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“I’M INNOCENT”: ADDRESSING FREESTANDING CLAIMS OF ACTUAL INNOCENCE IN STATE AND FEDERAL COURTS

ELI PAUL MAZUR†

INTRODUCTION

Mr. Jones is convicted of first-degree murder in North Carolina. Mr. Jones is sentenced to life without the possibility of parole. The trial is free of any constitutional errors of procedure. Six years after his conviction, the North Carolina Center on Actual Innocence discovers evidence clearly exonerating Mr. Jones. Namely, interns working for the Center (1) uncover evidence implicating Mr. Smith, who is currently serving a life sentence in Virginia, and (2) obtain Mr. Smith’s voluntary confession to the crime. Moreover, evidence clearly establishes that Mr. Jones and Mr. Smith have never met. The Innocence Project brings this information to the prosecution. The prosecution contends that Mr. Smith is merely an un-indicted coconspirator. At the Motion for Appropriate Relief hearing, the trial judge denies Mr. Jones’ motion because (1) Mr. Jones’ trial counsel failed to use due diligence in procuring the exonerating evidence at the time of trial, and (2) because the trial court determined that the evidence was not “probably true” based on the prosecution’s un-indicted coconspirator theory. The Appellate Court affirms. The Governor denies clemency because of political fears that he will be perceived as weak on crime. All state court remedies are exhausted. Query: Can Mr. Jones seek redress for his free-standing claim of actual innocence in federal court through a writ of habeas corpus? No.

On February 5, 2002, after four years in prison and less than a month after PBS aired his story on Frontline’s “An Ordinary Crime,”¹ Terence Garner was released from prison and granted a new trial.² The media response to Frontline’s documentary about Garner was immediate, critical, and enraged at the state of criminal justice in North Carolina.³ As one commentator noted: “[the Terence Garner] case

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1. *Frontline: An Ordinary Crime* (PBS television broadcast, Jan. 10, 2002).

2. Anna Saker, *Garner’s Conviction Thrown Out*, NEWS AND OBSERVER (Raleigh, NC), Feb. 6, 2002, at A1.

3. See e.g., Mark Sachs, *Tuned In: A Question of Guilt, Innocence*, L.A. TIMES, Jan. 10, 2002, at Calendar Weekend Part 6, p. 69 (stating that “‘An Ordinary Crime’ . . . presents com-

may be one of the darkest examples of how the criminal justice system breaks down, through both carelessness and malevolence.”⁴ Despite protesting the innocence and release of Garner for years, Tom Lock, the Johnston County Prosecutor, responded to such criticisms by filing papers in the county court in support of Garner’s motion for a new trial.⁵ For Mark Montgomery, Garner’s defense attorney, “it [was] humbling to realize [he] spent four years trying to get [Garner] . . . out of prison using all [of his skills as a lawyer], and a 90-minute television documentary [freed Garner] like magic.”⁶

Terence Garner’s plight was not an aberration.⁷ Since 1992, the Innocence Project at Cardozo Law School (“the Project”) has helped exonerate over 100 innocent people wrongfully incarcerated in the United States.⁸ Most of the “convicts” the Project represents have exhausted all available legal avenues.⁹ Notwithstanding this limitation, the Project attempts to conclusively establish an inmate’s innocence through DNA and reinvestigation. Once the innocence of an inmate is sufficiently established, the remedies for relief are extremely limited.

elling evidence that Garner may be guilty of nothing more than having the wrong first name”); Kevin McDonough, *A Miscarriage of Justice on ‘Frontline’*, CHATTANOOGA TIMES, Jan. 10, 2002, at E6 (stating that the “[d]ocumentary . . . reveal[s] an astounding story of complacency, corruption and the ultimate injustice”); Mark Jurkowitz, *Protest Surrounds Providence Journal Sex-Arrest Coverage*, BOSTON GLOBE, Feb. 6, 2002, at F1 (stating that “Garner and Frontline were flooded with letters after the program was broadcast” and stating that the program established the “crime . . . was almost surely committed by someone else”) [hereinafter JURKOWITZ].

4. Bennett Gershman, *A Review of the Garner Case* (2002), available at <http://pbs.org/wgbh/pages/frontline/shows/ordinary/thoughts/gershman.html>.

5. Prosecutor Lock denied that the Frontline broadcast had anything to do with his decision to support a new trial and stated “I think it’s purely coincidental that the [the airing of Frontline and the request for a new trial for Garner] came to a head at the same time.” See JURKOWITZ, *supra* note 3.

6. Jane Ruffin and Adrienne Lu, *Retrial Ruled Out For Garner*, NEW & OBSERVER, JUN. 12, 2002, at A1.

7. See e.g., Paul Green, *An Innocent Man on North Carolina’s Death Row: A History of State v. Munsey*, available at <http://pfadp.org/innocent.shtml> (1999) (detailing the conviction, death sentence, reversal, and untimely death of Mr. Charles Munsey, and the State’s “knowing blindness” in procuring the false testimony of a jailhouse informant).

8. Innocence Project, *Innocence Project*, available at <http://www.innocenceproject.org> (Feb. 13, 2002). As of February 13, 2002, twenty-five states, and Australia, have an in-state “Innocence Project.” See Innocence Project, *Projects by State*, at http://www.innocenceproject.org/about/other_projects.php (Feb. 13, 2002). The Innocence Project at Cardozo Law School only handles cases “where post-conviction DNA testing of evidence can yield conclusive proof of innocence.” Other Innocence Projects, however, like the North Carolina Center on Actual Innocence, handle cases without surviving DNA evidence. See North Carolina Center on Actual Innocence, at <http://www.law.duke.edu/innocencecenter> (Feb. 13, 2002). Throughout this article the phrase “Innocence Project” refers collectively to all the Innocence Projects currently in operation.

9. Innocence Project, *About the Innocence Project*, at <http://www.innocenceproject.org/about/index.php> (Feb. 13, 2002).

In North Carolina state courts, inmates are required to present newly discovered evidence suggesting actual innocence in a Motion for Appropriate Relief ("MAR").¹⁰ This process is plagued by unnecessary procedural hurdles, the nonsensical imputation of attorney negligence upon indigent criminal defendants, and judicial conflicts of interest. Moreover, in federal court, current Supreme Court jurisprudence renders a claim of actual innocence¹¹ by an inmate non-cognizable on federal habeas corpus review in the absence of a corresponding procedural due process claim.¹² For instance, after state judicial remedies are exhausted, federal courts will not entertain a claim of actual innocence during a habeas hearing, such as conclusive DNA evidence exonerating an inmate¹³ or the appearance of an alleged homicide victim, unless the inmate produces credible evidence that constitutional errors of procedure occurred during trial.¹⁴ In support of this doctrine, Justices Rehnquist, Scalia, Thomas, Kennedy, and O'Connor have held that federal habeas review is intended "to ensure that individuals are not imprisoned in violation of the Constitution," and it is not intended to "correct errors of fact" in state court.¹⁵ Essentially, the present Supreme Court believes that entertaining "freestanding claims of actual innocence" in federal court is an affront to the fundamental tenets of federalism.¹⁶ Therefore, inmates must seek redress in state courts, and state collateral proceedings, for freestanding claims of actual innocence.

In three parts, this article (1) examines North Carolina statutory and case law defining the treatment and review of freestanding claims of actual innocence by North Carolina courts; (2) critiques the federal doctrine precluding federal district courts from entertaining freestand-

10. See *infra* Part I.

11. For the purposes of this essay the phrase "actual innocence" should be interpreted to mean "factual innocence" as opposed to "legal innocence".

12. *Herrera v. Collins*, 506 U.S. 390, 398-99 (1993).

13. Although the Innocence Protection Act, currently pending approval in the Senate and House, will guarantee inmates the right to test biological material left at the crime scene for exculpatory DNA evidence, the Innocence Protection Act specifically provides that "[a]n application under this section shall not be considered an application for a writ of habeas corpus . . ." Innocence Protection Act of 2002, S. 486, 107th Cong. § 103(a)(2)(d) (2002); Innocence Protection Act of 2002, H.R. 912, 107th Cong. § 103(a)(2)(d) (2002); see also *supra* notes 172-178, and accompanying text. Accordingly, the Innocence Protection Act does provide an avenue for testing available biological material, however the Act does not provide an additional forum for challenging state factual determinations, related to the exculpatory nature of that evidence, in federal court.

14. *Herrera*, 506 U.S. at 398-99; Judge Josephine Linker Hart, *Available Post-Trial Relief after a State Criminal Conviction when Newly Discovered Evidence Established "Actual Innocence"*, 22 U. ARK. LITTLE ROCK L. REV. 629, 629-30 (2000).

15. *Herrera*, 506 U.S. at 400.

16. See *id.* at 401 (stating that "[f]ew rulings would be more disruptive to our federal system than to provide for federal habeas review of freestanding claims of actual innocence.").

ing actual innocence claims on habeas corpus review; and (3) proposes to amend existing North Carolina law, as well as advance strategies for petitioners seeking redress for freestanding claims of actual innocence in federal court.

Thus, in Part I, I will explore the avenues and forums in North Carolina open to factually innocent inmates who discover evidence establishing their innocence. First, I will examine North Carolina's MAR statute codified at N.C. Gen. Stat. § 15A-1411(c) (2001).¹⁷ Second, I will consider the limitations of the MAR as it relates to freestanding claims of actual innocence.¹⁸ Specifically, I will, with 20/20 hindsight, explicate how the administration of justice in North Carolina is effected by the MAR's (1) statutory demand for "due diligence" at the time of trial, (2) statutory preference for the original trial judge to entertain the MAR, and (3) exacting common law standard for accrediting an accomplice's recantation of incriminating trial testimony. Third, I will examine the existence and limitations of other forums for relief available for factually innocent inmates, including executive clemency, The Innocence Protection Act, and The North Carolina Actual Innocence Commission. Finally, I will conclude that North Carolina's MAR is relatively progressive when compared to other states, but that the procedural limitations of the MAR render it ineffective to deal with many claims of actual innocence.¹⁹

In Part II, I will examine the Supreme Court's jurisprudence defining the federal habeas corpus review of actual innocence claims. In explaining this jurisprudence, I will demonstrate the internal incoherence and inconsistency of the Court's logic in *Sawyer v. Whitley*²⁰ and *Schlup v. Delo*,²¹ where the Court held that substantial evidence of actual innocence provides a gateway to consider otherwise procedurally barred claims,²² with that of *Herrera v. Collins*,²³ where the Court refused to consider the merits of the actual innocence claim because Herrera did not allege corresponding procedural violations.²⁴ Essentially, why did the Court fail to apply the equitable reasoning in *Sawyer* and *Schlup* to the freestanding actual innocence claim in *Herrera*?

Finally, in Part III, I will propose three fundamental solutions for remedying the existing procedural and substantive limitations of the MAR. First, I will propose that the North Carolina General Assem-

17. See *infra* note 40, and accompanying text.

18. See *infra* note 52, and accompanying text.

19. See *infra* note 126, and accompanying text.

20. 505 U.S. 333 (1992).

21. 513 U.S. 298 (1995).

22. See *infra* note 192, and accompanying text.

23. 506 U.S. 390 (1993).

24. See *infra* note 204, and accompanying text.

bly amend the MAR to eliminate the provision requiring newly discovered evidence of actual innocence to have been “unknown or unavailable to the defendant at the time of trial . . . [and which] could not with due diligence have been discovered or made available at that time.”²⁵ This provision punishes factually innocent inmates for the ignorance, neglect, and lack of resources of trial counsel; a harsh result considering trial counsel is hired, funded, and appointed by the state in 82% of felony prosecutions.²⁶ Moreover, a recent study by the Common Sense Foundation found that 18% of inmates on North Carolina’s death row were appointed trial counsel who had previously been disciplined by the state bar.²⁷ Accordingly, the state, and not the defendant, is ultimately the party responsible for the infirmities of trial counsel.

Second, I will propose that the General Assembly amend the MAR to eliminate the strong preference for the original trial judge to hear the MAR based on newly discovered evidence of actual innocence. Although arguments for judicial efficiency certainly favor a judge who is apprised of the evidence and facts of the particular case, the efficiency argument is outweighed by (1) psychological research showing that the judge who convicted a defendant is less likely to view new evidence that places the trial result in doubt as credible, probably true, or relevant,²⁸ (2) empirical research demonstrating that judges subject to direct electoral pressure are less likely to find error, where error exists, in state post-conviction proceedings,²⁹ and (3) statistical evidence revealing a waning public confidence in the criminal justice system’s ability to protect the innocent from wrongful incarceration.³⁰

Third, the General Assembly should legislatively overrule the North Carolina Court of Appeals mandate that trial courts consider the recanted or repudiated testimony of codefendants, accomplices, and informants [hereinafter “accomplice”] as “exceedingly unreliable.”³¹ This characterization is disingenuous. Accomplice testimony is consistently procured by the state through inducements such as leniency or cash payment. The Supreme Court of the United States has recognized that procuring testimony through a market exchange inevitably creates motivations to fabricate and self-exculpate.³² Nevertheless, accomplice testimony is an important and integral resource in our

25. N.C. GEN. STAT. § 15A-1415(c) (2002).

26. See *infra* note 247-249, and accompanying text.

27. *Id.*

28. See *infra* notes 264-275, and accompanying text.

29. See *infra* notes 277-282, and accompanying text.

30. See *infra* note 242.

31. See *infra* note 139.

32. See *infra* note 290.

criminal justice system; often accomplice testimony is the only evidence connecting the defendant to the crime. Accordingly, the Supreme Court has reconciled the defendant's right to a fair trial with the state's need for relevant, yet dubiously procured, testimony by holding that the established safeguards of our adversary system are sufficient to protect the accused from any undue prejudice.³³ However, where an accomplice recants incriminating testimony the legitimacy of the criminal justice system is implicated: the state "purchased" and convicted a defendant on the basis of repudiated testimony. The North Carolina Court of Appeals believes these recantations are always unreliable. However, no evidence has ever been presented suggesting that the recantations or repudiations of accomplices are any more suspect than their original testimony. In fact, by recanting their incriminating testimony, most accomplices will lose the benefit of their plea agreements because they did not testify "truthfully."³⁴ Consequently, recantations are actually "against the interests" of such witnesses, and therefore, should be regarded as "exceedingly reliable," rather than "exceedingly unreliable."

Finally, in Part III, I will also advance strategies for future litigants who want federal courts to review their freestanding actual innocence claims. Most notably, I believe the *Herrera* Court failed to recognize that procedural due process is not an end in itself.³⁵ Rather, the criminal process is intended to secure a substantively correct end. Accordingly, where the result of a proceeding is clearly inequitable (substantively incorrect) the procedure is per se flawed. Thus, if an inmate can produce "truly persuasive" evidence of actual innocence that precludes any rational trier of fact from finding the essential elements of the crime charged beyond a reasonable doubt (DNA evidence or the appearance of an alleged homicide victim), then, by definition, the state has insufficient evidence to sustain its burden of proof—a per se violation of procedural due process. Although "specific" procedural protections might have been complied with, the procedural rights of the defendant were not "generally" protected. Moreover, in this section I will also examine the relevance of substantive due process and the Eighth Amendment's prohibition against cruel and unusual punishment, in light of the federal court's unwillingness to provide a forum for freestanding claims of actual innocence.

33. See *infra* note 296.

34. See *infra* note 293.

35. See *infra* notes 308-310, and accompanying text.

I. NORTH CAROLINA POST-TRIAL RELIEF WHERE NEWLY DISCOVERED EVIDENCE ESTABLISHES ACTUAL INNOCENCE

Six years after his conviction, Mr. Jones files a Motion for Appropriate Relief in North Carolina Superior Court based on newly discovered evidence that establishes his actual innocence.

A. Motion for Appropriate Relief ("MAR")

Under North Carolina law, all post-trial motions relating to the defendant's trial must be brought under a Motion for Appropriate Relief ("MAR").³⁶ The MAR is designed to "'correct errors occurring prior to, during, and after a criminal trial.'"³⁷ The MAR permits a defendant to contest the trial court's judgment even after all direct state court appeals have been exhausted.³⁸ Accordingly, federal courts require North Carolina inmates to file a MAR to cure unresolved trial and constitutional errors, before filing a habeas corpus petition pursuant to 22 U.S.C. § 2254.³⁹

Normally, a MAR must be filed within ten days of the actual trial and verdict.⁴⁰ However, the statute provides relatively generous provisions for newly discovered evidence.⁴¹ Specifically, the defendant is entitled to file the MAR within a "reasonable time" after the new evidence is discovered.⁴² According to the statute, a defendant merely has the burden of establishing in the MAR that the new evidence was:

[U]nknown or unavailable to the defendant at the time of trial . . . could not with due diligence have been discovered or made available at that time, and . . . has a direct and material bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence.⁴³

In *State v. Britt*,⁴⁴ however, the North Carolina Supreme Court substantially restricted the remedial breadth of the MAR. In *Britt*, the Court held that a defendant presenting newly discovered evidence must prove, in addition to due diligence, that (1) the newly discovered evidence is probably true; (2) the evidence is material, competent and

36. N.C. GEN. STAT. § 15A-1411(c) (1988); see also IRVING JOYNER, CRIMINAL PROCEDURE IN NORTH CAROLINA, P. 1032 § 13.8 (1999) (hereinafter CRIMINAL PROCEDURE).

37. CRIMINAL PROCEDURE, *supra* note 36, at 1032 (quoting *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990)).

38. *Vester v. Stephenson*, 465 F. Supp. 868 (E.D.N.C. 1978).

39. *Id.*

40. N.C. GEN. STAT. § 15A-1414(a) (2002).

41. N.C. GEN. STAT. § 15A-1415(c) (2002).

42. *Id.*

43. *Id.*

44. *State v. Britt*, 360 S.E.2d 660, 664 (N.C. 1987).

relevant; (3) the new evidence is not merely cumulative or corroborative; (4) the new evidence does not merely tend to contradict or impeach the testimony of a former witness, and (5) the evidence is of such a nature that a different result will probably be reached at a new trial.⁴⁵

When a defendant files an MAR based on newly discovered evidence, the state has the right to file an answer and a summary judgment motion in response.⁴⁶ The summary judgment motion is intended to summarily eliminate some of the MAR issues and, ideally for the state, the MAR hearing. However, once a hearing is granted, the judge who presided over the initial trial may entertain the MAR, even if his or her term is expired.⁴⁷ If the relief requested in the MAR is denied, a defendant does not have the right to appeal the disposition, unless the MAR was filed as part of the direct appeal.⁴⁸ In cases of newly discovered evidence suggesting actual innocence, the MAR will almost always be subsequent to the direct appeal by right.⁴⁹ Nevertheless, as a matter of last resort, a defendant can file a *writ of certiorari* to the appropriate appellate court to challenge the MAR disposition.⁵⁰ The appellate court, however, is free to dispose of the appeal without consideration, and the decision of the appellate court is final and not subject to review by any other North Carolina court.⁵¹

1. Procedural Limitations of the Motion for Appropriate Relief

The procedure for presenting newly discovered evidence during North Carolina's MAR is quite liberal relative to other states.⁵² Nevertheless, the MAR has vital procedural limitations. First, evidence establishing actual innocence is consistently held unreviewable under section (c) of the MAR, which requires that the new evidence was "unknown or unavailable to the defendant at the time of trial . . . [and] could not with due diligence have been discovered or made available

45. *Id.*

46. N.C. GEN. STAT. § 15A-1420(b1)(2) (2002); see also *State v. Sexton*, 532 S.E.2d 179 (N.C. 2000) (noting the ability of the judge to dismiss the case on the pleadings, if no questions of fact exist.)

47. N.C. GEN. STAT. § 15A-1413(b) (2002).

48. CRIMINAL PROCEDURE, *supra* note 36, at 1045.

49. The mechanisms now in place to investigate claims of actual innocence, like the North Carolina Center on Actual Innocence, often take years, even decades, to properly investigate and establish claims of actual innocence.

50. N.C. GEN. STAT. § 15A-1422(c)(3) (2002).

51. N.C. GEN. STAT. § 15A-1422(f) (2002).

52. See, e.g., Judge Josephine Linker Hart, *Available Post-Trial Relief after a State Criminal Conviction when Newly Discovered Evidence Established "Actual Innocence"*, 22 U. ARK. LITTLE ROCK L. REV. 629, 629-30 (2000) (stating that Arkansas has no procedure, except executive clemency, for the consideration of newly discovered evidence establishing actual innocence).

at that time.”⁵³ Consequently, defendants are denied a forum to redress claims of actual innocence because their attorney, often appointed by the state, failed to use due diligence.⁵⁴ Second, the MAR statute has a strong preference for the trial judge to entertain the MAR.⁵⁵ However, an analysis of the *Garner* case, similar cases, and relevant psychological and empirical research, reveals that the judge who convicted and sentenced the defendant at trial is less likely to view newly discovered evidence as credible, probably true, or relevant during a state post-conviction proceeding.⁵⁶ Third, the North Carolina Court of Appeals has advised trial courts to give little weight to a codefendant's, accomplice's, or informant's recantation or repudiation of incriminating testimony given pursuant to a state offered inducement of leniency or cash payment. Accordingly, even where the defendant's conviction is *entirely* based on the incriminating testimony of *one* witness who subsequently recants that testimony, North Carolina MAR courts consistently deny new trial motions because codefendant recantations are “exceedingly unreliable.”⁵⁷ In the following sections I will articulate the procedural limitations of the MAR, and lay the foundation for Part III, wherein I propose amendments to North Carolina's MAR.

a. Limitation #1: The Due Diligence Problem

North Carolina courts consistently deny MAR based upon newly discovered evidence because the evidence was available at trial.⁵⁸ Not

53. N.C. GEN. STAT. § 15A-1415(c) (2002).

54. In *Gideon v. Wainwright* the United States Supreme Court held that the Sixth Amendment to the United States Constitution requires federal and state governments to provide effective assistance of counsel to indigent defendants in all felony prosecutions. *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963). Accordingly, it would seem to naturally follow that a defendant whose wrongful conviction was caused by the negligence of his or her attorney could have his or her conviction vacated in state and/or federal post conviction proceedings. However, as one scholar has noted, the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), “interpreted the requirements of the Sixth Amendment's right to effective assistance of counsel in such an ultimately meaningless manner as to require little more than a warm body with a law degree standing next to the defendant.” Richard Klein, *Symposium Gideon—A Generation Later: The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1448 (1999). Although the infirmities of the Supreme Court's ineffective assistance of counsel jurisprudence is extremely relevant to actual innocence claims, these infirmities are, nevertheless, outside the scope of this article. For a thorough review and analysis of this topic see Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996).

55. See *supra* note 47.

56. See *infra* notes 264-282, and accompanying text.

57. See *infra* notes 148-160, and accompanying text.

58. *State v. Wiggins*, 431 S.E.2d 755, 767 (N.C. 1993); *State v. Powell*, 364 S.E.2d 322 (N.C. 1988); *State v. Person*, 259 S.E. 2d 867 (N.C. 1979); *State v. Beaver*, 229 S.E. 2d 179 (N.C. 1976); *State v. Smothers*, 423 S.E.2d 824, 827 (N.C. App. 1992); *State v. Riggs*, 394 S.E.2d 670, 674 (N.C. App. 1990).

surprisingly, courts rely on arguments of judicial efficiency, economy, and diligence to hold that evidence available at trial should be presented during trial. However, most cases of actual innocence, like those researched by the North Carolina Center on Actual Innocence, concentrate on reinvestigating the crime.⁵⁹ This reinvestigation often produces strong evidence of actual innocence that was available at the time of trial, but was not discovered by defense counsel because of a lack of funding, resources, or diligence. The MAR procedurally bars consideration of this evidence and punishes factually innocent and wrongfully incarcerated inmates because of the lack of resources or the ineptitude of trial counsel, many of whom are appointed by the state.⁶⁰ These critiques of the “due diligence” limitation are discussed at length in Part III.

In *State v. Powell*,⁶¹ for example, the defendant (“Powell”) was convicted of first-degree rape.⁶² At trial, the alleged victim testified that she was attacked and raped by a black man fitting the description of Powell.⁶³ After his conviction, Powell filed a MAR based on newly discovered evidence and section 15A-1415(c).⁶⁴ Powell presented the statements of two vacationers, who were staying at a beach cottage directly across from where the alleged rape occurred. The vacationers were prepared to testify that they had “observed through binoculars a black male and a white female in the dunes. The couple stayed in the dunes approximately twenty minutes and then walked hand in hand toward the beach.”⁶⁵ This newly discovered evidence was presented to show that the element of force was absent, because the alleged victim consented to the sexual contact.

The court denied the MAR, holding that Powell’s counsel failed to use due diligence in procuring and presenting the exculpatory testimony at trial.⁶⁶ The court reasoned that defense counsel examined an investigator’s notes containing the information during the actual trial; that defense counsel should have procured the testimony of the two witnesses at that time.⁶⁷ The court held that “the defendant . . . is not . . . entitled to a new trial . . . under N.C.G.S. § 15A-1415(b)(6) . . .

59. In fact, the Cardozo Law School Innocence Project handles most cases involving DNA exonerations. Other innocence projects, created at schools around the country, are primarily concerned with reinvestigating cases where an inmate claims actual innocence and no DNA evidence exists to exonerate the inmate.

60. See *infra* notes 247-252, and accompanying text.

61. *State v. Powell*, 364 S.E.2d 322 (N.C. 1988).

62. *Id.*

63. *Id.* at 334.

64. *Id.*

65. *Id.* at 336.

66. *Id.*

67. *Id.*

[because he] did not act with due diligence in seeking this witness.”⁶⁸ Although I take no position with respect to the innocence or guilt of Powell, it is relatively clear that the due diligence limitation of the MAR, imputing the ineffective investigation of trial counsel to the defendant, bars courts from considering relevant evidence bearing on the actual innocence of the wrongfully incarcerated.⁶⁹

b. Limitation #2: The Statutory Preference for the Trial Judge to Entertain the MAR

The judge who presided over the trial is the preferred judge to entertain the MAR.⁷⁰ This preference for the trial judge is strong: The statute permits the trial judge to entertain the MAR even after the judge's term has expired.⁷¹ This preference is problematic for two reasons. First, psychological research shows that the judge who convicted the defendant is less likely to view new evidence placing the trial result in doubt as credible, probably true, relevant, or likely to cause a different result in a new trial.⁷² Second, empirical research demonstrates that judges subject to direct electoral pressure are less likely to find error, where error exists, in state post-conviction proceedings.⁷³ These critiques, further explored in Part III, are particularly relevant in the context of the MAR. Specifically, the MAR's strong preference for the trial judge implicates the psychological theory of “egocentric bias,” and North Carolina constitutional and statutory law providing for the election of the Superior Court judiciary implicates the research on electoral pressure and judicial error rates.⁷⁴

Moreover, the psychological and empirical data is reinforced by North Carolina case law. In *State v. Garner* and *State v. Hunt*, the defendants' presented evidence at the MAR placing the trial result in doubt. In both cases, however, the judge, who also presided over the original trial, used “probable truth” and “likelihood of success” provisions of the MAR to summarily dismiss credible actual innocence claims. Through an examination of these cases, I hope to set the stage

68. *Id.*

69. For a discussion of the relationship between the Sixth Amendment right to effective assistance of counsel and actual innocence claims see *infra* note 54.

70. See *supra* note 47.

71. See *supra* note 47.

72. See *infra* notes 264-275, and accompanying text.

73. See *infra* notes 277-282, and accompanying text.

74. For instance, the Criminal Procedure Act, provides “venue for . . . trial proceedings . . . in the county where the charged offense occurred.” N.C. GEN. STAT. § 15A-131(c) (2001). Moreover, the North Carolina Constitution, as well as state election and appointment law, requires a Superior Court judge to be “a resident of the judicial district as it will exist at the time the person would take office if elected.” N.C. GEN. STAT. § 163-106(i) (2001); N.C. CONST. ART. IV SEC. G(1).

for an evaluation and analysis of the MAR's potential political and psychological bias against defendants presenting claims of actual innocence.

2. Trial Judge's Discretion in Determining "Probable Truth" and "Credibility" of New Evidence

During a MAR, a defendant must prove the probable truth of the newly discovered evidence.⁷⁵ The MAR court is vested with the determination of whether the newly discovered evidence is probably true.⁷⁶ The court's decision is binding on appeal, and reversible only if the court abused its discretion.⁷⁷ In *State v. Garner*, as well as other cases, the MAR court cited the "probable truth" limitation to dispose of credible claims of actual innocence supported by substantial evidence.⁷⁸

In *Garner*, an armed robbery and shooting occurred at the Quality Finance Company in Johnston County, North Carolina.⁷⁹ The police found Kendrick Henderson's fingerprints at the scene, and subsequently arrested him.⁸⁰ Henderson told the authorities that Richard Keith Riddick and Riddick's cousin from New York, "Terence," participated in the crime.⁸¹ The cousin, Terrance DeLoach, was a 24-year-old African-American from New Jersey. Terrance DeLoach recently moved to North Carolina after spending five years in a New York prison for robbery.⁸² Henderson gave the authorities the address of "Terence."⁸³

When Johnson County Police went to the address of Terrance DeLoach he was not home.⁸⁴ However, the police were familiar with a man named Terence Garner. Garner was a sixteen-year-old African-American recently arrested for possession of Marijuana. Based on Henderson's identification of a man named "Terence," public pressure to solve the crime, and Terence Garner's recent possession charge, the police arrested Terence Garner.⁸⁵ Henderson informed

75. *State v. Britt*, 360 S.E.2d 660, 664 (N.C. 1987).

76. *State v. Garner*, 523 S.E.2d 689, 698 (N.C. App. 1999).

77. *State v. Harding*, 429 S.E.2d 416, 423 (N.C. App. 1993).

78. *State v. Britt*, 360 S.E.2d 660, 665 (N.C. 1987); *State v. Garner*, 523 S.E.2d 689, 698 (N.C. App. 1999); *State v. Riggs*, 394 S.E.2d 670, 674 (N.C. App. 1990); *State v. Martin*, 252 S.E. 2d 859, 861 (N.C. App. 1979); *State v. Hoots*, 334 S.E.2d 74, 76 (N.C. App. 1985); *State v. Carter*, 311 S.E.2d 5, 11 (N.C. App. 1983); *State v. Sprinkle*, 266 S.E.2d 375, 377 (N.C. App. 1980).

79. *Garner*, 523 S.E.2d at 692.

80. *Garner*, 523 S.E.2d at 693; Mark Montgomery, *The Garner Case: Statement of the Case 1* (2000) (on file with author) [hereinafter "Montgomery"].

81. Montgomery, *supra* note 80.

82. *Id.*

83. *Id.*; *Garner*, 523 S.E.2d at 693.

84. Montgomery, *supra* note 80.

85. *Id.*

the Johnston County police that they had the wrong "Terence," the first time he met Garner.⁸⁶ Alice Wise, however, an employee who was shot in the eye during the robbery, told police they had "the right ones" after seeing Terence Garner and the other African-American codefendants in shackles at a bond hearing.⁸⁷ Police never returned to the address of Terrance DeLoach, and never investigated whether a different "Terence" was involved in the crime.⁸⁸

At trial, two eyewitnesses, Wise and a coworker, identified Terence Garner as the shooter.⁸⁹ Although he failed a polygraph examination prior to trial,⁹⁰ codefendant Riddick, the cousin of Terrance DeLoach, testified pursuant to a plea agreement that Terence Garner was an accomplice, and that Riddick did not have a cousin named "Terence."⁹¹ Bertha Miller, the only African-American employee of the Quality Finance Company present at the robbery, testified that she knew Terence Garner before the robbery—"I practically helped raise Terence Garner"⁹²—and that Terence Garner was not one of the assailants.⁹³ Moreover, Henderson, the other codefendant, testified on Garner's behalf, against the advice of his lawyer,⁹⁴ that Terence Garner was not involved in the crime and that the authorities had arrested the wrong "Terence."⁹⁵ Several of Garner's friends and relatives testified that he was playing Church softball at the time of the robbery.⁹⁶ Garner was convicted and sentenced to forty-three years in prison.⁹⁷

After trial, Henderson kept telling the Wayne County authorities they had the wrong "Terence."⁹⁸ Only a day after convicting Terence Garner, the police went back to the address of Terrance DeLoach.⁹⁹ This time Terrance DeLoach was home. After some questioning by Wayne County authorities, DeLoach confessed to the crime.¹⁰⁰ The Wayne County police transferred DeLoach to Johnson County au-

86. *Garner*, 523 S.E.2d at 693.

87. Montgomery, *supra* note 80.

88. *Id.*

89. *Garner*, 523 S.E.2d at 693.

90. *An Ordinary Crime*, *supra* note 1, at Interview of Tom Lock, available at <http://pbs.org/wgbh/pages/frontline/shows/ordinary/interviews/lock.html>.

91. *Garner*, 523 S.E.2d at 698.

92. *Frontline: An Ordinary Crime, Introduction* (2002), available at <http://pbs.org/wgbh/pages/frontline/shows/ordinary/etc/synopsis.html>.

93. *Garner*, 523 S.E.2d at 693.

94. *Frontline: An Ordinary Crime, Introduction* (2002), available at <http://pbs.org/wgbh/pages/frontline/shows/ordinary/etc/synopsis.html>.

95. *Garner*, 523 S.E.2d at 693.

96. *Id.*

97. *Id.* at 692.

98. *Id.* at 693.

99. *Id.* at 694.

100. *Id.*

thorities where he confessed to the crime a second time.¹⁰¹ Later that day, a stunned Johnston County Prosecutor, Tom Lock, held a press conference publicly disclosing the DeLoach confession and his intention to join in a defense motion for either a new trial or the immediate release of Garner.¹⁰² However, Lock quickly and mysteriously changed his position contending that Garner was still involved in the crime. Subsequently, Riddick admitted to State Bureau of Investigation agents that he perjured himself at trial, and that his cousin, Terence DeLoach, was the third accomplice in the crime.¹⁰³ Moreover, Bertha Miller, after being shown a photograph of DeLoach, stated that DeLoach might have been the third robber, and Miller again stated that Garner did not participate in the crime.¹⁰⁴ The other two eyewitnesses, both Caucasian, failed to identify DeLoach and remained steadfast in their identification of Garner.¹⁰⁵

Based on this newly discovered evidence of actual innocence, and Riddick's perjured testimony during trial, Garner filed a MAR seeking a new trial.¹⁰⁶ At the MAR hearing, to support his motion for a new trial, Garner first called Henderson who testified that Garner was not the right "Terence" and that Terence DeLoach was the gunman.¹⁰⁷ Next, Garner called DeLoach and Riddick, however both refused to testify based on their Fifth Amendment privilege against self-incrimination.¹⁰⁸ Bertha Miller did not testify, because the defense was unaware of her tentative identification of DeLoach.¹⁰⁹ The two Caucasian witnesses, Wise and Woodward, testified that Garner was the third robber.¹¹⁰

Judge Jenkins, who presided over the original trial, denied the defense motion for a new trial.¹¹¹ Judge Jenkins was running for reelection, the *Garner* case was front-page news, and commentators have

101. *Id.* Subsequently, DeLoach recanted his confession. *Id.* This recantation, however, has been the subject of great controversy. According to Mark Montgomery, Garner's appellate counsel, the Johnston County Police were not "overjoyed that DeLoach had confessed . . . they were concerned about the upcoming election, they were concerned about what this might mean to their job if they had gotten the wrong person convicted . . . And sure enough, four-and-a-half hours later, DeLoach took that confession back." *An Ordinary Crime*, *supra* note 1, at Interview with Mark Montgomery, available at <http://pbs.org/wgbh/pages/frontline/shows/ordinary/interviews/montgomery.html>.

102. *An Ordinary Crime*, *supra* note 1, at Interview of Tom Lock, available at <http://pbs.org/wgbh/pages/frontline/shows/ordinary/interviews/lock.html>.

103. *Garner*, 523 S.E.2d at 698.

104. *Id.* at 701.

105. Montgomery, *supra* note 80.

106. *Garner*, 523 S.E.2d at 694.

107. Montgomery, *supra* note 80.

108. *Garner*, 523 S.E.2d at 694.

109. *Id.*

110. *Id.*

111. *Id.*

argued that this political pressure was Garner's biggest obstacle to receiving a fair trial and MAR hearing.¹¹² As a basis for denying the MAR, Judge Jenkins held that the testimony of Riddick and DeLoach was not credible, and therefore, concluded as a matter of law that the proffered evidence was not "probably true."¹¹³ Moreover, on appeal, the North Carolina Court of Appeals affirmed Judge Jenkins. The Court held that "[t]he trial court is in the best position to judge the credibility of a witness. Here, the trial court found that the defendant failed to prove that DeLoach's statements . . . were probably true. Based on the competent evidence taken at the motions hearing, the findings by [Judge Jenkins] regarding DeLoach's confession are binding on appeal."¹¹⁴

On January 10, 2002, PBS aired Terence Garner's story on Frontline's *An Ordinary Crime*.¹¹⁵ "Television viewers from across the country sent telephone and computer messages to . . . Governor Mike Easley's office . . . [and] urged [him] to take action in the case;"¹¹⁶ "Chris Kelly, a spokesman for 'Frontline,' said the program drew 1,200 e-mail messages;"¹¹⁷ Tom Lock reported that his "voice mail [was] full;"¹¹⁸ and newspapers throughout the country responded with shock and rage at the state of criminal justice in North Carolina.¹¹⁹ On February 5, 2002, after four years in prison and less than a month after PBS aired his story on Frontline,¹²⁰ Terence Garner was released from prison and granted a new trial.¹²¹ Following this response, the Johnston County Prosecutor, Tom Lock, filed papers in

112. *Gershman*, *supra* note 4 (arguing that "the principal obstacle to a fair and truthful verdict [in the Garner case was] the trial judge, Knox V. Jenkins, Jr. . . . First elected eight years ago, he planned to run for reelection the year of the Garner trial. Indeed, it appears that he viewed this trial as a chance to promote publicly his near-obsession with teenage violence. He even asked a local newspaper reporter, Glenna Musante to cover the trial" and "apparently confided to [her] well before the conclusion of the trial that Garner was guilty of this 'horrible crime'").

113. *Garner*, 523 S.E.2d at 698.

114. *Id.*

115. *Frontline: An Ordinary Crime* (PBS television broadcast, Jan. 10, 2002).

116. Anne Saker, *PBS Show Gets Flurry of Protests*, NEWS & OBSERVER, Jan. 12, 2002, at B3.

117. *Id.*

118. *Id.*

119. See e.g., Sachs, *Tuned In; A Question of Guilt, Innocence*, L.A. TIMES, Jan. 10, 2002, at Calendar Weekend Part 6, p. 69 (stating that "An Ordinary Crime . . . presents compelling evidence that Garner may be guilty of nothing more than having the wrong first name"); Kevin McDonough, *A Miscarriage of Justice on 'Frontline'*, CHATTANOOGA TIMES, Jan. 10, 2002, at E6 (stating that the "[d]ocumentary . . . reveal[s] an astounding story of complacency, corruption and the ultimate injustice"); JURKOWITZ, *supra* note 3 (stating that "Garner and Frontline were flooded with letters after the program was broadcast" and stating that the program established the "crime . . . was almost surely committed by someone else").

120. *Frontline: An Ordinary Crime* (PBS television broadcast, Jan. 10, 2002).

121. Anna Saker, *Garner's Conviction Thrown Out*, NEWS AND OBSERVER (Raleigh, NC), Feb. 6, 2002, at A1.

the county court supporting Garner's motion for a new trial.¹²² On June 11, 2002, Tom Lock dismissed all charges against Garner, deciding not to re-prosecute him in a new trial. According to Lock, he was "no longer convinced beyond a reasonable doubt of Garner's guilt", and thought that "ultimately the system has worked for [Terence Garner]."¹²³ Mark Montgomery, Garner's defense attorney, disagreed with this contention arguing that "Terence Garner is free in spite of the system, not because of it."¹²⁴ In fact, for Montgomery "it [was] humbling to realize [he] spent four years trying to get [Garner] . . . out of prison using all [of his skills as a lawyer], and a 90-minute television documentary springs him like magic."¹²⁵

In *Garner*, the procedural limitations of the MAR rendered the statute ineffective to deal with Garner's claim of actual innocence.¹²⁶ Although Garner presented overwhelming evidence of actual innocence, Judge Jenkins ruled that the evidence was not credible. Although many commentators have argued that Judge Jenkins' bias against Garner was consciously malicious because Jenkins was acutely aware of the political volatility of the Garner case and his coming judicial election campaign, I disagree. Rather, Judge Jenkins, being the trial judge who entered judgment against Garner and sentenced him to forty-three years in prison, was not the fair and impartial arbiter of justice necessary in an MAR hearing presenting newly discovered evidence of actual innocence. If North Carolina required a different judge to hear MAR's based on newly discovered evidence of actual innocence then Garner might have received a new trial four years before Frontline aired his story.

3. Trial Judge's Discretion in Determining that a "Different Result will Probably be Reached at a New Trial"

During a MAR, a defendant must prove that "a different result will probably be reached at a new trial."¹²⁷ The MAR court is vested with the determination of whether the new evidence will likely produce a different result at a new trial.¹²⁸ The court's decision is binding on

122. Prosecutor Lock denied that the Frontline broadcast had anything to do with his decision to support a new trial and stated "I think it's purely coincidental that the [the airing of Frontline and the request for a new trial for Garner] came to a head at the same time." See JURKOWITZ, *supra* note 3.

123. Jane Ruffin and Adrienne Lu, *Retrial Ruled Out For Garner*, NEW & OBSERVER, Jun. 12, 2002, at A1.

124. *Id.*

125. *Id.*

126. *Supra* notes 105, and accompanying text.

127. *Britt*, 360 S.E.2d at 665.

128. *Garner*, 523 S.E.2d at 698.

appeal, and reversible only if the court abused its discretion.¹²⁹ In *State v. Hunt*,¹³⁰ and other cases,¹³¹ the MAR court has used this limitation as a gateway to dispose of credible actual innocence claims supported by substantial evidence.

In *Hunt*, Daryl Hunt was convicted of the first-degree felony murder of Deborah Sykes.¹³² Sykes died during the commission of a rape, sexual assault, kidnapping and robbery.¹³³ On the basis of newly discovered evidence, namely DNA evidence conclusively proving that Hunt was not the source of semen found in Sykes, Hunt requested a new trial. At the MAR hearing, Judge Morgan, who presided over the initial trial, entertained the motion. A DNA expert testified that Hunt could not have been the source of the semen found in Sykes.¹³⁴ Nevertheless, Judge Morgan held that Hunt was not entitled to a new trial because a different result would probably not be reached.¹³⁵ Judge Morgan concluded that Hunt did commit a sexual offense, and that the DNA evidence was irrelevant because "he could have penetrated the victim without depositing semen."¹³⁶ Finally, "Judge Morgan concluded that the State's case was not 'fatally flawed' because the State's theory on rape . . . was only 'somewhat weakened' by the DNA evidence."¹³⁷

As in *Garner*, the trial judge entertained Hunt's MAR. Judge Morgan, the judge who presided over the trial in which Hunt was convicted, likely denied a motion to dismiss based on the sufficiency of the evidence and entered judgment against Hunt believing in the justice and truth of the trial result. Although Hunt presented DNA evidence questioning the trial result, Judge Morgan refused to grant Hunt a new trial because, in his discretion, Judge Morgan did not believe that a different result would likely occur. If the MAR statute required a different judge to hear the MAR, Hunt might have received a new trial.

129. *Harding*, 429 S.E.2d at 423.

130. 339 N.C. 622, 457 S.E.2d 276 (1995).

131. See e.g., *Garner*, 523 S.E.2d at 698 (holding that the exclusion of Riddick's recanted testimony did not create "a reasonable possibility that a different result would have been reached at trial").

132. *Hunt*, 457 S.E.2d at 279.

133. *Id.*

134. *State v. Hunt*, No. 84CRS42263, jud. Order at 4, 9 (Super. Ct. Forsyth County, Nov. 10, 1994).

135. *Id.* at 10.

136. Elizabeth V. Lafollette, *State v. Hunt and Exculpatory DNA Evidence: When is a New Trial Warranted?*, 74 N.C. L. REV. 1295, 1300 (1996) (citing *State v. Hunt*, No. 84CRS42263, jud. Order at 9 (Super. Ct. Forsyth County, Nov. 10, 1994)).

137. *State v. Hunt*, No. 84CRS42263, jud. Order at 10 (Super. Ct. Forsyth County, Nov. 10, 1994).

In sum, a twenty-twenty hindsight review of previous MAR proceedings reveals a tension between the trial judge's investment in the original trial result and the petitioner's protected interest in presenting newly discovered evidence of actual innocence at any "reasonable time." In Part III, I will explore the psychological and empirical research supporting the elimination of the MAR's preference for the trial judge to entertain MAR based upon newly discovered evidence of actual innocence.¹³⁸

a. Limitation #3: Recanted Testimony of Codefendants

North Carolina courts consistently dispose of MAR based upon the recantation or repudiation of codefendant testimony by holding that the recantation is "exceedingly unreliable."¹³⁹ The MAR statute provides that "recanted testimony . . . which has a direct and material bearing upon . . . the defendant's guilt or innocence" is an available ground for relief.¹⁴⁰ In *State v. Britt*, the North Carolina Supreme Court articulated a different standard for the review of recanted testimony than that for newly discovered evidence. In *Britt*, the Court held that, "[a] defendant may be allowed a new trial on the basis of recanted testimony if: (1) the court is reasonably well satisfied that the testimony given by a material witness is false, and (2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at trial."¹⁴¹ However, in *State v. Garner*, *State v. Brown*,¹⁴² and *State v. Shelton*¹⁴³ the North Carolina Court of Appeals limited the remedial breadth of this review by holding that "[a] recantation by a convicted codefendant involving a confession of perjury is exceedingly unreliable."¹⁴⁴ Accordingly, the North Carolina appellate courts advised that "it is [the] duty of the trial court to deny the motion for [a] new trial where it is not satisfied that [the codefendant's] recantation is true."¹⁴⁵ As I will address in Part III, this "heightened scrutiny" for codefendant recantations is disingenuous, in contravention of known facts, and permits the courts to be complicit to injustice.¹⁴⁶

138. See *infra* notes 258-284, and accompanying text.

139. *Brown*, 394 S.E.2d at 449; see *Garner*, 523 S.E.2d at 699 (holding that the recanted testimony of a codefendant "is exceedingly unreliable . . . especially where the recantation involves a confession of perjury or where there is a repudiation of the recantation"); *Shelton*, 205 S.E.2d at 318-19 ("Such testimony is exceedingly unreliable If the recantations of witnesses are suspect, so are the post-trial statements by convicted defendants.").

140. N.C. GEN. STAT. § 15A-1415(c) (2002).

141. *Britt*, 360 S.E. 2d at 665.

142. *Brown*, 394 S.E.2d at 449.

143. *Shelton*, 205 S.E.2d at 318-19.

144. See *supra* note 139.

145. *Shelton*, 205 S.E.2d at 318.

146. See *infra* notes 285-291, and accompanying text.

In *State v. Brown*,¹⁴⁷ defendant, Bobby Ray Brown, was convicted of the first-degree murder of Mr. Clarence Wayne Tilley and sentenced to life imprisonment. In the words of the appellate court, "Richard Lee Hopper, known as Ricky, was the State's principal witness at trial."¹⁴⁸ In 1985, four years after the murder and while in custody on charges relating to a stolen truck, Hopper made a confession to police implicating himself and Brown in the 1981 murder of Mr. Tilley. In exchange for his testimony against Brown, Hopper received a suspended sentence for his part in the murder, a spot in the federal witness protection program, and a monetary allowance.¹⁴⁹

In 1987, two years after he was convicted, Brown filed a MAR based on Hopper's recantation of his testimony implicating Brown in the murder.¹⁵⁰ At the MAR hearing, "Hopper testified that his trial testimony was false to the extent that it implicated defendant or himself in the murder of Wayne Tilley."¹⁵¹ To explain his fabrication, "Hopper stated he was motivated to render false testimony to avoid conviction on unrelated charges concerning a truck."¹⁵² Moreover, Hopper testified that "while he was waiting to testify at defendant's trial, he . . . received free lodging and \$250 to \$300 per week for food and necessities."¹⁵³

In denying Brown's MAR, the trial judge concluded that "he was not reasonably well satisfied that Hopper's trial testimony was false."¹⁵⁴ As a basis for this conclusion, the trial judge found as fact that "there was no reason, except conscience, for Ricky Hopper to implicate himself or Brown in the Tilley murder."¹⁵⁵ Apparently, the trial court concluded that liberty, or the possible loss thereof, does not provide a sufficient motivation to fabricate and/or shift blame.¹⁵⁶ In affirming the trial court's denial of Brown's MAR, the appellate court held that "[a] recantation by a convicted codefendant involving a confession or perjury is 'exceedingly unreliable.'"¹⁵⁷ Seemingly, Hop-

147. *Brown*, 394 S.E.2d 434.

148. *Id.* at 437.

149. *Id.* at 438.

150. *Id.* at 441.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 449.

155. *Id.* at 449.

156. *But see generally*, Eli Paul Mazur, *Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice*, 51 DUKE L.J. 1333 (2002) (discussing the Supreme Court's jurisprudence holding that the accused is protected from the inherent motivations to provide fabricated and/or self-exculpating testimony spawned by plea agreements by virtue of the procedural safeguards of the Anglo-American adversary system, such as vigorous cross-examination and a properly instructed jury).

157. *Brown*, 394 S.E.2d at 449.

per's trial testimony contained sufficient indicia of reliability to withstand a motion to dismiss and a directed verdict.

In *Garner*, discussed *supra*, Richard Keith Riddick failed a pre-trial polygraph, yet, he was deemed reliable enough to testify pursuant to a plea agreement with the State that Terence Garner was the gunman during a violent robbery and shooting at Quality Finance in Johnston County, North Carolina.¹⁵⁸ One week after Garner was convicted and sentenced to forty-three years imprisonment, Riddick recanted his testimony during an interview with Agent Mike East of the State Bureau of Investigation.¹⁵⁹ Based on this evidence, as well as a plethora of other evidence, Garner filed a MAR seeking a new trial. During both the MAR hearing and the appellate court's review of the MAR hearing, the Court denied Garner's motion because Riddick changed his story three times evidencing that his recantation was "exceedingly unreliable."¹⁶⁰

In sum, the North Carolina Court of Appeals has advised trial courts that codefendant, accomplice, and informant recantations of incriminating trial testimony are exceedingly unreliable. In Part III, I will explore research and statistical evidence that suggests that this characterization is disingenuous and implicates the legitimacy of the criminal justice system, thereby transforming North Carolina courts into instruments of injustice.¹⁶¹

B. *Executive Clemency*

After having his MAR denied, Mr. Jones requests a Clemency hearing with the North Carolina Governor.

As a last resort, a North Carolina inmate can seek clemency from the Governor.¹⁶² Under Article III of the North Carolina Constitution, the Governor is vested with the power to "grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper."¹⁶³ However, the Governor's clemency power is not a judicial process, and is not subject to any review. Rather, the clemency power

158. *Garner*, 523 S.E.2d at 692-94.

159. *Garner*, 523 S.E.2d at 694.

160. *Id.* at 699.

161. See *infra* notes 290-300, and accompanying text.

162. N.C. CONST. ART III § 5(6).

163. *Id.*

is often affected by political factors.¹⁶⁴ Thus, as the court held in *State v. Jarrette*,¹⁶⁵

We reject categorically the contention . . . that 'the inevitable result of the North Carolina system of commutation is that an arbitrarily selected number of those convicted of like crimes will be put to death' The exercise by one Governor of this judgment, resulting in the commutation of the sentence of one man convicted of murder or rape and the refusal to commute the sentence of another convicted of such crime, cannot be called "freakish" or 'arbitrary' merely because another Governor might, theoretically, have reached opposite conclusions.¹⁶⁶

Empirical studies of clemency in North Carolina confirm the Court's holding in *State v. Jarrette*; executive clemency is not arbitrary in North Carolina, it is dead. Between 1909 and 1970, 594 inmates were sentenced to death in North Carolina.¹⁶⁷ Of the 594 inmates sentenced to die, 236 inmates (40%) had their sentences commuted to life.¹⁶⁸ In comparison, in the last twenty-five years only three North Carolina death row inmates had their sentences commuted to life "prior to . . . Governor Mike Easley's decision to grant clemency to Robert Bacon, Jr. on October 2, 2001."¹⁶⁹ The decline in the use of executive clemency is not unique to North Carolina.¹⁷⁰ Accordingly, clemency is not a practical alternative to effective post-conviction judicial review.¹⁷¹ Clemency does not satisfy the due process concerns associated with actual innocence claims.

164. See Daniel T. Kobil, "The Quality of Mercy Strained: Wrestling the Pardoning Power from the King," 69 TEX. L. REV. 569, 608 (1991) (contending that political and electoral pressure have eliminated the viability of executive clemency as a quasi-judicial remedy).

165. *State v. Jarrette*, 202 S.E.2d 721 (N.C. 1974).

166. *Id.* at 742-43.

167. Gene R. Nichol, *Governors With Power to Spare*, News & Observer (Raleigh, NC), Oct. 10, 2001, at A21.

168. *Id.*

169. Jake Sussman, "Unlimited Innocence: Recognizing an 'Actual Innocence' Exception to AEDPA's Statute of Limitations," 27 N.Y.U. REV. L. & SOC. CHANGE 343, Fn. 110 (2001-02).

170. See e.g., Hugo Adam Bedau, "The Decline of Executive Clemency in Capital Cases," 18 N.Y.U. L. & SOC. CHANGE 255, 272 (1990-91) (noting the marked decline in the use of executive clemency); Daniel T. Kobil, "Chance and the Constitution in Capital Clemency Cases," 28 CAP. U. L. REV. 567 (2000) (same).

171. Arlene Anderson, *Responding to the Challenge of Actual Innocence Claims After Herrera v. Collins*, 71 TEMP. L. REV. 489 (1998) (arguing that executive clemency is not an effective means of dealing with claims of actual innocence and noting that "the clemency process 'possesses the defects of its virtues: notably, a lack of guaranteed procedural safeguards, and, given the degree of discretion, a risk of arbitrary denial'" (quoting Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 967 (1994))).

C. *The Innocence Protection Act*

After the Governor denied Mr. Jones' request for a hearing, Mr. Jones waits three years until the federal house and senate pass the Innocence Protection Act, and the President signs the Act into law. Unfortunately, the Innocence Protection Act only benefits wrongfully convicted inmates where DNA evidence can establish "persuasive evidence of their innocence." The police, however, did not discover any DNA evidence in their investigation and prosecution of Mr. Jones. Consequently, the Innocence Protection Act is inapplicable to Mr. Jones.

On July 18, 2002, the Senate Judiciary Committee approved the Innocence Protection Act (hereinafter "IPA").¹⁷² First introduced in 2000, the IPA was, purportedly, a legislative response to "more than 100 cases in the United States [where] DNA evidence . . . led to the exoneration of innocent men and women . . . some of whom came within days of being executed."¹⁷³ In stating the Congressional Findings and Purposes of the IPA, the IPA provides: "Under current law in many States, it is difficult to obtain post-conviction DNA testing because of time limits on introducing newly discovered evidence."¹⁷⁴ Contrasting these time limitations with the aforementioned exonerations, the IPA provides: "It shocks the conscience and offends social standards of fairness to deny inmates a right of access to evidence for tests that could produce persuasive evidence of their innocence."¹⁷⁵ Accordingly, in order to prevent what the IPA labels "unconstitutional punishment," the IPA provides: "No State shall deny a prisoner in State Custody access to evidence for the purpose of DNA testing, if the proposed DNA testing has the scientific potential to produce new, noncumulative evidence which is material to [the prisoner's claim] that the prisoner did not commit [the offense for which he or she was convicted], and which raises a reasonable probability that the prisoner would not have been convicted"¹⁷⁶

Where DNA evidence is not left at the crime scene, however, the IPA does not provide relief for wrongfully convicted inmates.¹⁷⁷ As one commentator has explained, "the [IPA] does not go far enough in rooting out the evils that beset the process and lead to convictions of

172. Innocence Protection Act of 2002, S. 486, 107th Cong. § 102 (2002); Innocence Protection Act of 2002, H.R. 912, 107th Cong. § 102 (2002).

173. Innocence Protection Act of 2002, S. 486, 107th Cong. § 103(a)(1)(E) (2002);

174. *Id.* at § 103(a)(1)(H).

175. *Id.* at § 103(a)(1)(K).

176. *Id.* at § 103(b)(2)(b).

177. See e.g., *The Proposed Innocence Protection Act Won't—Unless it Also Curbs Mistaken Eyewitness Identification*, 63 OHIO ST. L.J. 263, 264 (2002) (noting that "[t]o avert mistaken convictions and executions, legislative reforms need to go beyond DNA, and avert mistakes arising from erroneous eyewitness identification").

innocent persons. Providing DNA testing is worthless if there is no biological material left behind at the crime scene [And] [o]nly a handful of . . . exonerations have come about from DNA testing."¹⁷⁸ Accordingly, the IPA, as currently written, is not a practical alternative to effective post-conviction judicial review for the factually innocent.

II: FEDERAL HABEAS REVIEW OF NEWLY DISCOVERED EVIDENCE

At this point, Mr. Jones has exhausted every state court remedy for his actual innocence claim. His MAR was denied. The Governor denied clemency. Moreover, because DNA evidence was either not discovered or not preserved, the Innocence Protection Act does not provide Mr. Jones with a forum for redress. Consequently, Mr. Jones is forced to seek redress in federal court. Thus, the next inquiry is: what redress can Mr. Jones receive in federal court for a freestanding claim of actual innocence? None

A. The Admissibility of Newly Discovered Evidence

The Supreme Court's jurisprudence relating to a federal habeas court's ability to entertain newly discovered evidence of actual innocence has a relatively short and incoherent history.¹⁷⁹ In *Townsend v. Sain*, the Court made its first declaratory pronouncement that:

Where newly discovered evidence is alleged in a habeas application . . . such evidence must bear upon the constitutionality of the applicant's detention; the existence of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.¹⁸⁰

In the opinion of the Supreme Court, federal habeas review is intended to protect the accused from constitutional violations of procedural due process.¹⁸¹ For instance, federal habeas provides a forum for relief to individuals who did not receive legal counsel,¹⁸² received ineffective assistance of counsel,¹⁸³ did not have the opportunity to confront adverse witnesses,¹⁸⁴ or where the prosecution failed to dis-

178. *Id.* at 270-71 (citing James S. Liebman, *The New Death Penalty Debate: What's DNA Got to Do With It*, 33 COLUM. HUM. RTS. L. REV. 527, 541 (2002) (finding that "of the 96 post-1973 exonerations, only a handful, something close to 10 percent, required DNA.)).

179. *Townsend v. Sain*, 372 U.S. 293, 317 (1963); *Patterson v. New York*, 432 U.S. 197, 208 (1977); *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Herrera v. Collins*, 506 U.S. 390, 398-99 (1993); *Schlup v. Delo*, 513 U.S. 298 (1995).

180. 372 U.S. at 317.

181. *Id.*

182. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

183. *Strickland v. Washington*, 466 U.S. 668 (1984). For a discussion of the relationship between ineffective assistance of counsel and actual innocence claims see *supra* note 54.

184. See e.g., *Coy v. Iowa*, 487 U.S. 1012 (1988).

close exculpatory evidence.¹⁸⁵ However, in the opinion of the Court, “[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.”¹⁸⁶

B. Schlup and Sawyer: The Procedural Gateway for Claims of Actual Innocence

However, in two cases after *Townsend*, the Court retracted from this hard-line position by granting federal habeas review to procedurally barred claims because of evidence of actual innocence.¹⁸⁷ In *Sawyer v. Whitley*, the inmate was convicted of first-degree murder and sentenced to death.¹⁸⁸ After his state and federal remedies were exhausted, Sawyer filed a second federal habeas petition alleging violations of *Brady* and *Strickland*.¹⁸⁹ In addition, Sawyer presented substantial new evidence that he was factually innocent of the crime.¹⁹⁰

Normally, successive habeas petitions are barred from judicial consideration by 28 U.S.C. § 2244.¹⁹¹ In *Sawyer*, however, the Court held that a “miscarriage of justice exception” permits federal courts to grant habeas review of procedurally barred claims where the petitioner can establish “a colorable claim of factual innocence.”¹⁹² The *Sawyer* Court held that a defendant must prove “by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found” him guilty.¹⁹³ Although the Court denied Sawyer’s petition, holding Sawyer did not satisfy the threshold showing of actual innocence, the Court did create a “gateway” for defendants to file, and for courts to consider, otherwise barred habeas petitions because of colorable claims of actual innocence.¹⁹⁴

185. *Brady v. Maryland*, 373 U.S. 83 (1963).

186. *Patterson v. New York*, 432 U.S. 197, 208 (1977).

187. *Schlup v. Delo*, 513 U.S. 298 (1995); *Sawyer v. Whitley*, 505 U.S. 333 (1992).

188. *Sawyer*, 505 U.S. at 336-37.

189. *Id.* at 347-48.

190. *Id.*

191. The provision stated in relevant part that no federal judge “shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person . . . , if it appears that the legality of such detention has been determined” by a federal court “on a prior application for a writ of habeas corpus. . . .” 28 U. S. C. § 2244(a) (2002).

192. *Sawyer*, 505 U.S. at 339.

193. *Id.* at 336.

194. *Id.* at 339. In *Sawyer*, the Court held that “the exception for ‘actual innocence’ is a very narrow exception and, accordingly, limited its ruling to the facts of Sawyer’s particular case: Namely, *Sawyer* only created a gateway for petitioners challenging their death sentences and not their underlying convictions. *Id.* at 341. Subsequently, however, in *Schlup v. Delo*, 513 U.S. at 302-03, this gateway was widened to include challenges to underlying convictions.

In *Schlup v. Delo*, Schlup was convicted of murder and sentenced to death.¹⁹⁵ Like Sawyer, Schlup exhausted his state and federal remedies, and filed a second habeas petition alleging violations of *Brady* and *Strickland*.¹⁹⁶ In addition to alleging procedural barred claims, Schlup presented substantial new evidence that he was actually innocent of the crime.¹⁹⁷ The appellate court denied Schlup's petition, holding that "but-for" causation did not exist between the alleged constitutional violation and the jury's determination of guilt and that a reasonable juror could have found Schlup guilty.¹⁹⁸

In *Schlup*, the Court reexamined the "but for" standard set in *Sawyer*, and instead held that a less exacting standard applied that requires a defendant to prove that "constitutional error has resulted in the conviction of one who is actually innocent. . . ."¹⁹⁹ The Court first noted "the fundamental miscarriage of justice exception seeks to balance the societal interests in finality . . . and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case."²⁰⁰ By extraordinary case, the Court was referring to the incarceration or execution of a factually innocent person. The Court noted the *Sawyer* standard was adapted from jurisprudence involving challenges to the severity of sentences, whereas Schlup was contesting the factual basis of his conviction and not the legal basis of his sentence.²⁰¹ Thus, the *Schlup* Court noted that "[t]he overriding importance of this greater individual interest merits protection by imposing a somewhat less exacting standard of proof on a habeas petitioner alleging a fundamental miscarriage of justice than on one alleging that his sentence is too severe."²⁰²

Accordingly, in *Schlup* and *Sawyer* the Court recognized that claims of actual innocence deserve extra attention by federal courts reviewing otherwise procedurally barred habeas petitions.²⁰³ Fundamen-

195. *Schlup*, 513 U.S. at 305.

196. *Id.* at 314.

197. *Id.* at 328.

198. *Id.* at 331.

199. *Id.* at 324.

200. *Id.*

201. *Id.* at 325.

202. *Id.* at 325.

203. In 1996, President William Jefferson Clinton signed into law the Antiterrorism and Effective Death Penalty Act ("AEDPA"). See Pub. L. No., 104-132, 110 Stat. 1214 (1996) (codified as amended at 28 U.S.C. 2244 (2000)). Scholars have argued that the "AEDPA alters the Supreme Court's actual innocence doctrine [in *Schlup*] by severely restricting federal review of successive [habeas] petitions in several ways." Mark M. Oh, *The Gateway for Successive Habeas Petitions: An Argument for Schlup v. Delo's Probability Standard for Actual Innocence Claims*, 19 CARDOZO L. REV. 2341, 2351 (1998) [hereinafter "Oh"]; see also Mark Tushnet and Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 36 (1997) (noting that the AEDPA implicitly overruled the Supreme Court's decision in *Schlup* and arguing that there

tally, the Court reasoned that incarcerating and executing the factually innocent is constitutionally repugnant and a miscarriage of justice. However, though procedural bars existed in the cases of *Schlup* and *Sawyer*, both defendants had valid *Brady* and *Strickland* violations accompanying their claims of actual innocence. Consequently, neither decision addressed the issue of whether habeas courts can review freestanding claims of actual innocence. Unfortunately, in *Herrera v. Collins* the Court faced a freestanding claim of actual innocence in a factually unsympathetic case and, consequently, made a decision that is irreconcilable with the reasoning of *Schlup* and *Sawyer*.

C. *Herrera: Freestanding Claims of Actual Innocence*

In *Herrera v. Collins*, the Supreme Court held that freestanding claims of actual innocence are not constitutional in nature.²⁰⁴ In *Herrera*, Leonel Torres Herrera was convicted of capital murder and sentenced to death.²⁰⁵ Ten years after his conviction, Herrera filed a second habeas petition in federal court alleging actual innocence based on evidence tending to show that his now-dead brother, rather than he, was actually guilty of the crime.²⁰⁶ In support of his allegation, Herrera submitted two affidavits, one from his brother's attorney and the other from his brother's prison roommate, claiming the brother confessed to the murders before his death.²⁰⁷ Unlike in *Schlup* or *Sawyer*, in *Herrera* the habeas petition was a freestanding

is "[n]o doubt [the AEDPA's] new rules and procedures will bring about the dismissal of almost all successive applications for federal [habeas] relief"); Larry W. Yackle, *A Primer of the New Habeas Corpus Statute*, 44 BUFFALO L. REV. 381, 390-93 (1996) (arguing that AEDPA's limits on judicial review of successive habeas petitions may unconstitutionally limit the federal judiciaries' ability to perform certain fact finding functions during habeas review of actual innocence claims). Most notably, the AEDPA requires a petitioner alleging actual innocence based on newly discovered evidence in a successive habeas petition to prove "by clear and convincing evidence that, but for the constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. 224(b)(2)(B)(ii). "Arguably, the AEDPA's clear and convincing standard of proof overrules the probability standard of *Schlup*." Oh, *supra* note 203, at 2354. To this date, however, it is unclear whether the Supreme Court will create an actual innocence exception into the various procedural bars of the ADEPA. See generally, Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343 (2001) (arguing that the equitable history of habeas corpus requires an actual innocence exception to the AEDPA's statute of limitations). Moreover, because this article argues that federal courts should be willing to entertain freestanding claims of actual innocence, the relationship between the AEDPA and *Schlup* is only marginally relevant. However, for an exhaustive review of the post AEDPA habeas jurisprudence see Randal S. Jeffrey, *Successive Habeas Corpus Petitions and Section 2255 Motions After the Antiterrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues*, 84 MARQ. L. REV. 43 (2000).

204. *Herrera*, 506 U.S. at 404.

205. *Id.* at 393.

206. *Id.*

207. *Id.* at 396.

claim of actual innocence, because Herrera did not allege any corresponding procedural due process violation at trial.²⁰⁸ The *Herrera* Court summarily rejected the petition based on an absence of subject matter jurisdiction over a purely factual, and not constitutional, claim.²⁰⁹

In *Herrera*, the Court reasoned the determination of guilt or innocence is exclusively within the purview of state courts.²¹⁰ Moreover, the Court noted the clear and consistent history and jurisprudence surrounding federal habeas review holding that trial evidence is not reweighed, relitigated, or reconsidered in federal court.²¹¹ Rather, the function of federal habeas review is to ensure that individuals are not incarcerated in violation of the Constitution.²¹² The Constitution, in the eyes of the *Herrera* Court, protects the accused from prejudicial errors in process, and does not protect the accused from the substantive failure of a jury to render a correct verdict.²¹³ So long as the accused received a fair trial, e.g. effective assistance of counsel, federal courts have no constitutional basis for subject-matter jurisdiction.²¹⁴

In dictum, however, the *Herrera* Court did state “for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim.”²¹⁵ Although this dictum seemed promising at the time of the *Herrera* decision, it is severely limited in three fundamental respects.²¹⁶ First, the dictum is limited to executions.²¹⁷ Second, the Court has interpreted the arbitrary process of executive clemency as a “fail safe” satisfying the “no state avenue” problem.²¹⁸ Third, the statement is dictum and has no value as precedent. Consequently, no inmate has ever made a “truly persuasive demonstration of actual innocence” enabling a federal court to review his/her freestanding claim of actual innocence.

208. *Id.* at 401.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 400.

213. *Id.*

214. *Id.* (quoting *Townsend*, 372 U.S. at 317).

215. *Herrera*, 506 U.S. at 427.

216. *Id.*

217. *Id.*

218. *Id.* at 415.

D. *Reconciling Schlup, Sawyer, and Herrera*

In *Schlup* and *Sawyer*, the Supreme Court held that the liberty interest in actual innocence outweighs the federal interest in barring successive federal habeas corpus petitions.²¹⁹ In *Herrera*, however, the Supreme Court held that the state's interest in maintaining the finality of factual decisions outweighs the federal interest in providing a forum to entertain freestanding claims of actual innocence.²²⁰ Thus, in *Schlup* and *Sawyer* the Court framed the question in the rhetoric of individual rights, balancing an individual's liberty interest against the federal interest in barring successive positions. In *Herrera* the Court framed the question in the rhetoric of federalism, balancing the state's interest in finality against the federal interest in providing a forum to attack state criminal judgments. Are these decisions reconcilable?

In attempting to distinguish the decisions, the *Herrera* Court advances three reasons why *Herrera* is fundamentally different from *Schlup* and *Sawyer*. First, the *Herrera* Court notes that in *Sawyer* and *Schlup* the federal court allowed habeas review based on the "fundamental miscarriage of justice exception."²²¹ This exception permits federal courts to accept procedurally barred claims in habeas petitions to ensure "that federal constitutional errors do not result in the incarceration of innocent persons."²²² According to this reasoning, the *Herrera* Court was precluded from claiming subject-matter jurisdiction, because *Herrera*'s alleged wrongful conviction was based on a potential error in judgment rather than by an erroneous denial or application of a right protected by the United States Constitution.

This reasoning is fundamentally unsound. The "fundamental miscarriage of justice exception" has not been applied to require a "but for" or "proximate" connection between the procedural error and defendant's wrongful incarceration. For instance, in *Sawyer*, one of *Sawyer*'s procedurally barred claims alleged ineffective assistance of counsel in the sentencing phase of the trial.²²³ This procedural claim was related only to the imposition of the death penalty, and was unrelated to *Sawyer*'s actual innocence.²²⁴

Second, the *Herrera* Court held that "habeas jurisprudence makes clear that a claim of actual innocence is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on

219. See *supra* notes 187-202, and accompanying text.

220. See *supra* notes 204-204, and accompanying text.

221. *Herrera*, 506 U.S. at 404.

222. *Id.*

223. *Sawyer*, 505 U.S. at 348.

224. *Id.*

the merits.”²²⁵ Implicit in this reasoning is the philosophy that, (1) a court reviews procedurally barred issues because of the equitable weight of the actual innocence claim, and (2) the court does not review evidence relating to actual innocence, because the innocence or guilt of a defendant is a factual issue to be decided in state court.

This reasoning is unsound. Consistently, once a petitioner has passed through the “actual innocence gateway,” the federal court actually entertains the allegations of actual innocence and not merely the procedurally barred claims. For instance, in *Sawyer* the Court weighed the credibility of the new evidence and held that: “We are convinced that the evidence allegedly kept from the jury . . . fails to show that the petitioner is actually innocent.”²²⁶ Thus, the *Herrera* Court’s second explanation, that a federal court is precluded from weighing the evidence relevant to guilt or innocence, is not applied to petitions admitted through the actual innocence gateway.

Third, the *Herrera* Court held that “[s]ociety’s resources [are] concentrated at the time of trial, and that the cost and burden of relitigating the factual issues of innocence claims in federal court is prohibitive.”²²⁷ It is unclear why this reasoning does not apply to petitions accepted through the actual innocence gateway. The Court fails to advance any argument, or provide any evidence, supporting the contention that the number of defendants raising freestanding claims of actual innocence will burden the court system. More importantly, the *Herrera* Court based its conclusion on a “conservation of judicial resources” argument. The *Herrera* Court reconsidered an issue resolved in *Sawyer*, and decided the issue on principles of federalism, by reframing the question and balancing a federal interest against a state interest. The *Sawyer* Court, however, did not consider judicial resources but arrived at its conclusion by weighing the state interest in conservation and finality against an individual liberty interest.

The *Herrera* Court attempted to distinguish its holding and reasoning from *Schlup* and *Sawyer*. The *Herrera* Court advances three contentions why *Herrera* is different, and why federal courts are precluded from entertaining freestanding claims of actual innocence.²²⁸ These reasons, as discussed *supra*, are internally inconsistent and fail to rationally reconcile two lines of jurisprudence. In Part III, I will discuss and suggest alternative approaches that will permit federal courts to entertain freestanding claims of actual innocence under the guise of procedural due process.

225. *Id.* at 404.

226. *Sawyer*, 505 U.S. at 349.

227. *Herrera*, 506 U.S. at 401.

228. See *supra* notes 221-221, and accompanying text.

III. PROPOSED SOLUTIONS

A. *The MAR*

As previously noted, North Carolina's MAR is progressive, relative to similar statutes in other states.²²⁹ Nonetheless, the MAR has substantial limitations.²³⁰ These limitations contributed to the wrongful incarceration of Terence Garner.²³¹ When PBS aired Garner's story on Frontline's "An Ordinary Crime,"²³² the media and public were critical and enraged at these limitations.²³³ On November 21, 2002, I. Beverly Lake, Jr., Chief Justice of the North Carolina Supreme Court, convened a group, tentatively called the North Carolina Actual Innocence Commission, to review (1) how innocent individuals are convicted in North Carolina, and (2) how to expedite their release after evidence of a wrongful conviction is discovered.²³⁴ The following are proposed amendments to the MAR to improve the review of actual innocence claims.²³⁵

1. Eliminate the MAR's Due Diligence Limitation

The MAR requires new evidence to have been "unknown or unavailable to the defendant at the time of trial . . . [and] could not with due diligence have been discovered or made available at that time."²³⁶

229. See *supra* note 52.

230. See *supra* notes 58-160, and accompanying text.

231. See *supra* notes 76-128, and accompanying text.

232. *Frontline: An Ordinary Crime* (PBS television broadcast, Jan. 10, 2002).

233. See *supra* note 3, and accompanying text.

234. Matthew Eisley, *State Delves into Wrongful Convictions*, NEWS & OBSERVER, (Raleigh, NC), November 27, 2002, at A1 (Chief Justice Lake stating "[North Carolina] need[s] to make sure that [it does not] convict an innocence person – and if we do, to catch it fairly quickly. The ultimate object of any court process is to find the truth").

235. In recent years many scholars have addressed the topic of how society, and, particularly, the criminal justice system, should address claims of actual innocence. See e.g. Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241 (2001) (proposing, in addition to legislative and judicial measures, the creation of an independent commission, modeled after the Criminal Cases Review Commission in England, to review actual innocence claims, whenever the evidence of actual innocence is uncovered); Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333 (2002) (proposing "self-study" commissions to uncover the root causes behind wrongful convictions); Jan Stiglitz, Justin Brooks, and Tara Shulman, *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413 (2002) (noting that law school innocence projects are a resource for decreasing wrongful convictions); Barry C. Scheck, *Preventing the Execution of the Innocent: Testimony before the Senate Judiciary Committee*, 29 HOFSTRA L. REV. 1165 (2001) (proposing to (1) eliminate the statute of limitations on the introduction of newly discovered evidence ; (2) create a duty to preserve biological evidence during incarceration; and (3) provide sufficient funding to obtain competent counsel in criminal cases); Stephen B. Bright, *Counsel for the Poor: The Death Sentence not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835 (arguing that competent and well-funded counsel is essential).

236. N.C. GEN. STAT. § 15A-1415(c) (2002).

As described in Part I, the “due diligence limitation” is consistently used by North Carolina courts to dispose of MAR based on newly discovered evidence tending to show actual innocence.²³⁷ The “due diligence” limitation should be eliminated because (1) it unconscionably imputes attorney negligence upon wrongfully incarcerated inmates and, thereby, denies review of actual innocence claims often “caused” by “bad lawyering;” (2) erodes public confidence and respect in the justice system by imputing the incompetent, ineffective, and/or negligent representation of *state appointed counsel* to the indigent.

First, the MAR’s “due diligence” limitation unconscionably imputes attorney incompetence, ineffectiveness, and/or negligence upon the wrongfully convicted. Of the 116 inmates exonerated by the Innocence Project at Cardozo Law School, 23 inmates were convicted because of “bad lawyering” during trial.²³⁸ The wrongfully convicted inmates exonerated by the Cardozo Innocence Project produced DNA evidence that conclusively established their innocence. Many wrongfully convicted inmates, however, do not have the advantage or luxury of having DNA evidence available to conclusively establish their innocence.²³⁹ Instead, these inmates must rely on new lawyers, law students, or innocence projects to reinvestigate their case. These reinvestigations mirror what the trial lawyer should have done at trial if he or she had the time, resources, and/or diligence. Under North Carolina’s MAR, however, evidence discovered during reinvestigation, like the eyewitness testimony in the aforementioned *Powell* case,²⁴⁰ is barred on MAR review because the evidence could “with due diligence have been discovered or made available at [trial].”²⁴¹ With respect to claims of actual innocence, the “due diligence” logic is circular. As demonstrated by the Cardozo Innocence Project, “bad lawyering,” often manifested by a failure to investigate diligently, is one of the fundamental causes of wrongful convictions. Thus, imputing the trial counsel’s lack of diligence to an inmate raising an actual innocence claim smacks of unconscionability.

Second, the MAR’s “due diligence” limitation erodes the public’s confidence and respect for the justice system by imputing the incompetent, ineffective, and/or negligent representation of *state appointed counsel* to the indigent. A recent survey conducted by the Depart-

237. See *supra* note 58.

238. *Innocence Project, Causes and Remedies: Bad Lawyering*, at <http://www.innocenceproject.org/causes/badlawyering.php> (Dec. 12, 2002). The Innocence Project attributes this statistic to many variables such as funding, caseload pressure, and lack of standards and training for criminal defense attorneys.

239. See *supra* notes 177-178.

240. See *supra* note 65, and accompanying text.

241. N.C. GEN. STAT. § 15A-1415(c) (2002).

ment of Justice reveals that 79% of the American public believe the criminal justice system is effective at “investigating and arresting persons suspected of committing crimes,” however, over 27% believe the criminal justice system is ineffective when it comes to “reaching just outcomes at criminal trials.”²⁴² Many commentators have argued that “public confidence in the criminal justice system suffers when it appears that a defendant’s likelihood of acquittal can turn on the defendant’s wealth rather than on the defendant’s actual guilt alone.”²⁴³ Empirical evidence certainly supports this bleak portrayal of American criminal justice; “bad lawyering” is a root cause of wrongful convictions.²⁴⁴ “A recent study found that 27 percent of the wrongfully convicted had subpar or outright incompetent legal help.”²⁴⁵ Failure to investigate—due diligence—is the “most common error” endemic to “bad lawyering” and inextricably bound to wrongful convictions.²⁴⁶ The MAR’s “due diligence” limitation imputes the trial lawyer’s incompetence to the criminal defendant claiming actual innocence.

Most criminal defendants, however, have neither the opportunity to investigate their own cases²⁴⁷ nor the choice of defense counsel. The Department of Justice estimates that 82% of state criminal defendants charged with a felony are represented by public defenders or assigned counsel.²⁴⁸ Moreover, in North Carolina 18% of inmates on death

242. U.S. Department of Justice, Bureau of Statistics, *Public Attitudes Toward Uses of Criminal History Information*, NCJ 187663, at 25 (2001), available at <http://www.albany.edu/sourcebook/1995/pdf/t215.pdf>.

243. David Orentlicher, *Representing Defendants on Charges of Economic Crime: Unethical When Done for a Fee*, 48 EMORY L.J. 1339, 1371 (1999); see also Kenneth Williams, *The Antiterrorism And Effective Death Penalty Act: What's Wrong With It And How To Fix It*, 33 CONN. L. REV. 919, 941 (arguing that public confidence in the criminal justice system is undermined by the perception, and sometimes fact, that bad lawyers represent individuals sentenced to death); see generally Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47 (1997) (arguing that public confidence in the criminal justice system is eroded by a two-tier system of justice whereby “[t]he distance between the quality of representation that a wealthy person (or corporation) receives in a criminal case and that received by an indigent person is scandalous”).

244. See *supra* note 238.

245. Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 688 (2002) (quoting BARRY SCHECK ET AL, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED 92 (2000)).

246. See Liebman II, *supra* note 277, at 1850.

247. According to the Bureau of Justice Statistics at the United States Department of Justice only “half of defendants using a public defender or assigned counsel . . . were released from jail prior to trial.” United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report, *Defense Counsel in Criminal Cases*, (2000) [hereinafter “*Defense Counsel in Criminal Cases*”], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf>.

248. See e.g., United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Selected Findings, *Indigent Defense*, 1 (1996), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/id/pdf> (noting that in “1991 about three-quarters of State prison inmates and half of Federal prison inmates . . . had a court appointed lawyer to represent them” during trial”); see also *Defense Counsel in Criminal Cases*, *supra* note 247, at 1 (noting that “approx-

row were appointed and “represented at trial by lawyers who [had previously] been singled out for disciplinary action by the State Bar.”²⁴⁹ Notably, the most common reason these “Capital Defense Attorneys” were sanctioned was because of their “failure to represent client[s] in a diligent and adequate manner.”²⁵⁰ Not surprisingly, studies have shown defendants represented by publicly financed counsel are more likely to be convicted and sentenced to prison than defendants represented by privately retained counsel.²⁵¹ These statistics attack the heart of the criminal justice system: the rule of law, impartiality, and fairness. In 1998, United States Attorney General Janet Reno acknowledged this problem and stated that “indigent criminal defendants do not invariably receive effective assistance of counsel . . . sometimes it is caused by lack of resources . . . such failings inevitably erode the community’s sense of justice and the aspiration of our system to equal justice under the law.”²⁵²

Accordingly, the United States Congress,²⁵³ the Department of Justice,²⁵⁴ and the American Bar Association²⁵⁵ have, respectively, promulgated legislation, statistics, and standards addressing the training, funding, and caseload problems plaguing publicly financed legal representation. Moreover, the North Carolina General Assembly has embraced these concerns and its “responsibility . . . under the federal and state constitutions to provide [indigent] person[s] with counsel,” by enacting the Indigent Defense Services Act of 2000.²⁵⁶ The MAR, however, has conspicuously not been amended to reflect our growing

mately 66% of felony federal defendants and 82% of felony defendants in large State courts were represented by public defenders or assigned counsel”).

249. See *Common Sense Says . . . That People on Death Row Often Had the State’s Worst Lawyers at Trial* (2002), available at <http://www.common-sense.org/Publications/CommonSenseSays/DPSpecialReport2002.html>. Moreover, according to the North Carolina State Bar only one percent of all licensed attorneys in North Carolina have been the subject of disciplinary action.

Id.

250. *Id.*

251. See Bob Sablatura, *Defendant’s Jail Likelihood Often Matter of Money* (1999), available at <http://www.geocities.com/CapitolHill/1526/defendants.htm> (study by the Houston Chronicle finding that defendants with court appointed counsel in Harris County Texas were sentenced to prison 58% of the time, whereas defendants who hired their attorneys were sentenced to prison 29% of the cases); *Defense Counsel in Criminal Cases*, *supra* note 247, at 3 (noting that “[d]efendants found guilty after using a [federal public defender] were more likely to be sentenced to prison . . . than those with private attorneys”).

252. Janet Reno, *Legal Service to the Poor Needs Renewed Vigilance*, U.S.A. Today, Mar. 19, 1998, at 12A.

253. See Innocence Protection Act of 2002, *supra* note 172, at Title II (proposing to provide grants to States that create and maintain effective systems of indigent defense in capital trials).

254. See *supra* note 247-248.

255. American Bar Association, *Indigent Defense Standards and Guidelines Index* (1998), available at <http://www.abanet.org/legalservices/downloads/sclaid/defenderstandardsindex.pdf> (a comprehensive guide to ABA publications pertaining to indigent defense standards).

256. Indigent Defense Service Act of 2000, N.C. GEN. STAT. § 7A-498.1 (2002).

awareness that wrongful convictions are substantially the result of ineffective training, funding, and caseload management of local, state, and federal indigent legal defense providers.

In sum, the “due diligence” limitation is nonsensical when applied to claims of actual innocence. Public opinion polls reflect a concern that the criminal justice system is more efficient than just. In all likelihood, this public opinion is the result of numerous exonerations of the wrongfully convicted revealing substantial defects in the process and substance of the American system of justice. Ineffective assistance of counsel, attorney negligence, and the shocking lack of attorney “diligence” is a root cause of the wrongful conviction of the innocent.²⁵⁷ Nevertheless, the MAR, in a circular and cruel logic, punishes the wrongfully convicted for their trial counsel’s failure to diligently investigate their case before and during trial. As a result, the MAR bars consideration of their actual innocence claims based on newly discovered evidence uncovered after vigorous reinvestigation. Accordingly, as a first step, the MAR should be amended to eliminate the “due diligence limitation.”

2. Eliminate the MAR preference for the Trial Judge

The MAR has a strong preference for the trial judge to entertain the motion.²⁵⁸ According to the MAR’s Official Commentary, “it [is] frequently preferable for the judge who heard the case to hear the motion because of the possibility of eliminating lengthy familiarization proceedings and papers.”²⁵⁹ Although the MAR does allow “in some instances . . . a different judge”²⁶⁰ in the same district to hear the MAR, the MAR’s preference for the original judge is so strong that it permits the trial judge to entertain the MAR even if that judge’s term has expired.²⁶¹ When an inmate is presenting newly discovered evidence of actual innocence, however, the MAR should be amended to eliminate this preference for three reasons: (1) psychological research, as well as common sense, reveals that the judge who convicted and sentenced the defendant is less likely to view newly discovered evidence of actual innocence as credible, probably true, or relevant²⁶²; (2) empirical research demonstrates that judges subject to electoral pressure, as they are North Carolina, are less likely to find error,

257. For a discussion of the relationship between the Sixth Amendment right to the effective assistance of counsel and actual innocence claims *see supra* note 54.

258. *See supra* note 47.

259. N.C. GEN. STAT. § 15A-1413 (2002) (Official Commentary).

260. *Id.*

261. *See supra* note 47.

262. *See supra* notes 264-273, and accompanying text.

where error exists, in state post-conviction proceedings²⁶³; and (3) having an independent judge, a judge “once removed” from the case, to review claims of actual innocence will inspire greater public confidence in North Carolina’s criminal justice system.

First, psychological research demonstrates that the judge who convicts a defendant is less likely to view newly discovered evidence, which reasonably places the trial result in doubt, as credible, probably true, or relevant.²⁶⁴ In their recent study *Inside the Judicial Mind*, Professors Chris Guthrie, Jeffrey J. Rachlinski, and Magistrate Judge Andrew J. Wistrich, explore the influence of cognitive illusions²⁶⁵ on judicial decision-making.²⁶⁶ The researchers note that “[p]sychologists have learned that human beings rely on mental shortcuts, which psychologists refer to as ‘heuristics,’ to make complex decisions.”²⁶⁷ Although “[r]eliance on these heuristic[s] facilitates good judgment most of the time . . . it can also produce systematic errors in judgment.”²⁶⁸ Accordingly, using a sample of 167 federal magistrate judges, the researchers designed an empirical study “to determine whether five common cognitive illusions influence the way judges make decisions.”²⁶⁹ Of particular interest, the researchers examined the effect of “egocentric bias” on judicial decision-making. Egocentric bias is the general tendency of people to make self-serving judgments about themselves and their abilities.²⁷⁰ The study revealed that “judges . . . exhibit[] a strong egocentric bias concerning the likelihood that they will be overturned on appeal.”²⁷¹ Judges were asked to estimate their reversal rates on appeal relative to the others judges taking the survey, and “87.7% of the judges believed that at least half of their peers had higher reversal rates.” Based on this evidence, and

263. See *supra* notes 277-280, and accompanying text.

264. Chris Guthrie, Jeffrey J. Rachlinski, Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2002).

265. The study produced empirical data on five common cognitive illusions: “anchoring (making estimates based on irrelevant starting points; framing (treating economically equivalent gains and losses differently); hindsight bias (perceiving past events to have been more predictable than they actually were); the representativeness heuristic (ignoring important background information in favor of individuating information; and egocentric bias (overestimating one’s own abilities). *Id.* at 784. Although the study produced empirical data demonstrating that each cognitive illusion has an effect on judicial decision making, only the “egocentric bias” is particularly relevant to the consideration of newly discovered evidence suggesting actual innocence in an MAR hearing.

266. *Id.* at 784.

267. *Id.* at 780.

268. *Id.*

269. *Id.* at 784.

270. For instance, “memory is egocentric in that people remember their own actions better than others’ actions. Thus, when asked to recall the percentage of housework they perform, people remember their own contribution more easily and, consequently, tend to overestimate it.” *Id.* at 812.

271. *Id.* at 814.

other psychological research exploring the egocentric bias,²⁷² the study concluded that “egocentric biases might make it unlikely that judges will grant requests to set aside judgments in . . . criminal cases. . . [Because] egocentric biases might lead the judge to react too skeptically to the suggestion that the trial over which he presided produced an erroneous result.”²⁷³

This study confirms common sense: “There is a natural disinclination to admit wrong, [because] people are concerned they will . . . diminish their stature”²⁷⁴ As research indicates, trial judges are vulnerable to this disinclination, and it makes sense: The trial judge is psychologically invested in the justness of the trial result; for instance, in a criminal case the trial judge likely denied a motion to dismiss and a motion for a directed verdict based on the insufficiency of the evidence. “In ruling on a motion to dismiss, the trial court must . . . determine if a jury could reasonably find the essential elements of the crime charged *beyond a reasonable doubt*.”²⁷⁵ The trial judge, as society would hope, believes that the trial was fair, the verdict reached was factually correct, and the jury had sufficient evidence to reasonably find the existence of the essential elements of the charge beyond a reasonable doubt.

Accordingly, when presenting newly discovered evidence of actual innocence during a MAR hearing to the original trial judge, the petitioning inmate is not dealing with an impartial arbiter of the truth. Rather, the trial judge denied motions to dismiss the charge and direct a verdict in defendant’s favor during and after trial, because the judge held a sincere belief in the defendant’s guilt. Unfortunately, the General Assembly has expressed in the MAR’s Official Commentary the belief that the State’s interest in judicial efficiency outweighs any potential psychological bias that a judge might have in reviewing a MAR based on newly discovered evidence in a case he or she tried. Apparently, the legislature is concerned that it is a waste of judicial economy to familiarize a second judge on the underlying facts of the previous judicial proceedings. Admittedly, the trial judge is in a better position to understand the context of newly discovered evidence. However, the trial judge is not an impartial observer without a “stake” in the outcome of the MAR. Therefore, the MAR should be altered to ex-

272. See e.g., Michael Ross & Fiore Sicoly, *Egocentric Bias in Availability and Attribution*, 37 J. PERSONALITY & SOC. PSYCHOL. 322 (1979) (testing for the prevalence of egocentric bias in joint activities).

273. *Id.* at 815.

274. Aviva Orenstein, *Apology Excepted: Incorporating A Feminist Analysis Into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 245-46 (1999) (citing NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 5, 14, (1991)).

275. *State v. Green*, 399 S.E.2d 376, 378 (N.C. App. 1991) (emphasis added).

press a preference for a judge other than the trial judge to entertain MAR where the petitioner presents newly discovered evidence of actual innocence.²⁷⁶

Second, recent empirical research demonstrates judges subject to direct electoral pressure are less likely to find error, where error exists, in state post-conviction proceedings. In 1991, the United States Senate Committee on the Judiciary commissioned a Columbia University Law professor, James S. Liebman, to calculate and explain the frequency of relief granted on federal habeas review to state inmates sentenced to death.²⁷⁷ An analysis of the years 1973 through 1995 revealed that state post conviction remedies, like North Carolina's MAR, found reversible error in 10% of the cases, whereas federal habeas courts found reversible error in 40% of the cases.²⁷⁸ In exploring the reasons behind this statistical variance, Professor Liebman's research revealed "a curious and potentially significant pattern: In general, the more electoral pressure a state's judges [were] under, the higher the state's death-sentencing rate."²⁷⁹ As a corollary, these same states experienced the highest rates of reversible error during federal habeas review. Consequently, Professor Liebman reasoned: "Public opinion may place a premium on obtaining death sentences. If so, a desire to carry favor with voters may lead elected . . . judges to cut corners . . . to secure that premium . . . [which] simultaneously [causes] death-sentencing rates, and error rates, to increase."²⁸⁰

Professor Liebman's research reveals a statistically significant relationship between judicial error rates and electoral pressure. Accordingly, because North Carolina judges are subject to electoral pressure, Professor Liebman's study would suggest an increased error rate for North Carolina judges, ruling against MAR, than similarly situated judges in states that use appointment rather than election to select their judiciary. Although by virtue of North Carolina's Constitution an elected judge will invariably entertain the MAR,²⁸¹ the error rates could be mitigated by using judges from separate superior court districts to review the evidence of actual innocence. Using a judge from

276. Whether or not it would benefit the administration of justice to have a different judge review all potential claims raised during an MAR is outside the scope of this article.

277. James S. Liebman et al., "A Broken System: Error Rates in Capital Cases, 1973-1995, at sec. VIII State Comparisons, *available at* www.justice.policy.net/jpreport, (last visited October 1, 2002) (hereinafter "Liebman I"), reprinted in part in James S. Liebman et al., "Capital Attribution: Error Rates in Capital Cases, 1973-1995, 78 *TEX. L. REV.* 1839 (2000) (hereinafter "Liebman II").

278. *Id.* at Table 5-7.

279. *Id.* at VIII., J.

280. *Id.*

281. See N.C. CONST. ART. IV § 9 (providing for the election of North Carolina superior court judges).

a separate judicial district will remove the "direct electoral pressure" that Liebman's study revealed as a "root cause" of increased judicial error rates.²⁸²

Third, employing a superior court judge, "once removed" from the case, to review claims of actual innocence will inspire greater public confidence in North Carolina's criminal justice system. As noted, Frontline's documentary on Terence Garner inspired public outcry at the state of criminal justice in North Carolina.²⁸³ Notably, many commentators believed "the principal obstacle to a fair and truthful verdict" for Garner was the trial judge, *Knox V. Jenkins, Jr.*²⁸⁴

3. Overrule by Statute the North Carolina Court of Appeals Assumption that the Recanted Testimony of a Codefendant, Accomplice or Informant is Exceedingly Unreliable

In *State v. Britt*, the North Carolina Supreme Court held that "[a] defendant may be allowed a new trial on the basis of recanted testimony if: (1) the court is reasonably well satisfied that the testimony given by a material witness is false, and (2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at trial."²⁸⁵ However, in *State v. Garner*, *State v. Brown*,²⁸⁶ and *State v. Shelton*²⁸⁷ the North Carolina Court of Appeals limited the remedial breadth of this review by holding that "[a] recantation by a convicted codefendant involving a confession of perjury is exceedingly unreliable."²⁸⁸ Accordingly, the North Carolina appellate courts advised that "it is duty of the trial court to deny the motion for [a] new trial where it is not satisfied that [the codefendant's recantation] is true."²⁸⁹ This higher standard for "believing" the recantation of incriminating codefendant testimony is problematic for

282. See e.g., N.C. GEN. STAT. § 7A-41.2 (2002) ("Candidates for . . . superior court judge shall be both nominated and elected by the qualified voters of the superior court district for which the election is sought."). Accordingly, using a judge from a separate superior court district will reduce the "electoral pressure" on the judge during his or her review of the evidence of actual innocence during the MAR hearing.

283. See *supra* note 3.

284. See *supra* note 112, and accompanying text.

285. *Britt*, 360 S.E. 2d at 665.

286. *Brown*, 394 S.E.2d at 449.

287. *Shelton*, 205 S.E.2d at 318-19.

288. *Brown*, 394 S.E.2d at 449; see *Garner*, 523 S.E.2d at 699 (holding that the recanted testimony of a codefendant "is exceedingly unreliable . . . especially where the recantation involves a confession of perjury or where there is a repudiation of the recantation"); *Shelton*, 205 S.E.2d at 318-19 ("Such testimony is exceedingly unreliable . . . If the recantations of witnesses are suspect, so are the post-trial statements by convicted defendants.").

289. *Shelton*, 205 S.E.2d at 318.

two reasons: (1) it is patently disingenuous and (2) it allows the courts to be complicit with, and an instrument of, injustice.

First, this “higher standard” for accrediting codefendant recantations is disingenuous. The United States Supreme Court has explicitly recognized that plea bargains and inducements create motivations to lie.²⁹⁰ As Judge Eugene Davis, writing for the Fifth Circuit Court of Appeals, stated: “It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence.”²⁹¹ Furthermore, when an accomplice testifies pursuant to a plea bargain North Carolina trial courts generally instruct the jury that: “There is evidence which tends to show that a witness was testifying [in exchange for leniency]. If you find that he testified in whole or in part for this reason you should examine his testimony with great care and caution in deciding whether or not to believe it.”²⁹² Thus, the Supreme Court of the United States and the North Carolina Pattern Jury Instructions explicitly recognize that bargained-for-testimony has inherent traits of unreliability. Accordingly, a natural question arises: Why should the MAR court be advised to disregard a codefendant’s recantation as “exceedingly unreliable,” but the defendant must remain in jail on the basis of incriminating and inherently suspect recanted testimony made by an “exceedingly unreliable” witness?

The North Carolina appellate courts summarily conclude that codefendant recantations are not credible. What empirical evidence supports this conclusion? On the contrary, commentators have argued, and I concur, that codefendant recantations have inherent indicia of reliability because often a codefendant will lose the benefits of plea bargaining by admitting that their trial testimony was not “truthful.”²⁹³ Accordingly, because the criminal justice system permits codefendants to give incriminating testimony notwithstanding their obvious motivations to fabricate and self-exculpate, consistency and sincerity demand that recantations of incriminating codefendant testimony should be given substantial, or at least equal, weight.

Second, North Carolina courts are “complicit with injustice” by summarily discrediting the recantation of codefendant testimony because codefendant testimony is (1) inherently unreliable, (2) procured

290. See generally, *Rational Expectations of Leniency*, *supra* note 156 (discussing the Supreme Court’s holding, and its implication for prosecutors, that the existing procedural safeguards of the adversary system are sufficient to expose the inherent motivations to lie and shift blame caused by bargained-for-testimony).

291. *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987).

292. North Carolina Pattern Jury Instructions, Criminal 104.21 (2001).

293. See e.g., Yvette A. Beeman, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 809 (1987) (examining the prevalence and effect of plea agreements with codefendants where the codefendant’s benefit is contingent on the success of the state’s case).

by inducements offered by the State, and (3) extremely persuasive to juries. As a general rule, it is unethical and illegal to compensate a witness for testifying.²⁹⁴ However, in criminal cases “[c]odefendant testimony is often the only testimony directly implicating the accused, and, therefore, a system that did not allow prosecutors to use this evidence would be inefficient and repugnant to [our notion of] justice.”²⁹⁵ Consequently, the United States Supreme Court has consistently reconciled the unreliability and evidentiary weight of accomplice testimony by holding that the “established safeguards of the Anglo-American legal system” are sufficiently stringent to protect the accused from the potential prejudice spawned by bargained-for-testimony.²⁹⁶ Accordingly, the system of compensating accomplices, informants, and jailhouse snitches for incriminating testimony is a hallmark of American criminal justice. In fact, “[a]ccording to statistics kept by the U.S. Sentencing Commission, in 1996 one of every five defendants [received compensation or leniency] through providing ‘substantial assistance’” to the State’s case against a codefendant.²⁹⁷

As noted, procuring incriminating testimony from an accomplice is neither free nor reliable. The State shoulders the cost burden, whereas the defendant must shoulder the burden of exposing the unreliability of the evidence to the jury. Research by the Innocence Project at Cardozo Law School demonstrates that juries are not always capable of discriminating between purchased testimony that is truthful and untruthful. For instance, of the first sixty-four DNA exonerations the false testimony of “snitches” was an important factor in twenty-one percent of the wrongful convictions.²⁹⁸ This makes sense, the State’s dependence “on accomplice testimony . . . [is] most likely to occur . . . where the extrinsic evidence is not sufficient . . . to convict any accomplice.”²⁹⁹

294. See e.g., 18 U.S.C. § 201(c)(2) (2000) (providing that “[w]hoever . . . directly or indirectly, gives, offers, or promises anything of value to any person for . . . testimony . . . shall be fined under this title or imprisoned for not more than two years, or both”). In *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), a panel of the Tenth Circuit Court of Appeals held that promises of leniency made by the government in exchange for incriminating testimony violated the federal anti-bribery statute. The court noted that “[t]he promise of intangible benefits imports as great a threat to a witness’s truthfulness as a cash payment.” *Id.* at 1350. The Tenth Circuit panel, however, was overturned by the Tenth Circuit sitting *en banc* in *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999). For an exhaustive discussion of the *Singleton* controversy see generally, James W. Haldin, *Toward a Level Playing Field: Challenges to Accomplice Testimony in the Wake of United States v. Singleton*, 57 WASH. & LEE L. REV. 515 (2000).

295. *Rational Expectations of Leniency*, *supra* note 156, at 1361-362.

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

297. George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 17 (2000) (citing Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 564 (1999)).

298. JIM DWYER, et al, ACTUAL INNOCENCE 146 (2000).

299. *Id.* at 53-4.

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Unlike the perjured testimony of an uncompensated witness, however, the State is directly responsible for inducing an accomplice or snitch to testify falsely.³⁰⁰ Accordingly, the recantation of an accomplice's incriminating bargained-for-testimony not only places the trial result in doubt, but, more significantly, the recantation of false testimony purchased by the State places the legitimacy of the criminal justice system in doubt. Consequently, where an accomplice, codefendant, or informant recants material incriminating testimony procured pursuant to a State offered inducement, a rebuttable presumption should arise that the defendant is entitled to a new trial. Moreover, at the very least, North Carolina courts should re-examine the rationale behind the proposition that codefendant recantations are exceedingly unreliable.

B. *Overcoming Herrera v. Collins: Future Strategies for Obtaining Federal Habeas Review of Freestanding Actual Innocence Claims*

There are three fundamental arguments that the Supreme Court majority did not fully consider in *Herrera*: (1) The conviction of a factually innocent defendant is a per se procedural due process violation. A truly persuasive showing of factual innocence that precludes a rational trier of fact from finding the essential elements of the crimes charged beyond a reasonable doubt is prima facie evidence that an error of procedural, and of constitutional proportion, occurred during trial; (2) the imprisonment of a factually innocent person violates the Eighth Amendment's prohibition against cruel and unusual punishment; and (3) a guilty verdict against, and the incarceration of, a factually innocent defendant who presents truly persuasive evidence of factual innocence precluding a rational trier of fact from finding the essential elements of the crimes charged violates substantive due process.

1. Convicting the Innocent: A Per Se Violation of Procedural Due Process

It is unfortunate the United States Supreme Court used the *Herrera* facts to establish the federal jurisprudence on freestanding claims of actual innocence. Mr. Herrera did not provide the Court with a sympathetic case. In *Herrera*, the defendant argued, ten years after his conviction, that his dead brother actually committed the murder.³⁰¹

300. See generally, *Testimony for Sale*, *supra* note 297, at 49-59 (explaining the State's role in potentially creating perjured testimony through the modern use of plea agreements, cash payments, and contingent plea agreements).

301. *Herrera*, 506 U.S. at 404.

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The "dead guy did it" defense is common and inherently weak.³⁰² However, *Herrera* is precedent. *Herrera* is the decision that future criminal defendants must overcome to gain access to federal courts for freestanding claims of actual innocence.

Fundamentally, *Herrera* was decided on one point of law: federal habeas review only protects criminal defendants from trial error that deprived the petitioner of procedural due process of law guaranteed by the United States Constitution. Habeas review is limited to constitutional procedural error because of society's interests in judicial economy, finality, and the sovereignty of state courts: "Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. [Accordingly], [f]ew rulings would be more disruptive to our federal system than to provide federal habeas review of freestanding claims of actual innocence."³⁰³ However, even in the majority's zeal, Chief Justice Rehnquist admitted that (1) *Herrera*'s argument that the Constitution prohibits the execution of an innocent had "elemental appeal,"³⁰⁴ (2) "for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim,"³⁰⁵ and (3) "our habeas jurisprudence [does not] cast a blind eye toward innocence."³⁰⁶ Nevertheless, the majority ultimately concluded that *Herrera*'s claim was "properly analyzed only in terms of procedural due process."³⁰⁷

For the dissent, however, the issue of actual innocence is a question of substantive due process because procedural "protections sometimes fail . . . [and] the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence."³⁰⁸ "In other words, even a prisoner who appears to have had a *constitutionally perfect* trial 'retains a powerful and legitimate interest in obtaining release from custody if he is innocent of the charge for which he was incarcerated.'"³⁰⁹ The majority found the dissent's argument untenable, because in the majority's view the Constitution is a guarantor of

302. Conversation with Professor James Coleman of the Duke University Law School (November 6, 2001).

303. *Id.* at 401; see also *supra* notes 204-214.

304. *Id.* at 397.

305. *Id.* at 427.

306. *Id.* at 404.

307. *Id.* at 408.

308. *Herrera*, 506 U.S. at 431 (Blackmun, J., dissenting).

309. *Id.* at 438-39.

fair process, not factually correct outcomes. Thus, the *Herrera* Court could not reconcile form and substance.

However, these views are not mutually exclusive. Form (procedural due process) and substance (substantive due process) are intended to secure similar ends; namely, public confidence in the administration of justice through the formation of procedures that lead to equitable results. Accordingly, where the result of a proceeding is clearly inequitable (substantively incorrect) the procedure is flawed, *per se*. For instance, the state has the burden of proving each element of a criminal offense beyond a reasonable doubt. If an inmate can produce "truly persuasive" evidence of actual innocence that precludes a rational trier of fact from finding the essential elements of the crime charged beyond a reasonable doubt, e.g., DNA evidence or the appearance of an alleged homicide victim, then, by definition, the state implicitly has insufficient evidence to sustain its burden of proof. This failure constitutes a *per se* violation of procedural due process, rather than an issue of substance alone. Although the *Herrera* majority might argue that the state's burden of proof can only "be evaluated in the light of the previous proceedings" and at the time of trial, this position ignores (1) the advancements in science that allow the public, as well as the criminal defendant, to know beyond *any doubt* that a criminal conviction was erroneous, and, as Chief Justice Rehnquist noted (2) "the central purpose of any system of criminal justice . . . to convict the guilty and free the innocent."³¹⁰

Accordingly, the conviction of an innocent ought to be considered a *per se* violation of procedural due process. If a defendant can make a truly persuasive showing of factual innocence that precludes a rational trier of fact from finding the essential elements of the crimes charged beyond a reasonable doubt, the federal court should review the petitioner's actual innocence claim in light of the gateways created by *Sawyer* and *Schlup*, and characterize "truly persuasive showing[s] of actual innocence" as *prima facie* evidence of *per se* procedural due process violations. Although "specific" procedural protections might have been complied with, e.g., effective assistance of counsel, proper jury instructions, and constitutional discovery processes, the procedural rights of the defendant were not "generally" protected.

2. Convicting the Innocent: Cruel and Unusual Punishment

The imprisonment of a factually innocent defendant violates the Eighth Amendment's prohibition against cruel and unusual punishment. In *Coker v. Georgia*³¹¹ and *Gregg v. Georgia*,³¹² the Supreme

310. *Id.* at 397.

311. 433 U.S. 584 (1977).

Court held that “punishment is excessive and unconstitutional if it is nothing more than the purposeless and needless imposition of pain and suffering,”³¹³ or if it is “grossly out of proportion to the severity of the crime.”³¹⁴ Moreover, in *Johnston v. Mississippi*³¹⁵ the Court held that Eighth Amendment protections do not cease once a defendant has been validly sentenced and convicted.³¹⁶ Accordingly, a defendant should be able to proceed at a habeas proceeding under the Eighth Amendment upon a “truly persuasive” showing of actual innocence that precludes a rational trier of fact from finding the essential elements of the crimes charged beyond a reasonable doubt. This position is in accordance with the Supreme Court’s Eighth Amendment jurisprudence as expressed in *Coker* and *Gregg* because (1) any punishment is disproportionate as applied to a factually innocent defendant, and (2) any punishment is tantamount to the needless imposition of pain and suffering if the defendant is factually innocent.

3. Convicting the Innocent: a Substantive Due Process Violation

The *Herrera* Court failed to fully consider whether the imprisonment of a factually innocent defendant is a violation of the Fifth and Fourteenth Amendment’s substantive due process guarantee.³¹⁷ The Due Process Clause of the Fifth Amendment provides that: “No person shall . . . be deprived of life, liberty, or property, without due process of law”³¹⁸ The Supreme Court has interpreted the Due Process Clause to protect individuals from two kinds of government interference: procedural and substantive deprivations.³¹⁹ Substantive due process is a nebulous legal concept, nevertheless, the Supreme Court has stated that substantive due process prevents the government from taking actions that “shock the conscience”³²⁰ or violate rights “implicit in the concept of ordered liberty.”³²¹

For instance, in *Rochin v. California* the Supreme Court held that police violated the substantive due process of a defendant where the police forcefully pumped his stomach to retrieve swallowed narcotics.³²² Specifically, the Court held that

312. 428 U.S. 153 (1976).

313. *Coker*, 433 U.S. at 593.

314. *Gregg*, 428 U.S. at 173.

315. 486 U.S. 578 (1988).

316. *Id.*

317. *Herrera*, 506 U.S. at 435.

318. U.S. CONST. amend. V.

319. *Rochin v. California*, 342 U.S. 165, 172 (1952).

320. *Id.*

321. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

322. *Rochin*, 342 U.S. at 172.

Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.³²³

In *Rochin*, the police actually observed the suspect swallowing the illegal narcotics.³²⁴ In *Rochin*, moreover, the deprivation was temporary and the defendant quickly recovered from the intrusion. However, in cases of factual innocence, particularly those defendants sentenced to death, the deprivation is permanent.

Consequently, as one scholar has argued, the due process clause in the Fifth and Fourteenth Amendments to the United States Constitution guarantees an incarcerated inmate the “substantive right to prove his [or her] innocence at any time.”³²⁵ Under Supreme Court jurisprudence, the conviction and imprisonment of a factually innocent defendant should “shock the conscience” and violate rights “implicit in the concept of ordered liberty.”

IV. CONCLUSION

North Carolina is a progressive state providing a relatively fair procedure to prisoners raising claims of actual innocence. The MAR, however, has vital limitations. Through amendment, these limitations can be mitigated. A perfect MAR, however, will not prevent all factually innocent defendants from wrongful conviction. Accordingly, federal courts should review claims of actual innocence where the petitioner can make a truly persuasive showing of factual innocence that precludes a rational trier of fact from finding the essential elements of the crimes charged beyond a reasonable doubt. Improving the MAR, and providing a federal forum for truly persuasive claims of factual innocence, will help secure the public's confidence in the administration of justice.

323. *Id.*

324. *Id.*

325. William D. Darden, *Recent Development: I. Herrera v. Collins: The Right of Innocence: An Unrecognized Constitutional Privilege*, 20 J. CONTEMP. L. 258, 269 (1994).