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NORTH CAROLINA INNOCENCE INQUIRY COMMISSION: AN INSTITUTIONAL REMEDY FOR ACTUAL INNOCENCE AND WRONGFUL CONVICTIONS

WARREN D. HYNSON*

I. INTRODUCTION

The machinery of American criminal justice, like any other human system, is fallible. Though its wheels of justice are said to grind slow but exceedingly fine, errors still slip through the cracks. Since the National Registry of Exonerations began its accounting in 1989, over 1500 exonerations have been documented nationwide, including 125 in 2014 alone.¹

Over time, scholars and lawyers have identified and studied common causes or factors associated with wrongful convictions. The canonical list includes, *inter alia*, eyewitness misidentification, flawed forensic science, false confessions, unscrupulous jailhouse informants, ineffective assistance of defense counsel, and prosecutorial misconduct.² Though courts, prosecutors, police, and defense counsel increasingly recognize these sources of wrongful convictions, the American criminal justice system, premised on an adversarial model of truth-seeking, is ill designed to structurally address claims of actual innocence after a defendant's guilt has been conceded in plea bargaining or proven at trial beyond a reasonable doubt.

The American criminal justice system, in order to effectively adjudicate post-conviction claims of actual innocence, is in need of a new type of adjudicative entity. Claims of actual innocence require a reorientation from an adversarial and procedurally focused model of appellate review to one that is inquisitorial and empowered with fact-finding capacity. The North Carolina Innocence Inquiry Commission (NCIIC) is a working example of a state-funded body of inquisitorial review dedicated to post-conviction innocence claims, "the first commission of its kind in the United States."³

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1. Matt Ford, *Guilty, Then Proven Innocent*, THE ATLANTIC (Feb. 9, 2015), <http://www.theatlantic.com/politics/archive/2015/02/guilty-then-proven-innocent/385313/>.

2. *The Causes of Wrongful Conviction*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction> (last visited Mar. 25, 2016).

3. David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1053 (2010).

Unlike traditional post-conviction procedures and collateral proceedings that are limited to reviewing procedural and constitutional violations, the NCIIC focuses exclusively on the substantive underlying facts that give rise to actual innocence claims. The NCIIC is designed to conduct expansive investigations, including DNA testing, as part of its duties in determining actual innocence. Arguably, the NCIIC is better equipped to address and mitigate wrongful convictions premised on actual innocence in a more comprehensive and flexible manner than prevailing post-conviction regimes.

II. ACTUAL INNOCENCE: DIFFICULT TO PROVE AT TRIAL, EVEN HARDER TO ESTABLISH ON APPEAL

One of the pillars of Anglo-American jurisprudence is the presumption of innocence afforded a criminal defendant until he or she is proven guilty of the crime charged. While noble, the presumption of innocence has effectively resulted in the creation of an insurmountable obstacle for defendants appealing their convictions on the basis of actual innocence.⁴ The systemic assumption being that if one were actually innocent, then the adversarial process would have demonstrated this truth at trial.⁵ This assumption, coupled with the substantial deference granted to trial courts' findings of fact, makes appellate relief on the basis of actual innocence nearly impossible.⁶ It is reported that less than ten percent of criminal convictions are ever reversed.⁷ As one commentator observed, "the grand procedural contraption that is the contemporary criminal trial is, in theory, a formidable bulwark against wrongful conviction."⁸

The term "wrongful conviction" has been subject to varying interpretations and definitions.⁹ Generally speaking, a wrongful conviction may oc-

4. See *Delo v. Lashley*, 507 U.S. 272, 278 (1993) ("Once the defendant has been convicted fairly in the guilt phase of trial, the presumption of innocence disappears.").

5. See Wolitz, *supra* note 3, at 1035 ("[T]he whole bevy of procedural protections for the accused at trial do the work of insuring that no innocent person is convicted.").

6. *Id.* at 1029–30 ("The legal aspect of our [i]nnocence [p]roblem is the enduring resistance of our judicial system to recognizing post-conviction claims based on factual innocence . . . The U.S. Supreme Court has consistently refused to recognize 'actual innocence' as a ground for habeas relief despite the pleas of numerous plaintiffs, activists, and academics.") (footnote omitted).

7. Mary Kelly Tate, *Commissioning Innocence and Restoring Confidence: The North Carolina Innocence Inquiry Commission and the Missing Deliberative Citizen*, 64 ME. L. REV. 531, 534 (2011–2012).

8. Wolitz, *supra* note 3, at 1036.

9. See *id.* at 1029, n.3 ("Wrongful convictions include all convictions based on legal error.") (citing Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Conviction Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1219 n.1 (2005) ("I count myself among those who use the term 'wrongful conviction' to refer not only to the conviction of the innocent but also to any conviction achieved in part through the violation of constitutional rights or through the use of systems and procedures that render the proceedings fundamentally unfair.")).

cur when a defendant's guilt is erroneously secured through a procedural or constitutional violation, or where the defendant was factually innocent of the crime charged but still convicted.¹⁰ Existing methods of judicial review in the American criminal justice system routinely—almost exclusively—focus on the former and shy away from the latter.

For instance, appellate review and post-conviction collateral proceedings are often narrow in scope and procedurally limited. A convicted prisoner in North Carolina pursuing a factual innocence claim is typically limited to three options for relief: (1) a post-trial motion for appropriate relief; (2) a federal habeas corpus action, once all avenues of state court relief are exhausted; or (3) executive clemency.¹¹ None of these options, however, present a high likelihood of success.¹²

First, in North Carolina and other states, strict procedural standards and a high burden of proof are placed upon the defendant who is required to demonstrate to a judge (often the same trial judge) that, based upon newly discovered evidence, another trial will probably produce a different result.¹³ Second, even the "Great Writ of Habeas Corpus" has proven to be an ineffective vehicle for fact-based challenges on review since the U.S. Supreme Court has repeatedly refused to recognize actual innocence as grounds for habeas relief.¹⁴ As the Court stated in *Herrera v. Collins*, "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact."¹⁵ In capital cases, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the standard of review is even more deferential to state court determinations, and thus that much more unlikely for petitioners with factual innocence claims to obtain relief.¹⁶ Finally, executive clemency has proven to be a near statistical impossibility fraught with political bias, and often occurs only after a release from imprisonment.¹⁷

For frame of reference, actual innocence is often defined synonymously with factual innocence, and this is the definitional approach adopted by the NCIIC, pursuant to North Carolina G.S. §15A-1460(1). "Factual innocence" is defined as "the complete innocence of any criminal responsibility for the felony for which the person was convicted and for any other reduced

10. Siegel, *supra* note 9, at 1219 n.1.

11. Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L. J. 1345, 1350 (2007).

12. *Id.*

13. *Id.* at 1352.

14. Wolitz, *supra* note 3, at 1037.

15. 506 U.S. 390, 400 (1993); *see also* Wolitz, *supra* note 3, at 1039.

16. Maiatico *supra* note 11, at 1353.

17. *Id.* at 1355.

level of criminal responsibility relating to the crime.”¹⁸ The causes for the wrongful conviction of a factually innocent defendant often stem from one or more of the problems in the “canonical list” enumerated above, including eyewitness misidentification, flawed forensic science, false confessions, unscrupulous jailhouse informants, ineffective assistance of defense counsel, and prosecutorial misconduct.¹⁹ Many of these issues are fact-based problems and are not susceptible to reversal in existing methods of appellate review.

Given our judicial system’s traditional discomfort with claims of actual innocence, a new paradigm is needed to investigate, review, and adjudicate such claims. The NCIIC is such a model — albeit imperfect — that may be replicated and subsequently improved. To understand the function and operation of the NCIIC, and therefore its significant distinction from traditional models of appellate judicial review, one must first know its history, including its British predecessor, the Criminal Cases Review Commission.

III. INDEPENDENT REVIEW COMMISSIONS: A NEW PARADIGM IN ANGLO-AMERICAN LAW

The origins of the NCIIC lie across the Atlantic Ocean and can be traced to Great Britain’s Criminal Appeal Act of 1995, whose enactment subsequently led to the creation of the United Kingdom’s Criminal Cases Review Commission (CCRC).²⁰ The CCRC was established in the wake of a series of wrongful convictions arising from terrorism cases in the early 1990s that were marred by police misconduct and flawed forensic testing.²¹ Following these cases, a Royal Commission on Criminal Justice published a series of reports for Parliament recommending the creation of an independent commission that was legislatively authorized to investigate cases when it appeared there may have been a miscarriage of justice.²² The independent commission refers potentially meritorious claims to the Court of Appeal when a “real possibility” exists that a conviction may not be upheld.²³ The Court of Appeal is similar to state appellate courts in the United States²⁴. When reviewing such convictions, it looks for “an argument, or evidence, not raised in the proceedings . . . [or] exceptional circumstances.”²⁵ Fur-

18. N.C. GEN. STAT. ANN. § 15A-1460(1) (West 2015).

19. THE INNOCENCE PROJECT, *supra* note 2.

20. Kent Roach, *The Role Of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI.-KENT L. REV. 89, 92 (2010).

21. Maiatico, *supra* note 11, at 1363.

22. *Id.*

23. Roach, *supra* note 20, at 94; *see also* Criminal Appeal Act, 1995, c. 35, § 13.

24. Maiatico, *supra* note 11, at 1361.

25. Criminal Appeal Act, 1995, c.35, § 13(1)(b)(i), (2); *see also* Maiatico, *supra* note 11, at 1364.

thermore, a “real possibility” has been interpreted by the Court of Appeal as “more than an outside chance or a bare possibility but which may be less than a probability or a likelihood or a racing certainty that the conviction, verdict, finding or sentence would be found unsafe.”²⁶

As for the institution itself, the CCRC is an independent body appointed by the Queen and consists of a minimum of eleven commissioners: two-thirds must consist of members with familiarity with or experience in the justice system, and the remaining one-third must be lawyers with at least ten years of experience.²⁷ The CCRC has subpoena power over public bodies, may conduct its own investigations, hire its own experts, and has complete discretion to decide whether to accept or reject petitions without having to provide a public explanation for its determination.²⁸ Review is not directly related to factual innocence claims, but instead referrals for judicial review are typically based on legal errors or procedural flaws.²⁹ An increasing number of referrals, however, have been premised on issues concerning flawed forensic evidence, undependable witness testimony, ineffective assistance of counsel, and changes to the law since a petitioner’s conviction at trial.³⁰ Ultimately, the CCRC bases its determinations on a “wide range of legal issues relating to whether the appellate courts would quash a conviction and accept the new evidence on appeal.”³¹

The CCRC process of review involves three different stages: (i) an eligibility assessment; (ii) intensive screening; and (iii) selection of an investigative officer.³² Nearly one-third of applications are dismissed during stage one and only a small number of cases proceed to stage three.³³ As a reflection of its stringent standards, the CCRC has rejected over ninety-six percent of the almost twelve thousand cases it has received.³⁴

The high percentage of cases referred by the CCRC to the Court of Appeal that have been successfully reversed on appeal, however, indicates that the CCRC’s exacting standards function as a precise screening mechanism. As of 2009, out of the 398 CCRC referrals heard by the Court of Appeal, 281 convictions were quashed—nearly seventy percent.³⁵ Though, the CCRC is not without its flaws. Hampered by a lack of resources and an in-

26. Maiatico, *supra* note 11, at 1365 (internal quotation marks omitted).

27. Roach, *supra* note 20, at 94.

28. *Id.* at 96.

29. *Id.* at 95.

30. *Id.* at 96–97.

31. *Id.* at 98.

32. Maiatico, *supra* note 11, at 1365–66.

33. *Id.* “[B]etween 1997 and 2005, only thirty-seven cases required the appointment of an investigative officer.” *Id.* at 1366.

34. Roach, *supra* note 20, at 96.

35. *Id.* at 95.

undation of petitions, applications to the CCRC have been reported to take over two years and some commentators claim the backlog will take thirty years to clear.³⁶ Petitioners whose claims were rejected by the CCRC have brought legal challenges against the CCRC related to its decision not to pursue certain investigative steps or for excessive delay; in one year alone, forty-one such challenges were made.³⁷

Though media coverage and public awareness of the CCRC has reportedly declined over the past decade, the CCRC remains an important and innovative entity in Anglo-American criminal jurisprudence, one which caught the attention of and inspired North Carolina officials confronting important questions related to wrongful convictions in its own jurisdiction.³⁸

IV. THE NORTH CAROLINA ACTUAL INNOCENCE COMMISSION AND THE CREATION OF THE NORTH CAROLINA INNOCENCE INQUIRY COMMISSION

In October 2002, former North Carolina Supreme Court Chief Justice I. Beverly Lake, Jr. convened officials from local law enforcement offices, prosecutors, defense lawyers, and law professors to discuss and examine wrongful convictions in North Carolina.³⁹ What began as informal discussions over lunch evolved into the nation's first state commission on actual innocence.⁴⁰

The North Carolina Actual Innocence Commission ("Commission"), the predecessor to the North Carolina Innocence Inquiry Commission, arose from the political will of an unlikely champion of wrongful convictions.⁴¹ Chief Justice Lake, Jr. Lake was considered a "tough-on-crime" trial court justice, a "North Carolina justice of yesteryear," who vigorously supported capital punishment as a legislator.⁴² Lake came from a conservative family: he was the son of Dr. I. Beverly Lake, Sr., an ardent segregationist active in North Carolina politics during the middle of the twentieth-century.⁴³ Lake followed in his father's footsteps in becoming a lawyer and then a public

36. Maiatico, *supra* note 11, at 1368 (citing David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91, 162 (2000) (quoting Alan Travis, *Justice Body's Case Plea Rebuffed by Straw*, GUARDIAN (London), Dec. 16, 1998, at 12)).

37. Maiatico, *supra* note 11, at 1367.

38. *Id.* at 1346, 1367.

39. Wolitz, *supra* note 3, at 1047–48.

40. See Eli Hager, *A One-Man Justice Crusade in North Carolina*, THE MARSHALL PROJECT (July 29, 2015, 5:21 PM), <https://www.themarshallproject.org/2015/07/29/a-one-man-justice-crusade-in-north-carolina>.

41. *Id.*

42. *Id.*

43. *Id.*

official.⁴⁴ When Lake began to publicly champion his commitment to establishing the Commission and addressing wrongful convictions, many of his conservative colleagues and long-time friends were dumbfounded; some, Lake attested, refused to speak with him.⁴⁵

Lake's commitment to challenging wrongful convictions was spurned by high-profile exonerations in North Carolina due to DNA evidence, including the infamous cases of Ronald Cotton and Darryl Hunt.⁴⁶ In those cases, Cotton and Hunt each served decades in the North Carolina prison system for convictions for rape and murder that both denied committing, and which DNA testing eventually corroborated.⁴⁷ In the Hunt case, Hunt's lawyers filed more than eleven post-conviction motions over the course of eighteen years asserting his innocence and attempting to surmount the procedural limitations that define traditional appellate review.⁴⁸ After those exonerations, Lake later told a reporter, his "faith in the criminal justice system, which had always been so steady, was shaken."⁴⁹

Lake sought to identify the causes of wrongful convictions with the intention of preventing their recurrence; he invited representatives from across the criminal justice spectrum to help him do so.⁵⁰ Though traditional adversaries such as prosecutors and defense attorneys reportedly found it difficult at first to agree on common ground, Lake mediated a series of discussions and formal meetings from 2002 to 2006 that examined the common causes of wrongful convictions, and the Commission drafted model legislation designed to mitigate them.⁵¹

The Commission consisted of thirty-one members and met every six to eight weeks; though the Commission always met in full, small focus groups were formed to study a particular topic under the wrongful conviction umbrella.⁵² Members of the Commission were able to consult with experts in different fields and developed new policies that were presented to local law enforcement leaders.⁵³ Topics of study included eyewitness misidentification, the recording of interrogations, the reliability of confidential informant testimony, discovery practices, and ineffective assistance of counsel.⁵⁴

44. *Id.*

45. CAROLINA JOURNAL, *Friday Interview: N.C. Actual Innocence Commission Revisited* (June 1, 2012, 12:00 AM), http://www.carolinajournal.com/exclusives/display_exclusive.html?id=9114.

46. Wolitz, *supra* note 3, at 1031.

47. Maiatico, *supra* note 11, at 1345, 1348.

48. *Id.* at 1352.

49. Hager, *supra* note 40.

50. *See Id.*

51. *Id.*

52. Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined By a Common Cause*, 52 Drake L. Rev. 647, 650–652 (2004).

53. *Id.* at 653.

54. *Id.* at 654.

Under Lake's leadership, the Commission drafted cutting edge legislation requiring the recording of interrogations, suggesting the strict imposition of rigorous standards for police eyewitness identification procedures, and mandating preservation of and access to DNA evidence for defendants in post-conviction proceedings.⁵⁵ Ultimately, the Commission eventually focused on the notion of creating and implementing a non-adversarial, independent body that could review and adjudicate wrongful convictions.⁵⁶ For guidance, the Commission looked to the sole institution in Anglo-American jurisprudence that could serve as a model—the British Criminal Cases Review Commission.⁵⁷ The work of the Commission led to a proposal for the creation of the North Carolina Innocence Inquiry Commission, the first state agency in the country devoted to investigating and adjudicating wrongful conviction claims based on actual innocence.⁵⁸

V. THE NORTH CAROLINA INNOCENCE INQUIRY COMMISSION: DESIGN AND OPERATION

In March 2005, the Commission voted to send its proposal for the creation of the NCIIC to the North Carolina legislature, where it was approved in July 2006 with bipartisan support.⁵⁹ Governor Mike Easley approved the North Carolina Innocence Inquiry Commission Act and the bill became state law one month later, in August 2006.⁶⁰ The legislation, however, does include a sunset clause, which, absent legislative renewal, automatically dissolves the NCIIC in four years.⁶¹ Thus far, the NCIIC Act has never lapsed and the NCIIC has remained in operation.⁶²

Article 92 of Chapter 15A of the North Carolina General Statutes “establishes [the Commission as] an extraordinary procedure to investigate and determine credible claims of factual innocence”⁶³ The NCIIC functions as an independent commission, but for administrative purposes is located within the state's Judicial Department.⁶⁴ Eight voting constituents make up the NCIIC and membership is determined by statute.⁶⁵ The NCIIC must consist of one superior court judge, one prosecutor, one defense attorney, one victim advocate, one member of the public who is not an attorney

55. See Hager, *supra* note 40.

56. Mumma, *supra* note 52, at 654.

57. *Id.*

58. Maiatico, *supra* note 11, at 1358.

59. *Id.* at 1357–58.

60. *Id.* at 1358.

61. *Id.*

62. See 2015 N.C. INNOCENCE INQUIRY COMM’N ANN. REP., at 5, 7.

63. N.C. GEN. STAT. § 15A-1461 (2015).

64. N.C. GEN. STAT. § 15A-1462 (2015).

65. N.C. GEN. STAT. § 15A-1463 (2015).

or an employee of the state's judicial branch, one current sheriff, and the final two members are appointed at the discretion of the Chief Justice of the North Carolina Supreme Court.⁶⁶

To qualify as a claimant for the NCIIC, the following criteria must be satisfied. First, the conviction at issue must be a felony and must have been adjudicated in a North Carolina state court.⁶⁷ Second, the claimant must be alive; an innocence claim may not be brought by the estate of a deceased defendant.⁶⁸ Third, petitions are strictly limited to claims of "complete factual innocence for any criminal responsibility for the crime, including any other reduced level of criminal responsibility for the crime."⁶⁹ Claims based on constitutional, legal or procedural violations will not be considered by the NCIIC.⁷⁰ Fourth, claimants must satisfy an initial burden of proof established by statute and Commission rules for factual claims of actual innocence: petitioners must establish that credible and verifiable evidence of innocence exists.⁷¹ Moreover, such credible, verifiable evidence must not have been previously presented at trial or any post-conviction proceeding.⁷² Finally, all claimants must sign an agreement stipulating to (i) waive procedural safeguards and privileges, including attorney-client privilege and the privilege against self-incrimination; (ii) provide full and accurate disclosures in response to NCIIC's inquiries; and (iii) cooperate with all NCIIC processes.⁷³

Prior to executing this agreement, claimants have the right to confer with counsel, either at their own expense or that of the state if the claimant is determined indigent by the NCIIC Chair.⁷⁴ Once a claimant initiates a petition, the NCIIC attempts to notify the victim or the victim's next of kin of the claim and to inform them of their right to have their views heard during the investigation.⁷⁵ The victim or his or her family must give ten days notice to the NCIIC if they wish to attend or be heard at a proceeding.⁷⁶ NCIIC proceedings are typically closed to the public and exempt from state

66. *Id.*

67. N.C. INNOCENCE INQUIRY COMM'N, RULES AND PROCEDURES Article 2(A)(1), (2).

68. *Id.* at Article 2(A)(3).

69. *Id.* at Article 2(A)(4).

70. Wolitz, *supra* note 3, at 1050.

71. N.C. INNOCENCE INQUIRY COMM'N, RULES AND PROCEDURES Article 2(A)(5), (6).

72. *Id.* at Article 2(A)(7).

73. N.C. GEN. STAT. § 15A-1467 (2015); N.C. INNOCENCE INQUIRY COMM'N, RULES AND PROCEDURES Article 5(B).

74. N.C. GEN. STAT. § 15A-1467 (2015); N.C. INNOCENCE INQUIRY COMM'N, RULES AND PROCEDURES Article 5(B)(1).

75. N.C. INNOCENCE INQUIRY COMM'N, RULES AND PROCEDURES Article 5(C).

76. *Id.* at Article 6(F)(1).

public meetings laws, and the decision to open a proceeding to the public is within the discretion of the NCIIC chair.⁷⁷

The NCIIC process of review consists of five phases: (i) the initiation of an innocence claim, beginning with the execution of the agreement and waiver of rights; (ii) initial review and investigation of the innocence claim; (iii) formal inquiry of an innocence claim; (iv) a hearing before the Inquiry Commission; and (v) judicial review by a three-judge panel.⁷⁸

In the first phase, a defendant with a factual innocence claim submits a petition for review by the NCIIC.⁷⁹ Petitions submitted by incarcerated individuals receive priority status.⁸⁰ Upon receipt of a completed application, the NCIIC conducts an independent investigation into the facts of a case, which includes the power to serve process, subpoena witnesses, review physical evidence, and utilize any means of discovery authorized by the North Carolina Rules of Civil Procedure.⁸¹ If at any point the petitioner refuses to cooperate, his or her case will be terminated.⁸² Defense counsel from the petitioner's trial and the respective prosecutor must respond to inquiries put to them by the NCIIC. The NCIIC must disclose to the petitioner any exculpatory evidence it uncovers.⁸³ Should the NCIIC discover evidence of other crimes committed by the petitioner, the NCIIC reserves the right to refer such information to the relevant authorities.⁸⁴

Only two percent of innocence claims survive the first two rounds of review and proceed to the third phase, the formal inquiry stage.⁸⁵ Whether this low rate is due to the stringency of review or an unnecessarily complex application process or some other cause is unclear. It is reported that "28 percent of rejected cases lacked new evidence, while another 20 percent had no way to prove their claims. 21 percent did not claim complete factual innocence of the crimes. In 9 percent of rejections, the evidence itself was deemed unreliable."⁸⁶ After a formal inquiry, the NCIIC votes to determine whether to refer the case to the next phase of judicial review.⁸⁷ To submit the case for judicial review requires an affirmative vote from five of the

77. *Id.* at Article 6(E).

78. Tate, *supra* note 7, at 544 (citing N.C. INNOCENCE INQUIRY COMM'N, RULES AND PROCEDURES).

79. See N.C. GEN. STAT. § 15A-1467(a) (2015).

80. N.C. INNOCENCE INQUIRY COMM'N, RULES AND PROCEDURES Article 4(G).

81. Wolitz, *supra* note 3, at 1051; see generally N.C. INNOCENCE INQUIRY COMM'N, RULES AND PROCEDURES Article 4.

82. N.C. INNOCENCE INQUIRY COMM'N, RULES AND PROCEDURES Article 4(P).

83. *Id.* at Article 9(B).

84. *Id.* at Article 9(C).

85. Tate, *supra* note 7, at 544.

86. Matt Ford, *Guilty, Then Proven Innocent*, THE ATLANTIC (Feb. 9, 2015), <http://www.theatlantic.com/politics/archive/2015/02/guilty-then-proven-innocent/385313/>.

87. N.C. INNOCENCE INQUIRY COMM'N, RULES AND PROCEDURES Article 6(I).

eight members;⁸⁸ However, all eight members must vote in support of further review if the petition arises from a guilty plea.⁸⁹ The controlling standard is whether there is “sufficient evidence of factual innocence to merit judicial review.”⁹⁰ The threshold showing required to satisfy this “sufficient evidence” standard is not clear, but it appears to be higher than a preponderance of the evidence. Two exonerations, discussed *infra*, shed light on what type or quantity of evidence may satisfy this standard.

The final stage of the NCIIC process resembles a more traditional judicial proceeding. A three-judge panel, appointed by the Chief Justice of the North Carolina Supreme Court, adjudicates the petitioner’s innocence claim by holding an evidentiary hearing to determine whether he or she has “proved by clear and convincing evidence that [he or she] is innocent of the charges.”⁹¹ The petitioner is represented by counsel, and prosecutors represent the interests of the state.⁹² None of the members of the judicial panel shall have participated in the petitioner’s original case.⁹³ Since it is an evidentiary hearing, “[a]ll credible, verifiable evidence relevant to the case” is admissible, even if it was previously considered by a judge or jury in a prior proceeding; the claimant, however, may not assert any privileges or prevent any witnesses from testifying.⁹⁴ If the panel unanimously finds that there is clear and convincing evidence of the petitioner’s innocence, then it must dismiss the charges against the petitioner.⁹⁵ If the panel does not find clear and convincing evidence of the petitioner’s innocence, then it must deny relief.⁹⁶ Either way, a decision by the panel is final and may not be appealed.⁹⁷

VI. THE NCIIC IN ACTION: THE CASES OF GREGORY TAYLOR AND JOSEPH SLEDGE

In the past five years, NCIIC proceedings have resulted in the exoneration of multiple individuals, including Gregory Taylor in 2010⁹⁸ and Joseph Sledge in 2015.⁹⁹ The Taylor and Sledge cases provide insight into the ac-

88. *Id.* at Article 6(I)(3) (citing N.C. GEN. STAT. § 15A-1468(c)) (2015).

89. *Id.* at Article 6(I)(4) (citing N.C. GEN. STAT. § 15A-1468(c)) (2015).

90. *Id.* at Article 6(I)(2).

91. Wolitz, *supra* note 3, at 1052 (citing N.C. GEN. STAT. §15A-1469(h)).

92. *Id.*

93. N.C. INNOCENCE INQUIRY COMM’N, RULES AND PROCEDURES Article 7(A)(1).

94. *Id.* at Article 7(H).

95. *Id.* at Article 7(K)(1).

96. *Id.* at Article 7(K)(2).

97. *Id.* at Article 7(L).

98. *What We Do-Successful Cases: Greg Taylor*, N.C. CENTER ON ACTUAL INNOCENCE, <http://www.nccai.org/what-we-do/successful-cases/greg-taylor.html> (last visited May 21, 2016).

99. *What We Do-Successful Cases: Joseph Sledge*, N.C. CENTER ON ACTUAL INNOCENCE, <http://www.nccai.org/what-we-do/successful-cases/joseph-sledge.html> (last visited May 21, 2016).

tual workings of the NCIIC and what type of evidence is sufficient to meet the clear and convincing burden of proof in such proceedings. These two cases also reflect the infallibility of the criminal justice system, and thus the need for post-conviction fact checking.

Greg Taylor's torment in the criminal justice system began in 1991 when his car was discovered stuck in the mud approximately one hundred yards from where a young woman was murdered the same night.¹⁰⁰ Despite having no physical evidence to link Taylor to the crime, the prosecution charged him with murder.¹⁰¹ To convict Taylor, the government relied on the false testimony of two jailhouse informants, provided pursuant to an agreement for leniency, and false testimony provided by a forensic scientist who claimed traces of the victim's blood was found on the tires of Taylor's truck.¹⁰²

Taylor was convicted in 1993 and incarcerated for over a decade.¹⁰³ Taylor subsequently contacted the North Carolina Center on Actual Innocence to assist him with a post-conviction innocence claim.¹⁰⁴ The North Carolina Center on Actual Innocence is an independent non-profit that assists with the processing and review of innocence claims in North Carolina; it is not a part of the NCIIC and is not to be confused with the aforementioned North Carolina Actual Innocence Commission.¹⁰⁵ In 2007, with the help of the North Carolina Center on Actual Innocence, Taylor's case was referred to the NCIIC, which conducted its own two-year investigation.¹⁰⁶

In February 2010, a three-judge panel convened to determine if there was clear and convincing evidence of Taylor's innocence.¹⁰⁷ Among the items proffered by Taylor's lawyers were the lab notes of the original forensic scientist, which indicated that the substance found on Taylor's car and tested by the lab was not human blood.¹⁰⁸ Such exculpatory information had not been provided to the defense at the original trial.¹⁰⁹ Taylor also presented evidence that discredited the testimony of the jailhouse informants from the original trial.¹¹⁰ On February 17, 2010, the NCIIC three-judge panel unanimously ruled that Taylor had presented sufficient evidence of his in-

100. N.C. CENTER ON ACTUAL INNOCENCE, *supra* note 98.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. See *About Us-Mission*, N.C. CENTER ON ACTUAL INNOCENCE, <http://www.nccai.org/about-us/mission.html>; *About Us-History*, N.C. CENTER ON ACTUAL INNOCENCE, <http://www.nccai.org/about-us/history.html>.

106. N.C. CENTER ON ACTUAL INNOCENCE, *supra* note 98.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

nocence and Taylor was released from prison, seventeen years after his conviction.¹¹¹

In September 1976, Joseph Sledge escaped from a prison work farm in eastern North Carolina where he was serving a four-year sentence for theft.¹¹² On the day following his escape two women were found murdered in their home, near the prison from which Sledge had fled.¹¹³ Sledge was quickly suspected of committing the crime, notwithstanding the absence of evidence connecting him to the crime scene.¹¹⁴ However, two years later in 1978, despite having possession of ample exculpatory forensic evidence, including fingerprints, palm prints, and shoeprints that did not match Sledge, the government charged Sledge with murder for the deaths of the two victims.¹¹⁵ Using flawed and misleading forensic science, as well as the false testimony of two jailhouse informants, the prosecution's first case resulted in a mistrial in May 1978.¹¹⁶ Three months later, Sledge was tried again and convicted on two counts of second-degree murder and sentenced to life imprisonment.¹¹⁷

Over the course of the next two decades, Sledge pleaded his innocence in more than twenty-five pro se motions filed in state and federal court.¹¹⁸ With the assistance of the North Carolina Center on Actual Innocence, the same organization that aided Gregory Taylor, Sledge was able to accumulate exculpatory evidence to support his petition to the NCIIC. In 2012, the hair evidence found at the scene of the crime—originally used to convict Sledge—was tested and the results excluded Sledge as its source.¹¹⁹ One year later, the only surviving jailhouse informant from Sledge's original trial recanted his testimony that Sledge had confessed his guilt to him, and admitted that he was given monetary and leniency incentives in exchange for false testimony.¹²⁰ In 2014, the original fingerprint and palm print evidence from the scene of the crime was reexamined and it too excluded Sledge as its source.¹²¹ After reviewing this evidence, the NCIIC convened a three-judge panel on January 23, 2015 to consider Sledge's innocence claim—he was unanimously exonerated.¹²²

111. *Id.*

112. N.C. CENTER ON ACTUAL INNOCENCE, *supra* note 99.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

Gregory Taylor's and Joseph Sledge's innocence claims provide critical lessons concerning the operation of and need for the NCIIC and other innocence adjudication commissions like it. First, factual reinvestigations of Taylor's and Sledge's cases, which took the NCIIC years to complete, revealed, *inter alia*, numerous forensic flaws, discovery violations, instances of prosecutorial misconduct, and false jailhouse informant testimony that lead to wrongful convictions. Without the investigatory resources of the NCIIC, it is unclear whether Taylor or Sledge's protestations of innocence would have ever been corroborated. Taylor and Sledge were each imprisoned for over a decade and filed scores of motions asserting their factual innocence with traditional appellate courts—all of which were denied—before the NCIIC was created and agreed to investigate their claims.

Second, both Taylor and Sledge presented a variety of evidence to meet the threshold of clear and convincing evidence of their innocence. In NCIIC proceedings the burden of proof is reversed from criminal trials: the defendant bears the burden of proving his innocence, rather than the prosecution proving his guilt.¹²³ Though the standard of review is not as high as it would be in a criminal trial, it is greater than a preponderance of the evidence typically employed in civil proceedings. In the Taylor and Sledge matters, the petitioners presented scientific evidence that discredited the flawed forensic materials originally used to convict them and undermined the jailhouse informants who testified against them. The Taylor and Sledge cases suggest that scientific evidence that excludes the petitioner as the actual perpetrator may, when supported by other evidence that undermines the integrity of the original proceedings (e.g. prosecutorial misconduct or false jailhouse informant testimony), be sufficient to meet the clear and convincing evidence standard required for exoneration by the NCIIC three-judge panel.

Third, the Taylor and the Sledge cases serve as a humbling prism through which courts, legislators, and reformers can see the fallibility of the criminal justice system, and the human consequences of its flaws. Their cases illuminate the potential for prosecutors, jailhouse informants, and state laboratory scientists to deviate from the truth for the sake of a conviction and finality; they reflect the inability of defense counsel to overcome false testimony and fabricated evidence to protect their client's interests and liberty; and they affirm the possibility of an adversarial criminal trial producing a wrongful conviction.

In short, the wrongful convictions of Taylor and Sledge and their subsequent exonerations by the NCIIC reveal the need for a new model of post-

123. N.C. GEN. STAT. ANN. § 15A-1469(h),

conviction review to effectively investigate and adjudicate claims of actual innocence. Despite the successes of Taylor's and Sledge's cases, as well as others, the NCIIC has not been universally welcomed.

VII. OPPOSITION TO AND CRITICISM OF THE NCIIC

From the outset, the NCIIC and its progenitor, the North Carolina Commission on Actual Innocence, have faced opposition and criticism. Traditionally, as noted above, appellate courts are loathe to hear claims of factual innocence and are not designed or authorized to adjudicate appellants' actual innocence. Institutionally, the criminal justice system champions the finality of factual determinations, guilty pleas, and unanimous jury verdicts. The prospect of post-conviction factual review and the re-opening of decades old investigations through NCIIC proceedings has been perceived by some to conflict with these values.

In North Carolina, state prosecutors have voiced opposition against the NCIIC's power to investigate innocence claims from petitioners who originally pleaded guilty to the crime under review, and have supported legislation that threatened to preclude the NCIIC from addressing such claims.¹²⁴ Arguing that defendants who accepted guilty pleas did so knowingly and voluntarily, state prosecutors have contended that the NCIIC should not pry into innocence petitions arising from a guilty plea.¹²⁵ "There has to be some finite point to litigation," Forsyth County District Attorney Jim O'Neill stated, adding, "the legislature is trying to be both fiscally and legally responsible in not wasting limited resources where defendants have admitted responsibility and pled guilty."¹²⁶ Peg Dorer, Director of the N.C. Conference of District Attorneys, has criticized the NCIIC's review of guilty pleas, asserting it was beyond the agency's purpose "to start picking up all the cases that fall through the cracks."¹²⁷

On a broader level, some commentators have called for prosecutorial vigilance against "innocence fraud," including in North Carolina.¹²⁸ Arguing that innocence "activists" are not above resorting to underhanded means to achieve their desired end of exoneration, some commentators and prosecu-

124. See JournalNow Staff, *Prosecutors Want Innocence Commission to Exclude Prisoners who Pled Guilty*, WINSTON-SALEM JOURNAL (May 10, 2011, 1:00 AM), http://www.journalnow.com/news/local/prosecutors-want-innocence-commission-to-exclude-prisoners-who-pled-guilty/article_a2105433-bd5b-5c78-94eb-54476061141c.html.

125. *Id.*

126. *Id.*

127. *Id.*

128. John M. Collins, Jr., *'Innocence Fraud' Demands Prosecutor Vigilance*, 48 PROSECUTOR 44 (Oct-Nov-Dec 2014).

tors have called into question the integrity of NCIIC investigations.¹²⁹ For example, a key basis for Gregory Taylor's aforementioned exoneration was the confession of another man—Craig Taylor (no relation to Gregory)—to the murder for which Greg Taylor was convicted.¹³⁰ When the NCIIC judicial panel adjudicated Taylor's innocence claim, the Wake County District Attorney's Office submitted an opposition questioning the veracity and the integrity of Craig Taylor's confession.¹³¹ The opposition highlighted numerous false confessions that Craig Taylor had provided in other crimes, noted his mental illnesses, and questioned the four interrogations of Craig Taylor conducted by NCIIC investigators despite their having knowledge of both his history of mental illness and making false confessions.¹³² John M. Collins, Jr. has argued this shows the existence of a double-standard governing police or prosecutorial practices and those applied to innocence investigators in post-conviction proceedings; "If a police officer had conducted the kind of interview that led to Craig Taylor's confession, it is almost certain that innocence activists would have labeled it a travesty of justice."¹³³

Doubtless, post-conviction investigators are not infallible and attorneys that work for defense organizations have an ethical mandate to zealously represent the interests of their client and attempt to establish his or her innocence.¹³⁴ Confessions by persons such as Craig Taylor, given his mental illness and history of false confessions, should be carefully scrutinized. Nevertheless, it is critical to distinguish the NCIIC from defense organizations such as innocence projects or public defender offices. The NCIIC and defense organizations serve different purposes and are both necessary. The NCIIC is an independent organization that does not represent the interests of the defendant. As NCIIC former executive director, Kendra Montgomery-Blinn, explained of the organization: "We're never advocates, we never represent the people who were originally convicted, we're always neu-

129. *Id.*

130. See Ed Crump, *Taylor Confession Credible?*, ABC 11 NEWS (October 13, 2009), <http://abc11.com/archive/7062296/>.

131. *Id.*

132. *Id.* The State's opposition to Gregory Taylor's NCIIC innocence petition can be viewed online at http://dig.abclocal.go.com/wtvd/taylor_docs_101309.pdf.

133. Collins, Jr., *supra* note 128, at 46.

134. A recent and controversial example of the potential ethical quagmires of post-conviction litigation was demonstrated by the investigation, prosecution, and admonishment of Christine Mumma, head of the NC Center on Actual Innocence. Mumma was accused of allegedly removing a water bottle from the home of a third party in an attempt to potentially obtain DNA evidence that matched other suspects and thus support her client Joseph Sledge's claim of innocence. Mumma was found to not have committed a professional ethical violation for conduct involving dishonesty, fraud, deceit or misrepresentation. See Anne Blythe, *NC Bar Admonishes Innocence Advocate Christine Mumma*, THE CHARLOTTE OBSERVER (January 14, 2016, 5:12 PM), <http://www.charlotteobserver.com/news/local/crime/article/54743530.html>.

tral.”¹³⁵ However, defense and innocence organizations are necessary to represent the interests of the accused before the courts and the NCIIC.

The strength and credibility of the NCIIC lies in the fact that it is required by statute to be independent and consists of representatives from all sides of the criminal justice system. Because it is an “independent and balanced truth-seeking forum for credible claims of innocence,” its eventual pronouncements of innocence are more likely to be respected by the parties involved, the legislature, and the general public.¹³⁶ The NCIIC should receive support from fiscal conservatives and proponents of judicial economy because it functions as a highly selective and efficient screening device for claims of actual innocence.¹³⁷ However, because a petition to the NCIIC does not foreclose or impact other post-conviction claims, it not clear that the NCIIC enhances judicial economy by reducing other state and federal post-conviction proceedings.¹³⁸ The unprecedented scope of factual review granted to the NCIIC, and its corresponding capacity for unearthing legitimate actual innocence claims, provides value to the existing universe of post-conviction proceedings that outweighs fiscal concerns or judicial economy, particularly in light of the limited budget allocated to the NCIIC and the very small percentage of cases that actually make it through the entire process.¹³⁹

However, the NCIIC is not a perfect institution and its experience thus far suggests specific areas for constructive development.

VIII. THE NCIIC: ROOM FOR GROWTH

As an error correction innocence commission, the NCIIC is the first and only one of its kind in the United States. Almost ten years into existence now, it is possible to look back on its first decade of experience and articulate areas for future development. The four following recommendations could be implemented to improve the NCIIC’s logistical operation and administration of justice.

First, the NCIIC should revise or simplify the initial application processes. As noted above, only two percent of cases actually survive the first two steps in the multi-step process of review. If the rules or instructions are not sufficiently clear with respect to the requirements of actual innocence petitions, then the efficiency and efficacy of the NCIIC is diminished. The

135. Bob Friedman, *Living the Truth*, ATT’Y AT L. MAG., N.C. Triangle Edition, <http://www.attorneyatlawmagazine.com/triangle-edition/nc-innocence-inquiry-commission/>.

136. Quoting the Preamble to N.C. INNOCENCE INQUIRY COMM’N, RULES AND PROCEDURES.

137. Maiatico, *supra* note 11, at 1369.

138. N.C. INNOCENCE INQUIRY COMM’N, RULES AND PROCEDURES, Article 8(A).

139. The NCIIC’s annual budget is approximately \$375,000. In addition, it recently received a federal grant of \$570,000 to improve DNA testing. *See* Wolitz, *supra* note 3, at 1050.

NCIIC chairs could appoint a special committee to review and prepare recommendations on how to simplify and streamline the application process. Relaxation of strict requirements in form analogous to *pro se*, *in forma pauperis* filings may be appropriate for petitioners who are incarcerated and do not have ready access to counsel in preparing their application.

Second, the NCIIC staff and investigators are endowed with essentially unfettered discretion with respect to their initial review of innocence petitions, and their decision whether to approve or reject petitions is not subject to appeal. As the Craig Taylor investigation discussed *supra* indicates, the NCIIC staff and investigators are not immune to error and may engage in questionable practices or conduct. Accordingly, the NCIIC should consider revising its rules and procedures to incorporate an element of review in narrowly defined circumstances where a petitioner or the state may appeal the staff's decision to approve or reject a claim to the eight commissioners. The NCIIC could adopt a "clearly erroneous" standard to govern such initial appeals of acceptances or rejections of claims, depending on the facts available to the staff and investigators and the methods they employed during their initial investigation.

Third, the NCIIC proceedings could be more transparent. Currently, NCIIC proceedings are exempt from public meetings laws and all NCIIC hearings are "presumed to be closed."¹⁴⁰ Further, before the NCIIC approves judicial review and the case is referred to a three-judge panel, all records are deemed confidential and are excluded from public record and public meeting laws.¹⁴¹ While such measures may protect confidential, private, or sensitive information, it further insulates the NCIIC staff from public scrutiny for their decisions to accept or reject petitions in their role as the initial gatekeeper. The NCIIC should aim to increase transparency in its initial procedures to inspire confidence amongst the public and legal community in the accuracy and fairness of its initial assessments of innocence petitions. Requiring the NCIIC staff to produce a written opinion for its decision to accept or reject a claim, briefly outlining the factual or investigatory basis for said decision and making it available to the public, is one means of doing so. Even if it were mostly boilerplate language consisting of various established bases for a decision, such written explanations for the staff's decision to accept or deny a petition should shine some light on the staff's initial decision-making process.

Fourth, in contrast to the prevailing secrecy of initial staff investigations and decision-making processes, petitioners are required to waive attorney-client privilege and any applicable procedural protections normally provid-

140. N.C. INNOCENCE INQUIRY COMM'N, RULES AND PROCEDURES, Article 6(E).

141. *Id.* at Article 6(G)(1), (2).

ed in traditional judicial proceedings. While complete access to information may be necessary for the NCIIC staff to fully vet a claim of innocence, the NCIIC should implement measures to preserve the privacy and integrity of the attorney-client relationship. A modified standard of attorney-client privilege, exclusive to NCIIC proceedings and which only covered the scope of factual inquiry conducted by the NCIIC, could be created to this end.

IX. CONCLUSION

The Anglo-American model of criminal justice lacks the institutional capacity and will to adjudicate claims of actual innocence in appellate and post-conviction proceedings. In light of the heightened awareness about wrongful convictions and their multifarious causes, the need for an institutional process to adjudicate actual innocence claims is self-evident. The NCIIC was created to fill this adjudicatory void in North Carolina, and it provides a working model of what a post-conviction actual innocence adjudication process can look like. Though it is not perfect, the NCIIC should inspire other states to adopt error correction commissions that are similarly empowered to investigate and adjudicate claims of actual innocence, and do, in other words, what traditional appellate or post-conviction proceedings do not: conduct *de novo* factual review of innocence claims. The unacceptable risk and existence of wrongful convictions demands nothing less.