a claim that is based on an indisputably meritless legal theory. See *Pratt v. Houston, supra*.

[3] This court has held that principles of liberal construction apply to the review of a denial of a motion to proceed in forma pauperis upon the ground that the complaint was frivolous. See *Tyler v. Nebraska Dept. of Corr. Servs., supra*. Liberally construed, Judy and Russell's petition claims their attorney committed malpractice in his representation of them in a bankruptcy case. While this claim may ultimately prove meritless, the district court erred in its finding that the petition was frivolous or malicious on its face and in denying in forma pauperis status for failure to plead a cause of action.

CONCLUSION

We conclude that the district court erred in denying Judy and Russell's motion to proceed in forma pauperis. We therefore reverse the judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
JUNEAL DALE PRATT, APPELLANT.
824 N.W.2d 393

Filed January 8, 2013. No. A-11-760.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. ____: ____. Under the DNA Testing Act, an appellate court will uphold a trial court's findings of fact unless such findings are clearly erroneous.
3. **DNA Testing.** Second, or successive, motions for DNA testing are permissible pursuant to the DNA Testing Act.
4. **Res Judicata: DNA Testing.** Res judicata principles would operate to bar a successive motion for DNA testing if the exact same issue was raised in both motions.
5. **Res Judicata.** The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if the former judgment was on the merits.

6. **DNA Testing.** Under the DNA Testing Act, a court is required to order DNA testing if it finds that (1) testing was effectively not available at the time of the 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 defendant's claim that he or she was wrongfully convicted.
7. **Postconviction: Appeal and Error.** An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
8. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
9. **DNA Testing.** When a defendant files successive motions for DNA testing pursuant to the DNA Testing Act, a court is required to first consider whether the DNA testing sought was effectively not available at the time of the trial; if it was not, the court must then consider whether the DNA testing was effectively not available at the time the previous DNA testing was sought by the defendant.
10. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
11. ____: ____. An exception to the law-of-the-case doctrine applies if a party shows a material and substantial difference in the facts on a matter previously addressed by an appellate court.
12. **Collateral Estoppel: Words and Phrases.** Collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit.
13. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
14. **Criminal Law: Collateral Estoppel: Double Jeopardy.** Collateral estoppel in a criminal proceeding has its basis in the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution.
15. **Criminal Law: Collateral Estoppel: Double Jeopardy: Proof.** A criminal defendant relying on collateral estoppel does so in relation to the constitutional protection against double jeopardy, and the defendant has the burden to prove that the particular issue sought to be relitigated is constitutionally foreclosed by the Double Jeopardy Clause.
16. **DNA Testing.** In cases of successive motions for DNA testing, the district court must make a new determination of whether the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, but such determination shall be limited to a review of the evidence occurring since the last motion for DNA testing.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Reversed and remanded for further proceedings.

Tracy Hightower-Henne, of Hightower Reff Law, L.L.C., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

Amy A. Miller for amicus curiae American Civil Liberties Union Foundation of Nebraska.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

INBODY, Chief Judge.

I. INTRODUCTION

Juneal Dale Pratt appeals the decision of the Douglas County District Court denying his second motion for DNA testing.

II. STATEMENT OF FACTS

In 1975, Pratt was convicted by a jury of sodomy, rape, and two counts of robbery and was sentenced to terms of incarceration on each of the convictions. These convictions and sentences were affirmed on direct appeal in *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977) (*Pratt I*). Thereafter, Pratt sought postconviction relief, which was denied, and which denial was affirmed in *State v. Pratt*, 224 Neb. 507, 398 N.W.2d 721 (1987) (*Pratt II*).

In June 2004, Pratt filed his first motion for DNA testing to have items still in evidence from the sexual assault tested for DNA. The motion was granted, and the clothing that had been worn by the victims at the time of the attack was tested at the University of Nebraska Medical Center for biological material. Pratt filed a motion to vacate his convictions or, in the alternative, a motion for new trial. Following a hearing, the district court denied Pratt's request to vacate his convictions or grant a new trial, citing the fact that the evidence was stored in such a way that it was impossible to tell how or when the DNA was deposited on the clothing. This decision was affirmed on appeal by the Nebraska Supreme Court.

See *State v. Pratt*, 277 Neb. 887, 766 N.W.2d 111 (2009) (*Pratt III*). In *Pratt III*, the Nebraska Supreme Court summarized the facts as follows:

> The facts of the case can be found in our prior decisions, but because Pratt is now arguing that the DNA evidence is at least exculpatory, we revisit the pertinent facts here. The victims in this case both testified at trial that they had separately picked Pratt out of a three-man lineup. Each victim also identified Pratt in a voice lineup, without any visual contact with the persons participating in the voice lineup. Both victims testified that they recognized Pratt's shoes during the lineup as the shoes of the man who had assaulted them. One victim testified that the shoes were distinctive because they were black patent leather with "suede in the middle." In addition, Pratt was wearing a ring at the lineup that both victims testified belonged to one of them.
>
> Another robbery victim testified that approximately 1 week after the first attack, Pratt had robbed her in the same hotel where the first attack took place. Several police officers testified regarding the chase and apprehension of Pratt after the second robbery.
>
> Pratt testified in his own defense and gave an alibi for the sexual assault. Pratt claimed to have had an injured leg at the time and therefore had been physically incapable of the attack. Pratt also testified that he was at home on the evening of the attack. This testimony contradicted statements Pratt gave to police at the time of his arrest. Both Pratt's mother and his live-in girlfriend testified in his defense, confirming his alibi. Pratt's sister testified that the ring he had been wearing was her ring and not the victim's ring. She further testified that Pratt often wore her clothing and jewelry. Pratt claimed that he was at the hotel at the time of the second robbery, because he was renting a room in order to have sex with a different girlfriend.
>
> On June 9, 2004, Pratt filed an amended motion under the [DNA Testing] Act to have items still in evidence from the sexual assault tested for DNA. The motion

was granted, and the clothing that had been worn by the victims at the time of the attack was tested for biological material. After the testing was conducted, Pratt sought a certification from the Douglas County District Court for a subpoena duces tecum to compel a DNA sample from one of the victims. Pratt claimed that with the victim's DNA, the DNA testing laboratory would be able to construct a complete profile that would result in his exoneration.

The district court granted the certification, and the State appealed, claiming that Pratt did not have the right to compel the victim to give a DNA sample under the [DNA Testing] Act. We determined that we did not have jurisdiction because the certification from the district court was not a final, appealable order and dismissed the case. Two concurring opinions suggested that Pratt did not have the right to obtain the victim's DNA through a subpoena duces tecum under the [a]ct.

After the case was sent back to the district court, the certification was vacated and a hearing was held on Pratt's motion to vacate his convictions under the [DNA Testing] Act or, in the alternative, motion for new trial. Pratt claimed that the DNA evidence, considered along with his alibi defense from trial, was sufficient to warrant vacating his convictions or, alternatively, to award him a new trial. Pratt claimed that the lineup in which he participated was highly suggestive and that the victims' identification, both in court and in the lineup, could not be trusted.

Kelly Duffy, a medical technologist, testified regarding the DNA results. Duffy stated that the results were inconclusive, that it was impossible to know when or how the DNA was deposited on the shirts, and that there was no evidence that any of the DNA was contributed from sperm, although it could have been. Duffy also testified that seven items of clothing, including both victims' clothing as well as Pratt's clothing, were stored in the same box. The clothing was not separately packaged or bagged in the box. Duffy testified that the DNA detected

could be from epithelial cells and that handling the clothing could be enough to deposit the DNA.

After preliminary testing, the two shirts worn by the victims at the time of the attack were found to have "stains" that might contain DNA. None of the stains were found to be presumptively from semen. The stains, although invisible to the naked eye, fluoresced under a particular kind of light used during the testing of the clothing. A red, white, and blue shirt worn by one victim at the time of the attack had eight different stained areas, labeled B1 through B8. A yellow flowered shirt worn by the other victim had five stained areas, C1 through C5a.

Two of the areas on the red, white, and blue shirt, B4 and B7, showed the presence of male DNA, and one area, B1, was inconclusive as to whether male DNA was present. Area B4 may or may not have been a mixture of one or more individuals, and if it was not a mixture, then Pratt would be excluded. Area B7 was a mixture of more than one individual's DNA, and at least one of those individuals was male. The results were inconclusive as to how many males contributed to the mixture, but at least one of those males was not Pratt.

Partial DNA profiles were obtained from all five stained areas on the yellow flowered shirt. Area C4 showed the presence of male DNA, while area C5 showed the possible presence of male DNA. Area C4 was a mixture of at least two people, one of them male, and Pratt could not be excluded as a contributor. Area C5 was also a mixture of at least two people, possibly more than one female and/or more than one male. Pratt could not be excluded as a contributor at area C5.

After the hearing, the district court denied Pratt's motion to vacate his conviction[s] as well as his motion for new trial. In its order, the district court cited the fact that the evidence was stored in such a way that it was impossible to tell how or when the DNA was deposited on the clothing. The district court found that the results of the DNA testing were largely inconclusive

> and that while the testing did not conclusively show that Pratt was a contributor, neither did it eliminate him as a contributor.

277 Neb. at 889-92, 766 N.W.2d at 113-15. In *Pratt III*, the Supreme Court affirmed the district court's determination that the DNA evidence was inconclusive because Pratt could not be excluded or included as a donor, and likewise affirmed the district court's denial of Pratt's motion to vacate his convictions and motion for new trial.

In June 2011, Pratt filed his second motion for DNA testing pursuant to the DNA Testing Act, Neb. Rev. Stat. § 29-4116 et seq. (Reissue 2008). Pratt's motion alleged that new technology for DNA testing had recently become available and "could lead to exculpatory evidence." In support of his motion, Pratt submitted an affidavit from Brian Wraxall, chief forensic serologist at the Serological Research Institute in Richmond, California. Wraxall's affidavit set forth that the analysis of the items of evidence submitted for testing was incomplete due to the limitations of the testing previously performed by the University of Nebraska Medical Center and to the improvements in technology that have occurred since 2005. Wraxall asserted that although no semen was detected on the two items tested, the test used (presumptive acid phosphatase test) reacts to an enzyme which is not stable, whereas the test he suggests using (P30 test) targets a protein which is very stable and makes it possible to detect sperm in older samples. Wraxall's affidavit further set forth that although only partial DNA profiles were obtained through the previous DNA testing, current techniques ("Identifiler Plus" and "Minifiler" kits) exist which were not available in 2005 and which can be used to increase the ability to obtain full DNA profiles in small, old, and degraded samples. Wraxall's affidavit explained that it is possible to attempt to obtain DNA samples of the victims by testing the clothing that had come in contact with the wearer's skin. Wraxall proposed reexamination of the samples to "possibly identify the source of the biological stains (e.g., semen or saliva)"; extract stains for DNA content and quantitate for the presence of male DNA; type any male stains using the

Identifiler Plus and Minifiler kits in order to obtain a male profile for potential searching in local, state, or national databases; and perform male DNA typing as necessary for possible inclusion or exclusion purposes.

The district court denied Pratt's second motion for DNA testing, finding that (1) the materials to be tested were not retained under circumstances likely to safeguard the integrity of their original composition, which finding was previously affirmed by the Nebraska Supreme Court in *Pratt III*; (2) it is possible that the clothing had further deteriorated or been further handled in a manner to deposit still more unidentified DNA; and (3) testing would not produce noncumulative, exculpatory evidence relevant to the claim that Pratt was wrongfully convicted. The district court specifically noted that contrary to claims contained in Pratt's motion, the affidavit from Wraxall did not claim that further testing would conclusively establish the source of the male DNA on the clothing sought to be tested. Further, the court summarized the strength of the case presented by the State at Pratt's trial, which included identifications of Pratt by three eyewitnesses, whose identifications were "thoroughly and exhaustively detailed to the jury," and the fact that at the lineup, Pratt was wearing a ring that he had stolen from one of the victims. Pratt appeals the denial of his second motion for DNA testing.

III. ASSIGNMENTS OF ERROR

On appeal, Pratt contends that the district court erred in denying his second motion for DNA testing. Pratt argues that the district court's finding that the biological material was not retained under circumstances likely to safeguard the integrity of its original physical composition was erroneous, because (1) the district court is bound by the law-of-the-case doctrine in making the determination and (2) the district court erred in failing to apply res judicata and/or collateral estoppel in making the determination. He also argues that the district court erred in finding that DNA testing would not likely produce noncumulative, exculpatory evidence relevant to his claim of wrongful conviction.

IV. STANDARD OF REVIEW

[1,2] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010); *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007). Under the DNA Testing Act, an appellate court will uphold a trial court's findings of fact unless such findings are clearly erroneous. *State v. Parmar*, 283 Neb. 247, 808 N.W.2d 623 (2012).

V. ANALYSIS

[3-5] Nebraska's DNA Testing Act allows for postconviction motions for DNA testing if the biological material at issue "[w]as 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." § 29-4120(1)(c). Thus, second, or successive, motions for DNA testing are permissible pursuant to the DNA Testing Act. However, we note that res judicata principles would operate to bar a successive motion for DNA testing if the exact same issue was raised in both motions. See *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007) (although strict doctrine of res judicata does not apply to postconviction actions, res judicata principles are applied in determining whether issues are procedurally barred). The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if the former judgment was on the merits. *Id.*

[6] Under the DNA Testing Act, a court is required to order DNA testing if it finds that (1) testing was effectively not available at the time of the 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 defendant's claim that he or she was wrongfully convicted. § 29-4120(5); *State v. Haas, supra*. Thus, we address each of these factors in turn, incorporating into our analysis the assignments of error raised by Pratt.

1. Testing Effectively Not Available at Time of Trial

The district court found, and the parties agree, that the DNA testing sought by Pratt was not available at the time of his trial, which occurred in the 1970's. However, we note that this is Pratt's second motion for DNA testing and the fact that there are continuing advances in DNA technology increases the likelihood that courts will be asked more frequently to consider successive motions for DNA testing filed by defendants. Our research has not uncovered a Nebraska appellate court opinion addressing the issue of a successive motion for DNA testing. But see *State v. Burdette*, No. A-07-1223, 2008 WL 4635849 (Neb. App. Oct. 21, 2008) (selected for posting to court Web site) (although court held second hearing on issue of DNA testing, record is unclear whether hearing was result of new motion for further DNA testing or previously filed motion).

[7,8] In the context of motions for postconviction relief, the Nebraska Supreme Court has held that an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion. *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009). The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *Id.* This rule preserves a defendant's ability to file claims, but mandates that a defendant raise issues at the first available opportunity.

[9] Applying this reasoning to successive motions for DNA testing would serve to maintain a balance of preserving defendants' rights to establish their innocence through DNA testing while acknowledging the need for finality in the criminal process. Therefore, we hold that when a defendant files successive motions for DNA testing pursuant to the DNA Testing Act, a court is required to first consider whether the DNA testing sought was effectively not available at the time of the trial; if it was not, the court must then consider whether the DNA testing was effectively not available at the time the previous DNA testing was sought by the defendant.

As we previously stated, both Pratt and the State concur that the DNA testing requested was not available at the time of his trial in the 1970's. The question then becomes whether the DNA testing was effectively not available at the time that Pratt filed his previous motion for DNA testing. Wraxall's affidavit set forth that improvements in technology have occurred since 2005, and he recommended performing certain DNA testing, such as the Identifiler Plus and Minifiler kits, which can be used to increase the ability to obtain full DNA profiles in small, old, and degraded samples. Additionally, Wraxall's affidavit suggests using the P30 test to attempt to detect sperm in the samples; whereas the test used in 2005, the presumptive acid phosphatase test, reacts to an enzyme which is not stable. Although Wraxall's affidavit does not specifically state that the P30 test was unavailable in 2005, at the time of Pratt's previous motion for DNA testing, the affidavit does make this inference. Thus, Pratt has sufficiently established that the DNA testing requested was not available at both the time of his trial and at the time of his previous motion for DNA testing.

2. Biological Material Retained Under Circumstances Likely to Safeguard Integrity of Original Physical Composition

The next issue is whether the biological material was retained under circumstances likely to safeguard the integrity of its original physical composition. Pratt argues that the district court's finding that the biological material was not retained under circumstances likely to safeguard the integrity of its original physical composition was erroneous, because (1) the district court is bound by the law-of-the-case doctrine in making the determination and (2) the district court erred in failing to apply res judicata and/or collateral estoppel in making the determination.

(a) Law-of-the-Case Doctrine

Pratt contends that the district court's previous ruling on his first motion for DNA testing, which ruling authorized DNA testing, necessitated a finding that the biological material had been retained under circumstances likely to safeguard the

integrity of its original physical composition; he contends that therefore, the court is barred by the law-of-the-case doctrine from reconsidering this issue.

[10,11] The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011); *Dowd Grain Co. v. County of Sarpy*, 19 Neb. App. 550, 810 N.W.2d 182 (2012). An exception to the law-of-the-case doctrine applies if a party shows a material and substantial difference in the facts on a matter previously addressed by an appellate court. *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008); *Dowd Grain Co. v. County of Sarpy, supra*.

Although Pratt does correctly point out that his previous motion for DNA testing was granted by the district court, following the completion of the DNA testing, a hearing was held wherein the medical technologist testified that the DNA results were inconclusive, that "it was impossible to know when or how the DNA was deposited on the shirts, and that there was no evidence that any of the DNA was contributed from sperm, although it could have been." *Pratt III*, 277 Neb. at 891, 766 N.W.2d at 114. Following this hearing, the district court found that the "evidence was stored in such a way that it was impossible to tell how or when the DNA was deposited on the clothing." *Id.* at 892, 766 N.W.2d at 115. The Nebraska Supreme Court, in affirming the denial of Pratt's motion to vacate his convictions and motion for new trial following his first motion for DNA testing, affirmed the lower court's factual finding that

> the evidence was not stored in such a way as to preserve the integrity of any DNA evidence. Although male DNA that might not be from Pratt was found on the clothing, . . . it was impossible to tell when or how the DNA was deposited on the clothing. The articles of clothing were stored in a box without being separately packaged. Evidence stickers were present on the clothing. . . . DNA may have come from epithelial cells deposited after handling the clothing.

Id. at 895, 766 N.W.2d at 117.

Although the district court must have initially determined that the biological material had been retained under circumstances likely to safeguard the integrity of its original physical composition, since such a finding was inherent in the court's decision to grant Pratt's first motion for DNA testing, the district court subsequently found that the evidence was not stored in such a way to preserve the integrity of any DNA evidence, which finding was affirmed by the Nebraska Supreme Court. Thus, we reject Pratt's claim that the law-of-the-case doctrine required the district court to find, in the course of his second motion for DNA testing, that the biological material in this case had been retained under circumstances likely to safeguard the integrity of its original physical composition.

(b) Collateral Estoppel and/or Res Judicata

Next, Pratt argues that the district court erred in failing to apply res judicata and/or collateral estoppel in making its finding that the biological material was not retained under circumstances likely to safeguard the integrity of its original physical composition.

(i) Collateral Estoppel

[12-15] The Nebraska Supreme Court has stated:

> "Collateral estoppel" means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit. There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.

State v. McCarthy, 284 Neb. 572, 576, 822 N.W.2d 386, 389 (2012). Collateral estoppel in a criminal proceeding has its basis in the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. *State v. Lynch*, 248 Neb. 234, 533

N.W.2d 905 (1995). A criminal defendant relying on collateral estoppel does so in relation to the constitutional protection against double jeopardy, and the defendant has the burden to prove that the particular issue sought to be relitigated is constitutionally foreclosed by the Double Jeopardy Clause. *Id.*

Pratt's collateral estoppel argument does not relate to his constitutional protection against double jeopardy; therefore, his claim is more properly considered under res judicata principles.

(ii) Res Judicata

Res judicata principles would operate to bar a successive motion for DNA testing if the exact same issue was raised in both motions. See *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007) (although strict doctrine of res judicata does not apply to postconviction actions, res judicata principles are applied in determining whether issues are procedurally barred). The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if the former judgment was on the merits. *Id.*

[16] In cases such as the instant case, where a defendant has filed successive motions for DNA testing, the district court is statutorily required to consider whether the "biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition." § 29-4120(5). Although a court must consider the question anew each time a defendant files a motion for DNA testing, we believe that limiting the review to evidence occurring since the last motion for DNA testing, regardless of the court's previous determination on the issue, is sound judicial policy and consistent with the principle of res judicata. Therefore, in cases of successive motions for DNA testing, the district court must make a new determination of whether the "biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition," but such determination shall be limited to a review of the evidence occurring since the last motion for DNA testing. Thus, if the prior determination was that the biological material had been retained

under circumstances likely to safeguard the integrity of its original physical composition, the district court will consider whether, in the intervening time period between the successive motions for DNA testing, the DNA sample continued to be retained under circumstances likely to safeguard the integrity of its original physical composition. Conversely, if the prior determination was that the biological material had not been retained under circumstances likely to safeguard the integrity of its original physical composition, the district court will need to consider if advances in DNA technology would affect this determination.

Although Pratt acknowledges that there has been a prior finding by the district court, which was upheld by the Nebraska Supreme Court, that the biological evidence was not stored in such a way as to preserve the integrity of DNA evidence, he contends that the same finding is not compelled in this case because of advances in DNA technology. Although the record reflects that DNA testing was performed on the two articles of clothing in 2005, which testing detected no semen on the clothing, Pratt argues that due to advancements in DNA technology, the evidence can now be tested to attempt to identify the biological source of the DNA evidence, i.e., skin cells, saliva, or semen. Pratt contends that if the new testing detects the presence of a DNA sample solely consisting of semen, that sample would meet the second requirement as having been retained under circumstances likely to safeguard the integrity of its original physical composition, because the presence of semen on the evidence would have come only from the perpetrator of the sexual assault, unlike skin cells or saliva samples which could possibly have been deposited through handling of the samples or through cross-contamination when the items of evidence were stored together.

Restated, Pratt's argument is that it is undisputed there is biological evidence on the clothing and that, even though prior DNA testing returned negative results for semen, due to advancements in the field of DNA testing, a retesting of the samples may be able to identify whether the biological source of the DNA is semen. If, in fact, further DNA testing proves that the source of one or more of the biological stains is semen,

it is unlikely that the stain would have been deposited at any time other than the commission of the offense. As such, the identification of the biological source as semen would establish that the samples had been retained under circumstances likely to safeguard the integrity of the original physical composition; if not, semen would not be able to be identified as the source of the biological stain.

We agree with Pratt. Although Wraxall's affidavit does not conclusively establish that further testing will absolutely be able to identify the source of the biological stains, he states that it may "possibly identify" the source. This case presents a unique factual situation where, until the DNA testing is conducted and it is determined whether the biological source of the stains can be identified, it is unknown with absolute certainty whether the samples were retained under circumstances likely to safeguard the integrity of their original physical composition. Although this may seem to be somewhat of a "fishing expedition," the statutory framework appears to authorize precisely such an expedition in order to allow wrongfully convicted persons the opportunity to establish their innocence through DNA testing. See § 29-4117. See, also, *State v. Smith*, 34 Kan. App. 2d 368, 372, 119 P.3d 679, 683 (2005) (district court's conclusion that absence of allegations contained in defendant's motion for DNA testing rendered motion "'purely a fishing expedition by the defendant' proved an unfortunate choice of phrase, given the subsequent Supreme Court endorsement of the statute's apparent scope as permitting precisely such an expedition").

3. Testing May Produce Noncumulative, Exculpatory Evidence

The final issue is whether the DNA testing requested by Pratt may produce noncumulative, exculpatory evidence relevant to his claim that he was wrongfully convicted. If the DNA testing that Pratt has requested is able to determine that the biological stains are from semen and the DNA does not match his DNA, this testing clearly meets the requirement that testing may produce noncumulative, exculpatory evidence relevant to his claim that he was wrongfully convicted.

See *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007) (where DNA testing could exclude defendant as contributor to semen sample, potential test results would be noncumulative, exculpatory evidence and relevant to claim of wrongful conviction). Additionally, some of the stains on the victims' shirts contained a mixture of male and female DNA and, because the victims' DNA was not available, prior DNA testing was unable to separate the mixed stains in order to exclude Pratt as a contributor and full profiles were not able to be obtained. Wraxall's affidavit states that using new DNA techniques which were not available in 2005, he may be able to produce a 16-marker profile. Wraxall's affidavit also proposes using DNA testing procedures which may identify the victims' DNA by testing areas of the shirts that came into contact with the wearer's body; this would allow male-only DNA typing which would allow Pratt to be either included or excluded from the mixtures. Additionally, Wraxall states that any full DNA profiles could be used for searching databases which Pratt contends can be used to obtain a hit matching the specific profile of the true perpetrator of the offense. This also meets the requirement that testing may produce noncumulative, exculpatory evidence relevant to his claim that he was wrongfully convicted.

VI. CONCLUSION

We find the district court erred in determining that the biological material was not retained under circumstances likely to safeguard the integrity of its original physical composition and that DNA testing would not produce noncumulative, exculpatory evidence. As such, the court abused its discretion when it denied Pratt's second motion for DNA testing. Therefore, we reverse the denial and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.