NOTES

SEEN BUT NOT HEARD: AN ARGUMENT FOR GRANTING EVIDENTIARY HEARINGS TO WEIGH THE CREDIBILITY OF RECANTED TESTIMONY

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I. INTRODUCTION: THE CASE OF TROY DAVIS

Shortly after midnight on August 19, 1989, an argument ensued between a homeless man and another young man outside a convenience store in Savannah, Georgia.[1] The homeless man, Larry Young, had just purchased some beer and cigarettes and was returning to a Burger King parking lot when Sylvester "Red" Coles approached Young and asked for a beer.[2] When Young refused, Coles supplemented his request with foul language and pursued Young down the street to the Burger King.[3] Prior to this encounter, Coles had been shooting pool in a nearby pool hall with Darrell "D.D." Collins and Troy Anthony Davis, both of whom were still with Coles during the early morning harassment.[4]

Young's girlfriend, Harriett Murray, also witnessed the entire exchange between Young and Coles while waiting for Young in the Burger King parking lot.[5] According to Murray, Young tried to walk away from the group, repeatedly saying that he did not want to fight.[6] She heard one of the three men order Young not to walk away, and then observed one pull out a gun.[7] As Young continued to walk away, the three pursued him into the parking lot and one of them hit Young in the head with the butt of the gun.[8] Young then ran to the drive-through window, where he banged his fists on the window and on a van parked there, pleading for help.[9]

Murray next saw a police officer, Mark MacPhail, enter the parking lot and attempt to break up the fight.[10] Officer MacPhail, who had been working as a security guard at a Greyhound bus

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[1] *In re* Davis, 565 F.3d 810, 828 (11th Cir. 2009) (Barkett, J., dissenting); *In re* Davis, No. CV409-130, 2010 WL 3385081, at *1 (S.D. Ga. Aug. 24, 2010), *appeal dismissed sub nom.* Davis v. Terry, 625 F.3d 716 (11th Cir. 2010), *cert. denied sub nom.* Davis v. Humphrey, 131 S. Ct. 1788 (2011) (mem.).

[2] Davis v. State, 660 S.E.2d 354, 357 (Ga. 2008).

[3] *Id.*

[4] *In re* Davis, 565 F.3d at 828 (Barkett, J., dissenting).

[5] *In re* Davis, 2010 WL 3385081, at *2.

[6] *Id.*

[7] *Id.*; *see also* Petition for a Writ of Certiorari at 4, Davis v. Georgia, 129 S. Ct. 397 (2008) (mem.) (No. 08-66), 2008 WL 4366181, at *4 (quoting Coles as saying, "You don't know me. Don't walk away from me. I'll shoot you.").

[8] *In re* Davis, 2010 WL 3385081, at *2.

[9] *Id.*

[10] *Id.*

station adjacent to the Burger King when he heard Young's cry for help,[11] ordered everyone to stop.[12] As the officer approached the group, the individual with the gun aimed his weapon at the officer.[13] According to Murray, when Officer MacPhail reached for his own weapon, the gunman shot him in the face, knocking him to the ground.[14] The assailant then approached to point-blank range and shot him twice more, killing him.[15]

Murray first identified Troy Davis as the shooter after seeing a photographic lineup.[16] She recounted the above story in two statements to the police and in her testimony at Davis's trial, but after the trial she signed an affidavit stating that Officer MacPhail's shooter was actually the person that she had seen arguing with Young.[17]

Murray was not the only person whose story changed after trial. In all, seven of the trial witnesses who had named Davis as the shooter later changed their stories.[18] Five eyewitnesses have since asserted that they were unable to identify who struck Young or who shot Officer MacPhail, and two others have said that they lied at trial.[19] In addition, three other witnesses have claimed that Coles had admitted to being the shooter.[20]

For instance, Young testified at trial that the man who had assaulted him with the butt of the gun was definitely not the same man with whom he had been arguing.[21] Several years after the trial, though, Young revealed that, while the police were

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[11] Davis v. State, 660 S.E.2d 354, 357 (Ga. 2008); Davis v. State, 426 S.E.2d 844, 846 (Ga. 1998).

[12] *In re* Davis, 2010 WL 3385081, at *2.

[13] *Id.*

[14] *Id.*

[15] *In re* Davis, 565 F.3d 810, 828 (11th Cir. 2009) (Barkett, J., dissenting).

[16] *In re* Davis, 2010 WL 3385081, at *10.

[17] *See id.* at *51 (noting that Murray testified at trial that Coles had been arguing with Young and that Davis had both hit Young with the pistol and shot Officer MacPhail, whereas her subsequent affidavit stated that the same person who had argued with Young had also hit him and shot the police officer). Harriet Murray died before Davis's evidentiary hearing was held. *Id.* Thus, any ambiguity as to whether she was identifying Coles or Davis in her posttrial affidavit remains unresolved.

[18] Davis v. State, 660 S.E.2d 354, 359–60 (Ga. 2008).

[19] *Id.*

[20] *Id.* at 361.

[21] *In re* Davis, 2010 WL 3385081, at *18.

questioning him, he had been bleeding from the head wound where his attacker had hit him with the pistol.[22] He claimed that the police had denied his repeated requests for medical assistance until he had given them the answers they wanted.[23]

Antoine Williams, a Burger King employee, testified that, on the morning of the shooting, he had just arrived for his 1:00 AM shift and parked his car when he saw three men accosting a fourth man in the parking lot.[24] He testified that one of the three men hit the fourth man in the head with the butt of a gun and then tried to hide the gun in his pants when an officer came running to the parking lot.[25] When the officer came closer, someone shot the officer.[26] Williams then ran inside the Burger King and told his manager to call the police.[27] During questioning, Williams identified Davis from a photo spread.[28] After trial, however, Williams revealed that he is illiterate and had signed the police statement provided to him without reading it.[29]

Dorothy Ferrell testified at trial that she was staying in a motel across the street from the Burger King and witnessed the entire attack.[30] She claimed at trial that she had been talking to a police officer two days after the shooting about an unrelated matter and happened to recognize Davis in a photo on the passenger seat of a police car.[31] Ferrell later stated in an affidavit that she "told the detective that Troy Davis was the shooter, even though the truth was that I didn't see who shot the officer."[32] Her affidavit now suggests police pressure over her initial statement:

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[22] AMNESTY INT'L, UNITED STATES OF AMERICA: WHERE IS THE JUSTICE FOR ME?': THE CASE OF TROY DAVIS, FACING EXECUTION IN GEORGIA 19 (Feb. 2007), http://www.amnestyusa.org/pdfs/AMR5102307.pdf.

[23] *Id*.

[24] *In re* Davis, 2010 WL 3385081, at *21.

[25] *Id*. at *21–22.

[26] *Id*. at *22.

[27] *Id*.

[28] *Id*.

[29] AMNESTY INT'L, *supra* note 22, at 20.

[30] *In re* Davis, 2010 WL 3385081, at *23.

[31] *Id*. at *24.

[32] AMNESTY INT'L, *supra* note 22, at 17 (quoting an affidavit signed by Ferrell on Nov. 29, 2000) (internal quotation marks omitted).

> I was real tired because it was the middle of the night and I was pregnant too . . . I was scared that if I didn't do what the police wanted me to do, then they would try to lock me up again. I was on parole at the time and I had just gotten home from being locked up earlier that year.[33]

D.D. Collins testified at trial that Davis was the one who assaulted Young.[34] Collins later claimed in his affidavit that the police had pressured him to identify Davis as Young's attacker.[35] He stated in the affidavit that since he had been with Davis and Coles on the night of the murder, the police threatened to charge him as an accessory to murder if he did not identify Davis as the murderer.[36]

Jeffrey Sapp testified at trial that he knew Davis personally and that Davis had told him that he had attacked Young and had killed Officer MacPhail.[37] In 1996, however, Sapp signed an affidavit claiming that he had lied about Davis's admission because the police were harassing him.[38] He also claimed that police further pressured him to maintain his lies at trial.[39]

Kevin McQueen testified that Davis confessed to him in jail that he was Officer MacPhail's murderer.[40] In 1996, though, he claimed in an affidavit that because he had been angry with Davis at the time, he had lied at trial.[41]

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[33] *Id.* (omission in original) (quoting an affidavit signed by Ferrell on Nov. 29, 2000) (internal quotation marks omitted).

[34] Davis v. State, 660 S.E.2d 354, 359 (Ga. 2008).

[35] *See* AMNESTY INT'L, *supra* note 22, at 18 ("[S]ome detectives came in and started yelling at me, telling me that I knew that Troy Davis . . . killed that officer by the Burger King." (omission in original) (quoting an affidavit signed by Collins on July 11, 2002) (internal quotation marks omitted)).

[36] *See id.* ("They were telling me that I was an accessory to murder and that I would pay like Troy was gonna pay if I didn't tell them what they wanted to hear.") (quoting an affidavit signed by Collins on July 11, 2002) (internal quotation marks omitted).

[37] *In re* Davis, No. CV409-130, 2010 WL 3385081, at *31 (S.D. Ga. Aug. 24, 2010), *appeal dismissed sub nom.* Davis v. Terry, 625 F.3d 716 (11th Cir. 2010), *cert. denied sub nom.* Davis v. Humphrey, 131 S. Ct. 1788 (2011) (mem.); Davis v. State, 660 S.E.2d at 359.

[38] Davis v. State, 660 S.E.2d at 359.

[39] *Id.*

[40] *Id.*

[41] *Id.*

Two witnesses did not retract their trial testimony.[42] One of these individuals was Coles who, according to Davis and some of the witnesses, may be the person actually responsible for Officer MacPhail's murder.[43] Coles testified at trial that he did indeed argue with Young outside the pool hall parking lot that night but that it was Davis who hit Young in the head with the pistol.[44] He claimed that he started to run as soon as Davis attacked Young but stopped after Officer MacPhail arrived and ordered everyone to halt.[45] Coles said that Officer MacPhail ran past him towards Young and Davis and that he then heard a gunshot and resumed running away from the scene.[46] According to Coles, he then heard two more gunshots and ran until he reached his sister's house.[47] The following afternoon Coles went with his brother and uncle to an attorney to relate his version of the story.[48] The attorney then accompanied Coles to the police station to give a statement.[49]

The other witness who maintained his trial testimony was Stephen Sanders, who at the time of the shooting was awaiting his to-go order in the van that Young ran to after being hit in the head with the pistol.[50] Sanders testified at trial that Davis both attacked Young and shot Officer MacPhail.[51] In his original statement to the police, however, he could only identify the assailant as "a black man in his twenties" and stated that he "wouldn't recognize [the group of assailants] again."[52]

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[42] *Id.* at 357.

[43] *See id.* ("At trial, Davis's defense centered on the theory that Coles was the murderer."); *see also supra* note 20 and accompanying text.

[44] *In re* Davis, No. CV409-130, 2010 WL 3385081, at *20 (S.D. Ga. Aug. 24, 2010), *appeal dismissed sub nom.* Davis v. Terry, 625 F.3d 716 (11th Cir. 2010), *cert. denied sub nom.* Davis v. Humphrey, 131 S. Ct. 1788 (2011) (mem.).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at *21.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of the Innocence Project in Support of Petitioner at 16 n.10, Davis v. Georgia, 129 S. Ct. 397 (2008) (mem.) (No. 08-66), 2008 WL 3862711 at *16 n.10.

The final person to testify to the events of that morning was Troy Davis himself.[53] Davis claimed that he did not see who shot MacPhail, but his testimony suggested that Coles was the shooter.[54] The other witnesses' testimony at trial, however, supported Coles's version of events.[55] In the years following his conviction, Davis obtained affidavits establishing that seven witnesses had retracted their trial testimony, and he attempted to submit them in an extraordinary motion for a new trial.[56] The Chatham County Superior Court, however, denied Davis's motion without holding an evidentiary hearing to weigh the credibility of the recantations.[57] The Georgia Supreme Court affirmed the denial of Davis's motion, further holding that the Superior Court did not abuse its discretion and that an evidentiary hearing was therefore unnecessary.[58] The court reasoned that "[t]rial testimony is closer in time to the crimes, when memories are more trustworthy," and that the trial process itself lends more credibility to witness testimony due to "public oaths, cross-examination, and the superintendence of a trial judge."[59]

Despite Georgia's refusal to hear Davis's evidence of the witnesses' recantations, Davis did receive an evidentiary hearing in the federal court system.[60] In a rare move not seen in nearly fifty years,[61] the U.S. Supreme Court granted Davis's original petition for habeas corpus and ordered the District Court Judge of the Southern District of Georgia to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes [Davis's] innocence."[62]

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[53] *In re* Davis, 2010 WL 3385081, at *33.

[54] *Id.* at *33–34.

[55] *In re* Davis, 565 F.3d 810, 827–28 (11th Cir. 2009) (Barkett, J., dissenting).

[56] *Id.* at 814 (majority opinion).

[57] Davis v. State, 660 S.E.2d 354, 357 (Ga. 2008).

[58] *Id.*

[59] *Id.* at 358.

[60] *In re* Davis, No. CV409-130, 2010 WL 3385081, at *37 (S.D. Ga. Aug. 24, 2010) (stating that Davis received a hearing on the new evidence supporting his claim of innocence on June 24, 2010), *appeal dismissed sub nom.* Davis v. Terry, 625 F.3d 716 (11th Cir. 2010), *cert. denied sub nom.* Davis v. Humphrey, 131 S. Ct. 1788 (2011) (mem.).

[61] *In re* Davis, 130 S. Ct. 1, 2 (2009) (Scalia, J., dissenting).

[62] *Id.* at 1 (majority opinion).

The District Court reached a decision on August 24, 2010, and found the new evidence insufficient to establish that no reasonable juror would have convicted Davis had such evidence been presented at trial.[63] With the reassurance of this holding, the state executed Davis on September 21, 2011,[64] over twenty years after sentencing him to death.[65]

Even though Davis's evidentiary hearing did not exonerate him, one commentator has noted that the very fact the U.S. Supreme Court intervened in this case with the rare granting of an original petition of habeas corpus could signal the beginning of a heightened focus on the substance of claims of actual innocence.[66]

The purpose of this Note is to consider how Georgia courts should treat a person who, unlike Troy Davis, may not be fortunate enough to have the U.S. Supreme Court grant an original petition for habeas corpus. This Note argues that Georgia courts should grant evidentiary hearings of witness recantations in an extraordinary motion for a new trial in criminal cases where the primary evidence against the defendant is eyewitness identification. Part II discusses the growing awareness of the likelihood of wrongful convictions and the reasons courts traditionally view witness recantations with hostility, arguing that the possibility of eyewitness misidentifications should give pause to the disfavor of recanted trial testimony. Part III analyzes the standards the Georgia state courts used in denying Troy Davis's motions for an evidentiary hearing and applies alternative standards to show that different outcomes at the state level were possible. This Note concludes that the General Assembly should amend Georgia's criminal procedure to loosen the restrictions on a defendant's ability to receive an evidentiary hearing when submitting recantation testimony through an extraordinary

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[63] *In re* Davis, 2010 WL 3385081, at *1, *45, *59, *61.

[64] Kim Severson, *Georgia Inmate Executed; Raised Racial Issues in Death Penalty*, N.Y. TIMES, Sept. 22, 2011, at A1.

[65] *See* Davis v. State, 426 S.E.2d 844, 845 n.1 (Ga. 1993) (noting that Davis's trial ended August 30, 1991).

[66] *See* Ellyde Roko, *Finality, Habeas, Innocence, and the Death Penalty: Can Justice Be Done?*, 85 WASH. L. REV. 107, 111 (2010) (commenting that the Davis case "has the potential to turn the focus back to the merits of such claims, particularly in the area of actual innocence").

motion for a new trial. By doing so, the goals of both finality and justice can be preserved.

It should be noted, of course, that the reasoning behind granting evidentiary hearings in these cases is not confined to Georgia criminal law. Rather, the relief proposed herein could serve as a model for any state seeking to refine its postconviction procedures to improve accuracy in guilty verdicts.

II. BACKGROUND

Georgia does not provide a postconviction remedy specifically tailored to erroneous convictions.[67] Instead, defendants asserting such a claim may pursue habeas corpus,[68] an ordinary motion for a new trial,[69] and an extraordinary motion for a new trial.[70] Before determining which remedy would be optimal for asserting evidence of recantation testimony, it is necessary to examine the broader context of witness recantations.

A. POSSIBILITY AND PROBABILITY OF WRONGFUL CONVICTIONS

1. No Longer an Anomaly. Throughout most of our criminal justice system's history, the debate on wrongful convictions has centered on *whether* people were ever convicted for crimes that they did not commit.[71] To wit, Judge Learned Hand famously quipped that "[o]ur procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."[72] Indeed, the very purpose of the constitutional protections

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[67] *See* 1 DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK § 13:126 (2010) ("Georgia does not have an erroneous convictions act.").

[68] O.C.G.A. §§ 9-14-1(c), -40 to -53 (2006).

[69] *Id.* § 5-5-40.

[70] *Id.* § 5-5-41(b).

[71] *See* Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75, 87 (2008) ("Before the advent of DNA evidence, the debate surrounding wrongful convictions often focused on *whether* wrongful convictions occurred in significant numbers, not on the causes producing such a systemic failure in the criminal justice system."); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 56 (2008) ("Postconviction DNA testing changed the landscape of criminal justice in the United States. Actors in the criminal system long doubted whether courts ever wrongly convicted people . . . .").

[72] United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

enshrined in our criminal procedure, arguably, is to prevent a person from being convicted for a crime that the person did not commit.[73] Under the ideal functioning of our adversarial system of justice, the truth should come out as long as the accused's constitutional rights are preserved.[74]

Despite such sentiments, numerous criminal defendants across the country have been pardoned or received clemency throughout the years. For example, in the late 1980s, discoveries in the study of DNA gave many pleas for postconviction relief a scientific foundation unavailable in earlier times.[75] In contrast to executive pardons or acquittals upon retrial, the DNA revolution provided the general public with scientific and indisputable proof that innocent defendants had been incarcerated.[76] Thus began a new era in which increasing numbers of criminal defendants became exonerated on the basis of DNA evidence.[77] Since 1989, DNA

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[73] *See, e.g.*, United States v. Nobles, 442 U.S. 225, 230 (1975) ("The dual aim of our criminal justice system is 'that guilt shall not escape or innocence suffer.' " (quoting Berger v. United States, 295 U.S. 78, 88 (1935))). This statement is qualified here as arguable because of the Court's statement in *Moore v. Dempsey* that "what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved." 261 U.S. 86, 87–88 (1923), *quoted in* Herrera v. Collins, 506 U.S. 390, 400–01 (1993).

[74] *See Herrera*, 506 U.S. at 420 (O'Connor, J., concurring) ("Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.").

[75] The story of Gary Dotson, the first person in the United States to be exonerated through DNA evidence, is illustrative. In 1979, Dotson was sentenced to twenty-five to fifty years for the violent rape of a sixteen-year-old girl that occurred in 1977. *See* Armbrust, *supra* note 71, at 75–76 (recounting the facts of Dotson's exoneration). Dotson's conviction was based primarily upon eyewitness testimony. *Id.* at 76. He spent several years behind bars, and his name was not cleared until technological advancements in the late 1980s enabled retesting of the original evidence to show that Dotson's DNA did not match that of the victim's attacker. *Id.* at 76–77. What makes Dotson's case relevant to this Note is that before the development of DNA testing, the victim had attempted to recant her earlier trial testimony. *Id*. at 76. Upon evaluating the victim's recantation, however, the court found her original testimony to be more credible. *Id*. Dotson's conviction combined with the victim's attempt to retract her trial testimony illustrates an example of where a defendant's constitutional rights had been preserved but an innocent man was *still* sent to prison.

[76] *See* Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 SW. U. L. REV. 965, 966 n.2 (2008) ("It now seems undisputable that DNA revelations have demonstrated beyond all doubt that some (whether a 'few' or 'many' is hotly disputed) convicted capital defendants have been factually, 'actually,' innocent.").

[77] *See, e.g.*, Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*,

evidence has freed more than 270 inmates in the United States who had received otherwise fair trials before a jury of their peers.[78]

The advent of DNA exonerations has so shaken public confidence in the criminal justice system that, since the late 1980s, forty-six states and the District of Columbia have enacted statutes or common law doctrines mandating DNA testing procedures if the results would have a sufficient exculpatory effect.[79] Furthermore, Harris Polls conducted in 1999, 2000, 2001, 2003, and 2008 have consistently found that 94%–95% of Americans believe that innocent people are sometimes convicted of murder.[80] These Americans, on average, even believe that 11%–13% of all those convicted of murder are actually innocent.[81]

2. Statistical Probability of Wrongful Convictions. There are several studies purporting to estimate the actual rate of wrongful convictions in the United States, with numbers varying from 0.027%–8%.[82] The divergence among these studies is due largely

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95 J. CRIM. L. & CRIMINOLOGY 523, 523 (2005) ("Until [Dotson], exonerations of falsely convicted defendants were seen as aberrational. Since 1989, these once-rare events have become disturbingly commonplace.").

[78] *Facts on Post-Conviction DNA Exonerations*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_Postconviction_DNA_Exonerations.php (last visited Aug. 20, 2011).

[79] *See* Petition for a Writ of Certiorari at 9–10 nn.5–6, Davis v. Georgia, 129 S. Ct. 397 (2008) (mem.) (No. 08-66), 2008 WL 4366181 at *9–10 nn.5–6 (listing the statutes and state law cases establishing DNA testing procedures).

[80] *See* Press Release, Regina A. Corso, The Harris Poll, Harris Interactive, Over Three in Five Americans Believe in Death Penalty 3 (Mar. 18, 2008), http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Over-Three-in-Five-Americans-Believe-in-Death-Penalty-2008-03.pdf (noting that the most recent poll surveyed 1,010 adults by telephone between February 5 and 11, 2008).

[81] *Id*.

[82] *See* Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES, Jan. 26, 2006, at A23, *quoted in* Kansas v. Marsh, 548 U.S. 163, 197–98 (2006) (Scalia, J., concurring) (calculating an erroneous conviction rate of 0.027%); Gross et al., *supra* note 77, at 551 ("Any plausible guess at the total number of miscarriages of justice in America in the last fifteen years must be in the thousands, perhaps tens of thousands."); *see also* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1336–46 (1997) (describing the methodology of different studies, with the caveat that while knowing how often innocents are convicted is impossible, "participants in the criminal process believe that people are wrongfully convicted (even if not actually innocent) and that these convictions are a regular, if relatively infrequent, event").

to disagreements over the definition of "exoneree"[83] and over the appropriate base pool of convictions.[84]

Professor Michael Risinger has criticized both extremes as distorting the database, with the low-end estimates factoring in exonerations from too broad of a base and the highest estimates including convictions reversed due to procedural irregularities.[85] Instead, he has developed a wrongful conviction rate based solely upon capital rape-murder cases in the 1980s, using DNA exonerations as the numerator.[86] By splitting the difference this way, he claims "to avoid the epistemic problems that could arise in regard to any rationally debatable exonerations, since it is easiest to establish DNA exonerations as being close to indisputable cases of factually wrongful conviction."[87] For the denominator, Risinger used all of the capital rape-murder convictions for which DNA was available for testing from 1982 to 1989.[88] With this method, Risinger calculated a minimum wrongful conviction rate of 3.3%.[89]

Unfortunately, the majority of crimes do not result in biological samples available for DNA analysis, and DNA evidence is available in only 5%–10% of all felony cases.[90] As a result, one cannot extrapolate Risinger's minimum wrongful conviction rate for capital rape-murders in the 1980s to other types of crimes to arrive at a general wrongful conviction rate with any justifiable

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[83] *See, e.g.*, Marquis, *supra* note 82, at A23 (faulting Samuel R. Gross's study, *supra* note 77, for including "cases where defendants were retried after an initial conviction and subsequently found not guilty as 'exonerations' ").

[84] *See* D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 768 & n.11 (2007) (explaining the epistemic problems in calculating the rate of exonerations and the opposing camps of interpreters of such statistics).

[85] *Id*. at 762 n.2.

[86] *Id*. at 768; *see also id*. at 772 (explaining the necessity of restricting the study to capital rape-murders by arguing that "[t]he DNA exonerations can only occur in the subset of capital convictions in which it is reasonable to believe that bodily sources of DNA might have been left in such a way as to provide the basis for including or excluding a defendant as the possible perpetrator").

[87] *Id*. at 768.

[88] *Id*. at 778.

[89] *Id*.

[90] Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. MIAMI L. REV. 1279, 1283 (2010) ("Consequently, the wrongful convictions of which we are aware are only a small fraction of the existing number of wrongful convictions.").

degree of accuracy.[91] Nevertheless, the insight his study provides for this particular subset of crimes offers a useful starting point for understanding the broader issue of erroneous convictions.[92]

B. EYEWITNESS MISIDENTIFICATION IS THE MAIN REASON FOR WRONGFUL CONVICTIONS

In 2008, Professor Brandon L. Garrett published the original empirical study of the criminal justice experiences of the first 200 people to be exonerated through DNA testing.[93] The study examined the evidence that led to convictions as well as the exonerees' previous efforts to obtain postconviction relief.[94]

Garrett found eyewitness misidentification to be the chief cause of the wrongful convictions and responsible for 79% of the exonerees' convictions.[95] Forensic analysis played a role in 57% of the convictions, informant testimony led to convictions in 18% of the cases, and the exonerees falsely confessed in 16%.[96] A more recent report published in 2009 and compiled by The Innocence Project echoed Garrett's findings, concluding that eyewitness misidentification was responsible for the convictions of 179 people who have since been exonerated by DNA evidence.[97] This figure represented 75% of the DNA exonerees as of 2009 and involved over 250 individual witnesses.[98]

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[91] Risinger, *supra* note 84, at 783–84; *see also* Garrett, *supra* note 71, at 74 (explaining that the subjects of a study examining exonerees who had been convicted for rape, murder, or rape-murder "do not reflect the typical criminal convicts in that very few suspects are charged with rape or murder and even fewer are convicted").

[92] *See* Risinger, *supra* note 84, at 787 (noting that, since the relative lack of justification for estimating the general wrongful conviction rate to be higher or lower places the two propositions in equipoise, "[i]t would seem incumbent on those who claim otherwise to proffer substantial particular reasons for the claimed differences, rather than simply invoking general problems of extension and external validity").

[93] *See* Garrett, *supra* note 71.

[94] *Id*. at 60.

[95] *Id*.

[96] *See id*. at 60 & n.18 ("Exonerees typically had more than one type of evidence supporting their convictions, so these figures add up to more than 100%.").

[97] THE INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION 3 (2009), http://www.innocenceproject.org/docs/Eyewitness_ID_Report.pdf.

[98] *Id*.

In examining courts' effectiveness in reviewing the erroneous or false evidence that supported the guilty verdicts, Garrett found that factual claims challenging the evidence were largely ineffective.[99] Most significantly, "[n]o conviction was reversed based on a challenge to an eyewitness identification."[100] Without DNA testing, all of these exonerees would likely still be behind bars, despite the fact that they were innocent and received trials devoid of procedural errors or constitutional violations.

Numerous studies have noted the deficiencies in eyewitness testimony and have suggested ways to improve the accuracy of eyewitness identifications.[101] As demonstrated below, however, courts normally discount attempted recantations despite the deficiencies inherent in eyewitness testimony.

C. TRADITIONAL PROBLEMS WITH WITNESS RECANTATIONS

As a general rule, courts are wary of witness recantations and have been so throughout much of our jurisprudence.[102] The reasons for this are legion and not without justification, although many commentators have questioned the premises behind the skepticism.[103]

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[99] *See* Garrett, *supra* note 63, at 55 ("[O]ur system of criminal appeals and postconviction review poorly addressed factual deficiencies in these trials. Few exonerees brought claims regarding those facts or claims alleging their innocence. For those who did, hardly any claims were granted by courts. Far from recognizing innocence, courts often denied relief by finding errors to be harmless.").

[100] *Id*. at 61.

[101] *See generally* Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 L. & HUM. BEHAV. 687 (2004) (finding that high levels of stress negatively impact eyewitness memory); Amina Memon et al., *Exposure Duration: Effects on Eyewitness Accuracy and Confidence*, 94 BRIT. J. PSYCHOL. 339 (2003) (concluding that an eyewitness's confidence in identification may be inflated by extended exposure to a specific face).

[102] *See, e.g.*, People v. Shilitano, 112 N.E. 733, 736 (N.Y. 1916) ("There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character.").

[103] *See* Sharon Cobb, Comment, *Gary Dotson as Victim: The Legal Response to Recanting Testimony*, 35 EMORY L.J. 969, 980–1002 (1986) (explaining why courts are wary of recanted testimony and offering countervailing policies to support consideration of recantations). *See generally* Armbrust, *supra* note 71 (canvassing the various reasons for judicial skepticism of witness recantations).

The primary reason is one of elementary logic: by the very act of recanting earlier testimony, the witness is presenting himself as one who has already lied under oath.[104] Without the solemnity of oath, the judge has little guidance for weighing the credibility of a person "who has either lied under oath or who is wasting a court's time by lying after trial."[105] Furthermore, the recantation may more accurately challenge the witness's credibility rather than challenge the earlier testimony.[106]

Another reason courts often refuse recantation evidence is the existence of other evidence supporting the trial testimony.[107] Since the purpose of reviewing new evidence is to discern whether there could have been a different verdict at trial, the contradiction of other evidence at trial, especially physical evidence, presents a formidable hurdle for a defendant to overcome.[108] Contradictory physical evidence is, of course, the most straightforward reason for denying the admissibility of a recantation.[109] When the conflicting evidence is another witness's testimony at trial, however, there is a credibility issue that reviewing courts generally are unwilling to examine.[110] To date there has been no judicial determination on whether a different policy should guide situations in which a *majority* of witnesses recant their trial testimony.[111]

Moreover, courts are often concerned about the possibility of duress or coercion being the force behind the recantation.[112] This

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[104] Armbrust, *supra* note 71, at 83; *see also* Cobb, *supra* note 103, at 982 ("While the purpose, presumably, of the recantation is to call the validity of the original testimony into question, the effect is that the recanting testimony itself also becomes suspect.").

[105] Armbrust, *supra* note 71, at 83.

[106] *Id*.; *see also* State v. Clayton, 427 So. 2d 827, 830 (La. 1982) ("[A] recantation at a new trial is a confession to perjury which destroys the credibility of the witness.").

[107] Armbrust, *supra* note 71, at 84.

[108] *Id*. at 84–85.

[109] *See, e.g.*, Cootz v. State, 924 P.2d 622, 629 (Idaho Ct. App. 1996) ("[E]ven if the new version by the recanter . . . is true, it would not undermine [the defendant's] conviction. There was sufficient testimony tying the physical evidence to [the defendant] without [the defendant's] admission of having committed a crime.").

[110] *See, e.g.*, People v. Shilitano, 112 N.E. 733, 738 (N.Y. 1916) (expressing the reviewing court's reluctance to "substitute its judgment for that of the jury and the trial judge").

[111] *Cf*. Davis v. State, 660 S.E.2d 354, 358–59 (Ga. 2008) ("Pretermitting whether such an argument might ever be persuasive, we find it unpersuasive in [this] case . . . .").

[112] *See, e.g.*, State v. Sena, 736 P.2d 491, 492 (N.M. 1987) (affirming the lower court's denial of a motion for new trial where the defendant's family coerced a witness's recantation through threats and acts of violence); *see also* Armbrust, *supra* note 71, at 85 (noting that

issue arises, in particular, when the witness has a close relationship with the defendant.[113] Since testifying against a close friend or relative is emotionally difficult, courts often presume that the recantation of a witness who is close to the defendant was motivated by regret and the desire to help the defendant.[114] Apart from the possibility of coercion, a close relationship between a witness and a criminal defendant may also come under suspicion because of social prejudice towards a "criminal class."[115] Even without a prior personal relationship between the recanting witness and the defendant, many courts view the recantation of trial testimony as an opportunity for fraud or manipulation of the court system.[116]

Finally, a more procedural reason to disfavor recantation evidence is a concern for finality and the preservation of judicial resources.[117] Courts are public entities and, as such, have limited funding; thus, they are legitimately concerned about procedural moves that may open a pathway to more new trials.[118] Furthermore, the judicial system is expected to maintain order in society, and any extension of a postconviction avenue can lead society away from the stasis that comes with a final judgment.[119]

While recognizing the validity and soundness of the above considerations in most situations of witness recantation, some commentators have advocated for a moderate relaxation of the default skepticism of recanted testimony in order to ensure more accurate judicial outcomes.[120] This effort has intensified in the

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suspicion of duress or coercion is of particular concern in cases involving gang violence or domestic violence).

[113] Armbrust, *supra* note 71, at 85–86.

[114] *Id*. at 86; *see also* Cobb, *supra* note 103, at 985 (asserting that courts often presume coercion in cases "where the recanting witness is a minor and is related to the defendant").

[115] *See, e.g.*, *Shilitano*, 112 N.E. at 735 ("[T]he witnesses to crimes of violence are often of a low and degraded character."); *see also* Cobb, *supra* note 103, at 988 ("The stereotyping of individuals into such a 'criminal class' and the attributing of undesirable characteristics to that class has contributed significantly to the low regard in which recanting testimony is generally held.").

[116] Armbrust, *supra* note 71, at 86–87.

[117] *Id*. at 86.

[118] *Id*.

[119] *See* discussion *infra* Part III.D; *see also* Cobb, *supra* note 103, at 991–92 (citing the preservation of finality as a reason behind courts disfavoring recantations).

[120] *See, e.g.*, Ambrust, *supra* note 71, at 79 ("The new framework calls on courts to

wake of DNA-based exonerations and will likely continue if the number of exonerations involving failed recantations increases.[121] Rather than support the granting of new trials in each and every instance of witness recantation, the more reasonable arguments balance the judicial concerns about recanted testimony with the possibility of incarcerating an innocent person.[122] Such arguments express "an attitude of judicial caution rather than one of presumptive disfavor."[123]

III. ANALYSIS

The fact that the Georgia Supreme Court affirmed the denial of Troy Davis's extraordinary motion for a new trial without holding an evidentiary hearing presents a perfect opportunity for the Georgia General Assembly to finally set the requirements of the extraordinary motion, especially with regard to witness recantations.[124] The court's opinion as to why an evidentiary hearing was unnecessary was in line with prior state case law,[125]

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abandon requirements of truthfulness in favor of a more relaxed corroboration standard, and proposes that courts eliminate deferential standards of review when new trial motions are summarily dismissed."); Cobb, *supra* note 103, at 1009 ("[T]he elimination of the presumptions regarding recanting testimony and a slight adjustment in the burden of proof in motions for new trials would result in better safeguards for innocent citizens who are wrongfully accused and hence would add to the integrity of the criminal justice system.").

[121] *See* Armbrust, *supra* note 71, at 98 ("The DNA revolution has called into question the factors relied upon by judges to dispute the reliability of nearly all recantations.").

[122] *See id*. ("An effective solution to this problem will not simply call on courts to grant new trials in every case in which there is a recantation. That remedy would swing the pendulum too far and would not be a palatable result for most courts. Rather, the solution needs to balance the legitimate concerns about recantations with the lessons learned from DNA exonerations."); Cobb, *supra* note 94, at 1008-09 ("It is clear that it is the *presumption* of the incredibility of recantations that is the culprit here. Yet equally clear is the fact that an automatic granting of new trial motions based on recanting testimony would be unwarranted and inappropriate.").

[123] Cobb, *supra* note 103, at 982.

[124] *See* Davis v. State, 660 S.E.2d 354, 363 (Ga. 2008) (Sears, C.J., dissenting) ("Georgia law is largely silent regarding the standards that should govern extraordinary motions for new trial.").

[125] *See, e.g.*, Dick v. State, 287 S.E.2d 11, 13 (Ga. 1982) (expressing that affirming the denial of an extraordinary motion for a new trial is proper if the pleadings "do not contain a statement of *facts* sufficient to authorize that the motion be granted if the facts developed at the hearing warrant such relief").

but the U.S. Supreme Court's order the following year[126] indicated that Davis's case deserved a hearing.

A. GEORGIA'S DENIAL OF DAVIS'S EXTRAORDINARY MOTION FOR A NEW TRIAL WITHOUT A HEARING WAS IN ACCORD WITH GEORGIA CASE LAW

In the Georgia Supreme Court's opinion affirming the denial of Davis's extraordinary motion for a new trial, Justice Melton invoked familiar reasons for skepticism of witness recantations and held that an evidentiary hearing was unnecessary. He stated that "[t]rial testimony is closer in time to the crimes, when memories are more trustworthy," and that "the trial process itself, including public oaths, cross-examination, and the superintendence of a trial judge, lends special credibility to trial testimony."[127] Thus, the court should disfavor recantations of trial testimony because the witnesses' memories at the time of recantation are likely not as fresh as at the time of trial, and because the recantations are not submitted to the credibility-enhancing procedures of a formal trial. Furthermore, an evidentiary hearing was unnecessary because none of the affidavits, even if credited as true, showed that the original trial testimony was the "purest fabrication."[128]

1. Recanted Testimony Is Not a Reason for a New Trial. Justice Melton's reasoning was in accord both with Georgia case law regarding judicial review of witness recantations[129] and with the court's disfavor for extraordinary motions for new trial in general.[130] Nevertheless, despite the suspect nature of

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[126] *In re* Davis, 130 S. Ct. 1, 1 (2009).

[127] Davis v. State, 660 S.E.2d at 358.

[128] *See id.* at 359–60 (analyzing each affidavit under the purest fabrication standard).

[129] *See* Fowler v. State, 1 S.E.2d 18, 19 (Ga. 1939) ("That a material witness for the State, who at the trial gave direct evidence tending strongly to show the defendant's guilt, has since the trial made statements under oath that his former testimony was false, is not cause for a new trial."); Brown v. State, 60 Ga. 210, 212 (1878) ("Declarations made after the trial are entitled to much less regard than sworn testimony delivered at the trial.").

[130] *E.g.*, *Dick*, 287 S.E.2d at 13 ("Extraordinary motions for a new trial are not favored . . . ."); *see also* 1 WILKES, *supra* note 67, § 13:106 ("When an extraordinary motion for a new trial is grounded on a claim of newly discovered evidence of innocence, the Georgia courts have traditionally been somewhat more reluctant to grant relief than they would be if the claim had been raised in an ordinary motion for a new trial.").

recantations, the court did not directly address the content of the witnesses' recantations in this particular case. For instance, the reliability of memory was not an issue for six of the seven recantations. Only Larry Young, the man whom Red Coles had harassed for a beer, recanted on the basis of memory, stating in his affidavit that he was "unable to 'remember what anyone looked like or what different people were wearing' and that he 'just couldn't tell who did what.' "[131] Even so, Young did not clarify whether he could no longer remember as of the date of the affidavit or had never been able to remember who shot Officer MacPhail.

The other witnesses, however, recanted their original testimony on bases wholly unrelated to memory. Jeffrey Sapp and Kevin McQueen, for example, both affirmatively stated that they had lied at trial about Davis admitting to them that he was guilty.[132] Sapp revealed that police officers had been harassing him and that the authorities had then pressured him to maintain the lie throughout trial.[133] McQueen claimed that he had lied simply because "he was angry at Davis."[134] D.D. Collins, who had testified at trial that Davis attacked Young, later stated in his affidavit that he had felt pressured to identify Davis as the attacker.[135] Antoine Williams and Dorothy Ferrell, both of whom had testified at trial that Davis shot Officer MacPhail, later submitted affidavits stating that they were unable to identify the shooter.[136] Williams said that he simply "could not identify the shooter,"[137] whereas Ferrell claimed that she "did not actually see who shot MacPhail" and that she also "felt pressured to make the identification."[138] Harriet Murray, Young's girlfriend at the time of the attack, had testified at trial that Officer MacPhail's shooter was the same person who had attacked Young and that Davis had attacked Young.[139] Later,

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[131] Davis v. State, 660 S.E.2d at 359.
[132] *Id*.
[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] *Id*. at 359–60.
[137] *Id*.
[138] *Id*. at 360.
[139] *In re* Davis, No. CV409-130, 2010 WL 3385081, at *19 (S.D. Ga. Aug. 24, 2010), *appeal dismissed sub nom.* Davis v. Terry, 625 F.3d 716 (11th Cir. 2010), *cert. denied sub nom.*

however, Murray submitted an affidavit that seemed to identify Coles as Young's attacker.[140] Thus, finding trial testimony to be more trustworthy than subsequent recantations on grounds of reliable memory does not address the witnesses' allegations here of outright lies stemming from anger or from police pressure to identify Davis as the murderer.

The court also concluded that the witnesses' recantations were less credible because submitting a posttrial affidavit requires less formal judicial procedure than does testifying at trial.[141] Even when affidavits are signed and notarized, they do not have the force of the witness raising his hand and taking an oath in front of the judge, jury, and everyone else in the courtroom.[142] In addition, the jury can hear the witness's account personally and view the witness's mannerisms in weighing the witness's credibility.[143] No similar extra-testimonial forms of information are available with a written affidavit. Finally, statements in an affidavit are not subject to cross-examination as in the case of trial testimony.[144] Thus, the form of the recantations in posttrial affidavits is itself less credible than the original trial testimony.

Nevertheless, each of these criticisms of the formality of recantations of trial testimony can be addressed by an evidentiary hearing. In a hearing, witnesses can be called to testify that they are changing or retracting their testimony.[145] The court can observe witnesses' mannerisms and submit their testimony to cross-examination.[146] Thus, an evidentiary hearing can provide for

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Davis v. Humphrey, 131 S. Ct. 1788 (2011) (mem.).

[140] *See supra* note 17 and accompanying text.

[141] *See supra* note 127 and accompanying text.

[142] *Cf.* Davis v. State, 660 S.E.2d at 358 (asserting that public oaths at trial lend "special credibility" to trial testimony).

[143] *See* Donald v. State, 700 S.E.2d 390, 391 (Ga. 2010) (noting that the jury can consider the witnesses' "manner of testifying" in judging credibility (quoting Patton v. State, 43 S.E. 533, 534 (Ga. 1903))).

[144] Davis v. State, 660 S.E.2d at 358.

[145] *Cf.* Hardin v. State, 494 S.E.2d 647, 651 (Ga. 1998) (holding that the trial court judge could weigh the credibility of witnesses who testify at the hearing).

[146] *Cf.* Bogan v. State, 303 S.E.2d 48, 50 (Ga. Ct. App. 1983) (recognizing a defendant's right and ability to cross-examine witnesses at evidentiary hearings).

recantations the very same features that give original trial testimony its "special credibility."[147]

2. Purest Fabrication in Every Material Part. The general standard by which to grant a new trial based upon newly discovered evidence was set forth by the Georgia Supreme Court more than a century and a half ago in *Berry v. State*.[148] Most state courts follow this standard,[149] which requires the defendant to show each of the following:

> (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.[150]

The *Davis* court weighed the affidavits proffered by Davis against these requirements, "particularly in light of the requirement . . . that newly-discovered evidence be so material that it probably would result in a different verdict."[151] Case law after *Berry* further defined this standard of materiality to require that the new evidence leave "no doubt of any kind that the State's witness'[s] testimony in every material part is purest fabrication."[152] Analyzing the affidavits in turn, the court found that each one merely impeached the credibility of the eyewitness testimony at trial rather than showing that the trial testimony should be disregarded as the purest fabrication.[153] Since, in a new

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[147] Davis v. State, 660 S.E.2d at 358.

[148] 10 Ga. 511 (1851).

[149] Armbrust, *supra* note 71, at 81.

[150] Timberlake v. State, 271 S.E.2d 792, 795–96 (Ga. 1980) (construing *Berry*, 10 Ga. at 527).

[151] Davis v. State, 660 S.E.2d at 358.

[152] Logan v. State, 442 S.E.2d 883, 888 (Ga. Ct. App. 1994) (construing Fugitt v. State, 307 S.E.2d 471, 472 (Ga. 1983)).

[153] Davis v. State, 660 S.E.2d at 359–60.

trial, the original trial testimony would still be admissible alongside the affidavits, the court held that the recanted testimony lacked the materiality required to support an extraordinary motion for a new trial.[154]

By analyzing each affidavit individually, however, the court sidestepped the features that made Davis's case special: (1) the overwhelming number of recantations and (2) the fact that the case against Davis was based almost entirely on eyewitness testimony.[155] The court disregarded Davis's argument that the whole set of recantations was stronger than the sum of each individually,[156] focusing instead on their impeaching quality.[157] Unless the affidavits could establish facts to prove the falsity of the trial testimony, the court refused to entertain a new credibility determination with a hearing.[158] Nevertheless, one could also argue that the witnesses' testimony at trial did not establish facts that would render it more credible than the recantations if the two sets of testimony were weighed together by a jury in a new trial.

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[154] *Id*.

[155] In addition to the witnesses' testimony, the State had also introduced evidence to connect the gun used in the MacPhail murder to another shooting that had occurred at a house party the previous evening. *Id.* at 357. Bullets and shell casings from the MacPhail crime scene were similar to those collected from the scene of the earlier shooting. *Id.* The ballistics evidence, however, only inculpated Davis to the extent that eyewitness accounts identified Davis as the shooter at the house party. *See In re* Davis, No. CV409-130, 2010 WL 3385081, at *7, *9–10, *27–33 (S.D. Ga. Aug. 24, 2010) (recounting police statements and trial testimony that Davis had attended the party, that Davis was in the proximity of the shooting when it occurred, and that the shooter at the party was of similar skin color and height as Davis), *appeal dismissed sub nom.* Davis v. Terry, 625 F.3d 716 (11th Cir. 2010), *cert. denied sub nom.* Davis v. Humphrey, 131 S. Ct. 1788 (2011) (mem.). None of the witnesses from the party testified at trial that Davis was the shooter or that they saw him with a gun. *Id.*

[156] *See* Davis v. State, 660 S.E.2d at 358–59 ("Davis argues that the sheer number of recantations in his case demands a different analysis. Pretermitting whether such an argument might ever be persuasive, we find it unpersuasive in Davis's case . . . .").

[157] *See id*. at 358 ("A recantation impeaches the witness'[s] prior testimony. However, it is not the kind of evidence that proves the witness'[s] previous testimony was the purest fabrication." (citation omitted) (quoting Johnson v. State, 513 S.E.2d 291, 293 (Ga. Ct. App. 1999))).

[158] *See id*. at 363 ("[I]f the pleadings in an extraordinary motion for new trial in a criminal case do not contain a statement of *facts* sufficient to authorize that the motion be granted if the facts developed at the hearing warrant such relief, it is not error for the trial court to refuse to conduct a hearing on the extraordinary motion." (quoting Dick v. State, 287 S.E.2d 11, 13 (Ga. 1982) (internal quotations omitted))).

Since the ultimate goal of a criminal trial is to uncover the truth and make determinations of guilt, the dearth of facts corroborating the trial testimony would support using a standard different than requiring a showing that the trial testimony is the "purest fabrication."[159]

Chief Justice Sears said as much in her dissent in *Davis*, wherein two other justices agreed that "this Court's approach in extraordinary motions for new trials based on new evidence is overly rigid and fails to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted."[160] In the dissent's opinion, the majority erred in applying a categorical rule excluding recantation testimony and should have used more discretion to consider the credibility of the recantations in Davis's case.[161] For the dissent, the relevant factor was not whether the new affidavits were merely cumulative and impeaching, but whether the posttrial affidavits called into question nearly *all* of the State's evidence against Davis.[162] Of the nine witnesses who testified at trial that Davis was the shooter, *seven* of them changed their stories and later said that they could *not* identify the shooter as Davis.[163] Of the two who did not, one is the most likely alternate murder suspect.[164] On their face, the written recantations themselves may not have been conclusive proof that prior testimony was the purest fabrication, but the specific circumstances of Davis's case

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[159] *See id.* at 364 (Sears, C.J., dissenting) ("[T]his Court is free to adopt rules and standards that best promote the ends of justice, and this case illustrates with alarming clarity why this Court's rules should allow trial courts to consider all forms of evidence that would be admissible if a new trial were ordered and to exercise sound discretion in weighing that evidence.").

[160] *Id.* at 363.

[161] *See id.* ("[I]t is unwise and unnecessary to make a categorical rule that recantations may *never* be considered in support of an extraordinary motion for new trial.").

[162] *See id.* at 364 ("If recantation testimony . . . shows convincingly that prior trial testimony was false, it simply defies all logic and morality to hold that it must be disregarded categorically.").

[163] *See id.* ("[N]early every witness who identified Davis as the shooter at trial has now disclaimed his or her ability to do so reliably.").

[164] *See id.* ("Three persons have stated that Sylvester Coles confessed to being the shooter. Two witnesses have stated that Sylvester Coles, contrary to his trial testimony, possessed a handgun immediately after the murder. Another witness has provided a description of the crimes that might indicate that Sylvester Coles was the shooter.").

warranted a closer look at the proffered affidavits to determine whether they would give a new jury reasonable doubt of Davis's guilt.[165]

B. THE U.S. SUPREME COURT'S ORDER GRANTING DAVIS A HEARING VINDICATES THE POSITION THAT A HEARING IN DAVIS'S CASE WAS WARRANTED

When the U.S. Supreme Court transferred Davis's original habeas petition to the Southern District of Georgia, Davis received an opportunity that does not become available for most criminal defendants. Since the Court had not ordered a district court to adjudicate an original petition of habeas corpus in nearly fifty years,[166] there is little reason to think that this will become standard practice in the future.

Why did the Court accept Davis's petition? As Justice Stevens stated in concurrence, the particular circumstances of Davis's case were "sufficiently 'exceptional' " to deserve such an unusual maneuver.[167] Seven of the key witnesses had recanted their trial testimony, several had identified Coles as the shooter, and no court had yet reviewed Davis's new evidence.[168] Thus, "[t]he substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing."[169]

Even though the Court's review was pursuant to a federal habeas petition and not a motion for a new trial, which is a

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[165] *Cf. id.* at 364–65 ("[T]he collective effect of all of Davis's new testimony, *if* it were to be found credible by the trial court in a hearing, would show the probability that a new jury would find reasonable doubt of Davis's guilt or at least sufficient residual doubt to decline to impose the death penalty.").

[166] *In re* Davis, 130 S. Ct. 1, 2 (2009) (Scalia, J., dissenting) ("Today this Court takes the extraordinary step—one not taken in nearly 50 years—of instructing a district court to adjudicate a state prisoner's petition for an original writ of habeas corpus.").

[167] *Id.* at 1 (Stevens, J., concurring).

[168] *Id.*; *see also In re* Davis, 565 F.3d 810, 827 (11th Cir. 2009) (Barkett, J., dissenting) ("Simply put, the issue is whether Troy Anthony Davis may be lawfully executed when *no* court has ever conducted a hearing to assess the reliability of the score of affidavits that, if reliable, would satisfy the 'threshold showing' for 'a truly persuasive demonstration of actual innocence . . . .' " (citation omitted)).

[169] *In re* Davis, 130 S. Ct. at 1 (Stevens, J., concurring).

creature of Georgia state courts,[170] the substance of Davis's claims of new evidence was identical in both, such that the question of whether Davis deserved an evidentiary hearing on the postconviction affidavits is valid irrespective of the judicial procedure under which it originated. After all, Davis had tried to include identical affidavits of recantation testimony in his extraordinary motion for a new trial to the Chatham County Superior Court in Georgia in 2007.[171] Furthermore, the substantial issue—whether the admissibility of the new evidence would lead a new jury to find reasonable doubt as to Davis's guilt—was the same as in the habeas petition to the U.S. Supreme Court. Thus, an assertion that the Court's order to a federal district court should have no bearing on whether Georgia state courts should have granted a hearing would be an argument that sidesteps the issue of whether recanted testimony could ever establish a defendant's innocence and whether such evidence should impact a prior conviction. The Court's ruling supports the notion that the judiciary should relax its presumption against the validity of recanted testimony and that evidence of recantations should not be automatically disregarded.[172]

C. THE EXTRAORDINARY MOTION FOR A NEW TRIAL IS THE PERFECT PROCEDURAL VEHICLE FOR SUBMITTING EVIDENCE OF POSTTRIAL WITNESS RECANTATIONS

If we accept the U.S. Supreme Court's order in *In re Davis* as a vindication of Davis's claim that the affidavits he submitted establishing recantation testimony deserved an evidentiary hearing, then the next step is to determine the best way to amend Georgia's criminal procedure to ensure that a future defendant possessing such evidence can secure a hearing. Georgia provides three postconviction remedies by which one could assert an erroneous conviction claim: habeas corpus, an ordinary motion for a new trial, and an extraordinary motion for a new trial.

1. Habeas Corpus Is Not Appropriate for Claims of New Evidence. The petition for a writ of habeas corpus is the classic

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[170] O.C.G.A. § 5-5-40 (1995 & Supp. 2011).
[171] *In re* Davis, 565 F.3d at 814.
[172] *In re* Davis, 130 S. Ct. at 1.

postconviction remedy, dating back to 1777 in Georgia.[173] The "Great Writ," as it is sometimes referred, exists at both the state and federal level, with federal habeas review often serving as a safeguard against errors made at the state level.[174]

Davis attempted to submit new evidence of recantation testimony through his state and federal habeas corpus petitions, but each petition was denied without a hearing[175] until the U.S. Supreme Court accepted his original petition for habeas corpus and transferred it to the U.S. District Court for the Southern District of Georgia.

Habeas corpus is traditionally geared more to violations of a defendant's constitutional rights than to freestanding claims of actual innocence, making it less useful for claims like Davis's.[176] As long as the defendant received a fair trial, in that he suffered no procedural violations denying his rights under either the U.S.

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[173] *See* Donald E. Wilkes, Jr., *The Writ of Habeas Corpus in Georgia*, GA. BAR J., Feb. 2007, at 21 (noting that Georgia was the first state to incorporate habeas corpus into its constitution).

[174] *See* VICTOR E. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS 2–3 (1994), http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISORoot=/criminal&CISOPTR=0 (reviewing the reasons for and against federal review of state court convictions).

[175] *See generally In re* Davis, 565 F.3d 810 (Davis's second federal habeas petition); Davis v. Terry, 465 F.3d 1249 (11th Cir. 2006) (Davis's first federal habeas petition), *cert. denied*, 551 U.S. 1145 (2007); Davis v. Turpin, 539 S.E.2d 129 (Ga. 2000) (Davis's state habeas petition), *cert. denied*, 534 U.S. 842 (2001).

[176] It may be argued that the Court in *Herrera v. Collins* implied that a defendant may seek habeas relief with a freestanding claim of actual innocence, but the Court only addressed this issue in dicta. *See* 506 U.S. 390, 417 (1993) ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."). Thus, the Court has not yet directly answered the question of whether the Constitution forbids the execution of a defendant who has received a procedurally fair trial but can establish his innocence with new evidence obtained after conviction. *But see In re* Davis, 565 F.3d at 829 (Barkett, J., dissenting) ("Between Justice O'Connor's concurrence and Justice Blackmun's dissent [in *Herrera*], five justices agreed that the execution of an actually innocent person would violate the Constitution."). For a more detailed argument that *Herrera* did not bring freestanding claims of actual innocence into the constitutional arena, see George C. Thomas III et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 284–88 (2003) (noting that the Court in *Herrera* only assumed the unconstitutionality of a state execution that followed a showing of actual innocence "for the sake of argument," and that "the threshold showing for such an assumed right would necessarily be extraordinarily high." (quoting *Herrera*, 506 U.S. at 417)).

Constitution or the Georgia Constitution, then the court will deny relief.[177] In Georgia, if the defendant tries to raise an issue in a habeas petition that could have been raised on direct appeal, the court will deny relief.[178]

2. The Ordinary Motion for a New Trial Provides Too Narrow of a Time Window. Another state postconviction procedure is the ordinary motion for a new trial.[179] A convicted defendant can file this motion within thirty days of his conviction, and as a rule courts will grant a hearing on any claims to new evidence filed with the motion.[180] There is no statutory limit on the number of ordinary motions for a new trial a defendant can file as long as they are filed within thirty days of the entry of judgment.[181]

Despite the norm of granting a hearing for an ordinary motion for a new trial, the thirty-day time limit effectively renders it unavailable for cases where a convicted defendant wishes to submit evidence of recantations of trial testimony. If the witness does not retract his testimony within thirty days of the conviction, the defendant may never be able to receive a hearing on any affidavits he might obtain demonstrating the recantation. In Davis's case, none of the affidavits recanting trial testimony were obtained within this thirty-day window. As a result, the guarantee of an evidentiary hearing for the ordinary motion for a new trial was not helpful to Davis's attempt to submit evidence of recanted testimony.

3. The Extraordinary Motion for a New Trial Has No Time Limit and Is Often Based on New Evidence. Georgia's criminal procedure is unique in that it grants defendants an avenue for postconviction relief in addition to the habeas corpus petition and the ordinary motion for a new trial.[182] After the thirty-day time period for filing a motion for a new trial has expired, Georgia allows the defendant an opportunity to file one extraordinary

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[177] O.C.G.A. § 9-14-42 (2006).

[178] *Id.* § 9-14-48(d).

[179] *Id.* § 5-5-40.

[180] *See* 1 WILKES, *supra* note 67, § 13:104 ("[A] hearing is required on an ordinary motion for a new trial.").

[181] *Id.*

[182] O.C.G.A. § 5-5-41 (1995).

motion for a new trial.[183] Similar to the requirements of filing an ordinary motion for a new trial, the extraordinary motion must be filed in the same court that rendered the conviction.[184] There are, however, a few important differences between the two procedures.[185]

First, the extraordinary motion for a new trial must provide a good reason for not being filed within the thirty-day window required to file an ordinary motion for a new trial.[186] Second, while ordinary motions for new trial may presumably be filed without limit within thirty days of the conviction, the defendant only has one opportunity to file the extraordinary motion.[187] Third, unlike the denial of an ordinary motion for a new trial, which may always be appealed, the denial of an extraordinary motion is subject only to discretionary appellate review.[188] Fourth, an ordinary motion for a new trial requires a hearing, but an extraordinary motion for a new trial may be denied without a hearing.[189] A final yet fundamental difference is that the extraordinary motion for a new trial is a product of case law.[190] It is only indirectly authorized by statute,[191] and the sections of the Georgia Code that do reference the extraordinary motion for a new trial do not state the motion's requirements.[192] Most commonly, though, extraordinary motions for new trial are based on newly discovered evidence.[193]

The extraordinary motion for a new trial would seem to be the best procedural vehicle for allowing a defendant to submit

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[183] *Id.* § 5-5-41(b).

[184] 1 WILKES, *supra* note 67, § 13:103.

[185] *See id.* § 13:104 (listing the differences between the ordinary and extraordinary motions for a new trial).

[186] O.C.G.A. § 5-5-41(a) (1995).

[187] *Id.* § 5-5-41(b).

[188] 1 WILKES, *supra* note 67, § 13:104.

[189] *Id.*

[190] Davis v. State, 660 S.E.2d 354, 357–58 (Ga. 2008) (citing Dick v. State, 287 S.E.2d 11, 13 (Ga. 1982)).

[191] *See Dick*, 287 S.E.2d at 13 n.2 ("There is no affirmative statutory authority in Georgia for extraordinary motions for new trial. Instead, they are authorized indirectly . . . .").

[192] O.C.G.A. §§ 5-5-40(a), -41(a), -41(b) (1995).

[193] 1 WILKES, *supra* note 67, § 13:106; *see also* Mountain Creek Hollow, Inc. v. Cochran, 607 S.E.2d 210, 211 (Ga. Ct. App. 2004) ("[A]n extraordinary motion . . . may be based on circumstances other than newly discovered evidence.").

evidence of witness recantations. Since there is no time limit, the defendant would not be penalized if a recanting witness were to retract testimony after the defendant's attempt at other options for postconviction relief. Also, unlike the petition for a writ of habeas corpus, there is no requirement that the trial have suffered a constitutional violation upon the defendant. Thus, the defendant could bring forth new evidence of his alleged innocence even after a procedurally fair trial. Finally, since existing law limits the defendant to one attempt at the extraordinary motion for a new trial, the court would not be burdened by additional motions if an additional witness retracted his testimony after an extraordinary motion had already been filed.

In fact, nearly every aspect of the extraordinary motion for a new trial as it currently exists would provide a future defendant in a position similar to Davis with the relief for which this Note argues, except for a court's ability to deny the extraordinary motion without holding an evidentiary hearing. This feature, combined with courts' general suspicion of witness recantations, provides little recourse to a defendant convicted primarily on eyewitness testimony if several of the chief witnesses attempt to retract their testimony after trial. The hearing that the U.S. Supreme Court found to be warranted in Davis's case would be available to a future defendant in Davis's position at the state court level if the Georgia General Assembly were to adopt the following rule: In criminal cases where the primary evidence supporting conviction is eyewitness testimony, an extraordinary motion for a new trial based upon evidence of witness recantations will not be dismissed without an evidentiary hearing.

D. WHAT ABOUT FINALITY?

Any extension of procedural rights for criminal defendants will necessarily invoke concerns about finality.[194] Additional judicial review will satisfy many aims of the criminal justice process such

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[194] *See* David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1054 (2010) ("The fundamental clash of values animating most discussions of post-conviction review is the clash between the norm of finality, on the one hand, and the values of additional review on the other.").

as accuracy, fairness, and preservation of constitutional rights; but the interests in finality play countermeasure to these purposes and at some point justify closing the courtroom doors to the defendant.[195] Any contemplated change to our judicial processes should strive to preserve finality because a judicial system allowed to expand without limit could quickly become more burdensome than valuable to society.

Nevertheless, the traditional finality concerns are more appropriately addressed to proposals for additional procedural review than for the postconviction introduction of new factual evidence. Arguing that purely procedural missteps in a defendant's trial do not justify additional review when the evidence clearly supports a guilty verdict is one thing. The posttrial discovery of new evidence, on the other hand, may directly compromise the verdict's support, such that the defendant and the public at large refuse to accept the verdict years after the trial. As demonstrated below, for a defendant convicted primarily on eyewitness testimony, holding a hearing on postconviction evidence of witness recantations will actually serve finality interests further than its denial.

One argument against extending postconviction relief is that it diminishes the authority of the initial trial. Submitting an increasing number of trial decisions to review and approval at a higher level deprives judges of the very quality that makes them judges: their decisive authority.[196] As a result, judges and juries may find it unnecessary to put as much thought into their rulings if they know that someone else is likely to undo their work in any case.[197]

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[195] *See* McCleskey v. Zant, 499 U.S. 467, 520 (1991) (Marshall, J., dissenting) ("[T]he test for identifying an abuse must strike an appropriate balance between finality and review in that setting."), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[196] *See* Geoffrey C. Hazard, Jr., *Reflections on the Substance of Finality*, 70 CORNELL L. REV. 642, 650 (1985) ("[W]hat if everything a trial judge does is in principle merely provisional, subject to approval by higher authority, both as to substance and as to technical regularity? In that model of system the first instance functionary epitomizes the low level bureaucrat. Who more than the latter is prone to haste, sloth, indifference, distraction, ignorance, bias, malevolence, or vengeance—and being autocratic?").

[197] *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963) ("I could imagine nothing more subversive of a

This argument does not apply, however, when the postconviction review at issue is one of new evidence rather than discretionary or procedural review of the original trial. When a defendant has obtained new evidence that could not have been acquired at trial, a hearing on this new evidence does not call into question the trial judge's ruling or the jury's fact-findings. Since the postconviction existence of new evidence could not be known during trial, there is no reason to think that judges or juries would take matters during the original trial any less seriously based on the possibility that new evidence may arise after trial.[198]

Another argument for drawing an end to criminal judicial proceedings is that the rehabilitation process cannot begin until the defendant accepts that he was found guilty and understands that the sentence he received is his just deserts.[199] This argument is certainly valid for the criminal defendant who *is* guilty and is only challenging his conviction as a last ditch effort to secure release or a lighter sentence. Even for the defendant who did suffer a minor procedural error at trial, punishment will not serve its reformative function until he stops fighting his sentence and accepts his punishment. If a defendant is innocent, however, the rehabilitation process is not warranted in the first place. In the case of an innocent inmate, finality serves a function as regressive as the error or falsehood responsible for his wrongful conviction.

A related interest served by finality is the psychological aspect of repose on the part of both the defendant and society at large.[200] Repose is an elusive concept that is "difficult to formulate because [it is] so easily twisted into an expression of mere complacency."[201]

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judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.").

[198] *See* Wolitz, *supra* note 194, at 1067 ("[T]here is in fact very little evidence, statistical or anecdotal, that the expansions of appellate and post-conviction review of the past seventy years have led to any diminution in the quality of trials or of judging or jury fact-finding.").

[199] *See id.* at 1055 ("There must be some point at which a conviction becomes irreversible and punishment inevitable if punishment is to effectively act as any sort of deterrent or if any retribution is to be had.").

[200] *See id.* at 1055–56 ("[R]epose is a state of reasonable psychological security, or closure . . . ."); Bator, *supra* note 197, at 452–53 ("Repose is a psychological necessity in a secure and active society . . . .").

[201] Bator, *supra* note 197, at 452.

At heart, repose is an acceptance of two facts. First, any system of justice is going to have some mistakes. Second, rather than relitigating on the off chance that the entire truth may not have been uncovered, society is better served by moving on to the next issue with confidence that the justice system achieved the best result possible.[202] Nevertheless, the breadth of public support for convicted inmates like Davis, whom many people believe to be innocent, is evidence that many have not achieved this state of rest even when judicial proceedings have ceased.[203]

The preservation of scarce judicial resources is the final and most forceful finality argument against extending postconviction relief.[204] The judicial economy is a zero sum game. The public has limited resources to try cases and hear evidence, and granting convicted defendants additional opportunities to present claims of new evidence would deprive other defendants access to the same courtrooms, judges, juries, and attorneys.[205]

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[202] *See id.* at 452–53 ("There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility. . . . What I do seek is a general procedural system which does not cater to a perpetual and unreasoned anxiety that there is a possibility that error has been made in every criminal case in the legal system.").

[203] *See* Severson, *supra* note 64, at A1 ("[Davis's] case catapulted into the national consciousness with record number of petitions—more than 630,000—delivered to the board to stay the execution, and the list of people asking for clemency included former President Jimmy Carter, Archbishop Desmond Tutu, [fifty-one] members of Congress, entertainment figures like Cee Lo Green and even some death penalty supporters, including William S. Sessions, a former F.B.I. director."). Compare, in this regard, the public support for the West Memphis Three, who recently attained their release after nearly twenty years in prison. *Suddenly, They're Free*, ECONOMIST, Aug. 27, 2011, at 26–27. On scant evidence, Damien Echols, Jason Baldwin, and Jessie Misskelley were convicted for murder as teenagers; Echols was sentenced to death. *Id.* at 26. Rather than bringing society any sense of repose, their unsuccessful appeals and continued incarceration attracted more attention over the years, culminating in benefit concerns hosted by popular musicians and in celebrities donating to their legal fees. *See id.* ("Freedom might never have come without the celebrities, documentaries and internet campaigning that brought international attention to the case.").

[204] Wolitz, *supra* note 194, at 1055.

[205] *See id.* ("Judicial economy . . . is, for many, the primary justification for finality."); *see also* Brown v. Allen, 344 U.S. 443, 536–37 (1953) (Jackson, J., concurring) ("[T]his Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own. . . . It must prejudice the occasional meritorious application to be buried in a flood of worthless ones." (citation omitted)); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148 (1970) (observing that the increased

This represents the strongest argument against allowing defendants an evidentiary hearing on witness recantations because any additional procedure granted to criminal defendants comes with an additional cost to the public. Nevertheless, limiting such procedural expansion to cases where the primary evidence was eyewitness testimony can mitigate this economic concern. Moreover, the sheer number of appeals and motions Davis filed since he first attempted to introduce evidence of witness recantations may even cost society more money than if he had originally been granted a hearing.[206]

IV. CONCLUSION

Convictions based upon eyewitness testimony have come under increasing scrutiny in the last couple of decades. Nothing shows this more dramatically than the ever-increasing number of DNA exonerations of prisoners who had been convicted on eyewitness accounts. Concurrently, a growing movement for reforms in the process of criminal identifications has spread among jurisdictions throughout the country. Some courts now allow expert testimony on the weaknesses of eyewitness identification, and some communities have changed the conduct of police photographic lineups to reduce instances of misidentification. If eyewitness testimony is not actually as reliable as once believed, then courts should be more open to hearing a witness who wishes to voluntarily retract or discount his previous trial testimony.

In many cases, of course, this will be unnecessary. For instance, where the primary evidence against the defendant was physical, it may be impossible for any evidence of a recantation to

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demand upon the time of judges, attorneys, and courtrooms is "the most serious single evil with today's proliferation of collateral attack").

[206] Since the Chatham County Superior Court's denial of Davis's extraordinary motion for a new trial in 2007, Davis: filed for and received a discretionary appeal by the Georgia Supreme Court in 2008; received a hearing by the Georgia Board of Pardons and Paroles, which spent a year reviewing his case in 2008; petitioned for certiorari review by the U.S. Supreme Court, which initially stayed his execution but subsequently denied his petition in 2008; petitioned the 11th Circuit for leave to file a second or successive federal habeas petition, which was denied in 2009; and filed an original habeas petition with the U.S. Supreme Court in 2009, which then transferred his petition to the U.S. District Court of the Southern District of Georgia for an evidentiary hearing in 2010.

counter the indications of the chief physical evidence. There may be cases where the recantation evidence is incredible on its face or where the new account is obviously impossible; such cases would not warrant an evidentiary hearing. But where eyewitness testimony was the primary or sole evidence against the defendant and the witnesses later retract their statements voluntarily, the courts should allow the new testimony when it would be likely to create a reasonable doubt of the defendant's guilt.

As Davis's case illustrates, the extraordinary motion for a new trial is one avenue where statutorily enumerated criteria for receiving an evidentiary hearing would further the interests of both justice and finality. Repeating the entire process—from the denial of his extraordinary motion for a new trial without an evidentiary hearing to the U.S. Supreme Court's order for the Southern District of Georgia to hold a hearing—would present too many contingencies for a future defendant in Davis's position to introduce new evidence of recantations obtained after trial. It would also extend the judicial procedure and burden both state and federal courts beyond the extent necessary to weigh the credibility of the voluntary recantations.

The Georgia General Assembly should, therefore, amend the state's criminal procedures to entitle the movant of an extraordinary motion to an evidentiary hearing in cases where the chief evidence supporting conviction was eyewitness testimony and the defendant obtains a voluntary recantation of that testimony. The exact language of such an amendment is beyond the scope of this Note, but the language could address the materiality requirement for new evidence and define it at a standard less rigorous than establishing trial testimony to be the purest fabrication. Such a change is more properly a role for the legislature than the judiciary as it would entail a detailed examination of how wrongful convictions occur and when misidentifications happen. The standards Georgia currently has in place for a defendant to receive an evidentiary hearing are the product of case law. The recent spate of DNA-based exonerations—many of which followed earlier attempts to recant trial testimony—shows that wrongful convictions are not an anomaly and that recantations often have merit. The people of

Georgia deserve to be heard through their elected representatives on what level of protections they wish to have in cases where a defendant may be convicted on mistaken, or even perjured, testimony and the witness admits this untruth more than thirty days after trial.

By adopting such an amendment, Georgia may serve as a model for other states. Any state that has already sought to improve its procedures of making eyewitness identifications or to modify the weight they are to receive at trial should also consider reforms for if those identifications are retracted after trial. Even though this Note has focused on Georgia law, the reasoning behind such reforms is of national relevance and importance.

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