

A UNIQUELY DISPOSITIVE POWER: HOW POSTCONVICTION DNA TESTING IMPEACHED ACCOMPLICE TESTIMONY, IMPLICATED A LONE KILLER, AND EXONERATED THE BEATRICE SIX

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I. INTRODUCTION

On January 26, 2009, the Nebraska Board of Pardons granted full pardons to five individuals after the State of Nebraska (“State”) declared those five individuals absolutely innocent of any involvement in the 1985 rape and murder of Helen Wilson.¹ Three months earlier, the District Court of Jefferson County exonerated a sixth individual by vacating his criminal conviction, granting him a new trial, and subsequently granting the State’s motion to dismiss the first degree murder charge against him.² By the time they were exonerated, these six individuals, commonly referred to as “The Beatrice Six” because the grisly murder occurred in Beatrice, Nebraska, had collectively served nearly seventy years in prison.³ DNA testing performed in 2008 on preserved biological material recovered from the crime scene proved, beyond all doubt, that none of the Beatrice Six had been involved in

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1. Catharine Huddle & Joe Duggan, *Five in '85 Murder Case Granted Pardons*, JOURNAL STAR, Jan. 27, 2009. <http://www.journalstar.com/news/articled796e601-22b1-57b3-bef6-75066bdf3c62.html>.

2. Order Granting New Trial, *State v. White*, 274 Neb. 419, 740 N.W.2d 801 (October 15, 2008) (No. 05-9000001) (on file with author); Order of Dismissal, *State v. White*, 274 Neb. 419, 740 N.W.2d 801 (Nov. 7, 2008) (No. 05-9000001) (on file with author).

3. Huddle & Duggan, *supra* note 1; Motion to Vacate Conviction under DNA Testing Act, or in the Alternative, Grant a New Trial, *State v. White*, 274 Neb. 419, 740 N.W.2d 801 (July 30, 2008) (No. 9316) (on file with author). James Dean served approximately four years and seven months in prison. *Id.* at 2. Debra Shelden served approximately four years and eight months in prison. *Id.* at 8. Kathy Gonzales served approximately four years and nine months in prison. *Id.* at 5, 12, 14. Thomas Winslow, Joseph White, and Ada JoAnn Taylor each served approximately nineteen years in prison. *Id.* at 1, 2, 19.

the Wilson rape and murder, even though three of the six individuals had testified to aiding and abetting in or witnessing the murder.⁴

The State wrongfully convicted the Beatrice Six with fabricated accomplice testimony obtained through questionable interrogation tactics, discredited psychological techniques, and contingent plea agreements promising leniency in the form of lesser charges and reduced sentences.⁵ The Beatrice Six case now ranks alongside such high profile accomplice cases as the “Ford Heights Four,” the “Central Park Five,” and the “Norfolk Four”—in which multiple convictions were challenged and, in two instances, overturned based on compelling DNA evidence.⁶

The State eventually exonerated the Beatrice Six after two lawyers persuaded the Supreme Court of Nebraska to recognize the scientific potential for favorable DNA testing results to impeach critical accomplice testimony on which their clients’ convictions rested.⁷ DNA testing not only excluded the Beatrice Six, but eventually implicated an initial suspect as the sole contributor of the non-victim DNA evidence.⁸

This Article examines the inherent unreliability of bargained-for accomplice testimony and how contingent plea agreements may induce accomplices to fabricate evidence.⁹ This Article first analyzes the unexamined approach used by the District Court of Jefferson and Gage Counties to deny White and Winslow DNA testing.¹⁰ The Article then analyzes the critical approach applied by the Supreme Court of Nebraska in *State v. White*¹¹ and *State v. Winslow*¹² to determine whether DNA testing may produce noncumulative exculpatory evidence relevant to wrongful conviction and sentence claims.¹³ This Ar-

4. UNIVERSITY OF NEBRASKA MEDICAL CENTER, DNA REPORT, HDI CASE 973 (July 30, 2008) (on file with author); UNIVERSITY OF NEBRASKA MEDICAL CENTER, DNA REPORT, HDI CASE 1047, at 3-7 (Oct. 10, 2008) (on file with author).

5. See *infra* notes 42-43, 46-47, 52-53 and accompanying text; Bill of Exceptions exhibits 34-37, *State v. White*, 239 Neb. 554, 477 N.W.2d 24 (May 2, 1990) (No. 9316) (on file with author).

6. See *infra* notes 180-82, 208-09, 231-33 and accompanying text. The wrongful convictions of the Ford Heights Four and Central Park Five were overturned. A petition for clemency seeking full pardons for the Norfolk Four is currently before Virginia Governor Tim Kaine.

7. See *infra* notes 106-07 and accompanying text. Post-Conviction counsel were Mr. Jerry L. Soucie, employed by the Nebraska Commission on Public Advocacy in Lincoln, Nebraska, and Mr. Douglas J. Stratton, Stratton Law PC, in Norfolk, Nebraska.

8. Memorandum from Mr. Corey O’Brien, Assistant Nebraska Attorney General, on the Findings of the 2008 Task Force Investigation into the Murder of Helen Wilson 5-6 (Jan. 26, 2009) (on file with authors).

9. See *infra* notes 123-38 and accompanying text.

10. See *infra* notes 270-97 and accompanying text.

11. 274 Neb. 419, 740 N.W.2d 801 (2007).

12. 274 Neb. 427, 740 N.W.2d 794 (2007).

13. See *infra* notes 298-324 and accompanying text.

ticle urges district courts to consistently apply this critical approach to all motions for post-conviction DNA testing.¹⁴ Finally, this Article recommends courts conduct pretrial reliability hearings in cases involving highly suspect accomplice testimony, and further recommends the Nebraska Supreme Court Committee on Practice and Procedure revise the pattern accomplice testimony instruction to more fully apprise jurors of the inherent unreliability of accomplice testimony.¹⁵

II. FACTS AND HOLDING

A. FACTUAL SUMMARY

In Beatrice, Nebraska, on the morning of February 6, 1985, Ivan Arnst discovered the dead body of his sister-in-law Helen Wilson, age sixty-eight, on the living room floor of her apartment.¹⁶ Arnst found Wilson with her nightgown pulled up over her body, a scarf wrapped tightly around her head, and her arms bound with a towel behind her back.¹⁷ Dr. John Porterfield, a Lincoln, Nebraska pathologist, concluded that Wilson died of hypoxia due to suffocation.¹⁸ The autopsy revealed that, prior to her death, Wilson had been sexually penetrated vaginally and anally.¹⁹

At the crime scene, Beatrice police took semen and blood samples.²⁰ Beatrice police also recovered several fingerprints and \$1300 in cash from Wilson's purse.²¹ During the investigation, Beatrice police commissioned an FBI criminal profile that concluded that a single individual, most likely a young white male familiar with the Beatrice area, committed the murder.²²

Based on the forensic evidence, the investigation focused on finding a single male, non-secretor with type-B blood.²³ The Beatrice police investigation focused briefly on Bruce Allen Smith, who was in Beatrice at the time of Wilson's murder but had left town soon thereafter. On the night of the murder, a witness placed Smith within two

14. See *infra* notes 325-70 and accompanying text.

15. See *infra* notes 371-75 and accompanying text.

16. Bill of Exceptions at 458, *State v. White*, 239 Neb. 554, 477 N.W.2d 24 (May 2, 1990) (No. 9316) (on file with author).

17. *Id.* at 477.

18. *Id.* at 629.

19. *Id.* at 631.

20. *Id.* at 878.

21. Memorandum from Corey O'Brien, Assistant Nebraska Attorney General, on the Findings of the 2008 Task Force Investigation into the Murder of Helen Wilson 1 (Jan. 26, 2009) (on file with authors) [hereinafter *O'Brien Memo*].

22. FBI Criminal Assessment Profile on Homicide of Helen L. Wilson by Agent Peter M. Klismet, Wilson 6, 9-10 (May 21, 1985) (on file with authors).

23. *O'Brien Memo*, *supra* note 19, at 1-2 ("A non-secretor, unlike 80% of the population, does not secrete enzymes that are prevalent in each person's blood in any other bodily fluids.").

blocks of Wilson's apartment. Shortly after the murder, witnesses reported seeing Smith with scratches on his face.²⁴ Several Beatrice police officers then followed Smith to Oklahoma, where they interviewed Smith and obtained blood, saliva and hair samples.²⁵ The Oklahoma City Police Laboratory tested Smith's biological material and identified him as a type-B secretor, so Beatrice police ruled Smith out as a suspect.²⁶

Thereafter, the investigation into Wilson's murder went cold, until retired Beatrice Police Officer Burdette Searcey reopened the investigation later as a private investigator.²⁷ In his investigation, Searcey spoke with Lisa Podendorf-Brown, who informed Searcey that Ada JoAnn Taylor told Podendorf-Brown that Taylor and Joseph White were involved in Wilson's murder.²⁸ White and Taylor were acquaintances, who had traveled together to Beatrice from California. Beatrice police had questioned White about the Wilson murder in February 1985, but had ruled him out as a suspect.²⁹

In 1989, Cliff Shelden, an inmate at Lancaster County Corrections Center, made several statements to Searcey implicating numerous people in Wilson's murder, including Shelden's future wife, Debra, White, Taylor, and Thomas Winslow.³⁰ Shelden claimed to know of these individuals' involvement in Wilson's murder from a letter written to him by Taylor.³¹ Based on Cliff Shelden's incriminating statements, Searcey interrogated Winslow about his involvement in the Wilson murder.³² During his first interrogation, Winslow admitted only to loaning his car to White and Taylor on the night of the murder³³ and hearing White and Taylor make inculpatory statements about having robbed and killed an elderly woman.³⁴ During his second interrogation, Winslow changed his earlier story, telling Searcey that he had been in Wilson's apartment with White and Taylor on the night of the murder, but that he and his wife, Beth, had left the apart-

24. Interview of Lisa Todd, Witness, Nebraska State Patrol (Feb. 28, 1985) (on file with author).

25. *O'Brien Memo*, *supra* note 23, at 2.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* Mr. White volunteered to answer questions before leaving Nebraska for his home in Alabama. *Id.*

30. *Id.* at 3 ("Clifford Shelden and Thomas Winslow were arrested in Lancaster County for the assault and robbery of a motel clerk").

31. Interview by Gage County Deputy Gerald Lankin with Clifford Shelden, in Lancaster County Corrections (Apr. 12, 1989) (on file with authors). Such a letter was never adduced at trial.

32. *O'Brien Memo*, *supra* note 23, at 3.

33. *Id.*

34. *Id.*

ment before anything bad happened to Wilson.³⁵ During his third interrogation with Searcey, Winslow recanted both of his previous statements and claimed to have no memory of anything that happened in Wilson's apartment.³⁶ On March 17, 1989, the Gage County Sheriff's Department charged Winslow with the first-degree murder of Wilson.³⁷

On March 15, 1989, law enforcement arrested White in Alabama for Wilson's murder based on prior statements made by Podendorf-Brown, Cliff Shelden, and Winslow.³⁸ Once in custody, White repeatedly told the police he was never in Wilson's apartment and he was not involved in her death.³⁹ White waived extradition, returned voluntarily to Nebraska, and agreed to give hair and blood samples to the Gage County Sheriff's Department.⁴⁰

Also on March 15, 1989, law enforcement arrested Taylor in North Carolina.⁴¹ Taylor also waived extradition and voluntarily returned to Nebraska. Taylor told North Carolina law enforcement that she, White, and a third man whose name she could not recall, were at an elderly woman's house doing yard work late one afternoon when White stabbed the elderly woman.⁴² After officers showed Taylor photographs and a videotape of the crime scene, and shared details about the police theory of the crime, the officers had Taylor consult with a part-time police psychologist, Dr. Wayne Price, who assisted Taylor with restoring her memories.⁴³ Thereafter, Taylor told police another story, in which she, White, and Winslow were in Wilson's apartment and all three participated in Wilson's sexual assault and murder.⁴⁴ Taylor told police White and Winslow took turns sexually assaulting Wilson, while Taylor held a pillow over Wilson's face.⁴⁵ Eventually, Taylor implicated Debra Shelden, James Dean, and Kathy Gonzales

35. *Id.*

36. Interview by Burdette Searcey with Thomas Winslow, at Gage County Sheriff's Office (Mar. 18, 1989) (on file with author).

37. *State v. Winslow*, 274 Neb. 427, 428, 740 N.W.2d 794, 795 (2007).

38. Bill of Exception, *supra* note 16, at 546, 710.

39. *O'Brien Memo*, *supra* note 23, at 3.

40. Paul Hammel, *Man Enjoys His First Freedom in 19 Years*, OMAHA WORLD-HERALD, Oct. 17, 2008, available at http://www.omaha.com/index.php?u_page=2798&u_sid=10460729.

41. Bill of Exception, *supra* note 16, at 923.

42. *O'Brien Memo*, *supra* note 23, at 3.

43. *Id.* At the time he interviewed Taylor, Dean and Shelden, Dr. Price held dual positions as the head of the Blue Valley Mental Health Center in Beatrice, Nebraska, and as a part-time Gage County Deputy Sheriff, who consulted as a psychologist to the Beatrice Police Department and the Gage County Sheriff's Office. Catherine Huddle, "Experts Weigh In on Price's Role as a Psychologist, Deputy," LINCOLN JOURNAL STAR, May 11, 2009.

44. *O'Brien Memo*, *supra* note 23, at 3.

45. *Id.*

as accomplices in the crime.⁴⁶ Taylor agreed to plead to second-degree murder and to cooperate fully in the prosecution of the other codefendants.⁴⁷ Taylor later told the press she plead guilty because she was threatened with the death penalty.⁴⁸

Based on Taylor's statements, the Gage County Sheriff's Department obtained arrest warrants for Debra Shelden, Dean, and Gonzales. On April 13, 1989, law enforcement arrested Debra Shelden, Wilson's great-niece, for her alleged involvement in Wilson's murder.⁴⁹ On April 15, 1989, law enforcement arrested Dean for his alleged involvement in the murder.⁵⁰ Finally, on May 25, 1989, law enforcement arrested Gonzales in Denver, Colorado.⁵¹ Upon being arrested, all three initially denied being in Wilson's apartment at the time of her murder.⁵²

Dr. Price succeeded in convincing Dean and Debra Shelden, but not Gonzales, that they had repressed memories of Wilson's murder, and that Dr. Price would teach them how to "restore their recollections through dreams and other memory provoking techniques."⁵³ After law enforcement shared details about the crime and the crime scene, and assured the three suspects that they would receive minimal jail sentences in exchange for cooperating with the police, Dean and Debra Shelden agreed to testify to a story that was very similar to the last story Taylor told to the police.⁵⁴

B. PROCEDURAL HISTORY

On November 1, 1989, Joseph White's trial commenced in Jefferson County District Court in Fairbury, Nebraska.⁵⁵ White was appointed two defense attorneys, Toney Redman and Alan Stoler. Richard Smith, the Gage County Attorney, and Jerry Shelton, a Gage County Deputy Attorney, represented the State. In the State's open-

46. *Id.*

47. Bill of Exception, *supra* note 16, at 890-91, exhibit 37.

48. Joe Duggan, *Taylor Freed from Prison*, BEATRICE DAILY SUN, Nov. 11, 2008, available at, <http://www.beatricedailysun.com/articles/2008/11/11/news/local/doc49199babc256e985336614.txt>. (Taylor claims law enforcement threatened she would be the first woman electrocuted in Nebraska).

49. Bill of Exception, *supra* note 16, at 723, 764.

50. *Id.* at 835.

51. Supplementary Report from Deputy Lankio of the Gage County Sherriff's Office on the Arrest of Katherine Gonzales (May 25, 1989) (on file with author).

52. *O'Brien Memo*, *supra* note 23, at 4.

53. *Id.*

54. *Id.* As part of her plea agreement, Gonzales agreed to cooperate and testify but only to details she could remember, none of which occurred on the night of Wilson's murder.

55. *State v. White (White I)*, 239 Neb. 554, 554, 477 N.W.2d 24, 24 (1991) (motion for change of venue).

ing statement, Smith told jurors that the State would prove White entered Wilson's apartment and sexually assaulted her and that when White left the apartment she was dead.⁵⁶ To prove these theories, the State relied on the accomplice testimony of Debra Shelden, James Dean, and Ada JoAnn Taylor.⁵⁷ Prior to White's trial, all three accomplices pled guilty to reduced charges in exchange for their cooperation and testimony.⁵⁸

At trial, Debra Shelden testified that after riding around in Thomas Winslow's Oldsmobile with White, Winslow, Taylor and Dean, the group stopped at Wilson's apartment building and entered her apartment.⁵⁹ Shelden further testified she saw White sexually assault Wilson and when Shelden tried to pull White off of Wilson, White threw Shelden against the wall, injuring Shelden's head.⁶⁰ Shelden testified that after White sexually assaulted Wilson, Winslow sexually assaulted Wilson.⁶¹ Shelden testified that when she and the other accomplices left the apartment, Wilson was not moving.⁶²

Dean testified he, Winslow, White, Shelden, and Taylor knocked on Wilson's door and pushed through when she answered.⁶³ Dean then testified White, Winslow, and Taylor forced Wilson into her bedroom.⁶⁴ Dean testified that he briefly left the apartment at this time, but upon re-entering the apartment, he witnessed White, Winslow, and Taylor sexually assaulting Wilson.⁶⁵ Dean testified he first saw White then Winslow rape Wilson, while Taylor held down Wilson's hands and licked her upper body.⁶⁶

Taylor was the State's last accomplice witness to testify.⁶⁷ Taylor testified to a version of events similar to Dean's and Shelden's.⁶⁸ Taylor testified that she held a pillow over Wilson's face, while White and

56. Bill of Exceptions at 463, [State v. White], 239 Neb. 554, 477 N.W.2d 24 (May 2, 1990) (No. 9316) (on file with author).

57. Kathy Gonzales also took the stand but did not testify to any details relating to the night of Wilson's murder. *Id.* at 810-11.

58. Memorandum from Corey O'Brien, Nebraska Assistant Attorney General, on the Findings of the 2008 Task Force Investigation into the Murder of Helen Wilson 4 (Jan. 26, 2009) (on file with authors) [hereinafter *O'Brien Memo*]. On September 28, 1989, the State offered White a deal to plea to a charge of second degree murder carrying a sentence of 25 years to life. White declined the offer and went to trial. See Joe Duggan, Presumed Guilty, Part Five: Threat of Death, LINCOLN JOURNAL STAR, May 11, 2009.

59. Bill of Exception, *supra* note 56, at 737.

60. *Id.* at 751.

61. *Id.* at 757.

62. *Id.* at 737.

63. *Id.* at 820.

64. *Id.* at 821.

65. *Id.* at 828.

66. *Id.* at 831, 832.

67. *Id.* at 890.

68. *Id.* at 904.

Winslow took turns raping Wilson.⁶⁹ Taylor testified Wilson was not moving when Taylor left the apartment.⁷⁰

On cross-examination, defense counsel questioned Taylor about her history of mental problems.⁷¹ Defense counsel emphasized Taylor's original version of the murder, in which Taylor described being at a house with White in the late afternoon and White using a knife to stab a woman.⁷² Taylor also admitted on cross-examination that she had not mentioned White or Winslow until after law enforcement first mentioned their names to her.⁷³ Taylor admitted each of her versions of the murder differed.⁷⁴ Taylor also admitted to telling a psychiatrist that she was not present at the murder.⁷⁵

White testified in his own defense that he was not in the apartment on the night of Wilson's murder and denied any involvement in Wilson's murder.⁷⁶ White testified the reason he told a psychiatrist and his attorney that he "had no recollection of being at the Wilson apartment" was because law enforcement told White his fingerprints were found at the scene and the accomplice witnesses placed him at the crime scene.⁷⁷

At the close of White's trial, defense counsel requested that the standard credibility jury instruction be amended to include language that witnesses who testify pursuant to a plea agreement receive certain benefits in exchange for their testimony.⁷⁸ The district court denied this request, but included the standard Nebraska jury instruction on accomplice testimony.⁷⁹

On November 9, 1989, the jury deliberated for only a few hours before finding White guilty of first-degree murder.⁸⁰ At sentencing, the State recommended that White be sentenced to death, but the district court determined the joint involvement of Winslow and Taylor mitigated against imposing the death penalty.⁸¹ On February 16, 1990, the district court sentenced White to life in prison for first-de-

69. *Id.* at 908.

70. *Id.* at 909.

71. *Id.* at 931-36.

72. *Id.* at 938.

73. *Id.* at 943.

74. *Id.* at 948.

75. *Id.* at 961.

76. *Id.* at 1080.

77. *Id.* at 1084-85.

78. *Id.* at 1113.

79. *Id.* at 1113, 1130.

80. *Id.* at 1134, 1135.

81. *Id.* at 1187-88.

gree murder.⁸² On November 22, 1990, the Nebraska Supreme Court affirmed White's conviction and sentence.⁸³

On December 8, 1989, following White's swift conviction and life sentence, Winslow opted against going to trial and instead plead no contest to aiding and abetting second-degree murder.⁸⁴ At sentencing, Winslow stated he had no memory of Wilson's rape and murder to which he was pleading guilty.⁸⁵ The Gage County District Court sentenced Winslow to imprisonment for fifty years.⁸⁶ In exchange for their accomplice testimonies, the district court sentenced Sheldon and Dean to ten years in prison, and Taylor to not less than ten years nor more than forty years in prison, for aiding and abetting the second degree murder of Helen Wilson.⁸⁷

C. POST-CONVICTION RELIEF

On October 26, 2005, pursuant to the DNA Testing Act, Doug Stratton, a private practitioner in Norfolk, Nebraska, filed a motion in Jefferson County District Court seeking post-conviction DNA testing of any biological material relating to Joseph White's prosecution.⁸⁸ On February 22, 2006, Thomas Winslow filed a *pro se* motion for DNA testing in Gage County District Court pursuant to the same act.⁸⁹ The Gage County District Court appointed Jerry Soucie from the Nebraska Commission on Public Advocacy as counsel for Winslow, who filed an amended motion for DNA testing.⁹⁰

White and Winslow moved the respective courts for orders to conduct forensic testing on slides containing semen recovered from Wilson's body and from clothing or other evidence potentially containing semen or other biological material that may have been left at the crime scene, including blood stains or fingernail scrapings taken from Wilson's body.⁹¹ For comparison purposes, White and Winslow also

82. *Id.* at 1188.

83. *White I*, 239 Neb. at 557, 477 N.W.2d at 26.

84. *State v. Winslow*, 274 Neb. 427, 428, 740 N.W.2d 794, 795 (2007).

85. Amended Motion for DNA Testing at 5-6, *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007) (No. 96-9000001).

86. *Winslow*, 274 Neb. at 428, 740 N.W.2d at 795. The State offered Winslow a sentence of 5 years in exchange for testifying against White. Winslow declined the offer because he did not want to commit perjury by testifying about events of which he had no memory of. Amended Motion, *supra* note 85, at 5.

87. Motion to Vacate Sentence at 2-8, *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007) (CR-96-9000001).

88. *State v. White (White II)*, 274 Neb. 419, 421, 740 N.W.2d 801, 803 (2007).

89. *State v. Winslow (Winslow II)*, 274 Neb. 427, 429, 740 N.W.2d 794, 796 (2007).

90. Amended Motion for DNA Testing, *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007) (CR-96-9000001).

91. *Id.* at 1.

sought DNA testing on any known samples collected from Wilson and other co-defendants or suspects.⁹²

Winslow's motion argued DNA testing "will, for the first time, provide a reliable way to contradict the materially false testimony of James Dean and Ada JoAnn Taylor concerning the rape of Mrs. Wilson."⁹³ Winslow's motion further contended DNA testing would produce noncumulative, exculpatory evidence relevant to the claims that the district court sentenced Winslow "based on materially false information."⁹⁴

On April 7, 2006 and April 17, 2006, the Honorable Vicki Johnson consolidated the DNA motions for hearing purposes and conducted hearings in Jefferson County to determine whether DNA testing should be granted.⁹⁵ At the April 7 hearing, Winslow's counsel, Jerry Soucie, argued:

Now, if the DNA testing in this case comes back and says that the DNA recovered from the rectum and vagina of that woman was neither Mr. Winslow nor Mr. White, what does that say about [the] case? It says that something is horribly, horribly wrong. That whoever did this crime to this woman is a free man today.⁹⁶

In opposing DNA testing, Richard Smith, the Gage County Attorney, argued any DNA testing would not be exculpatory because it was not necessary for White to be guilty of sexual assault in order for him to be guilty of felony murder.⁹⁷ Furthermore, Smith argued the State never presented evidence at trial that any semen samples belonged to Joseph White, so a DNA test result establishing the sample belonged to anyone else would be cumulative.⁹⁸ Smith also argued the DNA Testing Act did not apply to Winslow's plea-based and plea-bargained conviction.⁹⁹

In August 2006, in separate orders, the district court denied White's and Winslow's respective motions.¹⁰⁰ The Honorable Vicki Johnson held Winslow had waived his right to DNA testing due to his

92. *Id.*

93. *Id.* at 11.

94. *Id.*

95. *Winslow II*, 274 Neb. at 429, 740 N.W.2d at 796. At the hearing, the district court received as evidence, *inter alia*, the bill of exception from Mr. Winslow's arraignment, plea and sentencing from 1989-90, the affidavit of Dr. Wisecarver, and portions of testimony from Mr. White's trial.

96. Brief of Appellant at 14, *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007) (CR-96-9000001).

97. Brief of Appellee at 19, *State v. Winslow*, 274 Neb. 427, 429, 740 N.W.2d 794, 795 (2007) (CR-96-9000001).

98. *Id.* at 18.

99. *Id.* at 12.

100. *Winslow II*, 274 Neb. at 430, 740 N.W.2d at 797.

plea of no contest.¹⁰¹ However, recognizing this holding might be incorrect, the district court considered the merits of the DNA motions.¹⁰² The court first found White and Winslow had effectively proven that DNA testing was not available at the time of White's trial.¹⁰³ The court did not find, but rather assumed for purposes of discussion that the integrity of the biological material sought to be tested had been retained under circumstances likely to safeguard the integrity of the biological material's original composition.¹⁰⁴ The court reasoned that newly discovered evidence that White did not rape Wilson would not be relevant to White's conviction for felony murder because it would have been sufficient for White to have robbed Wilson and then to have killed her to sustain a felony murder conviction.¹⁰⁵ The court further reasoned there was enough evidence placing White and Winslow inside Wilson's apartment at the time of her murder that any test results excluding either White or Winslow as a contributor of the DNA evidence would not overcome the accomplice testimony placing both White and Winslow in Wilson's apartment at the time of the murder.¹⁰⁶

Both White and Winslow appealed the denials of their motions for DNA testing, and on November 2, 2007, the Supreme Court of Nebraska reversed the motion denials and remanded the cases back to the district courts.¹⁰⁷ In both *White* and *Winslow*, the Nebraska Supreme Court held DNA testing could produce noncumulative, exculpatory evidence relevant to their claims that they were wrongfully convicted and sentenced.¹⁰⁸ On remand, the district court judge granted the motions for DNA testing.¹⁰⁹ DNA testing was conducted, resulting in White and Winslow being excluded as contributors to all biological material collected from the crime scene.¹¹⁰

After the initial DNA test results were reported, the Nebraska Attorney General's office created a special task force to investigate the case further, and on August 29, 2008, the State filed a motion for addi-

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 430-31, 740 N.W.2d at 797.

105. *Id.* at 431, 740 N.W.2d at 797.

106. *Id.*

107. *White II*, 274 Neb. at 422, 427, 740 N.W.2d at 804, 807; *Winslow II*, 274 Neb. at 431, 437, 740 N.W.2d at 797, 801.

108. *White II*, 274 Neb. at 426-27, 740 N.W.2d at 807; *Winslow II*, 274 Neb. at 437, 740 N.W.2d at 801.

109. Motion to Vacate Sentence at 15, *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007) (CR-96-9000001).

110. Memorandum from Corey O'Brien, Assistant Nebraska Attorney General, on the Findings of the 2008 Task Force Investigation into the Murder of Helen Wilson 4 (Jan. 26, 2009) (on file with authors).

tional DNA testing on crime scene evidence not previously tested.¹¹¹ Further DNA testing established none of the biological material collected at the crime scene matched any of the Beatrice Six defendants.¹¹² DNA testing also proved the collected blood and semen samples belonged to the same person.¹¹³ Based on these results, the task force identified potential suspects based on the 1985 police investigation and identified Bruce Allen Smith as a likely source of the DNA.¹¹⁴ Additional testing of Smith's preserved hair, saliva, and blood proved Smith was the source of the semen and blood samples recovered from the crime scene.¹¹⁵ The task force investigation also ruled out any possibility that Smith acted in concert with any of the six co-defendants.¹¹⁶

Based on the task force's findings, White and Winslow moved to vacate their respective convictions.¹¹⁷ On October 15, 2008, the Jefferson County District Court vacated White's first-degree murder conviction on the record and entered a written order granting him a new trial. October 17, 2008, the Gage County District Court vacated Winslow's sentence.¹¹⁸ On November 7, 2008, the State moved to dismiss White's criminal charges, and, on the same day, the Jefferson County District Court granted the motion.¹¹⁹

On January 26, 2009, the Nebraska Board of Pardons considered the pardon applications of Winslow, Taylor, Dean, Shelden, and Gonzales.¹²⁰ At the hearing, Assistant Nebraska Attorney General Corey O'Brien told the Board that the six, including White, were not only innocent beyond a reasonable doubt, but beyond all doubt.¹²¹ After a

111. *Id.*

112. *Id.* at 6.

113. *Id.* at 5.

114. *Id.*

115. *Id.* Smith died of AIDS in an Oklahoma Hospital in 1992.

116. *Id.*

117. Motion to Vacate Conviction Under DNA Testing Act, or in the Alternative, Set Aside Plea and Grant New Trial or Sentencing Hearing, *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007) (CR-96-9000001); Motion to Vacate Conviction Under DNA Testing Act, Or in the Alternative, Grant a New Trial, *State v. White*, 274 Neb. 419, 740 N.W.2d 801 (2007) (No. 9316).

118. Order, *State v. Winslow*, CR-96-9000001 (Dist. Ct. Gage County Neb. Oct. 16, 2008).

119. Order for Dismissal, *State v. White*, No. 9316 (Dist. Ct. Jefferson County Neb. Nov. 7, 2008) Prior to the entry of dismissal order, the district court granted White's motion to vacate his conviction on the record and issued an order granting White a new trial. Order, *State v. White*, No. 9316 (Dist. Ct. Jefferson County Neb. Oct. 15, 2008).

120. Catharine Huddle and Joe Duggan, *Five in '85 murder case granted pardons*, LINCOLN J. STAR, Jan. 27, 2009, available at <http://www.journalstar.com/articles/2009/01/26/news/local/doc497e182e6fc8b250435706.txt?orss=1>.

121. *Id.*

brief deliberation, the Board granted full pardons to all five applicants.¹²²

III. BACKGROUND

A. BARGAINED-FOR TESTIMONY

Prosecutors routinely rely upon the incriminating testimony of accomplices—when little, if any, other evidence supports the prosecution of a charged criminal.¹²³ While police and prosecutors know obtaining and using accomplice testimony will bolster a case and increase the likelihood of obtaining a conviction, the use of accomplice witness testimony has led to convictions of innocent people.¹²⁴ A recent study of wrongful convictions in 111 capital case exonerations revealed accomplice testimony was involved in 46% of the wrongful convictions.¹²⁵

Accomplice statements and testimony are often obtained when prosecutors cut deals or offer inducements.¹²⁶ Frequently, the contingent plea bargain agreements induce accomplices to cooperate, talk, and assist the prosecution in convicting co-defendants. Prosecutors contend incentives are necessary because without incentives, accomplices would not come forward to assist in prosecuting cases.¹²⁷ Prosecutors exercise near plenary authority in selecting accomplice witnesses, and possess broad and unfettered discretion regarding what may be offered to accomplices in exchange for their cooperation and testimony.¹²⁸

122. White's vacature and dismissal constitute a judicial exoneration and the equivalent of an executive pardon. On July 13, 2009, District Judge Vicky Johnson granted White's petition to expunge all records on the arrest, prosecution, and conviction of White related to the 1985 death of Wilson. See Joe Duggan, *White's records expunged Helen Wilson murder*, LINCOLN JOURNAL STAR, July 14, 2009, available at <http://journalstar.com/articles/2009/07/14/news/local/doc4a5b7cc52512902436949.prt>.

123. Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 LAW & HUM. BEHAV. 137, 137-38 (2007) (citing R. Michael Cassidy, "Soft Words of Hope": Giglio, Accomplice Witnesses, and the Problem of Implied Inducements, 98 NW. U. L.R. 1129 (2004)).

124. Neuschatz et al. *supra* note 123, at 138

125. ROB WARDEN, HOW MISTAKEN AND PERJURED EYEWITNESS IDENTIFICATION TESTIMONY PUT 46 INNOCENT AMERICANS ON DEATH ROW 1 (2001), <http://www.deathpenaltyinfo.org/StudyCWC2001.pdf> Neuschatz et al. *supra* note 123, at 138.

126. Spencer Martinez, *Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency*, 47 CLEV. ST. L. REV. 141, 142 (1999).

127. Neuschatz et al. *supra* note 123, at 148; Spencer Martinez, *supra* note 126, *Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency*, 47 CLEV. ST. L. REV. 141, 144-45 (1999).

128. See Eli P. Mazur, Note, *Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice*, 51 DUKE L. J. 1333, 1343 (2002) (discussing the Tenth Circuit's criticism of bargained-for testimony).

Formal plea agreements offering accomplices leniency in the form of reduced charges or reduced sentences can undermine the integrity of the criminal justice system.¹²⁹ Leniency may motivate accomplices to lie and encourage accomplices to shift blame.¹³⁰ Statements and testimony given in exchange for reduced charges and sentences motivate accomplices to procure the best deal possible by pleasing the prosecutor at all costs, even to the point of fabricating evidence.¹³¹

Accomplice statements and testimony are inherently untrustworthy because individuals charged with serious crimes often seek to escape the consequences of their actions by implicating other individuals in order to curry favor with police and prosecutors.¹³² Accomplice witnesses present the most damaging evidence against those individuals standing trial because accomplices have the ability to lie convincingly and, typically, juries believe accomplice testimony.¹³³ The fact that accomplices who testify falsely are rarely, if ever, prosecuted for perjury, suggests accomplices may have much to gain and little to lose by falsely testifying.¹³⁴

Further complicating the problem of incentivized accomplice testimony is psychological research indicating that mock jurors are unable to detect the effect of an incentive on an accomplice witness' behavior.¹³⁵ In particular, mock jurors may presuppose an accomplice witness is offering his or her testimony as atonement for that witness's role in the crime, rather than deducing the accomplice witness' testimony may be motivated by self-serving incentives.¹³⁶ Jurors may accept at face value an accomplice's testimony without considering either the accomplice's motive for testifying or the situational inducements of incentives.¹³⁷ One recent study concluded jurors will be able to differentiate between honest and dishonest witnesses only if jurors are capable of perceiving the enormous incentives offered to cooperat-

129. *Id.*

130. *Id.*

131. *Id.* at 1339-40.

132. *People v. Hudson*, 414 N.E.2d 385, 389 (N.Y. 1980) (explaining the objective of the New York corroboration statute is to "protect the defendant against the risk of a motivated fabrication, to insist on proof other than that alone which originates from a possibly unreliable or self-interested accomplice").

133. Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 847 (2002) ("The cooperating witness is probably the most dangerous prosecution witness of all. No other witness has such an extraordinary incentive to lie. Furthermore, no other witness has the capacity to manipulate, mislead, and deceive his investigative and prosecutorial handlers. For the prosecutor, the cooperating witness provides the most damaging evidence against a defendant, is capable of lying convincingly, and typically is believed by the jury.")

134. Neuschatz, *supra* note 123, at 138.

135. *Id.* at 138-39.

136. *Id.* at 139.

137. *Id.* at 138-39.

ing witnesses to fabricate evidence in exchange for leniency.¹³⁸ If jurors cannot differentiate between honest and dishonest accomplice witnesses, serious risks exist for accomplice testimony to lead to wrongful convictions.¹³⁹

B. TO CORROBORATE OR NOT?

1. A Federal & State Overview

The United States Supreme Court has expressed skepticism concerning the veracity of accomplice testimony. Justice Robert H. Jackson remarked, “[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility.”¹⁴⁰ The Court has cautioned accomplice testimony “ought to be received with suspicion, and with the very greatest caution, and ought not be passed upon by the jury under the same rules governing other and apparently credible witnesses.”¹⁴¹ In *Giglio v. United States*,¹⁴² the Court held a prosecutor’s failure to disclose a formal plea bargain with a testifying witness constituted a *Brady* violation.¹⁴³

The Court has recognized most witnesses offering bargained-for testimony have an inherent motivation to lie.¹⁴⁴ The Court has found accomplice testimony that inculcates both the accomplice and a defendant is “inherently unreliable.”¹⁴⁵ Furthermore, the Court has declared “a codefendant’s confession is presumptively unreliable as to the passages detailing the defendant’s conduct or culpability because those passages may well be the product of the codefendant’s desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.”¹⁴⁶

Despite this explicit acknowledgement of presumptive unreliability, the Court has held that accomplice testimony is admissible without corroboration.¹⁴⁷ The Court has explained the Anglo-American legal system has established safeguards that “leave the veracity of a

138. *Id.* at 139.

139. *Id.*

140. *Lee v. United States*, 343 U.S. 747, 757 (1952).

141. *Crawford v United States*, 212 U.S. 183, 204 (1909).

142. 405 U.S. 150 (1972).

143. *Giglio v. United States*, 405 U.S. 150, 153, 154 (1972) (holding prosecutor’s failure to disclose a plea bargain with a testifying co-defendant warranted a new trial because evidence questioning the credibility of a key prosecution witness is exculpatory in nature and nondisclosure constitutes a violation under *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

144. *Hoffa v. United States*, 385 U.S. 293, 311 (1966).

145. *Lilly v. Virginia*, 527 U.S. 116, 132-33 (1999) (plurality opinion).

146. *Lee*, 343 U.S. at 764.

147. *Caminetti v. United States*, 242 U.S. 470, 495 (1917).

witness to be tested by [cross examination], and the credibility of his testimony to be determined by a properly instructed jury."¹⁴⁸ Due to these legal safeguards, the Court has held no absolute rule of law prevents convictions on the testimony of accomplices if juries believe the testimony.¹⁴⁹ Thus, courts rely on full disclosure of formal plea agreements and the adversary system to justify witness inducements.¹⁵⁰

Although the Court has held procedural safeguards are sufficient to protect against the inherent unreliability of accomplice testimony, many states have enacted corroboration statutes as an additional safeguard against the inherent dangers of incentivized testimony. Currently, fifteen states have accomplice corroboration statutes, and one state has established a corroboration rule by judicial decision.¹⁵¹ Although the corroboration statutes vary greatly between jurisdictions, all the corroboration statutes attempt to provide guidance in dealing with potentially unreliable accomplice testimony.¹⁵² Corroboration statutes require the prosecutor to offer evidence independent of the accomplice testimony that tends to connect the defendant with committing the charged offense.¹⁵³

2. *Nebraska Common Law*

Nebraska has not enacted an accomplice corroboration statute. The longstanding common law rule in Nebraska permits a fact-finder to convict a defendant solely on uncorroborated accomplice testimony.¹⁵⁴ Accomplice testimony is admissible in Nebraska courts "notwithstanding the fact that the testimony is procured by means of a

148. *Hoffa*, 385 U.S. at 311.

149. *Caminetti*, 242 U.S. at 495.

150. Eli P. Mazur, Note, *Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice*, 51 DUKE L. J. 1333, 1346 (2002).

151. ALA. CODE § 12-21-222 (1986) (applies to felony convictions); ALASKA STAT. § 12.45.020 (1984); ARK. CODE ANN. § 16-89-111(e)(1)(A) (2001) (applies to felony convictions); CAL. PENAL CODE § 1111 (West 1985); GA. CODE ANN. § 24-4-8 (1982) (rule applies to treason, perjury, and felonies, when accomplice is sole witness); IDAHO CODE ANN. 19-2117 (1979); IOWA CODE ANN. R. 2.21(3) (2002); MINN. STAT. ANN. § 634.04 (2003); MONT. CODE ANN. §46-16-213 (West 1985); NEV. REV. STAT. § 175.291 (1985); N.Y. CRIM. PROC. LAW § 60.22 (McKinney 2003; N.D. Cent. Code § 29-21-14 (1974); OKLA. STAT. ANN. tit. 22, § 742 (West 2003); OR. REV. STAT. ANN. § 136.440 (West 2003); S.D. CODIFIED LAWS ANN. § 23A-22-8 (1979); TEX. CRIM. PROC. CODE ANN. art. 38.14 (Vernon 2005). The corroboration rule is established by judicial decision in *Tennessee Clapp v. State*, 94 Tenn. 186, 30 S.W. 214 (1895); *State v. Copeland*, 677 S.W.2d 471, 474 (Tenn. Crim. App. 1984).

152. Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L. J. 785, 792 (1990).

153. CAL. PENAL CODE § 1111; N.Y. CRIM. PROC. LAW § 60.22.

154. See generally *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991); *State v. Loveless*, 234 Neb. 463, 451 N.W.2d 692 (1990); *State v. Burchett*, 224 Neb. 444, 399 N.W.2d 258 (1986).

plea bargain,” because the “promise of leniency or other favorable prosecutorial treatment goes only to the credibility of the accomplice’s testimony, not to its admissibility.”¹⁵⁵ Only in cases where a prosecutor has bargained for “false or specific testimony or a specific result,” is accomplice testimony “so tainted as to require its preclusion.”¹⁵⁶ Nebraska law requires a directed verdict when the sole evidence supporting a conviction is an uncorroborated accomplice statement that is “baldly perjurious or preposterous.”¹⁵⁷ In all other cases, including those involving uncorroborated accomplice statements involving willful-false swearing on a material matter, a cautionary jury instruction suffices.¹⁵⁸

Although uncorroborated accomplice testimony is admissible in Nebraska, a defendant may request a cautionary jury instruction on the weight and credibility the jury is to give to an accomplice’s testimony.¹⁵⁹ A trial court’s failure to give a requested cautionary jury instruction may be reversible error.¹⁶⁰ Nebraska’s Accomplice Testimony instruction does not define “accomplice,” but instead grants the judge discretion to decide whether the evidence establishes a witness as an accomplice.¹⁶¹ If the judge determines the evidence establishes a witness as an accomplice and the defendant requests the cautionary jury instruction, then the judge is required to give the Accomplice Testimony instruction.¹⁶²

C. DNA EXONERATIONS IN MULTI-ACCOMPLICE CASES

Fabricated accomplice statements and testimony have considerably greater effect on wrongful convictions than perceived because fabricated accomplice statements frequently implicate innocent people.¹⁶³ Significant legal and media attention has focused on three multi-accomplice cases: “The Ford Heights Four,”¹⁶⁴ “The Central Park Five,”¹⁶⁵ and, most recently, “The Norfolk Four.”¹⁶⁶ These cases have common elements, including the prosecution’s questionable use

155. *Burchett*, 224 Neb. at 454, 456, 399 N.W.2d at 260, 262.

156. *Id.* at 444, 399 N.W.2d at 260 (citing *United States v. Librach*, 536 F.2d 1228 (8th Cir. 1976)).

157. *State v. Smith*, 219 Neb. 176, 183, 361 N.W.2d 532, 536 (1985).

158. *Smith*, 219 Neb. at 183, 361 N.W.2d at 536.

159. *Id.*

160. NEB. JURY INSTRS. 2d Crim. 5.6, *Accomplice Testimony*, Comment (2008).

161. *Id.*

162. *Id.*

163. Steven A. Drizin & Richard A. Leo., *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 962, 963 (2004).

164. *People v. Jimerson*, 652 N.E.2d 278 (Ill. 1995).

165. *People v. Wise*, 752 N.Y.S.2d 837 (N.Y. Sup. Ct. 2002).

166. *Tice v. Commonwealth*, 563 S.E.2d 412 (Va. Ct. App. 2002).

of highly unreliable accomplice statements and testimony to secure convictions.¹⁶⁷

1. *The Ford Heights Four*

On May 11, 1978, in Chicago, Illinois, Carol Schmal and her fiancé, Larry Lionberg, were violently abducted from a filling station, transported to an abandoned house where Schmal was gang-raped, and both were shot to death.¹⁶⁸ After an informant tipped off police, the police questioned Paula Gray, who was seventeen years old and borderline mentally retarded.¹⁶⁹ Police interrogated Gray over several days, showed her photos of the deceased victims, physically intimidated and verbally threatened Gray before she confessed to witnessing and participating in the rape and double murder.¹⁷⁰ Gray testified before a grand jury that she had been present and held a cigarette lighter in the abandoned house when Kenneth Adams, Verneal Jimerson, Willie Rainge, and Dennis Williams repeatedly gang-raped Schmal and shot both victims to death.¹⁷¹

After a grand jury indicted Adams, Jimerson, Rainge, and Williams based on Gray's accomplice testimony, Gray recanted her confession, and the prosecutor charged Gray with rape, two murders, and perjury.¹⁷² Without Gray's confession, the State of Illinois could not prosecute Jimerson because no one could place Jimerson at the scene.¹⁷³ Illinois tried and convicted Gray, Adams, Rainge, and Williams.¹⁷⁴

In 1982 and 1983, when Williams and Rainge won new trials based on ineffective assistance of counsel, Gray agreed to cooperate and testify against Rainge, Williams and Jimerson, in exchange for being released from prison.¹⁷⁵ Rainge and Williams were convicted

167. *Jimerson*, 652 N.E.2d at 279-80.

168. *People v. Gray*, 408 N.E.2d 1150, 1151-52 (Ill. 1980).

169. NORTHWESTERN UNIVERSITY REPORT ON EXONERATION OF PAULA GRAY, www.law.northwestern.edu/wrongfulconvictions/exonerations/ilGraySummary.html.

170. NORTHWESTERN UNIVERSITY REPORT ON EXONERATION OF PAULA GRAY, www.law.northwestern.edu/wrongfulconvictions/exonerations/grayMemo4.PDF. On the night of Gray's second interrogation, Officers took Gray to the physical crime scene, showed her the physical layout and told her what to say vis-avis the physical setting. Officers also told Gray she would go away to prison for life, never see her family again, and what happened to Schmal would happen to her. *Id.*

171. *Gray*, 408 N.E.2d at 1151-52.

172. *Id.* at 1152-53. At the preliminary hearing, Gray stated her grand jury testimony was a lie which the state had coerced her to tell and that she knew absolutely nothing about the crimes against Schmal and Lionberg. *Id.*

173. *Id.* at 1153 n.1.

174. *People v. Rainge (Rainge I)*, 445 N.E.2d 535, 544 (Ill. Ct. App. 1983).

175. *People v. Rainge (Rainge II)*, 570 N.E.2d 431, 435-36 (Ill. Ct. App. 1991); *People v. Jimerson*, 699 N.E.2d 615, 615 (Ill. Ct. App. 1996); *Rainge I*, 445 N.E.2d at 555; *People v. Williams*, 444 N.E.2d 136, 143 (Ill. Ct. App. 1982).

upon retrial, and Jimerson was charged and also convicted for the rape and double murder.¹⁷⁶

In 1995, the Supreme Court of Illinois reversed Jimerson's conviction on grounds of prosecutorial misconduct.¹⁷⁷ Gray had falsely testified at Jimerson's trial that Gray received nothing in exchange for her testimony, and prosecutors had failed to correct Gray's perjury, despite knowing they had promised Gray release from prison.¹⁷⁸

Near this same time, David Protess, a journalism professor at Northwestern University, and three journalism students discovered that within a week of the Schmal and Lionberg murders, a witness had informed the police that the police had arrested the wrong men for the crime.¹⁷⁹ The witness told the police he heard gunshots and saw four men run from the abandoned house.¹⁸⁰ The police and the prosecutors never turned over the witness's statement to the defense prior to trial.¹⁸¹ By the time the police located the original witness, one of the four men identified by the witness was dead, but the other three men ultimately confessed to the rape and murders.¹⁸² DNA testing results corroborated the three confessions and conclusively established the actual innocence of the Ford Heights Four, who had collectively served sixty-five years in prison for a rape and double murder they never committed.¹⁸³

2. *The Central Park Five*

On the evening of April 19, 1989, a large group of youths instigated a series of assaults and batteries in New York City's Central Park.¹⁸⁴ At 1:30 a.m. on April 20, two men discovered an unconscious woman on a footpath near where several other victims had been attacked only hours before.¹⁸⁵ The victim, who came to be known as the "Central Park Jogger," was seriously injured and rushed to the hospital.¹⁸⁶ Authorities later determined the Central Park Jogger had

176. Rainge was sentenced to life without parole, and Williams and Jimerson were sentenced to death.

177. *Jimerson*, 652 N.E.2d at 288.

178. *Id.* at 286-87, 288.

179. Northwestern University Law School, Bluhm Legal Clinic, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilGraySummary.html> (last visited May 5, 2009).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*; see generally DAVID PROTESS & ROB WARDEN, *A PROMISE OF JUSTICE: THE EIGHTEEN YEAR FIGHT TO SAVE FOUR INNOCENT MEN* (1998).

184. *People v. Wise*, 752 N.Y.S.2d 837, 843 (N.Y. Sup. Ct. 2002).

185. *Id.*

186. *Id.* (detailing the victim's head was severely beaten and her body had numerous scratches, bruises, and abrasions).

been raped and robbed.¹⁸⁷ The police brought in for questioning five youths named Raymond Santana, Kevin Richardson, Antron McCray, Yusef Salaam, and Kharey Wise.¹⁸⁸

Detectives interrogated each of the five youths for periods ranging from fourteen to thirty hours.¹⁸⁹ None of the five youths admitted to raping the Central Park Jogger, but each youth provided police with an account of events in which each youth portrayed himself as an accomplice.¹⁹⁰ When police individually questioned the five youths about the rape, Richardson named McCray, Santana, and "Steve" as the perpetrators.¹⁹¹ McCray identified a "tall, skinny black male," "a Puerto Rican with a black hoodie," "Clarence," and Richardson as the rapists.¹⁹² McCray said that he had only simulated having sex with the Central Park Jogger.¹⁹³ Santana claimed Richardson raped the Central Park Jogger after which Santana left Central Park.¹⁹⁴ Salaam named Richardson, Wise, and a "couple of unknown males" as the rapists.¹⁹⁵ Wise named "Steven," Santana, and Richardson as the rapists.¹⁹⁶

All five youths eventually confessed to raping the Central Park Jogger, and police videotaped four of those confessions.¹⁹⁷ The Manhattan District Attorney's Office would later declare the recorded statements were plagued with problems, explaining:

[A] comparison of the statements reveals troubling discrepancies . . . the accounts given by the five defendants differed from one another on the specific details of virtually every major aspect of the crime – who initiated the attack, who knocked the victim down, who undressed her, who struck her, who held her, who raped her, what weapons were used in the course of the assault, and when in the sequence of events the attack took place Perhaps most significant, none of the

187. *Id.*

188. *Id.*

189. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 *PSYCHOL. SCI. PUB. INT.* 33, 60 (2004).

190. *Wise*, 752 N.Y.S.2d at 846-47.

191. *Id.*

192. *Id.* at 847.

193. *Id.*

194. *Id.*

195. *Id.* Though two of the youths identified "Steve" as an accomplice, the court never identified this person. *Id.*

196. *Id.*

197. Committee on Public Safety, Oversight: Central Park Jogger Case 2 (Jan. 30, 2003) (on file with author) (noting Salaam refused to make written statements or to be videotaped, but a detective testified at his trial that Salaam had made incriminating admissions).

defendants accurately described where the attack on the jogger took place.¹⁹⁸

After their arrests, the five youths recanted their statements, each alleging the police had intimidated and lied to them and coerced the false statements.¹⁹⁹ The inconsistencies and weaknesses in the youths' statements were vigorously but unsuccessfully raised at pre-trial hearings and again at the youths' trials.²⁰⁰ The court admitted the statements at trial, which "played a crucial role in the jury's verdict as to all convictions."²⁰¹

In February 2002, the New York County District Attorney's Office was notified that an inmate named Matias Reyes had come forward claiming he, and he alone, had attacked and raped the Central Park Jogger.²⁰² Reyes was incarcerated for committing three other rapes and a murder.²⁰³ The Manhattan District Attorney's Office questioned Reyes and discovered the evidence corroborated Reyes' account of the assault on the Central Park Jogger.²⁰⁴ The FBI laboratory conducted DNA testing on physical evidence admitted at the two trials of the Central Park Five.²⁰⁵ On May 8, 2002, the Manhattan District Attorney's Office learned Reyes' DNA matched the DNA taken from a sock that had been found at the Central Park crime scene.²⁰⁶ On December 19, 2002, the Supreme Court for New York County granted the

198. Affirmation in Response to Motion to Vacate Judgments of Conviction, Affirmations ## 86 & 97 at 48-49, *People v. Wise*, 752 N.Y.S.2d 837 (N.Y. Sup. Ct. 2002) (No. 4762/89).

199. Sydney H. Schanberg, *When Justice Is A Game: A Journey Through the Tangled Case of the Central Park Jogger*, VILLAGE VOICE, (Nov, 19 2002) available at <http://www.villagevoice.com/2002-11-19/news/a-journey-through-the-tangled-case-of-the-central-park-jogger/>

200. Committee on Public Safety, "Oversight: Central Park Jogger Case," Part V. Report of the NYPD Commission, Excerpts Related to Defendant's Confession. See <http://webdocs.nycouncil.info/attachments/56098.htm>

201. *People v. Wise*, 752 N.Y.S.2d 837, 850 (N.Y. Sup. Ct. 2002) (The Five were tried in two separate trials).

202. *Wise*, 752 N.Y.S.2d at 843-44.

203. *Id.* at 844.

204. *Id.*

205. *Id.* at 844-45. The court recounted:

DNA evidence was extracted from semen deposited on the jogger's sock, found near her at the crime scene. It did not match any of the defendants, or any other known sample. The same was true of DNA evidence extracted from a cervical swab; it did not match the defendants or any other known sample. Expert testimony at trial, however, established that the DNA from both the victim and the sock appeared to have come from the same source. Testimony also established that the DNA was not a mixture, it was from a single source, meaning that only one individual had ejaculated, and that, Ultimately, there proved to be no physical or forensic evidence recovered at the scene or from the person or effects of the victim which connected the defendants to the attack on the jogger, or could establish how many perpetrators participated.

Id. (internal quotations omitted).

206. *Id.* at 844

Central Park Five defendants' motion to vacate judgment and ordered a new trial on all convictions.²⁰⁷ By the time the court vacated the five youths' convictions, each of the five youths had served between five and one-half and thirteen years in prison.²⁰⁸

3. *The Norfolk Four*

On July 8, 1997, in Norfolk, Virginia, William A. Bosko returned to his apartment to find the dead body of his wife, Michelle Moore-Bosko, who had died from manual strangulation and multiple stab wounds to her chest.²⁰⁹ Moore-Bosko had also suffered forcible injuries to her vaginal area. City of Norfolk police officers found a blood-stained, serrated knife near Moore-Bosko's body and recovered DNA samples from the crime scene.

The Norfolk police first questioned a neighbor, Daniel Williams, who denied any involvement in Moore-Bosko's rape and murder. Williams maintained his innocence until police falsely told Williams an eyewitness had identified him leaving Moore-Bosko's apartment after she was last seen alive. Norfolk police also falsely told Williams he had failed a lie detector test, threatened Williams with capital punishment, and promised Williams leniency in exchange for his confession.²¹⁰ Eventually Williams confessed, but his confession was wholly inconsistent with the crime scene and his DNA did not match forensic evidence left at the scene.²¹¹

Over the next year, the Norfolk police interrogated three of Williams' naval friends, Joseph Dick, Eric Wilson, and Derek Tice, each whom initially denied any involvement in Moore-Bosko's rape and murder.²¹² Dick confessed to participating in Moore-Bosko's rape and murder following an eight-hour police interrogation in which the Nor-

207. *Id.* at 850.

208. Robert F. Moore, *Park Rape Cost Me My Life. Yusef Wants \$50M from City & a 'Sorry' from Trump*, DAILY NEWS (New York), May 21, 2006, available at http://www.nydailynews.com/archives/news/2006/05/21/2006-05-21_park_rape_cost_me_my_life_y.html.

209. *Tice v. Commonwealth*, 563 S.E.2d 412, 414 (Va. Ct. App. 2002).

210. HOGAN & HARTSON L.L.P. ET AL., SUMMARY OF EVENTS RELATED TO THE PETITION FOR CLEMENCY FOR JOSEPH JESSE DICK, JR., DEREK ELLIOT TICE, DANIAL J. WILLIAMS 4 (2005), available at http://www.norfolkfour.com/images/uploads/pdf_files/Executive_Summary.pdf [hereinafter EXECUTIVE SUMMARY].

211. EXECUTIVE SUMMARY, *supra* note 215, at 5 Williams' confession implicated only himself, claimed he struck Ms. Moore-Bosko with his hand, hit her three times with his fist, struck her with a flat-soled shoe, used no other weapon. Williams also claimed he did not strangle Moore-Bosko. The autopsy showed no signs that Moore-Bosko had been struck by a fist or with an object, and instead showed she had been stabbed multiple times and strangled. The stab wounds suffered by Moore-Bosko were inflicted at precisely the same angle, within inches of each other and each wound had a 5" depth, indicating one perpetrator inflicted the stab wounds. *Id.*

212. *Id.* at 5-6.

folk police lied to Dick about his alibi not checking out.²¹³ During the interrogation, the Norfolk police also threatened Dick with the death penalty and physical harm.²¹⁴ Dick's confession was baldly inconsistent with known crime scene facts.²¹⁵ Later, after police fed Dick vivid details of the crime, Dick produced a version of the crime loosely fitting the facts of Moore-Bosko's rape and murder.²¹⁶

When Dick's DNA failed to match the DNA found at the crime scene, detectives interrogated a third suspect, Eric Wilson, who also denied any involvement in the rape and murder.²¹⁷ After enduring hours of abusive police interrogation, Wilson broke down and confessed to raping Moore-Bosko in concert with Dick and Williams.²¹⁸

After learning Wilson's DNA also did not match the DNA samples obtained at the crime scene, Norfolk police interrogated Dick again, who confessed that a total of six men had been involved in Moore-Bosko's rape and murder, including Tice.²¹⁹ When Norfolk police arrested Tice in June 1998, Tice insisted he was innocent, but he eventually succumbed to the interrogator's coercive techniques and confessed to Moore-Bosko's rape and murder.²²⁰ Tice's statements also were inconsistent with the crime scene.²²¹ Norfolk police interrogated Tice until he implicated three more men, none of whom were a DNA match but the police refused to release them.²²²

In late February 1999, a Virginia inmate named Omar Ballard confessed to raping and murdering Moore-Bosko, and insisted that he had acted alone.²²³ On May 6, 1999, the Commonwealth of Virginia's forensic lab issued a report stating Ballard's DNA matched the DNA

213. *Id.* at 5.

214. *Id.* Dick told police the rape and murder had occurred in the living room, when, in fact, the crimes were committed in the bedroom. *Id.*

215. *Id.* (detailing that Dick could not identify the room in which the crime occurred).

216. *Id.*

217. *Id.* at 6.

218. *Id.*

219. *Id.* The police investigator pressured Dick for more leads to possible suspects. The pliable Dick obliged, giving the relentless investigator yet another version of events. *Id.*

220. *Id.* Tice was told "he would 'get the needle' and die unless he confessed to the crime." *Id.*

221. *Id.* Tice told police a gang of men had forced entry into Ms. Bosko's apartment using a claw hammer. The apartment door exhibited no signs of forced entry. Tice said he had ejaculated, but the recovered sperm sample did not match Tice. Tice told police Ms. Bosko had put up a struggle to protect herself, but there was no bruising on her body and nothing was out of place in the apartment. *Id.*

222. *Id.* at 7.

223. Tice, 654 N.E.2d at 921.

evidence found at the crime scene.²²⁴ Based on the DNA evidence, the prosecutor offered and Ballard accepted a plea agreement in which Ballard endorsed a multiple assailant theory in exchange for the Commonwealth sparing Ballard's life by dropping the death penalty.²²⁵

In light of DNA test results establishing that Ballard was the source of semen recovered from Moore-Bosko, Wilson recanted his confession and went to trial in 1999. At trial, a jury convicted Wilson of rape, and the court sentenced Wilson to eight and one-half years in prison.²²⁶ Williams and Dick pled guilty to rape and murder in 1999, and they received dual-life sentences.²²⁷ Tice went to trial in January 2000, and Dick testified against him.²²⁸ Tice was convicted of rape and murder, and sentenced to life without parole.²²⁹

The case gained national attention after twenty-six former Special Agents of the FBI wrote Virginia Governor Tim Kaine urging him to grant Tice, Williams, Dick, and Wilson absolute pardons.²³⁰ In their letter to Governor Kaine, the retired Special Agents wrote they believed a "tragic mistake has occurred in the cases of these four former Navy sailors wrongfully convicted for a rape and murder that they did not commit."²³¹ The retired Special Agents concluded the let-

224. *Id.* Ballard's DNA matched DNA collected from Ms. Bosko's vaginal swab, from the blanket covering Ms. Bosko's body, and from the blood found under Ms. Bosko's fingernail.

225. *Id.* at 925.

226. Executive Summary, *supra* note 215.

227. *Tice*, 563 S.E. 2d at 414-15.

228. *Id.* at 414, 415. Dick testified:

[O]n the evening of [Ms. Bosko's] death he, Tice, Williams and others were together at Williams' apartment when Williams said, "He wanted to see what color [Ms. Bosko's] panties were." The group discussed going to [Ms. Bosko's] apartment. Williams had visited the Boskos frequently, sometimes at unusual hours asking to use the phone. They knocked on the Boskos' door but [Ms. Bosko] would not let them inside her apartment. Dick testified that they remained outside the apartment in the parking lot talking with one another when Omar Ballard joined the group. Dick testified that he did not know Ballard and only learned his name at a later date. Ballard knew [Ms. Bosko] through another friend who lived at the apartment complex. Dick testified that on the second attempt to gain entry into the Boskos' apartment the men tricked [Ms. Bosko] into opening the door and they "rushed" into the apartment and grabbed her. Dick testified that they took [Ms. Bosko] directly to the bedroom where Williams first raped her while the other men held her down. Dick testified that next the defendant Tice and then the other men took turns raping her. Dick testified that after raping [Ms. Bosko] one of the men went to the kitchen, found a knife and each person then stabbed her.

229. *Id.* at 415.

230. <http://www.norfolkfour.com/images/uploads/FBILetter.PDF> (last visited July 30, 2009).

231. *Id.* The letter concluded:

[O]nly one person sexually assaulted and murder[ed] the victim . . . The evidence that Omar Ballard committed this crime alone is overwhelming. The DNA profiles produced from the crime scene evidence, the autopsy results, the physical condition of the crime scene, and many other piece of evidence, when

ter by stating, "We are convinced these confessions are false and that all four of these men are innocent of these crimes."²³²

Recently, attorney and bestselling author John Grisham became an advocate of the "Norfolk Four" writing letters to Governor Kaine on behalf of the four sailors, penning a screenplay, and doing whatever he can to "bring the case to the forefront, to the governor."²³³ Grisham has publicly declared the "Norfolk Four" case to be the "most egregious case of wrongful conviction" he has seen, explaining the prosecution "should have been a fairly clear-cut DNA case, involving a man who later pled guilty, and to this day confesses he did it and did it alone."²³⁴

D. POST-CONVICTION DNA TESTING STATUTES

1. *State and Federal Overview*

DNA technology has become a crucial component in investigating and prosecuting crimes. Furthermore, DNA technology has played a seminal role in exonerating wrongfully convicted defendants. To date, post-conviction DNA testing has established some 240 wrongful convictions nationwide.²³⁵ A study of the first two-hundred DNA exonerations highlighted the inherent problems with unreliable eyewitness identifications, police and prosecutorial misconduct, false confessions, bad forensic evidence, and ineffective assistance of counsel.²³⁶

As DNA testing results led to the exonerations of more and more wrongfully convicted persons, law makers began enacting laws to allow inmates greater access to post-conviction DNA testing. To date, forty-three states and the District of Columbia have enacted post-conviction DNA testing statutes, which provide a procedure for obtaining

considered together, convince us that this was a single-offender crime. Once implicated by DNA evidence, Omar Ballard confessed to the police and bragged that he committed the crime by himself. Ballard's confession is completely consistent with the physical evidence.

232. *Id.* The FBI agents noted the confessions of the four Navy men are completely inconsistent with the physical evidence and have all the hallmarks of false confessions. . . . The confessions of Joseph Dick, Derek Tice, Danial Williams, and Eric Wilson are completely uncorroborated. The statements obtained from these men clash starkly with the known facts of the case and the physical evidence.

233. Tom Jackman, *Grisham's Passion Project: A 'Norfolk 4' Screenplay*, THE WASHINGTON POST, July 8, 2009 available at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/07/AR2009070702604_p.

234. *Id.*

235. For a current list of the number of inmates exonerated through post-conviction DNA testing, see Innocence Project, <http://www.innocenceproject.org/> (last visited July 9, 2009). See also Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (analyzing the issues involved in the first 200 DNA exonerations).

236. Garrett, *supra* note 235, at 56-57.

DNA testing.²³⁷ Post-conviction DNA testing statutes provide procedures by which inmates may attempt to obtain testing of biological evidence relevant to their prosecutions and convictions.²³⁸ If DNA testing results are favorable, post-conviction DNA testing statutes provide for appropriate remedies for wrongful convictions and sentences.²³⁹

In 2004, Congress enacted the Justice for All Act (the "JFAA").²⁴⁰ Section 3600 of the JFAA, known as the Innocence Protection Act (the "IPA"), is the primary provision of the JFAA dealing with post-convic-

237. ARIZ. REV. STAT § 13-4240 (2001 & Supp. 2007); ARK. CODE ANN. § 16-112-201 to -207 (2006 & Supp. 2007); CAL. PENAL CODE § 1405 (West Supp. 2008); COL. REV. STAT. § 18-1-411 to -416 (2007); CONN. GEN. STAT. § 54-102kk (2007); DEL. CODE ANN. tit. 11, § 4504 (2007); D.C. CODE ANN. §§ 22-4131 to -4133 (Supp. 2007); FLA. STAT. ANN. §§ 925.11, 943.3251 (2007); GA. CODE ANN. § 5-5-41(c) (Supp. 2007); 7 HAW. REV. STAT. §§ 844D-121 to -133 (Supp. 2007); IDAHO CODE ANN. §§ 19-4901 (a)(6), 4902(b)-(f) (2004); 725 ILL. COMP. STAT. 5/116-3 (2006); IND. CODE §§ 35-38-7-1 to -19 (LexisNexis Supp. 2007); IOWA CODE § 81.10 (2007); KAN. STAT. ANN. § 21-2512 (Supp. 2006); KY REV. STAT. ANN. 422.285 (LexisNexis Supp. 2007); LA. CODE CRIM. PROC. ANN. art. 926.1 (Supp. 2008); ME. REV. STAT ANN. tit. 15, §§ 2137 to -2138 (Supp. 2007); MD. CODE ANN. CRIM. PROC. § 8-201 (Supp. 2007); MICH. COMP. LAWS § 770.16 (2006); MINN. STAT. § 590.01 (1a) (2006); MO. REV. STAT. § 547.035, .037 (2007); MONT. CODE ANN. § 46-21-110 (2007); NEB. REV. STAT. ANN. §§ 29-4116 to -4126 (2006 & Supp. 2007); NEV. REV. STAT. §§ 176.091, .0919 (2007); N.D. CENT. CODE 29-32.1-15 (2006); N.H. REV. STAT § 651-D:2 (2007); N.J. STAT ANN. § 2A:84-32a (West Supp. 2007); N.M. STAT. § 31-11-12 (Supp. 2007); N.Y. CRIM. PROC. LAW § 440.30 (1-a) (McKinney 2005); N.C. GEN. STAT. ANN. 15a-269-270 (2007); OHIO REV. CODE ANN.- 2953.21, .23, .71-.83 (LexisNexis Supp. 2007); OKLA. STAT. ANN. tit. 22, §§ 1371-1372 (West Supp. 2008); 2005 OR. LAWS 2205 (West 2003); 42 PA. CONS. STAT. ANN. § 9543.1 (West 2007); R.I. GEN. LAWS § 10-9.1-10 to -12 (Supp. 2007); TENN. CODE ANN. §§ 40-30-301 to 313 (2006 & Supp. 2007); TEX. CODE CRIM. PROC. ANN. art. 17.48, 64.01-.05 (Vernon 2006 & Supp. 2007); UTAH CODE ANN. §§ 78-35a-301 to -304 (2002 & Supp. 2006); VT. STAT. ANN. tit.13, §5561 (Supp. 2007); VA. CODE ANN. §§ 19.2-327.1 to .327.6 (2007); WASH. REV. CODE § 10.73.170 (2006); W. VA. CODE ANN. § 15-2B-14 (LexisNexis Supp. 2007); WIS. STAT. § 974.07 (2005 & Supp. 2006); and WYO. STAT. ANN. § 7-12-303 (effective July 1, 2008).

238. Jessica D. Gabel & Margaret D. Wilkinson, *Good Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 HASTINGS L. J. 1001, 1022 (2008).

239. See, e.g., Margaret Berger, *The Impact of DNA Exonerations on the Criminal Justice System*, 34 J. L. MED. & ETHICS 320 (2006); Kathy Swedlow, *Pleading Guilty v. Being Guilty: A Case for Broader Access to Post-Conviction DNA Testing*, 41 CRIM. L. BULL. 1 (2005); Eunyoung Theresa Oh, *Innocence after "Guilt": Postconviction DNA Relief for Innocents Who Pled Guilty*, 55 SYRACUSE L. REV. 161 (2004); Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355 (2002); Gwendolyn Carroll, Comment, *Proven Guilty: An Examination of the Penalty-Free World of Post-Conviction DNA Testing*, 97 J. CRIM. L. & CRIMINOLOGY 665 (2007); Daina Bortecck, Note, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429 (2004); Anna Franceschelli, Comment, *Motions for Postconviction DNA Testing: Determining the Standard of Proof Necessary in Granting Requests*, 31 CAP. U. L. REV. 243 (2003).

240. Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified as amended in scattered section of 10, 18, 28, and 42 U.S.C.).

tion DNA testing.²⁴¹ The chief purpose of the IPA is to reduce wrongful convictions by allowing DNA testing.²⁴² Under the IPA, post-conviction DNA testing may be granted only in cases involving federal offenses.²⁴³ Furthermore, an inmate may challenge a conviction through DNA evidence only if the inmate meets ten requirements outlined in the IPA. These requirements permit inmates to pursue DNA testing under “penalty of perjury;” inmates must claim they are “actually innocent;” the government must possess the evidence and have kept the evidence over time under a proper chain of custody; and “the identity of the perpetrator was at issue in the trial” if the applicant was convicted following a trial.²⁴⁴ The IPA provides, upon written motion by an inmate, “the court that entered the judgment of conviction shall order DNA testing of specific evidence if the court finds that all of the following [ten subsections] apply.”²⁴⁵

2. Nebraska’s DNA Testing Act

The Nebraska Legislature enacted the DNA Testing Act (the “Act”), which took effect on September 1, 2001.²⁴⁶ The Act provides wrongfully convicted persons with an opportunity to establish their innocence through DNA testing.²⁴⁷ In its findings, the Nebraska Legislature noted “due to its scientific precision and reliability, DNA test-

241. 18 U.S.C. § 3600 (2006).

242. 150 CONG. REC. S11609-01, Nov. 19, 2004, 2004 WL 2639662 (Cong. Rec.)

243. *See id.* (stating courts can order DNA testing for state offenses only if those crimes are accompanied by federal convictions).

244. 18 U.S.C. § 3600(a)(1)-(10), (a)(4), (a)(7).

245. § 3600(a).

246. NEB. REV. STAT. ANN. §§ 29-4116 to 29-4126 (LexisNexis 2004 & Supp. 2008).

247. NEB. REV. STAT. ANN. § 29-4120. The statute provides in relevant part:

(1) Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing of any biological material that:

- (a) Is related to the investigation or prosecution that resulted in such judgment;
- (b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material’s original physical composition; and
- (c) Was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.

...

(5) Upon consideration of affidavits or after a hearing, the court shall order DNA testing pursuant to a motion filed under subsection (1) of this section upon a determination that such testing was effectively not available at the time of trial, that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and that such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.

ing can, in some cases, conclusively establish the guilt or innocence of a criminal defendant."²⁴⁸ Since DNA testing can often be performed on biological material that is many decades old, the Nebraska Legislature declared, in some circumstances, DNA testing could prove convictions, which occurred prior to DNA testing, were based on erroneous factual findings.²⁴⁹ The Nebraska Legislature further declared, "DNA evidence produced even decades after a conviction can provide a more reliable basis for establishing a correct verdict than any evidence proffered at the original trial. DNA testing, therefore, can and has resulted in post-conviction exoneration of innocent men and women."²⁵⁰

The Nebraska Supreme Court has construed the procedures for testing under the DNA Testing Act as first requiring a person in custody to file a motion requesting DNA testing of "biological material that (1) is related to the investigation or prosecution that resulted in the judgment, (2) is in the actual or constructive possession of the State or others likely to safeguard the integrity of the biological material, and (3) either not previously subjected to DNA testing or can be retested with more accurate current techniques."²⁵¹ Once the motion is filed, the county attorney must file an inventory of all evidence the state or political subdivision secured in connection to the case.²⁵² A person in custody who was convicted and sentenced pursuant to a plea agreement is not excluded from seeking DNA testing under the Act.²⁵³

Once a motion is filed, and the county attorney has filed an answer and inventory, the court must order DNA testing upon determining that: "[1] such testing was effectively not available at the time of trial; [2] the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition; and [3] such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced."²⁵⁴ The Act defines "exculpatory evidence" as "evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody."²⁵⁵ The Nebraska Supreme Court has characterized the exculpatory evidence requirement as being "relatively undemanding," explaining that testing will generally

248. § 29-4118(2).

249. § 29-4118(4).

250. *Id.*

251. *State v. White*, 274 Neb. 419, 423, 740 N.W.2d 801, 804 (2007).

252. *Id.* (citing NEB. REV. STAT. ANN. § 29-4120(4)).

253. *Winslow*, 274 Neb. at 432, 740 N.W.2d at 798 (concluding as a matter of law that a defendant who pled guilty is eligible for DNA testing and does not waive such right if conviction was based on a plea).

254. *White*, 274 Neb. at 423, 740 N.W.2d at 804 (citing NEB. REV. STAT. ANN. § 29-4120(5)).

255. NEB. REV. STAT. ANN. § 41-2119 (LexisNexis 2004 & Supp. 2008).

be precluded only “where the evidence at issue would have no bearing on the guilt or culpability of the movant.”²⁵⁶

The Act is silent on whether and how courts should review the quantity and quality of the evidence relied upon to convict and sentence the defendant.²⁵⁷ The State has argued that courts should consider the sufficiency of the guilt evidence in determining whether to grant DNA testing.²⁵⁸ However, courts in other states have expressly ruled that the sufficiency of the state’s evidence used to convict is not a relevant factor in determining whether courts should grant DNA testing.²⁵⁹ The Act requires courts to determine whether DNA testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.²⁶⁰ In so requiring, the Nebraska Supreme Court has declared that courts may consider evidence adduced at trial, so long as such evidence was presented at the hearing on the request for DNA testing.²⁶¹ However, the Nebraska Supreme Court has not instructed district courts for what legitimate purpose such guilt evidence may be considered.²⁶²

The Nebraska Supreme Court deems a motion for DNA testing as a collateral attack on a conviction, similar to a post-conviction action, which is civil in nature.²⁶³ Consequently, an inmate moving for post-conviction DNA testing is not entitled to appointment of counsel under the Sixth Amendment to United States Constitution.²⁶⁴ However, if an inmate filing a *pro se* motion for post-conviction DNA testing is able to make a threshold showing that such testing is relevant to the inmate’s wrongful conviction or sentence claim, the inmate is entitled to appointment of counsel under the Act.²⁶⁵

256. *State v. Buckman*, 267 Neb. 505, 515, 675 N.W.2d 372, 381 (2004).

257. *See generally* NEB. REV. STAT. ANN. §§ 29-4116 to 29-4126.

258. Appellate Brief, *State v. Poe*, 271 Neb. 858, 717 N.W.2d 463 (2006) (No. S-05-235).

259. *See, e.g.*, *People v. Henderson*, 799 N.E.2d 682, 690 (Ill. App. Ct. 2003) (ordering postconviction DNA testing despite fact that guilt evidence was “indeed overwhelming”); *Bruner v. State*, 88 P.3d 214, 217 (Kan. 2004) (holding improper decision to deny statutory DNA testing on basis that guilt evidence was overwhelming); *State v. Peterson*, 836 A.2d 821, 826 (N.J. Super. Ct. App. Div. 2003) (declaring under DNA testing statute, “the strength of the evidence against a defendant is not a relevant factor in determining whether his identity as the perpetrator was a significant issue”), *see Brandon L. Garrett, Claiming Innocence*, 92 MINN. L. REV. 1629 (2008) (reviewing innocence claims and how they are assessed based on probative impact of new exculpatory evidence).

260. NEB. REV. STAT. ANN. § 29-4120(5).

261. *State v. Dean*, 270 Neb. 972, 976, 708 N.W.2d 640, 645 (2006).

262. *Dean*, 270 Neb. at 976, 708 N.W.2d at 645.

263. *State v. Poe*, 271 Neb. 858, 865, 717 N.W.2d 463, 469 (2006).

264. *Poe*, 271 Neb. at 865, 717 N.W.2d at 469 (finding that prisoners do not have a right to attorney when mounting collateral attacks upon their convictions) (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987)).

265. NEB. REV. STAT. ANN. § 29-4121.

Whether a court grants a motion for DNA testing is left to the court's sound discretion.²⁶⁶ Unless a district court abuses its discretion, its determination will not be disturbed.²⁶⁷ An abuse of discretion occurs only when a judge's reasons or rulings "are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition."²⁶⁸ In reviewing appeals of motions brought under the Act, the Nebraska Supreme Court applies a clearly erroneous standard of review to factual determinations made by the district court.²⁶⁹

IV. ANALYSIS

A. THE DISTRICT COURTS' UNEXAMINED APPROACH

In denying Joseph White and Thomas Winslow's motions for post-conviction DNA testing, the District Courts of Jefferson and Gage Counties failed to analyze whether favorable DNA testing results may have produced "noncumulative, exculpatory evidence" relevant to White and Winslow's respective wrongful conviction and sentence claims.²⁷⁰ Rather, the district courts determined substantial evidence of White and Winslow's guilt existed irrespective of DNA evidence.²⁷¹ The district courts also erred in concluding any DNA test result excluding White as a contributor of the biological material would be cumulative and not exculpatory.²⁷²

The district courts found that the first requirement of the Act, specifically a finding that "such testing was effectively not available at the time of trial," was met because the testing requested by White and Winslow was not available at the time of White's trial.²⁷³ The district courts assumed the samples sought for testing were properly pre-

266. *State v. Phelps*, 273 Neb. 36, 36, 727 N.W.2d 224, 225 (2007).

267. *Id.*

268. *State v. Rice*, 269 Neb. 717, 722, 695 N.W.2d 418, 423 (2005).

269. *State v. Poe*, 266 Neb. 437, 440, 665 N.W.2d 654, 657 (2003).

270. Journal Entry at 8, *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794, (Gage County Dist. Ct. Neb. 2006) (No. CR 06-9000001) [hereinafter *Winslow Journal Entry*]; Journal Entry at 7, *State v. White*, 274 Neb. 419, 740 N.W.2d 801 (Jefferson County Dist. Ct. Neb. 2006) (CR 05-6000001) [hereinafter *White Journal Entry*]. The Honorable Vicki L. Johnson consolidated both motions for hearing purposes but issued separate journal entries. Because Joseph White was tried in Jefferson County, that jurisdiction issued the opinion on his motion, while Thomas Winslow pled guilty in Gage County. *Id.*

271. *Winslow Journal Entry*, *supra* note 270, at 8; *White Journal Entry*, *supra* note 273, at 7.

272. *White Journal Entry*, *supra* note 270, at 7.

273. *Winslow Journal Entry*, *supra* note 270, at 6; *White Journal Entry*, *supra* note 270, at 5; *White*, 274 Neb. at 423, 740 N.W.2d at 804.

served.²⁷⁴ In addressing the third, “noncumulative, exculpatory evidence” prong of the Act, the district courts summarized what the courts believed was each movant’s theory:

The Defendant’s theory apparently is that he was not present at Wilson’s apartment at the time of her death and all of the co-defendants lied in their testimony placing the Defendant at the scene. The Defendant further claims that if a DNA test is undertaken, it will definitely prove whether the Defendant was present.

The Defendant’s goal is to establish by the absence of his DNA on the biological evidence that he was not present at the murder of Mrs. Wilson.²⁷⁵

In critiquing the plausibility of White’s defense theory, the district courts noted several flaws.²⁷⁶ First, even if DNA testing indicated the absence of White’s genetic markers, the courts declared such a finding “does not compel the conclusion that the Defendant was not there.”²⁷⁷ Moreover, with regard to Winslow, the district courts noted the absence of Winslow’s genetic markers did not compel a conclusion that Winslow did not aid and abet in Wilson’s murder.²⁷⁸ Second, the district courts noted there was “considerable evidence” both defendants were present at Wilson’s death.²⁷⁹ In support of this contention, the district courts referred to evidence establishing that each defendant participated in Wilson’s rape and murder.²⁸⁰ The courts reasoned even if DNA testing of the biological material were to establish the sample belonged to Winslow, the DNA testing would not prove White’s absence from the crime scene.²⁸¹ Conversely, if DNA testing established the sample belonged to White, it would not prove the Winslow’s absence from the crime scene.²⁸² Instead, the district courts determined the exclusion of either White’s or Winslow’s DNA profile on the biological evidence would not prove either White’s or Winslow’s absence from the crime scene, but would only be a single

274. *Winslow Journal Entry, supra note 270, at 6; White Journal Entry, supra note 270, at 5.*

275. *Winslow Journal Entry, supra note 270, at 6; White Journal Entry, supra note 270, at 6.*

276. *Winslow Journal Entry, supra note 270, at 6; White Journal Entry, supra note 270, at 6.*

277. *Winslow Journal Entry, supra note 270, at 7; White Journal Entry, supra note 270, at 6.*

278. *Winslow Journal Entry, supra note 270, at 7.*

279. *Id.; White Journal Entry, supra note 270, at 6.*

280. *Winslow Journal Entry, supra note 270, at 7; White Journal Entry, supra note 270, at 6.*

281. *Winslow Journal Entry, supra note 270, at 7; White Journal Entry, supra note 270, at 6.*

282. *Winslow Journal Entry, supra note 270, at 7; White Journal Entry, supra note 270, at 6.*

factor for a jury to consider in deciding guilt.²⁸³ The district courts noted the jury was able to determine the credibility of all trial witnesses, including White.²⁸⁴ Third, the district court opined White was not charged with sexually assaulting Wilson, but rather White was charged with felony murder.²⁸⁵ As such, the jury was not required to indicate on the verdict form which particular felony murder theory the jury based its finding of guilt.²⁸⁶

In August 2006, the district courts issued separate orders denying White and Winslow's motions for DNA testing.²⁸⁷ The district courts' respective orders reveal the district courts misconstrued White and Winslow's defense theory.²⁸⁸ Although Winslow's counsel, Jerry Soucie, argued DNA testing may exclude both White and Winslow as biological material contributors, the courts considered only the potential for DNA testing to exclude either White or Winslow, but not both.²⁸⁹ The courts never considered whether DNA testing resulting in the exclusion of *both* White and Winslow as DNA contributors would be relevant to White and Winslow's wrongful conviction and sentence claims.²⁹⁰ The district courts also never identified the potential for testing to yield a DNA profile belonging to a third party and whether this potential outcome would be relevant to White and Winslow's wrongful conviction and sentence claims.²⁹¹

Furthermore, the district courts erroneously equated the absence of biological material establishing that White committed the sexual assault with the potential for DNA testing to conclusively exclude White as the contributor of the biological evidence.²⁹² The forensic stipulation admitted at trial did not identify the biological evidence as

283. *Winslow Journal Entry*, *supra* note 270, at 7; *White Journal Entry*, *supra* note 270, at 6.

284. *Winslow Journal Entry*, *supra* note 270, at 7; *White Journal Entry*, *supra* note 270, at 7.

285. *White Journal Entry*, *supra* note 270, at 6 ("The State charged White with causing the death of Mrs. Wilson while participating in one of six named felonies: robbery, attempted robbery, sexual assault, attempted sexual assault, burglary or attempted burglary.").

286. *White Journal Entry*, *supra* note 270, at 6.

287. *Winslow Journal Entry*, *supra* note 270, at 9; *White Journal Entry*, *supra* note 270, at 8.

288. *Winslow Journal Entry*, *supra* note 270, at 9; *White Journal Entry*, *supra* note 270, at 8.

289. Brief of Appellant at 13, *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794, (2007) (CR-96-9000001); *Winslow Journal Entry*, *supra* note 270, at 7; *White Journal Entry*, *supra* note 270, at 6.

290. Brief of Appellant, *supra* note 291, at 13; *Winslow Journal Entry*, *supra* note 270, at 7; *White Journal Entry*, *supra* note 270, at 6.

291. Brief of Appellant, *supra* note 289, at 13; *Winslow Journal Entry*, *supra* note 270, at 7; *White Journal Entry*, *supra* note 270, at 6.

292. *White Journal Entry*, *supra* note 270, at 7 ("Additional DNA evidence, hypothetically showing no genetic markers to the Defendant would not be exculpatory evi-

belonging to White or Winslow. Therefore, DNA test results excluding White and Winslow as contributors of the biological evidence would not be cumulative.²⁹³

The most significant flaw in the district courts' orders was the judge's opinion that the evidence adduced at trial overwhelmingly proved White and Winslow's guilt.²⁹⁴ The judge declared that "considerable evidence" established White and Winslow were present at the time of Wilson's death, and that White and Winslow participated in Wilson's rape and murder.²⁹⁵ The judge also referred to "substantial eye witness testimony from the co-defendants" and "numerous witnesses" that placed White and Winslow at the crime scene.²⁹⁶ In both orders, the judge found "substantial evidence of the Defendant's guilt irrespective of DNA evidence."²⁹⁷

The district courts' orders are void of any analysis of the potential for DNA testing to undermine the trial evidence supporting the defendants' convictions and sentences. Clearly, the district courts never considered the potential for DNA testing to undermine the reliability of the State's accomplice testimony.

B. THE NEBRASKA SUPREME COURT'S CRITICAL APPROACH

In reviewing the district courts' orders denying White and Winslow's motions for DNA testing, the Nebraska Supreme Court applied, for the first time, a critical approach to determining whether DNA testing "may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced."²⁹⁸ Writing for a unanimous court, Justice Lindsey Miller-Lerman authored the companion opinions.²⁹⁹ Before commencing its analysis, the Nebraska Supreme Court reviewed the primary evidence adduced at White's trial.³⁰⁰ The court noted the testimony of three accomplice

dence that the Defendant was wrongfully convicted. It would be, at best, cumulative of the other biological evidence.").

293. See *State v. White*, 274 Neb. 419 426, 740 N.W.2d 794, 806 (2007) ("DNA test results specifically excluding White as a contributor would not be merely cumulative of forensic evidence, which simply failed to identify him.").

294. *Winslow Journal Entry*, *supra* note 270, at 8; *White Journal Entry*, *supra* note 270, at 7.

295. *Winslow Journal Entry*, *supra* note 270, at 7; *White Journal Entry*, *supra* note 270, at 6.

296. *Winslow Journal Entry*, *supra* note 270, at 7-8; *White Journal Entry*, *supra* note 270, at 6-7.

297. *Winslow Journal Entry*, *supra* note 270, at 8; *White Journal Entry*, *supra* note 270, at 7.

298. *State v. White*, 274 Neb. 419, 421, 422, 424-26, 740 N.W.2d 802, 803, 804-06 (2007); *State v. Winslow*, 274 Neb. 427, 436, 740 N.W.2d 794, 800-01 (2007) (adopting the reasons and conclusions in *State v. White*).

299. *Id.*

300. *White*, 274 Neb. at 421-22, 740 N.W.2d at 803-04.

witnesses, James Dean, Ada JoAnn Taylor, and Debra Shelden, each of whom testified “that they saw White and Winslow, and *only* White and Winslow sexually assault Wilson.”³⁰¹ The court also identified the expert testimony of a pathologist, who testified that Wilson had suffered vaginal injuries and both her vagina and rectum had been penetrated.³⁰² The court further highlighted parts of a trial stipulation by Dr. Rena Roy, a serologist, who indicated that one semen sample was “similar to Winslow’s blood type, but no forensic testing indicated that any sample belonged to White.”³⁰³ Lastly, the court noted White had testified at his trial and denied being present at Wilson’s death.³⁰⁴

After reviewing the primary trial evidence, the court identified the State’s critical guilt evidence. The court found “the testimonies of Dean, Taylor, and Shelden were critical to the State’s case against White resulting in White’s conviction for first degree murder.”³⁰⁵ Indeed, the court determined accomplice testimony against White constituted the “heart of the State’s case.”³⁰⁶ The court determined the crux of the accomplice testimony was that Dean, Taylor, and Shelden each testified they saw only White and Winslow sexually assault Wilson.³⁰⁷

Having identified both the State’s critical guilt evidence and its essential components, the court then evaluated the potential for favorable DNA test results to impeach accomplice testimony.³⁰⁸ If DNA testing established the semen samples belonged to neither White nor Winslow, the court declared that such DNA test results would “raise questions concerning the identity or identities of the person or persons who contributed the semen samples and who presumably committed the sexual assaults.”³⁰⁹ The court further reasoned that favorable DNA test results that excluded White and Winslow as contributors of the semen sample “could cause jurors to question the credibility of Dean, Taylor, and Shelden.”³¹⁰ The court reasoned DNA test results contradicting Dean, Taylor, and Shelden’s accomplice testimony that only White and Winslow committed the sexual assault

301. *Winslow*, 274 Neb. at 430, 740 N.W.2d 797; *White*, 274 Neb. at 424, 740 N.W.2d at 805;

302. *White* 274 Neb. at 421, 740 N.W.2d 803-04; *Winslow*, 274 Neb. at 430, 740 N.W.2d at 797.

303. *White* 274 Neb. at 421, 740 N.W.2d 803-04; *Winslow*, 274 Neb. at 430, 740 N.W.2d at 797.

304. *White*, 274 Neb. at 421-22, 740 N.W.2d at 804.

305. *Id.* at 425, 740 N.W.2d at 804.

306. *Id.*, 740 N.W.2d at 804.

307. *Id.*, 740 N.W.2d at 804.

308. *Id.*, 740 N.W.2d at 806; *Winslow*, 274 Neb. at 436, 740 N.W.2d at 801.

309. *White*, 274 Neb. at 425, 740 N.W.2d at 806.

310. *Id.*, 740 N.W.2d at 806.

could also “cause jurors to question their testimony regarding other matters.”³¹¹ The court deemed that newly discovered evidence producing “serious doubts regarding the credibility of these witnesses” would be favorable to White and be material to the issue of White’s guilt, and therefore satisfy the statutory definition of *exculpatory evidence*.³¹²

Before concluding its analysis, the court found there was a difference between a forensic stipulation that fails to identify a person and newly discovered evidence that excludes a person.³¹³ Therefore, the court reasoned DNA test results excluding White as a contributor were not cumulative of a forensic stipulation that merely failed to identify White.³¹⁴

As the court determined DNA testing could produce favorable test results excluding both White and Winslow as biological material contributors, the court concluded DNA testing “may produce noncumulative, exculpatory evidence relevant to the claim that White was wrongfully convicted or sentenced.”³¹⁵ Similarly, because the factual basis of Winslow’s no contest plea consisted of evidence adduced at White’s trial, the court reasoned favorable test results would also be noncumulative and exculpatory in Winslow’s case.³¹⁶ The court recognized evidence excluding White and Winslow as DNA contributors could raise doubts regarding the veracity of the accomplice testimony adduced at White’s trial that, in turn, served as the factual basis for Winslow’s plea.³¹⁷ The court also recognized DNA test results excluding Winslow as a contributor to the semen samples could be relevant to Winslow’s claim that he was “less culpable than the sentencing court had believed him to be” and therefore relevant to his wrongful sentence claim.³¹⁸

The court completed its analysis after evaluating the potential for favorable DNA test results to impeach critical accomplice testimony.³¹⁹ The court did not evaluate the potential for DNA testing to contradict the serological stipulation that one of the semen samples was similar to Winslow’s blood type. Nor did the court address the potential for DNA testing to corroborate White’s testimony that he

311. *Id.*

312. *Id.*, 740 N.W.2d at 806; NEB. REV. STAT. ANN. § 29-4119 (LexisNexis 2004 & Supp. 2008) (reciting statutory definition of “exculpatory evidence”).

313. *White*, 274 Neb. at 425-26, 740 N.W.2d at 806.

314. *Id.*, 740 N.W.2d at 806.

315. *Id.* at 427, 740 N.W.2d at 806.

316. *Winslow*, 274 Neb. at 436, 740 N.W.2d at 801.

317. *Id.*, 740 N.W.2d at 801.

318. *Id.*

319. *White*, 274 Neb. at 425, 740 N.W.2d at 806; *Winslow*, 274 Neb. at 437, 740 N.W.2d at 801.

was not present at the crime scene. The court also did not address the potential for DNA testing to implicate a charged or uncharged third party as a contributor to the semen samples.³²⁰

Despite an incomplete evaluation of the potentialities of DNA testing, the court applied, for the first time, a critical, two-step approach to determine whether DNA testing may produce noncumulative exculpatory evidence relevant to White and Winslow's wrongful conviction and sentence claims.³²¹ The court first identified the State's critical guilt evidence and determined its crucial components.³²² The court then evaluated the potential for DNA testing to undermine or disprove the State's critical guilt evidence.³²³ Once the court recognized the potential for DNA testing to impeach critical accomplice testimony, the court determined DNA testing may produce noncumulative, exculpatory evidence relevant to White and Winslow's claims that they were wrongfully convicted or sentenced.³²⁴

C. IDENTIFYING CRITICAL EVIDENCE & EVALUATING SCIENTIFIC POTENTIALITIES

In the *White* and *Winslow* cases, the Nebraska Supreme Court constructed a two-step critical analysis for district courts to use in making the requisite statutory determination of whether favorable DNA testing results "may produce noncumulative, exculpatory evidence relevant to the claim the person was wrongfully convicted or sentenced."³²⁵ Before beginning the two-step critical analysis, district courts must identify the primary evidence adduced at trial or the factual basis supporting the plea.³²⁶ The first step of the two-step analysis requires district courts to identify the essential component, or "heart," of the State's critical guilt evidence used to convict or sentence the defendant.³²⁷ The second step requires district courts to evaluate the potential for favorable DNA testing results to seriously undermine or to disprove the critical guilt evidence and to corroborate evidence of

320. See Appellate Brief at 17, *State v. Winslow*, 274 Neb. 419, 740 N.W.2d. 801 (2007) (No. 06-9000001) (stating if requested DNA testing excludes White and Winslow, "the only other potential perpetrator would be the third male co-defendant, James Dean, or some other yet unidentified perpetrator").

321. See *supra* notes 307-14 and accompanying text.

322. See *supra* notes 307-09 and accompanying text.

323. See *supra* notes 310-14 and accompanying text.

324. *White*, 274 Neb. at 426, 740 N.W.2d at 806; *Winslow*, 274 Neb. at 436-37, 740 N.W.2d at 800-01.

325. *State v. White*, 274 Neb. 419, 740 N.W.2d 801 (2007); *State v. Winslow*, 274 Neb. 427, 740 N.W.2d. 794 (2007); NEB. REV. STAT. ANN. § 29-4120(5) (LexisNexis 2004 & Supp. 2008).

326. See *supra* notes 303-06 and accompanying text.

327. See *supra* notes 307-09 and accompanying text.

innocence.³²⁸ If DNA testing produces newly discovered evidence that casts serious doubts on the reliability of critical guilt evidence used to convict or sentence the defendant, then this newly discovered evidence is favorable to the defendant, material to the issue of the defendant's guilt, and, therefore, *exculpatory* under the DNA Testing Act.³²⁹

This two-step critical analysis approach applies to all traditional forms of proof, including eye-witness identifications, cooperating witness statements and testimony, confessions, and forensic evidence. The approach does not require district courts to re-weigh evidence or reassess the credibility of witnesses, the reliability of confessions or the validity of forensic evidence.³³⁰ Rather, this two-step analysis requires courts to identify the primary evidence the State relied upon to secure the conviction, to identify the crucial components of the guilt evidence, and to evaluate the potential for DNA testing to impeach, discredit, or disprove critical guilt evidence.³³¹ Proper application of the second step requires district courts to evaluate both the potential for DNA testing to exclude the defendant and any co-defendants as contributors of biological evidence, and the potential for DNA testing to implicate a third-party as a contributor of biological evidence.³³² This evaluation will decide the ultimate inquiry: Whether newly discovered evidence in the form of favorable DNA test results may be relevant to a defendant's wrongful conviction or sentence claim.³³³

In ruling on post-conviction motions for DNA testing, district courts should not consider either the quantity or perceived strength of the State's guilt evidence.³³⁴ Due to its uniquely dispositive power, DNA testing can and has disproved all traditional forms of proof, including substantial accomplice witness testimony, as the *White* and *Winslow* cases demonstrate.³³⁵ Importantly, the Act makes no reference to the quantity or weight of the State's evidence used to convict or sentence a defendant.³³⁶ Instead, the Act mandates a judicial finding on the issue of whether DNA testing may produce noncumulative, exculpatory evidence.³³⁷ In order for courts to make this mandated finding, the courts must identify critical guilt or penalty evidence and

328. See *supra* notes 310-14 and accompanying text.

329. See *supra* notes 317-18 and accompanying text.

330. See *supra* notes 303-14 and accompanying text.

331. See *supra* notes 303-314 and accompanying text.

332. See *supra* note 322 and accompanying text.

333. NEB. REV. STAT. ANN. § 29-4120(5).

334. *Bruner v. State*, 88 P.3d 214, 217 (Kan. 2004) (stating it was improper to deny statutory testing on the basis that the evidence of guilt was overwhelming).

335. See *supra* notes 298-320 and accompanying text.

336. NEB. REV. STAT. ANN. § 29-4116 to 29-4126 (LexisNexis 2004 & Supp. 2008).

337. NEB. REV. STAT. ANN. § 29-4120(5).

then evaluate the scientific potential for favorable DNA test results to undermine or discredit such evidence.³³⁸

The Nebraska Supreme Court implicitly recognized this analytical requirement in *State v. Poe*.³³⁹ Stanley Poe's counsel argued the district court failed to engage in any analysis of why DNA testing on a cigarette butt recovered at the crime scene would not be relevant to his wrongful conviction claim.³⁴⁰ The court agreed with Poe's counsel's argument.³⁴¹ Because the district court had failed to analyze whether DNA testing may produce noncumulative exculpatory evidence, the court reversed and remanded the case to the district court with instructions to make this determination.³⁴² In remanding *Poe*, the court recognized the Act requires the court to make an explicit finding whether DNA testing on material evidence may produce noncumulative exculpatory evidence.³⁴³

The court's ruling in *Poe* that the Act requires a mandatory finding on whether DNA testing may produce noncumulative exculpatory evidence was seemingly lost on district courts. Since *Poe*, courts have consistently applied an unexamined, conclusory approach to deciding whether DNA testing may produce noncumulative exculpatory evidence.³⁴⁴ Without identifying critical guilt evidence or evaluating scientific potentialities, courts routinely declare it would be "mere speculation" to conclude the absence of a defendant's DNA on physical evidence necessarily excludes a defendant as being the perpetrator of a crime.³⁴⁵ Decisions denying post-conviction DNA testing are premised on the perceived sufficiency of State's guilt evidence.³⁴⁶ District courts routinely refer to "persuasive and undisputed trial evidence," to "more than sufficient evidence" linking the defendant to the crime, and to "overwhelming evidence" of guilt.³⁴⁷

338. *Id.*; *White*, 274 Neb. at 424, 740 N.W.2d at 805.

339. 266 Neb. 437, 665 N.W.2d 654 (2003).

340. *State v. Poe*, 266 Neb. 437, 438, 665 N.W.2d 654, 655 (2003).

341. *Poe*, 266 Neb. at 442, 665 N.W.2d at 658.

342. *Id.* at 443-44, 664 N.W.2d at 658, 659.

343. *Id.*

344. *See supra* notes 310-13 and accompanying text.

345. *State v. Dean*, 270 Neb. 972, 976-77, 708 N.W.2d 640, 645 (2006) ("[I]t would be mere speculation to conclude that the absence of Dean's DNA on the firearm and ammunition would exclude him as being the person who fired the fatal shot."); *State v. Bryant*, No. A-05-948, 2007 WL 2706474, at *5 (Neb. Ct. App. Sept. 18, 2007) ("[T]he absence of blood on Bryant's clothing would be inconclusive and not exculpatory"); *State v. Tolliver*, No. A-07-1364, 2008 WL 4780357, at *2 (Neb. Ct. App. Nov. 4, 2008) (quoting the district court, which found "it would be mere speculation to conclude that the absence of Tolliver's DNA on the tennis shoes would exclude as the person responsible for the death of Richard Rice").

346. *Dean*, 270 Neb. at 976-77, 708 N.W.2d at 645

347. *Id.*; *Tolliver*, 2008 WL 4780357, at *2; *Bryant*, 2007 WL 2706474, at *5.

Too often, denials of DNA testing are based on bald conjecture. In *Poe*, the district court judge asserted “I [don’t] think it would have made a difference one way or another had the cigarette butt been subjected to DNA testing at the time of trial. I don’t think it would affect the outcome of the trial one way or another.”³⁴⁸ In three other cases, district courts denied DNA testing based on rank speculation, declaring: “This is not a case in which the evidence against [the defendant] is so weak as to cast serious doubt about guilt.”³⁴⁹ In two cases, the courts’ speculation about the defendants’ guilt proved patently false.³⁵⁰ In the third case, the district court’s conclusory denial of DNA testing was affirmed summarily without analysis, so whether the judicial speculation is true or false will never be known.³⁵¹

Application of the two-step critical approach must not be limited only to a few, clear-cut cases in which DNA testing has the potential to prove guilt or innocence conclusively.³⁵² Effectuating the Act’s intent requires courts to apply the two-step analysis to all postconviction motions, including those in which DNA testing may not conclusively establish guilt or innocence.³⁵³ The Act’s drafters recognized this when they declared: “In some cases, DNA may not conclusively establish guilt or innocence but may have significant probative value to a finder of fact.”³⁵⁴ Therefore, if a court finds DNA testing has the potential to produce newly discovered scientific evidence relevant to the defendant’s wrongful conviction or sentence claim, then the Act mandates the court to grant the DNA testing motion.³⁵⁵

In cases where DNA testing may not conclusively establish guilt or innocence by identifying or excluding the defendant as a contributor of biological material, district courts must evaluate the potential for DNA testing to yield what was ultimately produced in the *White*

348. Brief of Appellant at 17-18, *State v. Poe*, 266 Neb. 437, 665 N.W.2d 664 (2003) (arguing that the “district court failed to address the ‘potential’ impact of DNA testing of this cigarette butt, which the Act requires”).

349. Journal Entry at 7, *State v. White*, 274 Neb. 419, 740 N.W.2d 801 (Jefferson County Dist. Ct. Neb. 2006) (CR 05-6000001) [hereinafter *White Journal Entry*] (finding “this is not a case where . . . evidence against the capital defendant is so weak as to suggest real doubt about guilt”); Winslow at 8, (finding “this is not a case where . . . evidence against the capital defendant is so weak as to suggest real doubt about guilt”); Tolliver, 2008 WL 4780357 at 2.

350. Journal Entry at 7, *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794, (Gage County Dist. Ct. Neb. 2006) (No. CR 06-9000001) [hereinafter *Winslow Journal Entry*]; *White Journal Entry* at 7, *supra* note 349, at 7.

351. Tolliver, 2008 WL 4780357, at *2.

352. For example, a rape case where the absence of the defendant’s semen could prove his innocence, or a murder case where there were signs of a struggle and the perpetrator left behind skin, hair or blood samples.

353. NEB. REV. STAT. ANN. § 29-4117.

354. § 29-4118(2).

355. § 29-4120(5).

and *Winslow* cases—a DNA profile belonging to an uncharged third party.³⁵⁶ To date, Nebraska courts have not considered this potentiality, at least not in writing. In *State v. Tolliver*,³⁵⁷ the defendant, Timothy Tolliver, offered an uncontroverted scientific affidavit in support of his argument that more advanced DNA testing on the inside of a pair of tennis shoes may generate a more sophisticated DNA profile that could exclude Tolliver and produce a previously undetected male DNA profile.³⁵⁸ In its order denying DNA testing, the district court acknowledged receiving into evidence the scientific affidavit, and quoted from the affidavit, stating, “newly available testing, known as YFilter, could very likely yield a more complete DNA profile which could be compared to the DNA of Tolliver which could either exculpate or inculpate Tolliver as a contributor of the male DNA detected from the shoes.”³⁵⁹ However, in denying DNA testing, the order ignored the affidavit’s uncontested, scientific opinion that “the YFilter kit may generate a previously undetected male DNA profile.”³⁶⁰ In analyzing whether DNA testing should be granted, the district court never referred to the scientific affidavit nor evaluated the potential for advanced DNA testing to impeach or disprove eyewitness testimony at trial linking Tolliver to the tennis shoes.³⁶¹ Instead, the district court denied the motion for advanced testing, finding that “even if DNA testing would not detect the presence of his DNA on the tennis shoes . . . the result would be inconclusive and not exculpatory *given the other evidence in this case produced at trial*.”³⁶² In so ruling, the district court erred in relying upon the perceived strength of the guilt evidence and failed to consider the scientific possibility that the DNA testing could produce a genetic profile of an unknown third-party and that such a profile, if produced, would unquestionably impeach the witness testimony adduced at Tolliver’s trial.³⁶³

356. Memorandum from Corey O’Brien, Assistant Nebraska Attorney General, on the Findings of the 2008 Task Force Investigation into the Murder of Helen Wilson 5-6 (Jan. 26, 2009) (on file with authors).

357. *State v. Tolliver*, No. 157-188 (Douglas County Dist. Ct. Oct. 25, 2007).

358. Brief of Appellant at 13, *State v. Tolliver*, No. A-07-1364 (Neb. Ct. App. Nov. 4, 2008) [hereinafter *Tolliver Brief*] (“In Tolliver’s case, a DNA expert testified by affidavit that testing the shoes with Y-filter could yield additional results which could not only exclude Tolliver as the source of the DNA, but also possibly generate a previously undetected male DNA profile from the shoes.”)

359. Order at 4, *State v. Tolliver*, No. 157-188 (Douglas County Dist. Ct. Oct. 25, 2007) (quoting the Affidavit of Cassie L. Johnson at Para. 8).

360. Affidavit of Cassie L. Johnson, June 12, 2007, at Para. 9, *State v. Tolliver*, No. 157-188 (Douglas County Dist. Ct. Oct. 25, 2007).

361. *Id.* at 4-7.

362. *Id.* at 6.

363. *Id.* at 6.

Tolliver appealed and, in his appellate brief, he discussed the Nebraska Supreme Court's analysis in *White* and in *Winslow*.³⁶⁴ Tolliver argued the potential for advanced DNA testing to establish the presence of a third party's DNA profile on the only physical evidence linking Tolliver to the crime was a sufficient basis to grant his motion for DNA testing.³⁶⁵ In *State v. Tolliver*,³⁶⁶ the Nebraska Court of Appeals issued an unpublished decision affirming the district court's denial of Tolliver's motion for post-conviction testing.³⁶⁷ The appellate court's analysis consisted of a single sentence: "Even if the advanced DNA testing were to exclude Tolliver as the source of the DNA from the interior of the tennis shoes, the evidence would not be exculpatory in light of the overwhelming testimony of the shoes belonging to Tolliver."³⁶⁸ For reasons unstated, the Court of Appeals ignored Tolliver's request to apply the two-step analysis used in *White* and *Winslow*.³⁶⁹ Tolliver then filed a petition for further review requesting the Nebraska Supreme Court to review his DNA testing motion in light of the analysis the Court applied in *White* and *Winslow*, but the Court declined his petition.³⁷⁰

The rulings in the *Tolliver* case reveal the potential for disparate outcomes when courts fail to consistently apply the two-step critical analysis. Consistent and uniform application of the two-step analysis is imperative because courts cannot objectively determine what is noncumulative and exculpatory without first identifying the critical guilt or penalty evidence and then evaluating the potential for DNA test results to undermine or disprove such evidence. If Nebraska state courts learn anything from the *White* and *Winslow* cases, it must be the uniquely dispositive power of DNA testing to debunk seemingly "overwhelming" trial evidence. Consistent and uniform application of the two-step analysis may well result in courts granting considerably more motions for post-conviction DNA testing. However, an increase in post-conviction DNA testing is surely preferable to courts denying DNA testing to defendants whose critical guilt or penalty evidence could be undermined or wholly disproved by newly discovered scientific evidence.

364. *Tolliver* Brief, *supra* note 358, at 13 ("Based upon the Supreme Court's analyses applied in *White* and *Winslow*, there should be no question that the district court erred in denying Tolliver's motion. The shoes were the only piece of physical evidence linking Tolliver to the crime.")

365. *Id.*

366. No. A-07-1364, 2008 WL 4780357 (Neb. Ct. App. Nov. 4, 2008).

367. *Tolliver*, 2008 WL 4780357, at *5.

368. *Id.* at *5.

369. See generally *Tolliver*, 2008 WL 4780357.

370. *State v. Tolliver*, No. A-07-1364, Order Denying Petition for Further Review (Neb. Sup. Ct. Dec. 17, 2008).

D. REFORMS & RECOMMENDATIONS

Beyond district courts consistently and uniformly applying the two-step critical analysis outlined in the *White* and *Winslow* cases, two additional reform measures may help safeguard against the inherent unreliability of accomplice testimony. The first proposed reform measure would permit criminal defendants standing trial to move the court for a pretrial reliability hearing on the admissibility of critical accomplice testimony. The second proposed reform measure would fully apprise jurors of the inherent unreliability of accomplice testimony.

In Joseph White's prosecution, the State disclosed all accomplice statements and offered into evidence the accomplice plea agreements.³⁷¹ At trial, defense counsel cross-examined the three accomplices and highlighted internal inconsistencies in those accomplices' multiple statements.³⁷² At the close of trial, the court gave jurors the pattern Accomplice Testimony instruction, cautioning jurors to carefully assess the credibility of the accomplice witnesses.³⁷³ Despite full disclosure, vigorous cross-examination, and a cautionary jury instruction, the jury believed the fabricated accomplice testimony and wrongfully convicted White.³⁷⁴

The jury's swift guilty verdict suggests that disclosure, cross-examination, and the pattern accomplice testimony instruction are insufficient to protect against wrongful convictions based on fabricated accomplice testimony. Even when accomplices are subjected to vigorous cross examination and jurors are instructed to closely examine accomplice testimony for possible motives to lie, wrongful convictions occur.³⁷⁵ This outcome in Joseph White's trial validates what psychological research has shown—jurors find accomplice testimony compelling and are unable to discern an accomplice's proper motive for testifying.³⁷⁶

One enhanced safeguard would be for district courts to assume a gate-keeping role in determining the admissibility of accomplice testimony in highly suspect cases. Conducting a pre-trial reliability hearing would allow the district courts to perform a gate-keeping function

371. Bill of Exceptions, *State v. White*, Trial Exhibits 728A (Sheldon's plea agreement); 812A (Gonzalez's plea agreement); 837A (Dean's plea agreement); 891A (Taylor's plea agreement)

372. See *supra* notes 71-75 and accompanying text.

373. See *supra* notes 79 and accompanying text

374. See *supra* note 80 and accompanying text

375. See *supra* notes 71-80 and accompanying text

376. See *supra* notes 133, 135 and accompanying text.

and to exclude highly suspect, uncorroborated accomplice testimony that is more likely fabricated than true.³⁷⁷

Conducting a pretrial reliability hearing would allow a court to examine an accomplice's incentives to fabricate testimony, the absence or existence of corroborating evidence, as well as significant discrepancies in the accomplice's successive statements. Additionally, conducting a pretrial reliability hearing would allow the court to consider the police interrogation techniques employed, and the government's efforts to validate the accomplice's statements. Had a pretrial reliability hearing been conducted before White's trial, the district judge would have reviewed all the recorded accomplice statements and interrogation tapes. The judge would have considered the flagrant discrepancies that existed between the accomplice statements and the crime scene evidence. The district court also would have discovered that the details provided in the accomplice statements were produced as a result of law enforcement officers showing the accomplices crime scene evidence, or through suggestive interrogative and psychological techniques employed by Deputy Searcy and Dr. Price.

Pretrial reliability hearings should be conducted sparingly, only in cases in which the veracity of accomplice testimony is highly suspect, and defense counsel can make a good cause showing for a hearing. If the court grants a pretrial reliability hearing, the government would bear the burden of proving by a preponderance of the evidence that the accomplice's proposed trial testimony is reliable. The government's failure to meet this burden would result in the accomplice's testimony being excluded at trial.

Another remedial measure Nebraska could use to guard against the inherent unreliability of accomplice testimony is for the Nebraska Supreme Court's Committee on Practice and Procedure to adopt a much stronger-worded cautionary jury instruction on the credibility of accomplice testimony. Currently, the jury instruction available upon the defendant's request only instructs that the jury should "closely examine [the accomplice witness's] testimony for any possible motive [the witness] might have to testify falsely."³⁷⁸ The jury instruction informs jurors that they "should hesitate to convict the defendant if [they] decide that [the witness] testified falsely about an important matter and that there is no other evidence to support [the witness's] testimony."³⁷⁹ The jury instruction is vague as to the motive of the accomplice witness to testify falsely, and the jury instruction ex-

377. See *Dodd v. State*, 993 P.2d 778, 785 (OK. Crim. App. 2000) (Struthers, J., specially concurring).

378. 1 NEPRAC NJI2d Crim. 5.6

379. *Id.*

pressly endorses a guilty verdict based on no other evidence than the testimony of an accomplice witness.

Nebraska's accomplice testimony instruction should be revised to inform jurors in detail why an accomplice witness should be viewed differently from any other witness. At White's trial, defense counsel requested a jury instruction regarding the credibility of accomplice witnesses, which cautioned jurors that a witness who has testified pursuant to a plea agreement receives certain benefits as a result of that witness's testimony.³⁸⁰ The district court denied the requested instruction.³⁸¹

A jury instruction such as the model instruction used in Pennsylvania clearly explains why jurors should view accomplice testimony with skepticism. The model jury instruction states that the testimony of an accomplice should be treated "with disfavor because it comes from a corrupt and polluted source."³⁸² The model jury instruction explains that "an accomplice, when caught, may often try to place the blame falsely on someone else. He or she may testify falsely in the hope of obtaining favorable treatment, or for some corrupt or wicked motive."³⁸³ Finally, the jury instruction also cautions jurors that "accomplice testimony is more dependable if supported by independent evidence."³⁸⁴ Nebraska would be wise to consider revising its pattern accomplice testimony instruction to better inform juries why accomplice testimony should be viewed differently than all other testimony.

V. CONCLUSION

The companion cases of *State v. White*³⁸⁵ and *State v. Winslow*³⁸⁶ illustrate the uniquely dispositive power of DNA testing to impeach and disprove traditional forms of proof, including fabricated accomplice testimony.³⁸⁷ DNA testing is, by far, a more reliable and more precise method of implicating perpetrators than any traditional form of identification proof, be it eyewitness identification, cooperating witness testimony, confessions, or traditional forensic evidence.³⁸⁸ DNA technology delivers a degree of certainty to which the criminal justice system is unaccustomed.

380. Bill of Exception, *supra* note 16, at 1113

381. *Id.*

382. PA-JICRIM 4.01

383. *Id.*

384. *Id.*

385. 274 Neb. 419, 740 N.W.2d 801 (2007).

386. 274 Neb. 427, 740 N.W.2d 794 (2007).

387. *See supra* notes 110-22 and accompanying text.

388. *See supra* note 238 and accompanying text.

Post-conviction DNA testing statutes provide the wrongfully convicted with procedures to challenge their convictions using the latest advances in criminal investigation technology.³⁸⁹ However, the Nebraska DNA Testing Act is an effective post-conviction remedy only if courts properly identify critical guilt and penalty evidence supporting convictions and sentences, and then evaluate the scientific potential for favorable DNA test results to undermine or disprove such evidence.³⁹⁰ Had the Nebraska Supreme Court not applied the two-step analysis in the *White* and *Winslow* cases and allowed DNA testing, critical, but wholly fabricated, accomplice testimony would never have been impeached, the lone killer would not have been implicated, and the Beatrice Six would not have been exonerated.

To minimize the risk of future wrongful convictions based on fabricated accomplice testimony, the Nebraska bench and bar should consider permitting pretrial reliability hearings on the admissibility of accomplice witness testimony in highly suspect cases and revising Nebraska's accomplice testimony instruction to fully apprise juries why accomplice testimony is inherently unreliable.

389. See *supra* notes 239-41 and accompanying text.

390. See *supra* note 355 and accompanying text.

