

SELECTIVE TESTING OF DNA AND ITS IMPACT ON POST-CONVICTION REQUESTS FOR TESTING

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I. INTRODUCTION

The prisons are full of men and women who profess their innocence despite having been convicted on the weight of the evidence presented by the prosecution. Yet, each year many of those found guilty are exonerated after post-conviction testing of deoxyribonucleic acid ("DNA") evidence proves that they are innocent. The Pennsylvania Innocence Project reports that 303 individuals have been exonerated through DNA testing, some posthumously. Studies conducted on the first 250 individuals exonerated have shown that in forty-five percent of the cases DNA testing helped to identify the actual assailant. Thus the

¹ Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 61 (2008) (reporting that the courts have reversed convictions at a rate of fourteen percent for noncapital cases, and a mere one to two percent for capital cases); *see also* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 5 (2011) (reporting that in sixty-eight percent of wrongful conviction cases the individual had been convicted of rape, in nine percent for murder, in twenty-one percent for the combined crime of rape and murder, and in two percent for robbery).

 $^{^{\}rm 2}$ Donald E. Shelton, Forensic Science In Court: Challenges in the Twenty-First Century 11 (2010).

³ DNA Exonerations Nationwide, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA _Exonerations.php# (last visited May 3, 2013); see also Myrna S. Raeder, Introduction to Wrongful Convictions Symposium, 37 Sw. L. Rev. 745, 747 (2008) ("It is likely that many more cases would have resulted in exclusions if DNA analysis had been available earlier.").

⁴ Garrett, Convicting the Innocent, *supra* note 1, at 5.

question presents itself: if there exists even the slightest possibility that forensic testing could allow an innocent individual to be released from jail, why does the judicial system present such vigorous opposition to requests for post-conviction DNA testing, and why are there insurmountable threshold obstacles placed in the paths of those seeking such post-conviction relief? ⁵ Take, for example, the cases of William Virgil and Hank Skinner.⁶

For those individuals seeking post-conviction access to DNA or other forensic evidence on the premise that the results would prove beyond a reasonable doubt that they are innocent of the crime for which they have been convicted, there are numerous legal obstacles that must be surpassed before access to the evidence will be granted. As there is no constitutional right to DNA testing,7 the individual is left at the mercy of the statute of the state in which he was convicted – provided, of course, that said state has such a statute. The lack of consistency among the states also presents a problem; some states, such as Pennsylvania, have more restrictive statutes than others, such as Rhode Island.8

⁵ Garrett, *Judging Innocence*, *supra* note 1, at 117-18 (noting that, even if DNA exists for testing, the judicial system has historically been hostile towards post-conviction claims of relief). In addition, statutes governing post-conviction relief are not available in every state, and those states that do have statutes covering post-conviction DNA testing often require an extremely difficult preliminary showing before relief will be granted. *Id*.

⁶ See Kentucky Judge Says Yes . . . Then No To DNA Testing That Could Prove Innocence. PA. INNOCENCE **PROJECT** (Aug. http://innocenceprojectpa.wordpress.com/2011/08/17/kentucky-judge-saysyes-then-no-to-dna-testing-that-could-prove-innocence. William Virgil has been refused DNA testing because he does not fall within the two classes of people permitted to obtain post-conviction DNA under Kentucky statute; whereas Hank Skinner's requests have been denied in part because his defense counsel made a strategic decision not to request testing during the trial phase. See Michael Graczyk, Inmate Maintains Innocence as Execution Approaches, LUBBOCK AVALANCHE-JOURNAL (Mar. 20, 2010), http://lubbockonline.com/stories/032010/sta_593115483.shtml.

⁷ Dist. Atty's Office v. Osborne, 557 U.S. 52, 72 (2009).

⁸ Compare 42 Pa. Cons. Stat. § 9543.1 (2002), with R.I. Gen. Laws § 10-9.1-12 (2012).

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This note will examine post-conviction testing of DNA evidence and how selective testing on the part of the prosecution often leads to a failure on the part of the defendant to meet the threshold requirements for post-conviction testing. This note will first discuss the power of DNA testing in securing convictions. It will then go on to analyze the selective testing technique used by prosecutors. It will then explore the factors that contribute to wrongful convictions.

This note then goes on to analyze state efforts to address the hurdles encountered by inmates filing requests for postconviction access to DNA testing, as well as recent efforts made by the legal profession to institute changes in the way prosecutors handle post-conviction requests for DNA testing, as well as selective testing. It will conclude by advocating for increased efforts in procedural changes.

This note will not address the number of individuals who are exonerated on the basis of faulty or outdated DNA testing, but rather will focus on those cases where DNA evidence had not been previously tested.

II. THE POWER OF DNA TESTING IN SECURING CONVICTIONS

Although the use of forensic science has been in existence for well over a century,9 it was DNA testing that became the prosecutor's favored tool. Originally used to settle issues of paternity, 10 DNA testing soon became the cornerstone of securing a conviction. In fact, DNA testing has come to be regarded as "probably the most important forensic science development in the twentieth century."

11 DNA has evolved as a powerful tool in solving crimes and assuring that those responsible are held accountable. In fact, "[p]rosecutors have been urged to use DNA evidence 'just as any other form or type of evidence – to corroborate, validate and/or impeach evidence

⁹ SHELTON, supra note 2, at 9.

¹⁰ *Id*. at 11.

¹¹ Id. ("DNA has become the 'gold standard' of forensic scientific evidence and DNA typing is now universally recognized as the standard against which many other forensic individualization techniques are judged.").

or testimony."¹² Problems can arise, however, when prosecutors engage in selective testing of DNA evidence.

III. SELECTIVE TESTING OF DNA EVIDENCE

Perhaps Harlan Levy said it best when he proclaimed, "[t]he greatest friend of the falsely accused is DNA testing at the beginning of a criminal investigation." However, DNA testing is not always conducted at the beginning of an investigation; in fact, DNA is often not tested at all. As part of the discretionary power of the prosecution, prosecutors can make a choice not to test the DNA.

Hank Skinner seems the unlikely poster boy for the plight of prisoners claiming to have been wrongfully convicted due to the prosecution's failure to test DNA. Skinner was convicted of the brutal killing of his girlfriend, Twila Jean Busby, and her two adult sons.¹⁷ On New Year's Eve 1993, Caler Busby, Twila's son, appeared on a neighbor's doorstep, bleeding profusely from multiple stab wounds inflicted at the hands of an individual he did not identify before succumbing to his injuries.¹⁸ Police would later discover the bodies of Twila Busby and her other son, Randy.¹⁹ Forensics would determine that Twila had been beaten fourteen times with an axe handle and that her son had been stabbed multiple times.²⁰ Skinner was not discovered at

¹² *Id.* at 28 (citing Lisa R. Kreeger & Danielle M. Weiss, *Forensic DNA Fundamentals for the Prosecutor: Be Not Afraid* 18 (2003), available at http://www.ndaa.org/pdf/forensic_dna_fundamentals.pdf).

¹³ HARLAN LEVY, AND THE BLOOD CRIED OUT: A PROSECUTOR'S SPELLBINDING ACCOUNT OF THE POWER OF DNA 197 (1996).

¹⁴ See id.

¹⁵ *Id*.

¹⁶ See id. at 196.

¹⁷ Graczyk, *supra* note 6.

¹⁸ *Id*.

¹⁹ *Id*.

²⁰ *Id*.

the scene.²¹ Rather, police followed a trail of blood leading from the murder scene to a house four blocks away.²² Skinner was found hiding in a closet in this home, his clothes covered in the blood of Twila's sons.²³ Skinner also had a laceration on his hand (which police theorized occurred when his hand, wet from the victims' blood, slipped down the shaft of a knife).²⁴

Although Skinner would later admit to being present at the scene when the murders took place, he would claim that he slept through the entire attack, passed out on the couch from a mixture of drugs and alcohol.²⁵ He explained to police that his clothes were stained in the victims' blood because Caler Busby, mortally wounded, had tried to wake Skinner from his drunken stupor; the cut allegedly occurred when he fell on broken glass.²⁶ Skinner insisted that the actual perpetrator was Twila's uncle, who was known to have a temper, and who had had an altercation with Twila earlier that evening.²⁷

Skinner alleged that his assertions could have been proven had all of the forensic evidence collected at the scene been subjected to DNA testing.²⁸ However, the prosecutors engaged in selective testing of the evidence.²⁹ The selective testing had been performed, not for nefarious reasons, but rather because the prosecutors believed other evidence they had in their possession was strong enough to connect Skinner to the

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<sup>21</sup> Id.
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²² *Id*.

²³ Graczyk, *supra* note 6.

²⁴ *Id*.

²⁵ *Id*.

²⁶ *Id*.

²⁷ Id.

²⁸ *Id.* Evidence collected included vaginal swabs and fingernails taken during Twila's autopsy, a knife recovered from the front porch, a second knife recovered from a plastic bag inside the house, a towel that had been placed inside the plastic bag with the second knife, a jacket found next to the body, and hairs found clutched in Twila's hand. *Id.*

²⁹ Graczyk, *supra* note 6.

murders and guarantee a conviction.³⁰ In fact, Skinner's trial attorney, Harold Comer, had been informed of the existence of the untested evidence, but chose not to have the material tested for fear that it would implicate his client.³¹

Skinner was convicted of the murders and sentenced to death.³² For the past seventeen years, he had continued to profess his innocence to the crime³³ and has sought to have the untested evidence subjected to DNA testing.³⁴ Not surprisingly, the prosecutors in Skinner's case have vehemently opposed all requests for post-conviction DNA testing.³⁵ The prosecutors have argued that Skinner received a fair trial and has no legal entitlement to post-conviction DNA testing.³⁶ Just one hour before his scheduled execution, the United States Supreme Court granted Skinner a temporary stay to allow them time to decide whether to grant certiorari to hear his §1983 claim.³⁷

³⁰ *Id.* There was also testimony admitted at trial from a woman who claimed Skinner told her that he had kicked Twila to death. *Id.* Autopsy results indicated no evidence of Twila having been kicked. *Id.*

³¹ *Id.*; see also Editorial, *Death, DNA* and the Supreme Court, N.Y. TIMES (Oct. 17, 2010), http://www.nytimes.com/2010/10/18/opinion/18mon3.html. Justice Sotomayor, joining in the opinion of the court, did not fault the strategic decision of defense counsel for not requesting at the trial level that the evidence be subjected to DNA testing. *Id.* However, it was noted that to now deny testing would "... elevate game-playing over truth-seeking and ignore the need to ensure, best as possible, that the right person has been convicted. Testing such evidence should not be left to a strategic decision, it should be standard in a serious criminal investigation." *Id.*

³² See Death, DNA and the Supreme Court, supra note 31.

³³ Graczynk, *supra* note 6.

³⁴ Death, DNA and the Supreme Court, supra note 31.

³⁵ Graczynk, *supra* note 6.

³⁶ *Id*.

³⁷ Steve Czajkowski, *Supreme Court Stays Execution of Condemned Texas Inmate Seeking DNA Test*, JURIST (Mar. 25, 2010, 15:58 PM), http://jurist.org/paperchase/2010/03/supreme-court-stays-execution-of.php; *see also* 42 U.S.C. § 1983 (2006).

In a novel move,³⁸ Skinner argued that there was no clarity from the state courts as to whether an inmate's request for post-conviction DNA testing may be granted under civil rights laws or whether relief is available only via a *habeas corpus* challenge.³⁹

The Skinner case is a perfect example of the selective testing determination often made by the prosecution. Frequently, the weight of the evidence is such that prosecutors do not believe testing of all evidence is required in order to connect the defendant to the crime and to secure a conviction.⁴⁰ However, given the fact that no test or testimony is beyond reproach, arguments can be made that, where evidence exists, testing should be performed regardless of the perceived strength of the case.

A. The Impact of *Brady* on Selective DNA Testing

Just recently, the American Bar Association ("ABA") asked the U.S. Supreme Court to "reaffirm that a prosecutor's ethical obligations to disclose exculpatory and mitigating evidence before trial are broader than the constitutional standards established for post-trial review of non-disclosure claims under the court's [sic] 1963 *Brady v. Maryland* jurisprudence."⁴¹

The *Brady* Court held that, upon the request of defendant for production of any evidence favorable to the accused, the suppression of such evidence by the prosecutor (regardless of the good faith basis of the prosecution) constitutes a violation of

⁴⁰ Wayne D. Garris, Jr., *Model Rule of Professional Conduct 3.8: The ABA Takes A Stand Against Wrongful Convictions*, 22 GEO. J. LEGAL ETHICS 829, 834 (2009) ("If a prosecutor goes to trial, he or she has already made a good faith determination that the defendant is guilty.").

³⁸ See Death, DNA and the Supreme Court, supra note 31. Skinner's decision to file a §1983 claim was strategically designed to avoid the legal doctrines and deadlines imposed by both Congress and the Supreme Court limiting post-conviction appeals. *Id*.

³⁹ Czajkowski, *supra* note 37.

⁴¹ ABA Urges Supreme Court to Reaffirm Prosecutors' Ethical Disclosure Obligations, ABANOW.ORG (Aug. 22, 2011), http://www.abanow.org/2011.08/aba-urges-supreme-court-to-reaffirm-prosecutors-ethical-disclosure-obligations. See Brief for the American Bar Association as Amicus Curiae Supporting Petitioner, Smith v. Cain, 132 S. Ct. 627 (2012) (No. 10-8145).

the accused's due process rights in instances where the evidence is material to either the guilt or punishment of the defendant.⁴²

Citing *Baldi*,⁴³ the *Brady* Court reasoned that the suppression of evidence favorable to the defendant was sufficient to uphold a denial of due process claim and that the same could hold if the State allowed evidence to go uncorrected.⁴⁴ So, it stands to reason that, where DNA still exists that could possibly exonerate the defendant, it should be subjected to testing to correct a wrongful conviction.

William Sessions, former Director of the Federal Bureau of Investigation, claims that there will always exist reasons why post-conviction DNA testing is denied, but that these reasons merely amount to excuses when it comes to issues of justice and fairness.⁴⁵ Regardless of the reasons why a prosecutor may decide not to test DNA, some of the blame must also be placed on defense counsel. When made aware of the existence of forensic evidence, the defense must also share in the obligation to obtain the most up-to-date testing available; especially if the client strenuously insists that he is innocent. However, "many criminal defense attorneys are wary of ordering a test in each individual case . . . that could potentially be admitted at trial to prove their client's guilt."⁴⁶

⁴² Brady v. Maryland, 373 U.S. 83, 87 (1963).

⁴³ United States *ex rel*. Almeida v. Baldi, 195 F.2d 815, 820 (3d Cir. 1952).

⁴⁴ Brady, 373 U.S. at 87.

⁴⁵ William S. Sessions, *DNA Tests Can Free the Innocent. How Can We Ignore That?*, WASH. POST (Sept. 21, 2003), http://www.fadp.org/news/washingtonpost-20030921.htm.

⁴⁶ LEVY, *supra* note 13, at 196; *see also* Graczyk, *supra* note 6. Skinner's defense attorney has stated that he did not seek testing on the items now in question because damage had been done to the case by those items that the prosecution had selected for testing and he did not want to "risk uncovering even more damaging evidence." Graczyk, *supra* note 6.

IV. FACTORS CONTRIBUTING TO WRONGFUL CONVICTIONS

Selective determination by the prosecutor may not be based on malicious reasons, but rather on the strength of other evidence in the prosecutor's possession.⁴⁷ However, it is this "other" evidence that may lead to false convictions. Problems with eyewitness testimony, including tainted testimony, distance problems, transference, misidentification by victims, false confessions, incriminating statements, jailhouse snitches, and guilty pleas, are only a few of the reasons contributing to false convictions.⁴⁸

Perhaps one of the best examples of how "other" evidence can lead to false convictions involves the matter of the Beatrix Six. Before being exonerated, the six had collectively spent nearly seventy years in prison.⁴⁹ In 1989, six individuals were convicted of the rape and murder of Helen Wilson.⁵⁰ Ms. Wilson's body was discovered on February 6, 1985, on the living room floor of her apartment.⁵¹ The investigation concluded that Wilson died of hypoxia due to suffocation.⁵² An autopsy revealed that, prior to her death, Wilson had been sexually assaulted.⁵³ Evidence collected at the scene included semen, blood, and fingerprints.⁵⁴

⁴⁷ See Bruce A. Green & Ellen Yaroshefsky, Prosecutorial Discretion and Post-Conviction Evidence of Innocence, 6 OHIO ST. J. CRIM. L. 467, 514-15 (2009).

⁴⁸ The Innocence Project, *Understanding the Causes, Eyewitness Misidentification, available at* http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited May 6, 2013).

⁴⁹ Jeanne A. Burke & Scott Mertz, *A Uniquely Dispositive Power: How Postconviction DNA Testing Impeached Accomplice Testimony, Implicated A Lone Killer, And Exonerated The Beatrice Six*, 42 CREIGHTON L. REV. 549, 549 (2009).

⁵⁰ Id. at 556-57.

⁵¹ *Id.* at 551.

⁵² *Id*.

⁵³ *Id*.

⁵⁴ *Id*.

The case remained open until 1989 when an inmate, Cliff Shelden, made statements implicating several individuals in Ms. Wilson's murder.⁵⁵ Shelden claimed to have knowledge of Ms. Wilson's assailants and stated that he obtained this evidence via a letter written to him by one of the perpetrators, Ada JoAnn Taylor.⁵⁶

Taylor was arrested based largely upon the statement provided to police by Shelden.⁵⁷ After undergoing interrogation. Taylor confessed to officers that she was present and participated in the murder of Ms. Wilson; she later named her Following her "confession" officers alleged accomplices.58 showed Taylor photographs and a videotape of the crime scene. and shared details about the police theory of the crime.⁵⁹ The officers also sought the assistance of a part-time police psychologist, Dr. Wayne Price, who assisted Taylor with restoring her memories.60 After undergoing a session with Dr. Price, Taylor told police a different version of the story, in which she and two other individuals participated in Wilson's sexual assault and murder.⁶¹ Taylor implicated Wilson's great-niece Debra Shelden, James Dean, and Kathy Gonzales as accomplices in the crime.⁶² Taylor agreed to plead to second-degree murder and to cooperate fully in the prosecution of the other codefendants (a plea she later claimed to have taken in order to avoid the death penalty).63

Based on Taylor's statements, arrest warrants were issued for Shelden, Dean, and Gonzales;⁶⁴ law enforcement later

⁵⁷ *Id.* at 553.

⁵⁸ Id. at 553-54.

⁵⁹ *Id.* at 553.

60 *Id*.

⁶¹ Burke & Mertz, supra note 49, at 553.

62 Id. at 554.

63 *Id*.

64 *Id*.

⁵⁵ Burke & Mertz, supra note 49, at 552.

⁵⁶ *Id*.

arrested them for their alleged involvement in Wilson's murder.⁶⁵ All three initially denied being in Wilson's apartment at the time of her murder.⁶⁶ However, after being subjected to the same type of questioning by police and sessions with Dr. Prince, Dean and Shelden recounted a story similar to Taylor's and agreed to testify in exchange for minimal jail sentences.⁶⁷ All parties mentioned in connection with the crime were convicted.⁶⁸

Fast-forward to 2008 when DNA testing performed on preserved biological material recovered from the crime scene proved that none of the Beatrice Six had been involved in the Wilson rape and murder.⁶⁹ The state had wrongfully convicted the Beatrice Six with fabricated accomplice testimony obtained through questionable interrogation tactics and plea agreements.⁷⁰ The State eventually exonerated the Beatrice Six after the Supreme Court of Nebraska was persuaded to recognize the potential of DNA results in impeaching accomplice testimony.⁷¹

A. EYEWITNESS TESTIMONY

Although eyewitness testimony is an extremely powerful tool in the prosecution's arsenal to secure a conviction, it is not without its problems.⁷² In fact, eyewitness testimony has been

⁶⁵ *Id*.

⁶⁶ *Id*.

⁶⁷ Burke & Mertz, *supra* note 49, at 554.

⁶⁸ *Id.* at 557.

⁶⁹ *Id.* at 549-50.

⁷⁰ *Id.* at 550.

⁷¹ *Id*.

⁷² Carl N. Hammarskjold, *Smokes, Candy, and the Bloody Sword: How Classifying Jailhouse Snitch Testimony as Direct, Rather than Circumstantial, Evidence Contributes to Wrongful Convictions*, 45 U.S.F. L. REV. 1103, 1122-23 (2011) ("Eyewitness identification is notoriously unreliable because of . . . the power of suggestion, lopsided lineups, faulty memory, cross-racial identification problems, and reinforcement bias and false confidence as the wrong person is selected first in a photographic

noted as being the leading cause of wrongful convictions.⁷³ Many factors can cause eyewitness testimony to be weak and unreliable, thus increasing the possibility that an innocent individual may be convicted.⁷⁴

On January 11, 2012, the Supreme Court refused to require courts to examine suggestive eyewitness testimony with extra care, unless that testimony was produced as a result of police misconduct.⁷⁵ Justice Ruth Bader Ginsburg, writing for the majority, said that there was no reason to treat eyewitness testimony any differently than other potentially flawed evidence, as it is "[t]he jury, not the judge, [that] traditionally determines the reliability of the evidence."⁷⁶ However, Justice Sonia Sotomayor, writing in dissent, stated that the unreliability of eyewitness testimony can undermine the fairness of a trial.⁷⁷

1. Tainted Testimony

Even the most subtle means of encouragement can taint the identification process.⁷⁸ Law enforcement officials who off-handedly mutter words of praise that the victim has done a good job in identifying the perpetrator tend to taint the identification

lineup, then reselected in a live lineup, and finally identified in court."); see also Raeder, supra note 3, at 746.

⁷³ Robert J. Norris et al., "Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions, 74 ALB. L. REV. 1301, 1304 (2011).

74 *Id*.

⁷⁵ Perry v. New Hampshire, 132 S. Ct. 716 (2012). *See* Adam Liptak, *Eyewitness Evidence Needs No Special Cautions, Court Says*, N.Y. TIMES (Jan. 11, 2012), http://www.nytimes.com/2012/01/12/us/supreme-court-says-witness-evidence-needs-no-special-cautions.html?_r=0.

⁷⁶ Liptak, *supra* note 75.

⁷⁷ *Id.* (quoting Justice Sotomayor stating, "this court has long recognized . . . that eyewitness identifications' unique confluence of features — their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process — can undermine the fairness of a trial."). *See* Perry, 132 S. Ct. at 730-31 (Sotomayor, J., dissenting).

⁷⁸ See Bethany Shelton, Turning a Blind Eye to Justice: Kansas Courts Must Integrate Scientific Research Regarding Eyewitness Testimony into the Courtroom, 56 U. KAN. L. REV. 949, 951-52 (2008).

process by subconsciously acknowledging that the victim has correctly identified her attacker, even if that individual was not the perpetrator.⁷⁹ By instilling a false sense of confidence in a victim's identification, law enforcement may be furthering the conviction of an innocent individual.

2. Distance Problems

Witnesses with the best of eyesight will often make serious errors in identifying the perpetrator. Distance cannot only make one's appearance out of focus, but may also distort the height, weight, and physical characteristics of an individual.⁸⁰ Lighting issues will also contribute to identification mistakes.⁸¹

3. Transference

The victim may identify an individual as the perpetrator of the crime believing strongly that he or she is, in fact, the person responsible. However, studies have shown that often a victim associates an individual whom they encounter at some time in close proximity to the crime with the individual who has in fact committed the crime.⁸² Known as unconscious transference, the victim transposes the memory of one event for that of another.⁸³

4. Misidentification of Defendant by the Victim

Eyewitness misidentifications have been reported to account for over seventy-five percent of wrongful convictions.⁸⁴

80 The Innocence Project, supra note 48.

⁷⁹ Id. at 958.

⁸¹ Shelton, supra note 78, at 958.

⁸² Id. at 957.

⁸³ Id. at 956-57.

Eyewitness Identification Reform, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform. php (last visited May 4, 2013); see Liptak, supra note 75 (noting seventy-six percent of overturned convictions involved misidentification); see also Garrett, Convicting the Innocent, supra note 1, at 48 (noting seventy-six percent of overturned convictions involved misidentification).

Identification of the defendant by the victim can take place in a variety of circumstances: composite sketches, photo arrays, police line-ups, or one-on-one.⁸⁵ Again, however, these methods are not without problems. Studies have shown that identifications made via photo array or line-up can be tainted, unintentionally, by positive feedback the victim/witness receives from law enforcement.⁸⁶ These methods of identification can also be influenced by "post-identification questioning, post-identification feedback, and pre-trial briefing."⁸⁷

Even when the witness has been informed prior to viewing the line-up or photo array that the actual perpetrator may not be present, the witness is predisposed to identify the individual actually present who most closely resembles his or her memory of the perpetrator.⁸⁸ The malleability of an eyewitness's memory contributes greatly to misidentification. The most innocent of comments, the slightest effort on the part of law enforcement to reinforce a victim's confidence or to provide emotional support, can often create a false identification. The fragility of memory is yet another factor in misidentification, as time has a way of clouding even the most horrific of events.⁸⁹

Child witnesses present yet another problem with eyewitness identification. Studies have shown that when presented with open-ended questions children often answer accurately; however, due to their high level of suggestibility, any leading question will increase the likelihood of a misidentification. Problems present themselves, however, when there is no option but to ask leading questions (the stress of the situation

⁸⁵ GARRETT, CONVICTING THE INNOCENT, supra note 1, at 52.

⁸⁶ Shelton, supra note 78, at 958.

⁸⁷ Norris, *supra* note 73, at 1307.

⁸⁸ *Id.* at 1306. (noting that witnesses "have a tendency to identify the person who in their estimation looks most like the culprit" even when that culprit is not included in the group).

⁸⁹ GARRETT, CONVICTING THE INNOCENT, *supra* note 1, at 50.

⁹⁰ *Id.* at 75. In twenty-two of 190 cases involving eyewitnesses, the eyewitnesses were children. *Id.*

undoubtedly will leave a prosecutor with little options but to ask leading questions).

B. False Confessions and Incriminating Statements

It has been reported that false confessions and incriminating statements made by the defendant account for twenty-five percent of cases in which DNA testing later exonerated the individual.⁹² Why someone would falsely admit to a crime they have not committed remains up for debate, although many in the legal profession have become increasingly aware that the psychological pressures placed upon an individual during a custodial interrogation is one factor.⁹³ The fact that a defendant has entered a guilty plea may prove to be a significant hurdle, depending on the law of that jurisdiction, and could even prove to be a complete bar to accessing DNA for post-conviction testing.⁹⁴ However, the fact that a guilty plea was entered does not prove guilt.

1. Contaminated Confessions

In 1990, Jeffrey Deskovic, then a seventeen-year-old high school sophomore, was said to have confessed to the murder of a classmate.⁹⁵ The fifteen-year-old girl had been found beaten to death, her body cast aside on a dirt path in a park in downtown Peekskill, New York.⁹⁶ Deskovic first came to the attention of the police when he interjected himself into the investigation – he told the police that he was eager to help them solve the

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⁹² DNA Exonerations Nationwide, supra note 3; see also Garrett, Convicting The Innocent, supra note 1, at 18 (reporting that in a study of the first 250 individuals exonerated, sixteen percent had originally been convicted as a result of a false confession).

⁹³ GARRETT, CONVICTING THE INNOCENT, supra note 1, at 18.

⁹⁴ 42 PA. CONS. STAT. § 9543.1 (2002); see also GARRETT, CONVICTING THE INNOCENT, supra note 1, at 19. The amount of detail involved in false confessions is often astounding. GARRETT, CONVICTING THE INNOCENT, supra note 1, at 19.

⁹⁵ GARRETT, CONVICTING THE INNOCENT, supra note 1, at 15.

⁹⁶ Id. at 14.

crime.⁹⁷ During his numerous meetings with officers he offered details and provided maps of the crime scene that depicted information that could have only been known to the killer.⁹⁸ The details Deskovic provided during these scenarios were so chillingly close to the events and method used to commit the murder that had taken place that the police asked him to undergo a polygraph.⁹⁹ Told that he failed the polygraph, Deskovic reportedly "curled up on the floor of the polygraph room in a fetal position and cr[ied]."¹⁰⁰ He reported to officers that he had gradually come to realize he was the killer.¹⁰¹ Although DNA testing failed to tie Deskovic to the crime, his confession – the only evidence linking him to the crime – was so compelling that a jury found him guilty.¹⁰² Fifteen years later, new DNA testing would prove his innocence and help to convict the actual murderer.¹⁰³

It was theorized that police leaked facts to Deskovic, feeding him details of the crime that were not released to the press.¹⁰⁴ Following his release, Deskovic stated that he told the police what he thought they wanted to hear.¹⁰⁵ A confession, like the one Deskovic gave, has been termed a "coerced-compliant" confession. A "coerced-compliant" confession occurs when police apply pressure to such a degree that the suspect confesses in order to obtain some gain promised by the officers – such as bringing a conclusion to lengthy interrogations and the chance to be released and sent home.¹⁰⁶

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97 Id.
98 Id. at 15.
99 Id.

100 Id.

101 GARRETT, CONVICTING THE INNOCENT, supra note 1, at 15.
102 Id. at 16-17.
103 Id. at 17.
104 Id.
105 Id. at 18.
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2. Police Training in Interrogation Techniques

The leading manual on police interrogation, the Reid Technique, describes a technique by which officers are encouraged to extract confessions from suspects. The Reid Technique instructs officers how to put pressure on suspects while simultaneously providing suspects with an elusive gain (i.e. an end to the relentless questioning, the chance to return home to their family, etc.).¹⁰⁷ These tactics, while questionable, are not illegal. Although the police are specifically instructed not to contaminate a confession,¹⁰⁸ the tactics uncovered in many of the false conviction cases bring to light the fact that police interrogation standards should perhaps be revamped to avoid false confessions.

The case of Jeffrey Deskovic is an example of the power of false confessions in the conviction of innocent individuals.¹⁰⁹ In fact, the Supreme Court, in *Arizona v. Fulminante*, made note of the powerful impact a confession has on the jury's perception of guilt or innocence.¹¹⁰

C. Jailhouse Snitch Testimony

Jailhouse snitches present yet another roadblock to inmates seeking to remedy their wrongful conviction. This problem is

¹⁰⁹ *Id.* at 20. In thirty-eight out of forty cases involving false confessions police officers reported that suspects had provided key details that were obtained without leading questions on the part of the officer. *Id.*

¹⁰⁷ Garrett, Convicting the Innocent, *supra* note 1, at 22. The techniques are referred to as "maximization" and "minimization" and instruct the police to engage in a storytelling fashion of interrogation whereby they offer a series of narratives as to how the crime may have occurred, or promise leniency in exchange for a confession. *Id.* The purpose of the technique is to get a confession, but to have the suspect confess because he believes that explaining the circumstances leading up to the crime will allow the prosecutor to charge him with a less severe crime, or that this explanation will prove a defense such as self-defense. *Id.*

¹⁰⁸ *Id.* at 23.

¹¹⁰ Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (citing Bruton v. United States, 391 U.S. 123, 139 (1968) (White, J., dissenting)) ("A confession is like no other evidence . . . 'the defendant's own confession is probably the most probative and damaging evidence that can be used against him").

not lost on the courts. In fact, Ninth Circuit Court of Appeals Judge Stephen S. Trott cautioned prosecutors who use criminals as witnesses that:

[T]he most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him. The snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air.¹¹¹

In 2004, The Center on Wrongful Convictions published a study that describes the cases of thirty-eight men who were convicted of crimes that they did not commit partly or wholly "on the testimony of witnesses with incentives to lie."¹¹² In fact, jailhouse snitches were noted to be present in twenty-one percent of the sixty-two wrongful convictions exposed by DNA tests studied by Dwyer, Neufeld, and Scheck.¹¹³

Consider the case of Kennedy Brewer. Brewer had been convicted for the 1992 rape and murder of his girlfriend's threeyear-old child.114 Although DNA analysis exonerated Brewer, at trial prosecutors presented inaccurate bite mark testimony by Dr. Michael West, a dentist who has been implicated in other wrongful convictions, and Dr. Steven Hayne, who conducted numerous autopsies despite not being board certified, as well as the testimony of several inmates who claimed that Brewer had confessed to them. These inmates also presented explanations that helped alleviate the inconsistencies in the prosecution's case to convict Brewer. 115 However, with the assistance of the Innocence Project, Brewer's conviction was overturned. Meanwhile, DNA results eventually helped to identify the actual perpetrator.¹¹⁶

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¹¹¹ Hammarskjold, *supra* note 72, at 1109.

¹¹² Emily Jane Dodds, *I'll Make You A Deal: How Repeat Informants Are Corrupting The Criminal Justice System And What To Do About It*, 50 WM. & MARY L. REV. 1063, 1076-77 (2008).

¹¹³ Hammarskjold, *supra* note 72, at 1108.

¹¹⁴ Raeder, supra note 3, at 754.

¹¹⁵ *Id.* at 754-55.

¹¹⁶ *Id*.

Brewer's story is just one in a system replete with stories of convicts willing to relay alleged confessions in exchange for some gain such as reduction in their sentence, increased jailhouse visits, or extra trips to the commissary. Courts have recognized this problem.¹¹⁷ In fact, Judge Trott has commented:

Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is not only to have the best lawyer money can buy or the court can appoint, but to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration, 118

The United States Supreme Court has made similar comments concerning accomplices.¹¹⁹ The skepticism of inmate testimony has led many jurisdictions to require corroboration of the testimony.¹²⁰ However, a greater number of states do not require corroboration and are satisfied with only a cautionary jury instruction.¹²¹

V. REQUESTS FOR POST-CONVICTION ACCESS TO DNA

A 1999 study conducted by the Department of Justice broke post-conviction requests down to those cases in which:

¹¹⁷ See N. Mariana Islands v. Bowie, 243 F.3d 1109, 1123-24 (9th Cir. 2001); see also The Honorable Stephen S. Trott, Words of Warning for Prosecutors Using Criminals as Witnesses, 47 HASTINGS L.J. 1381 (1996).

¹¹⁸ Bowie, 243 F.3d at 1123.

¹¹⁹ See, e.g., Crawford v. United States, 212 U.S. 183, 204 (1909) ("... the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses.").

¹²⁰ See Raeder, supra note 3, at 756, 758.

¹²¹ ABA Report to the House of Delegates, p.6, *available at* http://meetings.abanet.org/webupload/commupload/CR209700/relatedres ources/ABAInformant'sRecommendations.pdf (last visited May 6, 2013).

(1) . . . biological evidence . . . still exists, and if subjected to DNA testing . . . will exonerate the petitioner; (2) . . . biological evidence . . . exists, and if subjected to DNA testing . . . would support the petitioner's claim of innocence, but reasonable persons might disagree as to whether the results [would exonerate the defendant]; (3) . . . biological evidence . . . still exists, and if subjected to DNA testing . . . favorable results will be inconclusive; (4) . . . biological evidence was never collected, or cannot be found . . . or was destroyed, or was preserved in such a way that it cannot be tested; or (5) . . . request for DNA testing is frivolous. 122

VI. HURDLES TO POST-CONVICTION ACCESS TO DNA

In response to their requests for post-conviction testing of DNA, inmates often face fierce opposition from prosecutors. In a study of two hundred exonerations, it was shown that sixty percent (119) gained access to the requisite DNA evidence only after the consent of law enforcement.¹²³ "Access to potentially exonerating postconviction DNA testing pits our need for judicial efficiency (motivated by a desire for finality) against our constitutionally and humanely motivated desire for certainty of guilt."¹²⁴ Often, the prosecutor can be the determining factor as to whether DNA is made available for testing.¹²⁵ According to the Benjamin Cardozo School of Law Innocence Project, prosecutors consented to DNA testing in less than half of cases in which the individual was later exonerated through DNA.¹²⁶

¹²² SHELTON, supra note 2, at 30-31.

¹²³ Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?*, 7 OHIO ST. J. CRIM. L. 771, 779 (2010).

¹²⁴ SHELTON, supra note 2, at 32.

¹²⁵ Ginsburg & Hunt, *supra* note 123, at 778 ("Often the prosecutor is, as a practical matter, the sole arbiter of whether a defendant has access to potentially exculpatory material, including DNA, and the prosecutor's support or opposition may make or break the defendant's chance at exoneration ").

¹²⁶ Garris, supra note 40, at 840.

Prosecutorial denial of requests for post-conviction testing of DNA evidence has been linked to a number of reasons, ¹²⁷ such as the fact that the DNA evidence is not viewed as new evidence. The fact that a prosecutor has selectively tested a portion or none of the biological evidence that existed at the time of trial does not meet the criteria of "new evidence." ¹²⁸

A. DENIAL BY PROSECUTION

To correct the unyielding, admit no wrong ethos often portrayed when prosecutors vehemently oppose requests for post-conviction motions, some prosecutors' offices have made a conscious effort to internally change.¹²⁹ Expressing sentiments in line with the prosecutor's ethical and moral obligation to see that the correct person has been convicted, D.A. Frank A. Sedita, III stated that "citizens . . . need to know that the District Attorney's Office considers exonerating an innocent person as important as convicting a guilty one."¹³⁰ Mr. Sedita is not alone; D.A. Michael Green acted as quickly in the matter of Frederick Peacock.¹³¹

While there is no uniformity among the state statutes as to what requirements need to be met before a request for post-

¹²⁷ *Id.* at 836 (noting that the ABA has argued that wrongful convictions can be attributed to lack of resources available via funding and increased workloads in prosecutors' offices).

¹²⁸ Ginsburg & Hunt, supra note 123, at 781.

¹²⁹ See Aviva Orenstein, Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence, 48 SAN DIEGO L. REV. 401, 411 (2011). Orenstein stated that some offices have established protocols directing the prosecutors to seek out potentially innocent prisoners. *Id.* Orenstein singled out the San Diego District Attorney, who directed that all cases prosecuted prior to 1992 be reviewed. *Id.*

¹³⁰ *Id.* at 410. Sedita was credited with promptly submitting an affidavit to the court to have the indictment against Douglas Pacyon dismissed upon his receipt of the newly tested DNA results that exonerated Pacyon of the crime. *Id.* Pacyon had spent seven years in prison for a rape he had not committed. Gene Warner & Matt Gryta, *Man Jailed Nearly 7 Years for '84 Rape is Exonerated*, BUFFALO NEWS (June 22, 2010), www.buffalonews.com/city/article90422.ece.

¹³¹ Orenstein, *supra* note 129, at 411. "I look at this as doing our job, every bit as well, or every bit as importantly as getting a conviction in a big murder case." *Id*.

conviction DNA testing will be granted,¹³² there is a pattern that the states' definition of newly discovered evidence is not broad enough to encompass DNA evidence that had been tested previously under older methods but would provide more accurate results if tested currently,¹³³

Although "[t]here is a value in criminal law to finality of verdicts and not permitting prisoners endless legal challenges to their convictions . . . the justices should be more concerned with the finality of executing someone when untested DNA evidence might shed light on his culpability "¹³⁴

B. GUILTY PLEAS

One of the obstacles to obtaining grants of post-conviction testing appears when the case has reached finality as a result of a guilty plea. Society has difficulty conceptualizing an instance in which an innocent person would admit to something that they did not do just to avoid going to trial. However, innocent people have been known to plead guilty for a variety of reasons, which may not make sense to others, but to them, presents a more desirable outcome. For example, they may not believe they can prevail at trial, they do not wish to risk the more severe sentence that will result if they lose at trial, or the prosecutor is offering the accused a benefit of some nature that provides the incentive for the plea, such as agreeing not to file charges against a loved one alleged to have participated in the crime. 135

Plea bargaining is viewed as "less to do with the weight of the evidence than . . . with the psychological temperament of the defendant and the charging options available to the prosecutor. Put simply, plea bargaining has little to do with actual guilt or

¹³² Rachel Steinback, *The Fight for Post-Conviction DNA Testing is Not Yet Over: An Analysis of The Eight Remaining "Holdout States" and Suggestions for Strategies to Bring Vital Relief to the Wrongfully Convicted*, 98 J. CRIM. L. & CRIMINOLOGY 329, 336 (2007).

¹³³ *Id.* at 344.

¹³⁴ Death, DNA and the Supreme Court, supra note 31.

¹³⁵ Gregory M. Gilchrist, *Plea Bargains, Convictions And Legitimacy*, 48 AM. CRIM. L. REV. 143, 146 (2011).

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innocence."136 The Supreme Court has recognized the psychological bargaining power of the prosecutor, but has continued to uphold the inducement of such pleas, including those that offer leniency for third parties in return for the plea.¹³⁷

The defendant could have weighed the circumstances and possible outcomes of taking the case to trial and decided that this was his best option. The fact that the defendant had prior convictions, which would have increased the penalties at sentencing if he was found guilty in a jury trial, could have factored heavily in the defendant's decision to plead guilty. 138 He could have also taken the plea in return for the promise of a reduction in the charges, as he may have taken part in a portion of the crime that was committed, but not the predicate crime. 139

HISTORY OF RIGHT TO POST-CONVICTION VII. TESTING OF DNA

In 2004, Congress enacted the Justice for All Act. 140 Section 3600 of the Act, known as the Innocence Protection Act ("IPA"), is the primary section dealing with post-conviction DNA Similar to statutory regulations governing postconviction DNA testing, the IPA sets forth specific instances in which requests for testing will be granted. For instance, testing will be conducted only in cases involving federal offenses.

¹³⁷ *Id.* at 157 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 n.8 (1978)) (noting that "a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person other than the accused . . . might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider.").

¹³⁶ *Id*.

¹³⁸ See 204 PA. CODE § 303.11 (2008).

¹³⁹ For example, the defendant could have taken part in the robbery of an individual, but not in the gang rape of the victim.

¹⁴⁰ Burke & Mertz, *supra* note 49, at 574. Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

¹⁴¹ Id. at 574-75.

Challenges may be made by an inmate only if the inmate meets ten requirements outlined in the IPA.¹⁴²

In 2009, the United States Supreme Court in District Attorney's Office v. Osborne tackled the question of whether an inmate has a constitutional right to obtain post-conviction access to DNA testing. 143 This landmark case found that there is no due process violation in blocking access to post-conviction DNA testing, even if the testing would be done at the inmate's expense.¹⁴⁴ In the matter before the Osborne court, defendant Osborne had claimed he received ineffective assistance of counsel because there had been no request for a specific type of DNA testing on biological fluid found in a condom found at the scene of the crime. 145 Osborne was tried for the kidnapping. sexual assault and attempted murder of a woman that he and an accomplice, Dexter Jackson, had solicited for sex.¹⁴⁶ It was alleged that the two men drove the woman to a secluded road. where they proceeded to sexually assault her at gunpoint.¹⁴⁷ Following the rape, the men ordered the woman out of the car, where she was choked, beaten with a gun and wooden axe handle, and subsequently shot.¹⁴⁸ Believing the victim to be dead, the men fled the scene.¹⁴⁹ However, the victim, who was merely grazed with the bullet, found her way back onto the main road, where she was able to obtain assistance. 150 The police

145 *Id.* at 58.

¹⁴⁷ *Id*. at 56.

¹⁴² *Id.* at 575. These requirements permit inmates to pursue DNA testing: (1) under "penalty of perjury"; (2) the inmates attestation that they are "actually innocent"; (3) the government's possession of the evidence which must have been kept under a proper chain of custody; and, (4) if the inmate was convicted following a trial, a factual assertion that "the identity of the perpetrator was at issue in the trial." *Id.*

¹⁴³ Dist. Atty's Office v. Osborne, 557 U.S. 52, 55-56 (2009).

¹⁴⁴ *Id*.

¹⁴⁶ *Id*.

¹⁴⁸ *Id*.

¹⁴⁹ Osborne, 557 U.S. at 56.

¹⁵⁰ Id. at 56-57.

found several items at the scene: a spent shell casing, the axe handle used to beat the victim, the blue condom worn by one of the assailants, and clothing of the victim that was stained with blood.151

Dexter Jackson was arrested by military police several days after the assault.¹⁵² When his car was searched, the police recovered the gun used in the assault, as well as several items that were identified as belonging to the victim.153 interrogation, Jackson confessed to the crime and identified his accomplice as William Osborne. The prosecution, armed with a plethora of evidence connecting Osborne to the crime, 155 proceeded with filing charges against Osborne. 156

At the direction of the prosecutor, DNA testing was performed on the condom found at the crime scene. 157 However, the type of testing performed was one in which identification of the perpetrator could only be narrowed down to less than five percent of the population.¹⁵⁸ Although a more exact method of DNA testing was available that could have precluded Osborne as being one of the assailants, the prosecution declined to order such a test.¹⁵⁹ Despite having knowledge of the existence of biological evidence, as well as the method of testing performed by the prosecutor, defense counsel

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<sup>151</sup> Id. at 57.
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¹⁵² Id.

¹⁵³ *Id*.

¹⁵⁴ *Id*.

¹⁵⁵ Osborne, 557 U.S. at 57. The evidence consisted of several statements, including the statement by Jackson identifying Osborne as his accomplice; the victim's photo array identification of Osborne as being one of her assailants; the testimony of third party witnesses placing Osborne in the company of Jackson just prior to the time the assault was committed; and the discovery of an axe similar to the one used in the beating in the living quarters of Osborne. *Id.*

¹⁵⁶ *Id.* at 58.

¹⁵⁷ *Id.* at 57.

¹⁵⁸ *Id*.

¹⁵⁹ Id. at 58-59.

failed to request that an exact method of testing be performed. 160 Osborne and Jackson were convicted of kidnapping, assault, and sexual assault; they were acquitted of attempted murder. 161 Osborne was sentenced to twenty-six years in jail. 162 Osborne's conviction and sentence were both affirmed on appeal. 163 Osborne subsequently sought post-conviction relief to have a more exact form of DNA testing performed on the biological materials found at the scene. 164

The Alaska Court of Appeals found that, although access to DNA testing was available under state law, such access was limited to evidence that had not previously been presented at trial. However, the Court, in an effort to expand the inmate's reach to this type of evidence, applied a three-part test, which provided additional rights of access: 166 "[the defendant needed to show:]...(1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning the defendant's identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." 167

Based on this three-part test, the Court of Appeals ordered the state to turn over to Osborne all DNA evidence in its possession.¹⁶⁸ The state appealed.¹⁶⁹ Upon review, the United States Supreme Court reasoned that, "[t]he Court of Appeals

¹⁶⁰ Osborne, 557 U.S. at 58. Defense counsel had later claimed that he did not request such testing out of fear that it would conclusively identify his client as one of the perpetrators. *Id.* at 58-59.

¹⁶¹ *Id.* at 58.

¹⁶² *Id.* Five of those years were suspended. *Id.*

¹⁶³ Id. at 59.

¹⁶⁴ *Id*. at 58.

¹⁶⁵ *Id.* at 59.

¹⁶⁶ Osborne, 557 U.S. at 65. This test was "a widely accepted three-part test to govern additional rights to DNA access under the State Constitution." *Id.*

¹⁶⁷ *Id*.

¹⁶⁸ *Id*.

¹⁶⁹ *Id.* at 65.

went too far . . . in concluding that the Due Process Clause requires that certain familiar preconviction trial rights be extended to protect Osborne's postconviction liberty interest."¹⁷⁰ The Court further reasoned that "[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man."¹⁷¹ The Court determined that it was within the state's discretion to decide what, if any, offer of help will be extended to the defendant in requests for testing.¹⁷² The Court further held that Osborne had no constitutional right to postconviction access to DNA testing, and that "[e]stablishing a freestanding right to access DNA evidence for testing would force [the Court] to act as policymakers "¹⁷³

VIII. STATE EFFORTS TO ADDRESS POST CONVICTION ACCESS TO DNA

While *Osborne* determined that there is no constitutional right to post-conviction access to DNA testing, the majority of the states have enacted legislation granting such rights to inmates. Forty-seven states currently have laws governing the rights and procedures assigned to post-conviction access.¹⁷⁴ However, while such laws exist, there is no consistency among them.¹⁷⁵ Some statutes are more restrictive than others,

¹⁷⁰ *Id*. at 68.

¹⁷¹ *Id*.

¹⁷² See Osborne, 557 at 72-74.

¹⁷³ *Id.* at 73.

¹⁷⁴ Michele L. Berry, Michele L. Berry on District Attorney's Office of Alaska v. Osborne – the High Court Rejects a Due Process Right to DNA Tests that May Definitively Prove an Inmates Innocence, 2009 EMERGING ISSUES 4152 (Aug. 21, 2009).

¹⁷⁵ Kristen McIntyre, *A Prisoner's Right to Access DNA Evidence to Prove His Innocence: Post-Osborne Options*, 17 Tex. Wesleyan L. Rev. 565, 569 (2011). Evidencing the vast differences in state requirements: the majority of states require a threshold showing of "materiality" before testing is granted; twenty-five states predicate the access on conviction of certain crimes; sixteen states, including Pennsylvania, require that an inmate assert actual innocence and present a prima facie case that the identity of the perpetrator was at issue in the original proceedings which resulted in conviction and sentencing. *Id.* at 569-70.

requiring the defendant to show not only that the DNA testing would likely result in proving his innocence,¹⁷⁶ but also that he can meet a multitude of threshold showings, thereby, for example, limiting the rights to matters in which the conviction occurred during a certain time frame. ¹⁷⁷

Consider the case of William Virgil. On April 11, 1987, the body of Retha Welch was discovered in the bathtub of her home. Ms. Welch, a nurse and ordained minister who frequently preached to prisoners, had been raped and stabbed to death. Law enforcement recovered evidence at the scene, which could have definitively pointed them toward the killer. However, DNA testing was not available at the time of the original trial.

Arrested and convicted of the crime, William Virgil continued to profess his innocence, and has fought for the right to have the evidence tested. However, like many in his predicament, Virgil not only encountered opposition from the prosecution, but also fell outside the requirements placed on individuals seeking post-conviction testing. Complicating Mr. Virgil's case even further was the fact that the evidence could not be found. 483

¹⁷⁶ *Id.* at 570.

¹⁷⁷ *Id*.

¹⁷⁸ Jim Hannah, *Lawyer Seeks DNA Testing in 1987 Killing*, THE CINCINNATI ENQUIRER (May 8, 2011), *available at* 2011 WLNR 9138875.

¹⁷⁹ *Id*.

¹⁸⁰ *Id.* In addition to the rape kit collected during autopsy, police recovered beer bottles, shoe prints, a cigarette butt, drinking glasses, a bloody palm print, hairs found on the victim's bathrobe and bloody shoes belonging to Mr. Virgil. *Id.*

¹⁸¹ Judge Grants DNA Testing in 1987 Murder Case, WKYT.COM (May 24, 2011), http://www.wkyt.com/home/headlines/122507474.html.

¹⁸² See Kentucky Judge Says Yes... Then No To DNA Testing That Could Prove Innocence, supra note 6; Hannah, supra note 178. William Virgil had been sentenced to seventy years in prison. Hannah, supra note 178. Under Kentucky law, only those individuals sentenced to death are given access to post-conviction DNA testing. See KY. REV. STAT. ANN. § 422.285 (West 2012).

¹⁸³ Hannah, *supra* note 178.

Undaunted by the obstacles facing them, Virgil's attorney, Linda A. Smith, pushed on, and it paid off – at least temporarily. On May 24, 2011, some twenty-three years after his conviction, William Virgil was given a glimmer of hope when Campbell Circuit Judge Fred Stine ordered that evidence recently discovered in the attic of the Campbell County Courthouse be produced for testing. However, Virgil's hope for exoneration was fleeting when prosecutor Michelle Snodgrass's motion for reconsideration was granted. Snodgrass's motion for reconsideration was granted.

Pointing to one of the flaws in post-conviction DNA testing process – the need for finality – Linda A. Smith stated, "[t]he first value of our justice system cannot be merely finality, it must be to seek and do justice. The truth should not be threatening to anyone in the criminal justice system and truth is what Mr. Virgil is seeking." At this point, Mr. Virgil's only hope of obtaining the truth is for the prosecutor to agree to testing, independent of a court's intervention. For now, this does not appear likely to happen. But, as so many involved in cases such as Mr. Virgil's have voiced, "[t]esting can either confirm guilt or establish innocence." So, when the quest is for truth and justice, why not acquiesce to testing that could possibly free an innocent man and put a violent criminal behind bars?

The case of William Virgil exemplifies the obstacles often faced by prisoners seeking post-conviction relief. Since there is no standard threshold requirement set forth in various statutes, one's success at obtaining post-conviction DNA testing is

¹⁸⁴ Judge Grants DNA Testing in 1987 Murder Case, supra note 181.

¹⁸⁵ Kentucky Judge Says Yes . . . Then No To DNA Testing That Could Prove Innocence, supra note 6. Judge Stine later reversed his order and concluded that Virgil did not fall within the class of individuals for whom post-conviction DNA testing was permitted. *Id.* Judge Stine also found that there had been no fraud committed on the court, thus finding a failure on Virgil's behalf to meet the "extraordinary circumstance" exception set forth in the Kentucky statute. *Id.*

¹⁸⁶ *Id*.

¹⁸⁷ *Id*.

¹⁸⁸ *Id*.

determined by where the crime took place.¹⁸⁹ Examples of these vast differences in requirements can be seen by comparing the statutes of Rhode Island and Pennsylvania.

A. RHODE ISLAND

Rhode Island has perhaps one of the most inmate friendly post-conviction statutes governing access to post-conviction testing of biological evidence. Under the Rhode Island statute there is no requirement that the type of testing requested existed prior to conviction, or that defense counsel's prior request for the testing has been denied by the trial court.¹⁹⁰ Rather, under the Rhode Island statute, requests for post-conviction testing are mandatorily granted provided that:

- (1) A reasonable probability exists that petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.
- (2) The evidence is still in existence and is capable of being subjected to DNA testing.
- (3) The evidence, or a specific portion of the evidence identified by the petitioner, was never previously subjected to DNA testing; or that the testing requested by the petitioner may resolve an issue that was never previously resolved by previous testing.
- (4) The petition before the Superior Court was filed in order to demonstrate the petitioner's innocence and not to delay the administration of justice.¹⁹¹

¹⁸⁹ Compare R.I. Gen. Laws § 10-9.1-12 (West 2012), with 42 Pa. Cons. Stat. Ann. § 9543.1 (West 2013) and Tex. Code Crim. Proc. Ann. art. 64.03 (West 2007).

¹⁹⁰ § 10-9.1-12.

¹⁹¹ § 10-9.1-12(a)(1)-(4).

Under the Rhode Island statute, DNA testing is discretionary if:

- (1) A reasonable probability exists that the requested testing will produce DNA results which would have altered the verdict or reduced the petitioner's sentence if the results had been available at the prior proceedings leading to the judgment of conviction.
- (2) The evidence is still in existence and is capable of being subjected to DNA testing.
- (3) The evidence, or a specific portion of the evidence identified by the petitioner was never physically subjected to DNA testing; or that the testing requested by the petitioner may resolve an issue that was never previously resolved by previous testing.
- (4) The petition before the superior court was filed in order to demonstrate the petitioner's innocence and not to delay the administration of justice. 192

To further assist in the pursuit of the truth, Rhode Island also requires preservation of biological evidence by law enforcement.¹⁹³ Local authorities are not permitted to destroy biological evidence without leave of the court.¹⁹⁴ The mandate of the Rhode Island statute differs drastically from that of Pennsylvania, both in letter and spirit.

¹⁹² § 10-9.1-12(b)(1)-(4).

¹⁹³ R.I. GEN. LAWS ANN. § 10-9.1-11 (West 2012). Preservation of biological evidence is required of all authorities to whom the evidence has been transferred, and runs from the initial receipt of the evidence through the entire term of incarceration. § 10-9.1-11(a).

^{194 § 10-9.1-11(}b).

B. Pennsylvania

Pennsylvania is one of those states with the most restrictive laws governing access to post-conviction access to DNA. Under the current statute, access is permitted to evidence that was discovered both prior to, and after, conviction. However, if the evidence is such that it was known to all parties prior to conviction, access is granted only if the evidence had:

[N]ot have been subject to the DNA testing requested because the technology for testing was not in existence at the time of the trial or the applicant's counsel did not seek testing at the time of the trial in a case where a verdict was rendered on or before January 1, 1995, or the applicant's counsel sought funds from the court to pay for the testing because his client was indigent and the court refused the request despite the client's indigency.¹⁹⁶

While rigorous standards are set forth in the Pennsylvania post-conviction testing statute, one positive point is that, unlike some other states' statutes, a confession does not preclude DNA testing provided that all of the other factors have been met. ¹⁹⁷ There is, however, a one-year time limit on the request for testing in Pennsylvania, which begins to toll the moment the judgment becomes final. ¹⁹⁸

One of the major stumbling blocks presented in the Pennsylvania statute concerns those cases in which the prosecution engaged in selective testing of forensic evidence. ¹⁹⁹ In these instances, while testing had been available, the prosecution elected not to subject the forensic evidence to any testing. Although the underlying reasoning may not be based on

¹⁹⁵ 42 PA. CONS. STAT. ANN. § 9543.1 (West 2013).

^{196 § 9543.1(}a)(12) (emphasis added).

¹⁹⁷ Commonwealth v. Wright, 14 A.3d 798, 817 (Pa. 2011).

¹⁹⁸ 42 PA. CONS. STAT. ANN. § 9545 (West 2012); *see also* Commonwealth v. Davis, 75 Pa. D. & C.4th 417, 421 (2005).

^{199 § 9545.}

nefarious circumstances, the preclusion of this evidence from testing bars the inmate from gaining post-conviction access to the evidence under Pennsylvania's present statutory scheme.²⁰⁰

Obviously Pennsylvania and Rhode Island are not the only two states that have set requirements for post-conviction DNA testing affecting the outcome of individual cases - as exemplified by the case of Henry Skinner in Texas. Following his conviction for a triple murder, Skinner followed the applicable standard established for prisoners seeking postconviction testing of DNA - he filed the requisite appeals and motions, all of which were denied.²⁰¹ At the time, Texas did not have a statute on their books that governed post-conviction testing. However, in April 2001, Texas added a chapter to their criminal code, which permitted prisoners to file a motion with the court that issued the conviction.²⁰² The code set forth certain requirements that needed to be satisfied in order for relief to be granted.²⁰³ The court held that Skinner had failed to "establish by a preponderance of the evidence that a reasonable probability exist[ed] that he . . . would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing"²⁰⁴ In a system where the role of the prosecutor is to advocate for the truth, it seems rather paradoxical that an individual's search for that truth should be moot merely because his request fails to meet thresholds set forth in state statutes that provide no consistency from one jurisdiction to another.

²⁰⁰ Id.

²⁰¹ Leading Cases, 125 HARV. L. REV. 321, 322-23 (2010).

²⁰² *Id.* at 322 (noting that Texas added Chapter 64 to the criminal code).

²⁰³ TEX. CODE CRIM. PROC. ANN. art. 64.03 (West 2007).

²⁰⁴ Skinner v. State, 122 S.W.3d 808, 813 (Tex. Crim. App. 2003).

IX. ETHICAL OBLIGATIONS ON THE PART OF THE PROSECUTOR WITH REGARD TO REQUESTS FOR POST-CONVICTION DNA TESTING

In 2008, the American Bar Association ("ABA") adopted new model rules, Rules 3.8(g) and (h), governing the conduct of prosecutors in dealing with post-conviction issues.²⁰⁵ The primary purpose of Rules 3.8(g) and 3.8(h) is to remedy "incidence of wrongful convictions, and to compel prosecutors to act [promptly] if they have strong evidence that indicates a defendant's innocence."²⁰⁶

Rules 3.8(g) and 3.8(h) were modeled after rules adopted by the New York Bar Association, which set forth prosecutors' obligations in instances where there is new evidence that may prove a defendant's innocence.²⁰⁷ Rules 3.8(g) and (h) impose a post-conviction duty upon prosecutors and suggest that prosecutors "should make reasonable, affirmative efforts to rectify the wrongful conviction" when the evidence the defendant desires to have tested is evidence that is "clear and convincing" in terms of proving innocence.²⁰⁸ The Rules also require investigation where a prosecutor "learns of 'new, credible and material' evidence creating a reasonable likelihood that the convicted defendant is innocent."²⁰⁹ In addition, if the investigation yields clear and convincing evidence that the person did not commit the offense, the prosecutor has a duty to seek to remedy the conviction.²¹⁰

Where the original conviction occurred within the prosecutor's jurisdiction, there is a requirement that the

²⁰⁵ Ginsburg & Hunt, *supra* note 123, at 771.

²⁰⁶ Garris, supra note 40, at 836.

²⁰⁷ Id. at 832-33.

²⁰⁸ Green & Yaroshefsky, *supra* note 47, at 496.

²⁰⁹ *Id.* at 511.

²¹⁰ Id. at 496; see also Daniel S. Medwed, Prosecutorial Ethics in the Postconviction Setting from A to Zacharias, 48 SAN DIEGO L. REV. 331, 333 (2011).

prosecutor "undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit."²¹¹

Since the inception of Rules 3.8(g) and (h), some states soon followed suit by employing the language of the model rule; however, the guidelines provided no consistent guidance.²¹²

X. CONCLUSION

It goes without saying that no matter how hard the players in the legal system try, there will be innocent people who are convicted of crimes they did not commit. However, attempts to remedy these travesties should not be fraught with insurmountable obstacles. The growing number of exonerations obtained through DNA testing casts a shadow over the perceived fairness of practices currently in place. The questionable strategic decisions of a minority of prosecutors to deny requests for post-conviction DNA testing goes against the grain of their primary mission – to seek justice.

Much has been written about wrongful convictions, and many lay the blame on the prosecution. Allegations have been made that prosecutors are often overzealous, unwilling to admit that they are capable of being wrong. However, while that may be true in some instances, the majority of prosecutors are individuals who follow the course that they are to advocate wholeheartedly for the victim and to seek justice. That being said, prosecutors are not blinded to the fact that errors can be made that need to be corrected, and as such have recently taken several self-imposed steps at ensuring that those claiming innocence of a crime have the assistance of the prosecutor's office in helping to prove this fact.

Recently, "Dallas County prosecutor Craig Watkins created a Conviction Integrity Unit that is staffed by a senior deputy chief, a full-time assistant district attorney, an investigator, and a legal assistant."²¹³ The Conviction Integrity Unit reviewed more than

²¹¹ Medwed, *supra* note 210, at 333 (quoting MODEL RULES OF PROF'L CONDUCT R. 3.8(g) (2010)).

²¹² Ginsburg & Hunt, supra note 123, at 771.

²¹³ Medwed, *supra* note 210, at 334.

400 DNA cases and vowed to evaluate every case where evidence identifies a perpetrator other than the defendant.²¹⁴ In its first two years of existence, the unit was credited with helping to exonerate eight individuals.²¹⁵ When the unit took on these cases, they had one purpose in mind – to ensure that they originally put the correct person behind bars.²¹⁶ In March 2010, New York County District Attorney Cyrus R. Vance, Jr. also announced the creation of a program that will include "a panel of ten prosecutors to assess cases and office practices, as well as a group of outside experts to offer advice on policy matters."²¹⁷

Dallas and New York are just two examples of steps prosecutors' offices are taking to ensure that justice is served. The success of these two programs lends credence to the belief that all prosecutors' offices should develop systems to review claims of wrongful conviction. Changes need to be made, not only in the way prosecutors test available forensic evidence, but also in police interrogation tactics and eyewitness identification techniques. Prosecutors place much faith in their team – victim identifications obtained via tainted techniques will often lead to a false belief on the part of the prosecutor that the accused is the actual perpetrator, thus leading to a domino effect that ends with a wrongful conviction. While it is true that the system has a long way to go to eliminate wrongful convictions, they at least have started to address the problem and seek solutions.²¹⁸

²¹⁵ *Id*.

²¹⁴ *Id*.

²¹⁶ *Id*.

²¹⁷ Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting it Right The First Time*, N.Y.L. SCH. L. REV. 1033 (2011).

²¹⁸ The ABA's addition of Model Rule 3.8 is also an indication of the legal professions' attempt to correct an injustice; as are the various statutes that set less restrictive post-conviction DNA testing requirements. Medwed, *supra* note 210, at 333.