a certain number of years from the date of the "final determination" of a prisoner's case. Such a provision would not be an undue infringement on the rights of a prisoner. The amendment would, of course, have to work both prospectively and retrospectively. Its application would bar the claims of those in prison who claim a violation of their constitutional rights because a later court decision has changed the law from what it was when they were tried perhaps twenty-five or thirty years ago. There is no logical reason to conclude that because a modern court has indicated a modern trend in constitutional thinking, a prisoner was mistreated or not given a fair hearing of his case in a former generation. In short, such a provision would simply state that the claims normally inherent in any petition for a writ of habeas corpus would have to be made within a certain number of years from the date of the final determination of the case through normal appellate channels.

A limitation such as that advocated is now in force in the Illinois post-conviction act.[86] The act provides for a five-year liimtation period during which the prisoner may take advantage of the extraordinary processes provided by the state. The comments of an Illinois clerk[87] indicate that the five year limit was considered to be ample time for a prisoner to raise his complaints of denials of constitutional due process.

> A five year limitation period is prescribed, with provision for discretionary relaxation under unusual circumstances of hardship which are not susceptible to precise enumeration.... A three year period is provided as to judgments rendered prior to the promulgation of the Act because that period was regarded as entirely sufficient (particularly in view of the provisions for flexibility in hardship cases) for prisoners already incarcerated. Five years was felt to be too long a time in such cases.[88]

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[86]Ill. Ann. Stat. ch. 38, §§ 826-832 (Smith-Hurd 1961 Supp.).

[87]Albert E. Jenner, Jr. He was chairman of the committee of the Chicago and Illinois State Bar Associations which prepared the draft for the proposed rule of court providing for post- conviction hearings.

[88]Jenner, The Illinois Post Conviction Hearing Act, Ill. Ann. Stat. ch. 38, (Smith-Hurd 1961 Supp.) at 329, 342.

For any limitation such as this to be effective, it would of course be necessary that some correlation be established between the period written into the federal statute and the period of limitations in the state provisions. Adequate and complete state provisions would tend to lessen somewhat the heavy flow of habeas corpus petitions which tend to impede the federal judiciary's dispatch of other business.

A statute of limitations is, however, feasible.[89] It would allow the exploration of procedures which would insure competent and uniform maintenance of exhibits for possible future trials and the systematic disposal of such exhibits at the expiration of the time limit prescribed in the statute of limitations. Unless this procedure is adopted there appears to be no feasible alternative to indefinite storage of real evidence used in criminal proceedings.

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APPENDIX

Jurisdictions	*Sources of Replies*	*Statutes and Rules*
Alabama	Birmingham	None
Alaska	None	None
Arizona	None	None
Arkansas	Pine Bluff	None
California	Los Angeles, Burbank	Cal. Penal Code §§1417-1419
Colorado	Colorado Springs, Denver	None
Connecticut	Hartford, New Haven	Conn. Gen. Stat. Rev. § 54-36 (1958).
Delaware	Dover	Del. Super. Ct. (Crim.) R. 56 (c).
District of Columbia	Washington	None
Florida	Jacksonville	Fla. Stat. Ann. § 901.19 (1944).
Georgia	Macon	None
Hawaii	Honolulu	Hawaii Rev. Laws § 215-29 (1955). Also Rule 7, Rules of Cir. Ct. of 1st Cir., "Withdrawal of Papers and Exhibits."
Idaho	Boise, Twin Falls	None
Illinois	Decatur	Ill. Ann. Stat. ch. 110, § 201.20 (Smith Hurd 1956).
Indiana	Elkhart, Indianapolis	None
Iowa	Des Moines, Iowa City	Iowa Code §§ 645, 751 (1962).
Kansas	Kansas City, Wichita	Kan. Gen. Stat. Ann. §§ 2610-2617 (Supp. 1961).

[89]At first blush such a proposal does seem to be a great deprivation of rights. However, viewed in light of the possibility of an absolute right to counsel as essential to any conviction, it does not seem improper to deny convicted persons the opportunity to sleep on their rights. See contra this argument: Torcia and King, The Mirage of Retroactivity and Changing Constitutional Concepts, 66 Dick. L. Rev. 269 (1962). But see also, Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 517 (1963).

Jurisdictions	*Sources of Replies*	*Statutes and Rules*
Kentucky	Louisville, Pikeville	Ky. Rev. Stat. § 435.235 (1955).
Louisiana	Baton Rouge	La. Acts, 1960, No. 327.
Maine	Alfred	None
Maryland	Snow Hill	None
Massachusetts	Pittsfield	Rules & Orders of Mass. Superior Court, 1956 R. 110, 111. See XLI Mass. Law Quart. No. 1 p. ix.
Michigan	Detroit, Grand Rapids	None
Minnesota	Duluth, Minneapolis	Minn. Stat. §§ 480-499 (1957).
Mississippi	Columbia, Jackson	Miss. Code Ann. §§ 1637-38 (1942)
Missouri	Kansas City, St. Louis	None
Montana	Lewistown	None
Nebraska	None	None
Nevada	Las Vegas	Nev. Rev. Stat. § 3-305 (1957).
New Hampshire	Concord	None
New Jersey	Atlantic City, Newark	None
New Mexico	None	None
New York	New York	N.Y. Pub. Health Laws §§ 3352-3353; N.Y. Pen. Laws § 1899.
North Carolina	Greensboro	None
North Dakota	Lisbon, Valley City	None
Ohio	Cincinnati	None
Oklahoma	Oklahoma City	Okla. Stat. tit. 12 § 956.4 (1951).
Oregon	Oregon City, Portland	Ore. Rev. Stat. §§ 7.120, 142.040, 142.060, 166.280 (Supp. 1961).
Pennsylvania	Harrisburg, Pittsburgh Scranton	None
Rhode Island	Newport, Providence	Rhode Island Superior Court, R. 39 (1957).
South Carolina	McCormick	None
South Dakota	Sioux Falls	None
Tennessee	None	None
Texas	Amarillo	Tex. Code Crim. Proc. art. 760 (c) (1948).
United States, Judicial	Assistant Attorney General	None
United States, Military	Chief, Military Justice Division	AR-190-22
Utah	Brigham City	None
Vermont	Middlebury	Vt. Stat. Ann. tit. 22, § 454 (1959 Rev.).
Virginia	Alexandria, Culpeper Lexington, Spotsylvania	None
Washington	Spokane	Wash. Sess. Laws 1961, ch. 104 §§ 1-4 at 158.
West Virginia	Wheeling	W. Va. Code Ann. § 5750 (1961).
Wisconsin	Madison	Wis. Stat. § 59.715 (Supp. 1961).
Wyoming	Laramie	None