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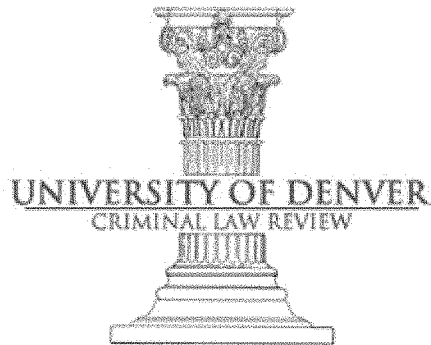
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BAD SCIENCE BEGETS BAD CONVICTIONS: THE NEED FOR POSTCONVICTION RELIEF IN THE WAKE OF DISCREDITED FORENSICS

JESSICA GABEL CINO*

I. INTRODUCTION

The headlines trumpet delayed justice: “Innocent Man Freed after 35 Years has an Incredible Outlook on Life,”¹ “North Carolina Frees Innocent Man Who Spent Half His Life in Jail,”² and “DNA Helps Free Inmate after 27 Years.”³ In the limelight is modern science’s ability to rectify decades-old wrongs. There is no question that scientific developments, particularly in the area of DNA, have advanced how criminal cases are investigated, prosecuted, and presented in court. Overlooked in the wake of such acclaim, however, is the fact that forensic science is far from infallible.

While progress in DNA testing has provided a more exacting tool with which to explore guilt and innocence, scientific developments that call previously accepted forensic techniques into question often escape attention. Headlines such as “FBI Admits Flaws in Hair Analysis over Decades,”⁴ “How the Flawed ‘Science’ of Bite Mark Analysis has Sent Innocent People to Prison,”⁵ and “Fuzzy Math: Advances in DNA Mixture Interpretation Uncover Errors in Old Cases”⁶

* Associate Professor, Georgia State University - College of Law. I would like to thank my intrepid research assistants, Michael Williford, Amy Patterson, and Majda Muhic for their fierce determination in completing this article. I would also like to thank Simon Cole, Sarah Chu, and Henry Swofford for their input and inspiration.

1. Christina Sterbenz, *Innocent Man Freed after 35 Years Has an Incredible Outlook on Life*, BUS. INSIDER (Oct. 18, 2013, 9:04 AM), <http://www.businessinsider.com/james-bain-exonerated-after-35-years-in-prison-2013-10>.

2. Ed Pilkington, *North Carolina Frees Innocent Man Who Spent Half His Life in Jail*, THE GUARDIAN (Jan. 23, 2015, 3:33 PM), <http://www.theguardian.com/us-news/2015/jan/23/north-carolina-frees-innocent-man-joseph-sledge-half-life-jail>.

3. *DNA Helps Free Inmate after 27 Years*, CBS NEWS 60 MINUTES (May 2, 2008), <http://www.cbsnews.com/news/dna-helps-free-inmate-after-27-years/>.

4. Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, WASH. POST (Apr. 18, 2015), https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfab310_story.html.

5. Radley Balko, *How the Flawed ‘Science’ of Bite Mark Analysis Has Sent Innocent People to Prison*, WASH. POST (Feb. 13, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/02/13/how-the-flawed-science-of-bite-mark-analysis-has-sent-innocent-people-to-jail/>.

6. Jessica Gabel Cino, *Fuzzy Math: Advances in DNA Mixture Interpretation Uncover Errors in Old Cases*, MIMESIS LAW (Oct. 8, 2015), <http://mimesislaw.com/fault-lines/fuzzy-math-advances-in-dna-mixture-interpretation-uncover-errors-in-old-cases/3669>.

underscore problems with forensic science that have largely escaped accountability and remain unchecked.

Undoubtedly, forensic science is a vital component of the criminal justice system. Thousands of guilty defendants have been convicted with the help of forensic techniques. At the same time, the Innocence Project estimates that forensic evidence with little to no probative value caused or contributed to a wrongful conviction in nearly half of the DNA exoneration cases the Project has evaluated.⁷ Many forensic techniques, such as hair and fiber analysis, toolmark comparisons, and fingerprint analysis, rely upon little more than a matching of patterns where a forensic analyst compares a known sample to a questioned sample and makes the highly subjective determination that the two samples originated from the same source. Although lacking a true scientific foundation, what passes as “science” plays a prominent role in many cases because of the availability of trace evidence, which is easy to leave and easy to find at a crime scene. Other forensic fields, including forensic pathology, arson investigation, and firearms identifications, rely on assumptions that are “under-researched and oversold.”⁸

In theory, scientific expert testimony must meet certain standards of reliability before being admitted in court. In federal court and some state courts, the *Daubert* standard governs the admissibility of such testimony.⁹ Under *Daubert*, a judge acts as a “gatekeeper” and may admit scientific evidence as long as it is both “relevant” and “reliable.”¹⁰ Other state courts have continued to follow the earlier *Frye* standard, under which scientific evidence “must be sufficiently established to have gained general acceptance in the particular field in which it belongs” to be admissible.¹¹ Despite these roadblocks to admissibility, courts have routinely accepted much of the so-called science underlying forensic testing with little, if any, inquiry.¹²

Forensic science’s armor has some cracks in it, however. In 2005, the Federal Bureau of Investigation (“FBI”) discontinued its Comparative Bullet Lead Analysis (“CBLA”) program, finding that “neither scientists nor bullet manufacturers are able to definitively attest to the significance of an association made between bullets in the course of a bullet lead examination.”¹³ The FBI Laboratory performed CBLA examinations for decades, and the resulting evidence was used to

7. Innocence Project, *DNA Exonerations in the United States*, <http://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Dec. 21, 2016) (stating that 46% of the 347 DNA exonerations “[i]nvolved misapplication of forensic science”).

8. Jessica D. Gabel & Margaret D. Wilkinson, *Good Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics*, 59 HASTINGS L.J. 1001, 1002 (2008).

9. See *Daubert v. Merrill Dow Pharms.*, 509 U.S. 579 (1993).

10. *Id.* at 597.

11. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *People v. Geier*, 161 P.3d 104, 142 (Cal. 2007).

12. See, e.g., *Johnson v. Commonwealth*, 12 S.W.3d 258, 263-64 (Ky. 1999).

13. FEDERAL BUREAU OF INVESTIGATION, FBI LABORATORY ANNOUNCES DISCONTINUATION OF BULLET LEAD EXAMINATIONS (Sept. 1, 2005), http://www.fbi.gov/pressrel/pressrel05/bullet_lead_analysis.htm.

convict many defendants.¹⁴ In 2015, the U.S. Department of Justice (“DOJ”) and FBI formally admitted that almost every examiner in the FBI’s microscopic hair unit gave misleading, exaggerated, or otherwise flawed testimony in criminal cases between 1972 and 1999.¹⁵ A cloud of doubt now hangs over cases involving hair evidence, but they are not alone. A committee at the National Academy of Science (“NAS”) concluded in 2009 that “no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”¹⁶ Simply put, the criminal justice system is “sending *people to jail based on bogus science.*”¹⁷

The President’s Council of Advisors on Science and Technology (“PCAST”), released a report on forensic science in September 2016.¹⁸ While the Council acknowledged the ongoing efforts to improve forensic sciences after the 2009 NAS Report, its report also emphasized the significant problems in multiple disciplines of forensic sciences.¹⁹ The PCAST Report focused on “pattern identification evidence” – the evidence that requires interpretation by an examiner.²⁰ The main question asked by PCAST is whether these types of evidence are supported by reproducible research.²¹

PCAST suggested that there are two types of validity a discipline of forensic science must pass.²² The first is foundational validity, which means that the discipline is based on research and studies that are accurate and reproducible.²³ The

14. *Id.*; see also John Solomon, *FBI’s Forensic Test Full of Holes*, WASH. POST (Nov. 18, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/17/AR2007111701681.html>.

15. Spencer S. Hsu, *supra* note 4.

16. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCE CMTY. ET AL., NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 7 (2009) [hereinafter NAS REPORT]. In recent years, studies of certain forensic fields have demonstrated a lack of scientific foundation in the testing methods, identified serious flaws, and questioned the continued use of such techniques. See INNOCENCE PROJECT ARSON REVIEW COMM., REPORT ON THE PEER REVIEW OF THE EXPERT TESTIMONY IN THE CASES OF STATE OF TEXAS V. CAMERON TODD WILLINGHAM AND STATE OF TEXAS V. EARNEST RAY WILLIS 40 (2006) (“The significant lack of understanding of the behavior of fire . . . can and does result in significant misinterpretations of fire evidence, unreliable determinations, and serious miscarriages of justice with respect to the crime of arson.”); NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, BALLISTIC IMAGING 3 (2008) (“The validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated.”).

17. Kelly Servick, *Reversing the Legacy of Junk Science in the Courtroom*, SCI. MAG. (Mar. 7, 2016, 4:30 PM), <http://www.sciencemag.org/news/2016/03/reversing-legacy-junk-science-courtroom>.

18. EXECUTIVE OFFICE OF THE PRESIDENT, PRESIDENT’S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS, (Sept. 2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [hereinafter PCAST REPORT].

19. *Id.* at 1-20.

20. *Id.*

21. See *id.*

22. *Id.* at 4-5.

23. *Id.*

second type of validity is applied validity, which means that the method is reliably applied in practice.²⁴ Among the disciplines of forensic science PCAST examined, including DNA analysis, bite marks, latent fingerprints, firearms identification, and footwear analysis, the only valid discipline (using both foundational and applied validity) was single-sourced DNA analysis.²⁵

What can the criminal justice system do about bad science? This article provides an answer to that question in three parts. First, this article looks at the inability of certain fields of forensic science to produce reliable results. Second, it discusses problems with the current methods of challenging convictions based on unreliable science. Finally, it proposes a new framework to better enable prisoners to seek review of such convictions. What this article does not do is propose ways to prevent wrongful convictions in the future. Many issues, including the need for more research, accurate testing, judicial acceptance, and shifts in forensic laboratory culture will need to be addressed in order to protect innocent individuals from being convicted in the first instance. This article proposes a way to confront faulty forensics retrospectively, by providing an avenue of relief for the numerous current prisoners who were convicted based on misleading scientific evidence.

II. FAULTY FORENSICS: SHROUDING GUESSWORK IN THE CLOAK OF SCIENCE

The cases are many, but the differences are few. Whether it was a bullet from a smoking gun or a fingerprint left on a glass, the evidence (and the alleged science behind it) produced wrongful convictions. Critics have attempted to shed light on the weaknesses in forensic science, but a policy of willful blindness prevails. The examples below are only a fraction of the larger problem, but should serve as a reminder that innocence cannot be ignored.

A. THE ERROR IN HAIR: MICROSCOPIC HAIR EXAMINATION

Hair analysis, also referred to as microscopic hair examination or hair microscopy, was used in criminal investigations from the 1970s through 2000, when DNA testing supplanted it. Even in 2000, the FBI stated that hair recovered from a crime scene was beneficial because it transferred during physical contact among and between the suspect, the victim, and the crime scene. The logic followed that

24. *Id.*

25. *Id.* at 7-14. The PCAST Report received criticism for its findings, most notably from those on the prosecutorial side of the aisle. *See, e.g.*, National District Attorneys Association, *National District Attorneys Association Slams President's Council of Advisors on Science and Technology Report* (Sept. 2, 2016), <http://www.ndaa.org/pdf/NDAA%20Press%20Release%20on%20PCAST%20Report.pdf>. PCAST responded in detail, noting: "Forensic science is at a crossroads. There is growing recognition that the law requires that a forensic feature-comparison method be established as scientifically valid and reliable before it may be used in court and that this requirement can only be satisfied by actual empirical testing." It also encouraged forensic science to be the author of its own destiny. EXECUTIVE OFFICE OF THE PRESIDENT, PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, AN ADDENDUM TO THE PCAST REPORT ON FORENSIC SCIENCE IN CRIMINAL COURTS 9 (2017), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensics_addendum_finalv2.pdf.

hair evidence could be used to associate a suspect with a crime scene or a victim.²⁶ Hairs recovered from a scene and hairs from a sample were analyzed and compared against each other to determine whether a transfer occurred.²⁷ Generally, this evaluation was done by an examiner who placed both the sample and the evidence under a comparison microscope for simultaneous viewing.²⁸ That enabled the examiner to determine whether the hairs came from the same source.²⁹

Although hair microscopy evidence received some criticism, it remained relatively unscathed for decades.³⁰ It appears, however, that the past-tense is finally an appropriate fit for hair comparison. In April of 2015, the FBI admitted major flaws in the analysis procedure.³¹ The DOJ and FBI “formally acknowledged” that almost all examiners in a forensic unit gave flawed testimony in trials for over two decades.³² The unsound testimony favored prosecutors in more than 95 percent of the initial 268 trials that had been reviewed by April of 2015.³³ Most often, this flawed testimony was in relation to the level of certainty the experts claimed.³⁴ “The review confirmed that FBI experts systematically testified to the near-certainty of ‘matches’ of crime-scene hairs to defendants, backing their claims by citing incomplete or misleading statistics drawn from their case work.”³⁵

This review began in July 2012, when the DOJ and the FBI began an evaluation of more than 10,000 cases in which hair analysis was used at trial.³⁶ Before that, although hair analysis was considered to be “highly unreliable” by the 2009 NAS Report on Forensic Science,³⁷ it still remained a feature in some cases. Of the 268 trials reviewed by April 2015, at least thirty-five cases involved defendants who received death sentences.³⁸

26. Douglas W. Deedrick, *Hair Evidence*, 2 FORENSIC SCI. COMM. 3 (July 2000), <https://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/july2000/deedric1.htm>.

27. *Id.*

28. *Id.*

29. *Id.*

30. See, e.g., Clive A. Stafford Smith & Patrick D. Goodman, *Forensic Hair Comparison Analysis: Nineteenth Century Science or Twentieth Century Snake Oil?*, 27 COLUM. HUM. RTS. L. REV. 227, 229-31 (1996) (“[F]orensic hair analysis has been generally accepted by our courts for many years, with little fuss or skepticism.”).

31. Hsu, *supra* note 4.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Spencer S. Hsu, *Justice Dept., FBI to Review Use of Forensic Evidence in Thousands of Cases*, WASH. POST (July 10, 2012), https://www.washingtonpost.com/local/crime/justice-dept-fbi-to-review-use-of-forensic-evidence-in-thousands-of-cases/2012/07/10/gJQAT6DlbW_story.html.

37. FEDERAL BUREAU OF INVESTIGATION, FBI TESTIMONY ON MICROSCOPIC HAIR ANALYSIS CONTAINED ERRORS IN AT LEAST 90 PERCENT OF CASES IN ONGOING REVIEW (April 20, 2015), <https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review>.

38. *Id.*

Since these results became public, many other cases have come under review.³⁹ For example, in 1991 a man in Virginia was convicted of rape based on a single hair found on the victim.⁴⁰ After testing the hair, the Innocence Project concluded it could not belong to Darnell Phillips, who was sentenced to 100 years in prison.⁴¹ He has been granted the right to test the new evidence.⁴² Additionally, the DOJ proposed in March of 2016 to expand its review from hair analysis to include fingerprint examinations and bullet-tracing.⁴³

B. TAKING THE BITE OUT OF BAD SCIENCE: BITE MARK ANALYSIS

Bite mark evidence gained national attention in the Ted Bundy trial in 1979.⁴⁴ Since then, American courts have time and again improperly legitimized this allegedly “scientific” evidence.⁴⁵ The common—yet untested—assumption is that each person produces a unique bite mark, unlike any other in the world.⁴⁶ Unlike DNA analysis, however, there is no scientific basis for the testimonial that an expert can identify a single individual based on bite mark analysis.⁴⁷ As a result the NAS Report recommended that the only probative value of such analysis in criminal prosecutions be in *excluding* an individual from suspicion rather than identifying a suspect.⁴⁸

In 2014, the American Academy of Forensic Sciences further evaluated forensic odontologists and determined that they lacked the ability to simply conclude which marks were actually bite marks.⁴⁹ What may initially appear to be bite marks can actually be just another injury; a cut or scrape that looks strikingly similar to a tooth pattern.⁵⁰ Moreover, bite marks, unlike a dental mold taken of a sus-

39. Seth Augenstein, *Four States Auditing Cases Involving Flawed FBI Hair Analysis*, FORENSIC MAG. (April 27, 2015), <http://www.forensicmag.com/articles/2015/04/four-states-auditing-cases-involving-flawed-fbi-hair-analysis>.

40. Seth Augenstein, *Virginia Inmate, Serving 100 Years for Rape Based on Hair, to Get New DNA Testing*, FORENSIC MAG. (Feb. 25, 2016), <http://www.forensicmag.com/news/2016/02/virginia-inmate-serving-100-years-rape-based-hair-get-new-dna-testing>.

41. *Id.*

42. *Id.*

43. Spencer S. Hsu, *Justice Department Frames Expanded Review of FBI Forensic Testimony*, WASH. POST (March 21, 2016), https://www.washingtonpost.com/local/public-safety/justice-department-frames-expanded-review-of-fbi-forensic-testimony/2016/03/20/ed536702-eed9-11e5-85a6-2132cf446d0a_story.html.

44. Radley Balko, *It Literally Started with a Witch Hunt: A History of Bite Mark Evidence*, WASH. POST (Feb. 17, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/02/17/it-literally-started-with-a-witch-hunt-a-history-of-bite-mark-evidence/>.

45. *Id.*

46. NAS REPORT, *supra* note 16, at 173-75.

47. *Id.*

48. *Id.* at 176.

49. Souviron, R. R. *The NAS Report, Forensic Odontology, and a Path Forward*. Presented at the American Academy of Forensic Sciences, Seattle, Washington, 2014.

50. *Id.*

pect's teeth, are left in malleable material: human skin, making it difficult to truly define the boundaries of an impression.⁵¹

As part of a larger examination of forensic science for which the validity has been called into question, in 2014 the Texas Forensic Science Commission began a sweeping review of cases where bite mark analysis played a role in the conviction.⁵² The Commission is now considering the validity of the entire field of bite marks.⁵³ Furthermore, the White House Science Advisor has also thrown doubt on the reliability of bite mark analysis.⁵⁴

The assumed reliability of “forensic odontology” is particularly dangerous due to the esoteric nature of the discipline and the simple fact that most jurors and attorneys are unfamiliar with either its terminology or methodology, and are more likely to uncritically accept the conclusions of a bite mark expert.⁵⁵ The cases of faulty bite mark evidence are numerous and appalling.⁵⁶ In March 2016, Keith Allen Harward was released from prison based on DNA evidence due to a rape conviction based entirely on the testimony of two forensic odontologists, who told the jury that the bite-mark found on the surviving woman's legs conclusively came from Harward.⁵⁷ Harward spent 33 years in prison.⁵⁸

Similarly, Bennie Starks was convicted of a brutal rape in 1986 and sentenced to sixty years in prison as a result of faulty forensic testimony.⁵⁹ The prosecution's forensic serologist testified that, based on her analysis of a semen sample taken from the victim's underpants and a sample obtained from Starks, she could not exclude Starks as the source.⁶⁰ The prosecution also hired two dentists who self-identified as “experts” in forensic odontology to testify that bite marks on the

51. *Id.*

52. Brandi Grissom, *Forensic Science Commission will Investigate Convictions Based on Bite Marks*, DALLAS MORNING NEWS: TRAIL BLAZERS BLOG (Aug. 14, 2015), <http://trailblazersblog.dallasnews.com/2015/08/forensic-science-commission-will-investigate-convictions-based-on-bite-marks.html>; see also Texas Forensic Science Commission, *Texas Bite Mark Case Review* (last visited Dec. 20, 2016), <http://www.fsc.texas.gov/texas-bite-mark-case-review>.

53. See Texas Forensic Science Commission, *Texas Bite Mark Case Review* (last visited Dec. 20, 2016), <http://www.fsc.texas.gov/texas-bite-mark-case-review>.

54. Radley Balko, *A High-Ranking Obama Official Just Called for the 'Eradication' of Bite Mark Evidence*, WASH. POST (July 22, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/07/22/a-high-ranking-obama-official-just-called-for-the-eradication-of-bite-mark-evidence/>.

55. Letter Brief of Amici Curiae in Support of Petition for Rehearing at 4, *In re Richards*, 289 P.3d 860 (Cal. 2012) (No. S189275), 2012 WL 7160188, at *5.

56. See, e.g., *In re Richards*, 289 P.3d 860, 863 (Cal. 2012); *People v. Starks*, 850 N.E.2d 206, 209 (Ill. App. Ct. 2006).

57. Seth Augenstein, *DNA Exonerates Man Convicted on Bite-Mark Evidence, 33 Years Later*, FORENSIC MAG. (Apr. 11, 2016), <http://www.forensicmag.com/article/2016/04/dna-exonerates-man-convicted-bite-mark-evidence-33-years-later>.

58. *Id.*

59. *People v. Starks*, 850 N.E.2d 206, 209-10 (Ill. App. Ct. 2006).

60. *Id.*

victim's shoulder had been made by Starks.⁶¹ The dentists testified that after comparing the evidence, photos, X-rays, and a model of Starks's teeth, the bite marks shared sixty-two characteristics with Starks's teeth.⁶² Hearing the forensic "experts" testimony tying the defendant to the crime, the jury convicted Starks of two counts of aggravated criminal sexual assault, attempted aggravated sexual assault, and aggravated battery.⁶³

In 2006, after spending nearly twenty years behind bars, a DNA test categorically excluded Starks as the source of the semen.⁶⁴ Additionally, two other odontologists' independent examinations of the bite mark evidence completely discredited the conclusions and testimonies presented at trial.⁶⁵ Their reports pointed out that the examination method used by the State's odontologists had since been rejected by its own creators and concluded that the dentists "misapplied the methodology and used flawed preservation and photography techniques."⁶⁶

The appeals court ordered Starks released on bond pending a new trial.⁶⁷ His convictions were vacated and the last charges dismissed in January 2013, which led to his full exoneration.⁶⁸ During the twenty years Starks spent behind bars, advancements in technology progressed exponentially (see the DNA that helped set him free), and it left bite marks behind. Even though bite mark evidence continues to suffer from fatal flaws and a low threshold of reliability, somehow it still perseveres.

Bite mark evidence's absurd perseverance is equally obvious in the case of William Richards.⁶⁹ In 1997, a California jury convicted Richards in the murder of his wife, Pamela.⁷⁰ Bite mark evidence provided the proverbial smoking gun.⁷¹ The analyst testified that he compared an autopsy photo of Pamela's body to the unusual gap in William's dentition and found a match.⁷² More than a decade later, the analyst recanted his testimony and called the once-matching gap a defect in the photo.⁷³ To add insult to injury, the analyst further stated that he no longer even believed the bite was made by a human.⁷⁴ Finally, four other forensic odontologists

61. *People v. Starks*, 975 N.E.2d 71, 73 (Ill. App. Ct. 2012).

62. *Id.*

63. *Id.* at 72.

64. *Id.* at 73.

65. *Id.* at 77.

66. *Id.* at 77.

67. *Id.* at 74.

68. Innocence Project, *Bennie Starks* (last visited Dec. 20, 2016), <http://www.innocenceproject.org/cases/bennie-starks/>.

69. *In re Richards*, 289 P.3d 860.

70. *Id.*

71. *Id.*

72. *Id.* at 865.

73. *Id.* at 948.

74. *See id.* at 956 (quoting Dr. Norman Sperber, the forensic dentist who testified as an expert at trial, as later saying "I cannot now say with certainty that the injury on the victim's hand is a human bite mark injury.").

said that the photo did not offer enough detail to provide a match to William Richards.⁷⁵

Roundly criticized as the “worst opinion of [2012],”⁷⁶ the California Supreme Court upheld Richards’s conviction.⁷⁷ The court concluded that Richards would have to prove that the evidence used against him went beyond the bounds of exaggeration: he would have to prove that it was false.⁷⁸ Thus, even though the bite mark analyst retracted his prior testimony, Richards cannot fight the conviction because *at the time of trial*, the analyst thought he was giving accurate testimony.⁷⁹ In light of the decision, the California legislature has begun a series of amendments to its false evidence statute, discussed *infra*,⁸⁰ and Richards has, yet again, found himself in front of the California Supreme Court.⁸¹

C. LATENT RELIABILITY: FINGERPRINT EXAMINATION

Fingerprint identification involves a comparison of questioned friction skin ridge impressions from fingers (or palms) left at a crime scene to known fingerprints. Once an examiner determines that there are enough areas of agreement between the two prints, the conclusion is that the questioned print is attributed to the suspect.⁸² Over the years, the terminology associated with this connection ranges from “match” to “identification” to “individualization.” These absolute terms rest on a premise ingrained in our minds since childhood and prevalent for more than a century: no two fingerprints are alike. In fact, there are three basic assumptions on which fingerprint identification depends:

1. [N]o two fingers have ever been found to possess identical ridge characteristics.
2. A fingerprint will remain unchanged during a person’s lifetime.
3. Fingerprints will have general ridge characteristics that permit them to be systematically classified and examined with great efficiency and efficacy.⁸³

75. *Id.* at 975 (Liu, J. dissenting).

76. Radley Balko, *The Path Forward on Bite Mark Matching - and the Rearview Mirror*, WASH. POST, (Feb. 20, 2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/02/20/the-path-forward-on-bite-mark-matching-and-the-rearview-mirror/>.

77. *Richards*, 289 P.3d at 970.

78. *Id.*

79. *See id.* at 964-66 (determining that even though the analyst had changed his opinion following the trial, new technology or advancements in the field had not rendered his initial testimony objectively untrue; therefore, because of the “subjective component of expert opinion testimony,” his testimony at trial was not false under California law).

80. *See infra* Part IV.B.

81. Balko, *supra* note 76.

82. *See* DAVID R. ASHBAUGH, RIDGEOLOGY: MODERN EVALUATION FRICTION RIDGE IDENTIFICATION 34-35 (1991), <http://onin.com/fp/ridgeology.pdf>.

83. TERRENCE F. KIELY, FORENSIC EVIDENCE: SCIENCE AND THE CRIMINAL LAW 349 (2d ed. 2006).

Since fingerprint evidence has been venerated for so long, its admissibility rarely receives challenges. There is no actual evidence, however, that an individual's fingerprints are unique to all others in the world.⁸⁴ Instead, like hair analysis, fingerprint analysis is another exercise in an examiner's subjective attempt at visual comparisons. Fingerprint evidence cannot fall short of admissibility, and for obvious reasons: it would upend more than a century of convictions.⁸⁵

Indeed, American courts have (and will continue) to accept forensic fingerprint identification without subjecting it to the kind of scrutiny that would be required of novel scientific or technical evidence today. Courts accepted the untested arguments that fingerprint identification was: (1) generally accepted, (2) science, and (3) reliable. Courts also accepted the claim that there were no two fingerprints in the world exactly alike. None of these claims were subjected to adequate scrutiny from either a scientific or a legal standpoint.⁸⁶ This logic requires a leap of faith rather than a fact of science: that if no two fingerprints are exactly alike in all the world, then the method of forensic fingerprint identification must be correspondingly reliable. Judicial acceptance (and in some cases judicial notice) became an important source in legitimating forensic fingerprint evidence. That is, people outside the legal system believed that fingerprinting was scientific and reliable because courts said it was so.

Consequently, the interpretation of forensic fingerprint evidence must rely upon the expertise of latent print examiners rather than on science. The NAS Report underscored the shortcomings and called for research to measure the accuracy and reliability of latent print examiners' decisions. Seven years later, however, research is still wanting. Even later reports and investigations cannot seem to give courts pause on the admissibility of fingerprint evidence. A 2012 report by a Committee of 34 scholars and forensic scientists, including at least 12 working latent print examiners, jointly convened by the National Institute of Standards and Technology ("NIST") and the National Institute of Justice ("NIJ") recommended that the report of the examination should ensure that the findings and their limitations are intelligible to non-experts.⁸⁷

Another report by the U.S. Justice Department Office of the Inspector General⁸⁸ noted that the FBI Laboratory Standard Operating Procedures "now re-

84. See *United States v. Havvard*, 117 F. Supp. 2d 848, 852 (S.D. Ind. 2000) ("In roughly 100 years since fingerprints have been used for identification purposes, no one has managed to falsify the claim of uniqueness by showing that fingers of two persons had identical fingerprints.").

85. Simon A. Cole, *Does "Yes" Really Mean Yes? The Attempt to Close Debate on the Admissibility of Fingerprint Testimony*, 45 JURIMETRICS J. 449, 450 (2005).

86. Jessica D. Gabel, *Realizing Reliability in Forensic Science from the Ground Up*, 104 J. CRIM. L. & CRIMINOLOGY 283, 285 (2014).

87. EXPERT WORKING GROUP ON HUMAN FACTORS IN LATENT PRINT ANALYSIS, LATENT PRINT EXAMINATION AND HUMAN FACTORS: IMPROVING THE PRACTICE THROUGH A SYSTEMS APPROACH 94 (National Institute of Justice, National Institute of Standards and Technology, 2012), http://www.nist.gov/customcf/get_pdf.cfm?pub_id=910745.

88. DEPARTMENT OF JUSTICE, A REVIEW OF THE FBI'S PROGRESS IN RESPONDING TO THE RECOMMENDATIONS IN THE OFFICE OF THE INSPECTOR GENERAL REPORT ON THE FINGERPRINT

quire that examiners create sufficient documentation, including annotated photographs and case notes, to allow another examiner to evaluate the examination and replicate any conclusions, and they include specific documentation requirements for each phase of the ACE-V process.”⁸⁹ Rarely does this occur, and there’s little incentive to effectuate a change. Such requirements have failed to sway the perception that latent print evidence is sufficiently reliable such that it deserves an automatic “pass” into admissibility.

In a recent (and fairly notable) decision, the Seventh Circuit, in *Herrera v. United States*,⁹⁰ effectively approved of the free pass. Judge Posner, writing for the court, concluded that a proponent of fingerprint evidence need not demonstrate reliability because it possessed some preternatural form of inherent reliability. The court’s substitution of its own unsupported indicia of reliability effectively created a series of logical leaps that exceed the bounds of current fingerprint research. *Herrera* found fingerprint identification evidence to be reliable for five reasons: (1) the prosecution’s fingerprint experts were certified by the International Association for Identification (“IAI”); (2) none of the first 194 prisoners exonerated by the postconviction DNA testing in the United States was convicted by faulty fingerprint evidence;⁹¹ (3) Francis Galton estimated the “probability of two people in the world having identical fingerprints” to be 1 in 64 billion;⁹² (4) “errors in [fingerprint] matching appear to be very rare;” and (5) examiner training encompassed “instruction on how to determine whether a latent print contains enough detail to enable a reliable matching to another print.”⁹³

Unfortunately, some of these points are factually inaccurate. Moreover, not one point supports a conclusion that fingerprint identification evidence could be admitted through expert testimony without a *Daubert* analysis. It is worth, however, scrutinizing the Seventh Circuit’s analysis and reliability conclusion because it represents one of the more recent (albeit bewildering) assessments of fingerprint analysis.

MISIDENTIFICATION IN THE BRANDON MAYFIELD CASE (2011), <http://www.justice.gov/oig/special/s1105.pdf>.

89. *Id.* at 40; NAS REPORT, *supra* note 16, at 143 (citation omitted); *see also id.* at 105–06 (“In *Maryland v. Rose*, a Maryland State trial court judge found that the Analysis, Comparison, Evaluation, and Verification (ACE-V) process . . . of latent print identification does not rest on a reliable factual foundation. The opinion went into considerable detail about the lack of error rates, lack of research, and potential for bias. The judge ruled that the State could not offer testimony that any latent fingerprint matched the prints of the defendant. The judge also noted that, because the case involved the possibility of the death penalty, the reliability of the evidence offered against the defendant was critically important. The same concerns cited by the judge in *Maryland v. Rose* can be raised with respect to other forensic techniques that lack scientific validation and careful reliability testing.”).

90. *United States v. Herrera*, 704 F.3d 480 (7th Cir. 2013).

91. *Id.* at 486–87.

92. *Id.* at 487.

93. Bradford T. Ulrey et al., *Accuracy and Reliability of Forensic Latent Fingerprint Decisions*, 108 PROCEEDINGS OF THE NAT’L ACAD. OF SCI. 7733, 7735–36 (2011).

The fact that an occupation runs a certification program does not constitute evidence about how accurately (or “reliably”) members of that occupation perform various tasks. To have such evidence effectively creates a *per se* rule that certification breeds reliability.⁹⁴ Beyond that, it seems misplaced to pin an argument on the fact that the “first 194 prisoners in the United States exonerated by DNA evidence” lacked a conviction based on erroneous fingerprint matches. This is, in part, because Stephan Cowans, the 141st person exonerated by postconviction DNA testing in the United States, was convicted in large measure on the basis of erroneous fingerprint evidence.⁹⁵ In addition, data demonstrates that at least five cases involving fingerprint analysis errors are among the 337 postconviction DNA exonerations to date.⁹⁶ Finally, postconviction DNA exonerations neither provide a representative sample nor statistically valid information about the prevalence of fingerprint analysis errors.

The Seventh Circuit’s assertion that the “great statistician Francis Galton” estimated a probability of “1 in 64 billion” for two people bearing identical fingerprints is also incorrect.⁹⁷ Galton’s estimate stemmed from a calculation of one specific “fingerprint” to *another* specific fingerprint (i.e., a 1:1 comparison).⁹⁸ Galton’s true estimate for the probability that a given fingerprint would be identical to *any* other fingerprint in the world population (estimated in 1892 at 1.6 billion) was a far more humble 1 in 4.⁹⁹ At the end of the day, the pertinent probability related to the court’s question should have been the probability of finding the common features between a suspect’s known prints and the latent prints offered into evidence against him *if* someone other than the suspect was the source of those latent prints. It is well understood in the literature, and it was stated in the NAS Report,

94. *Id.*

95. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG, 106-07 (2011); Simon A. Cole, *More Than Zero: Accounting for Error in Latent Fingerprint Identification*, 95 J. CRIM. L. & CRIMINOLOGY 985, 1014-16 (2005); Brandon L. Garrett & Peter Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 73-74, 95 (2009); Elizabeth F. Loftus and Simon A. Cole, *Contaminated Evidence*, 304 SCI. 959 (2004); Jennifer L. Minoakin, *A Blow to the Credibility of Fingerprint Evidence*, BOSTON GLOBE (Feb. 2, 2004), http://archive.boston.com/news/globe/editorial_opinion/oped/articles/2004/02/02/a_blow_to_the_credibility_of_fingerprint_evidence/; see also Brief of Amici Curiae Interested Scientists and Scholars in Support of Petition for Writ of Certiorari at 15 n.22, *United States v. Herrera*, 704 F.3d 480 (2013) (No. 12-1461), 2013 WL 3773550, at *15 n.22 [hereinafter *Herrera* Amicus Brief].

96. The Innocence Project, *The Cases*, <http://www.innocenceproject.org/all-cases/#forensic-other,exonerated-by-dna> (last visited Jan. 18, 2016).

97. *Herrera*, 704 F.3d at 487.

98. *Herrera* Amicus Brief, *supra* note 95, at 16 n.24.

99. FRANCIS GALTON, FINGER PRINTS 110-11 (1892); see SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION 80 (2001); Stephen M. Stigler, *Galton and Identification by Fingerprints*, 140 GENETICS 857, 858 (1995); David A. Stoney and John I. Thornton, *A Critical Analysis of Quantitative Fingerprint Individuality Models*, 31 J. FORENSIC SCI., 1187, 1188 (1986).

that neither Galton's estimate nor any estimate of the probability of exact duplication addresses this question.¹⁰⁰

The Seventh Circuit's fourth reason for reliability—that “errors in [fingerprint] matching appear to be very rare”—is a nebulous one. It lacks any empirical data to support the “appearance” of error rarity. The NAS Report found a dearth of information on the error rate of fingerprint identification in 2009, and not much has changed since then.¹⁰¹ Finally, the Seventh Circuit focused on the presence of training as part of its indicia of reliability. Simply because some examiners are trained does not propel fingerprint analysis to reliability. If reliability can be understood to be a three-legged stool, then one of those legs encompasses the reliability of the specific examiner (the other two being the reliability of the method and the reliability of the application of that method). That type of information would be one of the subjects of a *Daubert* inquiry—not a reason to discount it altogether. Yet, time and again courts have done just that.

As a post-script, there is hope for fingerprint analysis. In 2015, the National Institute for Standards and Technology awarded \$20 million to several universities to begin the process of developing comparable standards, research, and statistics in pattern evidence analysis, including fingerprints.¹⁰²

D. COMMUTED CALCULATIONS: DNA MIXTURES

For decades, fingerprints were the gold standard in criminal evidence. By the late 1980s, however, DNA was poised to inherit that label. DNA brought a new level of science to forensics—one built upon foundations of biochemistry, molecular biology, and genetics. But even DNA evidence can produce errors, and the potential for miscalculations is particularly ripe in DNA mixture cases. DNA mixtures occur when two or more donors have contributed to a forensic sample.¹⁰³ Because of the prevalence of this type of sample, many samples collected and processed in forensic laboratories are DNA mixtures.¹⁰⁴ Standard mixture analysis involves taking a separate sample of DNA from a suspect and comparing it to the mixture being tested.¹⁰⁵ This means it is “inherently subjective – the analyst sees the subject's genotype during the analysis.”¹⁰⁶

100. NAS REPORT, *supra* note 16, at 43, 144.

101. *Id.* at 142.

102. *New NIST Center of Excellence to Improve Statistical Analysis of Forensic Evidence*, NAT'L INST. STANDARDS & TECH. (Sept. 21, 2016), <https://www.nist.gov/news-events/news/2015/05/new-nist-center-excellence-improve-statistical-analysis-forensic-evidence>.

103. MARK W. PERLIN, OBJECTIVE DNA MIXTURE INFORMATION IN THE COURTROOM: RELEVANCE, RELIABILITY, AND ACCEPTANCE 4 (Sept. 15, 2015), <https://www.cybgcn.com/information/publication/2015/NIST/Perlin-Objective-DNA-mixture-information-in-the-courtroom-relevance-reliability-and-acceptance/paper.pdf>.

104. *Id.*

105. *Id.*

106. *Id.*

This method of comparison and analysis has been criticized because it relies heavily on interpretation. For example, an individual reference sample may have two allele peaks in common with the mixture sample.¹⁰⁷ While this may seem like conclusive evidence, one out of every fifteen people could match those two peaks out of the sample.¹⁰⁸ For unmixed samples, “analysts look at two sets of peaks at a given locus: one for the victim and one for the perpetrator.”¹⁰⁹ But mixtures are a different story: analysts look at multiple peaks at the same loci “with no indication of which pairs go together, or which source they came from.”¹¹⁰ Sorting out which peaks belong to which individual is “highly subjective,” but this DNA evidence, combined with a statement from another involved perpetrator (given in exchange for a lenient sentence), was enough to send a Georgia man to prison.¹¹¹

In the summer of 2015, the FBI discovered that numerous labs had been using incorrect protocol when calculating the probability of a match from a DNA mixture.¹¹² Originally, the FBI believed this error would not affect too many cases.¹¹³ But when labs began reanalyzing results, it became clear that the change in protocol significantly changed the probabilities in some (but not all) cases.¹¹⁴ For example, a Texas lawyer describes a case in which the original probability of the DNA sample matching his client was more than one million to one.¹¹⁵ With the new protocols in place, the lawyer believes the probability was significantly lower – in the neighborhood of thirty or forty to one.¹¹⁶ Nonetheless, the Texas Forensic Science Commission data states that the greatest difference in probability was from 1 in 260,900,000 to 1 in 225,300,000.¹¹⁷ Regardless of the true probability changes, any change is concerning because it is not difficult to imagine a scenario where a conviction was based solely, or at least primarily, on a seemingly conclusive

107. Chris Berdik, *Dubious DNA*, RESEARCH (July 21, 2015), <http://www.bu.edu/research/articles/dna-profiling/>

108. *Id.*

109. Douglas Starr, *Forensics Gone Wrong: When DNA Snares the Innocent*, SCI. (Mar. 7, 2016, 10:00 AM), <http://sciencemag.org/news/2016/03/when-dna-snares-innocent>.

110. *Id.*

111. *Id.*

112. TEX. FORENSIC SCI. COMM’N, *CLARIFICATION REGARDING THE TERM “CURRENT AND PROPER MIXTURE INTERPRETATION PROTOCOLS”* (2015), <http://www.fsc.texas.gov/sites/default/files/Clarification%20on%20current%20and%20proper%20mixture%20interpretation%20protocols.pdf> [hereinafter *CLARIFICATION*].

113. *Id.*

114. *Id.*

115. Martin Kaste, *‘Great Pause’ Among Prosecutors as DNA Proves Fallible*, NPR (Oct. 19, 2015, 5:30 PM), <http://www.npr.org/2015/10/09/447202433/-great-pause-among-forensic-scientists-as-dna-proves-fallible>.

116. *Id.*

117. TEX. FORENSIC SCI. COMM’N, *UNINTENDED CATALYST: THE EFFECTS OF 1999 AND 2001 FBI STR POPULATION DATA CORRECTIONS ON AN EVALUATION OF DNA MIXTURE INTERPRETATION IN TEXAS* (Aug. 21, 2015), <http://www.fsc.texas.gov/sites/default/files/documents/Unintended%20Effects%20of%20FBI%20Database%20Corrections%20on%20Assessment%20of%20DNA%20Mixture%20Interpretation%20in%20Texas%20NOTICE.pdf> [hereinafter *EFFECTS ON DNA MIXTURE INTERPRETATION*].

DNA match from a mixed sample.¹¹⁸ If there are doubts surrounding DNA mixture evidence (whether it is in the accuracy of the result or the accuracy of the statistics), it could affect many cases.

Because of these drastic differences, the Texas Forensic Science Commission began investigating the discrepancies.¹¹⁹ The Commission noted that the science behind DNA analysis is still sound, but “well-defined guidelines for interpretation are necessary when analyzing DNA samples containing multiple contributors, because of the complexity of the samples and the possibility of missing data (e.g., allele dropout and other stochastic effects).”¹²⁰ In August 2015, the Commission released a letter to the Texas Criminal Justice Committee explaining these issues and encouraging lawyers to determine whether their evidence was calculated using “current and proper mixture interpretation protocols.”¹²¹ A few months later, the Commission released a list of criteria for evaluating laboratories’ DNA mixture interpretation protocol.¹²²

Texas is not the only state to take notice of the limits of DNA mixture analysis. In 2015, a New York supreme court discussed and analyzed the viability of DNA mixture analysis in *People v. Collins*.¹²³ Specifically, the court looked at the “Forensic Statistical Tool” or FST, a computer program created by the New York City Office of Chief Medical Examiner to calculate the likelihood that a sample contains the DNA of a specific subject.¹²⁴ The court notes that “[t]he enormous value of such statistical results, compared to simple statements like ‘the individual cannot be excluded as a contributor’ is obvious—if the statistics are accurate.”¹²⁵ The operative phrase here is *if* the statistics are accurate. After examining the FST and hearing from experts in the field (on both sides of the issue), the court ruled that the FST did not pass the *Frye* test and was not admissible.¹²⁶ The court also noted that it did not exclude the evidence because it was proven to be false, but merely because it had yet to be accepted in the relevant scientific community.¹²⁷

118. Katie L. Dysart, *Managing the CSI Effect in Jurors*, AMERICAN BAR ASSOCIATION: SECTION OF LITIGATION TRIAL EVIDENCE (May 28, 2012), <http://apps.americanbar.org/litigation/committees/trialevidence/articles/winterspring2012-0512-csi-effect-jurors.html>.

119. See CLARIFICATION, *supra* note 112.

120. *Id.*

121. See EFFECTS ON DNA MIXTURE INTERPRETATION, *supra* note 117.

122. TEX. FORENSIC SCI. COMM’N, *CRITERIA FOR EVALUATION OF DNA MIXTURE INTERPRETATION PROTOCOLS* (Oct. 15, 2015), [http://www.fsc.texas.gov/sites/default/files/Texas%20Forensic%20Lab%20Mixture%20Criteria%20101515%20\(FINAL\).pdf](http://www.fsc.texas.gov/sites/default/files/Texas%20Forensic%20Lab%20Mixture%20Criteria%20101515%20(FINAL).pdf)

123. *People v. Collins*, 15 N.Y.S.3d 564 (N.Y. Sup. Ct. 2015)

124. *Id.* at 577.

125. *Id.*

126. *Id.* at 587.

127. *Id.* at 584.

It is, however, important to note that DNA mixture interpretation has not been completely discredited. Even with the issues described above, many experts believe that the science behind DNA mixture analysis is still sound.¹²⁸ Keith Inman, a forensic science professor, says that laboratories are stuck in a hard place.¹²⁹ The newest analysis method for DNA mixtures, probabilistic genotyping, takes time to implement, which has left laboratories knowing that a better method exists but still being required to analyze samples using the old method.¹³⁰ Similarly, the New York court in the *Collins* case did not dismiss the DNA mixture analysis entirely – it merely determined that the method was not up to the standards required by the scientific community.¹³¹

Nonetheless, juries still tend to give a great deal of weight to any DNA evidence that points to a defendant.¹³² Until the technology and analysis methods have progressed to the point of eliminating the potential for the results to vary based on which laboratory completes the analysis, the criminal justice community needs to be wary of placing too much emphasis or reliance on DNA evidence.¹³³

E. RIDING SHOTGUN: FIREARMS EXAMINATIONS

Firearms analysis is another forensic science that has been subject to criticism, but has not been completely discredited. Firearm examination can be divided into two groups: internal and external ballistics. External ballistics refers to the bullet's flight before it strikes a target, and terminal or impact ballistics, referring to the bullet striking a target.¹³⁴ It also includes the study of the flight path of projectiles.¹³⁵ "Internal ballistics" pertains to what happens inside the gun from the time it is fired until the bullet leaves the muzzle.¹³⁶ This can also be referred to as firearm tool mark analysis.¹³⁷ Internal ballistics often revolves around examinations of rifling marks on a bullet and comparing those marks to those left by a gun in evidence.¹³⁸ This section focuses on internal ballistics.

128. CLARIFICATION, *supra* note 112.

129. Kaste, *supra* note 115.

130. *Id.*

131. *Collins*, 15 N.Y.S.3d 564 at 577-82.

132. Dysart, *supra* note 118.

133. Kaste, *supra* note 115. "A lab using one method may find a match, while another lab, using a more conservative analysis, may judge the same sample to be inconclusive." *Id.*

134. *Firearms & Ballistics*, FORENSICS LIBRARY, <http://aboutforensics.co.uk/firearms-ballistics/> (last visited Dec. 20, 2016).

135. *Id.*

136. *Id.*

137. Adina Schwartz, *Challenging Firearms and Toolmark Identification—Part One*, 32 CHAMPION 10, 11 (2008).

138. *Firearms & Ballistics*, *supra* note 134. Rifling refers to the series of spiraling lands and grooves is produced along the inside of the barrel. *Id.* It will be cut with either a left or a right hand twist. *Id.* Rifling leaves characteristic marks on bullets, which is the basis for the comparison. *Id.*

Firearms examination evidence has widely been accepted by courts, even when evidence was challenged under the *Daubert* standard.¹³⁹ Much like other pattern examinations, internal ballistics has come under criticism for its subjectivity.¹⁴⁰ As the 2008 NAS Ballistics Imaging Report noted, gun identification comes down to a subjective assessment on whether or not the reference sample matches the bullet from the gun in evidence.¹⁴¹ Firearms experts often testify that the bullet in evidence was fired by the specific gun in evidence, to the exclusion of any other gun.¹⁴² This statement has been walked back some (in response to criticism), but it effectively operates the same—that it is a “practical impossibility” that another gun could have made the same marks. The conclusion of the report was succinct: “The validity of the fundamental assumptions of uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated.”¹⁴³ That conclusion, however, was handicapped by a further statement that the “baseline level of credibility” has been met by the existing research and the acceptance in judicial proceedings for years.¹⁴⁴ Judicial acceptance should not be scientific evidence of credibility.

The 2009 NAS Report also addressed this issue, noting that there is not enough known about the differences between guns to establish how many points of similarity are required to attain a statistically significant quantification about the accuracy of the conclusion.¹⁴⁵ The report suggested that additional studies should be conducted in order to make the analysis more “precise and repeatable.”¹⁴⁶

Adina Schwartz, professor at John Jay College of Criminal Justice, lists three central pitfalls related to toolmarks and firearms.¹⁴⁷ First, she discusses the possibility that individual characteristics are actually a combination of non-unique marks.¹⁴⁸ It is entirely possible that examiners confuse marks that are made by two separate tools with marks that are made by one unique tool.¹⁴⁹ Second, she notes that characteristics of marks can change over time.¹⁵⁰ In fact, “firearms and toolmark examiners do not expect the toolmarks on bullets fired from the same gun to ever be exactly alike.”¹⁵¹ This is because the gun will change as it is used, as well as from damage or corrosion.¹⁵² The final difficulty identified by Schwartz is

139. Paul C. Giannelli, *Ballistics Evidence Under Fire*, 25 CRIM. JUST. 50, 50 (2011).

140. NAT'L RES. COUNCIL BALLISTICS IMAGING 54-57 (2008), <http://www.nap.edu/read/12162/chapter/1>.

141. *Id.*

142. *Id.*

143. *Id.* at 81.

144. *Id.*

145. NAS REPORT, *supra* note 16, at 154.

146. *Id.*

147. Schwartz, *supra* note 137, at 12.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 13.

152. *Id.*

the danger of an examiner confusing an individual characteristic with what is known as a subclass mark.¹⁵³ A subclass mark is a microscopic mark that distinguishes one type of gun from another, not an individual gun of the type from another gun of the same type.¹⁵⁴ Subclass marks are common to all guns of a certain type.¹⁵⁵ This type of confusion could lead to either false positives or false negatives.¹⁵⁶

III. THE CURRENT MODEL: INCONSISTENT AND INEFFECTIVE APPROACHES TO BAD SCIENCE

The preceding section discussed how conjecture and exaggeration, masquerading as science, failed innocent people. The Innocence Project estimates that faulty forensic evidence played a role in at least 51 percent of the convictions overturned by DNA evidence.¹⁵⁷ It is impossible to know how many other innocent people have been convicted based on the same faulty forensic evidence where DNA is not available to exonerate them. Moreover, the preceding section only identified a handful of problematic forensic fields. There are other forensic specialties with similar weaknesses.

While DNA has become the new arbiter of guilt and innocence, it has also negatively affected prisoners who cannot take advantage of such compelling evidence. States have enacted statutes that provide for postconviction DNA testing in cases of alleged innocence. Lost in the shuffle, however, is DNA's other implication: that many fields of forensic science, despite widespread acceptance, frequently yield incorrect results. This section discusses the current framework for how a factually innocent person can challenge faulty forensics if DNA evidence is not available. As this section makes clear, the current postconviction framework (absent exculpatory DNA evidence) is ineffective to handle cases involving unreliable science.

A. AVAILABLE METHODS OF SEEKING DIRECT AND COLLATERAL REVIEW OF CONVICTIONS

1. DIRECT REVIEW

A motion for a new trial is the first form of direct review by which convicted individuals can seek to overturn their convictions on the basis of newly discovered evidence. All federal and state jurisdictions provide a mechanism by

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* (quoting *United States v. Green*, 405 F. Supp. 2d 104, 108 (D. Mass 2005)).

157. See Innocence Project, *Unvalidated or Improper Forensic Science*, <http://www.innocenceproject.org/causes/unvalidated-or-improper-forensic-science/> (last visited Dec. 21, 2016) (“In about half of DNA exonerations, unvalidated or improper forensic science contributed to the wrongful conviction.”).

which prisoners can move for a new trial. The rules of most jurisdictions explicitly recognize newly discovered evidence as a basis for such a motion.¹⁵⁸

In most jurisdictions, prisoners have only three years or less from a particular event—usually the verdict or finding of guilty, entry of judgment, or sentencing—to request a new trial based on new evidence¹⁵⁹ (though many jurisdictions extend or toll this time limit if newly discovered evidence is the primary basis for bringing the motion).¹⁶⁰ The time limits vary widely among jurisdictions, ranging from three years or more in federal court, the District of Columbia, and four states,¹⁶¹ to a month or less in fifteen states.¹⁶² In four other states, a prisoner may

158. *See, e.g.*, CAL. PENAL CODE § 1181(8) (Westlaw current through 2016 Reg. Sess.). The exceptions are Arkansas, Florida, Georgia, Hawaii, Illinois, Massachusetts, Michigan, Missouri, Montana, New Hampshire, Tennessee, Texas, Utah, Virginia, and Wisconsin. *See* ARK. R. CRIM. P. 33.3 (Westlaw current through Nov. 1, 2016); FLA. R. CRIM. PROC. 3.590 (Westlaw current through Aug. 15, 2016); GA. CODE ANN. §§ 5-5-40, 5-5-41 (Westlaw current through 2016 Session of the Georgia General Assembly); HAW. REV. STAT. § 635-56 (Westlaw current through Act 1 (End) of the 2016 Second Special Session); 725 ILL. COMP. STAT. 5/116-1 (Westlaw current through P.A. 99-912 of the 2016 Reg. Sess.); MASS. R. CRIM. P. 30 (Westlaw current through Nov. 1, 2016); MICH. CT. R. CRIM. P. 6.431 (Westlaw current through Nov. 15, 2016); MO. REV. STAT. § 547.020 (Westlaw current through end of 2016 Regular Session and Veto Session of the 98th General Assembly, pending changes received from the Revisor of Statutes); MONT. CODE ANN. § 46-16-702 (Westlaw current through 2015 session); N.H. REV. STAT. ANN. § 526:1 (Westlaw current through Chapter 330 (End) of the 2016 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legislative Services); TENN. R. CRIM. P. 33 (Westlaw current through Nov. 15, 2016); TEX. R. APP. P. 21.2 (Westlaw current through Sept. 1, 2016); UTAH R. CRIM. P. 24 (Westlaw current through Sept. 15, 2016); VA. SUP. CT. R. 3A:15 (Westlaw current through Dec. 1, 2016); WIS. STAT. § 809.30 (Westlaw current through 2015 Act 392, published Apr. 27, 2016).

159. *See, e.g.*, ARK. R. CRIM. P. 33.3(b) (entry of judgment); OHIO R. CRIM. P. 33(b) (Westlaw current through Aug. 1, 2016) (verdict); TENN. R. CRIM. P. 33(b) (sentencing).

160. *See, e.g.*, ALASKA R. CRIM. P. 33 (Westlaw current through Aug. 1, 2016) (increasing time from 5 days to 180 days); DEL. SUPER. CT. R. CRIM. P. 33 (2016) (increasing time from seven days to two years); MD. R. 4-331 (Westlaw current through Dec. 1, 2016) (increasing time from ten days to one year); N.M.R. 5-614 (Westlaw current through Aug. 1, 2016) (increasing time from ten days to two years); W. VA. R. CRIM. P. 33 (Westlaw current through Sept. 1, 2016) (removing ten-day limit).

161. FED. R. CRIM. P. 33(b)(1) (Westlaw current through Dec. 1, 2016); CONN. GEN. STAT. § 52-582 (Westlaw current through 2016 Sept. Special Session); D.C. SUPER. CT. R. CRIM. P. 33(b)(1) (Westlaw current through Oct. 1, 2016); NEB. REV. STAT. § 29-2103(4) (Westlaw current through the end of the 104th 2nd Regular Session (2016)); N.H. REV. STAT. ANN. § 526:4; N.D.R. CRIM. P. 33(b)(1) (Westlaw current through July 1, 2016).

162. ALA. CODE § 15-17-5(a) (Westlaw current through the end of the 2016 Regular Session and through Act 2016-485 of the 2016 First Special Session) (thirty days); ARK. R. CRIM. P. 33.3(b) (thirty days); FLA. R. CRIM. P. 3.590(a) (Westlaw current through Aug. 5, 2016) (ten days); HAW. R. PENAL P. 33 (Westlaw current through July 1, 2016) (ten days); 725 ILL. COMP. STAT. 5/116-1(b) (thirty days); IND. R. CRIM. P. 16(A) (Westlaw current through Nov. 1, 2016) (thirty days); MINN. R. CRIM. P. 26.04 subdiv. 1-1(3) (Westlaw current through May 1, 2016) (fifteen days); MISS. UNIF. R. CIR. & COUNTY CT. PRAC. 10.05 (Westlaw current through June 1, 2016) (ten days); MO. R. CRIM. P. 29.11 (Westlaw current through Nov. 1, 2016) (fifteen to twenty-five days); MONT. CODE ANN. §46-16-702(2) (2007) (thirty days); S.D. CODIFIED LAWS § 23A-29-1 (Westlaw current through 2016 Session Laws, Supreme Court Rule 16-68, and 2016 general election ballot measures) (ten days); TENN. R. CRIM. P. 33(b) (thirty days); TEX. R. APP. PROC. 21.4(a) (thirty days); UTAH R. CRIM. P. 24(c) (ten days); VA. SUP. CT. R. 3A:15(b) (twenty-one days for motion to set aside verdict); WIS. STAT. § 809.30(2)(b) (twenty days). In

potentially bring a new trial motion on the basis of newly discovered evidence at any time, subject to the court's discretion.¹⁶³ Only seven states allow a prisoner to seek a new trial at any time.¹⁶⁴

In addition to the often-limited amount of time available to seek a new trial based on newly discovered evidence, a prisoner may only make such a motion if several other requirements are met. For example, the evidence must not have been discoverable by "reasonable diligence" prior to the time of trial.¹⁶⁵ Also, the newly discovered evidence may only be sufficient to require a new trial if a prisoner can show that the evidence, if available at the time of trial, would have changed the verdict.¹⁶⁶ Many jurisdictions do not allow new trials based on new evidence where that evidence would be used only for impeachment or is cumulative of other evi-

Hawaii, a court may extend the ten-day limit indefinitely, but may only do so within that ten-day period, in Utah, a court may extend the fourteen-day limit before expiration of the time for filing a motion for new trial. *See* HAW. R. PENAL P. 33; UTAH R. CRIM. P. 24(c). In California, a motion for a new trial must be made before judgment is entered. CAL. PENAL CODE § 1182.

163. GA. CODE ANN. §§ 5-5-40(a), 5-5-41(a) (Westlaw current through 2016 Session of the Georgia General Assembly) (motion for new trial must be made within thirty days of judgment "except in extraordinary cases"); KY. R. CRIM. P. 10.06 (Westlaw current through Sept. 1, 2016) (motion for new trial based on newly discovered evidence must be made within one year of judgment "or at a later time if the court for good cause so permits"); OHIO R. CRIM. P. 33(B) (motion for new trial based on newly discovered evidence must be made within 120 days of judgment unless "it is made to appear by clear and convincing proof that the prisoner was unavoidably prevented from the discovery of the evidence upon which he [or she] must rely"); OR. R. CIV. P. 64(F) (Westlaw current with 2016 Reg. Sess. legislation eff. through July 1, 2016 and ballot measures approved at the Nov. 8, 2016 General Election, pending classification of undesignated material and text revision by the Oregon Reviser) (motion for new trial must be made within ten days of judgment "or such further time as the court may allow").

164. COLO. R. CRIM. P. 33(c) (motion for new trial based on newly discovered evidence must be filed "as soon after entry of judgment as the facts supporting it become known to the defendant"); MASS. R. CRIM. P. 30(b) (Westlaw current through Nov. 1, 2016) (no time limit for new trial motions); N.J.R. CRIM. P. 3:20-2 (Westlaw current through Aug. 15, 2016) (no time limit for new trial motions based on newly discovered evidence); N.Y. CRIM. PROC. LAW § 440.10.1 (Westlaw current through L.2016, chapters 1 to 503.) (no time limit for motions to vacate judgment); N.C. GEN. STAT. § 15A-1415(c) (Westlaw current through the end of the 2016 Regular Session of the General Assembly, pending changes received from the Revisor of Statutes) (new trial motion based on newly discovered evidence must be filed "within a reasonable time of its discovery"); 234 PA. CODE § 720(C) (Westlaw current through Pa. Bull., Vol. 46, Num. 50, dated Dec. 10, 2016) (new trial motion based on newly discovered evidence must be filed "promptly after such discovery"); W.VA. R. CRIM. P. 33 (no time limit for new trial motions based on newly discovered evidence).

165. *See, e.g.*, ALA. CODE § 15-17-5(a)(5) (20); CAL. PENAL CODE § 1181(8); IDAHO CODE ANN. § 19-2406(7) (Westlaw current through the 2016 Second Regular Session of the 63rd Idaho Legislature); MD. RULE 4-331(c); NEB. REV. STAT. § 29-2101(5) (2007); N.Y. CRIM. P. LAW § 440.10.1(1)(g); OHIO R. CRIM. P. 33(A)(6); S.D. CODIFIED LAWS § 15-6-59(a)(4); WASH. SUPER. CT. CRIM. R. 7.8(b)(2) (Westlaw current through June 15, 2016).

166. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 851(3) (Westlaw current through the 2016 First Extraordinary, Regular, and Second Extraordinary Sessions); MISS. UNIF. R. CIR. & COUNTY. CT. P. 10.05.3; N.Y. CRIM. PROC. LAW § 440.10.1(1)(g).

dence introduced at trial.¹⁶⁷ As a result, the requirements a prisoner must meet to get a new trial all but ensure that an innocent person in many jurisdictions will not be able to do so under direct review procedures.

2. COLLATERAL REVIEW

A. STATE POSTCONVICTION PROCEDURES

Every state has at least one postconviction remedy by which a prisoner can challenge the validity of his or her conviction after direct approaches have failed. These postconviction remedies may or may not be available to a prisoner who claims that newly discovered evidence establishes his or her innocence. In some states, a free-standing, or “bare” claim of innocence, which is a claim of innocence that is not accompanied by a constitutional claim,¹⁶⁸ cannot be the basis for postconviction relief.¹⁶⁹ Even where such a claim is cognizable, the standards a prisoner must meet to establish entitlement to relief can be quite strict and nearly impossible to meet.¹⁷⁰

Each jurisdiction has particular procedural requirements that a prisoner must satisfy to bring a petition for postconviction relief. In several jurisdictions, there is no time limit on when a prisoner may apply for such relief.¹⁷¹ In most others, however, a court may waive the time limit only if the prisoner: (a) has a claim based on new evidence that, with “due diligence” could not have been discovered in time to be presented at trial;¹⁷² (b) has filed a claim within a certain time after discovery of the evidence;¹⁷³ (c) has a claim of actual innocence;¹⁷⁴ and/or (d) can

167. *See, e.g.*, *Hester v. State*, 647 S.E.2d 60, 63 (Ga. 2007); *Stephenson v. State*, 864 N.E.2d 1022, 1048 (Ind. 2007); *Pippitt v. State*, 737 N.W.2d 221, 226 (Minn. 2007); *State v. Tester*, 923 A.2d 622, 626 (Vt. 2007); *Hicks v. State*, 913 A.2d 1189, 1193-94 (Del. 2006).

168. *See* 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, 133 (1996).

169. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 930.3; OHIO REV. CODE ANN. § 2953.21(A)(1)(a); *Jackson v. State*, 573 P.2d 637, 639 (Kan. Ct. App. 1977); *Barbee v. Warden of Md. Penitentiary*, 151 A.2d 167, 169 (Md. 1959).

170. For example, several jurisdictions require a prisoner to make a showing of actual innocence. *See, e.g.*, 725 ILL. COMP. STAT. 5/122-1(2) (requiring that petitioner be sentenced to death and evidence “establish[] a substantial basis to believe that the defendant is actually innocent” in order to establish entitlement to relief based on newly discovered evidence); *In re Weber*, 523 P.2d 229, 243 (Cal. 1974) (requiring newly discovered evidence must “point[] unerringly to innocence,” to warrant habeas relief).

171. *See, e.g.*, HAW. R. PENAL P. 40(a)(1); MASS. R. CRIM. P. 30(a); N.M. STAT. ANN. §31-11-6(A) (Westlaw current through the end of the Second Regular and Special Sessions of the 52nd Legislature (2016)); N.Y. CRIM. PROC. LAW § 440.10.1(1).

172. *See, e.g.*, FLA. R. CRIM. P. § 3.850(b)(1); 42 PA. C.S.A. § 9545(b)(1)(ii) (Westlaw current through 2016 Regular Session Acts 1 to 169 and 171 to 175); *see also* N.J. R. 3:22-4 (excusing time limit for claims that “could not reasonably have been raised” in a prior petition); OR. REV. STAT. § 138.510(3) (2005).

173. *See, e.g.*, GA. CODE ANN. § 9-14-52(b) (2007); MCA § 46-21-102(2) (2005) (requiring petition based on newly discovered evidence be filed within a year of when evidence was or could have

show that barring the petition on procedural grounds would be unjust.¹⁷⁵ Generally, second or successive petitions for postconviction relief are not allowed.¹⁷⁶ Nonetheless, a prisoner may be able to bring a successive petition if he or she could not have raised the claim in a previous petition.¹⁷⁷

The various hurdles placed in postconviction procedures work against the wrongly convicted. Their entitlement to counsel suffers from similar disabilities. In several states, the appointment of counsel is up to the discretion of the court or the state public defender.¹⁷⁸ Even where a prisoner has the right to counsel in a postconviction proceeding, the appointment of counsel usually does not occur until after the petition is filed. Without counsel, prisoners must either resort to proceeding *pro se*, or forego postconviction remedies altogether. The lack of counsel diminishes (and perhaps prohibits) an innocent person's ability to challenge his or her conviction.

B. FEDERAL POSTCONVICTION PROCEDURES

The disjointed patchwork of postconviction procedures is not unique to state law. The federal system also establishes similar indefinite and unreasonable requirements. State prisoners who have exhausted state postconviction remedies and whose claims are not procedurally barred may seek habeas relief from the federal courts under 28 U.S.C. § 2254.¹⁷⁹ As in many states, federal courts do not recognize a freestanding claim of actual innocence as a basis for relief. In *Herrera v. Collins*, the United States Supreme Court affirmed that without an accompanying claim of a constitutional violation, a bare claim of innocence based on newly discovered evidence does not warrant federal habeas relief for a state prisoner.¹⁸⁰

The *Herrera* majority assumed for the sake of argument that a state prisoner sentenced to death may be entitled to federal habeas relief where the prisoner makes "a truly persuasive demonstration of actual innocence" and there is no way to pursue the claim under state law.¹⁸¹ While the Supreme Court has subsequently

been discovered); S.C. CODE ANN. §17-27-45(c) (Westlaw current through the 2016 session, subject to technical revisions by the Code Commissioner as authorized by law before official publication.).

174. See, e.g., ALASKA STAT. § 12.72.020(b)(2); TENN. CODE ANN. § 40-30-102(b)(2).

175. See, e.g., KAN. STAT. ANN. § 60-1507(f)(2) (Westlaw current through laws enacted during the 2016 Regular and Special Sessions of the Kansas Legislature).

176. See, e.g., IDAHO CODE § 19-4908; ME. STAT. tit 15, § 2128(3) (Westlaw current through July 29, 2016); MD. CODE ANN., CRIM. PROC. § 7-103(a) (Westlaw current through all legislation from the 2016 Regular Session of the General Assembly).

177. See, e.g., COLO. R. CRIM. P. 35(c)(3)(VI); GA. CODE ANN. § 9-14-51; OKLA. STAT. tit. 22, § 1086 (Westlaw current through Chapter 395 (End) of the Second Session of the 55th Legislature (2016)); TEX. CODE CRIM. PROC. ANN. art. 11.07 sec. 4(a)(1), (c).

178. IND. R. POST-CONVICTION REM. 1 § 9(a) (2015); MASS. R. CRIM. P. 30(c)(5).

179. See generally 28 U.S.C. § 2254 (Westlaw current through P.L. 114-254. Also includes P.L. 114-256.).

180. *Herrera v. Collins*, 506 U.S. 390, 400-01 (1993).

181. *Id.* at 417.

declined to decide whether the exception suggested in *Herrera* does in fact exist,¹⁸² most circuits have recognized it in post-*Herrera* cases.¹⁸³ Because the exception would apply in such a narrow set of hypothetical circumstances, however, federal habeas relief is effectively unavailable to prisoners convicted under state law who seek to advance bare claims of innocence.

Federal prisoners who have unsuccessfully challenged their convictions on direct appeal may petition for habeas relief under 28 U.S.C. § 2255. While the Supreme Court has not ruled on the issue, two circuits have extended *Herrera*'s rationale to petitions brought under § 2255, the counterpart to § 2254 for federal prisoners.¹⁸⁴ Considering that the trend is for courts to extend *Herrera*'s rationale to § 2255 petitions, federal prisoners with bare claims of innocence likely may only bring those claims in a motion for a new trial.

In more recent renderings, the Supreme Court has allowed a proper showing of "actual innocence" to excuse the Anti-Terrorism and Effective Death Penalty Act's ("AEDPA") statute of limitations. But those cases (as Justice Ginsburg noted) are few and far between: "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare."¹⁸⁵

3. CLEMENCY OR PAROLE

Clemency is the "historic remedy for preventing miscarriages of justice where judicial process has been exhausted."¹⁸⁶ It is available under federal law and the law of all fifty states.¹⁸⁷ The United States Constitution vests the power to pardon in the President, and most state constitutions similarly vest the power to par-

182. *Dist. Attorney's Office v. Osborne*, 557 U.S. 57, 71 (2009); *House v. Bell*, 547 U.S. 518, 554-55 (2006).

183. *See, e.g., United States v. Sampson*, 486 F.3d 13, 27-28 (1st Cir. 2007); *Albrecht v. Horn*, 485 F.3d 103, 121-24 (3d Cir. 2007), *abrogated on other grounds by United States v. Berrios*, 676 F.3d 118, 126 (3d Cir. 2012); *Cress v. Palmer*, 484 F.3d 844, 854 (6th Cir. 2007); *In re Davis*, 565 F.3d 810, 823 (11th Cir. 2009); *Cox v. Burger*, 398 F.3d 1025, 1031 (8th Cir. 2005); *Clayton v. Gibson*, 199 F.3d 1162, 1180 (10th Cir. 1990); *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (en banc); *Milone v. Camp*, 22 F.3d 693, 699-700 (7th Cir. 1993); *Spencer v. Murray*, 5 F.3d 758, 765-66 (4th Cir. 1993). *But see United States v. Quinones*, 313 F.3d 49, 68 (2d Cir. 2002) (emphasizing that *Herrera* did not hold such an exception exists); *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000) (rejecting existence of such an exception), *overruled in part on other grounds by Lewis v. Thaler*, 701 F.3d 783, 791 (5th Cir. 2012).

184. *Conley v. United States*, 323 F.3d 7, 13-14 (1st Cir. 2003); *Guinan v. United States*, 6 F.3d 468, 470 (7th Cir. 1993), *overruled in part on other grounds by Massaro v. United States*, 538 U.S. 500, 503-04 (1993); *see also Sims v. United States*, No. 98-1228, 1999 U.S. App. LEXIS 34746, at *5-6 (6th Cir. Oct. 29, 1999).

185. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1928 (2013).

186. *Herrera v. Collins*, 506 U.S. 390, 412 (1993).

187. Holly Schaffer, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 *DRAKE L. REV.* 695, 724 (2002).

don in governors.¹⁸⁸ Clemency is not without its own cast of procedural nightmares.

In most jurisdictions a prisoner seeking clemency must have exhausted all other possible avenues of relief.¹⁸⁹ In several jurisdictions a prisoner must have additionally served a certain portion of his or her sentence before being eligible to apply for clemency.¹⁹⁰ If an application for clemency is denied, the prisoner may have to wait a certain amount of time before reapplying, or may be barred from reapplying altogether.¹⁹¹

While some jurisdictions permit the grant of a full pardon, including the restoration of civil rights,¹⁹² other jurisdictions allow for the commutation of a sentence only.¹⁹³ As a result, a grant of clemency will not necessarily lead to a prisoner's immediate release.¹⁹⁴ The grant of clemency may be revocable in some jurisdictions, subject to the grantee's compliance with certain conditions.¹⁹⁵ Consequently, clemency is available in highly specialized circumstances and even when granted may not provide adequate relief for innocent prisoners.

Parole does not offer any better alternative for a claim of innocence, and most do not have that option. For those that do, they are generally required to admit guilt as a condition of parole.

Fred Swanigan was 20 years old when he was convicted of murder in 1980. With no physical or forensic evidence to link Swanigan to the crime, prosecutors built the case on four eyewitnesses who identified Swanigan as the killer. While the California appeals court did not find those eyewitnesses to be terribly

188. U.S. CONST. art. II, § 2, cl. 1; *see, e.g.*, ALASKA CONST. art. III, § 21; CAL. CONST. art. V, § 8(a); FLA. CONST. art. IV, § 8 (a); ILL. CONST. art. V, § 12; ME. CONST. art. V, § 11; N.Y. CONST. art. V, § 4; OHIO CONST. art. III, § 11; VA. CONST. art. V, § 12; WIS. CONST. art. V, § 6; *But cf.*, PA. CONST. art. V, § 9 (a) (allowing governor to grant clemency only upon recommendation of a Board of Pardons); S.C. CONST. art. IV, § 14 (vesting only partial power to grant clemency in governor); TEX. CONST. art. IV, § 11(b) (permitting governor to grant clemency only after a recommendation from the Board of Pardons).

189. *See, e.g., Apply for Clemency*, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION EXECUTIVE CLEMENCY BUREAU, <https://www.ny.gov/services/apply-clemency> (last visited May 15, 2016).

190. *See, e.g.*, OR. REV. STAT. § 137.225(1)(a); *Clemency Form*, CONNECTICUT BOARD OF PARDONS AND PAROLES, <http://www.ct.gov/doc/lib/doc/PDF/form/PardonClemencyInstructions.pdf> (last visited May 15, 2016); *see also* ALA. CODE § 15-22-28(e) (requiring a unanimous vote to grant parole unless prisoner has served certain amount of time).

191. *See, e.g.*, MINN. STAT. § 638.02; ILL. PRISONER REVIEW BD., GUIDELINES FOR EXECUTIVE CLEMENCY 1, <https://www.illinois.gov/prb/Pages/prbexcleme.aspx> (last modified April 03, 2013).

192. *See, e.g.*, ARKANSAS LEGAL SERVICES PARTNERSHIP, PARDON (*EXECUTIVE CLEMENCY*), <https://www.arlegalservices.org/files/FSPardon.pdf> (last updated October 2014); MASS. PAROLE BD., EXECUTIVE CLEMENCY OVERVIEW, <http://www.mass.gov/eopss/law-enforce-and-cj/parole/exec-clemency-unit/executive-clemency-overview.html> (last updated Dec. 10, 2015).

193. *See, e.g.*, FLA. BD. OF EXEC. CLEMENCY, RULES OF EXECUTIVE CLEMENCY, https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf (last updated Mar. 9, 2011).

194. *See, e.g.*, IDAHO ADMIN. CODE R. 50.01.01.450(1)(c) (2016).

195. *See, e.g.*, MONT. ADMIN. R. 20.25.901A(2) (2005); VT. STAT. ANN. tit. 28, § 810 (2015).

persuasive or reliable, the 1981 jury convicted Swanigan and he received a sentence of 27 years-to-life in prison.¹⁹⁶

Before, during, and after the trial, Swanigan maintained his innocence. Once he became eligible for parole in 1996, he never waived on his innocence and refused to admit guilt. Admitting guilt—holding oneself accountable for the crime—often factors as the key component of the consideration for granting parole (in addition to risk assessment and recidivism).¹⁹⁷ Recently, the California Court of Appeals ruled that his claim of innocence should not be a bar to release.¹⁹⁸ But for the inmate who is innocent, this presents a problem: admit guilt and get out, or maintain innocence and stay put. It is a no-win situation that often boils down to a personal decision of how badly a person wants to get out of prison and what he or she is willing to say to make that happen. Swanigan's case may seem like a rare glitch in the system, but it is a common-enough occurrence that it even has its own Wikipedia entry.¹⁹⁹

B. PROBLEMS WITH CURRENTLY AVAILABLE METHODS OF RELIEF

As the foregoing overview suggests, a prisoner with a free-standing claim of innocence based on the discrediting of a forensic technique faces a litany of obstacles in seeking to overturn his or her conviction. The passage of time is a particular problem: relief simply may be unavailable after a certain amount of time has passed. Even if there are available avenues for challenging a conviction, the high standards for establishing exceptions to procedural bars and entitlement to relief may effectively preclude a successful challenge.

1. FORECLOSURE OF CLAIMS BY THE PASSAGE OF TIME

In several jurisdictions, the time for moving for a new trial is limited and claims of innocence based on newly discovered evidence are not cognizable in petitions for postconviction relief. For example, if three years have passed since a federal prisoner's conviction, he or she may not move for a new trial on the basis of newly discovered evidence.²⁰⁰ In addition, under *Herrera v. Collins*, he or she may not seek habeas relief for a bare claim of innocence.²⁰¹ In Louisiana, a prisoner can only move for a new trial on the basis of "new and material evidence" within a year after the verdict or judgment,²⁰² and a claim of actual innocence is not a

196. Seth Augenstein, *Calif. Inmate Who Maintains Innocence After 35 Years Won't Be Released Soon, Despite Court Victory*, FORENSIC MAG. (Sept. 14, 2015), http://www.forensicmag.com/articles/2015/09/calif-inmate-who-maintains-innocence-after-35-years-wont-be-released-soon-despite-court-victory?et_cid=4813634&et_rid=883093763&location=top.

197. *Id.*

198. *Id.*

199. *Innocent Prisoner's Dilemma*, WIKIPEDIA, https://en.wikipedia.org/wiki/Innocent_prisoner%27s_dilemma (last visited Apr. 19, 2017).

200. FED. R. CRIM. P. 33(b)(1).

201. 506 U.S. 390, 400-01 (1993).

202. LA. CODE CRIM. PROC. ANN. art. 851(3), 853.

cognizable ground for postconviction relief unless the claim rests on the results of DNA testing.²⁰³ In other states, a prisoner with a claim of actual innocence has an even shorter window of time to bring a claim of actual innocence. For example, in Arkansas, a prisoner must move for a new trial within thirty days after entry of judgment,²⁰⁴ and newly discovered evidence is not a ground for postconviction relief.²⁰⁵ The overriding theme is that time does not stop for innocence.

In addition to time constraints, jurisdictions impose substantive criteria on prisoners seeking relief for claims of innocence that may result in limiting relief to narrow circumstances. For example, in Illinois, only prisoners sentenced to death may bring claims based on newly discovered evidence, and even then only if the evidence “establishes a substantial basis to believe that the defendant is actually innocent by clear and convincing evidence.”²⁰⁶ Because the time limit for bringing a new trial motion in Illinois is thirty days after the verdict,²⁰⁷ a prisoner convicted of a non-capital crime is not able to challenge his or her conviction on the basis of a claim of innocence after that time has passed. The crazy part to this is that Illinois abolished the death penalty in 2011, but this draconian law remains on the books.²⁰⁸

Even if a claim of innocence on the basis of newly discovered evidence is cognizable in a petition for postconviction relief, strict procedural requirements for bringing such petitions, in combination with the time limit for bringing a motion for a new trial, may also render relief unavailable after a certain amount of time has passed. For example, while Alaska law recognizes newly discovered evidence as a basis for postconviction relief, a prisoner may only file one motion for postconviction relief, without exception.²⁰⁹ Where a prisoner cannot bring either a motion for a new trial or a petition for postconviction relief after a certain period of time, clemency will be the only form of relief left. The granting of clemency, however, is extremely rare.²¹⁰ A prisoner whose only chance at being exonerated is to

203. *Id.* at art. 930.3.

204. ARK. R. CRIM. P. 33.3(B).

205. *Chisum v. State*, 625 S.W.2d 448, 449 (Ark. 1981). In Tennessee, a prisoner must move for a new trial within thirty days after sentencing, and postconviction relief is only available for claims of constitutional error, not claims based on newly discovered evidence of innocence. TENN. R. CRIM. P. 33(b); *see also* *Myers v. State*, No. M2004-02411-CCA-MR3-PC, 2005 LEXIS 676, at *11-14 (Tenn. Crim. App. June 29, 2005).

206. 725 ILL. COMP. STAT. 5/122-1 (a)(2).

207. *Id.* at 5/116-1(b).

208. *Illinois Abolishes the Death Penalty*, NRP (Mar. 9, 2011), <http://www.npr.org/2011/03/09/134394946/illinois-abolishes-death-penalty>.

209. ALASKA STAT. §§ 12.72.010(4), 12.72.020(a)(6) (2006). *See generally id.* at §12.72.020. Similarly, in Delaware, a prisoner must apply for postconviction relief within a year of final judgment, regardless of what the claimed ground for relief is. DEL. R. CRIM. P. 61(i)(1). In combination with the sixty day limit on bringing a motion for a new trial, this strict statute of limitations bars any review of a conviction after a certain amount of time has passed. DEL. R. CRIM. P. 33.

210. Molly M Gill, *FAMM Seeks Commutation Cases to Spark Sentencing Reform*, National Association of Criminal Defense Lawyers, Nov. 2007, at 8 (observing that clemency is rarely granted); Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POLITICS 669, 671

seek clemency faces an uphill battle, both because of the political considerations that make executives reluctant to grant pardons and because of the lack of checks on an executive's discretion to refuse relief.²¹¹

When a motion for a new trial or a postconviction petition are no longer available, even an innocent prisoner has little hope of gaining freedom. On the whole, states differ dramatically in the availability and procedural aspects of postconviction relief. In practice, however, the effect is the same: an innocent person may well be in no better position to be released from prison than a guilty one.

2. THE DIFFICULTY OF ESTABLISHING EXCEPTIONS TO PROCEDURAL BARS AND ENTITLEMENT TO RELIEF

Even if a claim of innocence based on the discrediting of a forensic technique may be a basis for postconviction relief, there are usually high standards for establishing entitlement to relief and exceptions to procedural bars. It may be difficult for prisoners with such claims to advance them through traditional postconviction remedies. One potential pitfall is that the discrediting of a forensic technique is not a traditional form of newly discovered evidence, so that the substantive and procedural rules which involve a showing of newly discovered evidence may not be easy to meet. A related problem is that the discrediting of a forensic technique may nullify evidence used to convict a person at trial, but does not have the potential to conclusively prove that person's innocence. Thus, prisoners convicted on the basis of a discredited forensic testing technique may not be able to make a sufficient showing of innocence. Finally, because the laws of many jurisdictions either do not provide for a right to counsel in postconviction proceedings or do so only after a petition is filed, many prisoners will be in the position of filing a petition for postconviction relief without the assistance of counsel. As a result, petitioners with meritorious claims may not have the chance to present them adequately, if at all, much less obtain relief based upon them.

Characterizing a recently discredited forensic technique as newly discovered evidence raises the issue of when a technique is sufficiently discredited to constitute new evidence. To illustrate the gravity of these cases, look to the case of Santae Tribble. He was convicted of killing a taxi driver in 1978.²¹² During the in-

(2001) (nothing that the granting of clemency "has dramatically declined in the last few decades."), <http://scholarship.law.wm.edu/facpubs/1260>.

211. Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims After Herrera v. Collins*, 71 TEMP. L. REV. 489, 514-15 (1998) ([E]xecutive clemency is vulnerable to the whims of the political process . . . [and] 'possesses. . . a lack of guaranteed procedural safeguards and, given the degree of discretion, a risk of arbitrary denial.' " (quoting Vivian Berger, *Herrera v. Collins; The Gateway of Innocence for Death-Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943, 1009 (1994)); Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121, 145-146 (2005) ("[T]he clemency process poses three major problems: (1) it is subject to the whims of the political process, (2) it lacks guaranteed procedural safeguards, and (3) its use is approaching the vanishing point.").

212. Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Dept.*, WASH. POST, (Apr. 16, 2012), <https://www.washingtonpost.com/local/crime/convicted->

vestigation, a police dog uncovered a stocking mask one block away from the crime scene; the stocking contained a total of 13 hairs. The FBI's hair analysis concluded that one of the 13 hairs belonged to Tribble. Tribble took the stand in his defense, testifying that he had no connection to the taxi driver's death. Nevertheless, the jurors gave weight to the one "matching" hair and found Tribble guilty of murder. The judge sentenced him to 20 years-to-life in prison.²¹³

Both in prison and later, while on parole, Tribble maintained his innocence, and in January 2012, Tribble's lawyer, succeeded in having the evidence retested. A private lab concluded through DNA testing that the hairs could not have belonged to Tribble.²¹⁴ A more thorough analysis at the time of the crime—even absent DNA testing—would have revealed the same result: one hair had Caucasian characteristics and Tribble is African-American. Tribble served 25 years, plus an additional three years for failing to meet the conditions of his parole for a crime he did not commit.²¹⁵

In another case, Kirk L. Odom was convicted of sexual assault in 1981.²¹⁶ The star prosecution witness—an FBI Special Agent—testified that a hair discovered on the victim's nightgown was microscopically similar to Odom's hair, "meaning the samples were indistinguishable."²¹⁷ To illustrate the credibility of the evidence, the agent also testified that he had concluded hair samples to be indistinguishable only "eight or 10 times in the past 10 years, while performing thousands of analyses."²¹⁸ Odom presented alibi evidence, but the jury convicted him after just a few hours of deliberation. Odom was paroled in March 2003 and required to register as a sex offender.²¹⁹

That would have been the end of Odom's story had it not been for his lawyer's crusade to right the wrongs resulting from the erroneous hair comparisons.²²⁰ In February 2011, Sandra Levick (who had also represented Tribble) filed a motion for DNA testing under the D.C. Innocence Protection Act.²²¹ In response, the government located stained bedsheets, a robe, and the microscopically exam-

defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html?tid=a_inl.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. Innocence Project, *Kirk Odom*, <http://www.innocenceproject.org/cases/kirk-odom/> (last visited Dec. 21, 2016).

220. Spencer S. Hsu, *Kirk L. Odom Officially Exonerated; DNA Retesting Cleared Him in D.C. Rape, Robbery*, WASH. POST, (July 13, 2012), https://www.washingtonpost.com/local/crime/kirk-l-odom-officially-exonerated-dna-retesting-cleared-him-in-dc-rape-robbery/2012/07/13/gJQAuH3piW_story.html.

221. See *Kirk Odom*, *supra* note 219; Innocence Project, *Santae Tribble*, <http://www.innocenceproject.org/cases/santae-tribble/> (last visited Dec. 21, 2016).

ined hair from the crime scene.²²² Subsequent DNA testing of those items, in addition to mitochondrial testing of the suspect hair, excluded Odom.²²³ A convicted sex offender would later be linked to the crime, and Odom was exonerated on July 13, 2012.²²⁴

The Tribble and Odom cases illustrate one potential conundrum for prisoners using currently available avenues to challenge convictions based on a claim of a forensic testing technique being discredited: the evidence must cast sufficient doubt upon a forensic testing technique in order to support a claim. Thus, prisoners must wait for scientists to do research that discredits the technique to a satisfactory degree. On the other hand, once evidence that does sufficiently discredit the technique becomes available, a prisoner may have to bring a claim based on that evidence quickly in order to comply with applicable time limits. Consequently, the prisoner must negotiate the fine balance between waiting to gather enough evidence to demonstrate that a forensic technique is unreliable and risking the possibility that more conclusive research will be done but will not come to the prisoner's attention.

3. POSTCONVICTION DISCOVERY AND PRESENTATION OF EVIDENCE

Another problem faced by prisoners in using current procedures to challenge their convictions is obtaining the evidence necessary to establish their claims. Postconviction DNA testing statutes provide a procedure by which prisoners can obtain testing of biological evidence associated with their convictions, usually at the state's expense if the prisoner is indigent.²²⁵ In addition, DNA testing statutes may provide for access to other relevant evidence, such as the results of previous testing.²²⁶ In contrast, the rules governing new trial motions and postconviction procedures are usually silent on the issue of discovery. As a result, there is no clear mechanism by which prisoners can acquire the physical evidence used in a particular forensic technique and other relevant information that may be used to prove their innocence.

Further, even if prisoners can gather the relevant evidence, they may be handcuffed by the high standards they must meet to show their innocence. In Texas, for instance, "[e]stablishing a bare claim of innocence is a Herculean task."²²⁷ To establish entitlement to relief, "the applicant must show 'by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence.' This showing must . . . unquestionably establish [the] applicant's innocence."²²⁸ In

222. See *Kirk Odom*, *supra* note 219.

223. *Id.*

224. See *id.*

225. See, e.g., 18 U.S.C. §§ 3600(a), (c)(3); N.C. GEN. STAT. §§ 15A-269(a), (d5).

226. CAL. PENAL CODE § 1405(d)(1).

227. *Ex parte Brown*, 205 S.W.3d 538, 546 (Tex. Crim. App. 2006).

228. *Id.* (quoting *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996)).

addition, the applicant must provide “affirmative evidence” of innocence, not just raise doubt about his or her guilt.²²⁹

As explained below, it may be easier to discredit forensic science in Texas than it is to demonstrate actual innocence. The innocent applicant would need “affirmative evidence” that “unquestionably establishes” a prisoner’s innocence. Even assuming that a forensic technique was shown to be completely unreliable, it will not provide affirmative evidence of a prisoner’s innocence.

For example, if a prisoner showed that hair evidence was not a legitimate technique, it would, at most, exclude a hair from belonging to the suspect or the victim. While this might remove a critical piece of evidence from the conviction equation, such a showing would not prove that a prisoner did not commit the crime at issue. Because hair evidence cannot be used to tie individual hairs to individual persons, it cannot be used to prove that a person was or was not associated with the crime or the victim. Thus, a prisoner challenging his or her conviction in a jurisdiction that requires a strong showing of innocence probably will not be entitled to relief even if he or she conclusively shows that a forensic testing technique has insufficient probative value.

In many cases, even if a prisoner could otherwise establish exceptions to procedural bars to relief, he or she will not have the help of counsel in preparing a petition for postconviction relief. Where the discrediting of a forensic technique is the basis for a claim, it is important to obtain scientific research in support of the technique’s discreditation. Without the aid of counsel, a prisoner will be poorly positioned to marshal the evidence necessary to support a petition and avoid its summary dismissal. Texas law does not make any provision for the appointment of counsel to aid indigent, non-capital prisoners in filing habeas petitions.²³⁰ After filing, for the petition to proceed, the judge must find “controverted, previously unresolved facts which are material to the legality of the applicant’s confinement.”²³¹ Even then, the judge has the discretion to decide whether to hold an evidentiary hearing.²³² In light of such stringent requirements for establishing a claim of innocence, a prisoner who files a petition without the aid of counsel may not be able to highlight the new evidence establishing his or her innocence and state a claim sufficient to require further consideration.

The need for the aid of counsel is even more pronounced in jurisdictions that have detailed requirements governing the contents of postconviction petitions. For example, in Virginia, a prisoner with a claim of innocence based on newly discovered evidence may file a petition for a “writ of actual innocence.”²³³ If newly discovered “nonbiological evidence” is the basis for the petition, the prisoner must

229. *Ex parte Franklin*, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002).

230. See TEX. CODE CRIM. PROC. ANN. art. 26.05(a); *cf. id.* at art. 11.071 § 2.

231. *Id.* at art. 11.07 § 3(d).

232. *Id.*

233. VA. CODE ANN. § 19.2-327.2 to 19.2-327.14.

allege, “categorically, and with specificity,” a detailed list of eight facts.²³⁴ In addition, the “petition [must] contain all relevant allegations of facts that are known to the petitioner at the time of filing, [must] be accompanied by all relevant documents, affidavits and test results, and [must] enumerate and include all relevant previous records, applications, petitions, appeals and their dispositions.”²³⁵ Compliance with these requirements is necessary to avoid summary dismissal.²³⁶ Unfortunately, a petitioner is entitled to counsel only after, and only if, the petition is not summarily dismissed.²³⁷ Furthermore, it is up to the court’s discretion whether to appoint counsel before deciding whether to summarily dismiss a petition.²³⁸ Without the aid of counsel, it is much less likely that a prisoner with a claim of innocence based on a discredited forensic technique will be able to prepare a petition that complies with Virginia’s strict requirements.

IV. WRIT LARGE: THE NEED FOR JUNK SCIENCE STATUTES

The previous section provided just a handful of examples that illustrate the obstacles in proving that bad science produced a wrongful conviction. As the foregoing demonstrates, current postconviction remedies are insufficient to manage the evolution or test the bounds of science in the courtroom. Absent changes to currently available methods of relief, innocent people will remain in prison, convicted by unreliable science. However, two states have made positive steps toward statutory schemes aimed squarely at addressing bad science.

A. THE TEXAS TWO-STEP: A FORENSIC SCIENCE BOARD AND A JUNK SCIENCE STATUTE

In June 2013, the Texas legislature adopted Article 11.073 of the Code of Criminal Procedure to provide postconviction relief to individuals wrongfully con-

234. *Id.* at § 19.2-327.11(A) (“The petitioner shall allege categorically and with specificity, under oath, all of the following: (i) the crime for which the petitioner was convicted, and that such conviction was upon a plea of not guilty; (ii) that the petitioner is actually innocent of the crime for which he was convicted; (iii) an exact description of the previously unknown or unavailable evidence supporting the allegation of innocence; (iv) that such evidence was previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court; (v) the date the previously unknown or unavailable evidence became known or available to the petitioner, and the circumstances under which it was discovered; (vi) that the previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction by the court; (vii) the previously unknown or unavailable evidence is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and (viii) the previously unknown or unavailable evidence is not merely cumulative, corroborative or collateral.”).

235. *Id.* at § 19.2-327.11(B).

236. *Id.* at §§ 19.2-327.11(B), (D).

237. *Id.* at § 19.2-327.11(E).

238. *Id.*

victed as a result of unavailable or erroneous scientific evidence.²³⁹ The statute was initially enacted in response to the denial of Neal Hampton Robbin's application for writ of habeas corpus for a conviction of capital murder under Article 11.07 of the Code of Criminal Procedures, the state's false evidence statute, and a claim of actual innocence.²⁴⁰ In *Ex Parte Robbins*, the defendant was convicted of capital murder based in part on the testimony of the assistant medical examiner who performed an autopsy on the child victim's body and declared the cause of death to have been homicide.²⁴¹ After the medical examiner revised her opinion, finding the cause of death to have been "undetermined,"²⁴² Robbins applied for a writ of habeas corpus.²⁴³ The court denied relief, holding that the State did not use false evidence to obtain the defendant's conviction because, although subsequently revised, the medical examiner's trial testimony was not false and did not create a false im-

239. TEX. SESS. LAW SERV. ch. 410 (S.B. 344) (West 2013), *amended by* TEX. SESS. LAW SERV. Ch. 1263 (H.B. 3724) (West 2015).

The Statute provides:

(a) This article applies to relevant scientific evidence that:

(1) was not available to be offered by a convicted person at the convicted person's trial; or

(2) contradicts scientific evidence relied on by the state at trial.

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

(d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since:

(1) the applicable trial date or dates, for a determination made with respect to an original application; or

(2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.

Id.

240. TEX. CRIM. PROC. CODE ANN. art. 11.073.

241. *Robbins v. State*, 27 S.W.3d 245 (Tex. App. 2000), *aff'd*, 88 S.W.3d 256 (Tex. App. 2002).

242. *Id.*

243. *Ex parte Robbins*, 360 S.W.3d 446 (Tex. Crim. App. 2011).

pression. The court further held that the medical examiner's re-evaluation of her trial opinion did not unquestionably establish defendant's innocence.²⁴⁴

Initially proposed in February 2013, adopted in June 2013, and effective as of September 2013, Article 11.073 expanded the basis for postconviction relief based on inadequate evidence provided in 11.071 to address faulty science specifically. The statute thus applies to "scientific evidence that . . . (1) was not available . . . at trial; or (2) contradicts scientific evidence relied on by the state . . ."²⁴⁵ The statute allows a writ of habeas corpus to be granted if, first, "the evidence was not ascertainable through the exercise of reasonable diligence" before or during the trial and, second, the court finds that "had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted."²⁴⁶ The statute further asks the court to "[c]onsider whether the scientific knowledge or method on which the relevant scientific evidence is based has changed since" the trial date or dates of previously considered applications for writ of habeas corpus.²⁴⁷

Under the newly enacted statute, the Texas Court of Criminal Appeals granted Robbins's second application for habeas relief on the same factual basis and allowed for a new trial.²⁴⁸ The court held that the change in opinion constituted a change in the relevant "scientific knowledge" that contradicted scientific evidence relied upon by the State because both the expert's original and revised opinions were derived from the scientific method.²⁴⁹ The court further held that, had the new evidence been available at trial, the defendant would not have been convicted of capital murder.²⁵⁰

The initial five-to-four vote granting habeas relief in *Robbins II* reflected judicial unease and uncertainty with the recently enacted statute. In May 2015, a less favorable Court of Criminal Appeals, with three of the *Robbins II* majority judges retired and all of the dissenting judges remaining, granted the state's motion for rehearing in *Robbins II*, making defendant's second writ application again a pending writ application.²⁵¹ In response to the court's grant of the state's motion, the Texas legislature moved quickly to codify the *Robbins II* interpretation of the statute and amended Article 11.073 by House Bill 3724 to explicitly include expert

244. *Id.*

245. TEX. CRIM. PROC. CODE ANN. § art. 11.073.

246. *Id.*

247. *Id.*

248. *Ex parte Robbins*, No. WR-73484-02, 2013 WL 6212218, at *1 (Tex. Crim App. Nov. 27, 2013). Among the issues requested to be briefed by the Courts were "whether Article 11.073 is a new legal or factual basis under Article 11.07, § 4(a)(1)" and "whether 'the scientific knowledge or method on which the relevant scientific evidence is based,' as set out in Article 11.073(d), applies to an individual expert's knowledge and method." *Id.*

249. *Ex parte Robbins*, 478 S.W.3d 678, 692 (Tex. Crim. App 2014) [hereinafter *Robbins II*].

250. *Id.*

251. *Ex parte Robbins*, No. WR-73,484-02, 2016 WL 370157, at *11 (Tex. Crim. App. Jan. 27, 2016) [hereinafter *Robbins III*].

testimony in the definition of “scientific knowledge.”²⁵² Approved on June 20, 2015, this amendment became effective on September 1, 2015.²⁵³ The intent to expand the meaning of “scientific knowledge” is made explicit: “House Bill 3724 amends the Code of Criminal Procedure to *expand* the factors a court must consider when making a finding as to whether scientific evidence constituting the basis for an application for a writ of habeas corpus was not ascertainable.”²⁵⁴

Following the adoption of the amendment, the Texas Court of Criminal Appeals concluded that the state’s motion for rehearing was improvidently granted and denied the state’s motion for rehearing.²⁵⁵ In his concurrence, Judge Alcala asserted that it was the change in the court’s constitution that led to the granting of the state’s motion and expressed his unease about the uncertainty of the statutory meaning:

I do not envy the position of future litigants who must try to decipher this Court’s position on when relief is warranted under the new-science statute. . . This Court’s judicial decisions should not require litigants to run to the Legislature for a statutory response to correct our judicial mistakes. This Court’s judicial decisions should not give the appearance of indecision or manipulation for the achievement of a desired result. And this Court’s judicial decisions should not come half a decade too late

252. TEX. CODE CRIM. PROC. ANN. art. 11.073, *amended by* Act of June 20, 2015, H.B.3724, 84th Leg. (Tex.). The amended section reads as follows:

(d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the *field of scientific knowledge, a testifying expert’s scientific knowledge, or a scientific method* on which the relevant scientific evidence is based has changed since:

- (1) the applicable trial date or dates, for a determination made with respect to an original application; or
- (2) the date on which the original application or a previously considered application, as applicable, was filed, for a determination made with respect to a subsequent application.

Id. (emphasis added).

253. Act of Sept. 1, 2015, ch. 1263 (H.B. 3724), 2015 Tex. Sess. Law Serv.

254. *Id.* (emphasis added). The Background and Purpose section of the Bill further makes explicit the intent to codify specifically the holding of *Robbins II*:

The observers contend that a recent Texas Court of Criminal Appeals opinion held that a change in the scientific knowledge of a testifying expert would be a basis for habeas relief under the law. C.S.H.B. 3724 seeks to codify this decision . . . The bill specifies that the change in scientific knowledge that the court is required to consider is a change in the field of scientific knowledge.

Crim. Juris. Comm. Rep. C.S.H.B. 3724, 84th Leg. (Tex. 2015).

255. *Robbins III*, *supra* note 251, at *1.

while a defendant remains incarcerated based on what is clearly a wrongful conviction.²⁵⁶

The ambiguity of the young statute has led to judicial uncertainty in Texas. Its efficacy in expanding relief is still unclear. Other judicial renderings of the statute take a different, more limited approach leading to a hodgepodge of reasoning over legislative intent and science.²⁵⁷ These judicial interpretations should be brought in line with the express legislative intent to expand avenues of postconviction relief for convictions based on junk science.

Some case law suggests that 11.073 successfully expanded the relief initially granted under 11.071. In *Ex parte Reed*, the defendant's execution was stayed pending further order of the Texas Court of Criminal Appeals in response to the defendant's sixth application for writ of habeas corpus on the basis of new scientific evidence under the newly enacted statute.²⁵⁸ The writ alleged that the state presented false, misleading, and scientifically invalid testimony which violated due process. The previous three applications were dismissed for failure to satisfy Article 11.071.²⁵⁹ The order of the court is still pending.²⁶⁰

The same appellate court came to a different result in *Pruett v. State*. There, the defendant was convicted of capital murder of a correctional officer and sentenced to death.²⁶¹ The conviction was affirmed on direct appeal,²⁶² and the first writ of habeas corpus denied.²⁶³ In 2013, the court granted the defendant's motion for postconviction DNA and palm-print testing, which brought back inconclusive results.²⁶⁴ The defendant's second writ of habeas corpus was dismissed because the trial court judge, relying on the Texas DNA statute, held that it was not reasonably probable that the applicant would have been acquitted had the new DNA and palm-print results been available at trial.²⁶⁵ The decision was affirmed on appeal.²⁶⁶ The

256. *Id.* at *3 (Alcala, J. concurring).

257. *Ex parte* Garrett, No. WR-46210-11, 2014 WL 2491114, at *1 (Tex. Crim. App. May 7, 2014); *Ex parte* Marascio, 471 S.W.3d 832, 851 (Tex. Crim. App. 2015).

258. *Ex parte* Reed, No. WR-50,961-07, 2015 WL 831673, at *1 (Tex. Crim. App. Feb. 23, 2015) (per curiam).

259. *Ex parte* Reed, Nos. WR-50,961-04 & WR-50,961-05, 2009 WL 97260, at *1 (Tex. Crim. App. Jan. 14, 2009), and No. WR-50961-06, 2009 WL 1900364, at *2 (Tex. Crim. App. July 1, 2009).

260. *Id.*

261. *State v. Pruet*, No. B-01-M015-0-PR-B, 2002 WL 34391803, at *1-3 (Tex. Dist. Apr. 30, 2002).

262. *Pruett v. State*, No. 74370, 2004 WL 3093232, at *5 (Tex. Crim. App. Sept. 22, 2004).

263. *Ex parte* Pruet, 207 S.W.3d 767 (Tex. Crim. App. 2005).

264. *Pruett v. State*, NO. AP-77,037, 2014 WL 5422573, at *1 (Tex. Crim. App. Oct. 22, 2014).

265. *Id.* The Texas DNA statute provides:

After examining the results of testing under Article 64.03 and any comparison of a DNA profile under Article 64.035, the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, *it is reasonably probable* that the person would not have been convicted.

TEX. CODE CRIM. PROC. ANN. art. 64.04 (emphasis added).

266. *Pruett*, 2014 WL 5422573, at *2.

court subsequently denied defendant's application for a writ of habeas corpus brought under 11.073 on the same factual basis,²⁶⁷ because its previous holding that the new evidence did not support a reasonable probability of applicant's acquittal foreclosed habeas relief under Article 11.073, which calls for a "preponderance of the evidence" standard.²⁶⁸

The defendant's subsequent writ application brought under Article 11.073 relied on a different form of recently discredited scientific evidence relied upon by the state at his initial trial — physical match comparisons of masking tape, discredited by the NAS Report.²⁶⁹ The Texas court's holding turned on its reading of the timeliness requirement under 11.073(c), which requires "a *finding* as to whether *relevant scientific evidence was not ascertainable* through the exercise of reasonable diligence on or before a specific date."²⁷⁰ The court held the consideration of the claim procedurally barred for failure to satisfy the requirement.²⁷¹ The court reasoned that the applicant's counsel could have raised this new-scientific-evidence claim in his 2014 writ application because the 2009 NAS Report serving as the basis of the current claim was available at the time.²⁷² The court thus dismissed the application and denied the stay of execution without reviewing the merits of the claim.²⁷³

In his dissent, Judge Alcala argued for a grant of the stay and a closer examination of the evidence to fully "consider the merits of [the] complaint that junk science played a primary role in [the defendant's] conviction" while the statutory language regarding the timeliness requirement is clarified.²⁷⁴ According to the judge, the majority misread the statute by failing to consider its meaning in the context of the larger statutory scheme, specifically the legislative intent to allow

267. *Ex parte* Pruett, 458 S.W.3d 535, 536-37 (Tex. Crim. App. 2015).

268. *Id.*

269. *Ex parte* Pruett, 458 S.W.3d 537, 539-40 (Tex. Crim. App. 2015) (Alcala, J. dissenting).

270. *Id.* at 538, 540-41.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 539 ("Too many unanswered questions with respect to the meaning and application of Article 11.073 to permit a person to be executed for capital murder in a case in which it appears that junk science was used to corroborate the inherently questionable inmate testimony."). The dissenting Judge further laid out the still ambiguous elements of the statute:

Because the meaning of the temporal requirements of this statute are a matter of first impression before us, this Court should grant applicant's motion to stay the execution to fully consider whether it is this Court or the habeas court that should determine whether an applicant has pleaded facts to make a prima facie showing of "reasonable diligence" to secure the new-science evidence, whether such a pleading requirement exists at all in this context, and whether a habeas court rather than this Court must make a finding on the question of reasonable diligence as part of the trial court's findings and conclusions as to the merits of a complaint.

Id. at 542.

postconviction challenges to conviction based on junk science.²⁷⁵ Furthermore, because it is unclear whether the report date is enough to defeat the timeliness requirement, the decision at a pleading stage is not appropriate, and the case should be determined on its merits.²⁷⁶

By effectively holding that a case will be dismissed if an applicant cannot make a prima facie case that relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the majority thus affirmed the existence of a narrow procedural bar on subsequent writ applications.²⁷⁷ According to the dissenting Judge, this is in clear conflict with the legislative intent.²⁷⁸

B. CALIFORNIA: THE WRIT OF WRATH

The California Penal Code § 1473 was amended in 1975 to include a claim of false evidence as a basis for a writ of habeas corpus application.²⁷⁹ The existing statute was amended further in 2014 by Senate Bill No. 1058 to specifically include the opinion of experts in the definition of “false evidence,” either repudiated by the original expert or undermined by scientific or technological advances.²⁸⁰ The amendment was in large part a reaction to the case of William Joseph

275. *Id.* at 541.

276. *Id.*

277. *Id.* at 541-542.

278. *Id.* at 542.

279. CAL. PEN CODE § 1473. The 1975 Amendment added subsections (b) through (d) to the statute:

(b) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

(1) *False evidence* that is *substantially material or probative on the issue of guilt or punishment* was introduced against a person at a hearing or trial relating to his or her incarceration.

(2) *False physical evidence*, believed by a person to be *factual, probative, or material on the issue of guilt*, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person.

(c) Any allegation that the prosecution knew or should have known of the false nature of the evidence referred to in subdivision (b) is immaterial to the prosecution of a writ of habeas corpus brought pursuant to subdivision (b).

(d) This section shall not be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted or as precluding the use of any other remedies.

Id. (emphasis added.) Subsection (b) thus distinguished between (1) false evidence *substantially material or probative of guilt* and, in cases of a guilty plea, (2) material *false physical evidence*. *Id.*

280. CAL. PEN CODE § 1473 (2013 California Senate Bill No. 1058, California 2013-2014 Regular Session, 2014 Cal. Legis. Serv. Ch. 623 (S.B. 1058) (WEST)) The 2014 Amendment, approved in September 2014 and effective January 2015, added subsection (e) to the existing Cal Pen Code § 1473:

(e)(1) For purposes of this section, “*false evidence*” shall include *opinions of experts* that have either been repudiated by the expert who originally provided the

Richards, where a 4-3 majority of the California Supreme Court denied Richards habeas relief under the then existing § 1473 based on a repudiated forensic expert testimony.²⁸¹

Richards was convicted for first degree murder in 1997 in part on the bite mark analysis testimony of a forensic dentist, who testified that the marks found on the victim were both bite marks and consistent with the defendant's teeth.²⁸² At trial, the defense expert sought to repudiate the testimony by asserting that the photograph distortions prevented an accurate assessment of whether the marks were even human.²⁸³ Richards was sentenced to 25 years in prison.²⁸⁴

In 2007, Richards filed a habeas petition alleging, first, that the bite mark evidence introduced at trial was false and, second, that new forensic evidence indicated that he was wrongfully convicted.²⁸⁵ The state's dental expert filed a declaration supporting Richards's petition, repudiating his earlier opinion.²⁸⁶ The expert stated that his initial testimony was not based on scientific data and that he was no longer certain that the mark on the victim's body was in fact a bite mark.²⁸⁷ Additional experts testified at the evidentiary hearing that new technology which removed the distortions from the photographs made it doubtful that the indentation was a bite mark at all.²⁸⁸

While the trial court granted Richards habeas corpus relief, the California Court of Appeals reversed the decision and the Supreme Court of California affirmed, upholding his conviction.²⁸⁹ The California Supreme Court held that the expert's repudiated testimony did not constitute "false evidence" under § 1473 because he did not prove it to be "objectively false."²⁹⁰ The repudiated testimony was

opinion at a hearing or trial or that have been undermined by later scientific research or technological advances.

(2) This section does not create additional liabilities, beyond those already recognized, for an expert who repudiates his or her original opinion provided at a hearing or trial or whose opinion has been undermined by later scientific research or technological advancements.

Id. (emphasis added).

281. Cal S.B. 1058 (NS) (2013), 2013 CA S.B. 1058 (NS), California Committee Report; *In re Richards*, 289 P.3d 860 (2012). See also Radley Balko, *California's Senate has Approved an Important New Forensics Bill*, WASH. POST (Apr. 11, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/04/11/californias-senate-has-approved-an-important-new-forensics-bill>.

282. *In re Richards*, 289 P.3d 860, 864-66.

283. *Id.* at 866

284. *Id.*

285. The new forensic evidence included: (1) DNA evidence on one of the alleged murder weapons; (2) hair found under victim's fingernail; and (3) a tuft of fiber resembling fiber in his shirt not lodged under the victims' fingernail. *Richards v. Superior Court*, Cal. App. 4th Dist. unpub. LEXIS 8542, *1, *10-11 (Nov. 26, 2014).

286. *Id.* at 11.

287. *Id.* at 11-12.

288. *In re Richards*, 289 P.3d 860, 863 (Cal. 2012).

289. *Id.*

290. *Id.* at 873.

instead merely a “good faith expert opinion about a question as elusive as what may have caused an indistinct bruise.”²⁹¹ Furthermore, considered as “new evidence,” the repudiated testimony did not justify habeas relief as it did not “point unerringly to innocence,” even when considered cumulatively with the other new forensic evidence.²⁹²

The *Richards* dissent noted that § 1473(b) did not make a distinction between lay and expert testimony and that there was no reason to make such a distinction, where the majority opinion placed a heavier burden on a defendant seeking relief from false expert testimony.²⁹³ In 2013, Richards filed a motion requesting further DNA testing which was subsequently denied because “favorable DNA test results would raise only an abstract, indeed speculative possibility of a more favorable verdict.”²⁹⁴

In light of this decision, the California legislature passed two bills addressing wrongful convictions: Senate Bill No. 1058 (amending Section § 1473) and Senate Bill 618 (codifying the *In re Clark* standard for new evidence relied on in *Richards*). While Senate Bill No. 1058 amended § 1473 to include the opinion of experts in the definition of “false evidence,” as part of 2013 Cal SB 618, the legislature also passed § 1485.55, codifying “new evidence” as a possible basis for habeas relief.²⁹⁵ Section 1485.55 (g) defines “new evidence” as evidence “not available or known at the time of trial that completely undermines the prosecution case and points unerringly to innocence.” The section thus incorporates both a timeliness and sufficiency of evidence requirement. Case law interpreting the statutory changes has been limited to date.²⁹⁶

291. *Id.* at 873. The court points to the “tentative” nature of the opinion by emphasizing the language used, that “petitioner’s dentition is ‘consistent with’ the bite mark.” The court elaborates further: “. . . in the case of a tentative opinion regarding a subjective question, the opinion is not proved false if, as here, the petitioner’s experts concede it might be true. Otherwise, every criminal case becomes a never-ending battle of experts over subjective assertions that can never be conclusively determined one way or the other.” *Id.*

292. *Id.* at 868-69 (quoting *In re Clark*, 855 P.2d 729, 766 (Cal. 1993)).

293. *Id.* at 869-70, 877-78.

294. *Richards*, Cal. App. 4th Dist. unpub. LEXIS 8542, *20.

295. Cal. S.B.618, 2013 Chapter 800. (Cal. 2013). The relevant portion of Section 1485.55 states, “(g) For the purposes of this section, ‘new evidence’ means evidence that was not available or known at the time of trial that completely undermines the prosecution case and points unerringly to innocence.”

296. See *Jones v. Davis*, 2015 U.S. Dist. LEXIS 120213, *1, *4-5 (E.D. Cal. Sept. 8, 2015) (imposing a diligence requirement on false evidence and filing findings and recommendations denying capital defendant’s stay-and-abeyance motion and writ of habeas corpus in part due to a lack of diligence because defendant could have obtained the psychologist expert’s changed opinion sooner, despite the only recent explicit inclusion of repudiated expert opinion as “false evidence” warranting relief under § 1473). *Jones v. Davis*, 2016 U.S. Dist. LEXIS 42823 *1, *2 (E.D. Cal. Mar. 29, 2016) (affirming the magistrate’s findings after conducting a de novo review). See also *Keiper v. Holland*, 2015 U.S. Dist. LEXIS 175016 *1, n.8 (C.D. Cal. Dec. 7, 2015) (filing findings and recommendations holding that the forensic pathologist’s later testimony does not constitute “false evidence” under Cal. Pen. Code §1473 because it has not been repudiated or undermined by later scientific advances and Cal. Pen. Code §1473 inapplicable as a basis for habeas relief after the pathologist stated that there were “smaller abrasions

Further amendments are currently pending in the legislature affecting both § 1473 and § 1485.55. The proposed amendments set forth the evidentiary and timeliness requirements governing habeas claims based specifically on new evidence.²⁹⁷ While significantly lessening the sufficiency of evidence standard under which a writ of habeas corpus may be granted based on new evidence, the proposed amendments include a repeated timeliness requirement. Like the existing statute, the proposed amendments do not explicitly address forensic or scientific evidence but continue to defer to broad language of “false” and “new” evidence.

The initial version of the bill added “new evidence” as a basis for habeas relief to § 1473 and lowered the bar from evidence that “points unerringly to innocence” to evidence that “raises a reasonable probability of a different outcome.”²⁹⁸ The subsequent version of the bill further replaced the “reasonable probability” standard with evidence “of such decisive force and value that it would have more likely than not changed the outcome of the trial.”²⁹⁹

The proposal defined “new evidence” as evidence discovered after trial “that could not have been discovered prior to trial by the exercise of due diligence,” thereby articulating a temporal and diligence requirement.³⁰⁰ The currently pending proposal further reiterates the timeliness component by requiring that the “new evidence” be “presented without substantial delay.”³⁰¹ References to “new

that you might be able to exclude” from being the cause of death when pathologist earlier testified that the cause of death were multiple and combined blunt impact injuries to the head). *See also People v. Johnson*, 235 Cal. App. 4th 80, 91 (Cal. App. 1st Dist. 2015) (holding that even while the new version of the DSM may cast doubt on the validity of a paraphilic coercive disorder diagnosis, it does not reflect “scientific research that undermines expert testimony diagnosing that disorder and renders that testimony false evidence” when the commitment of a sexually violent predator does not have to be based on a disorder uniformly recognized by the mental health community).

297. CA S.B. 69 (2015)- Failed.

298. 2015 Bill Text CA S.B. 694, Reg. Leg. Sess. (Cal. Feb. 27, 2015). In the initial proposal, Section 1473(b) was to include an additional section that states: “(3) NEW EVIDENCE EXISTS WHICH WOULD RAISE A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME IF A NEW TRIAL WERE GRANTED. *Id.* The identical phrase “RAISES A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME IF A NEW TRIAL WERE GRANTED” was added throughout Section 1485.55 to lessen the petitioner’s evidentiary burden.

299. 2015 Bill Text CA S.B. 694, Reg. Leg. Sess. (Cal. July 16, 2015). The proposed **1473(b)(3)(A)** states: “New evidence exists ~~which would raise a reasonable probability of a different outcome if a new trial were granted.~~ THAT IS CREDIBLE, MATERIAL, AND OF SUCH DECISIVE FORCE AND VALUE THAT IT WOULD HAVE MORE LIKELY THAN NOT CHANGED THE OUTCOME AT TRIAL. *Id.*

300. *Id.* The added Section 1473(b)(3)(B) states: “FOR PURPOSES OF THIS SECTION, “NEW EVIDENCE” MEANS EVIDENCE THAT HAS BEEN DISCOVERED AFTER TRIAL, THAT COULD NOT HAVE BEEN DISCOVERED PRIOR TO TRIAL BY THE EXERCISE OF DUE DILIGENCE, AND IS ADMISSIBLE AND NOT MERELY CUMULATIVE, CORROBORATIVE, COLLATERAL, OR IMPEACHING.” *Id.*

301. 2015 Bill Text CA S.B. 694, Reg. Leg. Sess. (Cal. Feb. 28, 2016).

evidence” are removed from Section 1485.55,³⁰² which is designed only to regulate appropriations in cases of granted habeas relief.³⁰³

These statutes are not perfect, but they are necessary. The procedural options a prisoner might embark on to demonstrate innocence do not offer a true road to challenging a conviction based upon old or bad science. The lack of these statutes may be of little concern to legislators in an era when criminal justice reform is popular but letting people out of prison is not. I am reminded of the late Supreme Court Justice Antonin Scalia’s message in the Troy Davis case: “This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent.”³⁰⁴ What might be discredited science today was okay yesterday and that seems to make it fair.

V. PROPOSAL: DON’T MESS WITH TEXAS (WELL, MAYBE JUST A LITTLE. . .)

Junk science statutes are difficult pieces of legislation to stitch together. Regardless of the amount of work invested, these laws necessarily lean more toward a one-size-fits-all rather than an individualized remedy. Moreover, by their nature, junk science statutes must be reactive rather than proactive because it applies solely to the postconviction phase. Consequently, junk science statutes cannot prevent a wrongful conviction from occurring. Criminal justice remedies are imperfect for a number of reasons, but the imperfection is particularly acute in the field of wrongful convictions because even a positive end result (freedom) will always be tainted by the harm (years of wrongful imprisonment).

None of those are good reasons to avoid putting junk science statutes on the books, but with only two states entering the fray, it certainly appears that most lawmakers would rather not have the tough conversation (or admit) that sometimes even science gets it wrong and produces bad convictions. There should be something unsettling and unfair about someone spending the rest of (or even a portion of) his or her life in prison because we put too much confidence behind shoddy science.

There is no wiggle room: we have a responsibility to correct inaccurate forensic conclusions and remedy unjust results. Even if the justice system holds fast to finality rather than fairness, our moral code should provide an avenue of relief for discredited science—such as the hundreds of cases that now hang in the balance due to the revelation that microscopic hair evidence is unreliable. In its

302. *Id.*

303. *Id.*

304. *In re Davis*, 557 U.S. 952, 955 (2009) (Scalia, J. dissenting). In 1994, Justice Scalia also voted against a petition asking the Supreme Court to review the case of Henry McCollum. McCollum was North Carolina’s longest-serving death row inmate. McCollum and his half-brother Leon Brown were convicted of raping and killing an 11-year-old girl. They were later exonerated in 2014 after DNA evidence cleared them of the crime. Corey Adwar, *Justice Scalia Says Executing the Innocent Doesn’t Violate the Constitution*, BUS. INSIDER (Sept. 4, 2014), <http://www.businessinsider.com/antonin-scalia-says-executing-the-innocent-is-constitutional-2014-9>.

starkest form, when corrupted evidence is used to sustain a conviction it causes our criminal justice system itself to be unreliable.

I will quickly dispose of the California statute because in my mind it requires such a narrow situation that it is mostly useless to address the real problem with flawed forensic evidence. True, there is at least an attempt to retrofit that bill to make it more accessible. The rewrite, if passed, may change my assessment, but as it stands, that statute helps but a few individuals who are able to demonstrate that the evidence is false. For inmates, the message is “don’t bother.” The Texas statute, on the other hand, merits real consideration for widespread adoption.

At base, the Texas statute is fundamentally a good statute, and we do not need to reinvent the wheel when we can instead plug a few holes. First, it gets the standard of proof right. Preponderance of the evidence appreciates the realities of these cases: they are difficult to bring and rarely win. Sometimes DNA exists, but in other cases there is no DNA, and imposing any higher burden would (practically speaking) likely derail most of the non-DNA cases *ab initio*. Of course, cases based mostly on eyewitness testimony would still be doomed under this standard.³⁰⁵

My endorsement of the Texas statute, however, should not be interpreted as an assessment of perfection, but rather a reflection of practicability. Texas is a large, conservative state that to its credit is attempting to tackle problems in forensic science. I do take issue with some of its phrasing, namely the use of “changed” science. What constitutes a change in science? As Simon Cole notes, there are many ambiguities attached to the nebulous phrase “changed scientific knowledge” which make it difficult to deduce an objective assessment:

[D]oes it inhere in an individual or a collective; which individual or collective; and what constitutes change—mean that courts will as ample leeway for interpretation as they have had over the admissibility of scientific evidence. What constitutes changed scientific knowledge will be, unfortunately, in the eye of its judicial beholder.”³⁰⁶

I cannot agree more. Much like the assessment of the reliability of forensic science on the front end of a case, the determination by a judge as to what qualifies as “changed scientific knowledge” is inherently treacherous. Is it along the lines of undermining an entire forensic discipline, such as hair microscopy or bite mark evidence? Is it something less—such as a voluntary certification body changing reporting terminology such that older convictions could be called in to question like latent print comparisons? Do changed probability calculations meet the threshold, as in the DNA mixture cases? As Cole observes, “change is more conceptual; it

305. First, experts on the problems with eyewitness testimony often are not allowed to testify because courts deem it to be within the common knowledge of a jury that eyewitnesses might be wrong, so any “change” in the science of eyewitness identification probably would not qualify under this statute.

306. Simon A. Cole, *Changed Science Writs*. ___ AM. BAR ASSOC. J. LIT. ___ (forthcoming 2016)

concerns the proper way of interpreting and reporting the testimony. Moreover, the scientific change did not consist of anyone ‘inventing’ or ‘discovering’ anything.³⁰⁷

Indeed, for years, lawyers and scholars have attempted to draw attention to the shortcomings of pattern identification evidence—hair, fiber, toolmarks, fingerprints and the like. Until 2009, (when the NAS Report was released), these criticisms seemed like picky defense attorneys seizing the research of scientists untrained in the forensic disciplines to try and poke holes in well-established techniques. The tide appears to be changing—if ever slowly—with research now underway by the National Institute of Technology and other research partnerships among crime labs and universities to develop standards and probabilistic methodologies for the strength and quantification of forensic evidence. But that does little for the “thousands of inmates [who] were convicted on forensic evidence reported in a categorical, qualitative fashion that . . . often overstated the probative value of the evidence.”³⁰⁸ Mechanisms that help these prisoners challenge that evidence are lacking (with Texas as the standout) or poorly written (see California’s statute).

I would eliminate the word “changed” all together because it is too narrow. Moreover, while the delineated circumstances in which a court can consider the so-called change—“the field of scientific knowledge, a testifying expert’s scientific knowledge, or a scientific method on which the relevant scientific evidence is based”³⁰⁹—seem broad, they also seem to be an exclusive list. If interpreted narrowly, this omits other circumstances that might warrant a junk science statute, such as fraud, misrepresentation, or lack of qualification by the examiner. A change in probabilistic formulas might also escape review. Additionally, I would not link those delineated circumstances to the determination of whether the scientific evidence could have been discovered (as section 11.073(d) does). Instead, I would link those (and broaden them) to the determination of whether the evidence would have produced a different result by a preponderance of the evidence.

Of course, this begs the question of whether there is a way to craft a junk science statute that affirmatively addresses all of the concerns and in a way that does not deter or impede the current research being done to improve forensic science. There must also be an understanding that these statutes are not the proper mechanism for wide-scale case reviews, like those taking place for hair microscopy and bite marks. Beyond case-based reviews, the American Association for Advancement of Science is undertaking sweeping reviews of forensic science disciplines, and NIST and the National Commission on Forensic Science have spent the better part of three years evaluating forensics from top-to-bottom.³¹⁰ These case

307. *Id.*

308. *Id.*

309. TEX. CODE CRIM. PROC. ANN. Art. 11.073.

310. *Forensic Science Assessments: A Quality and Gap Analysis*, AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE, <http://www.aaas.org/page/forensic-science-assessments-quality-and-gap-analysis>. Unfortunately, recent events are poised to bring the work of the National Commission on Forensic Science to a possible standstill. The Trump administration announced on April 10, 2017 that it would dismantle the Commission. See Jessica Gabel Cino, *Sessions Assault on Forensic Science Will*

and science reviews are perhaps in a better position to study and *prevent* future wrongful convictions and eliminate the continued use of shoddy science. Correspondingly, the junk science statute is the most direct way for an innocent person to *respond* to the findings of those reviews and investigations and obtain relief. The various entities should work in tandem and share information because keeping an innocent person in limbo while a reviewing body performs long-term evaluations may only extend the time spent in prison.

Thus, I propose a few tweaks to the Texas statute (see Appendix). The proposal is an effort to correct the shortcomings of challenges to scientific evidence under current postconviction procedures married with the promise of junk science statutes. It removes “changed” from the calculus altogether, because that term is plagued by ambiguity and detriment. I also think it is important that a person neither runs afoul nor exhausts other state or federal remedies by taking advantage of this legislation. Foreclosure and finality may have a place in the criminal justice system, but the time has come to stop letting them be the drivers of the system. Science is not static: what is thought to be reliable today may require more than one challenge as the science improves, so I have attempted to correct the concern that a successive petition might be outright denied. Science evolves, as should the way in which we approach innocence and wrongful convictions.

VI. CONCLUSION

French mathematician and physicist Jules Henri Poincare wrote: “Science is facts; just as houses are made of stones, so is science made of facts; but a pile of stones is not a house and a collection of facts is not necessarily science.”³¹¹ Our criminal justice system depends increasingly on forensic science to fill the gaps that ordinary facts cannot. We should therefore expect more from science if we continue to couch convictions within its confines. Because the criminal justice infrastructure devotes a tremendous amount of energy to preserving convictions, it is difficult to see its weaknesses laid bare as something that ultimately will strengthen the system. But the unmasking of those weaknesses will be the opportunity to correct decades of fundamentally flawed forensic applications.

Being right should not matter more than doing right. Perhaps part of the reason that admitting a mistake becomes so untenable is that it opens up the figurative floodgates to questions about other cases. Numerous crime lab scandals around the country have made the cogs of the criminal justice system leery of coming forward with errors. Junk science statutes provide the system with a much needed ability to be more accepting of mistakes. While we have made some strides through the work of the Innocence Project and other groups, changing the status quo is an uphill battle. DNA statutes that provide for postconviction testing were a good starting point for innocence, but they cannot also be our end point. Relief

Lead to More Unsafe Convictions, NEWSWEEK (April 20, 2017) <http://www.newsweek.com/sessionss-assault-forensic-science-will-lead-more-unsafe-convictions-585762>.

311. Jules Henri Poincare (1851-1912).

cannot exist in a vacuum and we cannot make it available only to those who have testable biological evidence. DNA testing alone cannot eliminate wrongful convictions.

If our criminal justice system demands that guilt be proven beyond a reasonable doubt, then that same system should demand accurate and reliable science. Until we acknowledge and make an effort to correct the shortcomings of science, the headlines on shoddy science will continue. “Changed science writs are undoubtedly a promising trend with the potential to bring justice to many individuals to whom it might otherwise be denied due to an excessive legal attachment to the principle of finality.”³¹² We should not be content with operating a criminal justice system that remains wedded to inferior science and continues to tolerate a certain margin of error when things go awry. Evidence left behind at a crime scene does not always lend itself to reliable analysis, and appreciating the limitations of forensic science is a necessary step to improving the system as a whole. I submit that widespread adoption of junk science statutes would not be the Armageddon that some may fear. Instead, they might provide a collective sigh of relief by giving us the opportunity to do something to correct otherwise impenetrable injustice.

312. Cole, *supra* note 306.

APPENDIX

(a) This article applies to relevant scientific evidence that:

(1) was not available to be offered by a convicted person at the convicted person's trial; or

(2) contradicts scientific evidence relied on by the state at trial.

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application, in the manner provided by *state law*, containing specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the [*applicable state*] Rules of Evidence at a trial held on the date of the application; and

(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

(c) *In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the same claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application, as applicable, was filed.*

(d) *In making a finding as to whether a preponderance of evidence exists such that the person would not have been convicted, the court shall consider the field of scientific knowledge, the testifying expert's scientific knowledge; the scientific method on which the relevant scientific evidence, or any other relevant scientific testimony.*

(e) *Nothing in this provision shall preclude a later habeas corpus motion brought under existing state or federal law for any other claim unrelated to this statute.*

FEDERAL PUBLIC CORRUPTION STATUTES TARGETING STATE AND LOCAL OFFICIALS: UNDERSTANDING THE CORE LEGAL ELEMENT AND THE GOVERNMENT’S BURDEN OF PROVING A CORRUPT INTENT AFTER MCDONNELL

*THOMAS M. DIBLAGIO**

I. INTRODUCTION

State and local public officials who abuse their office to enrich themselves and their friends directly affect the quality of life in their communities. This conduct, left unchecked, puts into place a culture of corruption and impunity that erodes public trust in government and deters legitimate investment and commerce in the community. In response, there are three separate federal public corruption statutes that target state and local corruption. The federal program integrity statute targets a public official who demands or receives a payment “intending to be influenced” in connection with federally funded programs.¹ The federal extortion statute addresses a public official who demands or receives a benefit “under color of official right.”² The federal mail and wire fraud statute makes it a federal crime for a public official to deny the public “honest services.”³ The recurring question has been: what conduct falls within the scope of each of these statutes? Stated another way, as practical matter, what do prosecutors need to prove and juries need to find to sustain a public corruption conviction under these three federal criminal laws?

The underlying conduct for each of these public corruption statutes is essentially transactional. All three statutes require that the government prove a connection between a benefit provided to a public official and an official act. It is this agreement—nexus to state action or the conduct of government officials—that is the criterion of guilt. The United States Supreme Court has made this point clear: first by holding that extortion under color of title and honest services fraud are limited to bribery and kickback schemes,⁴ and second, by holding in *McDonnell v. United States* that the scope of an “official act” does not include routine political activities and is limited to government action.⁵ However, one additional step need be taken to give structure to the statutory scheme. Because the

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1. 18 U.S.C. § 666(a)(1)(B) (2012).

2. 18 U.S.C. § 1951(b)(2) (2012).

3. 18 U.S.C. § 1346 (2012).

4. *See Skilling v. United States*, 561 U.S. 358, 368 (2010) (honest services fraud); *Evans v. United States*, 504 U.S. 255, 256 (1992) (extortion).

5. *McDonnell v. United States*, 136 S. Ct. 2355, 2358 (2016).

three public corruption statutes do not use the term “bribery” or “kickback,” the courts have often struggled to correctly define the critical element of the offense and then to correctly translate this element into an evidentiary burden of proof.⁶ This failure presents a risk that the application of the law will be inconsistent and therefore, fundamentally unfair.

The reasons for the struggle are numerous. First, courts have used the term *quid pro quo* rather than “corrupt intent” to define the critical element of the offense. Although these terms mean essentially the same thing—a link between the benefit and official act—the courts have struggled to translate *quid pro quo* into a clear evidentiary burden of proof. As a consequence, the courts have characterized the government’s burden of proof in a variety of imprecise and vague ways and have stated that prosecutors must prove “some connection between the benefit and official act,” “some understanding that the payment is linked to some official act,” “some payment conditioned on the performance of some official act,” “something short of a formalized and thoroughly articulated contractual agreement,” “a corrupt payment sufficiently linked to some official act,” “some connection to an official act when opportunities arise,” or “some implied *quid pro quo*.”

The courts should jettison these perception of the moment standards, which are difficult to truly understand, clearly articulate the critical legal element of these offenses, and bring clarity to the entire statutory scheme. First, courts should recognize that all three offenses—the federal mail and wire fraud statutes, the federal program integrity, and federal extortion statutes—are limited to bribery and kickback schemes. Second, courts should hold that the critical legal element for all three statutes requires the government to prove a corrupt intent—that the benefit provided to the public official was intended to influence or affect state action or the conduct of government officials. Third, to prove a corrupt intent, the government should be required to identify state action or government conduct at or near the time the benefit was provided to the public official. Taken together, this approach would clarify the critical legal element of the offense by limiting the scope of the statutes to bribery and kickback schemes as well as connect this legal element to a more clearly defined requirement of the offense and evidentiary burden of proof. The result would be a statutory scheme that is both fundamentally fair and captures the most pervasive and entrenched corruption schemes.

II. *MCDONNELL V. UNITED STATES*

In *McDonnell*, the former governor of Virginia was charged with honest services fraud and extortion.⁷ There was an unambiguous record of the conduct.⁸ At trial, the government presented evidence that the defendant accepted \$175,000 in loans, gifts, and other benefits in exchange for the defendant’s influence in

6. See *United States v. Tavares*, 844 F.3d 46 (1st Cir. 2016) (reversing conviction and finding that government failed to prove requisite link between job offers and official act).

7. *McDonnell*, 136 S. Ct. at 2355.

8. *Id.* at 2357.

connection with an effort to have research studies undertaken at the Medical College of Virginia and University of Virginia School of Medicine.⁹ The gifts themselves were legal.¹⁰ However, the government introduced evidence that the defendant accepted these benefits in exchange for at least five “official acts.”¹¹ Those acts included “arranging meetings” with Virginia State officials, “hosting” events at the Governor’s Mansion, and “contacting other government officials” concerning the research studies.¹²

The defendant was convicted and he appealed.¹³ The defendant did not deny that he received the “benefits” reflected by the evidence.¹⁴ Moreover, the defendant did not challenge that there was some link between the loans and gifts provided and the acts taken by him.¹⁵ He argued, however, that the acts in question were not “official acts” prohibited by the honest services fraud and extortion statute, but rather reflected routine political acts which were not prohibited by the statutes.¹⁶ The Supreme Court agreed and reversed his conviction.¹⁷ The Court held that an “official act” under the statutes “must involve a formal exercise of government power,” and in this case, the jury was not instructed that the government was required to prove, and that they were required to find, that the conduct went beyond “simply expressing support for the research study” to “pressuring or advising another government official on a pending matter.”¹⁸

The Supreme Court expressed concern about where the line should be drawn between routine political acts and illegal behavior and held that an “official act” under the federal bribery statute means “a formal exercise of government power.”¹⁹ The Court then explained that, “[a]lthough it may be difficult to define the precise reach of those terms, it seems clear that a typical meeting, telephone call, or event arranged by a public official does not qualify as a ‘formal exercise of government power.’”²⁰ On the other hand, the Court found that “[u]sing your official position to exert pressure on another public official to perform an ‘official act’ would fall within the scope of the formal exercise of government power.”²¹ The Court held that a conviction was dependent on a specific finding by the jury

9. *Id.* at 2357.

10. *Id.* at 2365.

11. *Id.*

12. *Id.* at 2358.

13. *Id.* at 2367.

14. *Id.* at 2366.

15. *Id.*

16. *Id.*

17. *Id.* at 2355.

18. *Id.* at 2358.

19. *Id.* at 2371.

20. *Id.* at 2358.

21. *Id.* at 2359. *See also* United States v. Repak, ___ F.3d ___ (3rd Cir. 2016) (affirming public corruption conviction and finding that influencing and facilitating the award of economic redevelopment contracts by executive director of local redevelopment authority was an “official act” under *McDonnell*).

that the defendant agreed to take formal and concrete government action in exchange for the benefit provided:

It is up to the jury, under the facts of the case, to determine whether the public official agreed to perform an “official act” at the time of the alleged “*quid pro quo*.” The jury may consider a broad range of pertinent evidence, including the nature of the transaction, to answer that question.

Simply expressing support for the research study at a meeting, event, or call—or sending a subordinate to such a meeting, event, or call—similarly does not qualify as a decision or action on the study, as long as the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an “official act.” Otherwise, if every action somehow related to the research study were an “official act,” the requirement that the public official make a decision or take an action on that study, or agree to do so, would be meaningless.

Of course, this is not to say that setting up a meeting, hosting an event, or making a phone call is always an innocent act, or is irrelevant, in cases like this one. If an official sets up a meeting, hosts an event, or makes a phone call on a question or matter that is or could be pending before another official, that could serve as evidence of an agreement to take an official act. A jury could conclude, for example, that the official was attempting to pressure or advise another official on a pending matter. And if the official agreed to exert that pressure or give the advice in exchange for a thing of value, that would be illegal.²²

The Supreme Court’s decision in *McDonnell* provides some structure to the application of the federal statutory scheme used to prosecute state and local officials. However, the decision is also limited and does not resonate beyond the particular conduct of the defendant in that case. On the other hand, there is a more compelling theme being stated. The Court is clearly expressing a concern about the exercise of prosecutorial discretion and the need for a fundamentally fair application of the law—that it should be applied as a “scalpel” rather than a “meat axe.”²³

Accordingly, there is one more step that needs to be taken. This article sets forth a clear outline of the federal statutory scheme used to target corrupt state and local officials and then argues for an additional step—that courts should now require the prosecution to prove a direct connection between the benefit provided to a public official and the official act.

22. *Id.* The government subsequently abandoned its prosecution of the defendant. See Alan Blinder, U.S. Ends Corruption Case Against Former Governor of Virginia, N.Y. TIMES, September 9, 2016.

23. *McDonnell*, 136 S. Ct. at 2373.

III. FEDERAL PUBLIC CORRUPTION STATUTES

A. INTRODUCTION

There are three primary federal statutes employed by federal prosecutors against state and local corruption. First, the federal program integrity statute addresses state and local programs that receive federal funds and makes it a crime for a public official to demand or receive a payment “intending to be influenced.”²⁴ Second, the federal extortion statute makes it a federal crime for a public official to use his position as a government official to extort money or property from a third party.²⁵ Third, the federal mail and wire fraud statute makes it a federal crime to use the mails or interstate wires in connection with a scheme to defraud.²⁶ Section 1346 defines a “scheme to defraud” to include defrauding the public of the “intangible right to honest services.”²⁷ In *Evans v. United States*,²⁸ the Supreme Court limited the scope of the public corruption component of the federal extortion statute to bribery and kickback schemes.²⁹ In *Skilling v. United States*,³⁰ the Supreme Court narrowed the scope of honest services fraud to bribes and kickback payments linked to official acts.³¹ Because the federal program integrity statute is *in pari mater*i with the honest services and extortion statutes—all are bribery related offenses and share the identical core element—extending this limitation to federal program bribery is obvious.

The commonality of each of these federal corruption statutes reaches beyond the objective to hold public officials accountable for pervasive and entrenched corrupt practices. Although the statutes do not use the terms “bribery” or “kickback,” all three statutes are essentially bribery and kickback offenses and share a core legal element—that the government prove a sufficient nexus between the benefit provided to a public official and state action or the conduct of government officials. Therefore, to sustain a conviction the government must prove, and the jury must find, a corrupt intent. To establish a corrupt intent, the government must prove that the benefit was intended to influence state action or

24. 18 U.S.C. § 666(a)(1)(B) (2012).

25. 18 U.S.C. § 1951(b)(2) (2012).

26. 18 U.S.C. §§ 1341, 1343, 1346 (2012).

27. 18 U.S.C. § 1346 (2012).

28. *Evans v. United States*, 504 U.S. 255, 256 (1992).

29. Prosecutions for extortion under color of official right is essentially a bribery offense requiring proof of a *quid pro quo*. *Id.* at 268.

30. *Skilling v. United States*, 561 U.S. 358 (2010). In *Skilling*, the government alleged that the defendant, an executive of a private corporation, engaged in self-dealing but did not allege that he solicited or accepted a bribe or kickback from a third party in exchange for making misrepresentations to his company’s shareholders about the company’s fiscal health. The Supreme Court determined that the defendant’s honest services fraud conviction was flawed and reversed his conviction. *Id.* at 414–15. *See also* *United States v. Cantrell*, 617 F.3d 919, 921 (7th Cir. 2010) (affirming honest fraud conviction after *Skilling* based on kickbacks to public official—steering public contracts to a third party in exchange for a share of the proceeds).

31. *Skilling*, 561 U.S. at 409.

the conduct of a government official. To prove this connection, the prosecution should be required to identify the state action or the conduct of government at or near the time that the benefit is provided to the public official.

B. INTENT OF THE FEDERAL PUBLIC CORRUPTION STATUTES

The federal public corruption statutory scheme is intended to serve the public's interest by holding government officials accountable for pervasive and entrenched corrupt practices. Beyond the erosion of trust in government, public corruption undermines the quality of life in the community. State and local corruption is typically characterized by "pay to play,"³² bribery,³³ and kickback schemes³⁴ conducted among a class of fixers who specialize in connecting public officials with businessmen.³⁵ Because state and local governments are primarily

32. The phrase "pay to play" typically references two practices that lead to corruption: (1) companies use political donations and other financial benefits to public officials to bribe their way to securing lucrative government contracts; and (2) public officials extorting financial benefits from companies that wish to do business with the government. See, e.g., Benjamin Weiser, William Rashbaum & Vivian Yee, *Ex-Cuomo Aides Charged in Federal Corruption Inquiry*, N.Y. TIMES (Sept. 23, 2016), <http://www.nytimes.com/2016/09/23/nyregion/cuomo-former-aides-charges.html> (federal public corruption indictment alleging that state funded economic development contracts were awarded in exchange for bribes to public officials); Campbell Robertson, *Nagin Guilty of 20 Counts of Bribery and Fraud*, N.Y. TIMES (Feb. 12, 2014), http://www.nytimes.com/2014/02/13/us/nagin-corruption-verdict.html?_r=0 (describing conviction of former Mayor of receiving vacations, cash and building supplies in exchange for government contracts).

33. The term "bribe" means a payment in return for a vote, appointment, or other public act by a lawmaker or government official. See, e.g., Benjamin Weiser, *Ex-councilwoman and Admirer Found Guilty in Yonkers Case*, N.Y. TIMES (Mar. 30, 2012), <http://www.nytimes.com/2012/03/30/nyregion/two-convicted-in-yonkers-corruption-case.html>. In this case, prosecutors introduced evidence that the defendant, a former City council member, accepted \$195,000 in payment (including a down payment on her residences, payments for her student loans and a Mercedes) from a political operative in exchange for votes to approve a proposed luxury mall and housing complex. The jury rejected the defense argument that the benefits reflected gifts and a romantic relationship. See also Benjamin Weiser, *Lobbyist is Expected to Enter Guilty Plea in Corruption Case*, N.Y. TIMES (Jan. 3, 2012), <http://www.nytimes.com/2012/01/04/nyregion/guilty-plea-by-richard-lipsky-lobbyist-is-expected-in-bribery-case.html> (describing scheme where lobbyist paid New York State Senator cash in exchange for Senator's public action including sponsoring and supporting legislation, lobbying other elected officials, and directing state funds for the benefit of lobbyist).

34. In the public corruption context, the term "kickback" means a payment in return for a government contract. See William K. Rashbaum, *City Official Accused of Taking Bribes, Left in Boxes and Cups*, N.Y. TIMES (Oct. 6, 2011), <http://www.nytimes.com/2011/10/07/nyregion/nyc-housing-official-is-among-7-charged-with-bribery.html> (describing charges against commissioner at the New York Department of Housing Preservation and Development based on allegations that the defendant took \$600,000 in bribes and kickbacks from developers in exchange for steering city contracts to the developers and that the cost of the kickbacks were passed on to the city through inflated invoices); See Cantrell, 617 F.3d at 921 (affirming conviction based on defendant's use of his office to secure contracts for company in exchange for share of proceeds).

35. See William K. Rashbaum, *Albany Trials Exposed the Power of a Real Estate Firm*, N.Y. TIMES (Dec. 18, 2015), <https://www.nytimes.com/2015/12/19/nyregion/real-estate-firms-power-is-laid-bare-in-fall-of-albany-leaders.html> ("The recent federal trials that ended in the quick convictions of Sheldon Silver and Dean G. Skelos laid bare a world of greed, flagrant corruption and abuse of power

responsible for providing critical public services such as education, public safety, healthcare, public assistance for the poor, and building roads, bridges, schools, and libraries, corruption at this level has a corrosive and distorting impact on the quality of life in the community.³⁶ In particular, pervasively corrupting influences intended to manipulate and orchestrate the awarding of public contracts and services in return for bribes or kickbacks divert limited government resources away from needed community services.³⁷ In addition to diverting public money, corrupt practices that manipulate government contracts and municipal services further undermine economic growth by putting in place a culture of corruption that deters legitimate investment and commerce. The added cost of doing business in a

in Albany, with evidence showing payoffs taking a deceptive circular route from business interests to the elected officials whose help they sought.”). As a practical consequence, the enforcement of these federal corruption statutes typically targets powerful public officials and money interests. The enforcement of these laws, therefore, serves to further public confidence in the justice system by sending a compelling message to the community that the laws apply to everyone. See Joe Nocera, *How to Prevent Oil Spills*, N.Y. TIMES (Apr. 14, 2012), <http://www.nytimes.com/2012/04/14/opinion/nocera-how-to-prevent-oil-spills.html> (“I have argued in the past, mainly in the context of the financial crisis, that the country has been poorly served by the Justice Department’s unwillingness to hold to account big shots like Angelo Mozillo, the former chief executive of Countrywide, whose companies’ illegal practices helped lead us to the brink of financial apocalypse. It has sent a terrible message that there are two kinds of justice; one for the rich and powerful; and another for everybody else.”); see also Joe Nocera, *Biggest Fish Face Little Risk of Being Caught*, N.Y. TIMES (Feb. 25, 2011), <http://www.nytimes.com/2011/02/26/business/economy/26nocera.html>.

36. See Richard Perez-Pena, *13 Detroit School Principals Charged in Vendor Kickback Scheme*, N.Y. TIMES (Mar. 29, 2016), <https://www.nytimes.com/2016/03/30/us/13-detroit-school-principals-charged-in-vendor-kickback-scheme.html> (“In Detroit’s crumbling schools, where the threat of insolvency means that basic repairs, supplies and even teachers are in short supply, 13 principals conspired with a vendor to defraud the system, siphoning away millions of dollars . . . The principals . . . ordered supplies like paper, workbooks and chairs from the vendor, the Detroit Public Schools paid the bills. The vendor then delivered only some of the supplies to the schools and paid \$908,518 in kickbacks to the principals . . .”); Benjamin Weiser & Marc Santora, *In 2nd Alleged Bribe Scheme, a Legislator was in on the Case*, N.Y. TIMES (Apr. 4, 2013), <http://www.nytimes.com/2013/04/05/nyregion/assemblyman-eric-stevenson-is-accused-of-taking-bribes.html?pagewanted=all> (describing corruption charges against New York State assemblymen based on cash payments in exchange for assistance in opening adult day care centers and introducing legislation to block competing operators from opening centers); Mary M. Chapman, *Former Mayor of Detroit Guilty in Corruption Case*, N.Y. TIMES (Mar. 11, 2013), <http://www.nytimes.com/2013/03/12/us/kwame-kilpatrick-ex-mayor-of-detroit-convicted-in-corruption-case.html> (describing conviction of former Mayor of public corruption charges based on an pervasive practice of shakedowns, kickbacks, and bid-rigging schemes); Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles into Insolvency*, N.Y. TIMES (July 18, 2013), <http://www.nytimes.com/2013/07/19/us/detroit-files-for-bankruptcy.html?pagewanted=all> (describing Detroit’s filing for bankruptcy); Mary Williams Walsh, *In Alabama, a County that Fell Off the Financial Cliff*, N.Y. TIMES (Feb. 18, 2012), <http://www.nytimes.com/2012/02/19/business/jefferson-county-ala-falls-off-the-bankruptcy-cliff.html> (describing largest Chapter 9 municipal bankruptcy resulting from sewer project and corrupt financial schemes). In addition to the corruption involving government contracts, municipal debt financing and bond issuances has also been corrupted by the self-dealing by public officials.

37. A substantial portion of these public projects, although administered by state and local officials, are funded by federal programs and grants.

culture of corruption deters individuals from starting new businesses and deters existing businesses from growing.³⁸ However, the clear harm to the community does not outweigh the need to ensure a fundamentally fair application of the law.

C. 18 USC § 1346 MAIL AND WIRE FRAUD

The federal mail and wire fraud statutes make it a crime to use the mails or interstate wires in connection with a scheme to defraud. Section 1346 defines a “scheme to defraud” to include defrauding the public of the “intangible right of honest services.”³⁹ The meaning of the term “intangible right of honest services” has been clearly defined by the Supreme Court to be limited to a bribery or kickback scheme.⁴⁰ Therefore, after *Skilling*, to sustain an honest services fraud conviction, the government must prove that: (1) the defendant demanded or accepted a bribe or kickback; and (2) used the mails or wires in furtherance of the criminal activity.⁴¹

The Fourth Circuit’s decision in *McDonnell* provides relevant guidance on the standard of proof to establish corrupt intent. The *McDonnell* court held that to prove a corrupt intent, the prosecution must demonstrate more than an

38. See Matthew Dolan, Detroit Arena’s Revival Points a Way for City, WALL ST. J. (Apr. 23, 2012, 10:32 PM), <http://www.wsj.com/articles/SB10001424052702304331204577352101951231234>. Describing the challenges in reviving the Cobo convention center after years of widespread corruption, Dolan explained:

To be sure, the convention center’s financial challenges pale next to the fiscal crisis gripping Detroit. Under the weight of a \$265 million deficit and no infusion of cash from Michigan on the horizon, it will be a tough road to recovery for a city that lost one-quarter of its population between 2000 and 2010.

... Cobo ... was long a troubled asset for Detroit. Less than one-third of its 700,000 square feet of exhibit space was used for many years. It tied for last place in hosting national conventions and trade shows among similarly sized centers, according to a 2010 report from Conventions, Sports & Leisure, a consulting firm.

A big drawback [to attracting conventions]: widespread corruption that inflated exhibitors’ costs. Two successive Cobo directors were sent to federal prison in 2009 for taking bribes from a contractor who provided electrical, janitorial, catering and retail services. Patrons and exhibitors also complained of Cobo’s poor food, parking hassles and inefficient loading docks.

Id.

39. 18 U.S.C. § 1346 (2012).

40. *Skilling*, 561 U.S. at 368.

41. *Id.* at 412-13; See *United States v. George*, 676 F.3d 249, 252 (1st Cir. 2012) (explaining that the Supreme Court “truncated the reach” of the honest services fraud in *Skilling* by limiting it to bribery and kickback schemes); *United States v. Barraza*, 655 F.3d 375, 382 (5th Cir. 2011) (stating that “honest services fraud only consists of bribery and kickbacks, not the failure to disclose receipt of money”); *United States v. Bryant*, 655 F.3d 232, 243-44 (3d Cir. 2011) (stating that *Skilling* “defined the ‘core’ of honest services fraud” to include only bribery and kickback schemes); *Ryan v. United States*, 645 F.3d 913, 914 (7th Cir. 2011), vacated, 132 S. Ct. 2009 (2012), remanded 688 F.3d 845 (7th Cir. 2012) (explaining that *Skilling* held that the honest services form of the mail-fraud offense “covers only bribery and kickback schemes”).

expectation.⁴² On appeal, the *McDonnell* defendant claimed that the district court's jury instruction failed to require the government to sufficiently prove that the benefits were sufficiently linked to a specific official act.⁴³

The appellate court agreed with the defendant's contention that a higher standard of proof applied, but rejected his argument that the district court failed to properly instruct the jury on the law.⁴⁴ The court clearly affirmed the higher burden of proof and confirmed that the government was required to prove that the benefits were linked to a specific act.⁴⁵ The court first acknowledged that both honest services fraud and extortion are essentially bribery offenses requiring the government to prove a *quid pro quo*.⁴⁶ The court then defined the term *quid pro quo* to require the government to prove a corrupt intent—intent on the part of the defendant to influence a specific official act.⁴⁷ The court found that proving that a benefit was provided to a public official to generate good will is not enough.⁴⁸ The court then explained that bribery occurs only if the benefit is “coupled with a particular criminal intent” and this intent must be more than “a vague hope or expectation” that the public official will “reward the generosity.”⁴⁹ The court then held that the government must show that the defendant intended to secure or influence a “specific official action.”⁵⁰

The Court of Appeals in *McDonnell* concluded that the district court clearly articulated this standard to the jury and that the evidence was sufficient to establish a “corrupt understanding.”⁵¹ The defendant had received money, loans, favors, and gifts, and those benefits were linked to efforts to obtain research at a state university, state grant funds, and coverage for the dietary supplement under the state employee health care.⁵² The “temporal relationship” between the benefits provided to the defendant and the official acts represented “compelling evidence of corrupt intent”: none of these gifts were goodwill gifts from one friend to another. Indeed, the defendant had no relationship with the company until after he was elected Governor.⁵³

However, courts have generally not articulated such a clear evidentiary standard and have imposed a lower standard of proof on the government. The courts have accepted the ambiguity and have not required the government to identify the temporal connection between the state action and the benefit provided,

42. *United States v. McDonnell*, 792 F.3d 478, 487-92 (4th Cir. 2015), cert. granted in part, 1365 S. Ct. 89 (2016), and vacated and remanded, 136 S. Ct. 2355 (2016).

43. *Id.* at 505.

44. *Id.* at 514.

45. *Id.*

46. *Id.* at 506.

47. *Id.* at 514.

48. *Id.* at 515.

49. *Id.*

50. *Id.*

51. *Id.* at 514.

52. *Id.* at 518-19.

53. *Id.* at 519-20.

and have held that to sustain an honest services conviction the government meets its burden of proof by demonstrating only that the benefits were provided to the public official to influence some official act.⁵⁴ For example, in *United States v. Bryant*, the defendants, a New Jersey State Senator and the Dean of the School of Osteopathic Medicine, were charged with honest services fraud and federal program bribery.⁵⁵ At trial, the government presented evidence that the senator received a “low-show” job at the medical school as a “Program Support Coordinator” in exchange for his efforts as the chairman of the Senate Appropriations Committee to funnel state funding to the school.⁵⁶ The government asserted that as a result of this corrupt relationship, an additional \$10 million in funding was provided to the medical school over a three-year period.⁵⁷ The defendants were convicted and appealed.⁵⁸ On appeal, the defendants argued that the evidence was insufficient to sustain the convictions and that the district court’s jury instruction on both charges was defective.⁵⁹

The Third Circuit first ruled that the evidence was sufficient to prove a link between the employment at the medical school and the state funding.⁶⁰ The court found that the evidence indicated that the defendants had an understanding, even if implicit, that his salary, bonus, and pension eligibility from his position at the medical school was given in exchange for efforts to increase state funding for the school.⁶¹ The court primarily relied on the timing of the efforts to increase funding over the course of his nearly three-year employment to establish the link.⁶²

The defendants complained that the jury instructions for the honest services fraud counts were flawed in light of *Skilling*.⁶³ Specifically, the defendants asserted that the district court’s jury instruction did not make clear that the jury was required to find that the benefits were intended to “alter” the actions of the public official.⁶⁴ The appellate court rejected the defendants’ “alter” theory and found that the trial court’s instructions correctly set forth the government’s burden of proof.⁶⁵ The court explained that to prove a *quid pro quo* in support of honest services fraud, the government is not required to present evidence that attributes each corrupt payment to each official action by the public official.⁶⁶ Rather, the court found that it was enough for the government to present evidence that there

54. See, e.g., *United States v. Bryant*, 655 F.3d 232, 236–37 (3d Cir. 2011).

55. *Id.* at 236–37. For other examples from the Third Circuit, see *United States v. Wright*, 665 F.3d 560 (3d Cir. 2012) and *United States v. Kemp*, 500 F.3d 259 (3d Cir. 2007).

56. *Id.* at 237.

57. *Id.*

58. *Id.*

59. *Id.* at 240.

60. *Id.*

61. *Id.* at 241.

62. *Id.*

63. *Id.* at 243.

64. *Id.* at 244.

65. *Id.* at 245.

66. *Id.* at 241.

was “an intent to influence” sufficient to establish the link between the payments and some official action.⁶⁷

In *United States v. Rosen*, the defendants, the chief executive of a network of hospitals and three New York State legislators, were charged with honest services fraud.⁶⁸ At trial, federal prosecutors introduced evidence that showed that the chief executive provided the legislators with consulting fees in exchange for state financial assistance for the hospitals.⁶⁹ The defendants argued that the payments were legitimate consulting fees and were not directly connected to any specific official act.⁷⁰ However, the government pointed out that a close examination of the evidence revealed that little or no consulting work was performed under the contracts.⁷¹ Thus, the defendants were convicted and subsequently appealed.⁷²

On appeal, the defendants argued that the evidence was insufficient to prove the existence of the required *quid pro quo* to sustain the charges.⁷³ The Second Circuit rejected the defendants’ assertion. The court first ruled that the illegality of an “as opportunities arise” or series of corrupt payments was a valid prosecution theory.⁷⁴ Therefore, the court held that in cases involving public officials, a trier of fact may “infer guilt from evidence of benefits received and subsequent favorable treatment, as well as from behavior indicating consciousness of guilt.”⁷⁵ The court was not persuaded that any direct link was required to sustain a conviction, stating, “evidence of a corrupt agreement in bribery cases is usually circumstantial, because bribes are seldom accompanied by written contracts, receipts or public declarations of clear admissions and expressions of intentions in documents or conversations.”⁷⁶ Rejecting the assertion that the payments were gratuities rather than bribes, the court found that the amounts involved exceeded what reasonably could be expected for a gratuity.⁷⁷ Additionally, the court concluded that any collateral benefit to the public from the bribery scheme was irrelevant and held that “an illegal *quid pro quo* exchange persists even though the state legislator’s acts also benefit constituents other than the defendant.”⁷⁸

In *United States v. McDonough*, the First Circuit held that a lower standard of proof applied and that the government was not required to prove that

67. *Id.* at 241.

68. *United States v. Rosen*, 716 F.3d 691, 694 (2d Cir. 2013). For other examples from the Second Circuit, see *United States v. Bruno*, 661 F. 3d 733 (2d Cir. 2011) and *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007).

69. *Id.* at 702.

70. *Id.*

71. *Id.* at 702–03.

72. *Id.* at 698–99.

73. *Id.*

74. *Id.* at 700.

75. *Id.* at 702–03.

76. *Id.*

77. *Id.* at 702–04.

78. *Id.* at 701–02.

the defendant intended to influence a specific state action, but rather only that the defendant desired to induce some official act.⁷⁹ In this case, the defendants, the former Speaker of the Massachusetts House of Representatives and a lobbyist, were convicted of honest services fraud and extortion.⁸⁰ At trial, the government introduced evidence that the defendants were provided cash payments in exchange for influencing the award of and ensuring funding for two state software contracts.⁸¹

On appeal, the appellate court held that the evidence was sufficient to prove that the defendants received a series of payments that were sufficiently connected to official acts to sustain both the honest services and extortion convictions.⁸² The court explained that:

[T]he government must prove . . . the receipt of something of value “in exchange for” an official act. Such an agreement need not be tied to a specific act by the recipient. “It is sufficient if the public official understood that he or she was expected to exercise some influence on the payor’s behalf as opportunities arose.” Ultimately, [w]hat is needed is an agreement . . . which can be formal or informal, written or oral . . . We start by noting that “evidence of a corrupt agreement in bribery cases is usually circumstantial, because bribes are seldom accompanied by written contracts, receipts or public declarations of intentions.”⁸³

In *United States v. Whitfield*, the defendants, a trial attorney and two state court judges, were charged with various public corruption offenses based on loan guarantees that were provided in exchange for favorable decisions on cases pending before the judges.⁸⁴ At trial, the government introduced evidence that the judges accepted these loan guarantees but never intended to pay them back.⁸⁵ The government also presented evidence that called into question the legitimacy of the loans based on the timing of the financial transactions.⁸⁶ More specifically, the defendant attorney had a significant contingency fee case pending before each of the defendant judges.⁸⁷ The defendants were convicted and they appealed.

The Fifth Circuit rejected the defendants’ claim that the government was required to prove a direct link between the payment and specific official acts identified at the time loans were arranged or guaranteed.⁸⁸ Rather, the court held

79. *United States v. McDonough*, 727 F.3d 143, 153 (1st Cir. 2013). For another example from the First Circuit, see *United States v. Urchiuoli* 613 F.3d 11 (1st Cir. 2010).

80. *Id.* at 148–52.

81. *Id.* at 153.

82. *Id.* at 156.

83. *Id.* at 152–53 (citations omitted).

84. *United States v. Whitfield*, 590 F.3d 325, 335 (5th Cir. 2009).

85. *Id.* at 336.

86. *Id.* at 337.

87. *Id.*

88. *Id.* at 351–53.

that the government was only required to prove that the payment was demanded or accepted for some official act.⁸⁹ The court explained that as a practical matter, “it would have been impossible” for the defendants to have agreed on what cases the judges would fix at the time the loans were arranged because one of the cases at issue had not been filed in one judge’s court and the other judge was only then running for election and “was not yet on the bench.”⁹⁰ The district court’s jury instructions explained that:

In order to prove the scheme to defraud another of honest services through bribery, the Government must prove beyond a reasonable doubt that the particular defendant entered into a corrupt agreement to provide the particular judge with things of value specifically with the intent to influence the action or judgment of the judge on any question, matter, cause or proceeding which may be then or thereafter pending subject to the judge’s action or judgment.⁹¹

The defendants also complained that because the loan guarantees were made in the context of the defendant’s electoral campaigns, their constitutional right to free political speech was at stake in this case.⁹² As a consequence, the defendants argued that the *McCormick*⁹³ standard applied and required the government to prove that there was an explicit *quid pro quo* involving a specific official act identified at the time that the defendant arranged and guaranteed the loans from the bank.⁹⁴ The defendants claimed that, by failing to sufficiently require a *quid pro quo* exchange, the district court allowed the jury to convict them for acts that essentially amounted to gratuity, not bribery.⁹⁵

The court acknowledged that the government was required to prove that the payment was sufficiently linked to an official act.⁹⁶ However, the court held that the district court accurately set for this the legal element and burden of proof:

For the sake of argument, we will assume that *McCormick* [does] apply and that a *quid pro quo* instruction was required in this case. In doing so, we are also willing to assume that the initial \$40,000 loan guarantee to [defendant] and the \$25,000 loan guarantee to [defendant] were campaign contributions. However, we reject any attempt to characterize the \$100,000 loan guarantee to [the defendant] for the down-payment on

89. *Id.* at 353.

90. *Id.* at 353 n.17.

91. *Id.* at 348.

92. *Id.* at 348.

93. In *McCormick v. United States*, the Court held that when the benefit takes the form of a campaign contribution, the government must prove a direct connection between the payment and a specific official act. 500 U.S. 257, 273 (1991).

94. 590 F.3d at 348-49.

95. *Id.* at 349.

96. *Id.* at 352-53.

a home and the financial and legal assistance provided to [defendant] in connection with his state prosecution for embezzlement as having anything to do with their respective electoral campaigns. Still, even if we assume that a *quid pro quo* instruction was necessary because at least some of the financial transactions in question were campaign-related, we conclude that the jury charge in this case sufficiently fulfilled that requirement.

Despite the district court's failure to include the actual phrase *quid pro quo* in the jury charge, in the instant context the instructions sufficiently conveyed the "essential idea of give-and-take." Under the undisputed facts here, the jury's finding that there was a corrupt agreement necessarily entailed a finding of an *exchange* of things of value for favorable rulings in the judges' courts. Therefore, to the extent that a *quid pro quo* instruction may have been required in this case, the district court adequately delivered one.⁹⁷

In *Ryan v. United States*, the former Governor of Illinois moved to vacate, set aside, or correct his sentence for honest services fraud.⁹⁸ At his initial trial, the government introduced evidence that the defendant accepted kickbacks in the form of financial benefits in exchange for steering state contracts.⁹⁹ The court denied the defendant's motion to vacate his conviction and found that the jury instructions and evidence supported a corrupt payment theory—that the defendant was provided financial benefits in exchange for an official act.¹⁰⁰

The court explained that the "stream of benefits theory" allows for a bribery or kickback conviction based on evidence that benefits were provided to the public official during the same period of time that the public official exercised influence and favorable treatment.¹⁰¹ The court explained that:

[The defendant] is correct that, post- *Skilling*, an honest services fraud conviction does require a bribery or kickback scheme. As the court reads the challenged instruction, however, nothing in it suggests such a scheme is not a required path to conviction. In fact, this instruction taken alone suggests that a bribe is required for conviction. The instruction requires that "the government prove[] beyond a reasonable doubt that the public official accepted the personal and financial benefits with the understanding that the public official would perform or not

97. *Id.* at 353.

98. *Ryan v. United States*, 759 F. Supp. 2d 975, 977-78 (N.D. Ill. 2010), *aff'd*, 645 F.3d 913 (7th Cir. 2011), vacated on other grounds, 132 S. Ct. 2099 (2012), remanded, 688 F.3d 845 (7th Cir. 2012).

99. See *United States v. Warner*, No. 02 CR 506-1, 2006 WL 2583722 at *2 (N.D. Ill. Sept. 7, 2006).

100. *Ryan*, 759 F. Supp. 2d at 987-88.

101. *Id.* at 984-85.

perform acts in his official capacity in return—an instruction indistinguishable from a bribery instruction.¹⁰²

The law does not require that the government identify a specific official act given in exchange for personal and financial benefits received by the public official so long as the government proves beyond a reasonable doubt that the public official accepted the personal and financial benefits with the understanding that the public official would perform or not perform acts in his official capacity in return.

Likewise, the law does not require that the government identify a specific official act given in exchange for personal and financial benefits received by the public official so long as the government proves beyond a reasonable doubt that the personal and financial benefits were given with the understanding that the public official would perform or not perform acts in his official capacity in return.¹⁰³

The court then addressed the defendant’s challenge to the campaign contribution instruction. The defendant asserted that the government was required to prove a direct link between the campaign contribution and a specific official act.¹⁰⁴ The district court found that the *McCormick* standard applied to honest services prosecutions and agreed that the government was required to prove a direct link between a benefit and official act.¹⁰⁵ However, the court found that the jury was given the required instruction: “a campaign contribution can be deemed a bribe only if the money is given in return for a commitment to take (or not take) a specific action.”¹⁰⁶

In *United States v. DiMasi*, the Speaker of Massachusetts House of Representatives, was convicted of honest services fraud and extortion.¹⁰⁷ At trial, the government introduced detailed evidence that the defendant received kickbacks in exchange for steering and funding state contracts for computer software.¹⁰⁸ The government relied on this evidence to support both charges.¹⁰⁹ In a post-trial motion, the defendant asserted that the evidence was not sufficient to support the convictions and that the district court’s jury instructions on honest services and extortion were not correct statements of the law.¹¹⁰ The defendant asserted that the government was required to prove a direct link between the benefits and a specific official act.¹¹¹

102. *Id.* at 986 (citations omitted).

103. *Id.* at 987–88 (quoting district court’s jury instructions).

104. *Id.* at 986–87.

105. *Id.* at 989.

106. *Id.*

107. *United States v. DiMasi*, 810 F. Supp. 2d 347, 349, 360 (D. Mass. 2011).

108. *Id.* at 357–58.

109. *Id.* at 360.

110. *Id.* at 350.

111. *Id.* at 354 n.4.

The district court denied the defendant's motion.¹¹² The court first recognized that honest services fraud and extortion share a core legal element and that to sustain the honest services and extortion convictions, the government was required to prove a link between the payment and an official act.¹¹³ The court then found that the evidence was sufficient to support the defendant's convictions.¹¹⁴ The court determined that the evidence showed that: (1) the firm seeking state contracts made monthly retainer payments to the defendant's law practice; (2) there were discussions with the defendant about potential contracts; (3) the defendant was given talking points in support of the contracts; (4) the defendant actually used one of those points in an effort to influence a state agency to award contracts; (5) the defendant worked consistently and successfully to provide funding; and (6) the state contracts were actually awarded to the firm that provided the benefits.¹¹⁵

The court rejected the defendant's assertion that the government was required to prove that the payment was directly linked to an identifiable official act.¹¹⁶ The court also found that the government could rely on circumstantial evidence to prove the link: "an unlawful agreement . . . need not be express, [and] can be proven by inference, based on circumstantial evidence."¹¹⁷

In *United States v. Mosberg*, a real estate developer was charged with honest services fraud in connection with his relationship with the attorney for the local town planning board.¹¹⁸ The government argued that the defendant engaged in several real estate deals with the attorney's family members in exchange for influence and favorable treatment in connection with numerous pending real estate development projects.¹¹⁹ Specifically, the indictment alleged that the defendant "'g[a]ve the Attorney . . . a stream of concealed bribes . . . often in the form of favorable real estate transactions, *in exchange for* the Attorney exercising . . . 'official authority' " to assist the defendant.¹²⁰

Prior to trial, the defendant moved to dismiss the indictment complaining that it failed to allege a *quid pro quo* bribery scheme consistent with *Skilling* and

112. *Id.* at 362, 366.

113. *Id.* at 353–56.

114. *Id.* at 361.

115. *Id.* at 358–60.

116. *Id.* at 354.

117. *Id.* at 355. The district court's instructions required proof that payments were made with the intent to influence an official act:

The jury was also instructed that it was not necessary for the government to prove that the scheme involved making a specific payment for a specific official act; rather, it would be sufficient if the government proved beyond a reasonable doubt a scheme to make a series of payments in exchange for [the defendant] performing official actions benefitting [others] as opportunities arose.

Id. at 356.

118. *United States v. Mosberg*, 866 F. Supp. 2d 275, 280–82 (D.N.J. 2011).

119. *Id.*

120. *Id.* at 288 (quoting the government indictment).

with pre-*Skilling* case law.¹²¹ In particular, the defendant argued that the indictment was required to allege a direct link between the real estate deals and specific official acts.¹²² The district court disagreed and denied the defendant's motion.¹²³ The court held that the indictment sufficiently alleged a nexus between the payment and some official acts: "[t]he Indictment alleges the elements of honest services fraud, and apprises [the defendant] of the sort of bribery scheme that he must defend against—favorable real estate deals in exchange for expediting or favorably resolving Planning Board matters and Township litigation."¹²⁴ The court also acknowledged that this legal element was common to both program bribery and honest services charges.¹²⁵

D. 18 USC § 1951 EXTORTION

Section 1951, the federal extortion statute, or the Hobbs Act, makes it a crime for a person to commit extortion either (1) through threatened force, violence or fear; or (2) "under color of official right."¹²⁶ To convict a defendant of extortion under a color of official right, courts have typically identified the elements as follows: (1) the defendant must be a public official; (2) who solicited or accepted a payment ("money or property"); (3) the payment must have been induced "under color of official right"; and (4) there must have been at least a *de minimis* effect on commerce.¹²⁷ The text of the statute does not use the term "bribe" or "kickback." However, in *Evans v. United States*, the Supreme Court limited extortion under color or official right to bribery and kickback schemes.¹²⁸

121. *Id.*

122. *Id.* at 283–84.

123. *Id.* at 315.

124. *Id.*

125. *Id.* at 304. The district court held that a corrupt payment can exist even if the public official takes official action that he always intended:

[A]n allegation that a [public official] "exchanged" official actions for a bribe necessarily means that the bribe had some influence on that discretion—even if, as things turned out, the official's actions were the same as they would have been absent the bribe. This is because the "exchange" removes discretion from the legislator—which he is obligated to exercise in the best interests of the public—and instead locks him into a position favoring one constituent, as dictated by the *quid pro quo* arrangement.

Id. at 295 (internal citation omitted).

126. 18 U.S.C. § 1951(b)(2) (2012).

127. 18 U.S.C. § 1951. *See* *Sekhar v. United States*, 133 S. Ct. 2720 (2013) (reversing Hobbs Act conviction and holding that internal recommendations of an attorney are not transferable and therefore not property under Section 1951); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 936 (9th Cir. 2009); *Evans v. United States*, 504 U.S. 255, 267 (1992) (defining "money or property" under § 1951 to include any property that is transferable).

128. 504 U.S. at 258, 260, 268 (1992). *See also* *United States v. Blagojevich*, 794 F.3d 729 (7th Cir. 2015) (recognizing that to sustain conviction under extortion statute government must prove a *quid pro quo*—that a public official performed an official act in exchange for a private benefit but reversing conviction and holding that scope of *quid pro quo* does not include the exchange of an official act for another official act).

Therefore, prosecutions for extortion under color of official right, similar to prosecutions under other bribery related statutes, require the government to prove a corrupt intent—intent to influence state action or the conduct of government.

The courts, however, have been reluctant to impose this burden of proof in extortion cases and have sustained convictions under lower standards of proof. For example, in *United States v. Kincaid–Chauncey*, the Ninth Circuit held that to sustain an extortion conviction “under color of official right,” where the payment is not a campaign contribution, the government is required to prove a direct link between a benefit and official act.¹²⁹ In *Kincaid*, a member of the Clark County Commissioners was charged with extortion.¹³⁰ At trial, the government introduced evidence that the defendant received cash payments in exchange for influence and favorable treatment in connection with ordinances, permits, and licenses affecting the operation of adult clubs in Las Vegas.¹³¹ The district court instructed the jury that in order for the defendant to be found guilty of extortion “under official right,” the government must prove that: (1) the defendant was a public official; (2) the defendant obtained money or property; (3) the defendant knew that the money was given in return for taking some official action; and (4) there was an impact on interstate commerce.¹³²

On appeal, the defendant argued that the district court erred by failing to instruct the jury that to sustain the conviction the government was required to prove and the jury was required to find a *quid pro quo*—a direct link between the payment and a specific official act.¹³³ The Ninth Circuit disagreed and affirmed the conviction.¹³⁴ The court viewed extortion and bribery *in pari materia* and held that each requires a connection between the benefit provided to the public official and an official act.¹³⁵ However, the court held that a lower standard of proof applied to sustain an extortion conviction and reasoned that where the payment is not a campaign contribution, the government was required to prove only a sufficient link between the payment and some official act, rather than a direct link between the payment and a specific official act.¹³⁶ The court’s statements as to what was sufficient to sustain a conviction were less than convincing. The court explained that there must be “some understanding that the payment were in exchange for ‘some’ official act” and that the government was not required to identify the

129. 556 F.3d 923 (9th Cir. 2009), *abrogated by* Skilling v. United States, 561 U.S. 358 (2010).

130. *Id.* at 926.

131. *Id.* at 926–28.

132. *Id.* at 937.

133. *Id.* at 936.

134. *Id.* at 938.

135. *Id.*

136. *Id.*

official act at or near the time that the benefit was provided to the public official.¹³⁷ The court then concluded that the jury instruction adequately stated the government's burden of proof:

In the case of a public official who obtains money, other than a campaign contribution, the Government does not have to prove an explicit promise to perform a particular act made at the time of the payment. Rather, it is sufficient if the public official understands that he or she is expected as a result of the payment to exercise particular kinds of influence as specific opportunities arise.

Although "[n]o specific instruction to find an express *quid pro quo* was given," this instruction adequately stated the implicit *quid pro quo* element. . . . The instruction tells the jury that it can only find a defendant guilty if it finds that she "knew that the money was given in return for taking some official action." It then elaborates that the government does not have to show an express promise, but the public official must understand that "she is expected as a result of the payment to exercise particular kinds of influence as specific opportunities arise." "[A]lthough the magic words *quid pro quo* were not uttered, a simplified version of the concept, the idea that 'you get something and you give something,' was."¹³⁸

Likewise, the Third Circuit has held that Section 1951 does not require the prosecution to prove a corrupt intent and that the government was only required to prove an implied understanding.¹³⁹ In *United States v. Antico*, the defendant, who held various positions at the Department of Licenses and Inspections for the City of Philadelphia, was charged with extortion.¹⁴⁰ At trial, the government introduced evidence that the defendant was provided financial benefits in exchange for approving zoning, use permits, and licenses for several businesses.¹⁴¹ The defendant was convicted and he appealed.¹⁴² On appeal, the defendant argued that the district court failed to instruct the jury that the government was required to prove a specific *quid pro quo*.¹⁴³ The Third Circuit rejected the defendant's argument and held that the extortion statute contains no express *quid pro quo* requirement in the non-campaign contribution context.¹⁴⁴ The appellate court did

137. *Id.*

138. *Id.* at 937–38 (citations omitted).

139. *United States v. Antico*, 275 F.3d 245 (3d Cir. 2001), *abrogated by* *Skilling v. United States*, 561 U.S. 358 (2010).

140. *Id.*

141. 275 F.3d at 248–49.

142. *Id.* at 245.

143. *Id.* at 255.

144. *Id.* at 257; *see also* *United States v. Salahuddin*, 765 F.3d 329, 343 (3rd Cir. 2014) (to sustain a Hobbs Act conviction based on soliciting charitable contributions the government is not required to prove an explicit *quid pro quo*).

hold, however, that the phrase “under color of official right” requires the government to prove that the defendant accepted benefits with the implied understanding that he would perform or not perform an official act.¹⁴⁵ The court explained that: “The *quid pro quo* can be implicit, that is, a conviction can occur if the Government shows that [the defendant] accepted payments or other consideration with the implied understanding that he would perform or not perform an act in his official capacity “under color of official right.”¹⁴⁶

The Sixth Circuit has held that Section 666’s “intending to be influenced” and Section 1951’s “under color of official right” mean the same thing—that the government is required to prove a connection between the benefit and some official act.¹⁴⁷ In *United States v. Abbey*, a City Administrator for Burton, Michigan was charged with both Section 666 and Section 1951 violations.¹⁴⁸ At trial, the government presented evidence that the defendant was given real estate in exchange for favorable treatment in connection with a decision that would affect a proposed real estate development.¹⁴⁹ The same evidence was used for both charges and the government did not introduce any evidence establishing that when the property was transferred to the defendant, there was an agreement to take a specific official act.¹⁵⁰ On appeal, the defendant argued that to sustain each of his convictions, the government was required to prove that the benefit was linked to a specific official act.¹⁵¹

The Sixth Circuit rejected the defendant’s contention and held that the statutes do not contain such a heightened standard of proof that requires the prosecution to prove a corrupt intent.¹⁵² The court held that this “*quid pro quo* requirement” was limited to when the benefit takes the form of a campaign contribution.¹⁵³ The court then acknowledged that a lesser “*quid pro quo* requirement applies to all” Section 666 and Section 1951 prosecutions.¹⁵⁴ The court tried to distinguish, in a less than clear way, the two standards of proof.¹⁵⁵

145. *Id.* at 258. In *United States v. Munchak*, 527 F. App’x 191 (3d Cir. 2013), the defendants, County Commissioners in Lackawanna County, Pennsylvania, were charged with Hobbs Act extortion. At trial, the government introduced evidence that the defendants demanded payments in exchange for government contracts. The defendants were convicted and they appealed. On appeal, the defendants argued that the trial court erred when it instructed the jury that it could convict them of extortion and federal program bribery absent an explicit *quid pro quo*. The Third Circuit rejected this assertion and affirmed the conviction.

146. 275 F.3d at 258.

147. *United States v. Abbey*, 560 F.3d 513, 515 (6th Cir. 2009).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 518.

153. *Id.* at 517–18.

154. *Id.* at 517 (emphasis added).

155. *Id.* at 519.

However, it is doubtful that this effort added to the understanding of the government's burden of proof:

[N]ot all *quid pro quos* are made of the same stuff. The showing necessary may still vary based on context, though all cases require the existence of some kind of agreement between briber and official . . . “Indeed, in circumstances like this one-outside the campaign context-[r]ather than requir[e] an explicit *quid-pro-quo* promise, the elements of extortion are satisfied by something short of a formalized and thoroughly articulated contractual arrangement (i.e., merely knowing that the payment was made in return for official acts is enough).” A public official thus commits extortion ‘under color of official right whenever he knowingly receives a bribe.

So [the defendant] is wrong in contending that, to sustain a Hobbs Act conviction, the benefits received must have some explicit, direct link with a promise to perform a particular, identifiable act when the illegal gift is given to the official. *Instead, it is sufficient if the public official understood that he or she was expected to exercise some influence on the payor's behalf as opportunities arose.*

Similar to his argument regarding the Hobbs Act, he contends that the district court failed to properly instruct the jury that, to sustain a conviction under 18 U.S.C. § 666, the government must prove “a specific intent element” on [the defendant's] part “that there be a connection between [his] intent and a specific official act.”

By its terms, the statute does not require the government to prove that [the defendant] contemplated a specific act when he received the bribe; the text says nothing of a *quid pro quo* requirement to sustain a conviction, express or otherwise: while a “*quid pro quo* of money for a specific . . . act is sufficient to violate the statute,” it is “not necessary.” Rather, it is enough if a defendant “corruptly solicits” “anything of value” with the “inten[t] to be influenced or rewarded in connection” with some transaction involving property or services worth \$5000 or more.

...

The district court's jury instructions were not improper for failing to include a requirement that the government prove a direct link from some specific payment to a promise of some specific official act.¹⁵⁶

156. *Id.* at 517–18, 520–21. In *United States v. Turner*, 684 F.3d 244 (1st Cir. 2012), the defendant, a member of the Boston City Council, was charged with extortion. At trial, the government presented evidence that the defendant was paid cash in exchange for assistance in obtaining a liquor license. *Id.* at 254. In addition, the government presented evidence that the defendant denied receiving any payment. *Id.* The defendant was convicted and he appealed.

E. SECTION 666 FEDERAL PROGRAM INTEGRITY

Section 666 is intended to protect the financial integrity of state and local programs receiving federal funds and makes it a federal offense for a state or local official to demand or receive a payment “intending to be influenced.”¹⁵⁷ Courts have typically identified the elements of the offense as follows: (1) the defendant must be an employee or agent of a state or local government agency;¹⁵⁸ (2) the agency must receive in excess of \$10,000 in federal funding in any one-year period; (3) the employee or agent must demand or accept a benefit; and (4) the benefit must be in connection with any “business” or “transaction” in excess of \$5,000.¹⁵⁹

The term “bribery” or “kickback” is not used in the statute. The statute requires that the benefit must be given with intent to influence or reward a government agent “in connection with any business, transaction, or series of transactions.”¹⁶⁰ Section 666 does not say “official act” but states “any business, transaction, or series of transactions.”¹⁶¹ Section 666 does not say “in return for,” “because of,” or “in exchange for.” Rather, it says “in connection with.”¹⁶² Regardless, what makes providing a benefit to a public official a crime is the nexus between the benefit and any official “business” or “transaction.” In essence, a reading of the statute in a way that does not define “intending to be influenced” as requiring a link between the benefit and an official act, would disregard the core legal element of the offense. Because the federal program statute is *in pari materia* with the honest services and extortion statutes, Section 666 offenses are limited to bribery and kickback schemes.¹⁶³

On appeal, the defendant argued that the jury was not instructed that to sustain his conviction the jury was required to find that the payment was made in exchange for an official act and that the evidence was not sufficient to support the conviction. *Id.* The First Circuit rejected both of the defendant’s contentions. The appellate court first held that the jury was instructed that to sustain an extortion conviction the government was required to prove a link between the payment and the official act — “at least an implicit, as opposed to an explicit, *quid pro quo* or reciprocity understanding is necessary.” The appellate court then found that the evidence was sufficient and rejected the defendant’s contention that the payment was merely a gift and not linked to any official act. *Id.* at 254–259.

157. 18 U.S.C. § 666(a)(2) (2012).

158. The defendant can either be the public official who solicits or accepts the bribe or the individual who pays the bribe.

159. 18 U.S.C. § 666(a)(2) (2012); *United States v. Fernandez*, 722 F.3d 1, 13 (1st Cir. 2013) (“Thus, the bribe can be ‘anything of value’ – it need not be worth \$5000. The \$5000 element instead refers to the value of the ‘business’ or ‘transaction’ sought to be influenced by the bribe.”).

160. 18 U.S.C. §§ 666(a)(1)(B), (a)(2).

161. *Id.*

162. *Id.*

163. There are no other potential theories that could fall within the scope of the conduct precluded by the statute. The failure to disclose a conflict of interest or providing a gratuity do not require a corrupt payment and a nexus between a benefit and an official act and, therefore, would not fall within the scope of the statute. In *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013), the defendants, a commonwealth Senator and a businessman, were charged with violating § 666. At trial, the government introduced evidence that the Senator promoted legislation favorable to the defendant’s business

The courts, however, have not articulated such a clear evidentiary path to conviction and have imposed a lower standard of proof on the government. Courts have not required the government to prove a direct connection or identify the state action or conduct of government at or near the time that the benefit is provided to the public official; rather, to sustain a Section 666 conviction, the government must prove only that the benefits were provided to the public official to influence some official act. For example, the Eleventh Circuit has held that when the benefit does not take the form of a campaign contribution, the government can sustain a conviction by proving a connection between the benefit and some official act, as opposed to a specific official act.¹⁶⁴ In *United States v. McNair*, county officials of Jefferson County, Alabama and contractors were charged with numerous public corruption offenses related to a municipal sewer and wastewater repair and rehabilitation project.¹⁶⁵ At trial, the government presented evidence that the county officials overseeing the project received kickbacks from the contractors in exchange for construction and engineering contracts.¹⁶⁶ On appeal, the defendants argued that “intending to be influenced” requires a direct link between the benefit and a specific official act.¹⁶⁷ The Eleventh Circuit rejected the defendants’ assertion and held that the government was not required to prove a direct link between the kickback and a specific official act.¹⁶⁸ The court explained:

[W]e now expressly hold that there is no requirement in [Section 666] that the government allege or prove an intent that a specific payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*.¹⁶⁹

Importantly, § 666(a)(1)(B) and (a)(2) do not contain the Latin phrase *quid pro quo*. Nor do those sections contain language such as “in exchange for an official act” or “in return for an official act.” In short, nothing in the plain language of § 666(a)(1)(B) nor § 666(a)(2) requires that a specific payment be solicited, received, or given in exchange for a specific official act.

Simply put, the government is not required to tie or directly link a benefit or payment to a specific official act by that County employee.

interests at the same time he received travel and entertainment expenses. The defendants were convicted and they appealed. On appeal they argued that the trial court erred in instructing the jury that they could find the defendants guilty of a § 666 offense for offering and receiving a gratuity rather than a bribe. The First Circuit agreed and vacated the conviction. The court held that § 666 does not encompass illegal gratuities. The court explained that the statute specifically require that the government prove a corrupt payment. Therefore, to sustain a § 666 conviction, the government must prove a connection between the payment and an official act. *Id.* at 23–24.

164. *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010).

165. *Id.* at 1164–65.

166. *Id.* at 1164, 1169.

167. *Id.* at 1184–85.

168. *Id.* at 1187–88.

169. *Id.*

The intent that must be proven is an intent to corruptly influence or to be influenced “in connection with any business” or “transaction,” not an intent to engage in any specific *quid pro quo*.¹⁷⁰

Nevertheless, the court did acknowledge, that the government was required to prove *some* connection between the payment and official act.¹⁷¹ The court found that “sizable benefits” were provided with the intent to influence the county officials.¹⁷² There was no evidence of gifts to the county officials before the projects began, and the extent to which the defendants attempted to conceal the benefits was “powerful evidence” of the corrupt payments.¹⁷³

When the payment takes the form of a campaign contribution, the Eleventh Circuit has extended *McCormick* to Section 666 prosecutions and defined “intending to be influenced” to mean a direct connection between the payment and a specific official act.¹⁷⁴ In *United States v. Siegelman*, the former Governor of Alabama was charged with various public corruption offenses based on accepting a campaign contribution to an education lottery campaign in exchange for a political

170. *Id.* at 1187-88.

171. *Id.* at 1188-89.

172. *Id.* at 1196.

173. *Id.* The court also rejected the defendant’s assertion that that benefits were “gifts” not bribes. *See id.* at 1194-95. In *United States v. Langford*, 647 F.3d 1309, 1331-32 (11th Cir. 2011), the defendant, a Commissioner for Jefferson County, Alabama, was charged with federal program bribery. At trial, the government introduced evidence that while he was serving as a Commissioner, the defendant accepted more than \$240,000 in cash, clothing and jewelry from a local investment banker in exchange for steering municipal contracts involving the underwriting and marketing of municipal bonds to his firm. The defendant was convicted and he appealed. On appeal, the defendant asserted that a specific *quid pro quo* was required and that the government failed to prove a link between the benefit and a specific official act. The Eleventh Circuit rejected the defendant’s contention and affirmed the conviction. In *United States v. Keen*, 679 F.3d 981 (11th Cir. 2012), the defendants, county commissioners for Dixie County, Florida, were charged with federal program bribery. At trial, the government introduced evidence that the defendant was provided cash by an undercover FBI agent in exchange for favorable decisions in connection with a fictitious development project. The defendants were convicted and they appealed. On appeal, the defendants argued that the evidence was insufficient to support their convictions. In particular, the defendants argued that the government failed to prove “which particular business or transaction before the Dixie County Board of Commissioners was connected to the bribes nor the value of the benefit to be attained through bribes.” *Id.* at 994. The Eleventh Circuit rejected the defendants arguments and affirmed the conviction. The court explained that:

This Court has made it clear that § 666(a)(1)(B) does not require the government to prove a specific official act for which a bribe was received. Rather, the government must show only that [the defendants] “corruptly” accepted “anything of value” with the intent “to be influenced or rewarded in connection with any business, transaction, or series of transactions” of the Board. That is precisely what the government did when it presented evidence that [the defendants] accepted bribes from [undercover FBI agent] with the understanding that they would facilitate the approval of zoning changes benefitting the fictitious company of “Sean Michaels.”

Id. (citations omitted).

174. *United States v. Siegelman*, 640 F.3d 1159, 1171-72 (11th Cir. 2011).

appointment to the board that determined the number of healthcare facilities in the state.¹⁷⁵ At trial, the government introduced evidence that the campaign contribution was provided in exchange for the specific appointment.¹⁷⁶ On appeal, the defendant argued that district court erred in not requiring the jury to find a direct link between the campaign contribution and the specific appointment.¹⁷⁷ The court of appeals agreed that the *McCormick* standard applied to Section 666 prosecutions, and held that because the payment took the form of a campaign contribution, to sustain these convictions, the government was required to prove and the jury must find a direct link between the payment and a specific official act.¹⁷⁸ The court found, however, that the government had proven this direct nexus. The court explained that:

The district court in this case instructed the jury that they could not convict the defendants of bribery in this case unless “the defendant and the official agree that the official will take specific action in exchange for the thing of value.” This instruction was fashioned by the court in direct response to defendants’ request for a *quid pro quo* instruction, and was given in addition to the Eleventh Circuit’s pattern jury instruction for § 666 bribery cases. So, even if a *quid pro quo* instruction was required, such an instruction was given.¹⁷⁹

The defendants further argued that the district court erred in not requiring the government to prove the link with direct, rather than circumstantial, evidence.¹⁸⁰ The court of appeals disagreed and held that the government could rely on circumstantial evidence even in cases where the government was required to prove a direct nexus to a specific official act:

McCormick uses the word “explicit” when describing the sort of agreement that is required to convict a defendant for extorting campaign contributions. Explicit, however, does not mean *express*. Defendants argue that only “proof of actual conversations by defendants,” will do, suggesting in their brief that only *express* words of promise overheard by third parties or by means of electronic surveillance will do. But there is no requirement that this agreement be memorialized in a writing, or even, as defendants suggest, be overheard by a third party. Since the agreement is for some specific action or inaction, the agreement must be explicit, but there is no requirement that it be *express*.

. . .

175. *Id.* at 1163.

176. *Id.*

177. *Id.* at 1171.

178. *Id.* at 1171–72.

179. *Id.* at 1170–71.

180. *Id.* at 1171.

In this case, the jury was instructed that they could not convict the defendants of bribery unless they found that “the Defendant and official agree[d] that the official will take specific action in exchange for the thing of value.” This instruction required the jury to find an agreement to exchange a specific official action for a campaign contribution. Finding this fact would satisfy *McCormick*’s requirement for an explicit agreement involving a *quid pro quo*. Therefore, even assuming a *quid pro quo* instruction is required to convict the defendants under § 666, we find no reversible error in the bribery instructions given by the district court.¹⁸¹

Finally, the defendant asserted that *Skilling* compelled the reversal of the honest services conviction because the jury was not instructed that the government was required to prove a *quid pro quo* in order to convict them on a bribery theory of honest services fraud.¹⁸² The court, while declining to extend the *McCormick* standard to honest services fraud, nevertheless held that because the evidence sustaining the pay-to-play scheme was applicable to both the Section 666 charge and honest services fraud, the jury was properly instructed that they could not convict the defendant unless they found that the payment was linked to a specific official act.¹⁸³ The court correctly observed, however, that, “After *Skilling*, it may well be that the honest services fraud statute, like the extortion statute in *McCormick*, required a *quid pro quo* in a campaign donation case.”¹⁸⁴

In *United States v. Beldini*, the Third Circuit declined the opportunity to find that Section 666 was limited to bribery and kickback schemes and that the government was required to prove a direct link between the benefit and a specific official act.¹⁸⁵ In *Beldini*, the defendant was the Deputy Mayor of Jersey City, New Jersey, who reported directly to the Mayor.¹⁸⁶ An FBI Confidential Informant (“CI”), posing as a real estate developer, offered to make campaign contributions in return for the Mayor expediting approval for a fictitious real estate development project.¹⁸⁷ The defendant facilitated meetings with the Mayor and promised to work to provide the CI relief from existing zoning regulations.¹⁸⁸ Later, the CI made a second \$10,000 campaign contribution that was funneled to the Mayor’s campaign through third-party intermediaries.¹⁸⁹ The defendant was convicted and appealed.¹⁹⁰ On appeal, the defendant argued that the district court failed to instruct

181. *Id.* at 1171–72.

182. *Id.* at 1173.

183. *Id.* at 1173–74.

184. *Id.* at 1173 n.21.

185. *United States v. Beldini*, 443 F. App’x 709, 710 (3d Cir. 2011).

186. *Id.*

187. *Id.*

188. *Id.* at 711–12.

189. *Id.*

190. *Id.* at 710.

the jury that, to sustain the conviction, the government was required to prove a link between the payment and a specific act.¹⁹¹

The Third Circuit affirmed the conviction and rejected the defendant's argument.¹⁹² Because the defendant failed to object to the district court's decision not to give a *quid pro quo* instruction, the Third Circuit held that the plain error standard applied.¹⁹³ Because there was no binding precedent requiring the government to prove a direct link between the benefit and an official act, any "error" in failing to instruct the jury was not plain, clear, or obvious to require a reversal under the plain error rule.¹⁹⁴ The appellate court applied the lower standard of proof and held that the government was only required to prove some connection between the benefit and some official action.¹⁹⁵

In *United States v. McGregor*, four Alabama state lawmakers, several lobbyists, and gambling company executives were charged with federal program integrity, extortion, and honest services fraud.¹⁹⁶ At trial the government introduced evidence that suggested that campaign contributions were offered in return for official acts.¹⁹⁷ After the defendants were acquitted, the district court filed an opinion intended to provide guidance on the question of when a campaign contribution may be considered a bribe.¹⁹⁸

The district court first recognized that to sustain a conviction for each offense, the government is required to prove a sufficient nexus between a benefit to a public official and an official act.¹⁹⁹ The trial court then explained that when the benefit to the public official takes the form of a campaign contribution, a heightened *quid pro quo* "standard" is warranted.²⁰⁰ As a result, the district court gave the jury an instruction that required the government to prove a direct link between the campaign contribution and specific official act.²⁰¹

191. *Id.* at 710, 714, 717.

192. *Id.* at 717, 721.

193. *Id.* at 713.

194. *Id.* at 717.

195. *Id.*

196. *United States v. McGregor*, 879 F. Supp. 2d 1308, 1310 (M.D. Ala. 2012).

197. *Id.* at 1311–12.

198. *Id.* at 1310.

199. *Id.* at 1314.

200. *Id.*

201. The district court's jury instruction stated that:

Campaign contributions and fundraising are an important, unavoidable and legitimate part of the American system of privately financed elections. The law recognizes that campaign contributions may be given to an elected public official because the giver supports the acts done or to be done by the elected official. The law thus also recognizes that legitimate, honest campaign contributions are given to reward public officials with whom the donor agrees, and in the generalized hope that the official will continue to take similar official actions in the future. Therefore, the solicitation or acceptance by an elected official of a campaign contribution does not, in itself, constitute a federal crime, even though the donor

F. DIRECT AND CIRCUMSTANTIAL EVIDENCE

Imposing the higher standard of proof on the government should not present an obstacle to conviction. In addition to identifying the state action or conduct of government close in time to when the benefit is provided to the public official, there are several ways that the prosecution can further support the evidence of a corrupt intent. Once the benefit is traced to the public official, the question remaining is whether there is a sufficient nexus between the benefit and state action and conduct of government. To prove this link, the prosecutor will examine the facts and circumstances surrounding the exchange, including: (1) the value of the benefit; (2) the timing of the benefit;²⁰² (3) the nature of the official act; (4) the value of the official act to the source of the benefit; (5) the relationship between the public official and source of the benefit; (6) any effort to conceal the payment; (7) the use of third-party agents as conduits for the benefit; (8) the falsification of any documents; (9) any effort to conceal the relationship between the public official and source of the benefit; (10) any effort to destroy evidence; and (11) the defendant's behavior before and after the corrupt scheme came under scrutiny. The defense will attempt to undermine the government's assertion by arguing that the payment and official were not linked to any official act.²⁰³

has business pending before the official, and even if the contribution is made shortly before or after the official acts favorably to the donor.

However, when there is a *quid pro quo agreement*, orally or in writing, that is, a mutual understanding, between the donor and the elected official that a campaign contribution is conditioned on the performance of a *specific official action*, it constitutes a bribe under federal law. By this phrase, I mean that a generalized expectation of some future favorable action is not sufficient for a quid pro quo agreement; rather, the agreement must be one that the campaign contribution will be given in exchange for the official agreeing to take or forgo some specific action in order for the agreement to be criminal. A close-in-time relationship between the donation and the act is not enough to establish an illegal agreement.

A *promise* of a campaign contribution or a *solicitation* of a campaign contribution may be an illegal quid pro quo, as well. But to be illegal (1) it must be a promise or solicitation conditioned on the performance of a specific official action as I explained that phrase in the preceding paragraph; (2) it must be *explicit*; and (3) it must be *material*. To be explicit, the promise or solicitation need not be in writing but must be clearly set forth. An explicit promise or solicitation can be inferred from both direct and circumstantial evidence, including the defendant's words, conduct, acts, and all the surrounding circumstances disclosed by the evidence, as well as the rational or logical inferences that may be drawn from them.

Id. at 1310–1311; 18 U.S.C. § 1951 (2012).

202. The receipt of a benefit for an official act that would have been taken *regardless* of the benefit violates the federal public corruption statutes. See *United States v. Derrick*, 163 F.3d 799 (4th Cir. 1998).

203. See, e.g., *United States v. White*, 663 F.3d 1207 (11th Cir. 2011) (rejecting defendant's argument that cash payments were not taken with corrupt intent to influence an official act); *United States v. Abbey*, 560 F.3d 513 (6th Cir. 2009) (rejecting defendant's argument that there was no agreement to take a specific act when property was transferred to defendant).

Therefore, the facts and circumstance surrounding the payment and official act will be critical in determining the legitimacy of the benefit provided.

IV. CONCLUSION

It is not a crime to provide a gift, loan, employment, or other financial benefit to a public official or those close to him. What makes such a practice corrupt and a federal criminal offense is when public officials abuse their position for financial gain and use their government positions and discretion over state action or the conduct of government as a lucrative financial opportunities for themselves, their family, friends, or associates. As a consequence, each of the federal public corruption statutes require that the government prove a sufficient nexus or connection between a financial benefit provided to a public official²⁰⁴ and an official act. It is this agreement or corrupt intent that makes the conduct a federal criminal offense. Although the central legal element is this link between the benefit to the public official and official act, the courts have failed to provide the government with a path to conviction that is fundamentally fair to the defendant.

In *McDonnell*, the Supreme Court clearly expressed a concern about the exercise of prosecutorial discretion and the need for a fundamentally fair application of the law—that it should be applied as a “scalpel” rather than a “meat axe.”²⁰⁵ The courts have repeatedly used the term *quid pro quo* to describe the critical element of a bribery or kickback offense and have required the government prove a nexus between the benefit and official act. However, this term is used regardless of the form of the benefit or inducement provided to the public official. As a result, the term *quid pro quo* has been used to mean two different evidentiary requirements: that a payment was made to a public official in exchange for some official action, and that a payment was made in exchange for a specific official act. This is a significant distinction because the burden of proving a direct connection is significantly higher than proving some connection. The courts have imposed the higher burden of proof only when the benefit takes the form of a campaign

204. Corrupt payments are typically tendered with the intent to induce the following official acts: (1) provide government financial support for public and private projects; (2) favorable legislation or regulatory scrutiny; or (3) awarding government contracts. The form of benefit provided to the public official may include: (1) campaign contributions; (2) cash payments; (3) gifts of luxury items; (4) consulting fees; (5) travel and entertainment expenses and/or; (6) insider information regarding financial transactions. The scope of the benefits include benefits provided directly to the public official, family members and/or close associates. The benefits provided to or on behalf of the public official should be of some consequence. *See e.g., United States v. Newman*, 773 F.3d 438 (2d Cir. 2014) (holding that to sustain insider trading conviction the government must prove that the defendant received a benefit of some consequence).

205. *McDonnell*, 136 S. Ct. at 2373; *see also* *United States v. Weimert*, 819 F.3d 351, 370 (7th Cir. 2016) (reversing wire fraud conviction based on deceptive statements about negotiation positions and finding that the limits of the federal wire fraud statute must be “defined by more than just prosecutorial discretion.”); *United States ex rel. O’Connell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 658 (2d Cir. 2016) (reversing civil judgment and holding that breach of contract does not support fraud claim absent evidence of fraudulent intent not to perform the promise at the time of contract execution).

contribution. This is a distinction without merit. The criterion of guilt is the corrupt intent—not the form of the benefit provided to the public official. The lower evidentiary standard provides no comfort to justice. This lower standard is ambiguous, inconsistent, and allows for doubt. Ambiguous and inconsistent evidentiary standards rarely translate into meaningful jury verdicts or appellate review. Therefore, courts should jettison this distinction and uniformly impose a higher standard of proof. To trigger the corruption statutes, the courts should require the government to prove a corrupt intent—a direct connection between the benefit and intent to influence or affect state action or the conduct of government. Moreover, the courts should require the prosecution to identify this official act at the time the benefit is provided to the public official. This will result in clarifying the criterion of guilt and the fundamentally fair application of each of these federal corruption statutes.

**ONLY PRESUMED UNRELIABLE: PROVING CONFRONTATION
FORFEITURE WITH HEARSAY**

*TIM DONALDSON**

A criminal defendant may forfeit the right to confront a prosecution witness at trial if the defendant has purposefully prevented the witness from testifying.¹ This doctrine was recognized by the United States Supreme Court in 1878 but remained largely undeveloped until the 1970s.² After its use for many years by lower federal courts, the Supreme Court added a hearsay exception to the Federal Rules of Evidence in 1997 that admits into evidence “[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”³ The rule “codifies the forfeiture doctrine”⁴

The Supreme Court reconfirmed its acceptance of the forfeiture-by-wrongdoing doctrine in *Crawford v. Washington* without significant discussion.⁵ It has officially taken “no position on the standards necessary to demonstrate such forfeiture”⁶ However, the Court commented in *Davis v. Washington* that state courts have considered “hearsay evidence, including the unavailable witness’s out-of-court statements” when making forfeiture determinations.⁷ The Colorado Supreme Court succinctly explained the rationale relied upon by state courts in *Vasquez v. People*.⁸ The *Vasquez* court reasoned that the forfeiture-by-wrongdoing doctrine presents a preliminary question as to the admissibility of evidence; therefore, under regular evidentiary procedures, “the determination shall not be bound by the rules of evidence except those with respect to privileges. Thus,

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1. *Giles v. California*, 554 U.S. 353, 359-68 (2008); *Reynolds v. United States*, 98 U.S. 145, 158 (1878).

2. See generally Tim Donaldson, *Combating Victim/Witness Intimidation in Family Violence Cases: A Response to Critics of the “Forfeiture by Wrongdoing” Confrontation Exception Resurrected by the Supreme Court in Crawford and Davis*, 44 IDAHO L. REV. 643, 653-61 (2008) (tracing the development of the doctrine in the United States).

3. Order Amending the FED. R. EVID., 520 U.S. 1323, 1328 (1997) (codified as amended at FED. R. EVID. 804(b)(6)).

4. *Davis v. Washington*, 547 U.S. 813, 833 (2006); see also *Giles*, 554 U.S. at 367.

5. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

6. *Davis*, 547 U.S. at 833.

7. *Id.* (quoting *Commonwealth v. Edwards*, 830 N.E.2d 158, 174 (Mass. 2005)).

8. *Vasquez v. People*, 173 P.3d 1099 (Colo. 2007).

hearsay evidence, including the unavailable witness's out-of-court statements, will be admissible."⁹

Many courts have ruled that hearsay may be used to prove forfeiture-by-wrongdoing.¹⁰ A federal district court observed that "successful witness intimidation would often not be provable at all if hearsay were not permitted."¹¹ Some courts have nonetheless held that forfeiture-by-wrongdoing may not be proven solely by inadmissible evidence.¹² The Supreme Court of Utah wrote in *State v. Poole* that the right of confrontation is a significant constitutional protection that should not be easily forfeited.¹³ Courts in that state therefore "may not consider hearsay evidence in evaluating the admission of out-of-court statements on the basis of forfeiture by wrongdoing."¹⁴

This article examines whether hearsay may be relied upon for purposes of the forfeiture-by-wrongdoing doctrine to prove that a criminal defendant tampered with a witness.

I. DEVELOPMENT OF THE RULE ALLOWING RELIANCE ON HEARSAY

Two of the early circuit court decisions resurrecting the forfeiture-by-wrongdoing doctrine commented, with apparent approval, that the trial courts in those cases had relied upon hearsay evidence to determine the admissibility of statements made by unavailable witnesses.¹⁵ By the time those cases were decided, Federal Rule of Evidence 104 ("Rule 104") had been adopted stating that trial judges are "not bound by the rules of evidence except those with respect to

9. *Id.* at 1105.

10. *See, e.g.*, *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997) ("We thus join all the other courts to have addressed the matter in approving at least partial reliance on hearsay."); *Jenkins v. United States*, 80 A.3d 978, 996 n.47 (D.C. 2013) (citing cases); *State v. Pickens*, 25 N.E.3d 1023, 1058 (Ohio 2014) (same); *see also* *People v. Perkins*, 691 N.Y.S.2d 273, 274-75 (N.Y. Sup. Ct. 1999) (listing multiple New York and federal cases that allow use of hearsay to make forfeiture determinations).

11. *Geraci v. Senkowski*, 23 F. Supp. 2d 246, 258 (E.D.N.Y. 1998), *aff'd* 211 F.3d 6 (2d Cir. 2000).

12. California has held that the prosecution cannot rely solely upon an out-of-court statement made by a missing witness to prove forfeiture and must also "present independent corroborative evidence supporting the forfeiture finding. The prosecution also must show the unavailable witness's prior statement falls within a recognized hearsay exception and the probative value of the proffered evidence outweighs its prejudicial effect." *People v. Osorio*, 81 Cal. Rptr. 3d 167, 173 (Cal. Ct. App. 2008); *see also* *People v. Giles*, 152 P.3d 433, 446 (Cal. 2007), *vacated on other grounds by* *Giles v. California*, 554 U.S. 353 (2008). Kentucky also appears to require at least some admissible evidence to support a forfeiture-by-wrongdoing finding. *Hammond v. Commonwealth*, 366 S.W.3d 425, 432-33 (Ky. 2012).

13. *State v. Poole*, 232 P.3d 519, 527 (Utah 2010).

14. *Id.* at 526.

15. *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979) (recounting testimony given by an FBI agent about what the agent had been told by a witness regarding his reasons for not wanting to testify), *abrogated on other grounds by* *Richardson v. United States*, 468 U.S. 317, 325-26 (1984), *as recognized in* *United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000); *United States v. Carlson*, 547 F.2d 1346, 1353 (8th Cir. 1976) (noting that the trial court heard testimony from DEA agents who relayed hearsay statements made by a witness about why he refused to testify).

privileges” when making preliminary determinations concerning the admissibility of evidence.¹⁶ The Advisory Committee notes on Rule 104 assert that sound sense supported suspension of the exclusionary law of evidence in such situations, “and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.”¹⁷ The Second Circuit Court of Appeals adopted the forfeiture-by-wrongdoing doctrine in *United States v. Mastrangelo*, because “[a]ny other result would mock the very system of justice the confrontation clause was designed to protect.”¹⁸ The *Mastrangelo* court also expressly confirmed that a defendant’s possible waiver of his sixth amendment rights is a preliminary question going to the admissibility of evidence “governed by [Rule] 104(a), which states that the exclusionary rules, excepting privileges, do not apply to such proceedings.”¹⁹

Federal Rule of Evidence 804(b)(6) (“Rule 804(b)(6)”) regarding forfeiture-by-wrongdoing was adopted in early 1997.²⁰ The Advisory Committee note for the rule cites reasoning from *Mastrangelo* regarding the purpose behind the forfeiture-by-wrongdoing doctrine as justification for the rule.²¹ The Advisory Committee note does not expressly address the use of hearsay when making forfeiture determinations, but it does imply that Rule 104 generally applies by stating that the “usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.”²² Shortly after adoption of Rule 804(b)(6), the Circuit Court of Appeals for the District of Columbia in *United States v. White* explained the rationale for use of Rule 104(a) in the context of forfeiture-by-wrongdoing, writing that:

Because a judge, unlike a jury, can bring considerable experience and knowledge to bear on the issue of how much weight to give to the evidence, and because preliminary determinations must be made

16. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1930 (establishing rules of evidence for certain courts and proceedings) (codified as amended at FED. R. EVID. 104(a)); *see also* FED. R. EVID. 1101(d)(1).

17. WARREN BURGER, COMMUNICATION FROM CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. NO. 93-46, at 48 (1973) [hereinafter H.R. DOC. NO. 93-46]; *see also* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 188 (1969).

18. *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982).

19. *Id.*; *see also* *Steele v. Taylor*, 684 F.2d 1193, 1202-03 (6th Cir. 1982) (commenting with citation to Rule 104(a) that a trial judge is not bound by the rules of evidence when making such determinations); *United States v. Mayhew*, 380 F. Supp. 2d 961, 968 n.9 (S.D. Ohio 2005) (quoting Rule 104(a) and noting that “[i]n making a preliminary determination, the trial court has at its disposal all the information in the record, except privileged information.”); *United States v. Houlihan*, 887 F. Supp. 352, 357 (D. Mass. 1995) (writing that “[p]ursuant to FED.R.EVID. 104(a), this Court was not bound by the rules of evidence in making its determination.”).

20. Order Amending the FED. R. EVID., 520 U.S. 1323, 1328 (1997).

21. WILLIAM REHNQUIST, COMMUNICATION FROM THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES, H.R. DOC. NO. 105-69, 22 (1997) [hereinafter H.R. DOC. NO. 105-69].

22. *Id.* at 23.

speedily, without unnecessary duplication of what is to occur at trial, it is within the judge's discretion to admit hearsay evidence that has at least some degree of reliability.²³

The codification of the forfeiture-by-wrongdoing doctrine by Rule 804(b)(6) therefore bolstered the application of Rule 104 to forfeiture determinations. However, the suspension of normal evidentiary rules when making preliminary determinations on evidence admissibility was not universally endorsed before adoption of Rule 104. The Advisory Committee notes recognize that the authorities on the subject were "scattered and inconclusive."²⁴ One of the leading pre-rule cases was *Glasser v. United States*.²⁵ The Supreme Court held in *Glasser* that declarations made by an alleged co-conspirator in the absence of the person against whom they are offered would be admissible only if there was "proof *aliunde*" that such person was connected with the conspiracy.²⁶ The *Glasser* Court expressed concern that "[o]therwise, hearsay would lift itself by its own bootstraps to the level of competent evidence."²⁷ This proof *aliunde* condition required substantial independent evidence of predicate facts establishing admissibility.²⁸

Most of the U.S. Circuit Courts of Appeal initially held that *Glasser's* proof *aliunde* requirement survived adoption of Rule 104.²⁹ The Supreme Court ultimately held otherwise in *Bourjaily v. United States*.³⁰ The Court explained in *Bourjaily* that "[t]he Rule on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege."³¹ Noting that the rule is sufficiently clear, the Court held that it prevails over *Glasser*.³² The Court wrote that "[t]o the extent that *Glasser* meant that courts could not look to hearsay statements themselves for any purpose, it has clearly been superseded by Rule

23. *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997).

24. H.R. DOC. NO. 93-46, *supra* note 17, at 48 (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 53, at 123-24 n.8 (1954)); *see also* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 188 (1969).

25. *Glasser v. United States*, 315 U.S. 60 (1942), *superseded by statute*, FED. R. EVID. 104(a), *as recognized in* *Bourjaily v. United States*, 483 U.S. 171, 181 (1987).

26. *Id.* at 74.

27. *Id.* at 75. *Glasser* dealt with the co-conspirator statement rule, however, concerns about bootstrapping have not been limited to that hearsay exception. *See, e.g.*, *State v. Young*, 161 P.3d 967, 976 ¶34 (Wash. 2007) (requiring some independent corroborative evidence that a startling event occurred to admit an excited utterance); *State v. Post*, 901 S.W.2d 231, 234-35 (Mo. Ct. App. 1995) (same); *Truck Ins. Exchange v. Michling*, 364 S.W.2d 172, 174-75 (Tex. 1963) (same).

28. *United States v. Nixon*, 418 U.S. 683, 701 n.14 (1974).

29. *United States v. Ammar*, 714 F.2d 238, 246 n.3 (3rd Cir. 1983); *see also* *United States v. Alvarez*, 584 F.2d 694, 696-97 (5th Cir. 1978); *but see* *United States v. Vinson*, 606 F.2d 149, 153 (6th Cir. 1979) (adopting view that Rule 104(a) modified prior law to the contrary); *United States v. Martorano*, 561 F.2d 406, 408-09 (1st Cir. 1977) (questioning the continued vitality of *Glasser*).

30. *Bourjaily v. United States*, 483 U.S. 171 (1987), *superseded by statute*, FED. R. EVID. 801(d)(2), *as recognized in* *Wiest v. Lynch*, 15 F.Supp.3d 543, 563 n.14 (E.D. Pa. 2014).

31. *Id.* at 178.

32. *Id.* at 178-79.

104(a).”³³ The Court therefore held that a trial court “may examine the hearsay statements sought to be admitted” to make admissibility determinations under the co-conspirator exception to the hearsay rule.³⁴

Cases allowing consideration of hearsay evidence when making determinations under the forfeiture-by-wrongdoing doctrine have relied on many rationales, but all are somehow rooted in relaxation of proof requirements by rule when making preliminary judicial determinations regarding evidence admissibility. Many have expressly relied on state evidence rules similar to Rule 104.³⁵ The Court of Appeals for the District of Columbia made analogy to the process endorsed by *Bourjaily* for making admissibility determinations under the co-conspirator statement rule.³⁶ The Massachusetts state court decision, cited by the U.S. Supreme Court in *Davis v. Washington* as an example of state practices, reasoned, along with citation to *Mastrangelo*, that a forfeiture hearing “is not intended to be a mini-trial, and accordingly, hearsay evidence, including the unavailable witness’s out-of-court statements, may be considered.”³⁷ The Illinois Supreme Court agreed that hearsay evidence could be considered when making forfeiture determinations, because the U.S. Supreme Court had referenced such state practices in *Davis* with apparent approval.³⁸ The United States District Court for the Southern District of Ohio ruled with citation to *Davis* that hearsay may be relied upon at a preliminary evidentiary hearing to make the showing required for forfeiture-by-wrongdoing.³⁹ All link back to Rule 104 in some way.

II. LINGERING CONCERNS ABOUT RELIANCE ON HEARSAY

The Utah Supreme Court expressed concern in *State v. Poole* that “the rules of evidence, including the rules controlling the admission of hearsay evidence” should apply when making forfeiture determinations, because application of the doctrine deprives a criminal defendant of the significant

33. *Id.* at 181.

34. *Id.*

35. *Vasquez v. People*, 173 P.3d 1099, 1105 (Colo. 2007); *State v. Magouirk*, 561 So.2d 801, 805-06 (La. Ct. App. 1990); *State v. Sheppard*, 484 A.2d 1330, 1346-47 (N.J. Super. Ct. Ch. Div. 1984); *People v. Sweeper*, 471 N.Y.S.2d 486, 487-88 (N.Y. Sup. Ct. 1984); *State v. Pickens*, 25 N.E.3d 1023, 1058 ¶ 171 (Ohio 2014).

36. *Jenkins v. United States*, 80 A.3d 978, 996 (D.C. 2013). The *Bourjaily* holding was, in turn, based on Rule 104. *See Bourjaily*, 483 U.S. at 178-81 (1987).

37. *Commonwealth v. Edwards*, 830 N.E.2d 158, 174 (Mass. 2005); *quoted in Davis v. Washington*, 547 U.S. 813, 833 (2006). The *Mastrangelo* holding was, in turn, based on Rule 104. *Mastrangelo*, 693 F.2d at 273. Other courts have also based their reasoning on *Mastrangelo*. *See, e.g., People v. Banks*, 551 N.Y.S.2d 1011, 1012 n.* (N.Y. Sup. Ct. 1989); *La Torres v. Walker*, 216 F. Supp. 2d 157, 160 (S.D.N.Y. 2000).

38. *People v. Stechly*, 870 N.E.2d 333, 353 (Ill. 2007); *see also Ware v. Harry*, 636 F. Supp. 2d 575, 586 n.3 (E.D. Mich. 2008). The state practices mentioned by the Supreme Court in *Davis* were justified by *Mastrangelo* which was based on Rule 104. *Davis*, 547 U.S. at 833 (quoting *Edwards*, 830 N.E.2d at 174 (citing *Mastrangelo*, 693 F.2d at 273 (citing Rule 104))).

39. *United States v. Ledbetter*, 141 F. Supp.3d 786, 790 (S.D. Ohio 2015) (citing *Davis*, 547 U.S. at 833 (quoting *Edwards*, 830 N.E.2d at 174 (citing *Mastrangelo*, 693 F.2d at 273 (citing Rule 104))))).

constitutional protection provided by confrontation.⁴⁰ The *Poole* court acknowledged that Utah's rules of evidence generally did not by their terms apply to preliminary questions regarding the admissibility of evidence.⁴¹ The court explained, however, that this rule was not absolute, and it could still direct a trial court "to conduct its analysis within the confines of the Utah Rules of Evidence."⁴² The court therefore reasoned that "[t]he question then is not the existence of the power to disregard the Rules, but rather when that power should be exercised."⁴³ Due to the importance of the right of confrontation, the *Poole* court concluded that "[t]his is one of those instances that demands that we disregard 104(a)'s general rule."⁴⁴ Forfeiture may therefore be proven in Utah only "through evidence admissible under the Utah Rules of Evidence."⁴⁵

Some other jurisdictions have expressed the same concern raised in *Poole* that the right of confrontation should not be easily forfeited, but have addressed the concern differently.⁴⁶ For example, the Washington Supreme Court wrote in *State v. Mason* that forfeiture-by-wrongdoing could only be proven in Washington by clear-and-convincing evidence, because "the right of confrontation should not be easily deemed forfeited by an accused."⁴⁷ Despite sharing this concern, the *Poole* court rejected the clear-and-convincing evidence standard adopted by Washington in *Mason* and instead addressed it by limiting the type of evidence that may be used in Utah to prove forfeiture-by-wrongdoing under a preponderance of the evidence proof standard.⁴⁸

It seems unlikely absent an abandonment of existing precedent that the U.S. Supreme Court would find that the importance of a right, standing alone, completely bars consideration of hearsay evidence when determining if the right has been lost. The Supreme Court held in *United States v. Matlock* that a trial court could rely on hearsay during a suppression hearing to determine if a search was

40. 232 P.3d 519, 527 (Utah 2010).

41. *Id.* at 526-27.

42. *Id.* at 527.

43. *Id.* (quoting *State v. Ordonez-Villanueva*, 908 P.2d 333, 338 n.9 (Or. App. Ct. 1995)).

44. *Poole*, 232 P.3d at 527.

45. *Id.* Federal courts in Utah appear to allow at least partial reliance on hearsay. Trentadue v. C.I.A., 95 Fed. R. Evid. Serv. 308, 310 (D. Utah 2014).

46. See generally Tim Donaldson, *Keeping the Balance True: Proof Requirements for Confrontation Forfeiture by Wrongdoing*, 31 T.M. COOLEY L. REV. 429, 432-36 (2014) (reviewing jurisdictions that have adopted a clear-and-convincing evidence standard of proof for forfeiture determinations and their reasons for doing so).

47. *State v. Mason*, 162 P.3d 396, 404-05, ¶ 30 (Wash. 2007); see also *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir. 1982) ("[B]ecause confrontation rights are so integral to the accuracy of the fact-finding process and the search for truth, in contrast to the exclusionary rule, we conclude that the trial court was correct in requiring clear and convincing evidence of a waiver of this right."), *superseded by rule*, FED. R. EVID. 804(b)(6), as recognized in *United States v. Nelson*, 242 Fed. Appx. 164, 171 (5th Cir. 2007); *People v. Geraci*, 649 N.E.2d 817, 822 (N.Y. 1995) (adopting a clear-and-convincing evidence standard, writing: "Obviously, a defendant's loss of the valued Sixth Amendment confrontation right constitutes a substantial deprivation.>").

48. *State v. Poole*, 232 P.3d 519, 525-27, ¶¶ 22-27 (Utah 2010).

consensual, and a defendant had thereby lost his Fourth Amendment right against unreasonable searches and seizures to have evidence from the search excluded at trial.⁴⁹ The Court recognized in *Matlock* that it had distinguished between the rules governing trials and those applicable to whether evidence was admissible at trial.⁵⁰ The Court noted that Rule 104(a) had recently been proposed and transmitted to Congress.⁵¹ It further asserted that “[t]he Rules in this respect reflect the general views of various authorities on evidence.”⁵² The Court went on to explain that:

There is, therefore, much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel. However that may be, certainly there should be no automatic rule against the reception of hearsay evidence in such proceedings⁵³

The U.S. Supreme Court reached a similar conclusion in *Bourjaily v. United States*.⁵⁴ The *Bourjaily* Court reasoned that hearsay is not completely devoid of value. “[O]ut-of-court statements are only *presumed* unreliable. The presumption may be rebutted by appropriate proof.”⁵⁵ Therefore, trial courts should be allowed to evaluate the evidentiary worth of out-of-court statements as revealed by the particular circumstances in a given case.⁵⁶ The Court recognized that:

Courts often act as factfinders, and there is no reason to believe that courts are any less able to properly recognize the probative value of evidence in this particular area. The party opposing admission has an adequate incentive to point out the shortcomings in such evidence before the trial court finds the preliminary facts. If the opposing party is unsuccessful in keeping the evidence from the factfinder, he still has the opportunity to attack the probative value of the evidence as it relates to the substantive issue in the case.⁵⁷

The *Bourjaily* Court held that evidence was properly admitted at trial utilizing hearsay in part to determine admissibility and agreed that the requirements for admission under the co-conspirator statement rule “are identical to the

49. *United States v. Matlock*, 415 U.S. 164, 172-77 (1974).

50. *Id.* at 172-73 (citing *Brinegar v. United States*, 338 U.S. 160, 173 (1949)).

51. *Id.* at 173-74.

52. *Id.* at 174.

53. *Id.* at 175; *see also* *United States v. Raddatz*, 447 U.S. 667, 679 (1980) (“At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial.”).

54. *Bourjaily v. United States*, 483 U.S. 171, 178 (1987).

55. *Id.* at 179.

56. *Id.* at 180-81.

57. *Id.* at 180.

requirements of the Confrontation Clause, and since the statements were admissible under the Rule, there was no constitutional problem.”⁵⁸

III. CONCLUSIVENESS OF RULE 104?

The concerns raised by the Utah Supreme Court in *Poole* about usage of hearsay when making evidence admissibility determinations nonetheless merit consideration.⁵⁹ Rule 104(a) did not codify a universally acclaimed evidentiary procedure. The relaxation of evidentiary rules was “one of the few radical changes in the pre-existing law the Advisory Committee succeeded in carrying off.”⁶⁰ Only New Jersey had previously adopted a similar rule.⁶¹ “Though scholars had supported this change for some time, the courts generally held that the rules of evidence applied to preliminary fact determinations.”⁶² Many jurisdictions had no common law cases supporting the committee’s view and resisted the change.⁶³

The Advisory Committee’s rationale for the rule rested primarily upon the differentiation between the roles of judges and jurors with respect to evidentiary matters coupled with practical necessity. Advisory Committee notes rely upon *McCormick on Evidence* to explain with respect to the process for making admissibility determinations:

The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n. 8, points out that the authorities are “scattered and inconclusive,” and observes:

“Should the exclusionary law of evidence, ‘the child of the jury system’ in Thayer’s phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.”

This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence.⁶⁴

58. *Id.* at 182. It should however be noted that it could now be argued that confrontation rights were not actually at stake in *Bourjaily*. See *Giles v. California*, 554 U.S. 353, 374-75 n.6 (2008) (plurality opinion).

59. See *State v. Poole*, 232 P.3d 519, 526-27, ¶ 26 (Utah 2010).

60. 21A CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5055, at 163 (2d. ed. 2005).

61. *State v. Cardone*, 368 A.2d 952, 955 (N.J. Super. Ct. App. Div. 1976); see also H.R. DOC. NO. 93-46, *supra* note 17, at 49 (discussing development of state rules in California and New Jersey); Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 189 (1969) (same).

62. WRIGHT & GRAHAM, *supra* note 60, at 163 (footnote omitted).

63. *Id.* at 164-65; e.g., *State v. Davis*, 227 S.E.2d 97, 115-16 (N.C. 1976).

64. H.R. DOC. NO. 93-46, *supra* note 17, at 48 (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 53, at 123-24 n.8 (1954)); see also Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 188 (1969).

The passage from McCormick on Evidence quoted by the Committee goes on to say that “Wigmore states this as the law without citing supporting authority.”⁶⁵

The reasoning of McCormick and the Advisory Committee is derived from a famous passage in *A Preliminary Treatise on Evidence* where Professor James Thayer concluded that evidentiary rules which reject probative evidence on one or another practical ground are “the child of the jury system.”⁶⁶ In Thayer’s view, all logically probative evidence should be admissible unless excluded by some rule or principle of law.⁶⁷ He asserted that exclusionary rules are an offshoot of the development of the modern jury trial.⁶⁸ According to Thayer, it must be constantly kept in mind that the law of evidence is the product of “judicial oversight and control of the process of introducing evidence to the jury”⁶⁹ They provide a mechanism to prevent jurors from considering information that might be “misused or overestimated by that body”⁷⁰

Thayer’s view was shared by the other preeminent scholar of his time on the subject of evidence.⁷¹ Professor John Henry Wigmore agreed that “[a]ll facts having rational probative value are admissible unless some specific rule forbids.”⁷² He reasoned that evidentiary rules could be ignored in interlocutory proceedings heard before a judge “partly because of the subsidiary and provisional nature of the inquiry, but chiefly because there is no jury, and the rules of evidence are, as rules, traditionally associated with a trial by jury.”⁷³ Wigmore also asserted that “[i]n preliminary rulings by a judge on the admissibility of evidence, the ordinary rules of evidence do not apply.”⁷⁴

Wigmore’s proposition that the rules of evidence do not apply to admissibility determinations was extensively examined in a well-researched article by Professor John Maguire and Mr. Charles Epstein.⁷⁵ They found some historical common law support for the view that evidentiary rules apply only when

65. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 53, at 124 n.8 (1954). The Advisory Committee incompletely attributes to McCormick the view that authorities on the subject were “scattered and inconclusive.” McCormick more fully wrote that “American authorities are scattered and inconclusive but suggest that the judges trial and appellate give primacy here to habit rather than to practical adaptation to the situation, and tend to require the observance of jury-trial rules of evidence.” *Id.*

66. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 266 (Boston, Little, Brown, and Company 1898).

67. *Id.* at 265.

68. *Id.* at 180.

69. *Id.* at 181.

70. *Id.* at 266.

71. See JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 9, at 31-32, § 10, at 34-35 (Boston, Little, Brown, and Company 1904) (quoting Thayer).

72. *Id.* § 10, at 34.

73. *Id.* § 4, at 14.

74. *Id.* § 1385(2), at 1726.

75. John MacArthur Maguire & Charles S. S. Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101 (1927).

presenting information to a jury, but they also found other authorities that could be read as requiring use of regular evidence when making certain types of admissibility determinations.⁷⁶ They also concluded that more recent English decisions “lend little support to the decided statement by Wigmore”⁷⁷ Maguire and Epstein similarly found that American decisions were few and mixed. Some supported Wigmore’s proposition, but many required proof of preliminary facts by admissible evidence.⁷⁸ On the basis of their research, the authors indicated “skepticism as to the judge’s exemption from most rules of evidence.”⁷⁹ They ultimately determined however that the results from their examination of Wigmore’s hypothesis were inconclusive. Maguire and Epstein concluded: “On the whole, then, it is perhaps wisest to think of the few reported cases as often being persuasive only, and to admit frankly that in this minor aspect we are unlikely to find a common law of evidence.”⁸⁰

Historical sources dealing with the forfeiture-by-wrongdoing doctrine do not directly address the issue, but appear to have allowed consideration of hearsay for purposes of admissibility determinations. In the earliest appearance of the doctrine, the judges ruled in *Lord Morley’s Case* that a deposition of an absent witness could be used during a murder trial in the House of Lords “in case oath should be made that any witness . . . was detained by the means or procurement of the prisoner”⁸¹ Maguire and Epstein commented that the reference to an “oath” in *Lord Morley’s Case* was ambiguous, and it was therefore not clear what type of preliminary proof might have been required for admissibility rulings.⁸² The tribunal in that case did however consider double hearsay when making a determination, but it found the proof insufficient to implicate the forfeiture-by-wrongdoing doctrine.⁸³

76. *Id.* at 1103-12.

77. *Id.* at 1111.

78. *See id.* at 1112-25.

79. *Id.* at 1122.

80. *Id.* at 1125; *see also* Charles T. McCormick, *The Procedure of Admitting and Excluding Evidence*, 31 TEX. L. REV. 128, 144 n.81 (1952).

81. *Lord Morley’s Case* (1666) 84 Eng. Rep. 1079 (HL) 1080 ¶ 5, *reprinted in* 6 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 770, 770-71 para. 5 (London, T.C. Hansard 1816) [hereinafter *Lord Morley’s Case in HOWELL*].

82. Maguire & Epstein, *supra* note 75, at 1108-09.

83. *Lord Morley’s Case in HOWELL*, *supra* note 81, at 777 (considering what the employer of a missing witness was told by friends of the witness). The import of *Lord Morley’s Case* is also ambiguous, because the judges indicated that the forfeiture determination in that case should be made by the Lords as the fact finders in a proceeding against one of their peers, as opposed to the judges. *Id.* at 770-71. Hawkins later indicated in his influential treatise on pleas of the crown that forfeiture determinations in ordinary criminal cases during his time were made by the court; writing that the doctrine applied “if it be made out by Oath to the Satisfaction of the Court” 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER THEIR PROPER HEADS ch. 46, § 6, at 429 (Savoy, Eliz. Nutt & R. Gosling 1721). By the time of the American Constitution was adopted, the roles of the judge and jury

In another early case, a regular court of law held that prior testimony of a supposedly tampered witness might be used after “it was shewn to the Court that he was gone beyond sea”⁸⁴ The report for the case unfortunately does not otherwise indicate what type of proof was deemed satisfactory by the court. The same court in another case presumed tampering from circumstantial information, but the summary for that case does not detail the nature of the proof considered by the court.⁸⁵

The court in *Henry Harrison’s Case* held that the prosecution could use depositions given by a missing witness against Harrison if it could “prove upon him, that he made him keep away.”⁸⁶ The court in that case accepted hearsay and circumstantial evidence as such proof. One witness testified that an unnamed gentleman attempted to bribe the missing witness to give evidence favorable to Harrison, and that the missing witness further said that the gentleman would have seized him if he had been given the opportunity.⁸⁷ Another witness testified about the suspicious circumstances surrounding the disappearance of the missing witness and was asked by the court if he had been told by the missing witness about the attempted bribe.⁸⁸ This proof was evidently enough to satisfy the court, because it allowed the prior testimony of the missing witness to be read.⁸⁹

The House of Commons in *Fenwick’s Case* considered hearsay statements allegedly made by Fenwick’s solicitor when attempting to bribe someone to discredit a missing witness whose prior testimony was offered by the prosecution.⁹⁰ It likewise considered hearsay reportedly uttered by an accomplice of the defendant to determine whether the defendant was involved in an effort to bribe witnesses.⁹¹ After considerable debate, a divided House voted in favor of

with respect to determining the admissibility of hearsay were fairly well defined. *See, e.g.,* *United States v. Burr*, 25 F. Cas. 55, 179 (C.C.D. Va. 1807) (No. 14,693) (Chief Justice John Marshall concluding while presiding over a case as a Circuit Judge that “[i]t is of necessity the peculiar province of the court to judge of the admissibility of testimony.”); *see also* *Thomas John’s Case* (1790), reprinted in 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN ch. 5, § 124, at 358 (London, A. Strahan 1803).

84. *The Case of Thatcher and Waller* (1676), 84 Eng. Rep. 1143 (K.B.), T. Jones 53.

85. FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS, 243 (New York, Southwick & Hardcastle 1806) (summarizing a King’s Bench case entitled *Green v. Gatewick*).

86. 12 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 834, 851 (London, T.C. Hansard 1816) [hereinafter *Henry Harrison’s Case* in HOWELL].

87. *Id.*

88. *Id.* at 851-52.

89. *Id.* at 852-53.

90. 13 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 538, at 590-91 (London, T.C. Hansard 1816).

91. *Id.* at 588-89.

admitting prior testimony given by the missing witness.⁹² The value of *Fenwick's Case* regarding the type of proof needed to establish forfeiture is highly questionable, however, because much of the debate concerned whether the House of Commons was bound in that attainder proceeding by any of the rules regularly applicable in court.⁹³

The forfeiture-by-wrongdoing doctrine was codified by Parliament in a 1796 statute passed to deal with insurrections in Ireland.⁹⁴ A later statute regulating grand jury practice indicated that forfeiture could only be proven by “witnesses sworn, or other lawful Evidence . . .”⁹⁵ However, the statutes provide little guidance because they did not deal with how such issues could be decided by a judge. The statutes codifying the doctrine for Ireland all required and dealt only with forfeiture determinations made by juries.⁹⁶

An early American case confirms recognition of a forfeiture-by-wrongdoing doctrine in this country, but it does not describe the nature of the proof used to support the court’s forfeiture determination.⁹⁷ The doctrine is mentioned in passing by another early decision, but it wasn’t pertinent to the holding in that case and is not further discussed.⁹⁸ Constitution signer Charles Pinckney wrote in a letter criticizing a 1799 extradition decision that certain statutorily authorized pre-trial examinations could “only be given in evidence before a jury, when the court is satisfied the witness is dead, unable to travel, or kept away by the means or procurements of the prisoner.” He did not, however, further indicate what type of proof was needed to satisfy a court.⁹⁹

92. *Id.* at 607 (voting 218-145 in favor of allowing the preliminary examination of the missing witness to be read), 622 (voting 180-102 to allow use of testimony given by the missing witness at an earlier trial).

93. *Id.* at 597-98 (speech by Sir Edw. Seymour), 599 (speech of Sir Robert Richard), 600 (speech of Lord Cutts) 603-04 (speech of Sir Joseph Williamson), 604-05 (speech of Mr. Chanc. of the Exchequer), 605-06 (speech of Sir Henry Hobart).

94. An act more effectually to suppress insurrections, and prevent the disturbances of the public peace, 1796, 36 Geo. 3, c. 20, § 12 (Ir.), reprinted in *THE STATUTES AT LARGE, PASSED IN THE PARLIAMENTS HELD IN IRELAND: FROM THE THIRD YEAR OF EDWARD THE SECOND, A.D. 1310, TO THE THIRTY-SIXTH YEAR OF GEORGE THE THIRD, A.D. 1796, INCLUSIVE*, at 982 (Dublin, George Grierson 1797). A similar statute was subsequently enacted in 1810. *See* An act for the more effectually preventing the administering and taking of unlawful oaths in Ireland; and for the protection of magistrates and witnesses in criminal cases, 1810, 50 Geo. 3, 102, § 5 (Eng.).

95. An act to regulate proceedings of grand juries in Ireland, upon bills of indictment, 1816, 56 Geo. 3, 87, § 3 (Eng.).

96. *See* An act to regulate proceedings of grand juries in Ireland, upon bills of indictment, 1816, 56 Geo. 3, 87, § 3 (Eng.) (providing a method for proving forfeiture to a grand jury); An act for the more effectually preventing the administering and taking of unlawful oaths in Ireland; and for the protection of magistrates and witnesses in criminal cases, 1810, 50 Geo. 3, 102, § 5 (Eng.) (making forfeiture a collateral issue to be put to a jury); An act more effectually to suppress insurrections, and prevent the disturbances of the public peace, 1796, 36 Geo. 3, c. 20, § 13 (Ir.) (same).

97. *Rex v. Barber*, 1 Root 76 (Conn. Super. Ct. 1775).

98. *Drayton v. Wells*, 10 S.C.L. (1 Nott. & McC.) 409, 411-12 (S.C. 1819).

99. *United States v. Robins*, 27 F. Cas. 825, 838 (D. S.C. 1799) (No. 16,175) (reprinting an Aug. 3, 1799 letter attributed to South Carolina Senator Charles Pinckney).

The U.S. Supreme Court adopted the forfeiture-by-wrongdoing doctrine in *Reynolds v. United States*.¹⁰⁰ The Court found that there was sufficient information to apply the doctrine in *Reynolds* where the defendant did not deny interference and was uncooperative with prosecution attempts to secure the attendance of the witness at trial.¹⁰¹ The *Reynolds* Court did not expressly address whether the trial court had relied or could rely on otherwise inadmissible evidence, but it did generally indicate that a forfeiture-by-wrongdoing determination would be subject to only very limited appellate review, writing:

Such being the rule, the question becomes practically one of fact, to be settled as a preliminary to the admission of secondary evidence. In this respect it is like the preliminary question of the proof of loss of a written instrument, before secondary evidence of the contents of the instrument can be admitted. In *Lord Morley's Case (supra)*, it would seem to have been considered a question for the trial court alone, and not subject to review on error or appeal; but without deeming it necessary in this case to go so far as that, we have no hesitation in saying that the finding of the court below is, at least, to have the effect of a verdict of a jury upon a question of fact, and should not be disturbed unless the error is manifest.¹⁰²

Although not too much should be read into the *Reynolds* Court's above quoted comparison of the method for making forfeiture determinations to the process used for evidentiary rulings regarding loss of a written instrument, the Supreme Court had previously held in *Tayloe v. Riggs* that those preliminary determinations could be made on the basis of affidavits containing evidence that would normally be inadmissible.¹⁰³ In that situation, the Supreme Court had written that "we think the views of justice will be best promoted by allowing the affidavit, not as conclusive evidence, but as submitted to the consideration of the Court, to be weighed with the other circumstances of the case."¹⁰⁴

The early application of the forfeiture-by-wrongdoing doctrine therefore supports Wigmore's hypothesis. Most of the cases, and in particular those reported in detail, demonstrate reliance on hearsay when making forfeiture determinations.¹⁰⁵ The Supreme Court's decision in *Reynolds* additionally implies, when it is read in conjunction with the court's earlier decision in *Tayloe*, that normally inadmissible evidence may be used by a judge when deciding the

100. *Reynolds v. United States*, 98 U.S. 145, 158-59 (1878).

101. *Id.* at 159-60.

102. *Id.* at 159.

103. *Tayloe v. Riggs*, 26 U.S. 591, 596-98 (1828).

104. *Id.* at 598.

105. *See, e.g.*, *Henry Harrison's Case* in HOWELL, *supra* note 86, at 851-52.

preliminary question of forfeiture-by-wrongdoing.¹⁰⁶ None, however, contain a direct holding on the issue, and are therefore inconclusive.

As recognized by Maguire and Epstein, “[p]oints of evidence in this field of preliminary controversy arise abruptly and are handled summarily.”¹⁰⁷ This is particularly true with respect to witness tampering. There are many recognized methods by which a trial judge may consider a forfeiture-by-wrongdoing question ranging from a preliminary hearing to conditional admission based upon proffers.¹⁰⁸ Misconduct, however, cannot be reasonably predicted, and questions regarding disappearance of a witness often arise mid-trial without warning and must, by necessity, be dealt with in a manner that minimizes disruption to the trial that is in progress. A separate mid-trial mini trial is clearly undesirable.¹⁰⁹ A judge caught in such a situation should therefore have the flexibility when making an admissibility determination to “receive the evidence and give it such weight as his judgment and experience counsel.”¹¹⁰

Rule 104(a) is based more on sound sense than it is on clear precedent.¹¹¹ As a practical matter, it is impossible for a judge to completely shield himself or herself from considering inadmissible evidence when determining admissibility. As the Advisory Committee that recommended Rule 104 pointed out, “the content of an asserted declaration against interest must be considered in ruling whether it is against interest.”¹¹² A trial judge must similarly consider the content of an excited utterance to determine whether it is a “statement relating to a startling event or condition . . .”¹¹³ A forfeiture-by-wrongdoing claim based on spontaneous statements made by a scared missing witness that he or she had been threatened would therefore present a formalistic nightmare if rigid adherence to the rules of evidence was required. A trial judge would have to listen to the content of the hearsay to first decide whether it qualified as an excited utterance and could be considered legal proof for purposes of determining forfeiture, and then proceed to strike it entirely from his or her mind if it did not qualify. There is no reason to believe that this solution, which depends upon the presumed ability of a judge to compartmentalize information, is any better than simply recognizing that judges

106. *Reynolds v. United States*, 98 U.S. 145, 159 (1878); *Taylor*, 26 U.S. at 598.

107. Maguire & Epstein, *supra* note 75, at 1125.

108. See Tim Donaldson, *A Reliable and Clear-Cut Determination: Is a Separate Hearing Required to Decide When Confrontation Forfeiture by Wrongdoing Applies?* 49 *NEW ENG. L. REV.* 167, 169-76 (2015) (discussing the various procedural alternatives available to resolve forfeiture-by-wrongdoing questions).

109. See *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997) (commenting that admissibility determinations need to be made speedily and without unnecessarily duplicating what will be presented during trial); *Commonwealth v. Edwards*, 830 N.E.2d 158, 174 (Mass. 2005) (noting that a forfeiture hearing is not meant to be a mini-trial).

110. *United States v. Matlock*, 415 U.S. 164, 175 (1974).

111. See H.R. DOC. NO. 93-46, *supra* note 17, at 48.

112. *Id.*

113. *FED. R. EVID.* 803(2).

are able to properly recognize the probative value of purported evidence and weigh it according to its worth.

Trial judges routinely hear the content of proffered information to determine whether it is admissible.¹¹⁴ Hearsay is not automatically accepted as true simply because it is considered by a judge when considering a preliminary question of admissibility. A party opposing admission of evidence has an opportunity to point out its shortcomings before the judge finds the preliminary facts regarding its admissibility.¹¹⁵ In addition, judges possess legal training and experience to guide them regarding its usefulness.¹¹⁶ “[A] piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.”¹¹⁷ Even if a judge admits an out-of-court statement, its mere admission is not outcome determinative, because the party aggrieved by its submission to a jury still has the opportunity to attack its probative value as it relates to the substantive issue in the case.¹¹⁸

It has long been recognized that justice is best promoted by allowing judges the flexibility to consider and weigh all relevant information with other circumstances in a case when making an admissibility determination.¹¹⁹ Thus, there are good reasons to allow a judge to consider hearsay when making an admissibility determination under the forfeiture-by-wrongdoing doctrine and “no principled reason to forbid it *per se*.”¹²⁰

IV. RESISTANCE TO PURE BOOTSTRAPPING

The Supreme Court in *Bourjaily* held that Rule 104(a) superseded *Glasser* to the extent that *Glasser* prevented courts from considering hearsay statements “for any purpose” when determining their admissibility.¹²¹ However, the *Bourjaily* Court also expressly stated that “[w]e need not decide in this case whether the courts below could have relied solely upon . . . hearsay statements . . .”¹²² It further cautioned, as it had “held in other cases concerning admissibility

114. *See* *Jenkins v. United States*, 80 A.3d 978, 996 n.45 (D.C. 2013) (listing situations where judges consider the content of a statement to determine whether it is admissible under a hearsay exception).

115. *Bourjaily v. United States*, 483 U.S. 171, 180 (1987).

116. *See id.* (commenting that there is no reason to believe that judges are unable to properly recognize the probative value of evidence); *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997) (recognizing that a judge “can bring considerable experience and knowledge to bear on the issue of how much weight” to give evidence).

117. *Bourjaily*, 483 U.S. at 180.

118. *Id.*

119. *Tayloe v. Riggs*, 26 U.S. 591, 598 (1828).

120. *Jenkins v. United States*, 80 A.3d 978, 996 (D.C. 2013); *see also Bourjaily*, 483 U.S. at 179-81; *White*, 116 F.3d at 914.

121. *Bourjaily*, 483 U.S. at 181.

122. *Id.*

determinations, ‘the judge should receive the evidence and give it such weight as his judgment and experience counsel.’”¹²³

The Circuit Court of Appeals for the District of Columbia in *United States v. White* held, in part based on *Bourjaily* and Rule 104(a), that a trial court may at least partially rely on hearsay when making a forfeiture-by-wrongdoing determination.¹²⁴ Like the *Bourjaily* Court, it left “for another day the issue of whether a forfeiture finding could rest *solely* on hearsay.”¹²⁵

All of the early United States Circuit Courts of Appeal that considered the issue reserved in *Bourjaily* decided that a statement cannot be admitted under the co-conspirator exception to the hearsay rule based solely upon its own content.¹²⁶ The Seventh Circuit Court of Appeals in *United States v. Zambrana* found it significant that *Bourjaily* acknowledged the presumptive unreliability of hearsay.¹²⁷ It wrote that this presumption may dissipate only when the hearsay is “corroborated by *other evidence . . .*”¹²⁸ The Ninth Circuit Court of Appeals similarly recognized in *United States v. Silverman* that, when making admissibility determinations, trial courts “must bear in mind that out-of-court statements are presumptively unreliable.”¹²⁹ The court additionally cautioned that “Rule 104(a) does not diminish the inherent unreliability of such a statement. Because of this presumptive unreliability, a co-conspirator’s statement implicating the defendant in the alleged conspiracy must be corroborated by fairly incriminating evidence.”¹³⁰ It therefore concluded that “[t]he admissibility of the contested statements, therefore, hinges on whether the additional evidence . . . sufficiently corroborates the statements to overcome their presumed unreliability.”¹³¹ This universal reaction to

123. *Id.* (quoting *United States v. Matlock*, 415 U.S. 164, 175 (1974)).

124. *White*, 116 F.3d at 914.

125. *White*, 116 F.3d at 914; *cf. Bourjaily*, 483 U.S. at 181 (finding it unnecessary to decide whether hearsay alone could be used to determine the admissibility of a co-conspirator statement)

126. *United States v. Asibor*, 109 F.3d 1023, 1032-33 (5th Cir. 1997); *United States v. Tellier*, 83 F.3d 578, 580 (2d Cir. 1996); *United States v. Clark*, 18 F.3d 1337, 1341-42 (6th Cir. 1994); *United States v. Sepulveda*, 15 F.3d 1161, 1181-82 (1st Cir. 1993); *United States v. Beckham*, 968 F.2d 47, 50-51 (D.C. Cir. 1992); *United States v. Garbett*, 867 F.2d 1132, 1134 (8th Cir. 1989); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988); *United States v. Zambrana*, 841 F.2d 1320, 1343-45 (7th Cir. 1988); *United States v. Martinez*, 825 F.2d 1451, 1452-53 (10th Cir. 1987); *see United States v. Byrom*, 910 F.2d 725, 736 (11th Cir. 1990) (finding sufficient independent evidence to establish involvement in a conspiracy).

127. *Zambrana*, 841 F.2d at 1344-45.

128. *Id.* at 1345; *see also United States v. Gambino*, 926 F.2d 1355, 1361 n.5 (3d Cir. 1991) (“In the absence of any evidence to the contrary, however, the presumption of unreliability controls; and the hearsay statement cannot serve as the basis for establishing the declarant’s connection to the conspiracy.”).

129. *United States v. Silverman*, 861 F.2d 571, 578 (9th Cir. 1988).

130. *Id.*

131. *Id.* at 579.

Bourjaily was codified in 1997 by an amendment to Federal Rule of Evidence 801(d)(2) (“Rule 801(d)(2”).¹³²

The corroboration requirement codified by Rule 801(d)(2) does not directly apply to forfeiture determinations. The 1997 amendments to the Federal Rules of Evidence codified the forfeiture-by-wrongdoing doctrine in Rule 804(b)(6).¹³³ The 1997 amendments also answered the question left open by *Bourjaily* by amending Rule 801(d)(2) to read:

(d) Statements which are not hearsay.

.....

(2) Admission by party-opponent.—The statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. **The contents of the statement shall be considered but are not alone sufficient to establish the declarant’s authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).**¹³⁴

The 1997 amendments therefore limit Rule 104(a) by expressly requiring corroborative evidence as a prerequisite for admission of co-conspirator statements and extend that requirement to statements made by authorized representatives and agents. However, no mention is made of the simultaneously adopted forfeiture-by-wrongdoing exception.¹³⁵ In addition, Advisory Committee comments regarding Rule 804(b)(6) cite *Mastrangelo*,¹³⁶ which held that hearsay may be used when

132. Order Amending the FED. R. EVID., 520 U.S. 1323, 1327-28 (1997); see H.R. DOC. NO. 105-69, *supra* note 21, at 18 (Committee Note). The circuits that did not expressly rule on the issue before amendment of Rule 801(d)(2) have subsequently confirmed the need for corroborative evidence when determining admissibility under the co-conspirator exception to the hearsay rule. *FTC v. Ross*, 743 F.3d 886, 894 (4th Cir. 2014); *United States v. Turner*, 718 F.3d 226, 231 (3d Cir. 2013).

133. Order Amending the FED. R. EVID., 520 U.S. at 1328; see *Davis v. Washington*, 547 U.S. 813, 833 (2006) (commenting that the rule codifies the doctrine).

134. Order Amending the FED. R. EVID., 520 U.S. at 1327-28 (emphasis added).

135. *Id.*

136. H.R. DOC. NO. 105-69, *supra* note 21, at 22.

making forfeiture determinations,¹³⁷ but Rule 804(b)(6) did not adopt a limitation similar to the one added to Rule 801(d)(2).¹³⁸

The Court of Appeals for the District of Columbia decided, in *Jenkins v. United States*, that restrictions placed upon reception of co-conspirator hearsay need not be applied when considering forfeiture-by-wrongdoing.¹³⁹ Both hearsay exceptions were at issue in that case. The court adhered to the restrictive *Glasser* independent evidence requirement for the co-conspirator statement rule.¹⁴⁰ It found no justification for extending that limitation to the forfeiture exception.¹⁴¹ The *Jenkins* court wrote that “[a]s a general proposition, a trial court is permitted to rely on hearsay (whether or not it falls within a recognized exception) in ruling on the admissibility of evidence, ‘even where (as in this case) the question concerns the defendant’s constitutional rights.’”¹⁴² It was not persuaded that bootstrapping concerns mandated extension of the logic of case law regarding the co-conspirator statement rule to the forfeiture-by-wrongdoing doctrine.¹⁴³ The court explained:

Generally speaking, it is appropriate and common for judges to consider the substance of proffered hearsay together with independent evidence in determining whether a hearsay exception is available; and this court has implicitly approved such consideration in its forfeiture-by-wrongdoing cases. Courts in other jurisdictions have done likewise. There are good reasons to allow it, as discussed in *Bourjaily*, and we perceive no principled reason to forbid it *per se*.¹⁴⁴

The exceptions therefore do not necessarily need to be given identical treatment. The court in *Jenkins* expressly noted, however, that “we are not presented with an instance of ‘pure’ bootstrapping in which the testimony of the missing witness is the *only* evidence supporting forfeiture, and we do not hold that such ‘pure’ bootstrapping would be appropriate.”¹⁴⁵

Reliability is an admissibility concern under both the co-conspirator statement rule and the forfeiture-by-wrongdoing doctrine. The Second Circuit Court of Appeals in *United States v. Tellier* directed trial courts with respect to the co-conspirator statement rule that when making “preliminary factual determinations under Rule 104(a), the court may consider the hearsay statements themselves. However, these hearsay statements are presumptively unreliable, and, for such statements to be admissible, there must be some independent

137. *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982).

138. *See Order Amending the FED. R. EVID.*, 520 U.S. at 1328.

139. *Jenkins v. United States*, 80 A.3d 978, 995-96 (D.C. 2013).

140. *Id.* at 990-92.

141. *Id.* at 995-96.

142. *Id.* at 995 (quoting *Roberson v. United States*, 961 A.2d 1092, 1096 (D.C. 2008)).

143. *Id.* at 996.

144. *Id.* (footnotes omitted).

145. *Id.* at 997 n.49.

corroborating evidence of the defendant's participation in the conspiracy."¹⁴⁶ Although *Tellier* dealt with bootstrapping under the co-conspirator statement rule, there is no reason to believe that hearsay is any more or less reliable when used in other contexts to determine evidence admissibility. Concerns about bootstrapping in the Second Circuit may be logically extended to the forfeiture-by-wrongdoing doctrine, because that circuit has additionally expressed interest in ensuring some measure of reliability when confrontation forfeiture is at issue. It wrote in *United States v. Thai* that trial courts should balance probative value against prejudicial effect when admitting evidence under the forfeiture-by-wrongdoing rule "in order to avoid the admission of 'facially unreliable hearsay.'"¹⁴⁷

The Colorado Supreme Court allows hearsay to be used when making forfeiture determinations.¹⁴⁸ It has, however, expressed grave concerns about pure bootstrapping in criminal cases. The court ruled in *People v. Montoya* that hearsay may be used in determining whether the prerequisites for admission of co-conspirator statements have been met, but it immediately thereafter added:

We hasten to add, however, that while the alleged co-conspirator's statement may properly be considered in resolving the issue of admissibility, there must also be some evidence, independent of the alleged co-conspirator's statement, establishing that the defendant and the declarant were members of the conspiracy. Although the issue of corroborative evidence was not answered in *Bourjaily*, we believe this requirement is necessary to reduce the risk of "bootstrapping" the evidentiary antecedents for admissibility to the level of competent evidence. This additional requirement, in our view, will contribute some measure of reliability both to the statement itself and to the process by which its admissibility is determined. Without this added safeguard, the out-of-court statement could be put to the double service of establishing its own foundation for admissibility and thereby conceivably providing the sole evidentiary basis for a criminal conviction.¹⁴⁹

The Colorado Supreme Court later explained in *People v. Bowers* that the holding in *Montoya* was not dictated by rule.¹⁵⁰ *Montoya* therefore expresses a general concern and arguably establishes a common law rule in Colorado that should have application beyond the co-conspirator statement exception.

The Second Circuit and State of Colorado are not alone. The Circuit Court of Appeals for the District of Columbia has ruled that trial courts can rely at least

146. 83 F.3d 578, 580 (2nd Cir. 1996) (citations omitted).

147. 29 F.3d 785, 814 (2nd Cir. 1994) (quoting *United States v. Aguiar*, 975 F.2d 45, 47 (2nd Cir. 1992) (holding that trial courts should perform balancing in accordance with FED. R. EVID. 403).

148. *Vasquez v. People*, 173 P.3d 1099, 1105 (Colo. 2007).

149. *People v. Montoya*, 753 P.2d 729, 736 (Colo. 1988) (citations omitted).

150. 801 P.2d 511, 526 n.9 (Colo. 1990).

in part on hearsay when making forfeiture determinations.¹⁵¹ The Sixth, Eighth, and Tenth Circuits also appear to allow its use.¹⁵² However, all have additionally expressed post-*Bourjaily* concerns about pure bootstrapping when making admissibility decisions under the co-conspirator statement rule.¹⁵³ Illinois, New Jersey, New York, and Ohio cases display a similar dichotomy.¹⁵⁴ The question remains in those jurisdictions whether, and to what extent, they will extend the reasoning from their cases regarding admissibility under the co-conspirator statement rule to preliminary determinations under the forfeiture-by-wrongdoing doctrine.

Concerns about pure bootstrapping have added significance when forfeiture-by-wrongdoing is at issue; the Confrontation Clause “reflects a judgment, not only about the desirability of reliable evidence. . . , but about how reliability can best be determined[,]” namely cross-examination.¹⁵⁵ Cross-examination at trial is lost when forfeiture-by-wrongdoing is applied and out-of-court statements are admitted into evidence.¹⁵⁶ This has potential implications upon a defendant’s right to due process. The Fifth Circuit Court of Appeals has therefore held that trial courts “should scrutinize the proffered statements to ensure that the evidence is not unreliable.”¹⁵⁷ The New Jersey Supreme Court similarly ruled in

151. *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997).

152. *See Steele v. Taylor*, 684 F.2d 1193, 1202-03 (6th Cir. 1982); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *abrogated on other grounds by Richardson v. United States*, 468 U.S. 317, 325-26 (1984), *as recognized in United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000); *United States v. Carlson*, 547 F.2d 1346, 1353 (8th Cir. 1976).

153. *United States v. Clark*, 18 F.3d 1337, 1341-42 (6th Cir. 1994); *United States v. Beckham*, 968 F.2d 47, 50-51 (D.C. Cir. 1992); *United States v. Garbett*, 867 F.2d 1132, 1134 (8th Cir. 1989); *United States v. Martinez*, 825 F.2d 1451, 1452-53 (10th Cir. 1987).

154. Illinois allows consideration of hearsay to resolve forfeiture-by-wrongdoing questions. *People v. Stechly*, 870 N.E.2d 333, 353 (Ill. 2007). There must however be sufficient, substantial, and non-hearsay evidence showing the existence of a conspiracy before a co-conspirator statement is admissible in that state. *People v. Melgoza*, 595 N.E.2d 1261, 1272 (Ill. App. 1992). Lower courts in New Jersey and New York have ruled that hearsay may be used when making forfeiture determinations. *State v. Sheppard*, 484 A.2d 1330, 1346-47 (N.J. Super. Ct. Law Div. 1984); *People v. Perkins*, 691 N.Y.S.2d 273, 274-75 (N.Y. Sup. Ct. 1999); *People v. Banks*, 551 N.Y.S.2d 1011, 1012 n.* (N.Y. Sup. Ct. 1989); *People v. Sweeper*, 471 N.Y.S.2d 486, 487-88 (N.Y. Sup. Ct. 1984). The highest courts in those states have held that alleged co-conspirator statements cannot prove their own admissibility. *State v. Clausell*, 580 A.2d 221, 241 (N.J. 1990); *People v. Bac Tran*, 603 N.E.2d 950, 955-56 (N.Y. 1992). Ohio allows consideration of hearsay to resolve forfeiture-by-wrongdoing questions. *State v. Pickens*, 25 N.E.3d 1023, 1058 ¶ 171 (Ohio 2014). It however requires the existence of a conspiracy to be proven by independent evidence. *State v. Carter*, 651 N.E.2d 965, 971-72 (Ohio 1995).

155. *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

156. *Davis v. Washington*, 547 U.S. 813, 833 (2006) (“[O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.”)

157. *United States v. Thevis*, 665 F.2d 616, 633 n.17 (5th Cir. 1982), *superseded by rule*, FED. R. EVID. 804(b)(6), *as recognized in United States v. Nelson*, 242 Fed. Appx. 164, 171 (5th Cir. 2007). Due process principles may “constitute a further bar to admission of . . . unreliable evidence.” *Michigan v. Bryant*, 562 U.S. 344, 370 n.13 (2011) (citing *Dutton v. Evans*, 400 U.S. 74, 96-97 (1970) (Harlan, J., concurring)). Justice Harlan wrote in *California v. Green* that due process does not permit a conviction

State v. Byrd that “[b]efore admitting an out-of-court statement of a witness under the forfeiture-by-wrongdoing rule, the court must determine that the statement bears some indicia of reliability.”¹⁵⁸ It is unclear how this could be done without some sort of corroborative evidence. The forfeiture-by-wrongdoing doctrine does not establish the reliability of an out-of-court statement that it admits.¹⁵⁹ In addition, while Rule 104(a) authorizes use of hearsay when making admissibility determinations, it provides no assurance that the information is trustworthy.¹⁶⁰ Without the added safeguard of corroborative evidence, there would be increased risk that both the admissibility determination and ultimate verdict regarding guilt were based on inherently unreliable evidence.¹⁶¹ This seems to be at odds with the U.S. Supreme Court’s general approach to the rights of a criminal defendant. Even when defendant misconduct is at issue, the Supreme Court cautions that “courts must indulge every reasonable presumption against the loss of constitutional rights”¹⁶²

Due process concerns persist despite provisions that relieve judges from strict application of evidentiary rules when making preliminary admissibility determinations. The Kentucky Supreme Court recognized in *Hammond v. Commonwealth* that its version of Rule 104(a) applied to such determinations. However, it also expressed concern that due process requires the proponent of the hearsay to “*first present evidence*” to establish a factual basis for application of the forfeiture-by-wrongdoing doctrine.¹⁶³ It therefore held, “while we recognize that the evidentiary hearing to determine the question of forfeiture by wrongdoing is not governed by the Kentucky Rules of Evidence, it should go without saying that the party with the burden of proof must present some *evidence* to prove the material facts at issue.”¹⁶⁴

The California Supreme Court recognized in *California v. Giles* that federal cases allow hearsay to be considered when making forfeiture determinations, but indicated only qualified concurrence.¹⁶⁵ The *Giles* court,

based “on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court.” 399 U.S. 149, 186 n.20 (1970) (Harlan, J., concurring).

158. 967 A.2d 285, 304 (N.J. 2009).

159. *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (stating that the forfeiture-by-wrongdoing doctrine “does not purport to be an alternative means of determining reliability.”).

160. *See United States v. Silverman*, 861 F.2d 571, 578 (9th Cir. 1988) (writing that Rule 104(a) does not diminish the inherent unreliability of a hearsay statement).

161. *See People v. Montoya*, 753 P.2d 729, 736 (Colo. 1988) (dealing with admissibility under the co-conspirator statement exception to the hearsay rule).

162. *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (courtroom disruption case); *see also Davis v. Washington*, 547 U.S. 813, 833 (2006) (recognizing the risk of witness intimidation in domestic violence cases, but writing that “[w]e may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free.”).

163. *Hammond v. Commonwealth*, 366 S.W.3d 425, 432 (Ky. 2012) (quoting *Parker v. Commonwealth*, 291 S.W.3d 647, 670 (Ky. 2009)).

164. *Id.* at 432-33.

165. 152 P.3d 433, 446 (Cal. 2007), *vacated on other grounds by Giles v. California*, 554 U.S. 353 (2008).

without a full explanation of its rationale, held that “a trial court cannot make a forfeiture finding based solely on the unavailable witness’s uncontroverted testimony; there must be independent corroborative evidence that supports the forfeiture finding.”¹⁶⁶ *Giles* was overruled on other grounds by the U.S. Supreme Court,¹⁶⁷ but its holding regarding the usability of hearsay was subsequently reaffirmed by the California Court of Appeals.¹⁶⁸

The Tenth Circuit Court of Appeals commented in *United States v. Balano* “that often the only evidence of coercion will be the statement of the coerced person, as repeated by government agents.”¹⁶⁹ A corroboration requirement nonetheless would not be fatal to an effective application of the forfeiture-by-wrongdoing doctrine because the need for some additional evidence beyond the content of a hearsay statement does not pose an insurmountable burden. The Tenth Circuit has stated with respect to the corroboration requirement applicable to the co-conspirator statement rule that “such independent evidence may be sufficient even though it is not ‘substantial.’”¹⁷⁰

Authorities involving the co-conspirator statement rule provide guidance regarding the quantum and type of corroborative evidence required to avoid pure bootstrapping. The Sixth Circuit Court of Appeals succinctly explained in *United States v. Clark* that “ ‘[s]ome’ independent evidence is not merely a scintilla, but rather enough to rebut the presumed unreliability of hearsay.”¹⁷¹ The Ninth Circuit Court of Appeals in *United States v. Silverman* noted that the proof may consist of “evidence short of proof of the commission of a substantive offense . . .”¹⁷² It nonetheless must be “fairly incriminating,” and “[e]vidence of wholly innocuous conduct or statements by the defendant will rarely be sufficiently corroborative . . .”¹⁷³ “It is permissible, however, for a court to consider the corroborating evidence ‘in light of the co-conspirator’s statement itself.’”¹⁷⁴ Therefore, a court is not required to wear blinders when assessing whether sufficient corroborating evidence exists. The hearsay itself may be considered when determining if other evidence is incriminating or innocuous. “[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation

166. *Id.*

167. See *Giles*, 554 U.S. at 355-73, 376-77.

168. *People v. Osorio*, 81 Cal. Rptr. 3d 167, 173 (Cal. App. 2008).

169. 618 F.2d 624, 629 (10th Cir. 1979), *abrogated on other grounds by* *Richardson v. United States*, 468 U.S. 317, 325-26 (1984), *as recognized in* *United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000)

170. *United States v. Owens*, 70 F.3d 1118, 1125 (10th Cir. 1995) (quoting *United States v. Rascon*, 8 F.3d 1537, 1541 (10th Cir.1993)).

171. 18 F.3d 1337, 1342 (6th Cir. 1994).

172. 861 F.2d 571, 579 (9th Cir. 1988).

173. *Id.* at 578.

174. *United States v. Miller*, 981 F.2d 439, 442 (9th Cir. 1992) (quoting *Silverman*, 861 F.2d at 578).

prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.”¹⁷⁵

Clark, Silverman, and other circuit court cases decided in the wake of *Bourjaily* were considered by the Advisory Committee when it recommended addition of a corroboration requirement to Rule 801(d)(2).¹⁷⁶ Committee commentary is instructive regarding the types of proof that may satisfactorily corroborate a hearsay statement:

The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question.¹⁷⁷

The circumstances surrounding the utterance of the hearsay may therefore be sufficient.¹⁷⁸ This type of proof may actually be more probative than confirmatory evidence to rebut a hearsay statement’s presumed unreliability.¹⁷⁹

Circumstantial evidence may be sufficient to satisfy the corroborative evidence requirement under the co-conspirator statement rule.¹⁸⁰ This is consistent with cases involving the forfeiture-by-wrongdoing doctrine which have held that witness tampering may be proven entirely by circumstantial evidence.¹⁸¹ The Seventh Circuit Court of Appeals explained in *United States v. Scott*:

It seems almost certain that, in a case involving coercion or threats, a witness who refuses to testify at trial will not testify to the actions

175. *Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987); see *Geraci v. Senkowski*, 23 F.Supp.2d 246, 258 (E.D.N.Y. 1998) (“Standing alone, such conduct may be innocuous, but a factfinder is not required to view it in isolation.”), *aff’d*, 211 F.3d 6 (2d Cir. 2000).

176. H.R. DOC. NO. 105-69, *supra* note 21, at 18.

177. *Id.*

178. *Cf. State v. Byrd*, 967 A.2d 285, 304 (N.J. 2009) (holding that a statement is admissible under the forfeiture-by-wrongdoing rule if “its reliability has been established by a preponderance of the evidence in light of all surrounding relevant circumstances.”) (quoting *State v. Gross*, 577 A.2d 814, 820 (N.J. 1990)).

179. *Cf. Lilly v. Virginia*, 527 U.S. 116, 137-38 (1999) (stating that the Supreme Court had “squarely rejected the notion that ‘evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears “particular guarantees of trustworthiness.”’ ”); *Idaho v. Wright*, 497 U.S. 805, 819-23 (1990) (explaining that the exceptions to the hearsay rule rely on context and the circumstances in which certain types of statements are made to assure truthfulness and later doubting whether the confirmatory type of corroborating evidence provides any basis to presume that a hearsay statement is trustworthy).

180. *United States v. Warman*, 578 F.3d 320, 337 (6th Cir. 2009); see also *United States v. Zambrana*, 841 F.2d 1320, 1346-47 (7th Cir. 1988).

181. *United States v. Stewart*, 485 F.3d 666, 671 (2nd Cir. 2007); see generally Tim Donaldson & Karen Olson, *Classic Abusive Relationships and the Inference of Witness Tampering in Family Violence Cases after Giles v. California*, 36 LINCOLN L. REV. 45, 75-79 (2008-09) (reviewing cases approving reliance upon circumstantial evidence to prove forfeiture).

procuring his or her unavailability. It would not serve the goal of Rule 804(b)(6) to hold that circumstantial evidence cannot support a finding of coercion. Were we to hold otherwise, defendants would have a perverse incentive to cover up wrongdoing with still more wrongdoing, to the loss of probative evidence at trial.¹⁸²

In those instances, “[c]ircumstantial evidence is not a disfavored form of proof and, in fact, may be stronger than direct evidence when it depends upon ‘undisputed evidentiary facts about which human observers are less likely to err . . . or to distort.’”¹⁸³ Circumstantial evidence should therefore also be adequate to satisfy any corroborative proof requirement that might be engrafted to Rule 104(a) with respect to admissibility determinations under the forfeiture-by-wrongdoing doctrine.

V. CONCLUSION

The forfeiture-by-wrongdoing doctrine is a “prophylactic rule to deal with abhorrent behavior ‘which strikes at the heart of the system of justice itself.’”¹⁸⁴ Forfeiture is a preliminary question involving the admissibility of evidence, and it would therefore normally be governed by Rule 104(a), and similar state evidentiary rules, which provide that the exclusionary rules, other than privileges, do not apply to such determinations.¹⁸⁵ A majority of lower courts have therefore held that hearsay may be used to prove forfeiture-by-wrongdoing.¹⁸⁶

The Utah Supreme Court has acknowledged that its version of Rule 104(a) gives trial courts the ability to disregard evidentiary rules when making admissibility determinations, but it has explained that the real question is whether that power should be exercised.¹⁸⁷ The Utah Supreme Court has determined that the right of confrontation is too important to let questions regarding its forfeiture to be based on inadmissible evidence, and state courts in Utah therefore can rest forfeiture decisions only upon proof admissible under evidentiary rules.¹⁸⁸ The Utah rule aligns that state with authority originating from *Glasser v. United States* where the U.S. Supreme Court expressed concern before Rule 104(a) was adopted about hearsay lifting “itself by its own bootstraps to the level of competent evidence.”¹⁸⁹

182. *United States v. Scott*, 284 F.3d 758, 764 (7th Cir. 2002); *see also* *United States v. Jonassen*, 759 F.3d 653, 662 (7th Cir. 2014).

183. *People v. Geraci*, 649 N.E.2d 817, 823 (N.Y. 1995).

184. H.R. DOC. NO. 105-69, *supra* note 21, at 22 (Committee Note) (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2nd Cir. 1982)).

185. *See Mastrangelo*, 693 F.2d at 273; *State v. Pickens*, 25 N.E.3d 1023, 1058 ¶ 171 (Ohio 2014).

186. *See United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997).

187. *State v. Poole*, 232 P.3d 519, 527 (Utah 2010).

188. *Id.*

189. *Glasser v. United States*, 315 U.S. 60, 75 (1941).

The Court of Appeals for the District of Columbia wrote in *Jenkins v. United States* that it is not persuaded that bootstrapping concerns mandate extension of the logic adopted by *Glasser* and like cases to the forfeiture-by-wrongdoing doctrine.¹⁹⁰ Courts elsewhere have correctly observed that successful witness tampering would often not be provable if hearsay could not be used.¹⁹¹ The court in *Jenkins* reasoned that there is “no principled reason to forbid it *per se*.”¹⁹² That court nonetheless noted that it was not holding that “‘pure’ bootstrapping would be appropriate.”¹⁹³

A judge can bring considerable experience and knowledge to bear on the issue of how much weight to give hearsay, and the practicalities of criminal trials demand that the judge have discretion to consider its content when making a preliminary determination regarding its admissibility.¹⁹⁴ Hearsay is “only presumed unreliable.”¹⁹⁵ It has probative value, and the presumption “may be rebutted by appropriate proof.”¹⁹⁶

Witness tampering is difficult to prove. Witnesses too scared to testify are unlikely to testify as to why they are scared.¹⁹⁷ Despite this difficulty, trial courts should scrutinize hearsay statements when applying the forfeiture-by-wrongdoing doctrine to make sure that they are reliable.¹⁹⁸ Rule 104(a) does not by itself guarantee the reliability of a hearsay statement when used to help establish its own admissibility.¹⁹⁹ The forfeiture-by-wrongdoing doctrine also does not itself determine reliability.²⁰⁰ Without the added safeguard of corroborative evidence, there is a risk in instances of pure bootstrapping that an “out-of-court statement could be put to the double service of establishing its own foundation for admissibility and thereby conceivably providing the sole evidentiary basis for a criminal conviction.”²⁰¹ Trial courts should therefore be allowed to consider hearsay when making admissibility determinations under the forfeiture-by-wrongdoing doctrine, but at least some corroborative evidence should also be required.

190. See *Jenkins*, 80 A.3d at 996 (citing *Butler v. United States*, 481 A.2d 431 (D.C. 1984)). *Butler* adhered to *Glasser*. *Butler v. United States*, 481 A.2d 431, 439-40 (D.C. 1984).

191. *Geraci v. Senkowski*, 23 F.Supp.2d 246, 258 (E.D.N.Y. 1998), *aff'd* 211 F.3d 6 (2d Cir. 2000); see also *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), *abrogated on other grounds by Richardson v. United States*, 468 U.S. 317, 325-26 (1984), *as recognized in United States v. Cherry*, 217 F.3d 811, 815 (10th Cir. 2000).

192. 80 A.3d 978, 996 (D.C. 2013).

193. *Id.* at 997 n.49.

194. *United States v. White*, 116 F.3d 903, 914 (D.C. Cir. 1997).

195. *Bourjaily v. United States*, 483 U.S. 171, 179 (1987).

196. *Id.*

197. *United States v. Scott*, 284 F.3d 758, 764 (7th Cir. 2002).

198. *United States v. Thevis*, 665 F.2d 616, 633 n.17 (5th Cir. 1982), *superseded by rule*, FED. R. EVID. 804(b)(6), *as recognized in United States v. Nelson*, 242 Fed. Appx. 164, 171 (5th Cir. 2007).

199. *United States v. Silverman*, 861 F.2d 571, 578 (9th Cir. 1988).

200. *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

201. *People v. Montoya*, 753 P.2d 729, 736 (Colo. 1988).

A RIGHT WITHOUT A REMEDY: THE SIXTH AMENDMENT RIGHT TO COUNSEL AND THE AMERICAN INDIGENT DEFENSE CRISIS

NICHOLAS A. LUTZ*

I. INTRODUCTION

The Sixth Amendment to the Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”¹ Whether this brief clause imposes an affirmative duty on courts to provide counsel for those who could not otherwise afford it was historically less axiomatic than it is today. The modern understanding that the criminally accused must be appointed counsel when unable to afford a private attorney is based primarily on the landmark Supreme Court decision in *Gideon v. Wainwright*² and its legal progeny. *Gideon* declared “that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”³

Gideon clearly established that the right to counsel is fundamental to ensuring just criminal proceedings,⁴ and insisted that no criminal defendant be forced to face prosecution without the assistance of a competent lawyer. Today, however, the American legal system is systematically failing to provide the indigent criminally accused with the type of representation required by *Gideon* and the Constitution. America is facing an indigent defense crisis. Legal, social, and political practicalities have combined to create a seemingly insurmountable barrier to the real enforcement of the Sixth Amendment rights of the criminally accused. The indigent counsel crisis presents a unique and troubling question: what must be done when the nature of the legal system itself proves to defeat a constitutional maxim?

This article traces the development of Sixth Amendment jurisprudence leading to the recognition of the right to appointed counsel in criminal proceedings.⁵ It then reviews the apparent state of crisis in which that right goes

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1. U.S. CONST. amend. VI.

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

3. *Id.* at 344.

4. *Id.*; see Justin F. Marceau, *Embracing A New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161 (2012) (providing an extensive examination of the Supreme Court’s interpretation of the Sixth Amendment’s application to non-trial oriented and non-truth seeking procedural protections).

5. See Randy M. Sutton, Annotation, *Construction and Application of Sixth Amendment Right to Counsel—Supreme Court Cases*, 33 A.L.R. FED. 2d 1 (2009).

largely unrecognized for indigent criminal defendants. Next it proposes that the solution to the crisis may lie in the increased use of structural injunctions and argues that the recent Supreme Court decision in *Brown v. Plata*⁶ has opened the door for state and federal courts to impose unprecedentedly expansive affirmative demands upon state and local governments in order to reform constitutionally defective indigent defense systems. Finally, it examines recent federal district court decisions with opposing implications for the future viability of the structural injunction approach to remedying Sixth Amendment violations.

II. THE SCOTTSBORO BOYS: *POWELL V. ALABAMA* EXPANDS THE CONSTITUTIONAL ENTITLEMENT TO COUNSEL

In *Powell v. Alabama*,⁷ the Supreme Court recognized for the first time that state courts had a constitutional duty to appoint counsel to certain criminal defendants who could not otherwise acquire representation. *Powell* involved the alleged rape of two white women on a freight train in route from Chattanooga to Memphis, Tennessee.⁸ In what became a highly racialized public spectacle, a group of black men between thirteen and twenty years old, who had also been passengers on the train, were arrested in connection with the crime.⁹ By the end of the same day, local residents had formed a lynch mob outside the station where the men were held.¹⁰ As the United States Supreme Court would later describe the prosecution:

The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.¹¹

The “counsel” Justice Sutherland alludes to above refers to the trial court’s dubious appointment of “all of the members of the bar for the purpose of arraigning the defendants and to help if no counsel appear[ed].”¹² While a local lawyer and an interested out-of-state lawyer appeared the day of trial, both merely indicated a willingness to assist court appointed counsel, though no such appointment was ever made.¹³ Each of the defendants was found guilty after a one-day trial and sentenced to death.¹⁴

6. *Brown v. Plata*, 563 U.S. 493 (2011).

7. *Powell v. Alabama*, 287 U.S. 45, 45 (1932).

8. Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379, 379 (2009).

9. *Id.*

10. *Id.*

11. *Powell*, 287 U.S. at 57-58.

12. *Id.* at 53.

13. *Id.* at 57-58.

14. *Id.* at 50.

On appeal, the Supreme Court confined its examination to whether the trial court's failure to effectively appoint counsel was a violation of the defendants' constitutional rights under the Due Process Clause of the Fourteenth Amendment.¹⁵ Because *Powell* was decided during the pre-incorporation era, the text of the Sixth Amendment informed the analysis, but could not control on the issue of whether or not the *Powell* defendants were entitled to counsel in a state court.¹⁶ Rather, the analysis turned on whether the accused's right to counsel in a criminal trial was "of such a nature that [it was] included in the conception of due process of law" encapsulated by the Fourteenth Amendment.¹⁷

The Court reasoned that the concept of a fair hearing was a "basic element[]" of the constitutional requirement of due process of law," as presupposed in the American legal system as the requirement that the court have jurisdiction over the cases it hears.¹⁸ Further, inherent in the concept of a fair hearing was the right to the assistance of counsel.¹⁹ Therefore, in many circumstances, the denial of counsel effectively amounts to an absolute denial of a hearing, and thus violates the Due Process Clause. The *Powell* Court elaborated on the practical unfairness that confronts an unrepresented defendant in a criminal proceeding as further justification for the right's inclusion in the concept of due process of law:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.²⁰

The Court held that the *Powell* defendants had not been accorded their right to a fair trial in accordance with due process under the Fourteenth Amendment.²¹

15. *Id.* at 61.

16. See Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 355 (2001).

17. *Powell*, 287 U.S. 45 at 67-68 (quoting *Twining v. New Jersey*, 211 U.S. 78, 99 (1908)) (internal quotations omitted).

18. *Id.* at 68.

19. *Id.* at 66.

20. *Id.* at 69.

21. In order to reach the majority's holding in *Powell*, the court carefully distinguished *Hurtado v. California*, in which the Supreme Court ruled that the Fifth Amendment's requirement that convictions

As was typical of the Court's Fourteenth Amendment due process rulings in the criminal procedure context during the pre-incorporation era,²² *Powell* was decided on narrow and fact-intensive rationale. Despite the Court's language explaining in clear terms the unfairness that confronts *any* unrepresented criminal defendant (including, of course, "the intelligent and educated layman") in the context of *any* criminal prosecution, the *Powell* decision was limited to capital cases in which the defendant was unable to retain counsel, and unable to provide his or her own defense due to a limitation such as "ignorance, feeble-mindedness, illiteracy, or the like."²³ While *Powell* represents a judicial recognition of the fundamental nature of the right to appointed counsel for indigent defendants, it is also illustrative of the limitations imposed by the pre-incorporation case-by-case approach to due process rights in the realm of criminal procedure. Full affirmation of the right to appointed counsel would require the eventual abandonment of the substantive due process approach.

III. ONE STEP FORWARD, TWO STEPS BACK: *BETTS V. BRADY* RETRACTS THE SCOPE OF *POWELL V. ALABAMA*

Only a decade after the Court's decision in *Powell*, the Court made clear the limited nature of the decision's holding. In *Betts v. Brady*,²⁴ the Court considered the case of Smith Betts, an indigent defendant who was unable to hire a lawyer, denied appointed counsel, and ultimately convicted of robbery.²⁵ Betts

based on violations of capital or otherwise infamous crimes be preceded by a grand jury indictment was inapplicable to state courts. *Hurtado v. California*, 110 U.S. 516, 538 (1884).

Hurtado's rationale was that because the grand jury requirement was included in the language of the Fifth Amendment, but not in the language of the Fourteenth Amendment, that language could not have been intended to apply to the states, and thus applied to the federal government alone. *Id.* That rationale could logically have been extended to the Sixth Amendment, mandating a decision that inclusion of the right to counsel in the Sixth Amendment, and the lack of that language in the Fourteenth Amendment, precluded the right to counsel from being applied to the states as a due process right. The *Powell* Court relied on *Chicago, Burlington & Q.R. Co. v. Chicago*, 166 U.S. 226 (1887), which held that uncompensated takings were precluded by the Fourteenth Amendment due process clause, despite being explicitly addressed by the Fifth Amendment Takings Clause. *Powell*, 287 U.S. 45 at 66. The Court also cited *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925), which held that the First Amendment freedom of speech and of the press are encompassed within the fundamental rights protected by the due process clause of Fourteenth Amendment, and precluded from state infringement regardless of their explicit inclusion in the First Amendment. *Id.* at 67. The Court additionally cited *Stromberg v. People of the State of California*, 283 U.S. 359, 368 (1931), and *Near v. Minnesota*, 283 U.S. 697, 707 (1931), which reaffirmed the inclusion of First Amendment speech rights in the liberty protected by the Due Process Clause. *Hurtado*, the Court ruled, is merely "an aid to construction . . . it must yield to more compelling considerations whenever such considerations exist." *Id.*

22. Israel, *supra* note 15 at 354 ("The primary example of due process rulings stressing the circumstances of the particular case were those involving claims based upon the failure to provide counsel to assist indigent defendants") (footnote omitted).

23. *Powell*, 287 U.S. at 71.

24. *Betts v. Brady*, 316 U.S. 455 (1942).

25. *Id.* at 457.

argued that based on numerous precedents following the *Powell* decision, the Supreme Court had laid the foundation for a ruling that the right to appointed counsel applied to every criminal defendant unable to obtain a lawyer.²⁶ The Court acknowledged that the Sixth Amendment required the appointment of counsel for defendants who were otherwise unable to procure an attorney in federal criminal prosecutions.²⁷ Whether or not it applied to the states depended on whether it was fundamental to due process of law, a question which *Powell* answered in the affirmative.²⁸ After a searching review of colonial and early state constitutional provisions addressing the right to counsel at trial, the *Betts* Court determined that the inconsistent treatment of the matter across jurisdictions mandated the conclusion that “appointment of counsel is not a fundamental right, essential to a fair trial.”²⁹ States were not obligated to provide counsel in every criminal prosecution.³⁰ However, the Court did acknowledge that denial of counsel in a particular case might result in a fundamentally unfair conviction.³¹ This was not the case for Smith Betts, and the Court affirmed the denial of his petition of habeas corpus.³²

IV. *GIDEON V. WAINWRIGHT*: THE CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL IS EXPLICITLY APPLIED TO THE STATES

On June 3, 1961, there was a break-in at the Bay Harbor Poolroom in Panama City, Florida at about 5:30 a.m.³³ Clarence Earl Gideon, “a fifty-one-year-old white man who had been in and out of prisons much of his life,”³⁴ was charged with “breaking and entering with intent to commit petit larceny.”³⁵ Prior to trial, Gideon requested the assistance of counsel based on his constitutional entitlement (in a somewhat famous and bizarrely prescient colloquy with court):

The Court: What says the Defendant? Are you ready to go to trial?

The Defendant: I am not ready, your Honor.

The Court: Why aren't you ready?

The Defendant: I have no Counsel.

The Court: Why do you not have Counsel? Did you not know your case was set for trial today?

The Defendant: Yes, sir, I knew that it was set for trial today.

26. *Id.* at 462.

27. *Id.* at 464-65 (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)).

28. *Powell*, 287 U.S. at 73.

29. *Betts*, 316 U.S. at 471.

30. *Id.* at 471-72.

31. *Id.* at 473.

32. *Id.*

33. Bruce R. Jacob, *Memories of and Reflections About Gideon v. Wainwright*, 33 STETSON L. REV. 181, 200 (2003).

34. ANTHONY LEWIS, *GIDEON'S TRUMPET* 5 (1964).

35. Jacob, *supra* note 32, at 200.

The Court: Why, then, did you not secure Counsel and be prepared to go to trial?

The Defendant: Your Honor I request this Court to appoint Counsel to represent me in this trial.

The Court: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense.

The Defendant: The United States Supreme Court says I am entitled to be represented by Counsel.³⁶

Gideon's request for appointed counsel was denied, he was convicted, and ultimately sentenced to five years in a state prison.³⁷ Proceeding pro se, Gideon filed a petition for habeas corpus challenging his conviction based on the trial court's denial of his request for appointed counsel.³⁸ The Supreme Court of Florida denied his petition without a written opinion,³⁹ but the U.S. Supreme Court granted Gideon's petition for writ of certiorari.⁴⁰

The *Gideon* Court recognized that *Betts* rested entirely on the conclusion that the right to appointed counsel for indigent defendants was not so fundamental to a fair trial that it fell within the sphere of protection of the Due Process Clause of the Fourteenth Amendment.⁴¹ However, a number of decisions in the decade or so preceding *Betts*, including *Powell v. Alabama*, had affirmed the fundamental character of the right to counsel.⁴² Those affirmations, the Court reasoned, were no less valid because the decisions themselves were limited to the facts of their respective cases.⁴³ Though none of those precedents declared the affirmative duty of a court to appoint defense counsel where the accused could not otherwise afford it, the *Betts* decision was still an aberration in its declaration that the right to counsel was not fundamental.⁴⁴ Stressing the paramount role of the assistance of counsel in ensuring the fairness of American courts, the Court held:

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish

36. *Id.* at 200-01

37. *Id.* at 212.

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

39. *Gideon v. Cochran*, 135 So. 2d 746 (Fla. 1961), *rev'd sub nom. Gideon*, 372 U.S. 335 (1963).

40. *Gideon v. Cochran*, 370 U.S. 908, 908 (1962).

41. *Gideon*, 372 U.S. at 340.

42. *Id.* at 342-43.

43. *Id.* at 343.

44. *Id.* at 343-44.

machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide—spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.⁴⁵

The Court “concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them [is] the fundamental right of the accused to the aid of counsel in a criminal prosecution.”⁴⁶ The Court explicitly overruled *Betts*, the Sixth Amendment right to counsel was incorporated to the states through the Fourteenth Amendment, and *Gideon*'s legacy was born.⁴⁷

V. THE INDIGENT DEFENSE CRISIS AND THE REALITY OF *GIDEON*

Despite the clarity of *Gideon*'s holding that the Sixth Amendment requires that even impoverished defendants be afforded the assistance of counsel, the right to appointed counsel today is more aspirational than actualized. According to the American Bar Association, “indigent defense in the United States remains in a state of crisis.”⁴⁸ The United States Department of Justice has concluded that America's indigent defense systems routinely fail to meet the constitutionally mandated level of representation required by *Gideon*.⁴⁹

45. *Id.* at 344.

46. *Id.* at 343 (citing *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936)).

47. *Id.* at 345.

48. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS OF THE AM. BAR ASS'N., *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 38 (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [hereinafter *GIDEON'S BROKEN PROMISE*].

49. In its memorandum of accomplishments, the United States Department of Justice's Office for Access to Justice summarized the state of indigent defense in America succinctly: “In the criminal justice system, public defender offices are underfunded and understaffed, often so severely that they cannot hope to provide their clients with effective representation. Indigent defender annual caseloads can range from 500 to 900 felony cases and over 2,000 misdemeanors, at least five to six times the

Examination of the various indigent defense systems across the country reveals that the majority of systems are woefully underfunded, lack oversight and accountability, and persistently result in the violation of defendants' constitutional rights. Indigent defenders are underpaid, poorly trained, extraordinarily overworked, unable to adequately investigate or research their cases, impaired by conflicts of interest, overly reliant on plea agreements, and lacking in other practice-essential resources.⁵⁰ Their clients are persistently left without adequate representation, and they often cannot avoid violating their professional and ethical duties.⁵¹

However, the indigent defense crisis is not a new phenomenon. "In fact, since the 1963 Gideon decision, a major independent report has been issued at least every five years documenting the severe deficiencies in indigent defense services. . . . The claim that indigent defense sorely needs reform is neither novel nor controversial."⁵² Critics have discussed the disparity between *Gideon's* promise and the realities of indigent defense with the same sense of urgency and moral outrage displayed by today's commentators for some time.⁵³ However, the problem's persistence is not an indication of triviality, but rather a sign of the truly deep entrenchment of its causes, and its resistance to political reform.

VI. THE CRIMINAL PROCEDURE REMEDY: INEFFECTIVE ASSISTANCE OF COUNSEL AND *STRICKLAND V. WASHINGTON*

To begin to address the inadequacies of representation provided by indigent defense services, the most obvious avenue is probably direct appeal or post-conviction challenges asserting ineffective assistance of counsel. The principle that the right to counsel encompasses the right to *effective* counsel is so straightforward that it is given very little explicit attention in the early cases and is generally treated as being intertwined with the right to counsel itself.⁵⁴ Later cases acknowledged that incompetent or otherwise ineffective assistance of counsel may

recommended ceilings set by the National Advisory Commission on Criminal Justice. In some instances, jurisdictions have reported case load assignments to be so high that defenders average just seven minutes per case. Understaffing leads to lack of attention to individual clients' cases, which in turn can lead to grave injustice, including wrongful convictions and unjust imprisonment." OFFICE FOR ACCESS TO JUSTICE OF THE U.S. DEPARTMENT OF JUSTICE: FOUR YEAR ANNIVERSARY ACCOMPLISHMENTS (2010), <https://www.justice.gov/sites/default/files/atj/legacy/2014/03/14/accomplishments.pdf>.

50. GIDEON'S BROKEN PROMISE, *supra* note 47, at 38-41.

51. *Id.*

52. Note, Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense, 113 HARV. L. REV. 2062, 2064-65 (2000).

53. See, e.g., Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 627 (1986).

54. For example, in *Powell*, one of the bases on which the Court decided that the defendants had been denied their due process rights was that the representation administered by the court was more "pro forma than zealous and active." *Powell v. Alabama*, 287 U.S. 45, 60 (1932); See also *Reece v. Georgia*, 350 U.S. 85, 90 (1955) ("The *effective* assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard." (emphasis added)).

violate a defendant's Sixth Amendment right to counsel but did not, however, elaborate on a threshold level of representation sufficient to satisfy the right.⁵⁵

The seemingly glaring absence of a constitutional standard for the effective assistance of counsel was addressed by the Supreme Court in *Strickland v. Washington*.⁵⁶ The Court in *Strickland* explained the test for ineffective assistance of counsel as "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."⁵⁷ Under *Strickland*, to demonstrate that counsel's representation was sufficiently defective to warrant post-conviction relief, the defendant must demonstrate (1) that counsel committed serious errors in the course of the representation of the defendant, and (2) that the defendant was prejudiced by those errors.⁵⁸ As to the first prong, the Court announced an objective test requiring a showing that counsel's performance was unreasonable in light of the prevailing norms of the legal profession.⁵⁹ The second prong then requires a defendant demonstrate that but for his or her counsel's unreasonably deficient performance there is a reasonable probability that the proceeding would have resulted in a different outcome.⁶⁰

The holding in *Strickland* has been heavily criticized on number of grounds. Perhaps most compellingly, many commentators argue that the Court misconstrued the Sixth Amendment's function in that it merely serves to ensure that trials result in just *outcomes*, and does not protect the accused's *procedural* right to counsel in an absolute sense.⁶¹ This outcome centered approach, it has been argued, "suggests that the end justifies the means in the precise circumstance where the legitimacy of the end is dependent on the legitimacy of the means. . . . [O]ne cannot know the 'correct' result without first allowing the process to operate properly."⁶² Critics have also asserted the inappropriateness of the requirement that a defendant make an affirmative showing of prejudice based on the likelihood that it will often be nearly, if not actually, impossible for a defendant to prove that a

55. See, e.g., *McMann v. Richardson*, 397 U.S. 759, 771 (1970) ("[D]efendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.") (footnote omitted).

56. *Strickland v. Washington*, 466 U.S. 668 (1984).

57. *Id.* at 686.

58. *Id.* at 687.

59. *Id.* at 688.

60. *Id.* at 694.

61. See Richard L. Gabriel, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1266 (1986).

62. *Id.*

different result would have ensued but for counsel's error, especially where a jury verdict is at issue.⁶³

Whatever else may be said about the legal reasoning underlying *Strickland* (and much more might be said), it is clear that the standard places an incredibly high burden on defendants pursuing ineffective assistance of counsel claims. The decision's clear implication is that even where representation is systemically defective, very few convictions are likely to be overturned based on the ineffective assistance of counsel. With *Strickland* as the operative standard, appeals and collateral actions challenging convictions based on the inadequacy of appointed counsel are unlikely to have any reformatory effect on inadequate indigent defense systems. Successful post-conviction challenges are simply unlikely to ever be so numerous or burdensome that they impede the function of the courts to a degree that might garner the attention of policy makers.

Nevertheless, some cases have attempted to incorporate ineffective assistance of counsel claims with systemic challenges to indigent defense systems, arguing that the dysfunction of the public defender systems caused de facto ineffective assistance for defendants represented by those systems. In at least three such cases, the respective courts agreed that the indigent defense systems at issue were sufficiently defective to justify an inference or even legal presumption that the systems' clients received ineffective assistance.⁶⁴ The judicial recognition that the indigent defense systems at issue were constitutionally defective as a whole is a tremendous first step toward fixing those systems. However, because those cases were criminal appeals of individual convictions, any potential remedies applied only to the particular defendants. Even where a presumption of inadequate counsel applies, defendants are still haled into court, tried, and convicted in violation of their rights. Post-conviction criminal remedies cannot eliminate the underlying violations. Remedies based in criminal procedure, by themselves, are simply not capable of working the systemic change needed to address the indigent defense crisis.

VII. THE LEGISLATIVE REMEDY

Many commentators, including the American Bar Association, have urged that inadequate indigent defense systems can be cured through a combination of legislative changes and voluntary efforts on the part of non-state actors like the various national, state, and local bar associations.⁶⁵ It is true that the indigent

63. *Id.* at 1281 ("Proof of a reasonable probability that the result would have been different is virtually impossible since jurors' decisions are based on an infinite variety of subjective data, and one can rarely, if ever, state that it is reasonably probable that a jury would have reached a different result than it did.").

64. Gideon's *Promise Unfulfilled*, *supra* note 51, at 2069 ("[T]he high courts of Arizona, Louisiana, and Oklahoma have all found their state indigent defense systems constitutionally deficient.") (footnote omitted) (citing *State v. Smith*, 681 P.2d 1374 (Ariz. 1984); *State v. Peart*, 621 So.2d 780 (La. 1993); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990)).

65. GIDEON'S BROKEN PROMISE, *supra* note 47, at 38-41.

defense crisis might be solved through the political process. However, despite the opportunity provided by the better part of a century, we have yet to see any such meaningful national reform take shape. The political branches may have the capacity to solve the indigent defense crisis, but the persistence of the problem indicates that they apparently do not have the will. After all, as a group, the indigent criminally accused have minimal political clout,⁶⁶ and indigent defense systems must compete for resources with other, more politically palatable causes.⁶⁷ Where political expediency encourages eschewing the issue, and where “current constitutional law . . . leaves legislatures free to underfund indigent defense,”⁶⁸ a political solution seems improbable. That being the case, advocates should necessarily focus on the development of a legal strategy.

VIII. THE MOST DRASTIC AND MOST APPROPRIATE REMEDY: REFORM THROUGH RESURGENCE OF THE STRUCTURAL INJUNCTION

As several scholars have argued, the unique characteristics of the indigent defense crisis make it an ideal candidate for reform through the use of structural injunctions. A structural injunction, “in addition to enjoining the defendant institution from acting in a particular unconstitutional fashion, order[s] forward-looking, affirmative steps to prevent future deprivations.”⁶⁹ This immensely powerful judicial tool has its origins in the seminal public school desegregation cases of the 1950s.⁷⁰ Structural injunctions gained some prominence throughout the 1970s as an instrument of reform in the contexts of prison administration, public housing, and mental health care,⁷¹ though the use of the remedy is generally considered to have faded since that time.⁷² Because the indigent defense crisis is both unsuited to resolution through post-conviction procedural remedies, and is unlikely to be cured by the political process, attack through structural injunction

66. Gideon’s *Promise Unfulfilled*, *supra* note 51, at 2067-68 (“Criminal defendants comprise a political constituency with little, if any, leverage; indeed, many felony convicts are formally disenfranchised. Public choice theory clearly predicts, and experience demonstrates, that indigent defense will be undersupported.” (footnote omitted)).

67. See Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 *YALE L.J.* 2694, 2700 (2013) (“Although the need for greater resources for indigent defense services may be obvious, it is here that political will falters most, for equally obvious reasons. With clamoring demand for dwindling public funds for schools, hospitals, roads and bridges, public transportation, firefighters, and police officers, it is not surprising that more money for lawyers representing alleged criminals is not high on anyone’s list. Generating the will to provide these crucial resources is an enormous challenge.”).

68. Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 *WASH. & LEE L. REV.* 883, 904 (2013).

69. Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It’s Still Moving!*, 58 *U. MIAMI L. REV.* 143, 144 (2003).

70. *Id.* at 172 n.2. (“The birth of the modern structural reform injunction can be traced to *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955), which directed the district courts to implement the right to a non-segregated education.”).

71. 9 *WEST’S FED. ADMIN. PRAC.* § 11255 (2016).

72. Gilles, *supra* note 68, at 145 (“There are no contemporary examples of bold, *Brown*-like reformist judicial enterprises.”).

may well represent the only remaining method for effecting *Gideon's* now half-century old promise.

A handful of cases filed in multiple jurisdictions in recent years indicate that the structural injunction has not escaped the notice of indigent defense reform advocates. These cases, generally brought against states and municipalities and claiming affirmative injunctive relief based on Sixth Amendment violations, present a highly perplexing question: what legal standard applies to claims of denials of substantive Sixth Amendment rights? Should entitlement to injunctive relief be governed by the generally accepted standard for awarding injunctive relief, or should plaintiffs be additionally required to meet the ineffective assistance of counsel standard established by *Strickland*? The distinction between these alternatives is immensely important in determining the viability of the structural injunction approach.⁷³ If courts require that plaintiffs meet *Strickland's* requirements, then plaintiffs will be barred from bringing suits based on any pre-conviction Sixth Amendment violation, as no "outcome" will exist to allow analysis of *Strickland's* prejudice prong.⁷⁴ Additionally, where plaintiffs proceed with post-conviction civil actions for structural injunction, *Strickland's* incredibly burdensome standards might significantly limit the number of potentially successful actions, as many plaintiffs will simply be unable to demonstrate either serious error or substantial prejudice.

While it seems clear that civil claims based on Sixth Amendment violations should not require plaintiffs to meet the *Strickland* test for ineffective representation,⁷⁵ precisely what the alternative is remains unclear. Where

73. For an extensive review of the various standards applied by the courts reviewing Sixth Amendment challenges to defective public defense systems, see Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443, 462 (2010).

74. See, e.g., *Platt v. State*, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996) ("Here, Platt seeks to enjoin the Marion County public defender system because it effectively denies indigents the effective assistance of counsel. However, a violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial. This prejudice is essential to a viable Sixth Amendment claim and will exhibit itself only upon a showing that the outcome of the proceeding was unreliable. *Id.* Accordingly, the claims presented here are not reviewable under the Sixth Amendment as we have no proceeding and outcome from which to base our analysis.") (citing *Strickland*, 466 U.S. at 687); *Chiang, supra* note 72, at 462 (arguing "the lesson of Platt is that unless the court understands that *Strickland* is wholly inapplicable to pre-conviction claims, plaintiffs with even the most egregious of Sixth Amendment rights violations will see their claims fail.").

75. See *New York Cty. Law. Ass'n v. State*, 763 N.Y.S.2d 397, 412 (N.Y. Sup. Ct. 2003) (holding that a Sixth Amendment "claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case and therefore this court finds the more taxing two-prong *Strickland* standard used to vacate criminal convictions inappropriate in a civil action that seeks prospective relief.") (citing *New York Cty. Law. Ass'n v. State*, 745 N.Y.S.2d 376 (N.Y. Sup. Ct. 2002)) (internal quotations omitted). See also *Hurrell-Harring v. State*, 930 N.E.2d 217, 225 (N.Y. 2010) ("Collateral preconviction claims seeking prospective relief for absolute, core denials of the right to the assistance of counsel cannot be understood to be incompatible with *Strickland*. These are not the sort of contextually sensitive claims that are typically involved when ineffectiveness is alleged. The basic, unadorned question presented by such claims where, as here, the

Strickland has been held not to apply, courts have applied the general standard for entitlement to injunctive relief in which the plaintiff(s) must demonstrate “the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.”⁷⁶ While the uncertainty underlying the injunctive relief standard is problematic for developing a systemic Sixth Amendment violation litigation model, if these claims continue to be brought, a clearer test will undoubtedly emerge. Whatever the precise contours of the eventual test, a recent Supreme Court decision confirms that where it is met, the nature and scope of the affirmative equitable remedies that a court may permissibly impose on government is vaster than ever before.⁷⁷

IX. *BROWN V. PLATA* AND EXPANSION OF THE STRUCTURAL INJUNCTION

In 2011, the Supreme Court decided *Brown v. Plata*, a consolidated case arising from two class action suits alleging overcrowding and inadequate medical care in California prisons in violation of the Eighth and Fourteenth Amendments.⁷⁸ In the first of the underlying cases, *Coleman v. Wilson*,⁷⁹ the United States District Court for the Eastern District of California found that California’s prison system was responsible for systemic violations of mentally ill state prisoners’ Eighth Amendment right to be free from cruel and unusual punishment.⁸⁰ Upon that finding, the court ordered the state prison administrator:

[T]o develop and implement a series of forms, protocols, and plans in consultation with court-appointed experts. . . . [And] also recommended appointment of a special master for a period of three years to (1) consult with the court concerning the appointment of experts; (2) monitor compliance with court-ordered injunctive relief; (3) report to the court in twelve months on the adequacy of suicide prevention; and (4) perform such additional tasks as the court may deem necessary.⁸¹

The second of the underlying cases involved similar Eighth Amendment claims based on systemically deficient medical care in California’s prisons.⁸² The Defendants admitted that California’s prison medical system was unconstitutionally defective and “stipulated to a remedial injunction. The State

defendant-claimants are poor, is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel’s performance was inadequate or prejudicial.”); *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (holding that *Strickland* is “inappropriate for a civil suit seeking prospective relief. The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the ‘ineffectiveness’ standard may nonetheless violate a defendant’s rights under the sixth amendment.”).

76. *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974).

77. *See Brown v. Plata*, 563 U.S. 493 (2011).

78. *Id.*

79. *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995)

80. *Id.* at 1297.

81. *Id.*

82. *Brown*, 563 U.S. at 510-11.

failed to comply with that injunction, and in 2005 the court appointed a Receiver to oversee remedial efforts.⁸³ After nearly a decade of judicial oversight, the plaintiffs in both *Coleman* and *Plata* concluded that the ongoing violations of prisoners' constitutional rights would not be remedied without a significant reduction in the overall prison population.⁸⁴ The plaintiffs in both cases moved to convene a three judge panel which, under the Prison Litigation Reform Act ("PLRA"),⁸⁵ had the authority to order the State to reduce the prison population.⁸⁶ After a two week trial, the three-judge panel ordered that California "reduce its prison population to 137.5% of the prisons' design capacity within two years."⁸⁷ That order would require the release of 46,000 California state prisoners.⁸⁸ The state appealed the order of the three-judge panel to the U.S. Supreme Court.⁸⁹

At the outset of the majority opinion in *Brown*, Justice Kennedy acknowledges the sheer magnitude of the remedy granted by the three-judge panel, noting its "unprecedented sweep and extent."⁹⁰ However, Justice Kennedy reasoned, while courts must be deferential to the administrative arms of the state, courts must also abide by their obligation to enforce the constitutional rights of all persons.⁹¹ That obligation is not less compelling merely "because a remedy would involve an intrusion into the realm of prison administration."⁹²

Under the PLRA, before implementing a prisoner release, the three-judge panel must have determined "that the relief [was] narrowly drawn, extend[ed] no further than necessary, and [was] the least intrusive means necessary to correct the violation of the Federal right."⁹³ After reviewing the extensive remedial efforts undertaken by the District Court in both *Coleman* and *Plata*, the Court found that "the District Courts were not required to wait to see whether their more recent efforts would yield equal disappointment."⁹⁴ The Court found that the release order was not impermissibly broad because it might encompass prisoners who were not among the class of plaintiffs suing.⁹⁵ Nor did the Court find the release order overbroad because it "encompass[ed] the entire prison system, rather than separately assessing the need for a population limit at every institution,"⁹⁶ or

83. *Id.* at 507.

84. *Id.* at 509.

85. The PLRA provides in relevant part that "In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court." 18 U.S.C. § 3626(a)(3)(B) (2012).

86. *Brown*, 563 U.S. at 508-11.

87. *Id.* at 509-10.

88. *Id.*

89. *Id.*

90. *Id.* at 501.

91. *Id.* at 510-11.

92. *Id.* at 511.

93. *Id.* (internal quotations omitted) (citing 18 U.S.C. §3626(a)(3)(E)).

94. *Id.* at 516.

95. *Id.* at 531-32.

96. *Id.* at 532.

because it intruded on the State's authority to administer its prisons.⁹⁷ Finally, the State had not proposed any reasonable alternative to the release order, and decades of remedial effort had failed to produce one.⁹⁸ As Justice Kennedy explained:

The State's desire to avoid a population limit, justified as according respect to state authority, creates a certain and unacceptable risk of continuing violations of the rights of sick and mentally ill prisoners, with the result that many more will die or needlessly suffer. The Constitution does not permit this wrong.⁹⁹

The Court elaborated on the scope of courts' authority to craft affirmative injunctive remedies generally. "Once invoked, the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies" (though in this case, the PLRA required narrow tailoring).¹⁰⁰ Courts additionally retain broad and flexible authority to supervise remedial orders and make necessary modifications.¹⁰¹ A court may "invoke[] equity's power to remedy a constitutional violation by an injunction mandating systemic changes to an institution [and] has the continuing duty and responsibility to assess the efficacy and consequences of its order."¹⁰² While the Court reasoned that the state and its administrative entities deserved at least some deference, it ruled that there was nothing in the three-judge panel's order that was violative of either the district court's equitable authority, or the specific limitations imposed by the PLRA.¹⁰³ Justice Kennedy's opinion concludes, the "extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding. The relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA. The State shall implement the order without further delay."¹⁰⁴

The decision in *Brown* was accompanied by immense critical backlash.¹⁰⁵ The general tone of the criticism is well-encapsulated by Justice Scalia's blistering dissent, which begins by describing the majority's holding as "perhaps the most radical injunction issued by a court in our Nation's history," and "a judicial travesty" that "ignores bedrock limitations on the power of Article III judges, and takes federal courts wildly beyond their institutional capacity."¹⁰⁶

97. *Id.* at 533.

98. *Id.*

99. *Id.*

100. *Id.* at 538 (citing *Hutto v. Finney*, 437 U.S. 678, 688 n.9 (1978)).

101. *Id.* at 1946.

102. *Id.* (citing *New York State Assn. for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 967 (2d Cir. 1983)).

103. *Id.*

104. *Id.* at 545.

105. *See id.* at 550 (Scalia, J., dissenting).

106. *Id.*

Citing his own concurrence in *Mine Workers v. Bagwell*,¹⁰⁷ Justice Scalia outlined the origins of the structural injunction and concluded that historically, equitable remedies such as injunctions could not require any ongoing court supervision of a litigant's conduct.¹⁰⁸ Injunctions were traditionally limited to the requirement of no more than a "single simple act."¹⁰⁹ Thus, the ongoing administrative supervision required by many structural injunctions is simply an impermissible adulteration of an otherwise legitimate and long-established equitable remedy.¹¹⁰ Additionally, structural reform litigation, Justice Scalia argued, has the unavoidable consequence of usurping the policy choices of the branches they legitimately belong to and replacing them with that of unelected judges.¹¹¹

The most significant aspect of Justice Scalia's dissent in *Brown* is his conclusion that the decision "not only affirms the structural injunction but vastly expands its use, by holding that an entire system is unconstitutional because it *may produce* constitutional violations."¹¹² Other commentators have similarly concluded that *Brown* represents a watershed moment for the structural injunction, and very likely signals its potentially burgeoning use as a tool for systemic civil rights reform.¹¹³ If the vast structural injunction at issue in *Brown* can be upheld even in spite of the extreme limitations, such as the narrow tailoring requirement imposed by the PLRA, then it is difficult to imagine what, if any, affirmative injunctive orders would be impermissibly overbroad when aimed at addressing systemic rights violations like that at issue in *Brown*.

X. PERFECT PARALLELS: THE LEGAL RATIONALE OF *BROWN V. PLATA* AS APPLIED TO THE INDIGENT DEFENSE CRISIS

The structural obstacles underlying the persistence of the constitutional violations at issue in *Brown v. Plata* are markedly similar to those underlying the entrenchment of unconstitutionally defective indigent defense services. The Court

107. *International Union, UMWA v. Bagwell*, 512 U.S. 821, 841-42 (1994) (Scalia, J., concurring).

108. *Id.*

109. *Id.* at 841 (citing H. MCCLINTOCK, PRINCIPLES OF EQUITY § 15, at 32-33 (2d ed. 1948)).

110. *Id.* at 842-43.

111. *Brown*, 569 U.S. at 558 (Scalia, J., dissenting).

112. *Id.* at 555.

113. See Alicia Bower, *Unconstitutionally Crowded: Brown v. Plata and How the Supreme Court Pushed Back to Keep Prison Reform Litigation Alive*, 45 LOY. L.A. L. REV. 555, 567 (2012) ("With *Brown v. Plata*, the U.S. Supreme Court upheld perhaps the most extreme remedial order that it has ever issued. The structural injunction that the Court upheld called for the early release of a shockingly large number of California inmates. Beyond the practical implications of the order, the Court in *Plata* clearly signaled that structural injunctions in prison reform litigation remain a valid exercise of judicial power. Even more, the Court may have signaled an expansion of the scope of the structural injunction remedy by focusing on the potential, rather than the actual, constitutional deficiencies in the California prison system. The Court reached its conclusion, moreover, despite a congressional statute that was aimed at preventing precisely this type of judicial decision-making in this context; the Court ultimately pushed back on the PLRA in an effort to reaffirm its own broad equitable powers.").

in *Brown* described the rights violations attendant to the prison system as “rarely susceptible of simple or straightforward solutions. In addition to overcrowding the failure of California’s prisons to provide adequate medical and mental health care may be ascribed to *chronic and worsening budget shortfalls, a lack of political will in favor of reform, inadequate facilities, and systemic administrative failures.*”¹¹⁴

The Court also used the political failure to remedy the systemic violations as further support for judicial intervention. “The Court cannot ignore the political and fiscal reality behind this case. California’s Legislature has not been willing or able to allocate the resources necessary to meet this crisis . . . There is no reason to believe it will begin to do so now, when the State of California is facing an unprecedented budgetary shortfall.”¹¹⁵ The obvious similarities between the structural nature of the violations at issue in the California prison system and the indigent defense crisis compel the conclusion that rampant Sixth Amendment violations might also be addressed through sweeping injunctive orders.

While structural reform litigation on the scale of that at issue in *Brown v. Plata* will without a doubt encounter vehement opposition as violating separation of powers, federalism, comity, and judicial restraint, those concerns may not be sufficient to stymie the approach. At least one federal district court decision ordering fairly extensive affirmative injunctive relief against a municipal public defender system has already cited *Brown* to establish the extent of the district court’s equitable authority. *Wilbur v. City of Mount Vernon*¹¹⁶ involved the public defense system utilized by the cities of Burlington and Mount Vernon, Washington. The cities’ municipal court systems relied on a traditional public defender’s office as well as privately contracted, appointed defense counsel.¹¹⁷ The district court found that inappropriately low funding and understaffing of private appointed counsel created a system which “amounted to little more than a ‘meet and plead’ system.”¹¹⁸

Plaintiffs challenged the adequacy of the system as a whole, and alleged that it directly and foreseeably resulted in the violation of criminal defendants’ rights under the Sixth Amendment.¹¹⁹ Consistent with the Supreme Court’s reasoning in *Brown v. Plata*, the court focused not only on the actual representational inadequacies experienced by plaintiff class members, but also on the *potential and conceivable* violations that were likely to occur as result of the dysfunctional system.¹²⁰ The court ruled that the endemic Sixth Amendment violations were the foreseeable result of policy choices made by city officials.¹²¹

114. *Brown*, 563 U.S. at 525 (emphasis added).

115. *Id.* at 530.

116. *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

117. *Id.* at 1124-25.

118. *Id.* at 1124.

119. *Id.* at 1123.

120. *Id.* at 1127 (“The Court does not dispute the fact that many, if not the vast majority, of the plaintiff class obtained a reasonable resolution of the charges against them. The problem is not the ultimate disposition: if plaintiffs were alleging that counsel had affirmatively erred and obtained a

Applying the controlling Ninth Circuit standard, the court ruled that Plaintiffs had demonstrated that they were subjected to irreparable injury and that other adequate legal remedies were unavailable, thus entitling the class to injunctive relief.¹²² Citing *Brown* for the court's duty to enforce the constitutional rights of all persons and the extent of the court's equitable powers, the court entered an extensive and detailed injunction requiring, among other things, that the cities reevaluate their indigent defense provision contracts, hire additional supervisory staff, comply with a rigorously detailed supervision schedule, and submit numerous, frequent, and detailed performance reports to the court at regular intervals.¹²³ While the relief ordered in *Wilbur* is closer to the scale of the relief ordered in some pre-*Brown* affirmative injunction cases dealing with indigent defense systems, than it is to the scale of *Brown* itself, the district court displayed few qualms with ordering significant and costly reforms of the municipal indigent defense systems upon a finding of systemic rights violations.¹²⁴

XI. YOUNGER ABSTENTION PRESENTS OBSTACLES

Despite the broad inherent equitable power of federal courts apparent in *Brown*, other doctrines may present serious obstacles for the structural injunction reform approach. Specifically, the abstention doctrine announced in the Supreme Court's seminal decision, *Younger v. Harris*,¹²⁵ may prevent federal courts from enforcing structural reform orders if that enforcement would result in federal interference with pending state court criminal prosecutions. The Court in *Younger* held, "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury."¹²⁶ Justice Black described the constitutional underpinnings of *Younger* abstention:

This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government

deleterious result, the Sixth Amendment challenge would have been brought under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), rather than *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The point here is that the system is broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned.").

121. *Id.*

122. *Id.* at 1133 (citing *Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1988)).

123. *Id.* at 1134-37.

124. *See id.*

125. *Younger v. Harris*, 401 U.S. 37 (1971).

126. *Samuels v. Mackell*, 401 U.S. 66, 69 (1971) (describing the Court's holding in *Younger*).

will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as ‘Our Federalism.’¹²⁷

Despite the existence of cases like *Wilbur*, *Younger* concerns remain an ever-present feature of any attempt to force federal intervention into state court criminal prosecutions.

Recently, the United States District Court for the Middle District of Louisiana dismissed a class action suit challenging the constitutional adequacy of certain practices of the Orleans Parish Public Defender “as a matter of federalism and comity.”¹²⁸ Likely in anticipation of the enforcement problems presented by *Younger* and its progeny, the original iteration of the Plaintiffs’ complaint exclusively sought declaratory relief,¹²⁹ though injunctive claims were added in their amended complaint and in their second amended complaint.¹³⁰

Despite Plaintiffs’ attempts to limit the relief requested, the court concluded that “Plaintiffs [had] clearly requested relief which would inevitably cause [the] Court to violate comity and federalism principles.”¹³¹ The Court placed particular emphasis on its inability to remedy violations of even limited injunctive and declaratory orders without impermissibly interfering with Louisiana’s state courts.¹³² The court soundly rejected its ability to engage in the type of ongoing supervision like that entertained in *Brown*, explaining, “[a]ny declaratory judgment or injunction entered by this Court would inevitably lead it to become the overseer of the Orleans Parish criminal court system, a result explicitly condemned by the United States Supreme Court in *Younger*”¹³³ Despite the district court’s

127. *Younger*, 401 U.S. at 44.

128. *Yarls v. Bunton*, NO. 16–31–JJB–RLB, 2017 WL 424874, at *7 (M.D. La. Jan. 31, 2017).

129. Class Action Complaint at 15–16, *Yarls*, NO. 16–31–JJB–RLB, 2016 WL 212997.

130. Amended Class Action Complaint at 14–15, *Yarls*, NO. 16–31–JJB–RLB, 2016 WL 4061657; Second Amended Class Action Complaint at 16–18, *Yarls*, NO. 16–31–JJB–RLB, 2016 WL 4975341; see *Yarls*, 2017 WL 424874 at *6.

131. *Yarls*, 2017 WL 424874 at *6.

132. *Id.* (“On its face, an injunction that requires the Defendants to ‘implement a plan’ to provide the class with competent counsel may seem innocuous enough, but, what would happen if the Defendants failed to implement the plan? Would this Court have to order attorneys for certain indigents? To what extent would this Court be encroaching upon the role of the state judges in individual prosecutions? What would happen if inconsistent orders were issued? What if the Defendants were nominally complying with the order by assigning counsel to indigents but those attorneys were not ‘competent?’ Would the Court have to make a ‘competence’ determination pretrial? Would a class member be able to enforce the injunction and find that counsel was ineffective at the pretrial stage thereby circumventing the post-conviction habeas process? What if Defendants still refused to comply? Would this Court order the state courts to release the incarcerated members who were still on the waitlist? The Court declines to issue injunctive relief because it will inevitably lead this Court to engage in an ongoing audit of the criminal cases in Orleans Parish.”)

133. *Id.* at *3.

finding that “[i]t is clear that the Louisiana legislature is failing miserably at upholding its obligations under *Gideon*,” it dismissed the case.¹³⁴

XII. CONCLUSION

The ongoing failure of our legal system to provide constitutionally adequate indigent services has rightfully been recognized as a national embarrassment. Fortunately, the crisis is receiving the attention of dedicated advocates, and academic and legal scholars have continued to look for new approaches to remedy the rampant violations of the constitutional rights of the impoverished accused. This comment has reviewed a few the potential solutions frequently touted as the best way forward. However, as *Gideon* continues to age, the necessity of an impactful judicial remedy becomes more glaring, even if that remedy might be controversial in its doctrinal origins, scope, and role in our system of government. Structural reform litigation seeking expansive injunctive orders may have the very real potential to begin addressing the indigent defense crisis *today*. The Supreme Court has demonstrated that our nation’s courts may order our constitutionally defective institutions to fall into line. If the structural injunction can be reconciled with our system of federalism and the limited power of federal courts, and does in fact undergo a modern resurgence, perhaps we will see *Gideon*’s promise fulfilled after all.

134. *Id.* at *7.