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SCHULZ v. MARSHALL
528 F.Supp.2d 77 (2007)
Stephen G. SCHULZ, Petitioner, v. Luis R. MARSHALL, Superintendent of the Wallkill Correctional Facility, Respondent.
No. 06-CV-2875 (JFB).
United States District Court, E.D. New York.
November 19, 2007.
William H. Hellerstein, Esq., Brooklyn, NY, for Petitioner.
Anne E. Oh, Esq., Riverhead, NY, for Respondent.

MEMORANDUM AND ORDER
JOSEPH F. BIANCO, District Judge.
Stephen G. Schulz ("petitioner" or "Schulz") petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction in state court for robbery (the "petition"). In a judgment rendered on September 2, 1999, following a jury trial in the Supreme Court of the State of New York, Suffolk County (the "trial court"), petitioner was convicted of robbery in the first degree, and was sentenced to a term of eleven years' imprisonment.
This is an extremely troubling case. The conviction, based upon the identification testimony of a single eyewitness, has been the subject of over five years of litigation in the state court, including a dissenting opinion by Judge Rosenblatt in the New York Court of Appeals decision affirming the conviction, in which Judge Rosenblatt concluded that "[On the record before us, the possibility of the defendant's actual innocence is too high to justify denial of the CPL 440.10 motion without a hearing." People v. Schulz,4 N.Y.3d 521, 531, 797 N.Y.S.2d 24, 829 N.E.2d 1192 (2005) (Rosenblatt, J., dissenting). The conviction relates to the February 3, 1999 robbery by one perpetrator at the El Classico Restaurant ("El Classico") in Brentwood, New York (the "El Classico Robbery"). At the trial, Jose Velasquez ("Velasquez"), the owner and cook of the restaurant, testified that he heard the waitress, Otilia Ruiz ("Ruiz"), scream and, when he walked into the dining area, saw the robber leaving the restaurant. Velasquez unsuccessfully chased the getaway car, but testified that the car contained both a "T" and a "1" in the license plate. Although Velasquez identified the petitioner as the robber at trial, Ruiz was unable to identify the petitioner in court as the robber, and the car that the prosecution argued had been petitioner's getaway car did not have a "T" or a "1" in the license plate (and had a New York Yankees insignia, which Velasquez had not mentioned). The defense sought to demonstrate at trial that the El Classico Robbery was committed by an individual named Anthony Guilfoyle ("Guilfoyle"), who had some similar physical characteristics to the petitioner and had been arrested for numerous robberies in Suffolk County, New York ("Suffolk County"), including a robbery on the same night of the El Classico Robbery that occurred approximately three hours earlier, at a location about 10-12 miles away. However, the trial court precluded the defense from introducing a photograph of Guilfoyle (the "Guilfoyle photograph") at trial because the defense failed to establish a sufficient evidentiary basis to argue that Guilfoyle was the robber.1 Based essentially upon the identification testimony of Velasquez, the jury found the petitioner guilty.
Petitioner argues that certain decisions by his lawyer during the trial were constitutionally deficient and warrant habeas relief. Although petitioner points to a number of alleged deficiencies, there are two critical decisions that are the focus of this Court's inquiry. First, Schulz's attorney failed to interview Ruiz outside

the courtroom prior to her testimony and then did not cross-examine her at trial. The attorney later stated in an affidavit that, as a matter of trial strategy, he wanted to interview Ruiz shortly before her testimony, [528 F.Supp.2d 81]

but that the prosecutor refused to let him do so. When the Brooklyn Law School's Second Look Clinic interviewed Ruiz after the trial, Ruiz, who had no apparent motive to lie, stated in an affidavit that: (1) when the police showed her a photo array one day after the robbery, Velasquez (who was serving as an interpreter during the police interview) pointed at petitioner's photograph and told her that he was the person who had committed the crime; (2) prior to trial, Velasquez told her that, if she did not help put Schulz in jail, Schulz would be released from jail and hurt her; and (3) the petitioner did not commit the crime and, after being shown Guilfoyle's photograph, she was "90% certain" that Guilfoyle was the robber. She stated in that affidavit that she is "certain that Stephen Schulz has been convicted of a crime that he did not commit," Second, petitioner points to a post-trial affidavit from his roommate, Anthony Tralongo ("Tralongo"), stating that he was in the courthouse during the trial prepared to testify as an alibi witness for the petitioner because the petitioner was with him in their apartment at the time of the El Classico Robbery, but he never testified at the trial because petitioner's attorney told him that they did not need him.

As discussed in detail below, having carefully reviewed the' state court record and having conducted an evidentiary hearing on this issue, this Court concludes that trial counsel's performance in this trial fell well below the Strickland standard and that the state court failed to properly consider these deficiencies and the resulting undeniable prejudice that the conduct had on the verdict. Even apart from whether the alibi witness was called to testify, there is no question in the Court's mind that, had Ruiz been interviewed by defense counsel prior to her testimony and then provided the above testimony at the trial through his questioning (which would have, among other things, permitted the Guilfoyle photograph to be admitted), there is a reasonable likelihood that the jury would not have convicted the defendant based on the single identification made by Velasquez, especially in light of the other weaknesses in the prosecution case. In short, although the Court recognizes the deferential standard of review, this Court concludes for the reasons set forth infra that the state court unreasonably applied Strickland to the facts of this case and, thus, the extraordinary remedy of habeas relief is warranted.

I. TRIAL

A. THE PROSECUTION'S CASE

Schulz's trial commenced on August 30, 1999. As described below, three witnesses testified against him: Ruiz, Velasquez, and Detective Gary Gieck ("Detective Gieck"). The prosecution did not present any forensic evidence.

(1) VELASQUEZ

Velasquez testified that, at approximately 8:20 p.m. on February 3, 1999, a customer entered El Classico and placed a takeout order. (Trial Transcript ("T.")284, 288.) The customer was "tall, like 6'2", heavy, weigh like 250-275." (T.284.) At the time, Ruiz was behind the counter. (T.288.) As Velasquez was preparing the order in the kitchen, the customer remained in the dining area of the restaurant with Ruiz. (T.288-90.) Velasquez heard Ruiz yelling, and returned from the kitchen. (T.290.) The customer, now an apparent robber, said "[d]on't move" to Velasquez, and left the restaurant. (T.292.) Velasquez observed the robber get into a "fourdoor, 2-tone" car with a T and a 1 on the license plate. (T.293.) Velasquez gave chase in his car, but did not apprehend the robber. (T.293.)

[528 F.Supp.2d 82]

Velasquez identified Schulz as the robber in court. (T.294.) Velasquez also confirmed having identified the car belonging to petitioner's roommate from among approximately twenty cars at the police precinct on February 5, 1999, (T.296-300), and having identified petitioner in two lineups on March 16, 1999 (T.300-01).

On cross-examination, Barry J. Levine, Esq. ("Levine"), Schulz's attorney, elicited from Velasquez that the license plate of the car Velasquez identified on February 5, 1999 bore a New York Yankees insignia, which Velasquez had not mentioned to the police, and contained neither a "T" nor a "1." (T.319.) Velasquez also admitted that at the time of the robbery, he had a pending gun possession charge, about which he consulted with one of the officers who investigated the El Classico robbery, Detective Lawrence Conde ("Detective Conde"), to determine whether the pending charge could affect El Classico's liquor license. (T.350-51.) Velasquez could not recall when he spoke to Detective Conde, (T.351), but pleaded guilty to disorderly conduct on February 18, 1999 in satisfaction of the gun possession charge. (T.353.) Velasquez testified that he did not receive a deal on this charge from the Suffolk County District Attorney's Office (the "DA's Office") in exchange for his testimony. (T.354-55.)

(2) Ruiz

Ruiz testified that a customer came into El Classico at approximately 8:20 p.m. on the night of the El Classico Robbery. (T.358.) After placing a takeout order with Velasquez, the customer asked Ruiz for "a dollar." (T.358.) Ruiz did not give him the dollar, and the customer proceeded to open the cash register and put money in his pockets. (T.362.) Ruiz screamed and begged the apparent robber to stop. (T.362.) Then, "the man, all of a sudden, pulled out a knife, and put it right in front of Ruiz. (T.362.) Velasquez emerged from the kitchen and attempted to chase the robber. (T.363.) Ruiz remembered that the robber was "a very fat man, a very tall, fat man." (T.364.) Ruiz stated several times, however, that the robber was not in the courtroom. (T.364.) Ruiz also stated that she felt "dizzy" and did not want to be in court. (T.366.) Levine declined to cross-examine Ruiz. (T.369.)2

(3) TESTIMONY OF DETECTIVE GIECK

At trial, Detective Giecjc of the Suffolk County Police Department testified regarding the investigation of the El Classico Robbery. Detective Gieck stated that on the night of this robbery, he learned from Detective Conde that the suspect was a "white male approximately 6'2" tall, 250 pounds, big build, with rotten teeth." (T.154.) In particular, Detective Conde identified Schulz as a suspect to Detective Gieck because "two police officers had furnished that name to Detective Conde." (T.155.) Detective Gieck did not explain how the two police officers determined that Schulz was a suspect.

Detective Gieck further stated that he went to Schulz's home on February 4, 1999 and saw a "2-tone brown Chevy Celebrity," matching Velasquez's description of the robber's car, in petitioner's driveway. (T.157.) Detective Gieck arrested Schulz and later determined that the car belonged to Tralongo. (T.161-62.)

On cross-examination, Levine asked Detective Gieck about a "whole string of robberies" that took place in his precinct. (T.256.) Gieck stated that these robberies were committed by "Guilfoyle." (T.256.) Detective Gieck conceded that both Schulz

and Guilfoyle were "big guy[s]," (T.259), but denied that the "description" of both men, was "similar." (T.256).

B. THE GUILEOYLE PHOTOGRAPH

At the close of the prosecution's case, Levine moved to admit the Guilfoyle photograph into evidence on the grounds that Guilfoyle's robberies took place in the same time period and general location as the El Classico Robbery.3 (T.384-85.) Levine pointed out that the victims of Guilfoyle's robberies had described

him as "big"—consistent with Ruiz's description of the El Classico robber—and noted that Detective Gieck had testified that Guilfoyle weighed approximately 450 lbs. (T.385.)4 Levine stated that he intended to call Detective Lawes of the Third Precinct in order to elicit testimony that Guilfoyle had the same modus operandi as the El Classico robber. (T.385-86.) The prosecution objected, pointing out that Guilfoyle—unlike the El Classico robber—used a gun during his robberies.5 (T.386.)

The trial court indicated that Levine had not presented enough evidence to warrant admission of the Guilfoyle photograph, as Levine had not "shown a sufficient nexus between Ahat suspect or the person that you say committed the crimes, and this crime, to show that that person committed this particular crime." (T.387.) Levine stated that he intended to submit subpoenas to the trial court the following day in order to obtain further evidence about Guilfoyle's robberies. (T.387.)

The following day, the trial court gave Levine and the prosecution an additional opportunity to provide argument regarding the Guilfoyle photograph. (T.415.) Levine does not appear to have submitted any subpoenas for additional documentation of the Guilfoyle robberies. The trial judge denied Levine's request to admit the photograph into evidence. (T.415.)

C. THE DEFENSE CASE

Although Levine indicated before opening arguments that he would be calling Tralongo as an alibi witness in petitioner's defense, (T.11), petitioner did not call Tralongo to testify. Moreover, Levine did not call two additional detectives to the stand that the prosecution had brought to court at Levine's request, to give testimony about the Guilfoyle robberies. (T.417.) Levine rested the defense case without calling any witnesses to the stand or offering any evidence on petitioner's behalf.

D. VERDICT AND SENTENCING

On September 2, 1999, a jury convicted Schulz of robbing the El Classico Restaurant.

On November 1, 1999, the trial court sentenced Schulz, a prior felon, to a determinate

[528 F.Supp.2d 84]

term of eleven years' incarceration and five years' post release supervision. At sentencing, Levine pointed out to the trial court that Schulz "has always steadfastly stated . . . that he was not guilty of these offenses." (Sentencing Tr. at 7-8.) Levine noted that petitioner rejected a plea deal that would have required three years' incarceration. (Id. at 10.)

Levine also addressed his decision not to call Tralongo to testify, explaining:

We chose not to put forth the alibi witness based upon the fact that the victim of this crime failed to identify Mr, Schulz in the courtroom and [Velasquez] testified quite emphatically about a description and a license plate of a vehicle that did not match the license plate. . . . Based upon that and the belief that there was not a proper identification of Mr. Schulz, we did not go forward as we had no burden obviously to do so.

(Id. at 8-9). Levine further suggested that he did not call Tralongo as a witness because of petitioner's prior offenses, explaining: "[T]o put forth the alibi defense and to open the jury's mind as to why [Schulz] didn't testify as to where he was and then having to expose his prior offenses that the Court ruled would be submitted, a determination was made not to present it." (Id. at 9-10.)

Levine did not address Guilfoyle's robberies—or the Guilfoyle photograph—at sentencing.

II. POST-TRIAL PROCEDURAL HISTORY

A. TRIAL COURT PROCEEDINGS

(1) THE AUGUST 14 MOTION

On August 14, 2000, petitioner moved pro se under N.Y.Crim. Proc. Law § 440.10(1)(h) to vacate his judgment of conviction on grounds of ineffective assistance of counsel and because the prosecution allegedly failed to prove his guilt beyond a reasonable doubt (the "August 14 Motion"). The trial court

denied the August 14 Motion on September 5, 2000.

(2) THE OCTOBER 24 MOTION

By 2002, after obtaining counsel through the Second Look Clinic at Brooklyn Law. School, petitioner collected a series of additional affidavits and other evidence in support of his motion to vacate his, conviction on the basis of newly discovered evidence, pursuant to N.Y. Criminal Procedure Law § 440.10(l)(g) (the "October 24 Motion"). Among the evidence presented in support of the October 24 Motion was the following:

On March 10, 2002, petitioner obtained an affidavit from Ruiz (the "Ruiz Affidavit") reiterating that when she testified at trial, she "did not recognize Mr. Schulz as the person who had committed the robbery and, in fact, [she] had never seen Mr: Schulz in person before. The person who committed the robbery was a taller and much fatter man." (Ruiz Affidavit ¶ 6.) She also recounted that, during her police interview on the day after the robbery, the other eyewitness Velasquez told her to identify petitioner as the robber:

On February 4, 1999, the day after the robbery, the police brought a group of photographs to the El Classico restaurant. Given that I do not speak English, Jose Velasquez, my boss at the restaurant, served as my interpreter during our communications with the police. Jose Velasquez pointed at Stephen Schulz's picture from the group of photographs, and told me that he was the person who had done the crime and that he was in jail.

(Id. ¶ 4.) Ruiz also swore that Velasquez told her before trial that "if [she] did not help to put Mr. Schulz in jail, Mr. Schulz would be released and would come back to

[528 F.Supp.2d 85]

hurt me."6 (Id. ¶ 5.) In response to viewing a photograph of Guilfoyle, Ruiz further stated: "I am 90% certain that I recognize [Guilfoyle] as the man who robbed me. . . ." (Id. ¶ 8.) Ruiz further stated in connection with her post-trial affidavit that "no one had offered [her] anything for coming forward at this time" and that she has "nothing to gain from doing so." (Id. ¶ 9.) Finally, she emphasized that "[a]s an eyewitness . . . I am certain that Stephen Schulz has been convicted of a crime that he did not commit." (Id.)

On July 15, 2002, petitioner obtained an affidavit from Levine (the "Levine Affidavit") stating that prior to trial, he "made an effort to find Otilia Ruiz, the main eyewitness, but had difficulty contacting her." (Levine Affidavit ¶ 3.) Levine further stated: "On the day that Ms. Ruiz was scheduled to appear in court, I made an off-the-record request to the prosecution asking if I could interview Ms. Ruiz before she testified. That request was denied. Had I been provided with the opportunity to interview her, I intended to show her a photograph of Mr. Guilfoyle and ask whether he was the person who had robbed her." (Id. ¶ 5.)

On February 7, 2002, petitioner obtained an affidavit from Anthony Tralongo (the "February 7 Tralongo. Affidavit") stating that Schulz was with Tralongo at their shared residence for the entire evening of the El Classico Robbery. (February 7 Affidavit ¶ 4.) Tralongo further stated: "I was at the trial in Judge John Copertino's courtroom on September 2, 1999, and willing to testify under oath as to Stephen Schulz's alibi. Barry Levine, his defense attorney, never called me to the stand." (Id. ¶ 15.)7

On February 10, 2003, the trial court denied the October 24 Motion without a hearing. As a threshold matter, the trial court held that because all of the purportedly "newly discovered" evidence was "clearly" available at trial, the "true basis" for the November 24 Motion was the Ruiz Affidavit. (Trial Court Memorandum, dated February 10, 2003 (the "February 10 Memorandum") at 3 n. 3.) However, according to the trial court, the Ruiz Affidavit did not contain "newly discovered evidence" because "it cannot be said that Ruiz's qualified identification of Guilfoyle as the robber could not have been discovered before the trial with due diligence. . . ." (Id. at 3.) Specifically, the trial court noted that Levine "made no effort to

seek an adjournment or otherwise enlist the court's assistance in securing an opportunity to interview [Ruiz] before she took the stand." (Id.)

B. STATE APPELLATE REVIEW

1. APPELLATE DIVISION

On March 29, 2004, the Appellate Division affirmed the judgment of conviction, the August 14 Motion, and the October 24 Motion. People v. Schulz,5 A.D.3d 799, 774 N.Y.S.2d 165, 166 (N.Y.App.Div.2004).

With respect to the ineffective assistance of counsel claim, the Appellate Division held that:

The Supreme Court also properly denied the defendant's motions to vacate the judgment of conviction on the grounds of ineffective assistance of counsel pursuant to CPL 440.10. . . . As set forth above, the Supreme Court properly precluded the defendant from introducing evidence of third-party culpability at the trial. Consequently, trial counsel was not ineffective for failure to persuade the trial court to admit such evidence at the trial.

Schulz, 774 N.Y.S.2d at 167. The Appellate Division explained that the trial court properly excluded the Guilfoyle photograph at trial under People v. Primo,96 N.Y.2d 351, 728 N.Y.S.2d 735, 753 N.E.2d 164 (2001). Schulz, 774 N.Y.S.2d at 167. Primo holds that "Wile admission of evidence of third-party culpability may not rest on mere suspicion or surmise," and courts should require the defense "to make an offer of proof" showing that the probative value of the evidence outweighs its potential for prejudice prior to the evidence's admission. Primo, 96 N.Y.2d at 357, 728 N.Y.S.2d 735, 753 N.E.2d 164.

The Appellate Division did not address Levine's failure to, call Tralongo as a witness, nor did it address Levine's failure to interview Ruiz prior to her testimony to show her the Guilfoyle photograph, which would have, among other things, provided a basis for its admission.

2. COURT OF APPEALS

On May 5, 2005, the Court of Appeals of New York affirmed the decision of the Appellate Division (the "May 5 Decision"). People v. Schulz,4 N.Y.3d 521, 524, 797 N.Y.S.2d 24, 829 N.E.2d 1192 (2005). With respect to the ineffective assistance of counsel claim, the Court of Appeals stated that Levine's failure to call Tralongo as a witness was a "tactical decision." Id. at 531, 797 N.Y.S.2d 24, 829 N.E.2d 1192. The Court of Appeals did not address Levine's failure to achieve admission of the Guilfoyle photograph in the context of the ineffective assistance of counsel claim. Specifically, it did not address Levine's failure to interview Ruiz and show her the Guilfoyle photograph. Instead, the May 5 Decision affirmed the trial court's rejection of the Guilfoyle photograph because the trial court correctly found that Levine had not laid a sufficient foundation for the photograph's admission under Primo. Id. at 528, 797 N.Y.S.2d 24, 829 N.E.2d 1192. Specifically, the Court of Appeals noted that Levine did not call police officers to testify about the Guilfoyle robberies, and did not cross-examine Ruiz or show her Guilfoyle's photograph. Id.

Judge Albert M. Rosenblatt, who wrote the Primo decision, dissented in part with the May 5 Decision (the "Rosenblatt dissent"). In particular, Judge Rosenblatt strongly disagreed with the May 5 Decision's affirmance of the trial court's denial of the October 24 Motion without a hearing. Id. at 531, 797 N.Y.S.2d 24, 829 N.E.2d 1192 (Rosenblatt, J., dissenting in part). Judge Rosenblatt argued that the Ruiz Affidavit "sh[ook] the [trial] court's ruling barring the [Guilfoyle] photograph," id. at 534, 797 N.Y.S.2d 24, 829 N.E.2d 1192, and that the trial court should have held a hearing for Ruiz to "see Guilfoyle under court-arranged auspices [so that the trial court] could then determine whether the conviction was a miscarriage of justice." Id. "On the record before [the Court of Appeals]," Judge Rosenblatt argued, "the possibility of defendant's actual innocence is too high to justify denial of the CPL 440.10 motion without a hearing." Id. at 531, 797 N.Y.S.2d 24, 829 N.E.2d 1192.

C. DA's OFFICE RE-INVESTIGATION

In response to Judge Rosenblatt's dissent, the Chief of the Major Crime Bureau of the DA's Office, Peter H. Mayer ("Mayer"), conducted a "re-investigation" of the El-Classico Robbery, and reported the results of this investigation in a letter to the Court of Appeals, dated December 30, 2005. Mayer's investigation, during which he paid "particular attention to whether the crime could have been committed by another," (December 30 Letter at 1), included interviews of Guilfoyle and Velasquez. (Id. at 3.) Velasquez "remained consistent and certain concerning the circumstances of the robbery of February 3, 1999 and his identification of the defendant and his vehicle." (Id. at 3.). Guilfoyle denied committing the El Classico Robbery, "although his memory was hazy because of his drug use in 1999." (Id.) Guilfoyle admitted to committing another robbery on February 3, 1999 in West Babylon (which occurred about three hours before the El Classico robbery and about 10-12 miles away), but "couldn't quite remember what he did after. . . . He conjectured that he probably obtained crack and got high, which was his modus operandi." (Id. at 4.) Mayer noted that Guilfoyle would have had enough time to commit the El Classico Robbery after the West Babylon robbery, but in all of Guilfoyle's admitted robberies, he never possessed a weapon. (Id. at 3-4.) Mayer also noted that Schulz was 6'2" at the time of his arrest, and weighed 275 lbs., while Guilfoyle was 6'4" and 450 lbs, (id. at 3), and that Ruiz's and Velasquez's descriptions of the perpetrator therefore more closely "parallel Schulz." (Id. at 4.) Mayer concluded that "Guilfoyle's statements might best be characterized as unreliable but his degree of cooperation and willingness to answer belies any motive of wanting to hide something, particularly armed with the knowledge that the statute of limitations precludes any prosecution of him for this crime. . . . [T]here is simply no reliable evidence to conclude that anyone other than Stephen Schulz committed" the El Classico Robbery. (Id. at 4-5.)

D. PROCEEDINGS BEFORE THE COURT

Schulz filed the petition on June 2, 2006,8 challenging his conviction on the grounds that: (1) he was denied his right to the effective assistance of counsel; (2) insufficient evidence supported his conviction; and (3) newly discovered evidence warrants a new trial. Respondent responded on July 26, 2006. The Court originally scheduled oral argument for August 20, 2007, but petitioner's counsel filed his notice of appearance that day, so the Court adjourned the oral argument and accorded both parties the opportunity to supplement their original submissions.

The Court also determined, by Order dated September 10, 2007 (the "September 10 Order"), that the petition "raised sufficiently serious questions regarding the merits of petitioner's ineffective assistance of counsel claim to warrant an evidentiary hearing" in addition to oral argument. Sept. 10 Order at 1. In particular, the Court stated that under Sparman v. Edwards,154 F.3d 51 (2d Cir.1998), "`a district court facing the question of constitutional ineffectiveness of counsel should, except in highly unusual circumstances, offer the assertedly ineffective attorney an opportunity to be heard and to present evidence, in the form of live testimony, affidavits, or briefs.'" September 10 Order at 1 (quoting Sparman, 154 F.3d at 52).

See also Cox v. Donnelly,387 F.3d 193, 201 (2d Cir.2004) (remanding to district court "with instructions to give [the petitioner's trial] counsel an opportunity to be heard pursuant to Sparman)." In keeping with the Second Circuit's holdings in Sparman and Cox, the Court scheduled an evidentiary hearing and oral argument for October 3, 2007 to address the following issues under the standard for ineffective assistance of counsel set forth in Strickland:

(1) trial counsel's failure to interview [Ruiz] before trial or to show her the photograph of [Guilfoyle], who had been arrested for a series of robberies in Suffolk County during the same time period as the robbery for which petitioner was convicted; (2) trial counsel's failure to show Guilfoyle's photograph to Ms. Ruiz on the witness stand during the trial; (3) trial counsel's failure to develop evidence at trial regarding robberies committed by Guilfoyle which may have, among other things, established a sufficient foundation for the admission of a photograph of Guilfoyle; (4) trial counsel's failure to conduct an adequate pretrial investigation to discover that, in 1999, a car belonging to Guilfoyle's wife had a license plate that contained the letter "T" and the number "1", as specified in victim [Velasquez's] description of the getaway car's license plate; and (5) trial counsel's failure to call [Tralongo] who stated that petitioner was with him at the time of the crime.

Sept. 10 Order at 2. The Court also ordered Levine to appear at this hearing. Id. at 3. However, by letter dated September 12, 2007, petitioner notified the Court that Levine was deceased. At a telephone conference on September 24, 2007, petitioner notified the Court that Tralongo had also passed away. In light of these developments, the Court invited petitioner and respondent to determine whether there were other witnesses and/or evidence that could be presented at the evidentiary hearing, and rescheduled the hearing and oral argument for October 5, 2007 (the "October 5 Hearing").

1. THE OCTOBER 5 HEARING

Two witnesses testified at the October 5 Hearing, and both petitioner and respondent gave oral argument. Finally, respondent submitted additional affidavits in opposition to the petition. The evidence adduced at the hearing is summarized below.

Schulz testified on his own behalf. He stated that his planned defense at trial had two components: (1) his alibi witness, Tralongo; and (2) evidence that Guilfoyle had committed the robbery. (October 5 Hearing Tr. at 15.) Petitioner understood prior to trial that the prosecution planned to call both Velasquez and Ruiz to identify Schulz as the robber. (Id. at 15-16.) However, at the close of the prosecution's case, after Ruiz repeatedly failed to identify Schulz on the stand, Levine told Schulz that they need not put on a defense. (Id. at 9.) Levine told Schulz that the jury would not convict petitioner because Ruiz failed to identify him and the prosecution had the burden of proof. (Id.) Specifically, Levine stated that he would not call Tralongo as petitioner's alibi witness because "it opens doors to cross-examine" Tralongo. (Id. at 10.) Levine did riot specify "what was bad about Tralongo." (Id. at 21.) Schulz did not believe that Tralongo had a criminal record. (Id.) The Court found Schulz's testimony regarding these conversations with his attorney to be credible.

Catherine Loeffler, Schulz's prosecutor at trial, also testified. Ms. Loeffler credibly denied having any conversation with Levine "regarding his ability to interview a witness in this case," including denying

[528 F.Supp.2d 89]

Levine access to Ruiz, as alleged in the Levine Affidavit. (Id. at 31.)

Further, respondent put an additional affidavit by Tralongo into evidence, dated March 17, 1999 (the "March 17 Tralongo Affidavit") and argued that this affidavit contains an account of the evening of the El Classico Robbery materially different from that contained in the February 7 Tralongo Affidavit. (Id. at 32-33.) The alleged inconsistencies between the February 7 Tralongo Affidavit and the March 17 Tralongo Affidavit concern, among other things, whether Tralongo or Schulz cooked dinner that night and in which rooms Tralongo and Schulz were respectively watching television. (Id. at 72-73.) Respondent admitted that Levine did not have the March 17 Tralongo Affidavit at trial, but stated that the prosecution would have successfully impeached Tralongo with the purportedly inconsistent affidavits if Tralongo testified. (Id. at 75.)9

III. STANDARD OF REVIEW

A. THE AEDPA GOVERNS PETITIONER'S CLAIMS

In consider whether to grant the petition, the Court must apply the "deferential" standard of review set forth in 28 U.S.C. § 2254, as amended by the Antiterrorism and Death Penalty Act of 1996 (the "AEDPA"), to petitioner's claims. Eze v. Senkowski,321 F.3d 110, 120-21 (2d Cir. 2003). The Court thus' rejects petitioner's argument that the Court should review petitioner's ineffective assistance of counsel claim de novo. (Pet. Mem. at 25-26.) Specifically, petitioner argues that the "AEDPA's deferential standard is limited to claims that were `adjudicated on the merits in State court proceedings,'" Eze, 321 F.3d at 121 (citing 28 U.S.C. § 2254), and that the Appellate Division did not adjudicate the ineffective assistance claim on the merits. The Court rejects this contention.

An adjudication on the merits is a "substantive, rather than a procedural, resolution of a federal claim," Sellan v. Kuhlman,261 F.3d 303, 313 (2d Cir.2001), and "one that `(1) disposes of the claim on the merits, and (2) reduces its disposition to judgment.'" Bell v. Miller,500 F.3d 149, 155 (2d Cir.2007) (emphasis omitted) (quoting Sellan, 261 F.3d at 312). A court may discuss the merits, but not sufficiently "premise" its decision on these merits to warrant deferential review under the AEDPA. See Bell, at 155 (noting, for example, that where courts use a "contrary-to-fact construction: if the merits were reached, the result would be the same," the court did not adjudicate that issue on the merits under the AEDPA) (emphasis in original). Here, because the Appellate Division directly—albeit briefly—analyzed the ineffective assistance claim, as set forth supra, the Court therefore finds that the Appellate Division adjudicated the ineffective assistance claim on the merits and that this claim is subject to deferential AEDPA review.10

B. REVIEW UNDER THE AEDPA

Section 2254, as amended by the AEDPA, provides that:

[528 F.Supp.2d 90]

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254. "`Clearly established Federal law' means the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision.'" Green v. Travis,414 F.3d 288, 296 (2d Cir.2005) (quoting Williams v. Taylor,529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

A decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." Williams, 529 U.S. at 413, 120 S.Ct. 1495; see also Gersten v. Senkowski,426 F.3d 588, 606 (2d Cir. 2005). A decision is an "unreasonable application" of clearly established federal law if a state court "identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of [a] prisoner's case." Williams, 529 U.S. at 413, 120 S.Ct. 1495; see also Gersten, 426 F.3d at 606 ("The `unreasonable application' language applies where the state court identified the correct legal governing legal principle in the Supreme Court's decisions but applied it unreasonably.").

"An ineffective assistance claim asserted in a habeas petition is analyzed under the `unreasonable application' clause of AEDPA because it is `past question that the rule set forth in Strickland qualifies as

clearly established Federal law, as determined by the Supreme Court. . . .'" Lynn v. Bliden,443 F.3d 238, 247 (2d Cir.2006) (quoting Williams v. Taylor,529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). Further, because "[u]nreasonableness is determined by an objective standard," Gersten, 426 F.3d at 607, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Gilchrist v. O'Keefe,260 F.3d 87, 93 (2d Cir.2001) (quoting Williams, 529 U.S. at 411, 120 S.Ct. 1495). Instead, the Court must find that the state court's application of federal law reflected "`some increment of incorrectness beyond error.'" Gersten, 426 F.3d at 607 (quoting Henry v. Poole,409 F.3d 48, 68 (2d Cir.2005)). However, "[t]he increment of correctness beyond error . . . need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." Yung v. Walker,341 F.3d 104, 110 (2d Cir.2003) (quoting Francis S. v. Stone,221 F.3d 100, 111 (2d Cir.2000)).

In the instant case, for the reasons set forth below, the Court finds that petitioner has objectively established that the state court unreasonably, applied the Strickland standard in considering Schulz's ineffective assistance claim. Although the Court bases its ruling on the totality of Levine's representation, the Court especially grounds its ruling on Levine's failure to interview Ruiz prior to trial, since such an

[528 F.Supp.2d 91]

interview was reasonably likely to have given rise to admission of the Guilfoyle photograph—as well as other evidence of Guilfoyle's potential culpability for the El Classico Robbery—and there is a reasonable probability the result of the trial would have been different.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Petitioner claims that he was denied the effective assistance of counsel at trial because Levine failed to: (1) call Tralongo as petitioner's alibi witness; (2) interview Ruiz prior to trial and show her the Guilfoyle photograph; (3) show this photograph to Ruiz on the witness stand; (4) develop the Guilfoyle evidence through the police officers who had been produced in court; and (5) discover that Guilfoyle's wife, Kim, had a license plate containing the letter "T" and the number "1," which was consistent with Velasquez's description of the license plate of the getaway car. The Court finds, for the reasons set forth below, that Levine's failure to call Tralongo at trial and to interview Ruiz and show her the Guilfoyle photograph prior to trial constitutes ineffective assistance of counsel under Strickland. Moreover, the Court concludes that the state court—which addressed the Tralongo issue in a conclusory manner and failed to address the Ruiz issue at all—unreasonably applied Strickland to the facts of this case.

A. THE STRICKLAND STANDARD

"The Sixth Amendment guarantees persons charged with crimes the `assistance of counsel.' U.S. Const. amend. VI. `It has long been recognized that the right to counsel is the right to the effective assistance of counsel.'" Eze, 321 F.3d at 124 (quoting McMann v. Richardson,397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Under Strickland,

[the] test for ineffective assistance of counsel consists of two separate prongs, both of which must be satisfied in order to establish a constitutional violation, A defendant must show both (1) that defense counsel's performance fell "below an objective standard of reasonableness . . . under prevailing professional norms" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Davis v. Greiner, 428 F.3d 81, 87 (2d Cir.2005) (quoting Strickland, 466 U.S. at 688, 694, 104 S.Ct. 2052); see also Bell, at 155 ("A criminal defendant asserting that counsel is constitutionally deficient must show that the lawyer's performance `fell below an objective standard of reasonableness' and that `there is

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'") (citing Strickland, 466 U.S. at 688, 694, 104 S.Ct. 2052). For the reasons set forth below, the Court finds that petitioner has satisfied both prongs of the Strickland test, and that the state court's decision to the contrary was unreasonable.

B. THE PERFORMANCE OF DEFENSE COUNSEL

In order to meet the first prong of the Strickland test, "a defendant must show that counsel's representation `fell below an objective standard of reasonableness' determined according to `prevailing professional norms'. . . . Counsel's performance is examined from counsel's perspective at the time of and under the circumstances of trial." Murden v. Artuz,497 F.3d 178, 198 (2d Cir.2007) (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052); see also Davis, 428 F.3d at 88 ("When assessing whether or not counsel's performance `fell below an objective standard of reasonableness . . .

[528 F.Supp.2d 92]

under prevailing professional norms,' Strickland directs us to consider the circumstances counsel faced at the time of the relevant conduct and to evaluate the conduct from counsel's point of view.") (quoting Strickland, 466 U.S. at 688-89, 104 S.Ct. 2052). Therefore, "`[j]udicial scrutiny of a counsel's performance must be highly deferential . . . [and] every effort [must] be made to eliminate the distorting effects of hindsight.'" Cox, 387 F.3d at 198 (quoting Strickland, 466 U.S. at 689, 104 S.Ct. 2052); see also Eze, 321 F.3d at 125 (explaining scrutiny is deferential because "`it is all too tempting for a defendant to second-guess counsel's assistance after a conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable'") (quoting Strickland, 466 U.S. at 689, 104 S.Ct. 2052).

In particular, "[a]ctions or omissions by counsel that `might be considered sound trial strategy' do not constitute ineffective assistance.'" United States v. Best,219 F.3d 192, 201 (2d Cir.2000) (quoting Strickland, 466 U.S. at 689, 104 S.Ct. 2052); see also Bell, at 156 (explaining that in order to show ineffective assistance, "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy") (citation and quotation marks omitted); Lynn v. Bliden,443 F.3d 238, 247 (2d Cir.2006) ("As a general rule, a habeas petitioner will be able to demonstrate that a trial counsel's decisions were objectively unreasonable only if there [was] no . . . tactical justification for the course taken.") (citation and quotation marks omitted). For that reason, "[s]trategic choices made by counsel after thorough investigation are virtually unchallengeable . . . and there is a strong presumption that counsel's performance falls `within the wide range of reasonable professional assistance.'" Gersten, 426 F.3d at 607 (quoting Strickland, 466 U.S. at 689-90, 104 S.Ct. 2052); see also Pavel v. Hollins,261 F.3d 210, 216 (2d Cir.2001) (explaining that representation is deficient only if, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance") (emphasis in original) (citation and quotation marks omitted).

Finally, in determining whether one or more errors by trial counsel renders the representation constitutionally deficient under the first prong of Strickland, the Court "need not decide whether one or another or less than all of these . . . errors would suffice, because Strickland directs us to look at the `totality of the evidence before the judge or jury,' keeping in mind that `some errors [] have . . . a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture. . . .'" Lindstadt v. Keane,239 F.3d 191, 199 (2d Cir.2001) (quoting Strickland, 466 U.S. at 695-96, 104 S.Ct. 2052).

Here, the Court has "assess[ed] the impact of [Levine's representation] in the aggregate," Lindstadt, 239 F.3d at 204 (emphasis in original), and, as set forth below, concludes that "ineffectiveness permeated all

the evidence." Id. at 203.
(1) FAILURE TO CALL TRALONGO AS A WITNESS
"Courts applying Strickland are especially deferential to defense attorneys' decisions concerning which witnesses to put before the jury. . . . `The decision not to call a particular witness is typically a question of trial strategy that [reviewing] courts are ill-suited to second-guess.'" Greiner v. Wells,417 F.3d 305, 323 (2d Cir.2005) (quoting United States v. Luciano,158 F.3d 655, 660 (2d Cir.1998)); see also Eze, 321 F.3d at 129 ("A defense
[528 F.Supp.2d 93]

counsel's decision not to call a particular witness usually falls under the realm of trial strategy that we are reluctant to disturb."). In fact, depending on the circumstances, even counsel's decision not to call witnesses "that might offer exculpatory evidence . . . is ordinarily not viewed as a lapse in professional representation." Best, 219 F.3d at 201.
With respect to alibi witnesses in particular, courts have found that "even if . . . alibi evidence did exist, the trial attorney's decision not to call the purported alibi witnesses was a tactical decision that does not constitute deficient performance." Dupont v. United States, 224 Fed.Appx. 80, 2007 WL 1475562 at *1 (2d Cir.2007); see also Perkins v. Comm'r of Corr. Servs., 218 Fed.Appx. 24, 26 (2d Cir.2007) (finding valid "strategic reasons" for failure to call alibi witnesses).
"At the same time, however, the decision not to call a witness must be grounded in some strategy that advances the client's interests." Eze, 321 F.3d at 129. The Second Circuit has noted several legitimate, tactical reasons for failing to call a defense witness. For example, an attorney may choose not to call a witness where that witness' likely testimony is largely unknown to the attorney before trial, or where the witness is "unfriendly" to the defendant. E.g., Greiner, 417 F.3d at 323; see also, e.g., Seow v. Artuz, 98-CV-72, 2007 WL 2890259, at *10, 2007 U.S. Dist. LEXIS 72208, at *26-27 (E.D.N.Y. Sept. 27, 2007) (finding decision not to call witness "who was intoxicated and unsure of what he had seen" to be "a tactical choice"). Another reason for choosing not to call a witness is the potential for "opening the door" to potentially damaging testimony about the defendant's character, e.g., Best, 219 F.3d at 202, or indeed any "line of inquiry harmful to the defense." Greiner, 417 F.3d at 324. Further, the Second Circuit has specifically noted that the failure to call an alibi witness that would likely face effective impeachment cannot constitute ineffective assistance of counsel. See, e.g., Bennett v. Fischer, 246 Fed.Appx. 761, 76546 (2d Cir.2007) (analyzing witness' likely impeachment in context of second prong of Strickland test).
Here, respondent has provided no evidence showing that Levine's decision not to call Tralongo resembles any of the "tactical decisions" previously recognized by the Second Circuit. For instance, neither Levine nor respondent has put forth any evidence that Tralongo was more susceptible to cross-examination than any other witness in a criminal trial. The Court has seen no evidence, for example, that Tralongo particularly lacked credibility or even had a criminal record. Nevertheless, Levine and respondent have advanced several justifications for Levine's failure to call Tralongo as a witness. For the reasons set forth below, the Court finds all of these justifications unpersuasive.
Levine stated at sentencing that he did not call Tralongo—and indeed, called no witnesses at all—because Ruiz failed to identify petitioner and Levine undermined Velasquez on cross-examination. However, "[a]s the Second Circuit has held, a decision not to prepare an adequate defense because a defense lawyer thinks the prosecution's case is weak is not `strategic.' It is motivated by the desire to avoid work, not to serve the best interests of the defendant." Garcia v. Portuondo,459 F.Supp.2d 267, 287 (S.D.N.Y.2006) (citing Pavel, 261 F.3d at 218).11 That the
[528 F.Supp.2d 94]

prosecution's case was weaker than Levine initially anticipated does not justify his failure to call Tralongo as a witness.12

Further, as petitioner testified at the October 5 Hearing, his alibi represented one of only two components of his defense. The Court cannot objectively justify Levine's choice to halve this defense, leaving available only the Guilfoyle evidence—the admissibility of which Levine surely knew was in question under Primo. See Bell, at 157 (holding that where "defense proceeded along two strategic lines," failure to investigate witness that could have "promoted" one of these lines was a deficiency in representation). Even though Ruiz failed to identify Schulz, and Levine was able to undermine Velasquez's identification of petitioner's license plate, Velasquez made an in-court identification of petitioner. As a matter of law, and as Levine surely knew, "the testimony of a single, uncorroborated eyewitness is generally sufficient to support a conviction." See United States v. Frampton382 F.3d 213, 222 (2d. Cir.2004) (citing United States v. Danzey,594 F.2d 905, 916 (2d Cir.1979)); see also Bentley v. Scully,41 F.3d 818, 825 (2d Cir.1994) (stating that eyewitness testimony and identification constituted a major portion of overwhelming evidence of guilt); Huber v. Schriver,140 F.Supp.2d 265, 277 (E.D.N.Y.2001) (holding that testimony of single eyewitness defeated a petitioner's claim of legally insufficient evidence.). In light of this clear precedent for Schulz's conviction, Levine's apparent belief that Schulz's acquittal was guaranteed at the end of the prosecution's case was unreasonable.

In short, the Court thus finds that Levine's wholesale abandonment of Schulz's alibi defense without adequate explanation constituted a constitutional deficiency in Levine's representation. The fact that only one of the two eyewitnesses had identified petitioner at the trial and Levine viewed the prosecution case as weak does not justify the failure to call an alibi witness with no known credibility issues. Levine's other stated reason (at sentencing) for not calling Tralongo—that the jury might wonder why petitioner did not also take the stand—is also insufficient to justify the decision. Even assuming this decision could be viewed in isolation as tactical, the Court must consider this decision in the context of trial counsel's entire performance during the trial. More specifically, in "assess[ing] the impact of [Levine's representation] in the aggregate," Lindstadt, 239 F.3d at 204 (emphasis in original), the Court must consider Levine's failure to call Tralongo in the context of another major decision—namely, the decision not to interview Ruiz prior to her trial testimony to show her the Guilfoyle photograph—which lacked any strategic justification whatsoever. As discussed below, when the failure to call the alibi witness is considered in conjunction with his inexplicable decision not to interview Ruiz (despite Levine's admission that he wanted to interview her as part of his trial strategy), his representation is clearly deficient under Strickland.

[528 F.Supp.2d 95]

(2) FAILURE TO INTERVIEW RUIZ PRIOR TO TRIAL

The Court finds, for the reasons set forth below, that Levine's failure to interview Ruiz before her trial testimony represented a constitutional deficiency in his counsel under Strickland. As a threshold Matter, the Court assumes that if Levine interviewed Ruiz and showed her the Guilfoyle photograph, she would have provided information consistent with the Ruiz Affidavit, including that she is 90 percent sure that Guilfoyle committed the robbery and she is "certain that Stephen Schulz has been convicted of a crime he did not commit." (Ruiz Affadvit ¶¶ 6-9.) The Court is confident in this assumption because respondent has provided no grounds to discredit the Ruiz Affidavit or to believe that she would have hid this information from Levine if he had interviewed her prior to her trial testimony (or cross-examined her). Although respondent tries to suggest that there was some tactical or strategic reason not to interview Ruiz (October 5 Hearing Tr. at 64-70), that argument is wholly contradicted by the record. Specifically, in the

Levine Affidavit, Levine conceded that he wanted to interview Ruiz prior to her testimony and show her the Guilfoyle photograph. The sole reason given by Levine for not conducting that interview was that the prosecutor denied his request to speak with Ruiz on the day of her anticipated trial testimony. However, as a threshold matter, the prosecutor testified at the evidentiary hearing before this Court and emphatically stated that this conversation—in which Levine claims she denied him access to Ruiz on the day of her trial testimony—"never happened." (Tr. at 31) The prosecutor further testified that she never had any conversation whatsoever with Levine regarding his ability to interview a witness in the case. (Id.) Thus, respondent credibly undermined the only reason given for Levine's failure to interview Ruiz. However, even assuming arguendo that Levine's affidavit is accurate and the prosecution refused to allow him to interview the witness, the decision to abandon such an interview attempt certainly cannot be considered strategic. As set forth below, under "prevailing professional norms," Levine clearly should have known that he could have sought the trial court's help in securing a pre-trial interview of Ruiz, and his failure to interview this critical witness under the circumstances of this case was a constitutional deficiency under Strickland.

(a) STANDARD FOR PRE-TRIAL INVESTIGATION AND IMPORTANCE OF RUIZ INTERVIEW

In preparing for trial, "`[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Lindstadt, 239 F.3d at 200 (quoting Strickland, 466 U.S. at 691, 104 S.Ct. 2052); see also Wiggins v. Smith,539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation,"); Gersten, 426 F.3d at 607 ("[C]ounsel has a duty to make reasonable investigations, and a decision not to investigate will be reasonable only to the extent that reasonable professional judgments support the limitations on investigation.") (citation and quotation marks omitted).

Specifically, reasonable decisions not to pursue an avenue of investigation encompass cases "where counsel . . . cease[d] further investigation as a result of having discovered . . . evidence . . . to suggest that challenging the prosecution's . . . evidence would have been counterproductive, or that further investigation would have

[528 F.Supp.2d 96]

been fruitless," or where counsel has "good reason to think further investigation would be a waste." Gersten, 426 F.3d at 610 (citation and quotation marks omitted); see also Robles v. Superintendent of the Elmira Facility, No. 07 Civ. 596, 2007 WL 2600857, at *6, 2007 U.S. Dist. LEXIS 64809, at *17 (S.D.N.Y. Aug, 30, 2007) (finding counsel had not' erred in failing to pursue potential witness that was likely to be "poorly performing" and "uncooperative"); Hernandez v. Greene, No. 05-CV-5291, 2006 WL 2702060, at *8-9, 2007 U.S. Dist. LEXIS 9049, at *24-25 (E.D.N.Y. Feb. 8, 2007) (finding counsel had not erred in failing to pursue potential witness whose account of the relevant events would not be inconsistent with prosecution's case).13

Here, the Court finds that Levine breached his duty to investigate Schulz's case diligently. The Court finds that Levine's failure to interview Ruiz was unreasonable and fell below professional norms for counsel's representation. Levine had nothing to lose by interviewing Ruiz; either she would maintain her identification of Schulz as the robber, simply continuing the status quo, or she would help to acquit him by enabling Levine to introduce the Guilfoyle photograph.14 While the Court "will not normally fault counsel for foregoing a potentially fruitful course of conduct if that choice also entails a `significant potential downside,'" Greiner, 417 F.3d at 319, interviewing Ruiz prior to trial entailed no "downside" at all, significant or otherwise. Since the Guilfoyle evidence represented one-half of Levine's strategy, his failure to take obvious steps to get this evidence admitted constitutes a deficiency in his representation.

See Bell, at 157.
In fact, the Second Circuit has affirmed a grant of habeas corpus that was based largely on trial counsel's failure to investigate a witness who would have provided a foundation for the introduction of evidence of third-party culpability. See Sparman, 154 F.3d at 52 (affirming Judge Gleeson's grant of habeas corpus "substantially for the reasons" he provided). The Court thus finds Judge Gleeson's analysis in Sparman instructive here.
[528 F.Supp.2d 97]

In Sparman, the court found that trial counsel was constitutionally deficient in failing, inter alia, to interview a witness who had information that a third party—not the defendant—had committed the crime. Sparman v. Edwards,26 F.Supp.2d 450, 467 (E.D.N.Y.1997). The court held that had counsel interviewed this potential witness and elicited this testimony at trial, counsel would have been able to "establish[ ] a sufficient nexus between" the third-party and the crime to introduce evidence regarding the third-party's criminal history. Id. at 467-69. The court further held that in denying the petitioner's post-trial motion for relief, the state trial court had "failed to understand the relevance" of an affidavit the witness provided post-trial containing information about the third party. Id. at 468-69. Specifically, the trial court failed to place this information in context of the other evidence presented at trial because the evidence collectively would have "severely impair[ed] the prosecution's" case by showing that the third party had committed the crime of which defendant was convicted. Id. at 468. In Sparman, the court explained that counsel should have known to interview the witness prior to trial in part because the defendant so instructed. Id. at 451.
Here, although Schulz apparently did not instruct Levine to interview Ruiz, Levine had an even greater reason to interview her than the counsel did in Sparman: Ruiz was an eyewitness to the crime who could have confirmed that Guilfoyle was the perpetrator. Further, like the trial court in Sparman, the state court here unreasonably failed to contextualize the Ruiz Affidavit. In the context of Ruiz's failure to identify Schulz in court, the Ruiz Affidavit provided evidence that Levine was deficient in failing to interview her prior to trial because such an interview would likely have provided the "nexus" the state court explicitly demanded under Primo. As in Sparman, then, Levine's failure to conduct this interview had no conceivable strategic justification and was based on no apparent reasonable judgment. Levine's "[duty] was to investigate, not to make do with whatever evidence fell into his lap." Garcia, 459 F.Supp.2d at 277, 286 (finding counsel deficient where, inter alia, "thorough [pretrial] interview of [witness] . . . would have produced substantial testimonial evidence supporting . . . defense").
Not only would interviewing Ruiz have likely enabled Levine to introduce evidence about Guilfoyle, but would have also given Levine additional material to impeach Velasquez, the only other eyewitness. Specifically, Ruiz's identification of Guilfoyle would have undermined Velasquez's identification of Schultz. Moreover, Ruiz would have testified that Velasquez pointed petitioner out to her in the photo array and later told her, if she did not help put Schulz in jail, he would get out of jail and hurt her. This testimony by a witness like Ruiz with no motive to lie would have completely undermined the sole identification witness. See Bell, at 155-57 (finding that where "the only evidence identifying a criminal defendant as the perpetrator is the testimony of a single witness," failure to investigate means of impeaching witness constitutes ineffective assistance of counsel); Lindstadt, 239 F.3d at 200 (finding ineffective assistance of counsel where failure to investigate witnesses prevented counsel from "shak[ing] the testimony of the only percipient witnesses"); see also Batten v. Greiner, 97-CV-2378, 2003 WL 22284187, at *8-9, 2003 U.S. Dist. LEXIS 16923, at *25-26 (E.D.N.Y. Aug. 26, 2003) (finding counsel erred in failing to procure witness who could have undermined prosecution's eyewitness' testimony).
Here, where Levine anticipated the testimony of

only two eyewitnesses, he inexplicably failed to investigate testimony that would have significantly undermined not only Ruiz's identification of Schulz, but Velasquez's as well.

(B) THE PROSECUTOR'S ALLEGED REFUSAL TO PERMIT AN INTERVIEW OF RUIZ

In his post-trial affidavit, Levine recognized the importance of interviewing Ruiz and showing her the photograph, and stated that he wanted to interview her prior to her trial testimony. The only reason given for not doing so was the prosecutor's purported denial of his request for an interview. However, even assuming arguendo that the prosecutor denied him access to the witness on the day of her trial testimony (even though the prosecutor would have no legal basis for doing so), Levine's failure to pursue that alleged denial with the trial court cannot be excused under Strickland.

New York State courts have consistently held that prosecutors may not refuse defense counsel requests for interviews with prosecution witnesses, and that courts will enable these interviews if necessary. See, e.g., People v. Doty,73 A.D.2d 802, 423 N.Y.S.2d 797, 799 (N.Y.App.Div.1979) (noting that trial court had asked government informant to come to court for interview with defense counsel); People v. Marino,87 Misc.2d 542, 385 N.Y.S.2d 918, 918 (Monroe Cty.1976) ("Defense counsel has the right to interview the People's witnesses."); People v. Eanes,43 A.D.2d 744, 350 N.Y.S.2d 718, 718 (N.Y.App.Div.1973) ("We know of no rule or law which prohibits defense counsel from interviewing a person who has appeared at the request of the prosecutor. . . ."); People v. Cusano,63 Misc.2d 906, 313 N.Y.S.2d 833, 834 (Nassau Cty.1970) ("[D]efense counsel does not need permission of the court or the District Attorney to interview or interrogate [potential witnesses]."); see also People v. Estrada,1 A.D.3d 928, 767 N.Y.S.2d 552, 554 (N.Y.App.Div.2003) (finding no due process violation from prosecution witness' refusal to meet with defense counsel because prosecution did not instruct the witness to refuse).

In fact, as the trial court itself stated in denying petitioner's newly discovered evidence claim, Levine could have "made [an] effort to seek an adjournment or otherwise enlist the court's assistance in securing an opportunity to interview [Ruiz] before she took the stand." (February 23 Memorandum at 3.) Therefore, because legal precedent clearly provided that Levine could have sought the court's assistance to permit an interview of Ruiz despite any alleged prosecution efforts to prevent it, the Court finds Levine's failure to interview Ruiz (who was a key prosecution witness) on that sole ground fell below the objective standard of reasonableness under prevailing professional norms as set forth in Strickland. See Batten v. Greiner, No. 97-CV-2378, 2003 WL 22284187, at *9, 2003 U.S. Dist. LEXIS 16923, at *26 (E.D.N.Y. Aug. 26, 2003) ("Counsel's failure to take advantage of the procedural mechanisms available to him for the production of this key witness was performance that fell[ ] below a reasonable professional standard."); see also Noble v. Kelly,89 F.Supp.2d 443, 463 (S.D.N.Y.2000) ("Errors caused by counsel's ignorance of the law are errors that run afoul of the objective standard of reasonableness.") (citing Kimmelman v. Morrison,477 U.S. 365, 385, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)).

In sum, although respondent attempts to provide a strategic decision for Levine's failure to interview Ruiz and show her the Guilfoyle photograph, no such strategy existed. Such an interview (and showing her the Guilfoyle photograph) was risk-free

given that it was expected she would identify petitioner at trial. In fact, Levine admitted in his own affidavit that he wanted to interview her as part of his own trial strategy, but he did not do so purportedly because the prosecutor would not let him—an excuse that is clearly constitutionally deficient. This failure, given the Ruiz Affidavit, turned out to be monumental in that it deprived petitioner of the opportunity to

obtain critical evidence that would have completely undermined the prosecution case. Neither the Appellate Division, nor the Court of Appeals, addressed this failure in denying the ineffective assistance claim. Moreover, this error by counsel must also be considered in conjunction with the failure to call the alibi witness. Although the Appellate Division called that decision tactical, the Court is unaware of any alleged deficiencies in the roommate's testimony or in his credibility that would have supported this as a tactical decision. When these decisions are viewed together, it is clear that defense counsel simply abandoned mounting any defense when only one of the two eyewitnesses identified his client. That overall decision was unreasonable under the particular circumstances of this case (especially where the interview of Ruiz had absolutely no disadvantage whatsoever). Thus, the state court's failure to consider these defects as a whole in the context of the evidence at trial—including the wholesale abandonment of petitioner's two-pronged trial strategy—was an unreasonable application of Strickland.

(3) OTHER ALLEGED DEFICIENCIES

Petitioner also alleges other deficiencies in trial counsel's performance. First, petitioner argues that Levine should have shown Guilfoyle's photographs to Ruiz while she was on the witness stand. Specifically, petitioner contends that, once Ruiz stated at trial that petitioner was not the robber, there was no disadvantage to showing her the Guilfoyle photograph to see if she recognized it and lay the foundation for its admission. Similarly, petitioner argues in the alternative that Levine could have called police officers involved in investigating Guilfoyle's robberies to establish sufficient similarities to admit the Guilfoyle photograph. The Court, however, need not address whether these decisions were also constitutionally defective. Even assuming there are potential disadvantages to pursuing either one of these courses of action, there were no disadvantages, as noted supra, to interviewing Ruiz before her testimony. If Levine had conducted that interview, he then would have been able to question Ruiz during the trial and gain admission of the Guilfoyle photograph without being concerned that something negative would be elicited from Ruiz that would harm his client's case.

Petitioner also faults Levine for not conducting an adequate pre-trial investigation that petitioner claims would have discovered that a car belonging to Kim Guilfoyle, Anthony Guilfoyle's wife, had a license plate on a 1984 Oldsmobile Cutlass that contained the letter "T" and the number "1" as specified in Velasquez's description of the getaway car's license plate. However, after much exploration, this Court concludes that the license plate evidence is inconclusive. In particular, the documentation supplied by petitioner to support this argument demonstrated that Guilfoyle had title to a car with a license plate containing a "T" and the number "1" as of October 28, 1999, which was many months after the El Classico Robbery, Therefore, it provides no evidence as to the actual plate used on that vehicle at the time of the robbery. Although efforts were made by both sides to obtain information from the Department of Motor Vehicles ("DMV") regarding the license plate

for that vehicle on February 3, 1999, respondent submitted an affidavit to the Court indicating that such old records had been purged as part of DMV's standard operating procedure. (See Affidavit of Detective Investigator Patrick R. Mulcahy, dated October 4, 2007, at 1.) Thus, although the Court questions why Levine did not investigate the plates on any Guilfoyle vehicles as part of petitioner's defense, it is not a basis to find that he was ineffective under Strickland, especially under the prejudice prong, given the lack of information regarding what such investigation would have uncovered.

In short, the failure, to call the alibi witness combined with the failure to interview Ruiz were constitutionally deficient under the first prong of Strickland and the Court need not consider these other purportedly erroneous decisions by counsel.15

C. PREJUDICE

The second prong of the Strickland test requires petitioner to show that "`there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Murden, 497 F.3d at 198 (quoting. Strickland, 466 U.S. at 694, 104 S.Ct. 2052) Pavel, 261 F.3d at 226 (same). "`An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" Lindstadt, 239 F.3d at 204 (quoting Strickland, 466 U.S. at 691, 104 S.Ct. 2052). Moreover, "[u]nlike the determination of trial counsel's performance under the first prong of Strickland, the determination of prejudice `may be made with the benefit of hindsight.'" Hemstreet v. Greiner,491 F.3d 84, 91 (2d Cir.2007) (quoting Mayo v. Henderson,13 F.3d 528, 534 (2d Cir.1994)).

The Supreme Court has made clear that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhehning record support." Strickland, 466 U.S. at 696, 104 S.Ct. 2052. Consequently, "even serious errors by counsel do not warrant granting habeas relief where the conviction is supported by overwhelming evidence of guilt." Lindstadt, 239 F.3d at 204 see also Wynters v. Poole,464 F.Supp.2d 167, 176 (N.D.N.Y. 2006) ("[T]he determination of prejudice necessarily is affected by the quantity and quality of other evidence against defendant") (citing Strickland, 466 U.S. at 695, 104 S.Ct. 2052). Where the Second Circuit has found insufficient prejudice, the evidence against defendants was very strong, and counsel's error (or purported error) minor in comparison. E.g., Murden, 497 F.3d at 199 (finding insufficient prejudice from counsel's failure to investigate certain non-eyewitnesses who could have supported particular defense, where testimony of multiple eyewitnesses contradicted this defense); Hemstreet, 491 F.3d at 91-92 (finding prosecution's case "independently strong" even if counsel erred where, inter alia, defendant "arguably confessed" to murder to "two separate individuals"); Bennett, 2007 WL 2890259, *10, 2007 U.S.App. LEXIS at *8-9 (finding that even if counsel had interviewed alibi witness, witness was not credible, alibi defense would not have prevailed, and would have served to impeach defendant in other ways); Lynn, 443 F.3d at 253 (finding insufficient prejudice in part because jury was already aware of evidence counsel failed to admit); see also Seow Artuz,

[528 F.Supp.2d 101]

No. 98-CV-72, 2007 WL 2890259, at *10, 2007 U.S. Dist. LEXIS 72208, at *26-27 (E.D.N.Y. Sept. 27, 2007) (failing to find prejudice where witness that counsel failed to investigate "could not have provided" evidence helpful to defense); Bridges v. United States, No. 04 Civ. 2715, 2005 WL 1798084, at *4-5, 2005 U.S. Dist. LEXIS 15401, at *13-16 (S.D.N.Y. Aug. 1, 2005) (failing to find prejudice where prosecution presented, inter alia, accomplice testimony and recordings of defendant's incriminating conversations with accomplices).

On the other hand, the Second Circuit has found sufficient prejudice to warrant habeas relief where defense counsel failed to conduct investigation that "could have vastly increased the opportunity to cast doubt on . . . critical evidence." Bell, at 156; Lindstadt, 239 F.3d at 204 (finding prejudice where counsel failed to investigate witness that could have undermined the credibility of the prosecution's eyewitness); see also Batten, 2003 WL 22284187, *9, 2003 U.S. Dist. LEXIS 16923 at *26-27 (finding prejudice sufficient to warrant habeas grant where, inter alia, counsel failed to take sufficient steps to secure witness for trial); Bohan v. Kuhlmann,234 F.Supp.2d 231, 254 (S.D.N.Y.2002) (finding prejudice sufficient to warrant habeas grant where counsel failed to file alibi notice).

The Court has carefully considered the totality of the prosecution's case against Schulz, and finds that "[t]his [was] a case of underwhelming evidence . . . All of the evidence against [Schulz] was affected by his counsel's failures." Lindstadt, 239 F.3d at 205. There was no forensic evidence implicating Schulz.

Instead, there were only two eyewitnesses and one did not identify petitioner in court, and the other one (Velasquez) had credibility issues, including (1) the fact that his description of the license plate did not match the getaway car allegedly used by Schulz and (2) the fact that the witness he had a pending gun possession charge at the time of the robbery, which was later reduced to disorderly conduct.

Given that the verdict was based essentially on the testimony of the single eyewitness, the Court concludes that there is a strong likelihood that counsel's errors were pivotal to the outcome of the case. As a threshold matter, the testimony of an alibi witness may have substantially undermined this relatively weak case.16 More importantly, even apart from the alibi witness, there is a reasonable likelihood that the additional testimony from Ruiz—that counsel undoubtedly would have elicited on cross-examination if he had interviewed her prior to her testimony—would have been devastating to the prosecution case well beyond her failure to identify petitioner. Specifically, Ruiz would have testified to the following: (1) Schulz did not commit the El Classico Robbery; (2) she is 90 percent sure that Guilfoyle did; (3) Velasquez pointed to petitioner's photo in a

[528 F.Supp.2d 102]

photo array and informed Ruiz that he was the robber prior to Ruiz's identifying Schulz in that array; (4) prior to trial, Velasquez told her that if she did not help put petitioner in jail, he would be released from jail and hurt her; and (5) as an eyewitness, she is "certain that Stephen Schultz has been convicted of a crime he did not commit." (Ruiz Affidavit ¶¶ 4-9). This testimony would have provided a sufficient basis for the admission of the Guilfoyle photograph and thereby point to an alternative suspect. See generally Lyons v. Johnson,99 F.3d 499, 504 (2d Cir.1996) ("[T]he identification provided by the prosecution's eyewitnesses were shaky from the start, At a bare minimum, the possibility of misidentification would have raised a reasonable doubt as to [petitioner's] guilt had the jury been permitted to see if there were a resemblance between [petitioner] in this case and [the alternative suspect]. . . ."); see also Towns v. Smith,395 F.3d 251, 260 (6th Cir.2005) ("The only evidence linking [petitioner] to the crime was the eyewitness testimony of Roland Higgs. We have repeatedly expressed our grave reservations concerning the reliability of eyewitness testimony, . . . and Higgs's identification of [petitioner] was particularly shaky.") (citations and quotation marks omitted). Moreover, the Ruiz testimony in the affidavit would also have provided an additional strong basis for the jury to discredit Velasquez's identification if they believed he was trying to improperly coach or pressure Ruiz into identifying Schulz as the robber. Had this additional Ruiz evidence been placed before the jury, the. Court finds, in light of the evidence at trial, that it is reasonably likely that the outcome of Schulz's trial would have been different. Because counsel's errors undermined confidence in the outcome of the trial, the Court finds that Schulz suffered clear prejudice due to counsel's constitutional deficiencies at trial and the second prong of the Strickland test is satisfied.

V. CONCLUSION

For the reasons set forth above, the Court finds that petitioner has shown that his counsel's performance fell "outside the wide range of professionally competent assistance" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 690, 104 S.Ct. 2052. Moreover, given the facts of this case, the Court concludes that the state court's decision to deny petitioner's ineffective assistance claim under Strickland "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1),17

Accordingly, the Court grants the habeas petition. Respondent is ordered to, release petitioner from custody within 30 days of the date of this Order unless the state declares its intention, before those 30 days expire, to retry petitioner on the charge against him.18

SO ORDERED.
[528 F.Supp.2d 103]

EXHIBIT A
[Image in original not included.]

Footnotes

1. Annexed to this Memorandum and Order as Exhibit A is a photograph of petitioner (on the left) and a photograph of Guilfoyle (on the right) contained in the state record.
Back to Reference
2. Ruiz also identified Schulz in a photo array on February 4, 1999, (see Transcript of Wade Hearing, dated April 17, 2000), but the trial court did not permit the prosecution to present evidence of the out-of-court identification to the jury. (1.253.)
Back to Reference
3. Levine also moved to dismiss the charges against Schulz on the grounds that the prosecution had not made a prima facie case of robbery. (T.376.) The trial court denied this motion. (T.410.)
Back to Reference
4. Levine also stated that Ruiz suggested that the robber "was heavier and had a rounder face" than Schulz because during her testimony she "blew up her cheeks and put her hand in a cupping position around the side of her face." (T.385.)
Back to Reference
5. It should be noted that in addition to a robbery in West Babylon at 5:18 p.m. on the night of the February 3, 1999 El Classico Robbery, Guilfoyle's robbery spree in Suffolk County included the following other robberies in early 1999:(1) January 27, 1999 (J.J. French Dry Cleaners, Bay Shore); (2) January 27, 1999 (Floral Splendor Flower Shop, Islip Terrace); (3) February 1, 1999 (Carousel Hair Salon, West Babylon); (4) February 3, 1999 (Deer Park); (5) February 5, 1999 (All the Best Cards and Gifts, East Islip); and (6) March 7, 1999 (Islip Laundry, Islip). During at least some of the robberies, Guilfoyle did not display a gun, but rather put his hand in his pocket to pretend that he had a gun. (A.187-211.)
Back to Reference
6. Ruiz also noted that, "[a]fter the trial, when we were leaving the court, Jose Velasquez asked me why I did not identify Mr. Schulz because it would mean that we would have to keep returning to court, and he insisted that, if I would just identify him, then they would put him in jail and the case would be over." (Id.)
Back to Reference
7. Petitioner also provided documentation of a polygraph test he took on November 12, 2001, the results of which indicated that he spoke truthfully when he denied committing the El Classico Robbery. (See Report of Edwin F. Lambert, Wall Street Investigation Services, at 1-2.) However, because of issues regarding the reliability and admissibility of polygraph tests, the Court has not taken this test into account in granting Schulz's petition.
Back to Reference

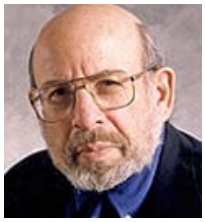
8. Respondent agrees that Schulz's petition was timely filed and that he properly exhausted all state court remedies.
Back to Reference
9. For convenience of the reader, the Court has not included here, but in the analysis infra, the key legal arguments parties offered at the October 5 Hearing. Similarly, respondent submitted an affidavit regarding the license plate issue, which is discussed infra.
Back to Reference
10. Moreover, the Court wholly rejects petitioner's contention at the October 5 Hearing that the Court should decide whether to grant the petition based on the Court's "comfort level . . . about the facts of the case." (October 5 Hearing Tr. at 45.) The role of the federal court in habeas review is not to second-guess state courts based on the "comfort level" of the federal judge, but to apply the law objectively and where appropriate, as in the instant case, with the deference the AEDPA mandates.
Back to Reference
11. Certainly, the Court does not hold that failure to present a defense constitutes ineffective assistance of counsel per se. Habeas petitioners cannot succeed based on a "self-serving and conclusory allegation that defense counsel failed to present witnesses," where "petitioner gives no indication as to which witnesses counsel should have presented" or "how these unidentified individuals would have changed the result of the proceeding." See generally Sturdivant v. Barkley, No. 04-CV-5659, 2007 WL 2126093, at *7, 2007 U.S. Dist. LEXIS 53582, at *19-*20 (E.D.N.Y. July 24, 2007). Here, however, petitioner specifically identified Tralongo and procured an affidavit indicating his likely testimony.
Back to Reference
12. Levine's other argument at sentencing— that Tralongo's testimony would have caused the jury to improperly question Schulz's failure to testify—is similarly unavailing.
Back to Reference
13. In evaluating claims of ineffective assistance of counsel based on failure to investigate witnesses, courts place weight on a defendant's ability to show that these, witnesses would have had helpful information. See, e.g., Ward v. Kuhlman, No. 9:01-CV-1054, 2007 WL 2907353, at *6, 2007 U.S. Dist. LEXIS 74470, at *19-*20 (N.D.N.Y. Oct. 4, 2007); Prousalis v. United States, No. 06 Civ, 12946, 2007 WL 2438422, at *8-9, 2007 U.S. Dist. LEXIS 63025, at *29 (S.D.N.Y. Aug. 24, 2007) (rejecting such claim where petitioner did not show that witness would have had exculpatory information); Ramdeo v. Phillips, No. 04-CV-1157, 2007 WL 1989469, at *31-32, 2007 U.S. Dist. LEXIS 49483, at *86-*87 (E.D.N.Y. July 9, 2007) (same).
Back to Reference
14. Respondent argued at the October 5 Hearing that Ruiz's identification of Schulz may have been "solidified" if Levine had showed her the Guilfoyle photograph prior to trial; (October 5 Hearing Tr. at 59), thus adversely affecting the defense. The Court is unpersuaded by this argument. There is no indication how showing her the Guilfoyle photograph would have solidified such identification. Either Ruiz was going to identify Schulz as the robber in court as expected, or she was not. Moreover, while the prosecution may have been able to introduce Ruiz's photo array if she identified Guilfoyle as the robber in court, this would have merely served to impeach Ruiz's testimony. The benefit of introducing the Guilfoyle photograph would have vastly outweighed any harm from the impeachment of Ruiz's credibility. In any event, as discussed supra, any purported strategic reason not to interview Ruiz is completely contradicted by Levine's own affidavit, which clearly stated that no such strategy existed. Instead, Levine states `unequivocally that he wanted to interview Ruiz as part of his, trial strategy (but was denied that opportunity by the prosecutor).
Back to Reference
15. Because the Court has not relied on these grounds, the Court also need not address respondent's

argument that these other grounds are unexhausted.
Back to Reference
16. The Court is unpersuaded by respondent's argument at the October 5 Hearing that Levine's failure to call Tralongo did not prejudice petitioner because the prosecution could have significantly impeached Tralongo regarding the differences between the February 7 Tralongo Affidavit and the March 17 Tralongo Affidavit. The Court finds these, differences—such as Tralongo's differing accounts of who cooked dinner and what television program Schulz was watching—to be relatively minor. Where the Second Circuit has found that the likelihood of impeachment negated any prejudice from counsel's failure to call a witness, that witness gave "inconsistent versions of the salient events." Hemstreet, 491 F.3d at 91-92 (emphasis added) (finding "salient" inconsistencies where witness gave differing accounts, inter alia, of the number of people present at murder). The differences between the Tralongo Affidavits are not salient and would not have provided significant—if any—grounds for impeaching Tralongo.
Back to Reference
17. Because the Court grants the petition on the grounds of ineffective assistance of counsel, the Court need not address the other bases for the petition.
Back to Reference
18. This Court's decision to grant the habeas petition should not be viewed in any way as a criticism of the handling of this case by the DA's Office at trial, on appeal, or during this habeas proceeding. To the contrary, the DA's Office diligently conducted an additional investigation after the Judge Rosenblatt dissent and also was extremely responsive to this Court's requests for additional information (especially regarding the license plate issue) during the evidentiary phase of the habeas. Moreover, in the interest of justice, counsel for respondent's voluntarily called the trial prosecutor during their portion of the evidentiary hearing knowing that her testimony completely undermined the only reason given by Levine for not interviewing Ruiz. Although the District Attorney's Office never uncovered conclusive proof of actual innocence and thus continued to oppose this habeas petition, this Court finds that, even in the absence of conclusive proof of actual innocence, there is a reasonable likelihood that, but for defense counsel's constitutional errors, the result of the trial would likely have been different.

News

11.21.11

William Hellerstein Honored by The Legal Aid Society



Professor Emeritus William Hellerstein, who retired in the fall of 2010 after 25 years of service to the Law School, was honored by the Legal Aid Society at its 40th anniversary Prisoner's Rights Project reception held on November 15th at offices of Davis Polk and Wardwell.

Over his 21-year career at The Legal Aid Society, Hellerstein rose from staff attorney to Attorney-in-Charge of the Criminal Appeals Bureau, arguing cases before the New York State Court of Appeals, the Second Circuit, and the United States Supreme Court. In 1971, responding to what he viewed as serious constitutional deficits in the prison system, Hellerstein created the Legal Aid Society's Prisoners' Rights Project. "One of the things that had always troubled me was the conditions in prisons and holding pens," recalled Hellerstein. The Project, which opened its doors on September 1, 1971, just days before the Attica inmate uprising, was devoted to addressing the deplorable conditions in the state's prisons and in the city's jails.

Since its inception 40 years ago, the Project has carried out groundbreaking work to protect the legal rights of prisoners through law reform, class action litigation, and advice and representation in individual non-criminal matters. The Project's landmark victories to prevent unconstitutional conditions of confinement for clients have had a national impact, and the Project continues to be a national leader in prison reform advocacy.

The Project's current priorities include preventing guard brutality, sexual abuse, and unsafe conditions; addressing the lack of mental health and medical care; and remedying the lack of educational programs for young prisoners. Virtually all persons incarcerated in New York City jails (13,000 individuals) and New York State prisons (57,000 individuals), as well as prison staff, benefit from the class action cases that the Prisoners' Rights Project has litigated.

Hellerstein joined the faculty of the Law School in 1985, and taught evidence, constitutional law, and a seminar in constitutional litigation. His teaching and mentorship inspired countless students to pursue careers in public service.

In 2001, Hellerstein created the Second Look Clinic, the only clinic in New York City focused exclusively on non-DNA innocence cases. Over the clinic's nine-year history, there were several monumental victories, in particular that of David Wong who spent 18 years in prison, wrongfully convicted of murder, before Hellerstein proved his innocence in 2004, and Stephen Schulz, who served 9 years for a robbery he did not commit and was freed in 2009.

Hellerstein continues to work for justice as a Permanent Member of the New York State Justice Task Force, established to investigate and identify recurring weaknesses in the criminal justice system that lead to false convictions.

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UP THE RIVER WITHOUT A PROCEDURE: INNOCENT PRISONERS AND NEWLY DISCOVERED NON-DNA EVIDENCE IN STATE COURTS

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INTRODUCTION

With all due respect to Edith Wharton's literary masterpiece about the golden era of New York high society, today may be the true "Age of Innocence."[1] Over the past fifteen years, the use of deoxyribonucleic acid (DNA) testing in criminal cases has helped to expose the problem of wrongful convictions in the United States, resulting in the post-conviction exoneration of 162 innocent defendants.[2] Indeed, dozens of state legislatures have recently enacted laws implementing procedures through which prisoners may request and secure access to post-conviction testing of biological evidence available in their cases.[3] By creating mechanisms that allow for the possibility that factually innocent prisoners may have entrée to DNA testing and thereby gain their freedom, these statutes both further the cause of justice at the individual level and bolster the institutional credibility of the criminal justice system as a whole.[4]

Evidence suitable for DNA testing, however, exists only in a smattering of criminal cases: an estimated 80–90% of cases do not have any biological evidence.[5] Even where biological evidence conducive to a DNA test is present at the outset of a particular case, the evidence is often lost, destroyed, or degraded

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1. EDITH WHARTON, AGE OF INNOCENCE (1st ed. 1920).

2. For a current tally of DNA exonerations, see Innocence Project Homepage, http://www.innocenceproject.org (last visited Sept. 6, 2005). For other case studies of exonerations, see EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005).

3. *See* THE INNOCENCE PROJECT: POST-CONVICTION DNA TESTING STATUTES, http://www.innocenceproject.org/docs/Model_DNA_Access_FactSheet.html (last visited May 16, 2005) (noting that "thirty-eight states provide convicted persons access to DNA testing").

4. Although post-conviction DNA testing legislation has generally received extensive praise, some observers suggest that many details of the statutes could be improved. *See generally* Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355 (2002) (lauding the enactment of these statutes, while also pinpointing some of their flaws).

5. *See Death Penalty Overhaul: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Barry Scheck), *available at* 2002 WL 1335515 ("The vast majority (probably 80%) of felony cases do not involve biological evidence that can be subjected to DNA testing."); Nina Martin, *Innocence Lost*, S.F. MAG., Nov. 2004, at 78, 105 (noting that "only about 10 percent of criminal cases have any biological evidence—blood, semen, skin—to test"). Advancements in DNA technology might eventually produce results in cases that are currently not subject to DNA tests. Seth Kreimer recently predicted a "second wave" of DNA exonerations in the next decade, observing that "more sophisticated and sensitive methods of DNA analysis are beginning to be tested that can engage in DNA matching from ever smaller amounts of biological material. Laboratory reports have been released of effective DNA matches from the small amounts of skin cells contained in smudged latent finger or palm prints." Seth F. Kreimer, *Truth Machines and Consequences: The Light and Dark Sides of 'Accuracy' in Criminal Justice*, 60 N.Y.U. ANN. SURV. AM. L. 655, 658–59 (2005).

over time.[6] Post-conviction innocence claims based on DNA testing therefore represent a small proportion of innocence claims generally,[7] and this percentage is bound to diminish in the future.[8] That is, the growing availability of DNA technology at the pre-trial stage should filter out a greater number of innocent defendants up-front and, in so doing, decrease the volume of post-conviction exonerations via DNA.[9]

Although post-conviction innocence claims hinging on DNA testing have captured the attention of state legislators and the broader public, the far more pervasive issue of innocence claims in cases that lack biological evidence has largely escaped notice.[10] The same problems that led to the wrongful convictions of those innocent prisoners later freed through DNA—erroneous eyewitness identifications, false confessions, witness perjury, ineffective assistance of counsel, and the like—presumably appear in the scores of convictions procured without biological evidence.[11] In these non-DNA cases, prisoners must find alternative

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6. *See* Barry Scheck & Peter Neufeld, *DNA and Innocence Scholarship*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 241, 245 (Saundra D. Westervelt & John A. Humphrey eds., 2001) ("In 75 percent of Innocence Project cases, matters in which it has been established that a favorable DNA result would be sufficient to vacate the inmate's conviction, the relevant biological evidence has either been destroyed or lost.").

7. *See, e.g.*, Steven J. Mulroy, *The Safety Net: Applying Coram Nobis Law to Prevent the Execution of the Innocent*, 11 VA. J. SOC. POL'Y & L. 1, 7 n.35 (2003) ("Of the 102 cases since 1973 where persons were freed from death row based on evidence of innocence, DNA only played a substantial role in 12 of those cases."); Ronald J. Tabak, *Finality Without Fairness: Why We are Moving Toward Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 735 (2001) ("Notwithstanding all the hoopla surrounding DNA testing, it can be performed only in a small minority of situations in which significant biological evidence from the real culprit is collected properly at the scene of the crime.").

8. *See, e.g.*, BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 323 (2001) ("In a few years, the era of DNA exonerations will come to an end. The population of prisoners who can be helped by DNA testing is shrinking, because the technology has been widely used since the early 1990s, clearing thousands of innocent suspects before trial.").

9. *Id.*

10. *See, e.g.*, Mulroy, *supra* note 7, at 1 (noting that, whereas "headline-making DNA sleuthing can certainly help in remedying individual cases of injustice," there should be "adequate procedural mechanisms—and legal standards governing those mechanisms—to address those situations where, after conviction, information comes to light raising doubts" about the validity of a conviction).

11. Scholarship analyzing wrongful convictions predates the DNA revolution by decades, and a text by Edwin Borchard is often cited as one of the earliest accounts. EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932). It is unclear whether the same error rate applies to convictions with DNA evidence as to those lacking it. *See, e.g.*, 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, 271–73 (2003) (discussing what the DNA exonerations signify regarding the total incidence of wrongful convictions). Even so, the same sources of wrongful convictions appear in both DNA and non-DNA exonerations. *See, e.g.*, SCHECK ET AL., *supra* note 8, at 323 ("From Borchard's review of cases stretching back to the dawn of the American republic, all the way to the dawn of the twenty-first century, the causes of wrongful convictions remain the same.").

means to support their innocence claims, frequently, "newly discovered evidence" not susceptible to a test tube,[12] such as confessions by the actual perpetrator, statements by previously unknown witnesses, and/or recantations by trial participants.[13] Without a doubt, non-DNA cases are difficult for defendants to overturn through state court proceedings given the subjectivity involved in assessing most forms of new evidence and the absence of a method to prove innocence to a scientific certainty.[14]

This inherent difficulty in litigating innocence claims predicated on newly discovered non-DNA evidence is exacerbated by the structural design of most state post-conviction regimes: in effect, the path to proving one's innocence through

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12. This Article will focus principally on non-DNA, *nonscientific* forms of new evidence given that states often provide special procedures for requesting scientific tests that were technologically unavailable at trial. *See, e.g.*, IDAHO CODE ANN. § 19-4902(b) (2004) ("A petitioner may, at any time, file a petition before the trial court that entered the judgment of conviction in his or her case for the performance of *fingerprint* or forensic deoxyribonucleic acid (DNA) testing on evidence that was secured in relation to the trial which resulted in his or her conviction but which was not subject to the testing that is now requested because the technology for the testing was not available at the time of trial." (emphasis added)).

13. The particular types of non-DNA, nonscientific evidence that have served as bases for newly discovered evidence claims are often testimonial in nature. *See, e.g.*, Michael J. Muskat, Note, *Substantive Justice and State Interests in the Aftermath of* Herrera v. Collins*: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 TEX. L. REV. 131, 132–33 (1996) (describing the sources of newly discovered evidence, "including testimony by previously undiscovered witnesses, recantation of testimony given by key prosecution witnesses, confession by the real killer . . ." (internal footnotes omitted)). For a discussion of how state courts have treated post-conviction claims hinging on third-party confessions, see Thomas R. Malia, Annotation, *Coram Nobis on Ground of Other's Confession to Crime*, 46 A.L.R.4th 468 (1986 & Supp. 2000). For a discussion of how courts have grappled with the issue of whether to grant a motion for a new trial based on recanted testimony, see Keith A. Mitchell, Note, *Protecting Guiltless Guilty: Material Witness Recantation and Modern Post-Conviction Remedies*, 21 NEW ENG. L. REV. 429 (1985–86); Janice J. Repka, Comment, *Rethinking the Standard for New Trial Motions Based Upon Recantations as Newly Discovered Evidence*, 134 U. PA. L. REV. 1433 (1986); Daniel Wolf, Note, *I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases*, 83 MICH. L. REV. 1925 (1985); Tim A. Thomas, Annotation, *Standard for Granting or Denying New Trial in State Criminal Case on Basis of Recanted Testimony—Modern Cases*, 77 A.L.R.4th 1031 (1990 & Supp. 2005).

14. *See* Edward K. Cheng, *Reenvisioning Law through the DNA Lens*, 60 N.Y.U. ANN. SURV. AM. L. 649, 649 (2005) ("DNA is a special kind of evidence with few previous analogs: It is powerful, physical evidence of identity that remains stable and available for retesting long after trial . . . . [B]ecause the scientific community developed DNA typing, DNA evidence comes pre-packaged with all the indicia of scientific reliability: population statistics, pre-defined and pre-tested procedural standards, and known error rates."); Scheck & Neufeld, *supra* note 6, at 248–49 (explaining that DNA testing provides scientific certainty to support innocence claims). In contrast, as Cheng notes, "[m]ost traditional forms of evidence are fleeting—memories fade, eyewitnesses move away, and (written) records are unwieldy to preserve and frequently lost." Cheng, *supra*, at 650.

new evidence has become virtually impassable due to procedural roadblocks.[15] To be sure, every state currently permits at least some form of post-trial relief on the basis of newly discovered evidence.[16] All too often, states even have multiple potential remedies for a new evidence claim—including an ordinary motion for a new trial and a collateral, post-conviction procedure[17]—yet navigating through these procedural shoals can be a source of confusion and frustration for litigants.[18] In general, these remedies are characterized by stringent statutes of limitations,[19] limited access to discovery,[20] and high legal and evidentiary thresholds.[21] Merely obtaining an evidentiary hearing pursuant to these procedures may be hard to achieve.[22] Even more, motions seeking relief on the grounds of new evidence are often filed with the original trial judge,[23] a person who may have a vested interest

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15. *See* Eli Paul Mazur, *"I'm Innocent": Addressing Freestanding Claims of Actual Innocence in State and Federal Courts*, 25 N.C. CENT. L.J. 197, 199 (2003) ("In North Carolina state courts, inmates are required to present newly discovered evidence suggesting actual innocence in a Motion for Appropriate Relief ("MAR"). This process is plagued by unnecessary procedural hurdles, the nonsensical imputation of attorney negligence upon indigent criminal defendants, and judicial conflicts of interests.").

16. *See* 1 DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF: WITH FORMS, § 1-13, at 55–58 (2001) (noting that every state offers a direct remedy in the form of a new trial motion based on newly discovered evidence, and many allow newly discovered evidence as a ground for collateral, post-conviction relief).

17. *See infra* notes 65–70 and accompanying text.

18. 1 WILKES, *supra* note 16, § 1-13, at 53–111 (discussing the potential remedies and obstacles facing an inmate seeking to present newly discovered evidence of innocence); *see also infra* note 274 and accompanying text (mentioning how many post-conviction motions are filed by inmates without the assistance of an assigned attorney).

19. 1 WILKES, *supra* note 16, § 1-13, at 56 (commenting that many states have brief statutes of limitations periods).

20. Cynthia Bryant, *When One Man's DNA is Another Man's Exonerating Evidence: Compelling Consensual Sexual Partners of Rape Victims to Provide DNA Samples to Postconviction Petitioners*, 33 COLUM. J.L. & SOC. PROBS. 113, 122–23 (2000) (noting how procedures for newly discovered evidence claims typically presuppose that prisoners already have the exonerating evidence and mentioning that courts have offered mixed views on whether to grant discovery in cases where the pertinent statute is silent); *see also* Gibson v. United States, 566 A.2d 473, 478–79 (D.C. 1989) (granting defendant discovery to support motion for new trial).

21. *See In re* Clark, 855 P.2d 729, 739 (Cal. 1993) (holding that a conviction may only be attacked collaterally on grounds of newly discovered evidence if the new evidence creates fundamental doubt about the reliability and accuracy of the proceedings); Mulroy, *supra* note 7 (analyzing the evidentiary standards used in Tennessee regarding newly discovered evidence claims); Muskat, *supra* note 13 (discussing the need for more permissive legal and evidentiary rules in the area of "bare innocence claims"); Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 452 (2001) ("An exoneration based on innocence requires, in the ordinary course, overwhelming proof, which is necessary to overcome the substantial procedural barriers to relitigation of outcomes in criminal cases.").

22. *See* Swedlow, *supra* note 4, at 356 (stating that "'traditional' post-conviction remedies . . . are dominated by harsh procedural rules and . . . often function to deny prisoners substantive review").

23. 1 WILKES, *supra* note 16, § 1-13, at 55 (noting that new trial motions are usually available in the convicting court).

in the outcome,[24] and that judge's decision normally receives tremendous deference on appeal.[25] The hodge-podge of state newly discovered evidence procedures must be critically examined in light of the realization, spawned by DNA testing, that innocent defendants are convicted with alarming frequency, and the reality that post-conviction innocence claims receive vastly different procedural treatment within most states depending on whether the claim involves DNA or non-DNA evidence.[26]

This Article aims to provide just such an examination: an analysis of the state procedures that prisoners may employ after trial to litigate innocence claims grounded on newly discovered non-DNA evidence.[27] Ultimately, the result of this examination is far from sanguine. Little-altered in decades beyond the trend toward recognizing the benefits of DNA testing, the structure of most state procedures means that a prisoner's quest for justice may turn on the fortuity that a biological sample was left at the crime scene and preserved over time.[28] The fact that DNA testing provides a modicum of certainty to an innocence claim does not imply that claims lacking the possibility of such certainty are spurious; on the contrary, DNA has unearthed holes in the criminal justice system, holes that are likely also prevalent in cases without biological evidence.[29]

But, as a precondition to filling these holes and garnering relief in newly discovered non-DNA evidence cases for potentially innocent defendants,[30]

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24. *See infra* notes 284–335 and accompanying text.

25. The standard of review for the denial of a motion for a new trial on the grounds of newly discovered evidence is generally abuse of discretion. *See* Penny J. White, *Newly Available, Not Newly Discovered*, 2 J. APP. PRAC. & PROCESS 7, 13 (2000). For a brief description of the abuse of discretion standard, see 5 AM. JUR. 2D *Appellate Review* § 695 (2004).

26. *See, e.g.*, Daniel F. Piar, *Using Coram Nobis to Attack Wrongful Convictions: A New Look at an Ancient Writ*, 30 N. KY. L. REV. 505, 506–07 (2003) (observing that *coram nobis* procedures bear a striking resemblance to their English ancestors).

27. Several scholars have studied the procedures in individual states. *See, e.g.*, Josephine Linker Hart & Guilford M. Dudley, *Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Establishes "Actual Innocence"*, 22 U. ARK. LITTLE ROCK L. REV. 629, 632 (2000) (determining that Arkansas's "post-trial procedures provide little opportunity for a prisoner to establish his or her actual innocence through newly discovered evidence"); Mazur, *supra* note 15 (criticizing North Carolina's treatment of newly discovered evidence claims and advocating a series of reforms).

28. *See* Mulroy, *supra* note 7, at 4 (commenting how, in many cases, exonerations "came as the result of the 'sheer accident' that a biological DNA sample happened to be available").

29. *See, e.g.*, Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 73 (2003) (observing "that for every defendant who is exonerated because of DNA evidence, there have been certainly hundreds, maybe thousands, who have been convicted" on comparable evidence yet whose cases lack physical evidence).

30. In this Article, I will focus on claims of factual innocence as opposed to wrongful convictions generally. *See* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Causes of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 535–36 (1999) (arguing for a focus on factual innocence); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the*

prisoners must first have adequate access to state courts—and such access is deficient in most jurisdictions.[31] To address this problem, states should: (1) re-fashion their procedures to minimize the chance newly discovered non-DNA evidence claims will be rejected due solely to procedural default; (2) construct each remedy so as to enhance the likelihood that viable claims will be heard in open court in front of an unbiased judge; and (3) utilize a de novo standard of review for appellate courts in assessing summary denials of motions for post-trial relief based on newly discovered evidence, i.e., cases where the trial court declines to hold an evidentiary hearing on the merits of an innocence claim prior to rejecting it. Modifying state procedures in this manner, without adjusting the legal and evidentiary thresholds that apply to innocence claims involving new evidence,[32] should allow more claims of potentially innocent prisoners to see the light of day in a courtroom, yet not result in additional guilty inmates seeing the light of day in the free world.

Part I of this Article offers a concrete example of how procedures in this area are troubling by exploring a single case in which state remedies proved inadequate to allow a prisoner to present his alleged new evidence in open court. Next, Part II traces the historical development of state approaches to newly discovered evidence claims, and then discusses the salient traits of contemporary state procedures. Finally, Part III critiques these procedures and assesses prospective reforms.[33]

Innocent?, 49 RUTGERS L. REV. 1317, 1346 n.92 (1997) ("Actual innocence means what it says—the defendant did not commit the crime of which he has been convicted. Wrongfully-convicted defendants may or may not be actually innocent; their defining characteristic is that their convictions were secured as a result of a material legal error.").

31. *See infra* notes 152–215 and accompanying text.

32. Some commentators have pressed for reforms in the legal and evidentiary standards used in this area. *See* Mulroy, *supra* note 7, at 1–3 (contending that the law in Tennessee, as in other states, is "not up to the task" of providing adequate post-conviction procedures and urging that in Tennessee "defendants should be able to prevail on a coram nobis petition if they can establish a 'reasonable probability' that the newly discovered evidence would have changed the initial trial outcome"); Muskat, *supra* note 13, at 162, 176–86 (recommending that, when reviewing bare innocence claims in state post-conviction proceedings, "[t]he reviewing judge should first assume the credibility of the new evidence in the light most favorable to the petitioner, and then evaluate its strength by applying a standard for relief which requires a judge wishing to grant relief to conclude that had the new evidence been presented at trial, no rational juror would have found the petitioner guilty beyond a reasonable doubt"). Muskat has also suggested that this standard "better assures that potentially meritorious claims will receive an evidentiary hearing to evaluate the credibility of the evidence." Muskat, *supra* note 13, at 162, 176–86. Outside the sphere of post-conviction remedies, scholars have also proposed the reform of trial and direct appellate procedures in cases of factual innocence. *See* D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281 (2004) (arguing for, among other things, the adoption of an "unsafe verdict" standard of review on direct appeal).

33. This Article will not explore the full gamut of state court mechanisms that may be at an inmate's disposal in raising a non-DNA innocence claim, including common law and statutory remedies unrelated to new evidence that allow collateral attacks based on alleged "off-the-record" constitutional violations. *See* 1 WILKES, *supra* note 16, § 1-13, at

I. AN INDIVIDUAL INJUSTICE: *PEOPLE V. SCHULZ*

To demonstrate the problems that can be generated by state procedures involving newly discovered evidence of innocence, I will draw upon my prior experience representing inmates in post-conviction proceedings for three years as assistant director of an innocence project at Brooklyn Law School.[34] Among the litany of claims that I investigated—and the few that I actually litigated—one stands out in particular, *People v. Schulz*.[35] The basic facts of the case are as follows.[36] A large white man entered a diner in a Long Island town on February 3, 1999.[37] The man placed his food order with the diner's cook, who then entered the kitchen to prepare the meal.[38] While the cook was in the kitchen, the man robbed a waitress at knifepoint; she was staffing the restaurant's cash register and was the only other person present in the dining area at the time.[39]

The next day, both the cook and the waitress viewed a photo array and identified Stephen Schulz, a tall white man who lived nearby, weighed approximately 250 pounds, and had a prior criminal record, as the perpetrator.[40] The cook later identified Schulz in a lineup—the waitress never participated in any identification procedures beyond the initial photo array—and Schulz was charged with first-degree robbery.[41] Prior to trial, the prosecution made Schulz an offer to plead guilty to a lesser crime and receive three years' imprisonment.[42] Schulz rejected the deal, steadfastly claiming to be innocent.[43]

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55 (citing "numerous cases where an innocent person obtained postconviction relief, not on grounds of newly discovered evidence of innocence, but rather on grounds the person was denied a constitutional right in the proceedings leading to the conviction"); Ursula Bentele, *Does the Death Penalty, by Risking Execution of the Innocent, Violate Substantive Due Process?*, 40 HOUS. L. REV. 1359 (2004) (discussing some of the constitutional arguments against capital punishment in light of the possibility of executing innocent defendants). This Article also declines to tackle the treatment of newly discovered evidence claims in federal court. Moreover, questions related to inmates who plead guilty and later seek to overturn their guilty pleas due to new evidence may implicate different state law remedies and, thus, will not be discussed.

34. For a description of the Second Look Program at Brooklyn Law School, see Brooklyn Law School: Academic Program: Second Look Program, http://www.brooklaw.edu/academic/courses/description/?course=116 (last visited Jan. 20, 2005).

35. 774 N.Y.S.2d 165 (App. Div. 2004).

36. The facts of this case are far more complex than those presented in this Article. For the sake of brevity, I have put forth only the details essential to the issues raised in this Article, namely, the facts relevant to the defendant's newly discovered non-DNA evidence of innocence claim. There were also other issues presented in the direct appeal and concerns regarding ineffective assistance of trial counsel.

37. Brief for Defendant-Appellant at 11, 14, People v. Schulz, 774 N.Y.S.2d 165 (App. Div. 2004) (A.D. Nos. 2003–01596, 2000–09423, 1999–10592) [hereinafter Appellant's Brief].

38. *Id.* at 11–12, 14–15.

39. *Id.* at 12, 15.

40. *Id.* at 10, 13, 16.

41. *Id.*

42. *Id.* at 22.

43. *Id.*

At trial, the cook maintained his belief in Schulz's guilt, but his testimony was replete with inconsistencies and reasons to question his credibility.[44] Specifically, the cook denied he had received any benefit in exchange for his testimony, a claim placed in doubt by the fact that his own lingering felony charge for weapon possession, pending at the time of the robbery, had been favorably resolved in the interim through a plea to the minor crime of disorderly conduct.[45] Then the waitress (the actual victim of and sole eyewitness to the robbery itself) took the stand. At a pivotal juncture in her testimony, when asked whether the man who had robbed her was present in the courtroom, she answered "No" and indicated the culprit was taller and heavier than the defendant.[46] The jury, nonetheless, found Schulz guilty of robbery in the first degree, and the court eventually sentenced him to eleven years in prison.[47]

More than two years later, my students and I began to follow a lead that Schulz's trial attorney had not comprehensively pursued: the possibility that another person had committed the crime. In particular, a white man named Anthony Guilfoyle, who was both taller and heavier than Schulz, had pled guilty to six factually analogous robberies that occurred in the vicinity of the diner from January to March 1999.[48] In 2002, we managed to locate the waitress and, upon viewing a photograph of Guilfoyle, she identified him with 90% certainty as the man who had robbed her;[49] evidently, neither the police nor anyone else had ever shown her Guilfoyle's picture before.[50] We also interviewed Schulz's roommate at the time of the robbery, a disabled mechanic with no criminal record, who declared that he was home with Schulz watching television when the incident allegedly took place.[51]

After obtaining affidavits from the waitress and roommate, as well as gathering other materials,[52] we filed a motion under the pertinent state post-conviction remedy with the New York state judge before whom Schulz was tried and convicted, requesting a new trial on the basis of newly discovered evidence or, at the very least, an evidentiary hearing at which our witnesses could be heard to

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44. *Id.* at 11–14.

45. *Id.* at 14.

46. *Id.* at 15.

47. *Id.* at 21–22.

48. *Id.* at 17–19, 27; *see also* Barbara Durkin, *The Description: Big; Robbery Suspect Used Size to Bully, Cops Say*, NEWSDAY, Mar. 10, 1999, at A31 (describing Guilfoyle's crime spree and plea bargain).

49. Appellant's Brief, *supra* note 37, at 24–25.

50. The waitress was not shown Guilfoyle's photograph during the trial, and there is no indication, from the police reports or other sources, that law enforcement officials ever showed her a picture of Guilfoyle. *See generally id.*

51. Notably, Schulz's roommate did not testify as an alibi witness at trial. *Id.* at 26.

52. The other materials included a polygraph report demonstrating Schulz had passed a lie detector test and an affidavit from Schulz's trial attorney explaining why he chose not to cross-examine the waitress and ask her about Guilfoyle, noting that he had not had the opportunity to interview her before trial. *Id.* at 24–28.

determine if a new trial was warranted.[53] On January 6, 2003, the court heard oral arguments to decide whether to hold an evidentiary hearing on the points raised in the motion.[54] As defense counsel, I urged the court to follow case law favoring the use of post-conviction hearings "to promote justice if the issues raised are sufficiently unusual and suggest investigation."[55] Unmoved, the trial judge stated his recollection that the waitress had failed to identify Schulz at trial because of "fear,"[56] and one month later formally rejected our motion without a hearing.[57]

Turning to the appellate courts, we first had to seek leave to appeal the summary disposition of the newly discovered evidence claim.[58] Although we gained authorization to appeal the decision, the state intermediate appellate court unanimously affirmed the trial judge's decision, concluding that the court had "providently exercised its discretion" in denying the motion summarily.[59] Thereafter, we petitioned for further review from the state Court of Appeals, the court of last resort in New York, and received permission to appeal. In a six-to-one decision, however, the Court of Appeals sustained the intermediate court's holding in May 2005.[60] To date, the waitress has never testified in open court as to whether Guilfoyle committed the crime, and Schulz's alibi witness never will; he has since died. *People v. Schulz* is an example of how state court procedures in the sphere of newly discovered non-DNA evidence claims may not always achieve the result that justice and common sense require: full and fair airings of claims of innocence.

II. OVERVIEW: NEWLY DISCOVERED EVIDENCE IN STATE COURTS

Post-conviction remedies are designed primarily to address egregious legal errors: mistakes of either jurisdictional or constitutional dimensions.[61] As a result, newly discovered evidence claims do not seem at first blush to be likely candidates for post-conviction relief given their fact-based orientation. Moreover, state courts have traditionally viewed newly discovered evidence claims with disdain,[62] fearing the impact of such claims on the finality of judgments and the

53. *Id.* at 24, 27–28; *see also* N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2004) (describing the standard for moving for a new trial on the basis of newly discovered evidence).

54. Appellant's Brief, *supra* note 37, at 28.

55. *Id.* at 28–29.

56. Minutes of Argument at 22, People v. Schulz, No. 368-99 (N.Y. Sup. Ct., Jan. 6, 2003) ("There are no papers that can be put into words what [the waitress] was like at the time of trial, Mr. Medwed. And I say this: It was fear written all over her face.").

57. Appellant's Brief, *supra* note 37, at 29.

58. *Id.* at 31; *see also* N.Y. CRIM. PROC. LAW §§ 450.15, 460.15 (McKinney 2004) (providing procedures through which a defendant may seek permission to appeal the denial of a post-trial newly discovered evidence claim).

59. People v. Schulz, 774 N.Y.S.2d 165, 167 (App. Div. 2004).

60. People v. Schulz, 829 N.E.2d 1192, 1199 (N.Y. 2005).

61. 1 WILKES, *supra* note 16, § 1-5, at 17 (noting that "postconviction relief usually is available only on grounds involving egregious legal error, i.e., errors that are jurisdictional, constitutional, or otherwise fundamental").

62. *See, e.g.*, People v Sutton, 15 P. 86, 88 (Cal. 1888) (mentioning that claims of newly discovered evidence warranting a new trial "are to be regarded with distrust and disfavor"); Sanders v. State, 370 N.E.2d 966, 968 (Ind. Ct. App. 1977) ("A motion for a new trial on the basis of newly discovered evidence should be received with great caution,

historic role of the jury as the true arbiter of fact,[63] and harboring doubts about the underlying validity of new evidence.[64]

Asserting newly discovered evidence as a ground for relief, though, has become an integral part of the state court landscape for criminal defendants. First, every state provides for a motion for a new trial on the basis of newly discovered evidence.[65] Such motions are viewed as direct, rather than collateral, remedies that are filed in the court of original conviction[66] and usually carry with them strict statutes of limitations.[67] Second, a number of states allow newly discovered evidence to serve as grounds for collateral, post-conviction relief through procedures in the nature of a writ of error *coram nobis* or, less often, habeas corpus.[68]

Therefore, a host of procedures—including, on occasion, multiple procedures within a particular state[69]—affect newly discovered evidence of

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and the alleged new evidence should be carefully scrutinized."); Hart & Dudley, *supra* note 27, at 632 ("Newly discovered evidence is the least-favored ground for the granting of a new-trial motion [in Arkansas].").

63. *See, e.g.*, Lee v. Moore, 213 So. 2d 197, 198 (Ala. 1968) (noting, in the context of a civil case, that "trial courts do have the power to grant motions for new trials in order to prevent irrevocable damage. Such power should be hesitantly exercised, because the verdict of a jury results from one of the most precious rights in our system of government, that is, the right of trial by jury").

64. Courts are often dubious of recantations or, for that matter, any evidence that otherwise contains ample opportunities for perjury. *See supra* note 13 and accompanying text. Likewise, courts are typically skeptical of third-party confessions. *See, e.g.*, Brown v. State, 955 S.W.2d 901, 902 (Ark. 1997) ("The mere fact that another person has confessed to a crime cannot, alone, be grounds for relief for such confessions are not uncommon and must be approached with some skepticism."). Moreover, judicial skepticism toward new evidence claims in general may be exacerbated by the overall volume of frivolous motions filed by inmates. *See, e.g.*, Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 148–49 (2004) (noting how the large number of post-conviction filings, many of which lack merit, deters prosecutors from viewing each one as potentially viable).

65. Herrera v. Collins, 506 U.S. 390, 410–11 (1993); 1 WILKES, *supra* note 16, at 30 n.15.

66. *See* 1 WILKES, *supra* note 16, §§ 1-3 to 1-5, at 13–30 (describing the general difference between direct and post-conviction remedies).

67. *See id.* A major distinction between new trial motions and collateral remedies concerning newly discovered evidence relates to statutes of limitations. *Id.* § 1-13, at 56 ("In those state jurisdictions which have affixed a statute of limitations to a particular postconviction remedy, the statute of limitations is usually longer than the limitations period for direct remedies, including the motion for new trial; and claims for relief based on newly discovered evidence are often exempted from the limitations period applicable to a particular state postconviction remedy."); Piar, *supra* note 26, at 508 n.35 ("The principal difference between a *coram nobis* petition and a motion for new trial is one of timing: a motion for new trial must normally be sought within a limited time (a maximum of three years), while traditional *coram nobis* relief could be sought at any time.").

68. *See infra* notes 190–92 and accompanying text.

69. For example, there are two post-trial statutory methods for prisoners to put forth newly discovered evidence claims in Tennessee. *See* Mulroy, *supra* note 7, at 12–25; Piar, *supra* note 26, at 517–25. A defendant may move for a new trial on that ground within

innocence raised by state prisoners after the completion of their trials. The motion for a new trial, albeit technically a direct remedy, is one of the tools available to convicted criminal defendants and must be analyzed in conjunction with existing collateral remedies to assess the manner in which newly discovered non-DNA evidence is treated in state courts. Also, on a conceptual level, new trial motions and collateral remedies centering on newly discovered evidence are extremely similar and ought to be viewed in tandem.[70]

A. Newly Discovered Evidence Claims in Historical Context

1. Direct Remedies: Motion for New Trial

England began to permit new trials in criminal cases in the late seventeenth century.[71] In the United States, the First Congress acknowledged this remedy, authorizing new trials for the "reasons for which new trials have usually been granted in courts of law,"[72] and individual states soon followed suit.[73] From the outset, motions for a new trial were normally filed with the original trial judge who presided over the case.[74] The power of a trial judge to order a new trial stems from the equitable concept that litigants and society as a whole deserve some mechanism to mend fundamental miscarriages of justice.[75] In accord with these equitable underpinnings, newly discovered evidence became generally recognized in federal and state jurisdictions as one of the grounds upon which new trial relief

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thirty days of the judgment, TENN. R. CRIM. P. 33(b), and may seek collateral relief within one year under the Tennessee Post-Conviction Relief Act, TENN. CODE ANN. § 40-30-102 (2004); *see also infra* notes 263–72 and accompanying text.

70. *See* LARRY W. YACKLE, POSTCONVICTION REMEDIES § 8, at 31 (1981) ("To begin, to the extent its objective is a new trial, the writ [of *coram nobis*] has something in common with ordinary post-trial motions, particularly a motion for a new trial."); Malia, *supra* note 13, § 2(a), at 471 ("It has been said that a petition for a writ of coram nobis is in the nature of a motion for a new trial, at least to the extent that the result sought, that of a new trial, is the same."); Mulroy, *supra* note 7, at 9 ("Coram nobis . . . alleges no error by the original court or in any of the court's findings; rather, it simply calls to that court's attention additional facts which were not known to the court at the time and which may change the result. Of course, in this form, it does parallel a motion for new trial based on newly discovered evidence."). Yackle, however, notes several "important differences" between new trial motions and the writ of *coram nobis*, including the fact that "[w]hile in some jurisdictions coram nobis is considered a part of the original criminal case, in others the writ initiates an independent civil lawsuit collaterally attacking the judgment." YACKLE, *supra*, at 31; *see also In re* Cruz, 129 Cal. Rptr. 2d 31, 38 (Ct. App. 2003) ("By analogy, a petition for a writ of habeas corpus based on newly discovered evidence resembles a motion for a new trial based on newly discovered evidence.").

71. Herrera v. Collins, 506 U.S. 390, 408 (1993).

72 . *Id.* (citing Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83).

73. *Id.* at 409–10.

74. *See* William Renwick Riddell, *New Trial in Present Practice*, 27 YALE L.J. 353, 360 (1917) (describing how the colonies followed the English common law system with respect to new trials, and noting how "the trial judge (at least in most cases) sat as the court and not as a mere commissioner; and he it was to whom the application for a new trial was made"). Riddell also observed that "[a]t the present time in practically every state of the Union, the trial judge has power to grant a new trial." *Id.* at 361.

75. *See* 58 AM. JUR. 2D *New Trial* § 8 (2004).

could be granted.[76] Still, the notion that the discovery of new evidence could theoretically provide the foundation for a new trial in early American courts belied the reality that such claims were embraced by neither the judiciary nor the legislature.

For instance, most jurisdictions had rigid statutes of limitations on filing motions for new trials.[77] Early federal cases even abided by the English common law rule that a new trial could only be granted during the term of the court in which the original judgment in the case was entered; if the claim were to be filed at a subsequent term, the court merely had the power to correct mistakes in form or clerical errors.[78] Likewise, most states initially heeded the common law rule regarding new trials—in jurisdictions that allowed new trial motions, those motions usually had to be filed prior to the end of the court term during which the original decision had been issued.[79] In due course, states made new trial motions available in a variety of situations, including claims of newly discovered evidence.[80] Although some states enlarged the time limit for filing beyond the court term, many continued to impose a brief time limit.[81]

Even if a newly discovered evidence claim did not fall prey to a statute of limitations problem, stern legal and evidentiary tests guided their resolution.[82] In 1851, the Georgia Supreme Court first articulated the "probability" standard to govern new trial motions based on newly discovered evidence.[83] *Berry v. Georgia* involved accusations that a white man, James Berry, had hatched a plan for two African-American slaves to steal money from another white man's house.[84] The state tried and convicted Berry of larceny,[85] and thereafter Berry filed a request for

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76. *Herrera*, 506 U.S. at 408–10.

77. *Id.*

78. *Id.* at 408. In 1934, the United States Supreme Court retreated from the common law rule and approved a sixty-day statute of limitations for the filing of new trial motions premised on newly discovered evidence in federal court. *Id.* In referring to the sixty-day limit for new trial motions, the Supreme Court opined in 1946 that:

> [T]he extraordinary length of time within which this motion can be made is designed to afford relief where, despite the fair conduct of the trial, it later clearly appears to the trial judge that, because of facts unknown at the time of trial, substantial justice was not done. It is obvious, however, that this privilege might lend itself for use as a method of delaying enforcement of just sentences.

United States v. Johnson, 327 U.S. 106, 112 (1946). In federal court, the time period for filing a new trial motion based on newly discovered evidence is now three years. FED. R. CRIM. P. 33(b).

79. *Herrera*, 506 U.S. at 409.

80. *Id.* at 409–10.

81. *Id.*

82. *See, e.g.*, Berry v. Georgia, 10 Ga. 511, 527 (1851); *see also* State v. Montgomery, 109 P. 815, 817 (Utah 1910) (holding that newly discovered evidence must be so conclusive as to raise a reasonable presumption that the result of a second trial would differ from the first).

83. *Berry*, 10 Ga. at 527; *see also* Wolf, *supra* note 13, at 1925 n.5 (crediting *Berry* with being the first case to implement the probability test).

84. *Berry*, 10 Ga. at 513–16.

85. *Id.* at 514.

a new trial on, among other grounds, newly discovered evidence.[86] In wrestling with Berry's claim, Georgia's highest court began by commenting that new trial motions based on newly discovered evidence "are not favored by the Courts,"[87] and noted that in neighboring South Carolina new trials are not granted on this ground alone.[88] Citing "a pretty general concurrence of authority,"[89] the court then outlined a multi-factor test for handling new evidence claims:

> It is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy the Court, 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only—viz.; speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.[90]

The *Berry* court, applying this test to the facts of the case, found the defendant's motion wanting and denied the request for a new trial.[91] In the ensuing decades, the test put forth in *Berry* became the model to which other states looked in formulating their own responses to newly discovered evidence claims.[92]

A subsequent federal case, *Larrison v. United States*,[93] also influenced the treatment of newly discovered evidence claims where the claim hinged on witness recantations.[94] *Larrison* announced that a new trial motion should be granted where: (1) the court is satisfied that the testimony of the material witness is false;

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86. *Id.* at 515–16.
87. *Id.* at 527.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 528, 531.
92. *See, e.g.*, Salinas v. State, 373 P.2d 512, 514 (Alaska 1962) ("A motion for a new trial based on the ground of newly discovered evidence has to meet the following requirements: (1) it must appear from the motion that the evidence relied on is, in fact, newly discovered, i.e., discovered after the trial; (2) the motion must allege facts from which the court may infer diligence on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) must be material to the issues involved; and (5) must be such as, on a new trial, would probably produce an acquittal." (quoting Pitts v. United States, 263 F.2d 808, 810 (9th Cir. 1959))); People v. Salemi, 128 N.E.2d 377, 381 (N.Y. 1955) (holding that, to be considered newly discovered in New York, the evidence must meet the following six criteria: "(1) it must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could have not been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be cumulative to the former issue; and (6) it must not be merely impeaching or contradicting the former evidence" (quoting People v. Priori, 58 N.E. 668, 672 (N.Y. 1900))).
93. 24 F.2d 82 (7th Cir. 1928).
94. *See* Mulroy, *supra* note 7, at 7 (noting that witness recantation evidence "is the most common source of newly discovered evidence in criminal cases").

(2) the jury might have reached a different conclusion without the testimony; and (3) the party seeking a new trial was surprised when the new testimony was given and did not know of the original testimony's falsity until after the trial.[95] Several jurisdictions later adopted the *Larrison* test as the proper standard in ruling on new trial motions involving witness recantations.[96] The evolution of the *Berry* and *Larrison* tests, coupled with harsh statutes of limitations, reflected the judicial and legislative cynicism toward newly discovered evidence claims in the nineteenth and early twentieth centuries—these claims may have been cognizable through motions for a new trial, but relief was seldom forthcoming. [97]

2. Collateral Remedies: Coram Nobis and Habeas Corpus

In addition to the new trial motion remedy, the modern approach to newly discovered evidence claims has its roots in the English common law writs of error *coram nobis*[98] and, to a much lesser extent, habeas corpus.[99] The remedy of *coram nobis*, which literally means "before us,"[100] was available in the court of original judgment in order to amend its own proceedings.[101] Developed in the sixteenth century, *coram nobis* served to correct significant errors of fact rather than law in criminal cases in England; claims made collaterally under this writ asserted the existence of facts unknown to the court at the time of judgment that bore upon the soundness of a conviction.[102] Classic functions of the writ included rectifying clerical errors or mistakes concerning the process of notice and pleading.[103] Most notably, this writ contained no statute of limitations—it was cognizable "however late discovered and alleged"[104]—and its trademark form of relief was to vacate the

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95. *See Larrison*, 24 F.2d at 87–88.

96. *See generally* Thomas, *supra* note 13.

97. *See supra* notes 82–96 and accompanying text.

98. *See* 1 WILKES, *supra* note 16, § 1-5, at 16 (citing that "there are two basic categories of principal postconviction remedies in the states. They are (1) the remedy of the writ of habeas corpus, and (2) the remedies in the nature of the writ of error coram nobis"); Piar, *supra* note 26, at 506–07.

99. Historically, there were several substantive differences between the writs of *coram nobis* and habeas corpus. *See* YACKLE, *supra* note 70, §§ 1-13, at 1–69; Piar, *supra* note 26, at 508 n.39 ("The major practical difference between *habeas corpus* and *coram nobis* in modern law is that *habeas corpus* will lie only where the petitioner is in custody, whereas *coram nobis* can be used even after a sentence has been served and a petitioner released. Further, *coram nobis* is an attack on the validity of a conviction because of facts unknown at trial, while *habeas corpus* is an attack on the legality of detention for reasons that may or may not have to do with the factual basis for the conviction." (citation omitted)).

100. *See* Mulroy, *supra* note 7, at 9.

101. *See* Piar, *supra* note 26, at 506.

102. *Id.*

103. *See* YACKLE, *supra* note 70, § 8, at 32.

104. Piar, *supra* note 26, at 507 n.20 (quoting Blackstone). Nonetheless, post-conviction remedies have traditionally been subject to some timing restrictions, if not statutes of limitations. *See, e.g.*, 1 WILKES, *supra* note 16, § 1-5, at 18 (observing that historically post-conviction remedies could not be invoked until after direct remedy proceedings, i.e., the direct appeal of the conviction).

conviction with leave for the state to re-try the defendant.[105] Despite the absence of a statute of limitations, parties seeking to use the remedy of *coram nobis* were required to prove they had proceeded with reasonable diligence.[106]

The United States Supreme Court recognized *coram nobis* as early as 1810,[107] and individual states started to accept the writ's legitimacy near the beginning of the nation's history.[108] Together with acknowledging the concept of *coram nobis*, American jurisdictions imported many of the writ's mechanical traits from England. Application for the writ, for example, typically occurred in the court of conviction through motion or petition accompanied by affidavits.[109] Early observers deemed it preferable for the same judge who had rendered the initial judgment to receive the application due to that jurist's familiarity with the facts.[110]

In assimilating *coram nobis* into their legal frameworks, however, American courts did not mirror the English model entirely. Daniel Piar suggests that *coram nobis* jurisprudence in the United States evolved "along slightly more liberal lines than it had in England,"[111] as American judges showed less concern for rigid adherence to common law forms than for the achievement of substantive justice.[112] Over time, *coram nobis* emerged as an extraordinary remedy to which courts resorted sparingly and only to repair significant miscarriages of justice.[113] Even so, not all of the writ's potential uses were welcomed with open arms in the United States, especially its availability in the realm of innocence claims founded on newly discovered evidence.

Whereas the *Berry* and *Larrison* tests, or variations thereof,[114] soon governed most state courts' treatment of new trial motions relating to newly discovered evidence of innocence in the nineteenth and twentieth centuries,[115]

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105. *See* Piar, *supra* note 26, at 507.

106. *See* Mulroy, *supra* note 7, at 11.

107. *See* Piar, *supra* note 26, at 507 (citing Strode v. The Stafford Justices, 23 F. Cas. 236 (Marshall, Circuit Justice, C.C.D. Va. 1810) (No. 13,537)).

108. *See* Piar, *supra* note 26, at 507 n.23. Donald Wilkes identifies a Virginia state court case as the first known *coram nobis* proceeding in the United States, Gordon v. Frazier, 2 Wash. 130 (Va. 1795), and mentions that for many years *coram nobis* in state courts was only available in regard to civil proceedings. 1 WILKES, *supra* note 16, § 2-3, at 149. Wilkes further observes that a decision of the Missouri Supreme Court, *Ex parte* Toney, 11 Mo. 661 (1848), represented the initial use of *coram nobis* as a post-conviction remedy in state court to attack a criminal conviction, and notes that "it was not until the period from 1927 to 1931 that the majority of coram nobis cases reaching the state appellate courts involved attacks on criminal rather than civil judgments." *Id.* § 2-3, at 150.

109. *See* YACKLE, *supra* note 70, § 8, at 34.

110. *Id.*

111. Piar, *supra* note 26, at 507.

112. *See id.* at 507–08.

113. *Id.* at 508 n.32; *see also* 1 WILKES, *supra* note 16, § 2–4, at 155 ("As late as 1916 there were only 30 reported state postconviction coram nobis cases . . . ."); Mulroy, *supra* note 7, at 11 ("Originally, American courts did not often make use of the writ in criminal cases, and usage declined well into the 20th century.").

114. *See* Thomas, *supra* note 13 (observing that some jurisdictions developed standards independent of either test, at least in the area of recantations).

115. *See supra* notes 92–96 and accompanying text.

judges appeared to be even more grudging in accepting the idea that new evidence alone might form the basis for a collateral remedy. In fact, the predominant rule in nineteenth century American courts decreed that newly discovered evidence never warranted *coram nobis* or habeas corpus relief.[116] The policies behind this rule lay primarily in concerns about preserving the finality of judgments and aversions to the relitigation of guilt or innocence,[117] mainly in situations involving witness recantations.[118] Given that petitions for *coram nobis* relief generally lacked statutes of limitations, courts were also fearful that a defendant could bolster his chance of success by purposely letting time pass before petitioning for the writ.[119] Furthermore, possible injustices revealed through the discovery of new evidence could supposedly be cured by an alternative remedy: the executive clemency power.[120]

Notwithstanding the aforementioned reservations, beginning in the 1920s, several state courts began to concede that common law post-conviction relief could be granted on the basis of newly discovered evidence.[121] The courts were frugal in fashioning such remedies, though, affording relief typically only upon determining that the newly discovered evidence would *conclusively* result in a different verdict.[122] By the 1940s, a handful of other state courts had held that, while common law *coram nobis* could not be used to resolve innocence claims based on newly discovered evidence, judges could still create a special post-conviction remedy comparable to *coram nobis* to fix errors in cases where proof of innocence was conclusive.[123] Around the same time, the general use of common law *coram nobis* experienced an upsurge in the wake of the Supreme Court's decision in

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116. 1 WILKES, *supra* note 16, § 1-13, at 56.

117. *Id.* § 1-13, at 56–57; *see also* Humphreys v. State, 224 P. 937, 940 (Wa. 1924) ("It seems highly probable that in all cases of newly discovered evidence touching exclusively the merits of the issue actually tried and determined there can be no relief under any circumstances at the hands of the courts. To open the door to such inquiry would be to create a condition wherein the judgments of courts would have no finality . . . .").

118. *See supra* note 13 and accompanying text.

119. As the Kansas Supreme Court warned in 1901, "[w]hen time had removed or so scattered the witnesses of the prosecution, or the memory of those who could be obtained had grown dim, a writ of *coram nobis* would result in certain acquittal." Dobbs v. State, 65 P. 658, 660 (Kan. 1901).

120. *See, e.g.*, Sharpe v. Commonwealth, 143 S.W.2d 857, 858 (Ky. 1940) (holding that "an appeal for executive clemency is the remedy of a person convicted of a crime which, after the judgment of the court convicting him has become final, it is shown by subsequently discovered evidence he did not commit"); *Humphreys*, 224 P. at 940 (suggesting that a lack of finality for court judgments would "be fruitful of greater evil than would flow from very rare cases of possible injustice, which would, however, not be beyond all cure, for, if injustice results from any such condition, it is readily curable, as far as human ingenuity can safely do, upon proper showing by a resort to the pardoning power").

121. 1 WILKES, *supra* note 16, § 1-13, at 57. Wilkes pinpoints Davis v. State, 161 N.E. 375 (Ind. 1928), as the "first major state appellate decision holding newly discovered evidence may be a basis for postconviction coram nobis relief." *Id.* § 2-4, at 159 n.34.

122. *Id.* § 1-13, at 57.

123. *Id.*

Mooney v. Holohan,[124] which prescribed that state post-conviction procedures must be broad enough to address deprivations of federal constitutional rights.[125]

Shortly thereafter, a trend arose whereby states enacted legislation forming more comprehensive post-conviction regimes to supplant traditional common law remedies.[126] In a sense, the creation of statute- and rule-based systems reflected an effort to grapple with the unruly nature of the common law writs: to tame *coram nobis*, above all, a remedy that a Kentucky judge once termed "the wild ass of the law which the courts cannot control."[127] By 1965, eighteen states had promulgated a modern post-conviction remedy through statute or court rule,[128] a movement that has continued into the present day.[129] The extent to which *coram nobis* survived this development differs significantly across the country.[130] In some states, *coram nobis* was officially incorporated into the legislative framework by statute or endured as a secondary common law remedy; in other states, it was abolished or superseded by new statutory forms of relief.[131] Establishing statutory post-conviction regimes by and large altered the scope of relief available in state courts, yielding a narrowing of potential relief in some locales while other systems retained relief coextensive or possibly greater than that afforded by common law *coram nobis*.[132]

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124. 294 U.S. 103 (1935).

125. *Id.*; *see also* Young v. Ragen, 337 U.S. 235, 238–39 (1949) (urging states to augment their state post-conviction remedies); Mulroy, *supra* note 7, at 11–12 (noting how *Mooney* triggered a revival of *coram nobis*).

126. The Illinois Post-Conviction Hearing Act is credited as the first statute establishing an entirely new, comprehensive post-conviction remedy. 1 WILKES, *supra* note 16, § 2-5, at 161 ("The Illinois Post-Conviction Hearing Act of 1949 created a modern postconviction remedy—that is, a remedy which (1) authorizes relief on grounds of violations of constitutional or other basic rights generally, (2) is unhampered by obsolete, unjustified, and irksome procedural obstacles to relief, and (3) is designed to be used in lieu of traditional, narrower habeas corpus and common law coram nobis remedies."). The remedy formed by the Illinois statute can be considered "in the nature of coram nobis, i.e., it was available, like the common law coram nobis remedy, in the convicting court . . . ." *Id.*; *see also* YACKLE, *supra* note 70, § 10, at 42–43 (noting that "the Act channeled all prisoners' postconviction claims to the sentencing court").

127. Anderson v. Buchanan, 168 S.W.2d 48, 55 (Ky. 1943) (Sims, J., dissenting).

128. *See* 1 WILKES, *supra* note 16, § 3-2, at 188.

129. *See infra* notes 184–87 and accompanying text. According to Wilkes, the writ of habeas corpus is currently the principal post-conviction remedy in twelve states. 1 WILKES, *supra* note 16, § 3-3, at 206. In four of those states, "the remedy results principally from liberal judicial interpretation of traditional habeas corpus statutory provisions," whereas "[i]n the remaining eight states the remedy is the result of either a modernizing statute . . . or a modernizing judicially promulgated rule of court . . . ." *Id.* As for the other thirty-eight states, Wilkes characterizes their principal post-conviction remedy as "a remedy in the nature of coram nobis." *Id.* § 3-4, at 213. In twenty-six of those states, "the remedy was created by statutory enactment," and in the other twelve it emerged through "a judicially promulgated rule of court." *Id.*

130. *See* Mulroy, *supra* note 7, at 11–12.

131. *Id.* at 12.

132. *See* Piar, *supra* note 26, at 530.

The codification of most state post-conviction practices may have signaled the demise of the common law writ of error *coram nobis* as a principal state law remedy,[133] yet not of newly discovered evidence claims as grounds for post-conviction relief in state courts. Indeed, some states explicitly cited newly discovered evidence as a basis for relief when overhauling their post-conviction regimes by statute or court rule,[134] and others found such claims cognizable through judicial decisions.[135] Additionally, the 1966 and 1980 versions of the Uniform Post-Conviction Procedure Act (UPCPA), a model statute implemented to some degree in several jurisdictions,[136] endorsed newly discovered evidence as an acceptable ground for collateral relief.[137] This feature of the UPCPA also met with the approval of both the 1968 and 1978 editions of the American Bar Association's Post-Conviction Standards.[138]

As for legal and evidentiary thresholds, many jurisdictions that counted newly discovered evidence among their post-conviction causes of action expressly imposed heavy burdens on defendants seeking to prevail under that theory. By statute or court rule, some states required that factors comparable to those developed in the context of new trial motions (e.g., *Berry*'s probability standard)[139] should govern new evidence claims raised collaterally as well.[140] Even where the pertinent post-conviction rule was silent in regard to the precise legal standards controlling newly discovered evidence claims, case law in certain states adopted criteria similar to those announced in *Berry*,[141] and still other states kept the rule

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133. *See* 1 WILKES, *supra* note 16, § 3-5, at 232 (observing that common law *coram nobis*, while a secondary post-conviction remedy in eighteen states, is no longer a principal post-conviction remedy in any state).

134. *Id.* § 1-13, at 57.

135. *Id.* § 1-13, at 58.

136. *See id.* app. A at 762 (describing the grounds for relief in Idaho's post-conviction statute as identical to those of 1966 UPCPA); Piar, *supra* note 26, at 530–31 (noting how a number of states hew closely to the UPCPA in providing post-conviction relief that is liberal both as to timing and scope); IDAHO CODE ANN. § 19-4901(a) (2004).

137. 1 WILKES, *supra* note 16, § 1-13, at 58 (commenting that both versions of the UPCPA "expressly provide for relief if there is evidence of material facts, not previously presented or heard, that requires vacation of the conviction or sentence in the interest of justice").

138. *Id.*; *see also* STANDARDS FOR POST-CONVICTION REMEDIES 22-2.1(a)(v) (1978) [hereinafter ABA 1978 STANDARDS]; STANDARDS RELATING TO POST-CONVICTION REMEDIES § 2.1(a)(v) (1968) [hereinafter ABA 1968 STANDARDS].

139. *See supra* notes 82–92 and accompanying text.

140. *See, e.g.*, ARIZ. R. CRIM. PROC. 32.1(e) (including, as a ground for post-conviction relief, a claim that "[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if: (1) The newly discovered material facts were discovered after the trial. (2) The defendant exercised due diligence in securing the newly discovered material facts. (3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence").

141. *See, e.g.*, People v. Johnson, 793 N.E.2d 591, 598 (Ill. 2002) ("A claim of actual innocence based on newly discovered evidence may be raised in a post-conviction petition . . . . The supporting evidence must be new, material, noncumulative, and so

that newly discovered evidence only merited collateral relief upon "conclusive" proof of innocence.[142]

With respect to habeas corpus, the history of the "Great Writ"[143] in state courts is of little service to this Article's emphasis on newly discovered evidence claims because habeas corpus traditionally applied to prisoners challenging the lawfulness of their detention and extended only to errors of law, not fact.[144] Factual questions of guilt or innocence therefore had no bearing on a court's assessment of a habeas corpus petition.[145] With that history in mind, courts have been reticent to address newly discovered evidence claims raised via habeas corpus; as the Iowa Supreme Court observed in 1917 in rejecting a habeas corpus filing based on alleged new evidence of innocence, "[W]e are not yet ready to make so radical a venture."[146] Nevertheless, given that several states have since made that venture and currently treat habeas corpus as a means by which prisoners may present newly discovered evidence of innocence,[147] a few of the writ's distinctive aspects

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conclusive that it would probably change the result on retrial."); Harrington v. State, 659 N.W.2d 509, 516 (Iowa 2003) (holding that, with respect to a petition filed pursuant to Iowa's post-conviction procedures, "[t]o prevail on his newly discovered evidence claim [the defendant] was required to show: (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial").

142. *See, e.g.*, Richardson v. State, 546 So. 2d 1037, 1038 (Fla. 1989) (holding that, in order to receive *coram nobis* relief, the alleged newly discovered evidence must be of a character such that it would conclusively have prevented entry of the judgment).

143. *See, e.g.*, YACKLE, *supra* note 70, § 4, at 7–15 (discussing the history of habeas corpus).

144. *See, e.g.*, *id.* §§ 3-6, at 4–29. Habeas corpus was often only available to correct jurisdictional defects. *See* 1 WILKES, *supra* note 16, § 2-2, at 136 (commenting that, from roughly the mid-nineteenth century through 1935, "[a]s a general rule, the state courts refused to grant habeas corpus relief to persons imprisoned pursuant to an allegedly invalid criminal conviction or sentence unless the conviction was void for lack of either personal or subject matter jurisdiction, or the sentence was void for lack of jurisdiction"). In general, courts began to utilize habeas corpus to redress constitutional errors in the 1930s, especially after Johnson v. Zerbst, 304 U.S. 458 (1938), where the Supreme Court adopted the legal fiction that, in a criminal case, constitutional violations deprive a trial court of jurisdiction. YACKLE, *supra* note 70, § 5, at 15–16.

145. YACKLE, *supra* note 70, § 3, at 5 ("The writ in theory has nothing to do with the prisoner's guilt or innocence but is concerned only with the process employed to justify detention under attack."); *see also Ex parte* Presnell, 49 P.2d 232, 234 (Okla. Crim. App. 1935) ("It has long since been established that the office of the writ of habeas corpus is not to determine the guilt or innocence of the prisoner, and the only issue it presents is whether or not the prisoner is restrained of his liberty by due process of law.").

146. Springstein v. Saunders, 164 N.W. 622, 623–24 (Iowa 1917); *see also* Anderson v. Gladden, 383 P.2d 986, 991 (Or. 1963) (holding that "[a]s a general rule, *habeas corpus* (or its statutory counterpart in post-conviction proceedings) does not provide relief from a conviction resulting from a mistake of fact, where proof of the jury's mistake must depend on the credibility of newly discovered evidence").

147. *See In re* Weber, 523 P.2d 229, 243 (Cal. 1974) (holding that newly discovered evidence fails to warrant habeas relief unless it thoroughly undermines the entire structure of the prosecution's case, and such evidence undermines the prosecution's case

should be mentioned. Unlike *coram nobis* applications, state habeas corpus petitions were historically submitted to a court in the prisoner's county of confinement, and petitioners were required to be in custody.[148] Moreover, the form of relief upon a grant of a habeas corpus petition often consisted of absolute release from custody with no provision for further proceedings against the petitioner.[149]

Thus, by the late twentieth century, prisoners could try to utilize *coram nobis* (and occasionally habeas corpus) to prove their innocence through newly discovered evidence. Yet, in doing so, inmates had to overcome burdensome legal and evidentiary requirements[150] and, more abstractly, judicial opposition to the very idea of employing collateral remedies to present newly discovered evidence at all.[151]

B. Contemporary State Procedures Regarding Newly Discovered Evidence

In contemporary practice, newly discovered evidence claims filed by defendants after trial surface in a mélange of direct and collateral remedies: motions for a new trial, procedures created by statutes and court rules in the nature of *coram nobis*, applications for common law *coram nobis* relief, and even habeas corpus petitions. Through resort to either direct and/or collateral remedies, prisoners convicted in each of the fifty states and the District of Columbia may avail themselves of a post-trial procedure to put forth a claim of innocence based on newly discovered non-DNA evidence.[152] In practice, though, prisoners encounter a daunting task considering that these remedies are marked by severe procedural limitations.

1. New Trial Motions Today

Each state currently permits a motion for a new trial on the basis of newly discovered evidence, nominally providing any state prisoner who may be factually innocent—and who has new evidence to substantiate that claim—with recourse to a post-trial procedure in state court.[153] Such motions, which Donald

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only if it is conclusive and unerringly points to innocence); *Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (finding state habeas relief available in cases of actual innocence where the petitioner shows "*by clear and convincing evidence* that no reasonable juror would have convicted him in light of the new evidence" (emphasis added)); *infra* note 192 and accompanying text.

148. *See* 1 WILKES, *supra* note 16, § 2-2, at 137.

149. *Id.* § 1-8, at 38.

150. *See supra* notes 139–42 and accompanying text.

151. *See supra* notes 116–19 and accompanying text.

152. *See infra* notes 153, 190–92 and accompanying text. Indeed, prisoners in many jurisdictions have access to at least one post-trial procedure in order to present newly discovered evidence of innocence that—be it a motion for a new trial or a post-conviction remedy—has a relatively favorable statute of limitations or none whatsoever. *See* 1 WILKES, *supra* note 16, § 1-12, at 51 ("There are in fact 38 states which now permit relief based on newly discovered evidence of innocence, whether in a direct or a postconviction proceeding, instituted more than three years after conviction.").

153. *See* 1 WILKES, *supra* note 16, § 1-13, at 55; Mitchell, *supra* note 13, at 464–65.

Wilkes dubs the "traditional and usual" means of presenting claims of innocence conditioned on new evidence,[154] are direct remedies that adhere to the historic requirements mentioned above; they typically must be filed in the court of original judgment[155] within a short time frame.[156] These features, then, dictate that prisoners often must not only seek relief from the specific judge before whom they were tried and convicted, but they must find evidence supporting their claim of innocence soon after the curtain falls on their trial. And, in the event the original trial judge denies a defendant's request for a new trial based on newly discovered evidence, state rules of appellate procedure tend to make it difficult for defendants to challenge this decision on appeal, much less obtain a reversal.

First, many time limits governing motions for a new trial on the grounds of newly discovered evidence are remarkably brief.[157] As a result, these remedies are of limited utility to the bulk of criminal defendants who, in the immediate aftermath of their convictions, might not have the resources or the good fortune to find new evidence. According to Wilkes, litigants in seventeen states must file their motions within sixty days of judgment,[158] and one state still follows the common law rule that motions for a new trial can only be filed during the court term in which the original judgment was entered.[159] Seventeen other states and the District of Columbia have time restrictions on new trial motions spanning from one to three years.[160] Of the remaining states, six allow new trial motions to be filed beyond three years after conviction,[161] with four of those jurisdictions boasting waivable time limits of less than 120 days.[162] A sparse number of jurisdictions—nine—have no limitations period whatsoever.[163] Also, many of the

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154. 1 WILKES, *supra* note 16, § 1-13, at 55.

155. *See* OR. REV. STAT. § 136.535 (West 2005) (making Rule 64(A) of the Oregon Rules of Civil Procedure applicable to criminal actions); OR. R. CIV. P. 64(A) ("A new trial is a re-examination of an issue of fact in the same court after judgment."); *supra* notes 74–75 and accompanying text; *cf.* GA. CODE ANN. § 5-5-43 (West 2004) ("A judge who did not try the case may, if presented with a motion for new trial within 30 days from the date of verdict or judgment sought to be set aside, allow the filing of, issue rule nisi thereon, and decide the motion . . . .").

156. *See supra* notes 77–81 and accompanying text; *infra* notes 157–63 and accompanying text.

157. *See, e.g.*, Thomas et al., *supra* note 11, at 279 ("Arkansas requires claims of newly discovered evidence be filed within thirty days of sentencing. If that period expires, the common law writ of coram nobis rule is available for four narrow categories of claims that do not include newly discovered evidence.").

158. Herrera v. Collins, 506 U.S. 390, 410 (1993); 1 WILKES, *supra* note 16, § 1-13, at 56. Until recently, Virginia required defendants to present newly discovered evidence within only twenty-one days of judgment. *See* Philip H. Yoon, Statute Note, *Va. Code Ann.* § *19.2-327.01*, 15 CAP. DEF. J. 513, 513 (2003). In 2003, however, both the Virginia Senate and the House of Delegates passed a bill extending the deadline to ninety days, and the law became effective on July 1, 2004. *Id.*

159. *Herrera*, 506 U.S. at 410; 1 WILKES, *supra* note 16, § 1-13, at 56.

160. *Herrera*, 506 U.S. at 410; 1 WILKES, *supra* note 16, § 1-13, at 56.

161. *Herrera*, 506 U.S. at 411; 1 WILKES, *supra* note 16, § 1-13, at 56.

162. The remaining two of these six states have waivable time limits in excess of 120 days. *Herrera*, 506 U.S. at 411; 1 WILKES, *supra* note 16, § 1-13, at 56.

163. *Herrera*, 506 U.S. at 411; 1 WILKES, *supra* note 16, § 1-13, at 56.

states that impose time limits on new trial motions view those conditions as jurisdictional in nature, barring trial courts from granting tardy motions even when such motions are based on newly discovered evidence.[164]

Some states have carved out exceptions to general statutory time limits when new trial motions involve newly discovered evidence.[165] Similarly, if the alleged new evidence could not have been discovered prior to the end of the limitations period, several jurisdictions have held that the trial court has the latitude to consider the motion.[166] Where the purported new evidence is coupled

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164. *See, e.g.*, *Ex parte* O'Leary, 438 So. 2d 1372, 1374 (Ala. 1983) ("Where a motion for new trial filed within 30 days of a judgment of conviction does not contain a ground relative to newly discovered evidence, a defendant is not in a position to make an assertion regarding newly discovered evidence by motion for new trial after expiration of the 30-day period, even though the new evidence could not have been discovered until after that time period had elapsed." (quoting O'Leary v. State, 417 So. 2d 214 (Ala. Crim. App. 1980))); Taylor v. United States, 759 A.2d 604, 609 (D.C. 2000) ("The time periods for filing the new trial motion are jurisdictional; this court has no power to consider an untimely new trial motion, even if the result seems harsh and it is difficult to see how the alleged newly discovered evidence would have been available within the jurisdictional period."); Peterson v. State, 810 So. 2d 1095, 1100 (Fla. Dist. Ct. App. 2002) (holding that the trial court lacked jurisdiction over a new trial motion grounded on newly discovered evidence that was filed after the statutory deadline); State v. Reed, 712 So. 2d 572, 582–83 (La. Ct. App. 1998) (deeming motion for new trial based on newly discovered evidence filed after the one-year statute of limitations untimely and rejecting arguments that the time bar was unconstitutional "as it is the legislative prerogative to set reasonable procedural formalities and requirements such as the time limitations provided in [the pertinent state procedure]"); *cf.* People v. Parker, 227 N.W.2d 775, 779 (Mich. 1975) ("A delayed motion for a new trial can always be filed at any time on leave granted by the trial court.").

165. *See, e.g.*, N.C. GEN. STAT. § 15A-1415(c) (2004) (providing that, irrespective of the general time limits on a Motion for Appropriate Relief, such motions based on newly discovered evidence need only be filed within a "reasonable time" after discovery of the evidence); COLO. R. CRIM. P. 33(c) ("A motion for a new trial based upon newly discovered evidence shall be filed as soon after entry of judgment as the facts supporting it become known to the defendant, but if a review is pending the court may grant the motion only on remand of the case. A motion for new trial other than on the ground of newly discovered evidence shall be filed within fifteen days after verdict or finding of guilt or within such additional time as the court may fix during the fifteen-day period."); IDAHO CRIM. R. 34 ("A motion for a new trial based upon the ground of newly discovered evidence may be made only before or within two (2) years after final judgment. A motion for a new trial based on any other ground may be made at any time within fourteen (14) days after verdict, finding of guilt or imposition of sentence, or within such further time as the court may fix during the fourteen (14) day period.").

166. *See, e.g.*, Noffke v. State, 422 P.2d 102, 106–07 (Alaska 1967) ("There is nothing in the record to show that appellant's trial counsel had any knowledge, within the time limits of Crim.R. 33 [rule governing new trial motions], of the fact that the trial judge had given the jury this supplemental instruction. In such a situation we believe that it would work an injustice to appellant to hold that he is now precluded from questioning the propriety of the supplemental instruction."); State v. Condon, 808 N.E.2d 912, 917 (Ohio Ct. App. 2004) (granting leave to file a delayed motion for a new trial on the basis of newly discovered evidence where the defendant presented clear and convincing proof that he was unavoidably prevented from discovering the new evidence within 120 days of the jury's verdict).

with a strong claim of innocence, some state courts gravitate toward entertaining the motion even if untimely filed pursuant to procedural norms.[167] A number of states, however, have neglected to create exceptions to rigid time limits for new evidence claims, and a few states openly distinguish between scientific and nonscientific evidence in implementing statutes of limitations, treating the former with greater leniency.[168] Only at great cost, therefore, may state prisoners delay in pursuing potential non-DNA evidentiary leads and submitting their innocence claims to the trial court after conviction.

Second, rules requiring that new trial motions be filed in the court of conviction owe their continued existence not merely to historical inertia wrought from British custom, for the policy rationale behind them is an obvious one—efficiency. After all, the trial judge presided over the case and ideally has retained some memory of those prior proceedings.[169] This knowledge, in turn, could inform and assist the evaluation of any newly discovered evidence, particularly where such evidence depends on witness credibility from the trial (namely, the recantation context).[170] Regardless of whether witness credibility lies at the crux of a defendant's claim, trial judges necessarily must review decisions from the original proceedings when evaluating new trial motions based on newly discovered evidence because the legal standard in most states for granting a new trial has incorporated some offshoot of the *Berry* requirements: whether, among other factors, the newly discovered evidence is noncumulative, does not simply impeach

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167. *See* Thomas et al., *supra* note 11, at 280 ("The trend is undoubtedly in the direction of finding a basis to allow powerful claims of innocence to be heard even if filed too late under the rules of procedure.").

168. For example, Connecticut, Illinois, Missouri, and Tennessee have time limits on new trial motions involving nonscientific evidence, yet lack limits for motions based on scientific testing that could not have been conducted at trial. *Id.* at 277–78 (describing time limits for scientific and nonscientific evidence in Illinois, Missouri, and Tennessee); *see also* CONN. GEN. STAT. ANN. § 52-582 (West 2005) ("No petition for a new trial in any civil or criminal proceeding shall be brought but within three years next after the rendition of the judgment or decree complained of, except that a petition based on DNA (deoxyribonucleic acid) evidence that was not discoverable or available at the time of the original trial may be brought at any time after the discovery or availability of such new evidence.").

169. *See, e.g.*, Salinas v. State, 373 P.2d 512, 513 (Alaska 1962) ("[T]he trial judge is in a better position to determine the possible effect and merit of the alleged newly discovered evidence since he presided over the original trial and heard all the evidence there."); *see also* 58 AM. JUR. 2D *New Trial* § 369 (2004) ("A motion for a new trial is best heard and decided by the judge who presided at the trial of the cause, since that judge's familiarity with the case better enables him or her to rule upon the questions which are raised by the motion."); YACKLE, *supra* note 70, § 8, at 34 ("Indeed, it was considered preferable that the same judge who had rendered the judgment should receive the application, since that judge was already familiar with the case and thus able to determine quickly whether the facts alleged in the petition had been adjudicated at trial.").

170. *See supra note* 169 and accompanying text. Courts have historically frowned upon recantation evidence. *See supra* note 13 and accompanying text; Yarborough v. State, 514 So. 2d 1215, 1220 (Miss. 1987) ("No form of proof is so unreliable as recanting testimony . . . . Our skepticism does not translate into callousness, however.").

the prosecution's witnesses, and would probably yield a different result in a new trial.[171]

As will be discussed in more depth in Part III of this Article, there may be good reason to reconsider the propriety of directing newly discovered evidence claims to the original trial judge in spite of any potential inefficiency that might arise.[172] Having played a vital role in the initial decision, the trial judge arguably has a vested interest in preserving that outcome[173] and, as a matter of common sense, human beings undoubtedly struggle to some extent when asked to review their own work and examine it critically.[174] Yet criminal defendants wary of filing new trial motions with the original trial judge in their case have few available, let alone viable, alternatives. If the trial judge is no longer in office, ordinarily her successor is conferred with jurisdiction to handle the motion.[175] Save those circumstances, to avoid filing with the original trial judge the defendant is often forced to assert the existence of a blatant conflict of interest or otherwise ask the judge to recuse herself.[176] This is no easy feat; the applicable rules and case law generally demand parties seeking recusal to proffer specific factual bases for challenging the judge's ability to be fair and impartial, a requirement not often met by bald allegations of a "vested interest in the outcome."[177]

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171. *See supra* notes 82–92 and accompanying text.

172. *See infra* notes 284–335 and accompanying text.

173. *See, e.g.*, Mazur, *supra* note 15, at 201, 207, 233 (urging North Carolina to abandon the preference for allocating a Motion for Appropriate Relief—a catch-all provision encompassing traditional new trial motions—based on newly discovered evidence of innocence to the original trial judge).

174. *See* Medwed, *supra* note 64, at 144 (analyzing the practice of trial prosecutors being assigned post-conviction motions in cases they handled and positing that "there is an inherent problem" in asking people to review their own work product); *infra* notes 284–335 and accompanying text.

175. *See* 58 AM. JUR. 2D *New Trial* § 369 (2004). As Eli Mazur points out, the statutory preference for the original trial judge to handle post-trial motions can be quite potent; in North Carolina, the relevant statute permits the original trial judge to entertain the Motion for Appropriate Relief even after the expiration of her term. Mazur, *supra* note 15, at 207, 230; *see also* N.C. GEN. STAT. § 15A-1413(b) (2004).

176. *See, e.g.*, UTAH R. CRIM. P. 29(c)(1)(A) (requiring that a motion to disqualify a judge must be "accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias, prejudice or conflict of interest"). While the terms "recusal" and "disqualification" originally had different meanings, the concepts today are often used interchangeably. *See* Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1214 n.4 (2002).

177. At common law, a direct financial interest was the only basis for invoking recusal or disqualification. Bassett, *supra* note 176, at 1223; *see also* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 106 (1996) ("At common law, however, a judge could not be disqualified because of bias, except insofar as such bias might be inferred from the fact of his pecuniary interest in the cause."). Over time, the rules affecting recusal have expanded to address other forms of potential bias. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(a)–(b) (2000) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to [situations where] the judge has a personal bias or

Third, after a trial judge rejects a new trial motion based on newly discovered evidence, state procedures limit the capacity of defendants to overturn that decision on appeal. As an initial matter, denials of new trial motions are not always appealable as of right; the defendant may have to petition the appellate court for permission to appeal.[178] Even if a state appellate court agrees to review the denial of a new trial motion, the standard of review applied to that denial is extraordinarily deferential—the defendant normally must prove the trial court abused its discretion in rendering its decision[179] or failed to exercise that discretion.[180] The deferential nature of the abuse of discretion standard reflects (and reinforces) the belief that the trial judge is best able to weigh the new

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prejudice [against] a party or a party's lawyer, [has] personal knowledge of disputed evidentiary facts[, or] has served as a lawyer [or] been a material witness [in the case].."). In any event, states often require that parties seeking to disqualify a judge substantiate that claim with ample facts. *See, e.g.*, IND. R. POST-CONV. REM. 1(4)(b) ("Within ten [10] days of filing a petition for post-conviction relief under this rule, the petitioner may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner. The petitioner's affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be accompanied by a certificate from the attorney of record that the attorney in good faith believes that the historical facts recited in the affidavit are true. A change of judge shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice."). Trial judges also have a great deal of autonomy in considering recusal requests—with any resulting decision rarely overturned. *See* Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?*, 28 VAL. U. L. REV. 543, 545 (1994) ("In the majority of states, the decision of whether to grant or deny a motion to recuse is within the sound discretion of the challenged judge."). In some states, however, the recusal motion is forwarded to another judge for consideration. *See, e.g.*, UTAH R. CRIM. P. 29(c)(2) ("The judge against whom the motion and affidavit are directed shall, without further hearing, enter an order granting the motion or certifying the motion and affidavit to a reviewing judge."). Moreover, the standard of review that applies to a denial of a recusal motion is frequently quite deferential. *See* Abramson, *supra* note 177, at 556 ("Reversal of a trial judge's decision not to recuse occurs if there is an abuse of discretion.").

178. *See*, *e.g.*, N.Y. CRIM. PROC. LAW §§ 450.15, 460.15 (McKinney 2004) (providing procedures through which a defendant may seek permission to appeal the denial of a post-trial newly discovered evidence claim).

179. *See* Mills v. State, 786 So. 2d 547, 549 (Fla. 2001) ("Absent an abuse of discretion, a trial court's decision on a motion based on newly discovered evidence will not be overturned on appeal."); State v. Weaver, 554 N.W.2d 240, 244 (Iowa 1996) (observing that the state Supreme Court reviews a trial court's decision on a new trial motion on the basis of newly discovered evidence under the abuse of discretion standard and finds abuse "'only when discretion is exercised on grounds clearly untenable or to an extent clearly unreasonable'" (quoting Preferred Mktg. Assocs. Co. v. Hawkeye Nat'l Life Ins. Co., 452 N.W.2d 389, 393 (Iowa 1990) (internal citation omitted))); State v. Stukes, 571 S.E.2d 241, 244 (N.C. Ct. App. 2002) ("The decision of whether to grant a new trial in a criminal case on the ground of newly discovered evidence is within the trial court's discretion and is not subject to review absent a showing of an abuse of discretion."); DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL 207 (1994) (noting that trial court rulings on new trial motions are treated with deference on appeal); White, *supra* note 25, at 13 (stating that the abuse of discretion standard is the norm in reviewing denials of new trial motions based on newly discovered evidence).

180. *See* 58 AM. JUR. 2D *New Trial* § 429 (2004).

evidence and thus deserves a large margin for error.[181] Under this standard of review, trial judges routinely enjoy vast leeway in determining not only whether to grant a new trial, but also whether even to order an evidentiary hearing to explore the character of the new evidence before issuing a final decision.[182] What this means for everyday courtroom combat is that new trial motions are often decided on paper submissions alone, with the new evidence allegedly proving the inmate's innocence never developed in open court and therefore absent from the record on appeal.[183]

2. Current Modes of Collateral Relief

As previously noted, states have largely revamped their collateral, post-conviction procedures in recent decades, codifying the available forms of relief by statute or court rule.[184] This shift from common law systems of state post-conviction relief in favor of statute- and rule-based regimes is revealed by the fact that only four states have yet to pass a statute or court rule creating a modern post-conviction remedy in the nature of *coram nobis* or a modern version of habeas corpus.[185] Regarding the jurisdictions that have chosen a statute or court rule to displace common law *coram nobis* or traditional habeas corpus as their chief form of post-conviction relief, eight of those states have installed a remedy akin to habeas corpus[186] and thirty-eight have promulgated a remedy in the nature of *coram nobis*.[187] Though on the wane, the common law writ of *coram nobis* remains as a secondary post-conviction remedy in eighteen jurisdictions.[188] True to

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181. *See, e.g.*, G. Fred Metos, *Appellate Advocacy: Standards of Appellate Review*, CHAMPION, Dec. 1996, at 31, 32 (observing that the abuse of discretion standard "is generally applicable to trial court decisions that involve balancing various interests or factors. A trial judge is generally in a better position than an appellate court to make these decisions.").

182. Some jurisdictions treat a trial court's decision whether to hold an evidentiary hearing on a new trial motion based on newly discovered evidence as a matter of discretion. *See, e.g.*, State v. Cossette, 856 A.2d 732, 738 (N.H. 2004) ("We hold that it was well within the trial court's discretion to deny the defendant's request for a hearing on the newly discovered evidence [alleged in a new trial motion]."); State v. Butler, No. 2003 CA 26, 2004 WL 869371, at *2 (Ohio Ct. App. Apr. 23, 2004) (stating that "the decision of whether a hearing is warranted upon [a new trial motion grounded on newly discovered evidence], also lies soundly within the discretion of the trial court"); *see also* 58 AM. JUR. 2D *New Trial* § 356 (2004) (noting that the decision to grant or deny a motion for a new trial based on newly discovered evidence in a federal criminal case falls within the sound discretion of the trial judge, as does the decision whether to hold an evidentiary hearing in connection with the motion).

183. *See, e.g.*, 58 AM. JUR. 2D *New Trial* § 400 (2004) (noting that "a motion for a new trial ordinarily may be decided upon affidavits without an evidentiary hearing").

184. *See supra* notes 126–32 and accompanying text.

185. 1 WILKES, *supra* note 16, § 2-5, at 163–64. According to Wilkes, in California, Connecticut, New Hampshire, and Virginia, "the principal postconviction remedy exists by authority of a traditional habeas corpus statute that has been modernized principally by a process of liberal judicial construction." *Id.* § 3-2, at 189.

186. *Id.*

187. *Id.*

188. *Id.* § 3-5, at 232.

the origins of *coram nobis*, state courts still refer to the writ as an extraordinary remedy, a singular weapon in the judicial arsenal geared to tackle errors of fact where no other form of redress exists.[189]

The degree to which claims of innocence hinging on newly discovered evidence may be raised collaterally in state courts varies greatly at the moment,[190] but on the whole, states seem more amenable to recognizing those claims than in the past.[191] Newly discovered evidence of innocence has emerged as an appropriate basis for collateral relief in numerous jurisdictions, as evidenced by Donald Wilkes's conclusion that it represents a ground for relief through the principal state post-conviction remedies in thirty-two states.[192] Yet—as in the

189. *See, e.g.*, Cloird v. State, 76 S.W.3d 813, 815 (Ark. 2002) ("A writ of error *coram nobis* is an extraordinarily rare remedy, more known for its denial than its approval. The writ is allowed only under compelling circumstances to achieve justice and to address errors of the most fundamental nature." (internal citations omitted)); People v. Carty, 2 Cal. Rptr. 3d 851, 854 (Cal. Ct. App. 2003) ("Importantly, the 'purpose [of a petition] is to secure relief, *where no other remedy exists*.'" (emphasis in original) (internal citations omitted) (quoting People v. Adamson, 210 P.2d 13 (Cal. 1949))); Edwards v. State, 633 N.W.2d 623, 625 (S.D. 2001) (per curiam) ("The writ of coram nobis can only be used to remedy a profound injustice where the petitioner has no other available remedy.").

190. *See, e.g.*, Mulroy, *supra* note 7, at 12 ("Depending on the state, coram nobis may be available under the common law, abolished by statute, supplanted by the statutory provision of other remedies, or expressly adopted by statute."). Some states permit newly discovered evidence of innocence to be presented through state habeas corpus procedures. *See infra* note 192 and accompanying text. There may even be other post-conviction methods of presenting newly discovered evidence depending upon the jurisdiction. For instance, Georgia allows newly discovered evidence claims to be raised collaterally through an "extraordinary" motion for a new trial. *See, e.g.*, Dick v. State, 287 S.E.2d 11, 13 (Ga. 1982) (noting that extraordinary motions are similar to ordinary motions for a new trial, except that the former is filed after the deadline for submitting an ordinary motion and is subject to stricter requirements when, for example, the motion is based on newly discovered evidence).

191. *See supra* notes 116–19 and accompanying text.

192. *See* 1 WILKES, *supra* note 16, § 1-13, at 57–58. In twenty-four of those states, the primary means for presenting newly discovered evidence collaterally is a procedure in the nature of *coram nobis*. *Id.* § 1-13, at 57–58. The technique for putting forth such a claim in the remaining eight states derives from a habeas corpus remedy. *Id.* at 57; *see also* Summerville v. Warden, 641 A.2d 1356, 1369 (Conn. 1994) (noting that "a substantial claim of actual innocence is cognizable by way of a petition for a writ of habeas corpus, even in the absence of proof by the petitioner of an antecedent constitutional violation that affected the result of his criminal trial"); Ryan Edward Shaw, *Avoiding a Manifest Injustice: Missouri Decides Not to Execute the "Actually Innocent"*, 69 MO. L. REV. 569, 577–80 (2004) (discussing state court decisions granting habeas corpus relief on freestanding actual innocence claims); Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421, 433–38 (2004) (same). Many states retain the historic view that newly discovered evidence by itself is an inappropriate basis for habeas corpus. *See, e.g.*, Boyles v. Weber, 677 N.W.2d 531, 537 (S.D. 2004) ("Newly discovered evidence is generally an insufficient ground for habeas relief when the evidence pertains to guilt rather than a deprivation of constitutional rights or lack of jurisdiction."). Furthermore, new evidence of innocence is cognizable through common law *coram nobis* in seven of the eighteen states where that common law writ lingers as a secondary post-conviction option. 1 WILKES, *supra* note 16, § 1-13, at 57.

sphere of new trial motions[193]—the actual availability of newly discovered evidence as a method to prove one's innocence in state post-conviction proceedings is tempered by the harsh reality inflicted by an array of procedural obstacles.

Although post-conviction remedies have historically lacked statutes of limitations,[194] states have become increasingly willing to place time restrictions on the use of collateral measures.[195] This broad proposition is buttressed by the data; in 1972, only three states (Illinois, New Jersey, and Wyoming) attached a time limit to their principal post-conviction remedy whereas now thirty-one states have such requirements.[196] In terms of duration, the limitations periods operating in those states run the spectrum from sixty days (Missouri) to ten years (Maryland).[197] Collectively, moreover, states that installed limitations periods as part of their post-conviction regimes have displayed reluctance to lengthen the time frames.[198] Despite the fact that many states with statutes of limitations on post-conviction relief provide exceptions for newly discovered evidence claims, especially where the evidence could not have been found with due diligence prior to the expiration of the period,[199] not every state provides prisoners with such a safety valve[200] and some states only earmark DNA evidence for preferential

193. *See supra* notes 153–83 and accompanying text.

194. *See supra* note 104 and accompanying text.

195. *See infra* notes 196–98 and accompanying text.

196. 1 WILKES, *supra* note 16, § 3-2, at 191.

197. *Id.* § 3-2, at 192.

198. *Id.* ("Since 1973 seven states with a statute of limitations applicable to the principal postconviction remedy—Arkansas, Idaho, Illinois, Louisiana, Montana, Tennessee, and Wyoming—have shortened the limitations period, whereas only two states—Oregon and Utah—have lengthened it.").

199. *See, e.g.*, *id.* §§ 1-13, 3-2, at 56, 193 (observing that "claims for relief based on newly discovered evidence are often exempted from the limitations period applicable to a particular state postconviction remedy"); Thomas et al., *supra* note 11, at 278–81 (mentioning a few states that afford litigants freedom from rigid time constraints in filing post-conviction petitions based on newly discovered evidence); *see also* IOWA CODE ANN. § 822.3 (2004) (stating that the general three-year statute of limitations on post-conviction petitions "does not apply to a ground of fact or law that could not have been raised within the applicable time period"); FLA. R. CRIM. PROC. 3.850(b)(1) (providing for a two-year statute of limitations on petitions for post-conviction relief unless, among other bases, "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence"). Also, some states that impose time restrictions on newly discovered evidence allow the limitations period to begin to run as of the date of discovery of the newfound facts. For example, Utah's Post-Conviction Remedies Act permits post-conviction challenges based on newly discovered evidence to be filed within one year of the "date on which [the defendant] knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based." UTAH CODE ANN. § 78-35a-107(1), (2)(e) (2004); *see also* ALA. R. CRIM. PROC. 32.2(c) (providing that, pursuant to the state post-conviction statute, a claim of newly discovered evidence must be brought within six months after discovery of the evidence); *infra* note 261 and accompanying text.

200. *See* People v. Ambos, 51 P.3d 1070, 1073 (Colo. Ct. App. 2002) (noting that, while newly discovered evidence is a basis for state post-conviction relief, it is subject to the three-year statute of limitations); State v. Mixon, 983 S.W.2d 661, 670 (Tenn. 1999)

treatment.[201] The frequency with which states have fastened statutes of limitations to their post-conviction procedures in recent decades also indicates the trend is toward endorsing as opposed to abandoning time restrictions.[202]

In addition, prisoners seeking redress through state post-conviction procedures may face forum-related dilemmas comparable to those in the area of new trial motions, such as requirements that petitions go to the original trial judge[203] and onerous standards for obtaining recusal.[204] As mentioned above, historically the common law writ of error *coram nobis* was directed toward the judge who presided over the case at trial.[205] In converting from common law to rule- or statute-based post-conviction regimes, many jurisdictions that crafted a remedy in the nature of *coram nobis* as their principal mode of relief borrowed that

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(enforcing the one-year time limit for newly discovered evidence claims under the state post-conviction statute); Piar, *supra* note 26, at 632 (discussing Wyoming's intractable five-year statute of limitations on post-conviction relief, and noting that he has found no cases extending or excusing this limit); Thomas et al., *supra* note 11, at 279 ("A few states still appear to have rigid deadlines for filing claims based on newly discovered evidence, with either no exception for fairness or the interests of justice or one that is difficult to satisfy.").

201. Virginia, for instance, has strict time limits on filing state habeas petitions but allows for issuance of a writ "of actual innocence" in cases involving biological or scientific evidence, regardless of any deadlines. Thomas et al., *supra* note 11, at 278–79. Florida also affords flexibility regarding its statute of limitations in post-conviction cases involving DNA testing. *Id.* at 279 ("Though the Florida habeas statute does not seem to have a loophole for good cause shown, the Florida Supreme Court has indicated that a prisoner could request a DNA test even if the request is outside the two year statute of limitations as long as the prisoner satisfied due diligence."). Connecticut differentiates as well between post-trial claims based on DNA and those based on other grounds; a three-year time limit governs *coram nobis* relief and new trial motions in the state, except for claims involving DNA evidence. *See* Piar, *supra* note 26, at 525.

202. Daniel Piar has described the willingness of states such as Arkansas, Connecticut, and Tennessee to put statutes of limitations on *coram nobis* relief as a "disturbing trend." *See* Piar, *supra* note 26, at 524–28.

203. As with respect to new trial motions, this requirement usually stems from statute or court rule. *See, e.g.*, COLO. R. CRIM. P. 35(c)(3) (defendants seeking post-conviction relief, among other grounds, on the basis of newly discovered evidence "may file a motion in the court which imposed the sentence to vacate, set aside, or correct the sentence"); DEL. SUPER. CT. CRIM. R. 61 (providing that a motion for post-conviction relief is filed first in the office of the prothonotary in the county in which the conviction occurred and, if the motion is facially sufficient, it shall be allocated to the superior court judge who presided at the moving party's trial); MASS. R. CRIM. P. 30(a) (directing post-conviction relief motions to the "trial judge").

204. *See, e.g.*, Patrick J. Quinn & John J. Hynes, *Impact of Recent Decisions upon Proceedings under the Post-Conviction Hearing Act*, 34 LOY. U. CHI. L.J. 639, 642 (2003) (noting how, regarding the principal post-conviction remedy in Illinois, "the same judge who presided over the defendant's trial should hear his post-conviction petition, unless it is shown that the defendant would be substantially prejudiced. Thus, defendants do not have an absolute right to substitution of a judge at a post-conviction proceeding, but rather they must show that they will be substantially prejudiced if the motion for substitution is denied").

205. *See supra* notes 100–01 and accompanying text.

procedure, assigning petitions to the court of conviction.[206] Even in the realm of habeas corpus, some states have departed from the conventional practice of filing requests for relief in the court having jurisdiction over the region in which the prisoner is incarcerated.[207] Specifically, in four of the eight states that permit newly discovered evidence of innocence to be raised via habeas corpus—Nevada, South Dakota, Texas, and Utah—the post-conviction petition is usually filed in the convicting court.[208]

Finally, as for appellate review, denials of state post-conviction petitions are often subject to standards analogous to those applied to new trial motions.[209] At common law, litigants were ordinarily not allowed to appeal rejections of habeas corpus petitions,[210] and appellate review of *coram nobis* applications was similarly circumscribed.[211] The creation of comprehensive state post-conviction regimes modified the specific parameters surrounding the reviewability of denials of post-conviction relief, but not the general tenet that lower courts warrant deference in this domain of activity; although some states provide for appeals as of right from denials of post-conviction petitions,[212] others deem such review discretionary[213]

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206. *See* 1 WILKES, *supra* note 16, § 1-5, at 16–18; YACKLE, *supra* note 70, § 7, at 29–30. The fact that many states demand filing in the court of conviction or sentencing court does not necessarily indicate that court clerks direct post-conviction petitions to the original trial judge herself, although it appears that many do so. Notably, Vermont, whose principal post-conviction remedy is in the nature of *coram nobis*, explicitly requires filing in the superior court in the county of sentencing, but bars the original trial judge from hearing the petition. 13 VT. STAT. ANN. § 7131 (2004); 2 WILKES, *supra* note 16, app. A at 684–85 (describing Vermont's chief post-conviction remedy as a "remedy in the convicting court in the nature of coram nobis").

207. *See supra* note 148 and accompanying text.

208. *See* 1 WILKES, *supra* note 16, § 3-3, at 206–07. California permits state petitions for writs of habeas corpus to be filed originally in a variety of courts: the superior court, the state court of appeal, or the state supreme court. CAL. PENAL CODE § 1508(a)–(c) (West 2005).

209. *See supra* notes 178–83 and accompanying text.

210. YACKLE, *supra* note 70, § 158, at 581 ("At common law, there was no right of appeal from judgments in habeas corpus."). Even today, Louisiana, for instance, apparently does not permit appellate review of denials of state habeas corpus petitions. *See* LA. CODE CRIM. PROC. ANN. art. 369 (West 2004).

211 . YACKLE, *supra* note 70, § 8, at 35 ("In jurisdictions that considered coram nobis proceedings to be independent of the original criminal case, trial court judgments denying relief were generally reviewable on writ of error or appeal—though, again, the scope of review was narrow. In states that considered applications for the writ to be part of the criminal prosecution, appellate review was sometimes denied in the absence of a statute expressly establishing the right.").

212. *See, e.g.*, 22 OKLA. STAT. ANN. §§ 1051, 1087 (West 2005) (prescribing that a defendant may appeal as of right any judgment against him and detailing the procedure for appealing the judgment on a post-conviction petition to the Court of Criminal Appeals).

213. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-470(b) (West 2005) (providing that a denial of relief under the principal post-conviction remedy, habeas corpus, may only be appealed if the losing party petitions the habeas judge or a judge of the state supreme court or state appellate court to certify that the case involves a question worth reviewing, and the judge certifies to that effect); ME. R. APP. P. 19(a) (mandating discretionary review of denials of post-conviction petitions when criminal defendants are seeking to appeal); N.M.

and still others seemingly balk at any appellate review.[214] Significantly, where denials of post-conviction relief are appealable, states tend to endorse the abuse of discretion standard or a close facsimile of it in reviewing petitions grounded on newly discovered evidence, sometimes even when the petition is dismissed without an evidentiary hearing.[215]

III. REGIME CHANGE: PROPOSED MODIFICATIONS TO STATE PROCEDURES

As discussed in Part II, state procedures in the area of newly discovered non-DNA evidence bear similar traits to those of their British ancestors and, more notably, contain strict procedural requirements. Prominent among the procedural barriers facing inmates are statutes of limitations, restrictions on the forum in which the motion must be filed, and rules regarding appellate review. Whereas the restrictions vary from procedure to procedure, and from jurisdiction to jurisdiction, the end result remains largely the same: after trial, convicted criminal defendants seeking to prove their innocence through newly discovered non-DNA evidence have trouble obtaining access to full-fledged evidentiary hearings in state courts.

In this Part of the Article, I urge states to revise their procedures to afford prisoners the access needed to allow courts to make thorough evaluations of the validity of post-conviction innocence claims. Simply put, it is not that states should unlock the gates of their prisons, but rather that states should more readily open the doors to their courthouses in the context of newly discovered non-DNA evidence given the lessons learned by the DNA revolution. On a fundamental level, waylaying prisoners' attempts to receive evidentiary hearings on alleged newly

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R. CRIM. P. 5-802(G)(2) (specifying that a final judgment denying relief under the principal state post-conviction remedy is reviewable in the discretion of the New Mexico Supreme Court upon timely filing of a writ of certiorari).

214. *See, e.g.*, *In re* Reed, 663 P.2d 216, 217 n.2 (Cal. 1983) (noting that statutory law in California provides no appeal from the denial of a habeas corpus petition by a superior court, and that the proper remedy would be to file a new habeas petition in the court of appeal).

215. Although some jurisdictions use different standards of review depending on whether an evidentiary hearing occurred, *see infra* note 339 and accompanying text, the abuse of discretion standard has been applied in assorted jurisdictions to summary denials of newly discovered evidence claims as part of post-conviction petitions. *See, e.g.*, People v. Schulz, 774 N.Y.S.2d 165, 167 (App. Div. 2004) (holding that the trial court "providently exercised its discretion in denying the defendant's motion pursuant to CPL 440.10(1)(g) [newly discovered evidence prong of post-trial remedy statute] without a hearing"); State v. Apanovitch, 667 N.E.2d 1041, 1042–52 (Ohio Ct. App. 1995) (holding that the lower court did not abuse its discretion in summarily dismissing petition for post-conviction relief allegedly based partially on newly discovered evidence). States frequently apply the abuse of discretion standard to post-hearing denials of collateral relief petitions. *See, e.g.*, Kirby v. State, 652 So. 2d 797, 798 (Ala. Crim. App. 1994) (stating that, in the context of an appeal of a denial of post-conviction relief after the completion of an evidentiary hearing, "[t]he standard applied by this court when reviewing the denial of a Rule 32 petition that alleges newly discovered evidence is whether the court abused its discretion in denying the petition"); Callier v. Warden, 901 P.2d 619, 628 (Nev. 1995) (finding that the trial court did not abuse its discretion in denying a habeas corpus petition based on newly discovered evidence after conducting an evidentiary hearing).

discovered evidence of innocence by means of procedural obstacles clashes with core concepts of justice as well as constitutional safeguards,[216] and does nothing to inspire confidence in the underlying correctness of the decisions rendered through the criminal justice system.[217]

State courts, though, have historically looked askance at newly discovered evidence claims,[218] signaling that this traditional animus—and the policies behind it—must be taken into account in molding any prospective reforms. To that end, states should weigh several proposed modifications that might achieve a satisfactory balance between finality and efficiency, on the one hand, and justice for the actually innocent on the other. First, in order to curb the risk of procedural default, states should abolish the use of statutes of limitations and simplify their mechanisms for presenting newly discovered evidence claims by adopting a single procedure in lieu of multiple ones. Second, defendants ought to be able to submit their innocence claims to a judge other than the original trial judge without making a showing equal to that required in a recusal motion. Third, appellate courts should have the authority to review summary dismissals of newly discovered evidence claims de novo. Any one of these reforms by itself would improve the adjudication of post-conviction innocence claims in the courts and, if employed together, these changes could go beyond improving the system and truly foster the exoneration of innocent prisoners.

A. Decreasing the Risk of Procedural Default

Presupposing that potentially innocent prisoners with newly discovered evidence at their disposal deserve the chance to have that evidence presented in state courts, the question then becomes how to provide such access without unduly harming finality and judicial economy.[219] Granted, omitting all procedural restrictions from new trial motions and post-conviction petitions to facilitate the analysis of new evidence claims would almost surely hurt the very people (wrongfully convicted prisoners) such a shift would be designed to help; the ensuing flood of claims would diminish the likelihood that courts could

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216. Thomas et al., *supra* note 11, at 292 ("Limits on powerful claims of innocence are not only prudentially unjustifiable but also violate the fundamental premises of the Supreme Court's own procedural due process jurisprudence."); *see also* Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547 (2002) (arguing for a constitutional right to the disclosure of biological evidence for DNA testing in cases of actual innocence).

217. It has been argued that the ability of the American criminal justice system to reliably ascertain "true" guilt or innocence is central to its legitimacy. *See, e.g.*, Christopher A. Bracey, *Truth and Legitimacy in the American Criminal Process*, 90 J. CRIM. L. & CRIMINOLOGY 691, 693 (2000) (reviewing WILLIAM PIZZI, TRIALS WITHOUT TRUTH (1999)) ("The American trial system is fundamentally 'weak,' according to Professor Pizzi, because it privileges fairness norms at the expense of 'truth.'").

218. *See, e.g.*, Berry v. Georgia, 10 Ga. 511, 527 (1851).

219. *See, e.g.*, Kreimer & Rudovsky, *supra* note 216, at 561 n.50 (citing sources arguing for the importance of finality in the criminal justice system).

successfully differentiate the wheat from the chaff.[220] Moreover, crime victims have an interest in gaining some element of closure to their cases, and policies that encourage prisoners to submit frivolous claims—or at least fail to discourage such filings—risk needlessly reopening old wounds.[221]

Along with promoting finality, procedural restrictions arguably enhance systemic efficiency in other ways. For instance, in certain jurisdictions, a properly filed new trial motion may serve as a basis for a litigant to move to stay any direct appeal of the judgment of conviction pending the outcome of the motion, and thus possibly avoid an unnecessary appeal.[222] Valuing finality and efficiency as assets in the world of post-trial litigation, however, does not mean they should trump competing policy objectives, particularly the accuracy of criminal adjudication.[223] Ultimately, how should states accommodate, or even synthesize, these potentially conflicting policies in their procedures?

Lessening the threat of procedural default in presenting claims of innocence based on newly discovered evidence, without significantly altering the substantive standards used in adjudicating them,[224] would appear to reach a delicate equilibrium between finality of judgments and individualized justice for

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220. *See* Thomas et al., *supra* note 11, at 294 ("If there were no way at some point to impose a sentence with finality, prisoners would endlessly search for scraps of new evidence and bombard the courts with petitions to reopen their cases.").

221. *See, e.g.*, Kreimer & Rudovsky, *supra* note 216, at 606 (noting that the Supreme Court has consistently proclaimed that "finality is essential to both the retributive and deterrent functions of the criminal law and to the interests of victims of crimes in obtaining closure"); Medwed, *supra* note 64, at 146 (noting that "alerting victims to a post-conviction motion in a case is not a task cherished by prosecutors and, accordingly, one not readily undertaken for fear of evoking painful memories"). For a discussion of post-conviction innocence cases from the perspective of a victims' rights advocate, see Dan S. Levey, *Wrongfully Convicted: A No-Win Situation for the Victim*, 52 DRAKE L. REV. 695 (2004).

222. *See, e.g.*, KY. R. CRIM. P. 10.06(2) ("After a motion for a new trial is filed and if there is an appeal pending, either party may move the appellate court for a stay of the proceedings in the appellate court, whereupon the clerk of the appellate court shall notify the clerk of the trial court that the motion has been filed."). Some state post-conviction regimes explicitly aim to consolidate collateral challenges with the direct review of a conviction. *See* Swedlow, *supra* note 4, at 360 n.20 ("It is undisputed here that California is a unitary review State, which is a State that allows prisoners to raise collateral challenges in the course of direct review of the judgment, such that all claims may be raised in a single state appeal." (citing Calderon v. Ashmus, 523 U.S. 740, 743 n.1 (1998))). Moreover, the shorter the statute of limitations period on the new trial motion, the greater the prospect that the direct appeal will not yet have been decided.

223. *See, e.g.*, Piar, *supra* note 26, at 533 ("While the state has a legitimate interest in the finality of criminal judgments, that interest cannot overcome a person's right to be permitted to challenge his conviction absent some culpable procedural default.").

224. This Article focuses on the procedural rules relating to the litigation of non-DNA claims of innocence rather than the legal and evidentiary standards used in assessing those claims in court. As a result, I will refrain from commenting much on those standards, except to note that several observers have suggested that the legal and evidentiary standards used today should perhaps be less onerous. *See generally supra* note 32 and accompanying text.

defendants. To be more precise, easing the procedural requirements surrounding entry to state courts on newly discovered evidence claims after trial while simultaneously maintaining relatively high legal and evidentiary standards in considering those claims ought to enhance the possibility that (a) actually innocent prisoners will receive evidentiary hearings in newly discovered evidence cases and (b) only valid claims of innocence eventually obtain relief.

As for the legal and evidentiary standards pertaining to new trial motions and post-conviction petitions, nearly every jurisdiction requires that the defendant prove (at a minimum) that the purported new evidence could not have been discovered with due diligence at the time of trial, is neither merely cumulative nor impeachment evidence, and would probably result in a different verdict if it were received at trial—by no means effortless hurdles to clear.[225] What is more, the defendant customarily bears the burden of proof in making these assertions,[226] which is appropriate considering the presumption of innocence has long since vanished. The enforcement of these legal and evidentiary standards should provide the requisite safeguard to prevent guilty prisoners from slipping through the opening created by removing some procedural roadblocks that confront new evidence claims.[227] That is, even if a factually guilty defendant were to have his new evidence claim assessed during a post-trial evidentiary hearing due to a relaxation of procedural barriers, he would still likely struggle to carry the burden of proving that all of the requirements for relief are met.[228] And, because the trademark brand of relief sought under most state procedures is a new trial, a further backstop is embedded within the process to ensure that few guilty prisoners are released—the subsequent trial.[229] The combination of rather mild procedural rules and stringent legal and evidentiary thresholds in the realm of newly discovered non-DNA evidence claims would also promote transparency and lend credibility to the judicial decisionmaking process.[230]

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225. *See supra* notes 82–92, 139–42 and accompanying text.

226. *See, e.g.*, Berry v. Georgia, 10 Ga. 511, 527 (1851) ("It is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy the Court . . . ."); N.Y. CRIM. PROC. LAW § 440.30(6) (McKinney 2004) (providing that, on a motion filed pursuant to Article 440, "the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion").

227. For obvious reasons, the fear that guilty prisoners may benefit is often raised as a challenge to any proposed reforms designed to enhance the ability of potentially innocent prisoners to gain their freedom. *See, e.g.*, C.C. Horton II, *Utah's DNA Actual Innocence Bill*, UTAH B.J., Dec. 2001, at 12 ("What we wanted to achieve [in creating a post-conviction DNA testing statute in Utah] was a balanced approach that would give the truly innocent every opportunity to be exonerated, while not creating a mechanism which would be abused by the guilty.").

228. *See supra* notes 225–27 and accompanying text.

229. Of course, as the Kansas Supreme Court cautioned, in certain cases the passage of time could lead to fading memories and missing prosecution witnesses, possibly resulting in acquittals for some not necessarily innocent defendants. *See* Dobbs v. State, 65 P. 658, 660 (Kan. 1901).

230. Augmenting state review of newly discovered evidence claims also affirms principles of state sovereignty by limiting the likelihood of federal habeas corpus review. *See* Muskat, *supra* note 13, at 162–65.

In this vein, I would recommend two specific procedural reforms to state regimes. For one, discarding statutes of limitations on new evidence claims would reduce the risk of procedural default caused solely by lapse of time and concomitantly increase the chance that viable innocence claims will be heard in open court. Additionally, unifying the disparate methods of presenting new evidence claims within any particular jurisdiction into a single remedy—namely, fusing the new trial motion and collateral relief options—might minimize the complexity facing prisoners, thereby decreasing the threat of procedural default, and possibly even lower the overall administrative burden on state courts by channeling newly discovered non-DNA evidence claims into one straightforward procedure.

1. Statutes of Limitations

Admittedly, prisoners in many jurisdictions may resort to at least one post-trial procedure to present newly discovered evidence of innocence that—be it a motion for a new trial or a post-conviction remedy—has no statute of limitations, a relatively benign time restriction, or an exception to the general limitations period for such claims.[231] But not every jurisdiction has such favorable rules regarding timing,[232] and the tendency of states to attach limitations periods to post-trial remedies in recent years suggests many prisoners must grapple with time bars in filing their innocence claims or will confront these stumbling blocks in the future.[233] Thus, the advantages and disadvantages of applying statutes of limitations to newly discovered evidence claims must be explored.[234]

As Oliver Wendell Holmes once asked, "[W]hat is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?"[235] In seeking to answer that question, proponents of statutes of limitations generally cite several distinct policy interests. First, time limits arguably promote finality and the right to "repose" by pinpointing a date at which the parties know that any exposure stemming from the relevant incident has

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231. 1 WILKES, *supra* note 16, § 1-12, at 51 ("There are in fact 38 states which now permit relief based on newly discovered evidence of innocence, whether in a direct or a postconviction proceeding, instituted more than three years after conviction."); *see, e.g.*, D.C. CODE ANN. § 22-4135 (2004) (allowing a person convicted of a crime to move for a new trial or have a sentence vacated on grounds of actual innocence at any time, and providing the court shall vacate the conviction if, after reviewing the new evidence, the court concludes the defendant is actually innocent by clear and convincing evidence); IND. R. POST-CONV. REM. 1(6) (imposing no statute of limitations in seeking post-conviction relief on, among other grounds, newly discovered evidence).

232. *See supra* notes 157–68, 195–202 and accompanying text.

233. *See supra* note 202 and accompanying text.

234. For discussions of the purposes and policies allegedly served by statutes of limitations, see generally Ehud Guttel & Michael T. Novick, *A New Approach to Old Cases: Reconsidering Statutes of Limitations*, 54 U. TORONTO L.J. 129 (2004); Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitations*, 28 PAC. L.J. 453 (1997).

235. Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

ceased.[236] Among the benefits of finality offered by backers of time limits are gaining peace of mind, avoiding disturbing settled expectations, and reducing uncertainty and the costs associated with uncertainty.[237] A second basic policy aim is to prevent the deterioration of evidence: to encourage the filing of claims while evidence is fresh and witnesses are available, which aids the accuracy of the fact-finding mission.[238] Third, statutes of limitations help adversaries by putting them on notice about the existence of a potential claim and, thus, assist them in mounting a defense.[239] Fourth, temporal restrictions on filing actions reinforce the cultural value of diligence by encouraging claimants to act promptly.[240] Finally, advocates often suggest that limitations periods function to decrease the toll on the court system by shrinking the aggregate volume of litigation.[241]

Nevertheless, in the context of newly discovered evidence of innocence, many of the policies favoring statutes of limitations wither in the face of critical examination. At its core, the enforcement of statutes of limitations that begin to run as of the date of conviction[242] fundamentally impedes the presentation of

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236. *See, e.g.*, Ochoa & Wistrich, *supra* note 234, at 460–71 (discussing the policy of "repose"). The concept of repose in criminal cases should be distinguished from "statutes of repose" that state legislatures frequently pass to govern a significant amount of civil tort litigation. That is, in the tort context, legislators may differentiate statutes of repose from those of limitations. *See, e.g.*, Stephen J. Werber, *The Constitutional Dimension of a National Products Liability Statute of Repose*, 40 VILL. L. REV. 985, 989 (1995) ("A statute of repose is a form of statute of limitations that runs from a point in time which disregards the date of injury . . . a true statute of limitations begins to run when a person discovers, or reasonably should have discovered, the existence of a claim through violation of a legal right whereas a statute of repose runs from a fixed date or event."). In contrast, time restrictions in the area of criminal cases are typically designated as statutes of limitations, even if they often resemble civil statutes of repose by commencing at a date certain, and the term "repose" usually refers to a right of a party (most often a potential criminal defendant) to have an end to the uncertainty of possible litigation. *See* Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. LEGAL STUD. 99, 99 n.3 (2002).

237. Ochoa & Wistrich, *supra* note 234, at 460–71.

238. *Id.* at 471–83; *see also* James Herbie DiFonzo, *In Praise of Statutes of Limitations in Sex Offense Cases*, 41 HOUS. L. REV. 1205, 1210 (2004) ("Time fades memories, witnesses die or disappear, and documentation is destroyed or irretrievably misplaced.").

239. *See* Ochoa & Wistrich, *supra* note 234, at 483–88.

240. *Id.* at 488–92.

241. *Id.* at 495–500. Ochoa and Wistrich cite two additional policies often espoused by supporters of statutes of limitations: the goal of encouraging the prompt enforcement of the law, and the need to avoid retrospective application of contemporary standards. *Id.* at 492–95.

242. In all but a few states, time limits on post-conviction relief generally start to run upon completion of direct appellate review or when the time for submitting a direct appeal has expired. *See* 1 WILKES, *supra* note 16, § 3-2, at 192–93. The starting point of the statute of limitations periods applicable to new trial motions varies; some commence at the date of verdict or sentencing, whereas others begin as of the final judgment. *See, e.g.*, ALA. R. CRIM. PROC. 24.1(b) ("A motion for a new trial must be filed no later than thirty (30) days after sentence is pronounced."); DEL. SUPER. CT. CRIM. R. 33 (providing that a "motion for a new trial based on the ground of newly discovered evidence may be made

innocence claims given that the new evidence may not even be discoverable prior to the expiration of the limitations period.[243] Resolving a dispute on a basis other than the substance of the claim leaves litigants dissatisfied and also weakens the legitimacy of the legal system, the chief purpose of which is to adjudicate controversies on their merits.[244]

In addition to inhibiting the chance for prisoners to present meritorious innocence claims at all, time restrictions fail to advance many of the policies described above. As for the notion of "repose" in criminal cases,[245] this goal is effectively turned on its head where an innocence claim is rejected solely on procedural grounds; any peace of mind or sense of certainty acquired by the decision might be undermined by the uneasy feeling that substantive justice was denied and that an innocent person may remain incarcerated while the actual culprit is at large, free to commit other crimes. Moreover, the costs saved by evading litigation through procedural default are passed on to the state prison system in the form of the expense of continuing to house and feed a potentially innocent prisoner.[246] With respect to the other justifications for statutes of limitations, those aims could still be achieved by a less severe procedural rule, one that adequately juxtaposes the desire for finality against the opportunity for prisoners to put forth their innocence claims. Specifically, in place of statutes of limitations, states should wholly rely on a more equitable method of upholding finality and spurring prisoners to proceed with haste: the doctrine of due or reasonable diligence.

To elaborate, even if states do not expressly affix time limits to newly discovered evidence claims, they typically oblige litigants to exercise due diligence in pursuing their allegations after the new evidence is discovered—as

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only before or within two years after final judgment"); FLA. R. CRIM. P. 3.590(a) (requiring that a motion for a new trial be made within ten days of rendition of the verdict). Some states have created a "discovery rule" for newly discovered evidence claims that allows the statute of limitations to commence as of the date the new evidence is or should have been discovered. *See infra* note 261 and accompanying text.

243. *See generally* Piar, *supra* note 26 (arguing that rigid time limits fail to recognize that complexities may arise in pursuing or uncovering extraordinary grounds for relief).

244. *See* Ochoa & Wistrich, *supra* note 234, at 500–01.

245. *See supra* note 236 and accompanying text.

246. The annual costs of housing a prisoner are exorbitant, both in terms of gross expenditures and the lost opportunity to allocate these funds to other endeavors. *See, e.g.*, Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1031 (2004) (mentioning that, in an address to the American Bar Association, "Justice Kennedy noted the monetary expense of incarceration, explaining that in California the cost per prison inmate per year was about $26,000"); John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL'Y 189, 191 (2005) ("The cost of a year in prison has been accurately estimated to be quite close to a year in college. The funds for prisons come mainly from discretionary state budgets and, thus, they compete with other possible draws on these budgets, such as medical and educational payments for citizens.").

was the case with *coram nobis* at common law.[247] Under the doctrine of due diligence, litigants must present their claims shortly after discovery of the evidence;[248] analogues include laches or good faith pleading requirements.[249] Whether cast in the rhetoric of laches, good faith, due diligence, or a comparable theory grounded in equity, these standards demonstrate respect for the finality of judgments by signaling to defendants that dilatory filing will not be excused.[250] At the same time, the use of these equitable benchmarks as opposed to "hard and fast" timing rules accommodates the need for individualized justice by accepting the fact-specific nature of new evidence claims; in particular, identifying the date of discovery as the trigger point of any timing analysis fails to penalize defendants for the vagaries of their post-trial investigation, an adverse byproduct of some regimes at present.[251] This reform would also alleviate the procedural due process concerns generated by current practices in jurisdictions that enforce firm post-trial time limits on claims that allege newly discovered evidence of innocence.[252]

Revamping state post-conviction regimes in this manner would not necessarily displease supporters of time limits. Innocent prisoners would still have incentives to pursue their claims conscientiously—for fear that tardy filings will face dismissal from the courts—and to defend against evidence decay.[253] Likewise, the sanctity of the trial process and the primary role of the jury in resolving

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247. *See supra* note 106 and accompanying text. Regardless of whether a jurisdiction has adopted a statute of limitations, states may forbid defendants from raising such claims if the evidence could have been found with due diligence at the time of trial. *See, e.g.*, N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2004).

248. *See supra* note 247 and accompanying text.

249. Although traditionally the doctrine of laches only extended to post-conviction proceedings in a few states, in jurisdictions where it is applicable today "laches may operate to prevent an applicant for postconviction relief from obtaining relief, even though the claim is meritorious, if the applicant slumbered on his or her rights and the delay in applying for postconviction relief has prejudiced the government." 1 WILKES, *supra* note 16, § 1-5, at 18; *see, e.g.*, Sanders v. State, 733 N.E.2d 928, 930 (Ind. 2000) (noting that, while there is no statute of limitations on the application for post-conviction relief under Rule 1 of the Indiana Rules of Post-Conviction Remedies, the state may plead laches and claim the petitioner unreasonably delayed filing the petition and that such delay prejudiced the state); Brewer v. State, 446 N.W.2d 803, 805 (Iowa 1989) (mentioning that laches is available to the state as an affirmative defense to a post-conviction relief petition).

250. *See* Piar, *supra* note 26, at 529 n.224 (observing that laches or bad faith pleading rules can be used to deal with the problem of petitioners being deliberately dilatory).

251. As noted above, some states start their statutes of limitations for post-conviction relief claims at, for instance, the date of final judgment. *See supra* note 242 and accompanying text. States that have such rules and lack "discovery" rules for newly discovered evidence claims, *see id.*, risk potentially harming defendants who are unable, whether by virtue of insufficient funds and/or bad luck, to find the evidence within the time frame.

252. *See* Thomas et al., *supra* note 11, at 301 ("Our argument is, ultimately, a simple one. Both a cost-benefit Mathews calculus and principles of fairness conclude that it is unjust to reject powerful claims of innocence because of rules about when those claims can be made.").

253. It should be noted that defendants naturally would have no incentive to proceed rapidly for fear that the *prosecution's* evidence might be lost.

questions of factual guilt or innocence, oft-mentioned justifications for imposing time limits specifically on new evidence claims,[254] would remain intact considering the relief sought is almost universally a new trial.[255] If a new trial is granted in a particular case, then juries and trial judges would have another chance, this time equipped with the newfound evidence, to determine whether a conviction is deserved. So as to guard against the possibility that the government will be disadvantaged, i.e., cases where its own evidence is no longer available at the time a defendant discovers and wishes to present new evidence,[256] courts could consider any undue prejudice to the prosecution in deciding whether to order a new trial.

To be sure, supplanting statutes of limitations altogether with due diligence-type standards in the area of innocence claims based on newly discovered non-DNA evidence would insert some procedural uncertainty into the post-conviction mix. Prosecutors and defendants would not know precisely when a particular claim might be rejected as untimely, and forcing courts to engage in a facts and circumstances assessment of due diligence for each case would strain judicial resources and damage finality to a degree.[257] On the whole, courts might also obtain additional filings in the absence of statutes of limitations given that a certain number of prisoners would not be dissuaded from submitting their claims through threat of an automatic procedural bar.[258]

It is my contention, however, that any modest rise in inefficiency spawned by embracing the due diligence standard is appropriate to bear in exchange for reaping the rewards of ensuring that viable claims of innocence receive substantive evaluation. Ridding state post-conviction regimes of unforgiving time limits on newly discovered evidence claims not only accrues to the benefit of potentially innocent defendants, but also reflects well upon the criminal justice system itself, sending a message that courts are willing and able to look anew at legitimate claims of innocence and not hide behind a veil of

254. *See, e.g.*, CONNORS ET AL., *supra* note 2, at 28–29 ("The reason for limiting the time to file appeals based on new evidence is to ensure the integrity of the trial process and jury verdicts.").

255. *See generally supra* notes 71–215 and accompanying text.

256. *See supra* note 119 and accompanying text.

257. In 1999, the Tennessee Supreme Court cited finality concerns in upholding the one-year statute of limitations period for newly discovered evidence claims filed under the state post-conviction statute and determining that the period begins to run as of the date of judgment. State v. Mixon, 983 S.W.2d 661, 670–71 (Tenn. 1999). Moreover, the court noted that, whereas in the past it was appropriate for due diligence to comprise the time limit on the writ of error *coram nobis*, "criminal procedure has drastically changed in the past thirty years" and defendants have a plethora of other methods for raising their claims. *Id*.

258. Nonetheless, abandoning strict time limits could partially diminish the amount of frivolous motions predicated on newly discovered evidence by removing the inducement for prisoners to file a motion—regardless of the actual content of the evidentiary claim—prior to the expiration of the limitations period for fear of otherwise being barred.

procedural default.[259] Furthermore, to offset the uncertainty created by the departure of statutory time limits, state courts would likely establish approximate, de facto guidelines as to how long litigants have after discovery of new evidence to file their claims.[260] The implementation of somewhat flexible timing standards of this nature, which would start to run at the date of discovery and be determined judicially on a case-by-case basis, would advance the airing of bona fide innocence claims yet still largely sustain the systemic goal of finality. Short of this reform, simply pegging the statute of limitations period for new evidence claims to the time of discovery or the time when the evidence should have been discovered as opposed to the date of conviction—essentially tolling the time period during the search for new evidence—would be a step in the right direction.[261]

2. Simplifying Post-Trial Procedures

Along with abandoning rigid time limits, a second proposed reform geared toward decreasing procedural default in newly discovered non-DNA evidence cases relates to harmonizing—in effect, simplifying—the procedures through which prisoners must raise their claims. As described in Part II of this Article, newly discovered evidence of innocence may generally be presented

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259. *See* ABA 1978 STANDARDS, *supra* note 138, 22-2.4(a) ("A specific time period as a statute of limitations to bar post-conviction review of criminal convictions is unsound."). As Ochoa and Wistrich point out:

> [Permitting] litigants their "day in court" promotes the dignitary value of the legal process. It is frustrating and demeaning not to be allowed to be heard when a person believes that he or she possesses a valid complaint. Creating such feelings of frustration and powerlessness causes disaffection with the legal system, and possibly with the political system as well.

Ochoa & Wistrich, *supra* note 234, at 501–02.

260. For instance, in New York, which has no statute of limitations on newly discovered evidence claims, the courts have given litigants an indication of what constitutes a lack of due diligence through decisions suggesting that filing more than one year after discovering the evidence may constitute a failure to exercise due diligence. *See, e.g.*, People v. Stuart, 509 N.Y.S.2d 824, 829 (App. Div. 1986).

261. A number of states have endorsed this option. *See, e.g.*, 15 ME. REV. STAT. ANN. § 2128(5) (West 2005) ("A one-year period of limitation applies to initiating a petition for post-conviction review seeking relief from a criminal judgment . . . . The limitation period runs from the latest of the following: . . . . C. The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."); 42 PA. CONS. STAT. ANN. § 9545(b)(2) (West 2004) (requiring a request for post-conviction relief based on new evidence, among other grounds, to be "filed within 60 days of the date the claim could have been presented"); S.C. CODE ANN. § 17-27-45(C) (2004) (mandating that post-conviction applications based on newly discovered evidence be filed within one year of actual discovery or from the date when such facts should have been discovered through reasonable diligence). North Dakota has a hybrid new trial motion time limitation, requiring that the motion be filed within thirty days after the discovery of the facts *and* within three years after the verdict or finding of guilt. N.D. R. CRIM. P. 33(b); *see also* 22 OKLA. STAT. ANN. § 953 (West 2005) ("A motion for a new trial on the ground of newly discovered evidence may be made within three (3) months after such evidence is discovered but no such motion may be filed more than one (1) year after judgment is rendered . . . ."); *supra* note 199 and accompanying text.

through either a direct and/or collateral remedy.[262] While the presence of multiple remedies at the state court level may seem desirable or at least better than the alternatives, a single option or no remedy at all, the interrelationship between these devices within any given jurisdiction can be perplexing. Consider the situation in Tennessee.

Tennessee offers two mechanisms for presenting newly discovered, nonscientific evidence of innocence, each of which has a statute of limitations. Tennessee Rule of Criminal Procedure 33(b) allows defendants to move for a new trial on the basis of newly discovered evidence within thirty days of judgment,[263] after which a defendant's sole outlet may lie with the Tennessee Post-Conviction Relief Act.[264] Pursuant to that Act, defendants may seek collateral relief due to new evidence within one year of judgment.[265] The only exceptions to this deadline arise in cases involving scientific proof of innocence[266] or capital matters concerning the discovery of exculpatory evidence.[267]

Viewed in isolation, these procedures would appear to interact quite seamlessly—a defendant unable to meet the new trial motion deadline can conceivably take advantage of the post-conviction remedy. Yet Tennessee courts have added a mysterious judicial gloss to the superficial symmetry of these procedures by utilizing *different* legal standards for each of the remedies.[268] To obtain a new trial under the post-conviction relief statute, a defendant must show that she is without fault in neglecting to put forth the purported new evidence at the original trial and that such evidence "may have resulted" in a different outcome had it been presented at the earlier proceeding.[269] This language, "may have resulted," conflicts with the standard applicable to Rule 33 new trial motions in Tennessee, where the defendant must prove "that the evidence will likely change the result of the trial."[270] This dissimilar treatment between collateral petitions and new trial motions, which Steven Mulroy terms "somewhat incongruous,"[271] could produce unwanted filing incentives for defendants, namely, inducements to bypass the thirty-day limit for a new trial motion to profit from a more lenient legal standard and submit a post-conviction petition before the one-year period expires.[272] The availability of "incongruous" procedures in the sphere of newly

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262. *See generally supra* notes 71–215 and accompanying text.

263. TENN. R. CRIM. P. 33(b).

264. TENN. CODE ANN. § 40-30-102 (2004).

265. *Id.* The Tennessee courts have strictly construed the one-year statute of limitations. *See, e.g.*, State v. Mixon, 983 S.W.2d 661, 670–71 (Tenn. 1999).

266. TENN. CODE ANN. § 40-30-102(b)(2) (2004); Piar, *supra* note 26, at 519 (mentioning the exception from the one-year deadline in instances of actual innocence based on scientific testing).

267. *See* Mulroy, *supra* note 7, at 6 (noting that the Tennessee Supreme Court has ruled that the deadline can be extended indefinitely in regard to capital convictions where the late discovery of exculpatory evidence was not the defendant's fault).

268. *Id.* at 10–19.

269. *Id.* at 13–16.

270. TENN. R. CRIM. P. 33. According to Mulroy, this equates to a probability or preponderance standard commonly found in other states. Mulroy, *supra* note 7, at 16.

271. Mulroy, *supra* note 7, at 16.

272. *Id.* at 16–18.

discovered evidence claims also enhances the risk of divergent outcomes for factually comparable claims depending on the specific procedure used by a litigant, a danger that undermines the legitimacy of the state court system.[273]

Not to overstate the implications of Tennessee's post-trial regime, but the unevenness of its precise procedures may cause problems beyond creating detrimental filing incentives and/or inconsistent results: the existence of nonintegrated, possibly contradictory, and likely confusing remedies for newly discovered evidence claims within a particular state heightens the risk of procedural default. Despite the fact that many states offer some form of a right to counsel for indigent prisoners in state post-conviction proceedings, newly discovered evidence claims are often filed by prisoners pro se,[274] adding to the chance of excessive procedural default in jurisdictions with multiple—and rather baffling—post-trial remedies.

Accordingly, states might consider taking a unitary approach to newly discovered non-DNA evidence claims, constructing a single remedy that fits squarely within neither the new trial motion nor the *coram nobis* camp. New York provides just such a procedure.[275] Historically, New York recognized a morass of post-trial remedies, among them, common law *coram nobis* and post-judgment motions for a new trial on the basis of newly discovered evidence.[276] Article 440 of the Criminal Procedure Law was enacted in 1970, in the view of one commentator, "collectively to embrace all extant non-appellate post-judgment remedies and

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273. Assuming that the truth-seeking function of the criminal justice system is indeed crucial to its legitimacy, *see supra* note 217 and accompanying text, then procedures that might yield different results for factually similar claims may be problematic.

274. There is no constitutional right to counsel for collateral, post-conviction proceedings. *See* Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1393 (1999) ("Hornbook constitutional law tells us that the state has no obligation to provide counsel to a defendant beyond his first appeal as of right. The Supreme Court has rejected arguments that either the Due Process Clause or the Equal Protection Clause require that the right to counsel apply to collateral, post-conviction proceedings."); Jonathan G. Neal, Note, *"Critical Stage": Extending the Right to Counsel to the Motion for New Trial Phase*, 45 WM. & MARY L. REV. 783 (2003) (contending that a right to counsel should apply to motions for a new trial). Nevertheless, many states have passed legislation creating such a right. *See* ALA. CODE § 15-12-23 (2004) (providing for appointment and payment of counsel to represent indigent defendants applying for state post-conviction relief); N.J. STAT. ANN. § 2A:158A-5 (West 2004) (prescribing that public defenders may be appointed to represent defendants in post-conviction proceedings); 1 WILKES, *supra* note 16, § 3-2, at 196 (noting that thirty-one states "generally guarantee, whether by statute, rule of court, or caselaw, the right to appointed counsel to indigents applying for the state's principal postconviction remedy," and observing that only seven states "refuse to provide, as a matter of right, free counsel to any and all indigent persons applying for the state's principal postconviction remedy"). The right to counsel in state post-conviction proceedings, however, is often discretionary with the court. *See, e.g.*, State v. Parmar, 544 N.W.2d 102, 105 (Neb. 1996) (noting that the district court has discretion to appoint counsel in a post-conviction relief matter, and a failure to appoint counsel is not error absent abuse of discretion).

275. N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2004).

276. *See* Peter Preiser, *Practice Commentaries*, N.Y. CRIM. PROC. LAW § 440.10, at 246–49 (McKinney 2004).

motions to challenge the validity of a judgment of conviction."[277] Section 440.10(1)(g) of that Article addressed the issue of newly discovered evidence and selected a solitary remedy for all such claims:

> 1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . . (g) [n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence[.][278]

Although the New York State Legislature amended Article 440 in 1994 to incorporate a specific provision governing requests for post-conviction DNA testing,[279] and in the process became the first state to enact such a statute,[280] section 440.10(1)(g) continues to steer the resolution of newly discovered non-DNA evidence claims in the state. By harmonizing new trial motion and collateral petition relief, section 440.10(1)(g) provides a single procedure whose foremost virtue, besides its relative clarity, is the omission of any statute of limitations on newly discovered evidence claims and, instead, espousal of the due diligence standard. Undoubtedly, the New York post-conviction regime is not without its flaws, as reflected by the account of the Stephen Schulz case in Part I,[281] but by

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277. *Id.* at 247–48 (attributing this description to Judge Denzer, the principal draftsperson of the Criminal Procedure Law and author of the original Practice Commentary); *see also* YACKLE, *supra* note 70, § 10, at 12 (Supp. 2004) ("Under New York law, ancient common law writ of coram nobis has been largely superseded by the motion to vacate a judgment, and remains available as remedy only in those situations not explicitly covered by N.Y. McKinney's CPL § 440.10 which governs motions to vacate."). State habeas corpus in New York is not covered by Article 440 of the Criminal Procedure Law, but rather by a provision of the Civil Practice Law and Rules. *See* N.Y. C.P.L.R. art. 70 (McKinney 2004).

278. N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2004). If the purported newly discovered evidence is presented to the trial judge during the period between the jury verdict and sentencing, the defendant technically must submit the claim pursuant to a different yet substantively comparable provision. *See id.* § 330.30.

279. *Id.* § 440.30(1-a).

280. *See* INNOCENCE PROJECT, NYSA § 440.30, NY COURT OF CLAIMS ACT SEC.8-B, HB BILL A07003, http://www.innocenceproject.org/legislation/display_description.php?id=a09250&sort=jurisdiction&filterStatus=all&filterJurisdiction=New%20York&filterCategory=all (last visited Aug. 19, 2005).

281. *See* YACKLE, *supra* note 70, § 11, at 50–51 (criticizing certain provisions of section 440.10(2) that provide for the mandatory denial of requests for relief, which thereby "deprives the courts of New York of one last opportunity to reach the merits of federal claims and correct errors that may otherwise open the judgment to attack in federal habeas corpus"); *id.* § 11, at 60–61 (observing that "[t]he effectiveness of New York's scheme . . . is difficult to measure" and highlighting many of the advantages and disadvantages of the regime); *supra* notes 34–60 and accompanying text.

offering a unitary approach to post-trial claims of innocence based on newly discovered evidence that snubs harsh time limits, it is a model worthy of consideration and even emulation by other states.

Not incidentally, simplifying a jurisdiction's newly discovered evidence remedies could lighten the overall administrative load borne by state courts. That is, in lieu of multiple prospective filing options, a prisoner might be limited to a single remedy—and, at that, a remedy somewhat impervious to exploitation through repeated use. As it stands, some states currently ban the submission of second or "successive" claims under a particular post-conviction remedy,[282] or at least impose additional filing burdens to deter inmates wishing to do so.[283] With the availability of only one potential remedial measure that is not subject to rigid time limits, prisoners would be prompted to consider carefully the optimal moment to file a newly discovered evidence claim, and make a decision unencumbered by artificial time constraints. Even so, to ensure that inmates with legitimate innocence claims are not harmed by this streamlined approach, states that adopt a single remedy should refrain from barring successive petitions outright; rather, prisoners should be allowed to file additional claims in certain cases, e.g., upon finding compelling "new" newly discovered evidence of innocence after a previous application has been rejected as insufficient.

B. Full and Fair Hearings Before Unbiased Judges

Throughout this Article, I have repeatedly mentioned that many new trial motions and post-conviction petitions premised on newly discovered non-DNA evidence are directed to the trial judge who handled the case originally.[284] As part of these references, I have intimated my displeasure with such arrangements, speculating that it is only human nature for people to struggle when asked to reexamine their own work.[285] Nonetheless, in the post-conviction and myriad other areas, the criminal justice system condones judges engaging in this type of analysis. For instance, neither codes of judicial conduct nor appellate cases generally prohibit judges from ruling on the validity of search warrants that they coincidentally had authorized, or ruling on motions to suppress evidence seized pursuant to those warrants.[286] Implicit and at times explicit in this system, then, is the idea that judges can put aside any potential biases stemming from their role in

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282. Along with limiting the time frame in which defendants may file their post-conviction petitions, some states have opted to curtail the number of petitions that any individual litigant may file; Arkansas, Maryland, and Missouri, for instance, have each amended their principal post-conviction remedy so as to disallow the filing of any more than one application for relief. 1 WILKES, *supra* note 16, § 3-2, at 194.

283. *See, e.g.*, IND. R. POST-CONV. REM. 1(12)(a) ("A petitioner may request a second, or successive, Petition for Post-Conviction Relief by completing a properly and legibly completed Successive Post-Conviction Relief Rule 1 Petition Form in substantial compliance with the form appended to this Rule. Both the Successive Post-Conviction Relief Rule 1 Petition Form and the proposed successive petition for post-conviction relief shall be sent to the Clerk of the Indiana Supreme Court, Indiana Court of Appeals, and Tax Court.").

284. *See supra* notes 169–77, 203–08 and accompanying text.

285. *See supra* notes 173–74 and accompanying text.

286. *See* Abramson, *supra* note 177, at 544 n.4.

the original outcome of a case and maintain impartiality.[287] But recent scholarship has shed light on a topic previously shrouded in darkness: the prevalence of cognitive biases that might influence judicial decisionmaking.[288]

1. Selected Aspects of Behavioral Decisionmaking Theory

Scholars have studied an array of cognitive biases that may apply to the manner in which most state courts currently resolve newly discovered non-DNA evidence claims.[289] Even if a judge has no objective stake in the outcome of a case,[290] as Dan Simon notes, she always owns a "stake of professionalism" in the matter, "a professional interest in the soundness and effectiveness of the decision rendered."[291] This professional interest in a judicial decision can manifest itself in

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287. In the words of William Blackstone, "the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends on that presumption and idea." WILLIAM BLACKSTONE, 3 COMMENTARIES *361. Some courts have acknowledged the inherent potential for bias or the perception thereof in situations where judges are asked, through a habeas corpus petition, to review cases in which they presided over the state court proceedings. *See, e.g.*, Clemmons v. Wolfe, 377 F.3d 322, 329 (3d Cir. 2004) ("[We] now . . . require that each federal district court judge in this circuit recuse himself or herself from participating in a 28 U.S.C. § 2254 habeas corpus petition of a defendant raising any issue concerning the trial or conviction over which that judge presided in his or her former capacity as a state court judge.").

288. *See, e.g.*, Bassett, *supra* note 176, at 1222 ("Recent psychological studies suggest that unconscious bias is far more prevalent than originally believed."); *see also* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2002) (analyzing the impact of cognitive biases on the judicial decisionmaking process); Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 27–29 (1998) (describing the study of "judicial behaviorism" as a movement that explores "the relationship between judges' personal predispositions and the decisions they make. This approach is based on the claim that judicial decisions are affected to a large degree by extra-legal or quasi-legal factors, namely, the judge's general attitudes, values, and other socially determined behavioral traits").

289. In a series of lectures that were later published in a book, Benjamin Cardozo attempted to describe the factors and impulses that enter into judicial decisionmaking, mentioning several modes of analysis to which judges resort in resolving disputes, including comparison to precedent, references to history and customs, and sociological concerns, yet observing that "[m]ore subtle are the forces so far beneath the surface that they cannot reasonably be classified as other than subconscious. It is often through these subconscious forces that judges are kept consistent with themselves, and inconsistent with one another." *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 11–12 (1921). Cardozo also noted that:

> I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed . . . . The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.

Id. at 167–68.

290. A financial interest is an example of an objective stake in a case and historically served as a basis for judicial disqualification. *See supra* note 177 and accompanying text.

291. Simon, *supra* note 288, at 40–41.

a variety of ways for the individual jurist, including an aversion to the prospect of reversal on appeal.[292] The desire to preserve the status of a decision in the face of appellate review may reflect fears about being viewed as incompetent and/or unworthy of advancement within the judicial hierarchy.[293]

A number of other potential biases may surface when judges evaluate the merits of post-conviction innocence claims relating to trials over which they previously presided. Behavioral psychologists have chronicled, for example, how people often act in ways that allow them to preserve a "positive self-image."[294] Specifically, individuals may be hesitant to acquire information that undermines the affirmative image they carry of themselves and, when confronted with information that could negate that positive self-identification, people are less likely to deem it relevant or may simply interpret it away.[295] Intertwined with the concept of preserving a positive self-image is the cognitive heuristic known as the "egocentric bias," a term that describes the proclivity of individuals to develop a positive—and perhaps over-inflated—vision of their own abilities.[296] With regard to judges, most members of the bench may perceive themselves as fair individuals who, in the main, render or oversee correct decisions. The potential effect of the egocentric bias on judges emerged in a recent survey of 167 federal magistrate judges that asked the respondents to gauge their individual reversal rates relative to their co-equals in the study;[297] nearly 90% of the judges believed they had lower reversal rates than at least half of their colleagues.[298]

Researchers have also identified a phenomenon known as the "status quo bias."[299] Proponents of this theory contend that people often have difficulty

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292. *See, e.g.*, *id.* at 13 n.68.

293. *See, e.g.*, Mazur, *supra* note 15, at 232 n.274 ("There is a natural disinclination to admit wrong, [because] people are concerned they will . . . diminish their stature . . . .").

294. *See* Manuel Utset, *A Theory of Self-Control Problems and Incomplete Contracting: The Case of Shareholder Contracts*, 2003 UTAH L. REV. 1329, 1368 n.143 ("A positive self-image is something that individuals value, and self-confidence and optimism play an important role in preserving and bolstering that self-image." (citing Roy F. Baumeister, *The Self*, *in* 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 680, 688–92 (Daniel T. Gilbert et al. eds., 4th ed. 1998))).

295. *See* Baumeister, *supra* note 294, at 690 ("Given the powerful motivation to think well of oneself, it is necessary to ask how people manage to maintain such self-flattering views in the face of mixed and contrary evidence."); Utset, *supra* note 294, at 1368 n.144 ("Economic actors may engage in such 'strategic ignorance' aimed at preserving their current levels of self-confidence.").

296. *See* Guthrie et al., *supra* note 288, at 784; Mazur, *supra* note 15, at 231–32.

297 . *See* Guthrie et al., *supra* note 288, at 784.

298. *Id.* at 814.

299. *See, e.g.*, Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 197–98 (1991) ("One implication of loss aversion is that individuals have a strong tendency to remain at the status quo, because the disadvantages of leaving it loom larger than advantages."); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625 (1998) (mentioning empirical findings indicating "that people systematically favor maintaining a state of affairs that they perceive as being the status quo rather than switching to an alternative state, all else being equal"). As Korobkin notes, the term "status quo bias" is often used

deviating from a prior decision because that decision has become the reference point to which they compare and contrast newfound information.[300] In effect, they ascribe significant and likely undue weight to that reference point and, in order to compel the decisionmaker to spurn that earlier decision and embrace a different solution, much more information ("evidence") is required than had that previous decision never been made.[301] To put it more bluntly, even if the information objectively suggests that Option B is the best route, the decisionmaker will be less likely to choose that option if she had selected Option A before than if she had never previously made a determination in the matter at all.[302]

The status quo bias has widespread implications for judicial decisionmaking—and not solely for judges asked to encounter their decision a second time. Studies suggest that, when given a chance to revisit a decision, a person may be predisposed toward the outcome of the earlier decision in the matter regardless of whether she was responsible for that decision in the first instance, a concept that has been referred to as "conformity effects."[303] Pursuant to this theory, individuals are profoundly influenced by others and may lean toward acting in conformity with those whom they admire.[304] In particular, people are often swayed by the decisions of others deemed to have access to greater—and possibly "better"—information or who are thought to enjoy such access.[305] Research also indicates that conformity effects are amplified in situations where

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interchangeably with a phenomenon known as the "endowment effect." *Id.* at 626 n.58; *cf.* Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LIT. 11, 14 (1998) (treating the endowment effect and the status quo bias as related yet distinguishable ideas, and describing the former as "[o]nce a person comes to possess a good, she immediately values it more than before she possessed it").

300. *See, e.g.*, Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice, in* CHOICES, VALUES, AND FRAMES 146 (Daniel Kahneman & Amos Tversky eds., 2000) (commenting that "a decision maker who is indifferent between *x* and *y* from *t* will prefer *x* over *y* from *x*, and *y* over *x* from *y*," and crediting William Samuelson and Richard Zeckhauser with introducing "the term 'status quo bias' for this effect of reference position").

301. *See supra* notes 299–300 and accompanying text.

302. A study involving health plan options available to employees at Harvard University is illustrative. Samuelson and Zeckhauser discerned that, after the school added a number of new health care options, a larger proportion of faculty members who had been hired prior to the creation of the new options retained their former plans and rejected the new options in comparison with faculty members hired after the availability of the new options. *See* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 26–31 (1988); *see also* Colin F. Camerer, *Prospect Theory in the Wild: Evidence from the Field, in* CHOICES, VALUES, AND FRAMES, *supra* note 300, at 294–95 (describing the Harvard health plan study and other empirical data related to the status quo bias).

303. *See, e.g.*, Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 GEO. IMMIGR. L.J. 35, 54–56 (2004).

304. *Id.* at 56.

305. *Id.*

the decisionmakers are colleagues or self-identify as members of the same group.[306]

2. Implications of Behavioral Decisionmaking Theory for New Evidence Claims

The above survey of behavioral decisionmaking theory, albeit brief,[307] has significance with respect to how judges approach post-trial claims of innocence predicated on newly discovered evidence in cases over which they presided originally. To begin with, professional interests in maintaining the result of the initial trial may affect how judges react to the new trial motion or post-conviction petition when it comes across the transom; judges may fear having "gotten it wrong" and feel cowed by the ramifications of acknowledging that error publicly. The result sought—a new trial—could further expose a judge's evidentiary rulings and other decisions at the original trial to scrutiny from both the public and colleagues within the judiciary.

Similarly, a particular judge's positive self-image could be threatened by the presentation of newly discovered evidence that, in theory, signals the possibility an innocent person was convicted at a trial held on that judge's watch and during which she issued evidentiary and legal rulings that bore upon the result.[308] In the face of this potential threat to one's self-image, a judge might unconsciously dismiss the alleged newfound information as irrelevant or otherwise characterize it as not outcome-determinative. Indeed, the authors of the aforementioned study of federal magistrate judges expressed grave concerns about the impact of egocentric biases in criminal cases, suggesting that judges may fail to set aside judgments as often as they should in cases they originally handled.[309]

Although the status quo bias has been explored most often in the area of economic choices, the concept inevitably surfaces in post-conviction litigation involving newly discovered evidence.[310] The fact that there has already been a

306. *Id.*

307. Indeed, an exhaustive study of the literature on behavioral decisionmaking theory and behavioral law and economics far exceeds the scope of this Article. For further information about the field, see generally Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Rabin, *supra* note 299.

308. *See* Mazur, *supra* note 15, at 232 ("The trial judge is psychologically invested in the justness of the trial result; for instance, in a criminal case the trial judge likely denied a motion to dismiss and a motion for a directed verdict based on the insufficiency of the evidence.").

309. Guthrie et al., *supra* note 288, at 815 (noting that these biases "might lead the judge to react too skeptically to the suggestion that the trial over which he presided produced an erroneous result").

310. Not only has this bias typically been observed in an economic setting, but much of the empirical work has been done in the area of consumer goods. *See* Korobkin, *supra* note 299, at 629. Nevertheless, the status quo bias pervades many aspects of everyday life. For instance, the National Football League's instant replay system exemplifies this bias. Shane Frederick, *Automated Choice Heuristics*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 555 (Thomas Gilovich et al. eds., 2002) ("When the 'on-field' call is challenged, it is reviewed by the replay official, who has access to multiple angles and slow motion photography. However, despite these advantages, the on-field call is

verdict—guilty—becomes the reference point to which a judge may look in assessing the new evidence; it may require much greater evidence to prod the judge to move away from that reference point than had no verdict ever been rendered and, say, the judge were merely evaluating a motion to dismiss at the close of the prosecution's case at trial. Even more, the possible effect of the status quo bias is magnified by the convention of assigning newly discovered evidence claims to the actual judge who handled the case at trial. Not only has "guilty" become the reference point, but the judge witnessed the process through which guilt was determined, presumably making her more deeply attached to the status quo than a judge lacking any prior connection to the case.[311]

What this discussion of behavioral decisionmaking theory means for state post-conviction regimes is that there are legitimate and compelling reasons for rethinking the propriety of directing newly discovered evidence claims of innocence to the original trial judge. Frankly, allocating these claims to different judges is a "second-best" solution. At some level, efficiency considerations militate in favor of letting judges entertain such motions in cases they handled at trial; they observed the trial witnesses' testimony and demeanor, received the evidence, and theoretically stand in the best position to assess whether the purported new evidence warrants a new trial.[312] Moreover, the concept of conformity effects raises doubt as to whether assigning newly discovered evidence claims to a different judge will truly improve the likelihood of a correct decision. That is, the new judge may be prone toward acting in conformity with the original trial judge—a colleague on the bench who had extensive access to the factual background of the case during the initial proceedings.[313] Yet the justifications for permitting the original trial judge to receive newly discovered non-DNA evidence claims rest on flawed assumptions.[314] As indicated above, studies allude to the possibility that biases infect the decisionmaking processes of many judges, biases that may be accentuated when a judge reviews a case in which she previously

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given preference in any 'close calls'; the replay official is instructed to defer to the on-field call unless he has 'indisputable visual evidence.' Although there are reasons to minimize challenges of on-field calls (such as maintaining the flow of the game), once a ruling has been challenged and is going to be reviewed anyway, it makes little sense to give more weight to the first call when the second can be made with better information."). One's assessment of a particular situation may also depend largely on that individual's personal experiences instead of any objective, absolute evaluation of the situation. *See, e.g.*, Rabin, *supra* note 299, at 13 (mentioning the common occurrence in which "the same temperature that feels cold when we are adapted to hot temperatures may appear hot when we are adapted to cold temperatures").

311. The status quo bias likely has profound implications for a trial judge looking at a previous decision anew. Even so, a judge may be more willing to excuse an incorrect trial outcome when the challenge is based on newly discovered evidence rather than other grounds in the sense that a judge could always rationalize the previous decision as having been based on incomplete information.

312. The question of whether the original trial judge (or any trial judge for that matter) is genuinely in the best position to assess a newly discovered evidence claim may hinge on whether that judge orders an evidentiary hearing on the claim. *See infra* notes 336–72 and accompanying text.

313. *See supra* notes 303–06 and accompanying text.

314. *See supra* notes 74, 110 and accompanying text.

played a role.[315] The presence of potential biases undercuts the notion that the original trial judge can view newly discovered evidence claims with the requisite detachment; as the Third Circuit recently proclaimed, "[T]he passage of time cannot overcome a reasonable person's doubts about a judge's impartiality in judging his or her own past works."[316]

Furthermore, sending post-trial innocence claims to a judge different from the one who heard the case originally may serve to mitigate any unwelcome political pressures on the resolution of those claims in jurisdictions where judges are elected by the public.[317] In many states, judges ascend to the bench by dint of popular elections,[318] and for those judges, political considerations may inexorably (and regrettably) enter into the post-conviction decisionmaking equation.[319] The impact of political pressure on judges may be particularly acute when such pressure is "direct": where the judge who handled the trial initially must address the case once again in the form of a post-conviction innocence claim and thus

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315. *See supra* notes 288–302 and accompanying text.

316. Clemmons v. Wolfe, 377 F.3d 322, 327–28 (3d Cir. 2004). The fact that a judge in certain circumstances may have a limited recollection of a case—and thus be "emotionally removed"—might minimize any potential bias and allow her to offer a relatively fresh perspective. *See* Muskat, *supra* note 13, at 169.

317. *See generally* Mazur, *supra* note 15, at 233 (noting the effect of electoral pressure on judges in evaluating post-trial motions); Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791 (2004) (discussing the pros and cons of electing judges).

318. *See, e.g.*, Michael R. Dimino, *Pay No Attention to that Man behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 310 (2003) ("At present, a clear majority of states—thirty-nine—elect some or all of their judges."); *see also* Clive S. Thomas et al., *Interest Groups and State Court Elections: A New Era and Its Challenges*, *in* JUDICIAL POLITICS: READINGS FROM JUDICATURE 53, 53 (Elliot E. Slotnick ed., 3d ed. 2005) (stating that "judges seeking election, reelection, or reconfirmation are subject to codes of conduct that restrict what they can say in campaigns, but there are few restrictions on interest groups"); Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, N.Y. TIMES, Oct. 24, 2004, at 1 (describing the recent rise in campaign spending and television advertisements, fueled by interest groups, in judicial races).

319. *See* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999) (comparing the relative willingness of partisan-elected appellate judges with other judges to uphold capital sentences); Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1826 (2000) ("Once in office, any vote that might be perceived as 'soft on crime' or as delaying executions—no matter how clear the law requiring it—carries with it the risk that the judge will be voted out of office in the next election."); Richard R.W. Brooks & Stephen Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 638 (2002) (noting that defendants in Chicago from 1870–1930 were 15% more likely to be sentenced to death in a judicial election year); *cf.* Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 VA. L. REV. 239, 288–97 (2003) (suggesting that political considerations did not surface as significant factors in an empirical study of clemency decisions).

experience renewed public inspection about the case within her district.[320] As a result, in states where judges are elected rather than appointed,[321] sending a post-trial motion to a judge outside the district—or at least a different judge within the district—might obviate to some extent any direct political demands on the judge to affirm the conviction.[322]

Given the possibility of cognitive biases and political pressures impairing judicial decisionmaking, as well as the high stakes involved in resolving innocence claims, states should contemplate allowing defendants to file post-trial motions based on newly discovered evidence with a judge other than the one who conducted the original trial. This prompts the crucial question of who should properly field those motions, and two alternatives seem most promising upon reflection. First, newly discovered evidence claims could be randomly assigned to another trial judge in the county or district of conviction.[323] Due to conformity effects, a new judge may be loathe to order a new trial in a case over which a peer within the same jurisdiction presided,[324] but she likely is less susceptible to many of the biases described above than the original trial judge. In particular, she would own a limited professional stake in the outcome of the newly discovered evidence claim considering she had no hand in the prior proceeding. Likewise, any positive self-image to which she may feel obliged to cling would remain unaffected by her decision on the post-trial motion, and the status quo bias would probably be less pronounced than if the original trial judge were handling the claim. Another possible virtue of this proposal is that it preserves a modicum of efficiency; the office and even the attorneys who prosecuted the case in the specific county could stay involved in the post-trial matter if that happens to be the custom within the jurisdiction.[325]

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320. *See* Mazur, *supra* note 15, at 233.

321. A thorough analysis of the relative merits of electing versus appointing judges surpasses the scope of this Article. For a more detailed analysis of the processes surrounding how judges rise to the bench, see Dimino, *supra* note 318; Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L.J. 95 (2003); Zeidman, *supra* note 317.

322. *See* James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000) (summarizing the chief findings from a study on errors and the death penalty); Mazur, *supra* note 15, at 233–34 ("Using a judge from a separate judicial district [in North Carolina] will remove the 'direct electoral pressure' that Liebman's study revealed as a 'root cause' of increased judicial error rates.").

323. *See, e.g.*, 13 VT. STAT. ANN. § 7131 (2004) (compelling filing in the superior court in the county of sentencing but banning the original trial judge from hearing the petition).

324. *See supra* notes 303–06, 313 and accompanying text. The term "structural bias" is occasionally used to characterize the potential bias exhibited by individuals in favor of colleagues within an organization or group, such as how directors make decisions affecting other members of a corporate board of directors. *See, e.g.*, Biondi v. Scrushy, 820 A.2d 1148, 1164 n.40 (Del. Ch. 2003) (describing "the danger that the difficult-to-detect influence of fellow-feeling among directors (*i.e.*, so-called 'structural bias')" may impose on special litigation committees within corporations).

325. The involvement of the original trial prosecutors in post-conviction innocence cases, however, raises a number of other issues in its own right. *See* Bruce A. Green & Fred C. Zacharias, *Prosecutor Neutrality*, 2004 WIS. L. REV. 837 (describing the

Second, as is the practice for many habeas corpus petitions, newly discovered evidence claims could be filed in the county of confinement as opposed to the county of conviction.[326] The advantages of this change include not merely removing the original trial judge from any adjudicatory role in the post-trial proceeding, but also blunting any conformity effects that may derive from the assignment of the motion to a judicial cohort within the same county or district.[327] As a practical matter, though, it may be burdensome to compel prosecutors from the county of conviction to prepare for and attend evidentiary hearings in what are often far-flung locales and a likely alternative measure, allocating the case to prosecutors in the county of confinement, would impose even greater demands on efficiency by forcing the newly-assigned attorneys to learn the case from scratch.[328] More significantly, many state prisons are located in sparsely populated counties where the courts are already inundated with litigation stemming from intraprison crimes and disputes.[329] Even if clustering post-conviction innocence claims within particular courts could build up expertise among those judges in evaluating newly discovered evidence, foisting another set of cases on these counties would further strain their court systems.[330] Finally, selecting the county of confinement as the proper forum for newly discovered evidence claims would

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factors and principles that tend to affect prosecutorial decisionmaking). *See generally* ABA 1968 STANDARDS, *supra* note 138, § 1.3(b), at 27–28 ("Because of the nature of post-conviction claims and their probably pervasive importance to criminal process in any state, it is preferable to charge the office of the attorney general or comparable official with basic responsibility for representing the state in such cases. Such an office will develop a greater expertise on the manifold phases of this type of litigation than can be expected in most local prosecutors' offices." (citation omitted)); Medwed, *supra* note 64.

326. Although state habeas corpus petitions are typically filed in the county of incarceration, several states allow filing in the county of conviction. *See supra* notes 207–08 and accompanying text.

327. *See supra* notes 303–06, 313, 324 and accompanying text.

328. Assigning post-conviction motions to prosecutors in the state attorney general's office might be a worthwhile option. *See* ABA 1968 STANDARDS, *supra* note 138, § 1.3(b), at 27–28 (suggesting that lawyers in the state attorney general's office or comparable officials should handle these motions).

329. *See, e.g.*, Larry Yackle, *The Misadventures of State Postconviction Remedies*, 16 N.Y.U. REV. L. & SOC. CHANGE 359, 365 n.35 (1987–88) (describing the administrative tension in state habeas corpus jurisprudence in which "courts situated near penal institutions could be swamped with prisoner petitions, while sentencing courts, with more convenient access to records and witnesses, handled other business").

330. If the application were granted by a judge in the county of confinement and a new trial ordered, presumably the case would be transferred back to the county of conviction for all further proceedings. Otherwise, in addition to burdening the county of confinement, the prospect of retrying the defendant in a region where the composition of the jury pool may differ vastly from that of the place where the crime occurred raises genuine fairness issues; the right of a defendant to a jury of her "peers" could possibly be affected by a change of venue. *See* James Oldham, *The History of the Special (Struck) Jury in the United States and its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges*, 6 WM. & MARY BILL RTS. J. 623, 626 (1998). At its core, this concept derives from the belief that a jury should contain "a representative number of people that share the defendant's cultural, linguistic, ethnic, or possibly socio-economic circumstances." *Id.*

neglect to account for the potentially innocent yet not currently imprisoned defendant.[331] As a consequence, a person who has already served his sentence would have no recourse—aside from executive clemency[332]—in seeking to clear his name.

Any jurisdiction open to the idea of directing new evidence claims to a judge other than the original trial judge, irrespective of whether the recipient is located in the county of conviction or the county of confinement, should consider making its procedure compulsory.[333] It might be tempting to give defendants the ability to choose as between the original judge and a new, randomly assigned judge, but providing that option would be fraught with peril. Such a choice would promote forum-shopping, a much-dreaded inducement,[334] and possibly overwhelm those original trial judges perceived as "defense-friendly" with innocence claims (or at least give them more than their fair share). Also, prisoners and especially their lawyers might suffer artificial constraints in making this decision. Opting for a new judge could send a negative and highly public signal about the original judge's objectivity—and this could discourage some defense lawyers from making that choice for fear of potential retaliation during future appearances in that courtroom.[335]

C. Appellate Review

Trial judges enjoy vast autonomy in considering claims of innocence based on newly discovered evidence, whether in the form of new trial motions or collateral petitions, and the appellate procedures governing denials of newly discovered evidence claims embody this freedom. As mentioned above, not only are decisions rejecting these claims occasionally appealable only as a matter of permission,[336] but the standard of review pertaining to those lower court decisions

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331. Litigants seeking redress through a procedure in the nature of *coram nobis* are not generally required to be in custody at the time of filing. *See supra* note 99 and accompanying text.

332. For a discussion of some of the limitations of the executive clemency power, see *infra* notes 382–84 and accompanying text.

333. It should be noted that several scholars have proposed a completely different method of handling post-conviction innocence petitions: the formation of an independent commission. *See, e.g.*, Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1302–03 (2001). Griffin has lauded the English treatment of innocence claims whereby the bipartisan Criminal Cases Review Commission evaluates post-conviction innocence claims and directs the strongest allegations to the Court of Appeal. *Id.* at 1275–78.

334. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995) (arguing for the need to retain change of venue rules to neutralize the danger of forum-shopping).

335. Certain behavior by defense lawyers can conceivably spark retaliation—or at least the fear of retaliation—against them or their clients by judges. *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2486 (2004) (discussing, for instance, how "[d]efendants whose lawyers take extensive discovery or file many motions may suffer retaliation by judges and prosecutors" in the plea bargaining context).

336. *See supra* notes 178, 213 and accompanying text.

chosen for appellate consideration is typically "abuse of discretion."[337] An extraordinarily deferential standard of review, abuse of discretion acts, in the words of one prominent scholar, as "a virtual shield from reversal."[338] In light of these procedures, the chances of reversal on appeal are remote regardless of whether a trial judge denies a newly discovered evidence claim summarily or after an evidentiary hearing.[339]

Although it may be impracticable to depart from the routine of allowing appeals only as a matter of permission in states where that is the norm, particularly in jurisdictions with high caseloads, and instead provide appellate review for every post-trial newly discovered evidence case, once authorization to appeal has been granted the standard of review applicable to summary denials of these claims should be less deferential than that afforded to dispositions rendered after a hearing. To a large degree, the present system of appellate review of newly discovered evidence claims offers few incentives—and arguably provides a disincentive—for trial judges to do so much as hold an evidentiary hearing.[340]

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337. *See supra* notes 179–83, 215 and accompanying text.

338. ROGER PARK ET AL., EVIDENCE LAW § 12.01, at 540–41 & n.6 (1998). For a well-known case where the United States Supreme Court overturned a conviction upon a finding of abuse of discretion, see generally Old Chief v. United States, 519 U.S. 172 (1997) (holding that a district court abused its discretion when it rejected the defendant's offer to concede the fact of a prior conviction, the existence of which was an element of the crime at issue at trial, and instead admitted the full record of the prior offense).

339. Even though many jurisdictions apply the abuse of discretion standard to summary denials, *see supra* notes 182, 215 and accompanying text, some jurisdictions provide differing standards of review in evaluating summary denials of newly discovered evidence claims as opposed to post-hearing dispositions. For example, in evaluating rejections of post-conviction relief petitions alleging newly discovered evidence, Florida affords a more deferential standard of review to denials that occurred subsequent to a hearing. *See, e.g.*, FLA. R. APP. PROC. 9.141(b)(2)(D) (stating, with respect to appeals of summary denials of motions for post-conviction relief in noncapital cases, that "[o]n appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief"); McLin v. State, 827 So. 2d 948, 955–56 (Fla. 2002) (holding that the trial court erred in summarily denying post-conviction relief based on recantation evidence); *cf.* Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997) (stating that, in reviewing a denial of a newly discovered evidence claim after an evidentiary hearing, assuming that substantial competent evidence supported the trial court's findings, "this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court'" (quoting Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984))).

340. A number of states allow courts significant freedom in determining whether to hold an evidentiary hearing prior to ruling on a newly discovered evidence claim. *See, e.g.*, ALA. R. CRIM. PROC. 32.7(d) ("If the court determines that the [post-conviction relief] petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing."). To be fair, some jurisdictions provide a degree of encouragement for trial judges to order evidentiary hearings or at least offer guidelines for judges in deciding

Accordingly, many post-trial allegations of innocence are never heard in open court, with the effect that litigants are prevented from developing a thorough record of the new evidence.[341] A vicious cycle then ensues; it may conceivably be difficult for appellate courts to find an abuse of discretion based on a scanty record, yet trial judges lack institutional incentives to order evidentiary hearings and thereby produce a serviceable record for appeal.[342] And, as the end result, the system falls short of effectively assessing potentially viable innocence claims.[343]

To address this situation, appellate courts should retain a deferential standard in evaluating denials of newly discovered evidence claims in the aftermath of evidentiary hearings but undertake de novo review for claims rejected summarily.[344] This reform could achieve several beneficial policy aims. First, bolstering the capacity of appellate courts to review summary denials anew would make trial judges more accountable for their decisions and may, on the margins, provoke judges to become more willing to conduct hearings where potentially meritorious innocence claims hang in the balance.[345] Second, spurring judges to hold hearings in cases where the innocence claim may have validity would yield a

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whether to hold hearings. *See, e.g.*, N.Y. C.P.L § 440.30(2)–(5) (McKinney 2004) (offering guidance regarding how trial courts should treat Article 440 motions, especially with regard to when a court must grant, must deny, or has the discretion to deny the motion without a hearing); Shockley v. State, 199 S.E.2d 791, 792 (Ga. 1973) (interpreting Georgia statutory authority to signify that defendants are entitled to hearings on motions for a new trial); State v. Allen, 744 P.2d 789, 792 (Haw. Ct. App. 1987) (discussing how evidentiary hearings should be held on petitions for post-conviction relief where a petition puts forth a colorable claim).

341. Trial judges are often compelled to create a record of some fashion; that is, even if a trial judge summarily disposes of a new trial motion, that judge may be required to specify the grounds upon which she based her decision. *See* 58 AM. JUR. 2D *New Trial* § 436 (2004). Not every jurisdiction, though, imposes such an obligation. *Id.*

342. On the one hand, holding an evidentiary hearing exposes the trial judge's decision to greater scrutiny; the appellate court has more to work with in evaluating the decision. On the other hand, the fact that a judge held a hearing may suggest she did not abuse her discretion in ultimately refusing to order a new trial, i.e., she took the time to analyze the issues and thus her decision is entitled to deference.

343. Indeed, appellate judges seem to take comfort in cases where an evidentiary hearing was held by the lower court prior to the denial of a post-conviction petition. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 755–56 (1991) (rejecting a defendant's post-conviction allegation of ineffective assistance of counsel, and pointedly mentioning that "the Buchanan County Circuit Court, after a 2-day evidentiary hearing, addressed Coleman's claims of trial error, including his ineffective assistance of counsel claims").

344. This model is not unprecedented; Illinois, for example, has embraced a comparable approach in regard to petitions denied pursuant to the principal post-conviction remedy in the state. *See* Quinn & Hynes, *supra* note 204, at 641–42 ("The standard of review for summary dismissals is de novo. The manifest error standard, however, is applicable when reviewing orders granting or denying relief are made after an evidentiary hearing."); *supra* note 339 and accompanying text.

345. Muskat has also insisted that state courts display greater willingness to hold evidentiary hearings in cases revolving around newly discovered evidence of innocence, maintaining that the legal standard applicable to the evaluation of bare innocence claims should be altered to prompt state courts to order such hearings. Muskat, *supra* note 13, at 172–73.

greater number of fully transcribed records of innocence claims for appellate review, scholarly analysis, and public scrutiny. Third, preserving the abuse of discretion standard (or a comparable test) with respect to post-hearing dispositions correctly recognizes the fact-specific nature of those decisions, which explicitly involve the critique of witness credibility and the weighing of conflicting testimony and/or other evidence,[346] and does not deter the ordering of hearings in the first place. Lastly, this proposal, adopting a de novo standard of review for summary dispositions while keeping a deferential approach to denials issued after evidentiary hearings, comports with the core theories and principles underlying appellate review and the interrelationship between trial and appellate courts.[347]

1. Theoretical Justifications for Divergent Standards of Review

On appeal, labeling an issue as one of fact, law, or discretion is of critical importance given that the categorization dictates the standard of review germane to the issue.[348] The standard of appellate review, in turn, affects the outcome of the case: the more deferential the standard, the less likely the prospect of reversal.[349] Issue characterization is by no means a simple endeavor,[350] for judicial decisionmaking often takes place in the murky waters between the islands of clearly identifiable issues of fact and those of law, and may involve mixed questions of fact and law or so-called "discretionary" decisions by the lower court.[351] Scholars have discussed how appellate courts should treat discretionary decisions by trial courts, such as those regarding discovery, evidence, and jury-

346. *See* Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 242 (1991) (suggesting that deference may be justified where the trial court's determination included the assessment of credibility, and the weighing of both conflicting testimony and conflicting evidence).

347. *See infra* notes 348–66 and accompanying text.

348. *See* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 645–46 (1971) ("[A]ll appellate Gaul is divided into three parts for review purposes: questions of fact, of law and of discretion.").

349. *See, e.g.*, MEADOR ET AL., *supra* note 179, at 154 ("Implicit in the effort to formulate rational and workable standards of review is acceptance of the principle that the reviewing court should subordinate its own view and defer to the trial court's decision in some situations and to some degree.").

350. *See, e.g.*, Sch. Dist. v. Z.S. *ex rel.* Littlegeorge, 295 F.3d 671, 674 (7th Cir. 2002) (Judge Richard Posner observing that "the cognitive limitations that judges share with other mortals may constitute an insuperable obstacle to making distinctions any finer than that of plenary versus deferential review"); *see also* Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 504–06 (2004) (citing the aforementioned comment by Judge Posner and noting that "appellate courts often remark on the difficulties involved in attempting to divine the difference between similar, but purportedly distinct, standards of review").

351. *See* MEADOR ET AL., *supra* note 179, at 154 (mentioning "a four-way classification of the nature of issues on appeal: questions of fact; questions of law; mixed questions; and questions of discretion"); Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003) ("The importance of the law-fact distinction is surpassed only by its mysteriousness.").

related matters,[352] and the standard of review in assessing those decisions is frequently articulated in terms of abuse of discretion.[353] Under this standard, appellate courts in general will only overturn discretionary decisions if the trial court relied on an erroneous view of the law, misapplication of the law, mistaken view of the evidence, or otherwise impermissible or irrelevant factors.[354] Patrick Brennan has stated that the abuse of discretion standard represents "a compromise between the competing desires of affording power and flexibility to the trial court, yet at the same time minimizing arbitrary decisions,"[355] and it is a compromise in which "[t]he scales are tipped in favor of trial court flexibility."[356] Among the oft-stated reasons for giving trial courts significant discretion with respect to certain types of decisions are judicial economy,[357] judicial comity,[358] lower courts' morale,[359] and finality of judgments.[360] Some observers also champion deference on the basis that particular types of decisions are grist for a lower court's daily mill, which allows trial judges to gain vital experience in these areas that informs their decisionmaking capability.[361] Yet many commentators have found these

352. *See* Patrick W. Brennan, *Standards of Appellate Review*, 33 DEF. L.J. 377, 412–14 (1984), *reprinted in* MEADOR ET AL., *supra* note 179, at 196 (observing that the discretion of a trial court "is exercised in many situations: rulings on motions, discovery, arguments of counsel, admissibility of evidence, instructions, and numerous other jury-related matters").

353. *See, e.g.*, 5 AM. JUR. 2D *Appellate Review* § 695 (2004) ("Various formulations have been employed to elaborate on the practical effect and meaning of the term 'abuse of discretion.'"); MEADOR ET AL., *supra* note 179, at 196–221 (discussing the abuse of discretion standard of review and including excerpts from articles on the topic).

354. *See* Hofer, *supra* note 346, at 245 (describing the abuse of discretion standard in Wisconsin). In the vernacular, as the Utah Supreme Court once declared, "[W]e give the trial court a great deal of pasture" in reviewing certain discretionary decisions by the lower court. State v. Pena, 869 P.2d 932, 938 (Utah 1994) (mentioning, at "the extreme end of the discretion spectrum," a trial court decision "to grant or deny a new trial based on insufficiency of the evidence").

355. Brennan, *supra* note 352, at 412–14.

356. *Id.*

357. *Id.* ("An appellate court could not begin to handle all of the cases that would be appealed if trial court rulings were a meaningless formality."); *see also* Brooks v. State, 61 S.W.3d 916, 919 (Ark. Ct. App. 2001) (commenting that judicial economy would not have been served by holding a hearing on the defendant's motion for a new trial where the defendant failed to set out any new evidence).

358. *See* Brennan, *supra* note 352, at 412–14 ("Appellate courts should and do recognize the integrity and competence of the lower courts.").

359. *See* Hofer, *supra* note 346, at 241 ("Morale boosting . . . means that trial judges would become demoralized if all their rulings were measured by a de novo yardstick.").

360. *See* Brennan, *supra* note 352, at 412–14.

361. *See* Oldfather, *supra* note 350, at 447–48 (describing one justification for a trial court's "supposed advantage" over an appellate court in reviewing facts as having "to do with experience" and specifically the idea that trial judges are "better at disentangling conflicting evidence simply because they have more practice"). Oldfather then proceeds to engage in an interesting critique of the "institutional competence justification" for deference to trial courts in the realm of facts: "To say, however, that juries and trial courts are superior fact-finding instruments in most cases and with respect to most types of evidence is not to say that they are superior in all cases and with respect to all types of evidence." *Id.* at 449.

justifications lacking, grounded as they are in general, macro-level policy concerns rather than any issue-specific quality.[362]

Instead of relying on large-scale policy objectives, the strongest justification for deferring to trial judges on appeal may stem from the fact that those judges are often in a better position to render certain decisions than their appellate peers.[363] Specifically, deference has both practical utility and theoretical legitimacy where a trial judge's chance to view the witnesses "live" and receive evidence proved instrumental to the decision.[364] In those conditions, the lower court arguably stood in a better decisionmaking posture than its appellate counterpart ever could based solely on its interpretation of the cold, black-and-white text of the record on appeal.[365] Therefore, in ultimately ascertaining the proper measure of deference to give the lower court, the key issue may lie in determining whether the trial court was in a better position to consider the specific question than an appellate tribunal would be.[366]

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362. *See* Hofer, *supra* note 346, at 241 (citing Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1975)). In Hofer's view, many of the arguments mentioned above to rationalize deference "fall to the wayside in a functional analysis. They do not espouse deference because of any quality found in a particular issue. Rather, they are ex post facto, arising from larger policy concerns; they arise from the general rather than from the particular." *Id.*

363. *See, e.g.*, State v. Bocharski, 22 P.3d 43, 56 (Ariz. 2001) (Martone, J., concurring) (noting that in assessing "whether the trial court abused its discretion in weighing probative value against prejudicial effect" regarding the admissibility of photographs "appellate courts are not in a very good position to second guess such judgments").

364. *See* Henry Friendly, *Indiscretion about Discretion*, 31 EMORY L.J. 747, 784 (1982) ("An appellate court must carefully scrutinize the nature of the trial court's determination and decide whether that court's superior opportunities of observation or other reasons of policy require greater deference than would be accorded to its formulations of law or its application of law to the facts."); Hofer, *supra* note 346, at 239; *cf.* Oldfather, *supra* note 350, at 447–49 (disputing the validity of the better position or "situational" justification for deference to trial courts regarding all factual questions).

365. *See, e.g.*, State v. Pena, 869 P.2d 932, 936 (Utah 1994) (noting how, regarding factual findings, trial courts are "considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record"). For the countervailing view, Oldfather has insisted that transcripts, to some extent, have advantages over the rapid, immediate processing of information by judges and juries at trial. Oldfather, *supra* note 350, at 451–57. Also, as Oldfather points out, "Research consistently shows that people perform poorly at using demeanor to determine whether a person is telling the truth . . . . Observers tend to focus on facial expressions, which are highly manipulable and therefore unreliable, rather than on speech patterns, which are better indicators of deception." *Id.* at 457–58.

366. *See* Miller v. Fenton, 474 U.S. 104, 114 (1985) ("At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."); Hofer, *supra* note 346, at 231 (advocating for "an analysis which affords deference to lower tribunals where they were in a better position to address a question than the appellate court

2. Altering the Standard of Review Applicable to Summary Denials of Newly Discovered Evidence Claims

Application of the "better position" theory to newly discovered evidence claims suggests deference to the trial judge's determination is not always warranted. By denying a new trial motion or post-conviction application premised on newly discovered evidence of innocence without ordering an evidentiary hearing, a trial judge has not taken advantage of any superior opportunities of observation nor attempted to grasp a "feel" of the case.[367] No evidence has been received nor witnesses heard; the trial court has issued its ruling based only upon the written submissions, a decision not unlike those usually made by appellate courts, and concluded that the defendant's allegations fail to merit so much as a hearing. This decision, in essence, could be construed as a question of law or at the very least a mixed question of law and fact: that the defendant's assertions, even if true, are legally insufficient to support further analysis.[368] In reviewing mixed questions of law and fact, appellate courts often afford almost total deference to a trial court's determination where such determination rested on assessments of credibility and demeanor.[369] In contrast, de novo review of mixed questions is justified and occasionally utilized when the lower court's decision did not entail critical examinations of these variables.[370] As a normative matter, therefore, de novo review should apply to summary dismissals of state new trial motions and post-conviction petitions grounded on newly discovered evidence, namely, cases where no critical inspection and vetting of the new evidence occurred in open court.

Admittedly, under the current regimes in which the judge who presided at trial has jurisdiction over the subsequent presentation of newly discovered evidence, that judge may try to lay claim to a superior decisionmaking platform even in instances of summary dispositions. After all, she heard the witnesses and received evidence at the *original* trial, making her all the more competent to evaluate the strength of the defendant's alleged newfound information and its

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would be"); *id.* at 249 ("Finally, and certainly not least, some of the deference accorded to discretionary acts again goes back to the 'better position' principle.").

367. *See* Brennan, *supra* note 352, at 412–14 ("It is said that one of the strongest reasons behind according discretion to the trial court is the fact that the judge is in a better position to see and hear the witnesses. This superior position allows a better 'feel of the case' that examination of the appellate court record does not afford.").

368. Appellate courts tend to take a "functional approach" to mixed questions, analyzing whether the issues are essentially factual or legal in nature. *See, e.g.*, URSULA BENTELE & EVE CARY, APPELLATE ADVOCACY: PRINCIPLES AND PRACTICE 206–12 (4th ed. 2004).

369. *See, e.g.*, Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997) ("The appellate courts, including this Court, should afford [almost total deference] to trial courts' rulings on 'application of law to fact questions,' also known as 'mixed questions of law and fact,' if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. The appellate courts may review *de novo* 'mixed questions of law and fact' not falling within this category." (internal citations omitted)).

370. *See id.*

comparative impact on the evidence adduced at trial.[371] As stated in Part III.B of this Article, however, the supposed benefits of having the original trial judge entertain a new evidence claim are largely illusory in any circumstance given the potential existence of cognitive biases.[372] More to the point here, regardless of whether the judge assigned to handle the post-trial innocence claim participated in the initial trial, the main rationale for deference—the trial judge's purportedly superior position based on the ability to observe witnesses and take evidence—is diminished, if not entirely absent, in the summary denial situation. Consequently, where a trial court exercises its post-trial judgment regarding a newly discovered evidence claim without holding an evidentiary hearing and viewing witnesses, an appellate court should be entitled to look afresh at the case to provide a necessary check on the lower court and a major precaution against injustice.

CONCLUSION

Any effort to reform post-trial procedures with an eye toward granting prisoners greater access to state courts must address the wariness with which many participants in the criminal justice system approach newly discovered evidence claims. Most notably, this discomfort stems from fears about jeopardizing the finality of judgments, undermining the trial process, and straining judicial resources; doubts about the validity of most newly discovered non-DNA evidence claims; and suspicions that guilty prisoners will capitalize on any "slackening" of procedural safeguards.[373] But reducing the rate of procedural default and providing full-scale evidentiary hearings for a greater number of innocence claims would mainly facilitate the exoneration of actually innocent prisoners, not to mention inspire confidence in the accuracy of the criminal justice system.[374] Moreover, whereas the proposed easing of the procedural restrictions attendant to newly discovered non-DNA evidence claims might hinder judicial economy to a degree, the continued enforcement of demanding legal and evidentiary standards

371. *See, e.g.*, Whitley v. United States, 783 A.2d 629, 633–34 (D.C. 2001), *reh'g granted, opinion modified* 796 A.2d 26 (D.C. 2002) (declaring that the trial judge who had a chance to develop a "feel" for the case is in a superior position to appellate judges to determine if the newly discovered evidence put forth as part of a motion for a new trial has any potential for affecting the jury's verdict). A Texas state appellate court applied the abuse of discretion standard in reviewing the summary disposition of a habeas corpus petition despite citing case law that "an appellate court must conduct a *de novo* review when 'the trial judge is not in an appreciably better position than the reviewing court to make that determination.'" *Ex parte* Carbajal, No. 08–03–00297–CR, 2004 WL 1772113, at *3 (Tex. App., Aug. 5, 2004) (unpublished) (internal citations omitted). The court explained that "[w]hile the trial court did not hear live testimony, the facts were contested, the affidavits were conflicting, and the same trial judge presided at Appellant's guilty plea and his petition for writ of habeas corpus." *Id.*

372. *See supra* notes 288–335 and accompanying text.

373. *See, e.g.*, *supra* notes 62–64, 116–20 and accompanying text.

374. At a fundamental level, holding evidentiary hearings with respect to colorable innocence claims and subjecting the defendant's witnesses to cross-examination would advance the truth-seeking function of the system of litigation. *See* 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1838, at 463 (James H. Chadbourn ed., rev. ed. 1976) (describing cross-examination as the greatest legal engine ever invented for the discovery of the truth).

minimizes the risk that factually guilty inmates will succeed in taking advantage of the relaxation of procedural constraints.[375] If states were to adopt the procedural reforms set forth in Part III of this Article, in the end, the cost to administrative efficiency would be a proper one to absorb—assuming the failure to adequately review claims by potentially innocent prisoners runs counter to the goals of our society in this age of DNA exonerations.[376]

The rise of DNA testing since 1989 has lent scientific credence to the long-suspected fear that actually innocent prisoners are not always acquitted at trial, and has provoked many people to reconsider their views of the criminal justice system's effectiveness.[377] Indeed, the extensive efforts by many state legislatures in the past decade to improve post-conviction access to DNA testing of biological evidence deserve acclaim.[378] State treatment of newly discovered non-DNA evidence, however, need not mirror the traits of modern post-conviction DNA testing legislation; non-DNA evidence is often less reliable than DNA evidence and may earn more rigorous evidentiary and legal requirements to ensure reliability.[379] Rather than pressing for wholesale changes to the legal and evidentiary rules governing the treatment of newly discovered non-DNA evidence claims, my position is that the lessons from the DNA revolution justify modification of the procedural attributes of most state regimes. Ideally, these changes would provide more meaningful access to state courts for those potentially innocent defendants whose greatest misfortune lies in the happenstance that the

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375. *See supra* notes 225–29 and accompanying text.

376. Several scholars suggest that the focus on factual innocence in the recent debate on reforming the criminal justice system may be misplaced. Some of these critiques have taken the form of attacks on the overall number of actually innocent prisoners. *See, e.g.*, Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501 (2005) (arguing that the emphasis on innocence is misleading given that only a few wrongful convictions occur and that such mistakes are inevitable as well as acceptable). Others have contended that the focus on innocence may partially serve to obscure the problem of more mundane and pervasive errors in the criminal justice system, "including arbitrary and unequal treatment of offenders as well as disproportionate punishment of the 'guilty.'" *See* Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 597 (2005).

377. The spate of DNA exonerations also famously contributed to the decision by Governor George Ryan of Illinois to study the death penalty in that state, a decision that culminated in the pardoning of four death row inmates and the commutation of 167 death sentences to life in prison. *See, e.g.*, Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan 12, 2003, at 1.

378. *See supra* notes 3–4 and accompanying text.

379. *See* White, *supra* note 25, at 10–11 (arguing that evidence that becomes "newly available" due to technological advances and is highly reliable, such as DNA evidence, should be treated differently from most forms of newly discovered evidence). To a degree, the emergence of DNA testing has possibly raised the bar for proving innocence in other cases. *See, e.g.*, Kirk Makin, *The Reliance on Science as a Cure for Injustice*, GLOBE & MAIL (Toronto, Can.), Nov. 22, 2004, at A1 (quoting a veteran defense attorney as claiming that "[b]ecause DNA is now the best-known and surest means of exoneration, it has come to be seen as a sort of benchmark for testing wrongful convictions . . . . I have had prosecutors say to me, 'After all, this isn't a case where innocence can be shown by DNA'").

actual perpetrators of the crimes for which they were wrongfully convicted did not leave biological evidence at the crime scene.

The need to amend state court procedures has reached a critical stage partly because of the dearth of alternative venues for potentially innocent prisoners. In particular, the rising number of procedural hurdles that prisoners must overcome to obtain relief in federal court through a writ of habeas corpus has made that option effectively unavailable.[380] Nor is parole a feasible solution for most innocent state prisoners. Parole boards customarily frown upon an unwillingness to convey remorse, which puts actually innocent prisoners in a Catch-22: continue to proclaim innocence or boost the chances for parole by "admitting" guilt and showing regret.[381] Furthermore, the executive clemency power—an oft-cited, purported panacea for the ills of wrongful convictions[382]—is seldom exercised by government officials.[383] Even when used, clemency may be aimed chiefly toward attaining political objectives, with any correction of injustice as a side effect.[384]

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380. Inmates may pursue innocence claims in federal court via habeas corpus petitions, but the United States Supreme Court has clarified that freestanding claims of actual innocence based on newly discovered evidence do not provide an independent ground for habeas relief absent compelling circumstances. *See generally* Herrera v. Collins, 506 U.S. 390 (1993). Moreover, the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 provided additional restrictions on federal habeas corpus review. *See generally* Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997). If passed, a bill recently introduced in Congress—the Streamlined Procedures Act of 2005—would further restrict federal habeas corpus review of capital cases. *See* Editorial, *Stop This Bill*, WASH. POST, July 10, 2005, at B6; Alan Elsner, *Bill Would Cap Appeals Over Death Sentences*, STAR-LEDGER (NEWARK, N.J.), July 7, 2005, at 6. Notably, the Supreme Court is slated to examine the issue of DNA evidence of innocence and federal habeas corpus during the 2005–06 Term in House v. Bell, No. 04–8990. *See* Linda Greenhouse, *Justices to Review Rules for Death Case Appeals*, N.Y. TIMES, June 29, 2005, at A18; Charles Lane, *Court May Revise Rule on Death Row Appeals*, WASH. POST, June 29, 2005, at A3.

381. *See, e.g.*, Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 19 (2002) (recounting how a prisoner in Massachusetts, later exonerated through DNA testing, "was denied parole 'because he proclaimed his innocence and refused to enter treatment for sexual deviance'"); Martin, *supra* note 5, at 98–100 (quoting one former inmate as having been told by a California parole commissioner that "'[i]f you don't admit that you did this crime, you'll never get out'").

382. *See, e.g.*, *Herrera*, 506 U.S. at 411–12 (terming clemency the "historic remedy for preventing miscarriages of justice where judicial process has been exhausted"); State v. Mixon, 983 S.W.2d 661, 671 (Tenn. 1999) (noting that "convicted defendants who discover new non-scientific evidence of actual innocence too late to file a motion for new trial or petition for writ of error coram nobis may always seek executive clemency").

383. *See* HOWARD ABADINSKY, DISCRETIONARY JUSTICE: AN INTRODUCTION TO DISCRETION IN CRIMINAL JUSTICE 147–48 (1984) ("All states and the federal government have provisions for clemency. . . . The basis for a pardon varies from state to state, and it is not used extensively anywhere."); Heise, *supra* note 319, at 241 (noting that "an increase in the number of death sentences has coincided with a decrease in the number of defendants removed from death row through clemency"); *cf.* Beau Breslin & John J.P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231, 231 (2002) ("In the past quarter

More than ever, then, state post-conviction procedures comprise the most appropriate vehicle to rectify wrongful convictions and a subset of those procedures, the rules concerning newly discovered evidence, have the potential to operate as the principal engine driving cases toward fair resolutions.[385] Ultimately, it may be impossible to determine for certain whether prisoners are actually innocent when their cases rest solely upon non-DNA evidence.[386] That is a poor excuse, though, for depriving defendants like Stephen Schulz, the inmate convicted of robbery in New York, of the opportunity to present their claims in a manner that both justice and common sense require. The lone dissenter to the New York Court of Appeals' recent decision affirming Schulz's conviction criticized the trial court's denial of the post-conviction innocence claim without holding an evidentiary hearing and summarized his views in a sentence that aptly serves as a wrap-up to this Article: "The interests of finality count for a great deal, and may be alluring, but they are not always consistent with the higher ends of justice."[387]

century more than forty-five prisoners have been removed from death row because of executive orders, while countless others have not been so successful."). Even if governors want to use their clemency powers, they may lack funding to investigate clemency petitions sufficiently. *See* Hart & Dudley, *supra* note 27, at 641.

384. *See* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 203 (1989) ("It is not overly cynical to suggest, however, that politicians weigh public opinion in a pardon decision."); Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 257 (1990–91) ("Clemency decisions—even in death penalty cases—are standardless in procedure, discretionary in exercise, and unreviewable in result."); *cf.* Breslin & Howley, *supra* note 383, at 232 (arguing that "clemency is, and should remain, a political process").

385. *See* Muskat, *supra* note 12, at 161 ("The best way to formulate an adequate process for the resolution of bare innocence claims is not to force review on unenthusiastic federal courts, but instead to encourage the states to review such claims through effective state postconviction remedies.").

386. *See supra* note 14 and accompanying text.

387. People v. Schulz, 829 N.E.2d 1192, 1201 (N.Y. 2005) (Rosenblatt, J., dissenting).

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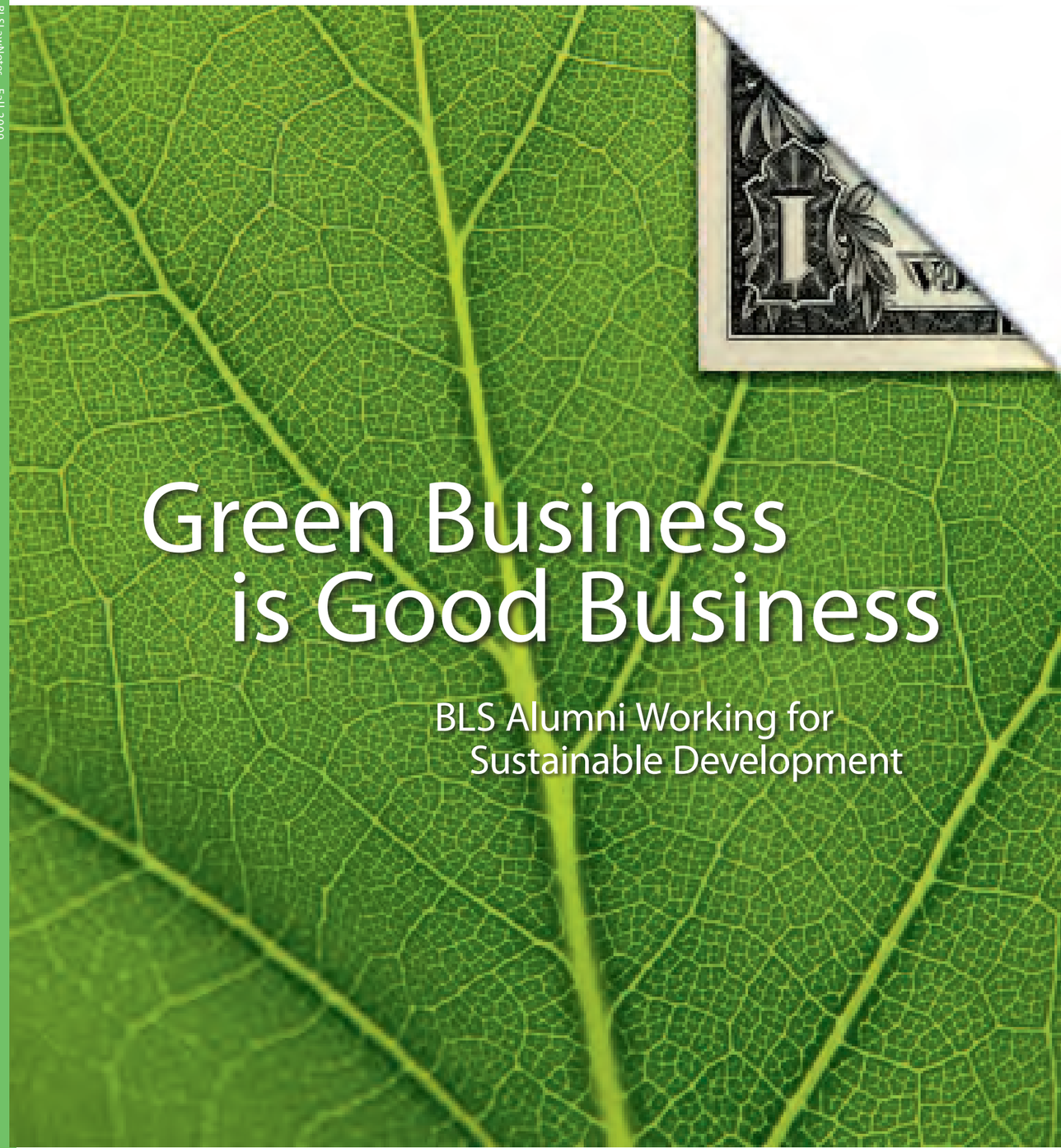

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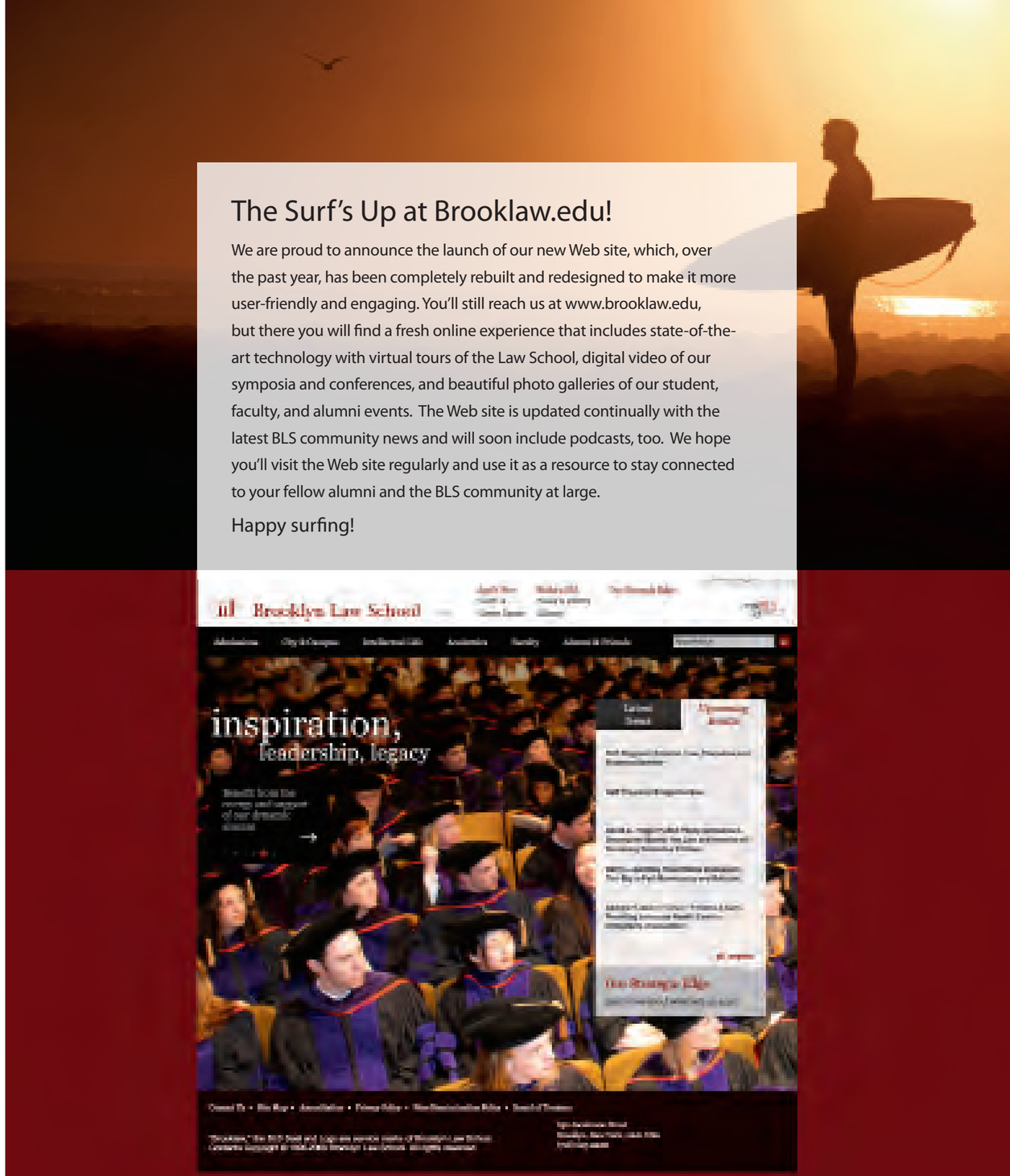

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Contents

FEATURES

DEPARTMENTS

A Second Look Gives a Second Chance

Defendants Granted Habeas Corpus Thanks to BLS Clinic

RAMON ESPINAL WAS 17 YEARS OLD WHEN he was sentenced to 58 1/3 years to life for a double homicide he did not commit. Twenty years later he may finally be free thanks to Brooklyn Law School.

Professor William Hellerstein's Second Look Clinic, which ran from 2001 to 2008, was the only clinic in New York City to focus exclusively on non-DNA innocence cases, and it took on Espinal's case in 2005. At the time, Espinal was already represented by an attorney who welcomed the Clinic's assistance. After an exhaustive investigation and an examination of prior proceedings, Hellerstein, his colleague Professor Marjorie Smith, and students Everett Witherell '07 and Alison Bowles '07 concluded that Espinal was innocent. They presented their material in a lengthy memorandum to Brooklyn District Attorney Hynes, and his senior staff, unfortunately to no avail.

Undeterred, they filed a motion for leave to appear in the case as amicus curiae, which U.S. District Court Judge David G. Trager granted. On December 4, 2008, based on the evidence developed by Second Look, Judge Trager granted Espinal a writ of habeas corpus and ordered the state to either provide him with a new trial within 90 days or release him. The District Attorney appealed Judge Trager's decision to the Second Circuit. Hellerstein defended Judge Trager's ruling before the Second Circuit, and on August 18, the Second Circuit affirmed Judge Trager's decision. Hellerstein is representing Espinal in his new trial before Brooklyn Supreme Court Justice Neil Firetog.

While Espinal was one of the last cases the Clinic took on, one of its first cases — that of Stephen Schulz — has also recently benefited from the Clinic's steadfast advocacy. Second Look undertook the representation of Schulz, who had been convicted in Suffolk County for armed robbery and sentenced to 11 years in prison, in 2001. After an extensive investigation, it was the Clinic's conclusion that Schulz was innocent and that the robbery was actually committed by another person who looked very much like Schulz. "Innocence is sort of like what Justice Stewart said with respect to pornography," said Hellerstein. "I know it when I see it. And I knew Schulz was innocent."

In 2005, Hellerstein argued Schulz's appeal before the New York Court of Appeals. However, the Court affirmed Schulz's conviction by a 6–1 vote. The dissenting judge expressed doubt about Schulz's guilt.

In 2007, U.S. District Court Judge Joseph F. Bianco held an evidentiary hearing on the Clinic's habeas petition and determined that Schulz's trial attorney had indeed violated his rights to the effective assistance of counsel as the Clinic students had argued. Judge Bianco granted the Clinic's application for Schulz's release on his own recognizance pending disposition by the Second Circuit of the prosecution's appeal. Second Look students Jane Fox '09 and Rachel Moston '08 worked with Hellerstein on the brief to the Second Circuit, which affirmed the grant of a writ of habeas corpus by Judge Bianco on September 4, 2009.

"I read the decision the day it came down, and it felt really good," said Moston. "The best part of the Clinic was that it took the abstraction of law school away. It allowed me to take all the skills I learned in law school and apply them to a real person's case. Professor Hellerstein used to say, 'Every now and then you get a gut feeling that something went wrong, and you hope that justice can be done.' In this case it was."

Hellerstein and his former students are now waiting and hoping that the prosecution will agree to a dismissal of the indictment. Meanwhile, Schulz is in Georgia, where he has a job and has, after nine years of wrongful imprisonment, been reunited with his family.

Most recently, another belated victory for Second Look came down from New York Supreme Court Judge John Cataldo. Second Look spent close to seven years defending the innocence of Fernando Bermudez, who was found guilty of a homicide in 1991. The Clinic's habeas petition was denied by U.S. District Court Judge Kevin Fox and its appeal denied by the Second Circuit. But Bermudez's new counsel built on the evidence established by the Second Look Clinic, and on November 9, 2009, his conviction was vacated by Judge Cataldo. "I find by clear and convincing evidence that the defendant has demonstrated his actual innocence," Judge Cataldo said in vacating his conviction, refusing to order a new trial on the charges. □

"The best part of the clinic was that it took the abstraction of law school away. It allowed me to take all the skills I learned in law school and apply them to a real person's case." — Rachel Moston '08

http://nyca.vlex.com/vid/stephen-g-schulz-vs-the-people-321559

Stephen G. Schulz vs. The People, No. 65 (N.Y. 2005)
New York Court of Appeals
Reporting Judge: G.B. Smith, J.
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While defendant additionally seeks relief on the ground of newly discovered evidence, "[t]his Court . . . has no power to review the discretionary denial of a motion to vacate judgment upon the ground of newly discovered evidence" (People v Crimmins, 38 NY2d 407, 409 [1975]; see also People v Smith, 63 NY2d 41, 66 n 4 [1984]; People v Brown, 56 NY2d 242, 246 [1982]). [X]During the cross examination of Velasquez and Detective Gieck, defense counsel brought out that Velasquez had told the police that the get-away car had a license plate with a "1" and a "T" but this did not match the license plate in the defendant's driveway. [X]Prior to trial, a Wade hearing was held on April 7 and April 15, 1999, and the motions to suppress the line-up identifications of defendant were denied. [X]The dissent highlights the "extraordinary proximity in time and place of Guilfoyle's crimes compared with the El Classico robbery" and points out that Guilfoyle was charged with robberies of small businesses only miles away (dissent, at p. 3). ...[X]

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2 No. 65

The People &c., Respondent, v. Stephen G. Schulz, Appellant.

William E. Hellerstein, for appellant.

Anne E. Oh, for respondent.

G.B. SMITH, J.:

There are two primary issues before us on this appeal. First, defendant alleges that the trial court abused its discretion in denying third-party culpability evidence that would have shown that someone other than defendant committed the robbery charged in the indictment (see People v Primo, 96 NY2d 351, 356-57 [2001]). Second, defendant also contends that the People failed to prove his guilt of the crime of robbery, first degree beyond a reasonable doubt. We reject both contentions and affirm the order of the Appellate Division.[1]

Facts

A jury convicted defendant of robbing the El Classico Restaurant in Brentwood, New York. One of the two persons in the restaurant, Jose Velasquez, the owner and cook, identified defendant at trial. The

second witness, an employee at the restaurant, Otilia Ruiz, failed to identify defendant at trial.

At approximately 8:20 P.M. on February 3, 1999, defendant entered the restaurant, asked for a menu and ordered a shrimp dinner. He subsequently went to the kitchen door to ask how long it would take to prepare the meal. Velasquez responded 10 to 15 minutes. Thereafter, Velasquez came out of the kitchen and went over to Ruiz who was standing behind the cash register in the bar area. He asked Ruiz what she was doing with the dollar bill in her hand, and she responded that the customer (defendant), who was also in the bar area, wanted change.

Ruiz testified that after Velasquez returned to the kitchen, the customer went to the cash register, opened it and began taking money. Ruiz grabbed the robber by the shirt, told him not to take the money and screamed to Velasquez that they were being robbed. The robber pulled out a knife and held Ruiz by the neck with his other hand. Velasquez heard Ruiz scream.

He came out of the kitchen and saw the defendant leaving the restaurant. Velasquez described the defendant as a "white male, tall, like 6'2", heavy, weigh like 250, 275." He described the defendant as having chestnut colored hair. Velasquez also described the car as "like Chevy or Oldsmobile or Buick, four door, 2-tone, brown on the bottom, beige on the top." This description matched the car of defendant's roommate, Anthony Tralongo.[2] Velasquez attempted to follow the car but lost it after a few blocks.

Also on February 3, 1999, Ruiz gave a statement to Detective Conde of the Suffolk County Police Department describing the robber as a "big white guy" wearing blue docker type pants, a blue striped shirt, and brown work boots. She also told the police that defendant was "very large, about 6' 2,"250- 275 pounds, clean shaven, rotten teeth, and bad breath and dark hair.

On the day following the robbery, both Velasquez and Ruiz identified defendant from a photograph of six white men.

Based on the descriptions, the detectives went to defendant's home where they saw a two-toned brown Chevrolet Celebrity in the driveway. The detectives arrested the defendant and impounded the car, which belonged to his roommate. Several days later, Velasquez identified the car at the police precinct where the police had placed it among twenty other cars.

At trial, Velasquez, in addition to testifying about the facts of the robbery, also testified to selecting defendant from two line-ups of six men, all in white jumpsuits. According to testimony by Detective Gieck, defendant was allowed to select his number in the line-up. The line-ups occurred sequentially.

In the first line-up, he selected number three and in the second, number six. According to the detective, defendant was selected both times by Velasquez as the robber of El Classico Restaurant.[3]

At trial the arresting officer, Detective Gieck, testified that Velasquez told him on the night of February 3, 1999, that the person who robbed his restaurant was "a big white male, 250 pounds." Defense counsel asked defendant to stand up and asked Detective Gieck how much his client appeared to weigh.

The detective replied "about 250 pounds." Defense counsel also asked Detective Gieck about a string of robberies being investigated in a nearby precinct at the time of the EL Classico robbery. The detective indicated that the perpetrator of those robberies weighed over 450 pounds.

Defense counsel also had a newspaper photo of a third- party marked for identification as Exhibit E. The detective was shown the picture of Guilfoyle but did not recognize it. Ruiz, however, failed to make a positive identification, and in fact did not identify defendant as the person who robbed the restaurant. On the People's application, defendant was required to stand and show his teeth to the jury so that they could make an analysis of whether or not the teeth were rotten and chipped.

Defendant chose not to cross-examine Ruiz and, thus, did not show her a picture of Guilfoyle. At the end of Ruiz's testimony, defendant made a motion to dismiss based upon insufficient evidence, which was denied. Defendant next made an offer of proof to enter a newspaper photograph of Anthony Guilfoyle, who defendant claims is the actual robber of the restaurant. Counsel claimed that because Guilfoyle had robbed two or three establishments in the area prior to February 3, 1999 and two or three after February 3, 1999, and because he resembled the description of the robber given by Velasquez and Ruiz, there was a chance that Guilfoyle was the robber. To lay a foundation for the photograph, defendant offered to call the police officers, who made the arrests in the Guilfoyle case, to describe the prior robberies, and the indictment against Guilfoyle. The officers were produced on September 2. Prior to any testimony from the officers, the court ruled that it would not permit the photograph into evidence because there was no evidence linking that person to the restaurant robbery. The defense attorney then stated that the defendant would not put in a case and would not call the officers.

Defendant was convicted of first degree robbery and sentenced to a determinate term of 11 years. On June 14, 2000, defendant moved pro se in the trial court to vacate his conviction on the basis of ineffective assistance of counsel, and on the basis that the prosecution failed to prove his guilt beyond a reasonable doubt (see CPL 440.10(1)(h)). On September 5, 2000, the trial court denied the motion.

On February 10, 2003, Supreme Court also denied defendant's CPL 440.10(1)(g) motion to vacate the conviction based on newly discovered evidence, concluding that the affidavit made in support of the motion, in which Ruiz stated that she is "90%" certain that Guilfoyle is the person who robbed her, was not newly discovered, and that defense counsel had the opportunity to use the photograph of Guilfoyle at trial to cross- examine her but chose not to. Supreme Court wrote:

"Here, the 'newly discovered evidence' offered by the defendant consists of an affidavit in which Otilia Ruiz states that the defendant was not the robber, and that she is 90% certain that Anthony Guilfoyle was the true perpetrator. Although the defendant contends that this evidence would probably change the result if a new trial is granted, the court is not convinced that such is the case. Ruiz essentially testified at trial that the defendant was not the robber, and the jury nevertheless found the defendant guilty based on identification testimony by Jose Velasquez. It is by no means probable that Ruiz's ability to identify Guilfoyle as the robber would have affected the jury's assessment of the identification testimony."

Moreover, there is no evidence that the picture revealed the rotten teeth that Ruiz noted in her description of the robber.

Defendant appealed to the Appellate Division which, on March 29, 2004, affirmed the conviction and affirmed both orders denying defendant's CPL 440.10 motions to vacate the judgment of conviction. The Appellate Division found that the evidence against defendant was "legally sufficient to establish the

defendant's guilt beyond a reasonable doubt" (see People v Schulz, 5 AD3d 799, 800 [2nd Dept. 2004]). Further, the Appellate Division determined that defendant had not proffered newly discovered evidence and that the motion to vacate the conviction was properly denied without a hearing.

A Judge of this Court granted defendant leave to appeal.

Discussion

People v Primo (96 NY2d 351, 356 supra), which held that before permitting evidence that another party committed the crime for which a defendant is on trial, the court must balance the probity of the evidence against the prejudicial effect to the People, is determinative of this appeal. In that case, this court reversed a conviction for attempted murder in the second degree based upon the trial court's exclusion of ballistics evidence tied to another person who was present at the scene.

This Court stated, "The admission of evidence of third-party culpability may not rest on mere suspicion or surmise." The concern is that the evidence of third-party culpability will cause "undue prejudice, delay and confusion" of the evidence presented to the jury. In order to determine whether the evidence will be admitted, the court must allow the defense "to make a proffer outside the presence of the jury to explain how it would introduce evidence of third party culpability." Then, the court must allow the prosecutor to make counter-arguments.

In the case at bar, the court allowed the defense to make a proffer of evidence concerning the photograph outside the presence of the jury concerning how he would lay a foundation to enter the photograph of Guilfoyle. The prosecution countered that there was no foundation for entering the photograph. The court, after hearing the defense, determined that there was no "sufficient nexus between that suspect or the person that you say committed the crimes, and this crime, to show that that person committed this particular crime." However, the court stated it would allow the defense to call two officers to testify concerning the photograph of Guilfoyle, but defendant in the end chose not to call those witnesses. Moreover, Ruiz was not cross- examined and was not shown Guilfoyle's photograph.

Defendant offers no evidence which shows a modus operandi, a witness who saw Guilfoyle at the scene or even a connection between the get-away car and Guilfoyle. What defendant offers on this appeal is a Newsday article, dated March 10, 1999, which describes Guilfoyle's crime spree, and the affidavit of Ruiz, dated March 10, 2002, taken three years after the crime was committed, Ruiz's inability to identify defendant at trial as the robber, a picture which allegedly shows that defendant and Guilfoyle resemble one another, and the fact that Guilfoyle committed several robberies in the vicinity of El Classico around February 3, 1999.[4]

Unlike in Primo, where the alleged suspect was at the scene of the crime, identified as the shooter, and where the ballistics report matched a gun of the person who defendant said committed the crime, here there is no evidence linking Guilfoyle to the crime at El Classico. "While evidence tending to show that another party might have committed the crime would be admissible, before such testimony can be received there must be such proof of connection with it, such a train of facts or circumstances as tend clearly to point out someone besides the prisoner as the guilty party" (see Greenfield v People, 85 NY 75, 89 [1881]). "Remote acts, disconnected and outside of the crime itself, cannot be separately proved" to show that someone other than the defendant committed the crime (see id.). In the circumstances of this case, the trial court did not abuse its discretion in determining that the photograph of Guilfoyle would

have caused undue delay, prejudice and confusion, and properly precluded the evidence.

Insufficient Evidence

Defendant argues that the evidence against him was insufficient and that his CPL 440.10(1)(h) motion should have been granted. The standard for sufficiency of evidence is whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt" (citation omitted) (see Jackson v Virginia, 443 US 307, 319 [1979]; see also People v Jennings, 69 NY2d 103, 114 [1986]).

Under Penal Law 160.15, the jury had to find that defendant forcibly stole property, and in the course of the commission of the crime or immediate flight therefrom, he or another participant in the crime used or threatened the immediate use of a dangerous instrument. In the case at bar, defendant is accused of entering El Classico Restaurant, taking money from the cash register and using a knife to accomplish the robbery. All acts, if found to be true, support a finding of robbery in the first degree.

Velasquez testified that he saw defendant in the restaurant and spoke with him, and then again saw him leaving the restaurant after having committed the robbery. He chased the defendant in his car. Velasquez identified defendant in a photo- array, and in a police line-up. At trial, Velasquez pointed out the defendant as the one who had committed the crime. Ruiz testified that someone forcibly took money from the cash register where she was working and that this person had no authority to take the money. While she did identify defendant in a photo array the next day, she could not point out defendant at trial as the one who had committed the crime.

As we noted in People v Arroyo (54 NY2d 567, 578 [1982]) "the testimony of one witness can be enough to support a conviction, noting that it is typically the province of the jury to determine a witness' credibility" (see also People v Contes, 60 NY2d 620, 621 [1983] [defendant identified by tattoos enough evidence to convict]).

When two eyewitnesses to a crime give conflicting testimony, it is the jury that must weigh the evidence and determine who to believe (see People v Jackson, 65 NY2d 265, 272 [1985] ["That two or more witnesses give conflicting testimony, however, simply creates a credibility question for the jury to be determined by them in the context of the entire body of evidence before them"] [citation omitted]; see also People v Stewart, 40 NY2d 692, 699 [1976] [it is different when the evidence comes from a single prosecution witness "who offer[s] irreconcilable testimony pointing in both directions to guilt and innocence"]; People v Ledwon, 153 NY 10, 18 [1897]). In the instant matter, the jury weighed the evidence and found Velasquez's identification of defendant to be credible.

Ineffective Assistance of Counsel

In order to sustain a claim of ineffective assistance of counsel, New York courts examine the trial as a whole to determine whether defendant was afforded meaningful representation (People v Benevento, 91 NY2d 708, 713 [1998]). In the case at bar, defendant argues that trial counsel's failure to have Anthony Tralongo, his roommate, testify as an alibi witness concerning his whereabouts on the evening of February 3, 1999, and failure to interview Ruiz prior to trial constitute ineffective assistance of counsel. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having

produced a just result" (see Strickland, 466 US 668, 686, supra).

Here, there has been no showing that trial counsel was deficient in failing to provide a meaningful defense in light of the circumstances (see People v Hobot, 84 NY2d 1021, 1022 [1995] [claim for ineffective assistance of counsel failed, defendant did not meet "high burden of demonstrating that he was deprived of a fair trial by less than meaningful representation"]; People v Flores, 84 NY2d 184, 189 [1994] [defendant received meaningful representation]). The trial record indicates that defense counsel made a tactical decision not to call defendant's roommate after Ruiz failed to identify defendant. "Hindsight should not escalate what may have been a few tactical errors into ineffective assistance of counsel" (People v Baldi, 54 NY2d 137, 151 [1981]).

Accordingly, the order of the Appellate Division, should be affirmed.

People v Schulz

No. 65

ROSENBLATT, J., dissenting in part:

Respectfully, I dissent from so much of the Court's decision as upholds the denial of defendant's CPL 440.10 (1) (g) motion without a hearing. On the record before us, the possibility of defendant's actual innocence is too high to justify denial of the CPL 440.10 motion without a hearing. The majority determined that the case is legally sufficient, and no one can quarrel with that. My discomfort stems from the combined effect of two rulings: the first, denying the introduction at trial of Guilfoyle's photograph; and the second, summarily denying defendant's post-trial motion after the primary victim, Ruiz (who at trial said defendant was not the robber), submitted an affidavit stating that she is 90 percent certain that the person in the photograph -- Guilfoyle -- was the robber. Coming on the heels of a borderline ruling disallowing Guilfoyle's photograph at trial, the affidavit is too potent to be cast aside.

I'll elaborate.

1) As between Ruiz and Velasquez, Ruiz is the more important witness. She was the one whom the robber held at knifepoint. Velasquez did not testify that he saw the actual crime; he did not see it. He said he saw defendant in the restaurant. I do not discount his testimony or his identification of the car. It is important evidence and inferential enough to give the prosecution a legally sufficient case, but it is not as compelling as Ruiz's testimony combined with her post-trial affidavit.

2) The majority states that defendant was arrested based on the descriptions of both Velasquez and Ruiz. On the record before us, however, we do not know how it came about that police suspicion settled on defendant. At oral argument, the People told us they did not know.

3) The majority points out that Guilfoyle robbed two or three establishments before and two or three after the robbery in question. This characterization is accurate, but it does not emphasize, as I think it should, the extraordinary proximity in time and place of Guilfoyle's crimes compared with the El Classico robbery. Guilfoyle's arrest reports reveal that he was charged with a robbery the same night as the El

Classico robbery, roughly three hours before the El Classico crime and only 10-12 miles away. Guilfoyle's other robberies occurred on January 27, 1999, at a small business fewer than three miles away from El Classico; then again, later in the evening on January 27, at another small business roughly five miles away from El Classico; again on February 1, at a small business 8-10 miles away; on February 5, at 5:45 pm roughly five miles from El Classico; and finally, on March 7, at another small business about five miles away.

There was also Guilfoyle's modus operandi: in each instance, he took money from the cash register of a small business by intimidating the worker and sometimes pretending to have a gun. The El Classico robber's method seems similar enough to Guilfoyle's technique that the connection should have been explored. I cannot agree with the majority that Guilfoyle's robberies were marked by "remoteness" from the one involved here.

Affirming both the conviction and the CPL 440.10 denial is disquieting, but not because Primo created a rule that, if applied to a pre-Primo case, would call for a different result. Primo articulates a better test than the earlier "clear link" standard because it is less mechanical and allows the court, in a conventional way, to balance probative value against prejudice.

The problem here would be much the same had Primo never been decided. Primo implicitly recognized that a trial, if not properly constrained, could become skewed and the prosecution put to the impossible burden of having to disprove the guilt of everyone who, in a photograph, looks like the accused.

If that were allowed, a criminal case could deteriorate into a chaotic series of mini-trials, one per photograph, given the ease with which defendants can find pictures of felons who resemble them (at least the ordinary defendant can, even if not this one). Primo should not be read as having opened that door.

On the contrary, most judges, I suspect, had instinctively applied a Primo prejudice/probative value test without calling it that. We just gave it a better name, reminding judges that discretion is antithetical to rigidity and some rulings call for more elasticity than others.

This is all worth mentioning because of what happened at the trial. In refusing to let the jury see Guilfoyle's photograph, the court did not rule it prejudicial or valueless.

Rather, the court considered whether a proper foundation had been proffered, which was the prosecution's only objection, and ruled that the photograph's connection to the case was too tenuous. It was a very close call.

In trying to get Guilfoyle's photograph into evidence, the defense pointed out that it could establish a foundation by testimony from the detectives who had worked on the Guilfoyle cases. The defense argued that the detectives' description would confirm that Guilfoyle's method of operation matched the El Classico crime. In response to the prosecution's challenge that Guilfoyle's appearance may have changed since the date of the photograph, the defense explained that the police officers would be able to describe any differences between the photograph and Guilfoyle's contemporary appearance. It was only after the defense had rebuffed the prosecution's foundation objection that the trial court, on its own, began wondering aloud whether a sufficient link existed between the photograph and the crime.

The trial court based its ruling on the proper conclusion that a mere similarity of appearance would not

suffice to make the photograph admissible. The court rejected the defense's protestations that the close proximity in time and place, coupled with the similarity of method, of Guilfoyle's crimes made the admissibility of the photograph rest on a good deal more than mere physical resemblance.

Had the court allowed the jury to see the photograph, no one could have justly criticized the ruling on "foundation" grounds or as an exercise of discretion. But excluding Guilfoyle's photograph was within the court's discretion, and if that were all there was before us I would close the book on this case.

It's what happened afterward that's unsettling. By submitting a post-trial affidavit identifying Guilfoyle, Ruiz has, in hindsight, shaken the court's ruling barring the photograph. Her affidavit does not make the ruling wrong, or reversible, because we do not use hindsight to overturn trial judges' determinations. For that reason, I agree with the Court that reversal of the conviction is not now warranted.

The CPL 440.10 motion, however, should not have been denied without a hearing, and in my view it was an abuse of discretion to, in effect, reject the Ruiz affidavit out of hand. Rather than affirming the denial of a hearing, this Court should remand so that Ruiz can be called before the court, under oath, to give her a chance to see Guilfoyle under court-arranged auspices. The court could then determine whether the conviction was a miscarriage of justice. As a dissenter, of course, I cannot make this happen. It would seem to me, though, that there is nothing to be lost and everything to be gained if this chapter were fulfilled. The Guilfoyle photograph is too blurry to justify any kind of certainty. After seeing Guilfoyle in person, however, Ruiz may conclude that he is not the robber. If so, the case is over and justice is served. But if Ruiz insists that Guilfoyle is the man who robbed her, I should think that any right-minded prosecutor would want to know of it. Given the affirmance, the prosecutor's alternative is to do nothing and never put Ruiz to a test before the wise and experienced judge who heard this case. Given her affidavit, Ruiz's testimony at a CPL 440.10 hearing would necessarily produce an additional measure of truth. Prosecutorial inaction would be lawful, but regrettable. The interests of finality count for a great deal, and may be alluring, but they are not always consistent with the higher ends of justice.

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Order affirmed. Opinion by Judge G.B. Smith. Chief Judge Kaye and Judges Ciparick, Graffeo, Read and R.S. Smith concur. Judge Rosenblatt dissents in part in an opinion.

Decided May 5, 2005

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[1]While defendant additionally seeks relief on the ground of newly discovered evidence, "[t]his Court . . . has no power to review the discretionary denial of a motion to vacate judgment upon the ground of newly discovered evidence" (People v Crimmins, 38 NY2d 407, 409 [1975]; see also People v Smith, 63 NY2d 41, 66 n 4 [1984]; People v Brown, 56 NY2d 242, 246 [1982]).

[2]During the cross examination of Velasquez and Detective Gieck, defense counsel brought out that Velasquez had told the police that the get-away car had a license plate with a "1" and a "T" but this did not match the license plate in the defendant's driveway.

[3]Prior to trial, a Wade hearing was held on April 7 and April 15, 1999, and the motions to suppress the

line-up identifications of defendant were denied.

[4]The dissent highlights the "extraordinary proximity in time and place of Guilfoyle's crimes compared with the El Classico robbery" and points out that Guilfoyle was charged with robberies of small businesses only miles away (dissent, at p. 3).

The dissent highlights the "extraordinary proximity in time and place of Guilfoyle's crimes compared with the El Classico robbery" and points out that Guilfoyle was charged with robberies of small businesses only miles away (dissent, at p. 3).

Miles away, however, is hardly "extraordinary proximity" in the suburbs of Suffolk County, which are densely inhabited by people and small businesses. Moreover, the dissent states that the defense could have established "a foundation by testimony from the detectives who had worked on the Guilfoyle cases" (dissent, at p. 5). Perhaps, but it chose not to. The dissent fails to recognize that the People produced both detectives in court the day after defense counsel's request. Defense counsel, however, chose to rest its case, stating "[a]fter the time given to us by the Court to discuss the next phase of this trial with my client, I state to the Court we do not intend to call any witnesses on behalf of the defendant."