

1-1-2008

Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look

Shawn Armbrust

Mid-Atlantic Innocence Project American University, Washington College of Law, innocenceproject@wcl.american.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/twlj>

 Part of the [Evidence Commons](#)

Recommended Citation

Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. Third World L.J. 75 (2008), <http://lawdigitalcommons.bc.edu/twlj/vol28/iss1/2>

This Essay is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Third World Law Journal by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

REEVALUATING RECANTING WITNESSES: WHY THE RED-HEADED STEPCHILD OF NEW EVIDENCE DESERVES ANOTHER LOOK

SHAWN ARMBRUST*

Abstract: Courts have generally disfavored evidence from recanting witnesses. This article examines the standards laid out in *Berry v. State* and *Larrison v. United States* that courts use when considering motions for new trials based on new evidence. It next explores some of the reasons courts have disfavored recantations. Recent cases involving DNA exonerations present useful lessons for evaluating recantations and weaken many of the reasons courts have used to reject such evidence. Because DNA evidence is not readily available in most cases, however, the current framework has led to incarceration of innocent defendants. Given these lessons, courts must find new means of assessing the testimony of recanting witnesses. Courts should adopt a modified version of the *Larrison* standard, which would require corroboration rather than proof of truth. Appellate courts should not apply a deferential standard of review to summary denial of motions for new trials based on recantations.

INTRODUCTION

On July 9, 1977, police found Cathleen Crowell Webb walking near a Homewood, Illinois park.¹ When the bleeding, crying, and disheveled sixteen-year-old told police she had been kidnapped by three men and raped in their car, they had every reason to believe her.² Her story became even more convincing when she was examined at a local hospital, where doctors found vaginal trauma and carvings on her ab-

* Executive Director, Mid-Atlantic Innocence Project. J.D., Georgetown University Law Center, 2004; B.S., Northwestern University, 1999. I am particularly grateful to Dan Medwed for encouraging me to pursue this article and to Don Salzman and David Eppler for giving me the freedom to write it. I also would like to thank Tim Sparapani for his patient assistance and support.

¹ Scott Kraft, *Nation Debates Jailed Man's Innocence: Recantation Puts Rape Case in Spotlight*, L.A. TIMES, Apr. 21, 1985, § 1, at 1; David Remnick, *Making Right Her Wrong: Cathy Webb's Public Mission After Recanting the Rape Tale*, WASH. POST, Apr. 16, 1985, at B1.

² See Kraft, *supra* note 1.

domen.³ After vividly describing the attack to police and looking through hundreds of mug shots, she identified her attacker as Gary Dotson, a high-school dropout with a criminal record.⁴ Although Dotson adamantly protested his innocence, he was convicted in 1979 and sentenced to twenty-five to fifty years in prison.⁵

Webb ultimately married and moved to New Hampshire, becoming a born-again Christian.⁶ That conversion prompted her to recant her testimony, admitting that she had fabricated the rape story because she feared that she was pregnant.⁷ Dotson immediately requested a new trial and received an evidentiary hearing, but the judge ultimately found that Webb's trial testimony was more credible than her recantation.⁸ The ensuing drama became the intense focus of the media, with newspapers, magazines and morning television shows profiling the case and engaging in a national debate on the way courts treat recanting testimony.⁹ Dotson ultimately was paroled—although not pardoned—after the Illinois governor personally presided over a televised hearing on Dotson's clemency request.¹⁰

Dotson did not stop trying to prove his innocence, however, and, in 1989, he became the first person in the United States to be exoner-

³ *Id.*

⁴ *Id.*; see also Kevin Klose, *Illinois Governor Questions Dotson, Webb: 'Extraordinary' Rape Case Attracts Wide Audience*, WASH. POST, May 10, 1985, at A3 (noting Dotson had several encounters with police prior to his arrest for Webb's rape).

⁵ *People v. Dotson*, 516 N.E.2d 718, 719 (Ill. App. Ct. 1987); JIM DWYER ET AL., *ACTUAL INNOCENCE* 39–40 (2000); Alan Dershowitz, *Our System of Justice Does Make Mistakes*, ST. PETERSBURG TIMES (Florida), Aug. 19, 1989, at 19A.

⁶ Kraft, *supra* note 1.

⁷ *Id.*

⁸ See *Dotson*, 516 N.E.2d at 718–19, 721–22 (affirming trial court's finding that Webb's 1979 trial testimony was more credible than her 1985 evidentiary hearing testimony).

⁹ See, e.g., Laurent Belsie, *Recanted Testimony: Issue Tests Criminal-Justice Credibility*, CHRISTIAN SCI. MONITOR, Apr. 19, 1985, at 5 (discussing the debate among law professors and women's groups that was provoked by the recantation in the Dotson case); Peter W. Kaplan, *NBC, at No. 1, Snaps 10-Year Ratings Decline*, N.Y. TIMES, June 1, 1985, at 46 (explaining that CBS interrupted its live coverage of the Claus von Bülow trial to show the Dotson rape hearings); Kraft, *supra* note 1 (relaying that Webb apologized to Dotson's mother on national television and that a Senate subcommittee was holding hearings on the way courts treat recanted testimony); Remnick, *supra* note 1 (discussing Webb's public campaign to secure Dotson's exoneration by appearing on morning shows, in *People* magazine, and on the Phil Donahue show). The Dotson case was also the focus of legal scholarship; some authors argued, based in part on the Dotson case, that courts should reevaluate the way they treat recanting witnesses. See, e.g., Janice J. Repka, Comment, *Rethinking the Standard for New Trial Motions Based upon Recantations as Newly Discovered Evidence*, 134 U. PA. L. REV. 1433, 1454–58 (1986) (arguing for a more relaxed "reasonable probability approach" for judging the credibility of recantations).

¹⁰ *New Trial Denied in Rape in Which Accuser Recanted*, L.A. TIMES, Aug. 20, 1985, at A7.

ated based on DNA testing, proving conclusively that Webb's recantation was true.¹¹ Since that time, more than 200 innocent prisoners have been exonerated based on DNA testing, and these ever-increasing numbers have sensitized the public and policymakers as never before to the problems in the criminal justice system.¹² These exonerations have conclusively proven that much of the evidence frequently relied upon by courts—such as informant testimony, accomplice testimony, eyewitness testimony, and confessions—are more unreliable than anyone ever realized.¹³ Moreover, the study of DNA exonerations has led to tremendous reforms all over the country, such as the improvement of eyewitness identification procedures, the videotaping of police interrogations, crime lab reform, and the creation of “innocence commissions” that recommend reforms in individual states.¹⁴ In addition to reforms that would prevent wrongful convictions, at least forty-two states have laws that allow prisoners to seek post-conviction DNA testing that would help prove their innocence.¹⁵ Indeed, it would not be an exaggeration to say that these exonerations have had a greater impact on criminal justice policy than any other event in recent American history.

As other commentators have observed, however, the reforms that have focused on correcting wrongful convictions have focused almost exclusively on cases involving DNA evidence.¹⁶ Unfortunately, DNA evi-

¹¹ DWYER ET AL., *supra* note 5, at 39–40.

¹² Innocence Project, About Us: Mission Statement, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Jan. 2, 2008).

¹³ See generally DWYER ET AL., *supra* note 5, (chronicling the stories of wrongly convicted individuals who were eventually exonerated by DNA evidence).

¹⁴ See S.B. 351, 423d Gen. Assem., Reg. Sess. (Md. 2007) (providing for the regulation of state crime labs); Innocence Project, <http://www.innocenceproject.org/Content/415.php> (last visited Jan. 2, 2008) (listing North Carolina, Wisconsin, California, Connecticut, Illinois, and Pennsylvania as states that have each created commissions to study the problem of wrongful convictions and recommend state reforms); Innocence Project, Fix the System: Priority Issues: Eyewitness Identification, <http://www.innocenceproject.org/fix/Eyewitness-Identification.php> (last visited Jan. 2, 2008) (providing a list of jurisdictions that have implemented eyewitness identification reforms, either through the legislature, the courts, or other means). See generally Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1131 (2005) (listing the jurisdictions that require the recording of custodial interrogations as a means of safeguarding against false confessions).

¹⁵ Innocence Project, Fix the System: Priority Issues: DNA Testing Access, <http://www.innocenceproject.org/fix/DNA-Testing-Access.php> (last visited Jan. 2, 2008).

¹⁶ See, e.g., Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 715–18 (2005) (examining state procedures for prisoners with newly discovered non-DNA evidence of inno-

dence is unavailable in the vast majority of cases, either because there was no biological evidence present at the initial crime scene, because evidence initially available has been lost or destroyed, or because evidence that has been saved is no longer viable for testing because it is too degraded.¹⁷ Moreover, because DNA tests are now more widely available before trial, the pool of cases in which post-conviction DNA testing is available inevitably will shrink.¹⁸ Thus, it will be increasingly important in the future to provide improved post-conviction mechanisms for prisoners who have newly discovered non-biological evidence of innocence, such as “confessions by the actual perpetrator, statements by previously unknown witnesses, and/or recantations by [key] trial participants.”¹⁹

There are significant roadblocks for any defendant with newly discovered non-DNA evidence of innocence. The type of evidence most emphatically disfavored by courts, however, is the kind proven reliable when Gary Dotson was exonerated: the recantation of key witnesses like Webb.²⁰ It is fair to say that courts are almost uniformly skeptical of recanting witnesses, and the predominant view still seems to be the one espoused by the Court of Appeals of New York in 1916: “There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character.”²¹ It is undoubtedly true that concerns about recanting witnesses—witnesses who have lied on at least one occa-

cence and offering suggestions for making those procedures more equitable for innocent defendants).

¹⁷ See *Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 221 (2002) (statement of Professor Barry Scheck, Co-Director of the Innocence Project and Member of New York State’s Forensic Science Review Board) (estimating that approximately eighty percent of felony cases do not involve biological evidence amenable to DNA testing); Nina Martin, *Innocence Lost*, S.F. MAG., Nov. 2004, at 78, 105 (“only about ten percent of criminal cases have any biological evidence”).

¹⁸ Medwed, *supra* note 16, at 657.

¹⁹ See *id.* at 658.

²⁰ See Repka, *supra* note 9, at 1434 (defining a recantation as “a formal, intentional renunciation by a witness of her former testimony”).

²¹ *People v. Shilitano*, 112 N.E. 733, 736 (N.Y. 1916) (finding witness’ recantation incredible and denying defendant’s motion to grant a new trial); see Sharon Cobb, Comment, *Gary Dotson as Victim: The Legal Response to Recanting Testimony*, 35 EMORY L.J. 969, 981 (1986). A Lexis search of the phrase “there is no form of proof so unreliable as recanting testimony” found thirty-four hits between the time of Dotson’s release and September 27, 2007. <http://www.lexis.com> (in MEGA database, type in terms and connectors search: “there is no form of proof so unreliable as recanting testimony,” and restrict date from 8/15/1989 to 9/27/2007).

sion—are valid, and some recantations clearly lack any specificity or indicia of reliability.²² While some of this skepticism is fair, such a blanket mistrust of recantations seems outdated in the era of DNA exonerations, when we know that testifying under oath does not always produce the most reliable information.²³

This article argues that the longstanding skepticism of the judiciary toward recantations deserves reexamination; some DNA exonerations have proven the unreliability of certain forms of testimony and the reliability of certain recanting witnesses. Part I of this article examines the standards used when courts consider recantations as newly discovered evidence in a motion for a new trial. Part II examines some of the reasons why courts are strongly skeptical of recantations. Part III examines the lessons of DNA exonerations and explains why some of those lessons undercut most of the reasons why courts have traditionally disfavored recantations. Part IV proposes a new framework for evaluating recantations, which more effectively balances the concerns of Part II with the new realities discussed in Part III. The new framework calls on courts to abandon requirements of truthfulness in favor of a more relaxed corroboration standard, and proposes that courts eliminate deferential standards of review when new trial motions are summarily dismissed.

I. STANDARDS FOR CONSIDERING RECANTATIONS

People both inside and outside the legal system frequently presume that the post-conviction and appellate processes in criminal cases are well suited to the task of rooting out wrongful convictions. This opinion, however, ignores the reality that appellate and post-conviction procedures are almost exclusively focused on correcting

²² See Cobb, *supra* note 21, at 982 (“When a witness substantially recants his or her previous testimony, it is immediately apparent that on one occasion or the other, he or she told something other than the truth.”). In my current capacity, I have seen recantations that are extremely incredible, such as letters saying “I’m sorry I lied about you,” and containing no other indications of why someone might have lied. I, however, also have seen recantations that seem quite credible, such as repeated public statements explaining exactly why a witness lied at trial, for reasons ranging from police pressure to malice toward the defendant. It is easy to see why courts would be reluctant to grant new trials in the former cases, but recantations, as any other type of evidence, can vary considerably in reliability.

²³ See, e.g., DWYER ET AL., *supra* note 5, 142–43, 153 (detailing the witness testimonies implicating Ron Williamson for murder and rape and his post-conviction exoneration through DNA evidence). I do not intend to suggest that most testimony elicited at trial is unreliable. Rather, my intention is to indicate that testimony elicited at trial is not *always* more reliable than a recanting statement, as courts and judges seem to assume.

legal and constitutional errors, not on correcting factual errors.²⁴ The presumption of innocence that cloaks criminal defendants no longer exists after a defendant is convicted, and the burden of proving innocence after conviction is therefore tremendous.²⁵ In addition, courts are skeptical of newly discovered evidence claims because they are concerned about finality, believe firmly in the jury's ability to make factual determinations, and have inherent doubts about the validity of evidence that is discovered after trial.²⁶

Despite these obstacles, there are procedures in state courts for prisoners who want to bring forward new evidence of innocence.²⁷ The primary vehicle for a defendant with newly discovered evidence of innocence is a motion for a new trial.²⁸ In some states, newly discovered evidence also can be brought to a court's attention through collateral attack proceedings.²⁹ This article focuses primarily on motions for a new trial because they are the primary vehicle for litigating newly discovered evidence claims and are conceptually similar to collateral attack proceedings and, therefore, can be treated similarly.³⁰ States considering newly discovered innocence claims primarily use or have adopted one of two standards: the *Berry* standard or the *Larrison* standard, with some states offering adaptations outside those schemes.³¹

²⁴ See Medwed, *supra* note 16, at 664.

²⁵ See Schlup v. Delo, 513 U.S. 298, 326 n.42 (1995) (stating that convicted defendants "no longer ha[ve] the benefit of the presumption of innocence" but instead face a strong presumption of guilt).

²⁶ Medwed, *supra* note 16, at 664–65.

²⁷ See *Herrera v. Collins*, 506 U.S. 390, 410–11 (1993); DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF § 1-13, at 55–58 (2001). The primary vehicle for challenging state convictions in federal courts is habeas corpus, which exists to remedy constitutional violations and therefore is not available for claims of newly discovered evidence. Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of Herrera v. Collins*, 42 AM. CRIM. L. REV. 121, 121 (2005).

²⁸ See Medwed, *supra* note 16, at 665 (noting that "every state provides for a motion for new trial on the basis of newly discovered evidence").

²⁹ See WILKES, *supra* note 27, §§ 1-3 to 1-5, at 13–30.

³⁰ Medwed, *supra* note 16, at 665–66; see LARRY W. YACKLE, POSTCONVICTION REMEDIES 31 (1981) (explaining that collateral attacks that mirror a writ of coram nobis are similar to motions for a new trial). "Coram nobis is an ancient common-law writ that provides a means of collateral attack in criminal cases where some event outside the trial record has rendered a conviction fundamentally flawed." Daniel F. Piar, *Using Coram Nobis to Attack Wrongful Convictions: A New Look at an Ancient Writ*, 30 N. KY. L. REV. 505, 505 (2003).

³¹ *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928); *Berry v. State*, 10 Ga. 511 (1851); Tim A. Thomas, Annotation, *Standard for Granting or Denying New Trial in State Criminal Case on Basis of Recanted Testimony—Modern Cases*, 77 A.L.R. 4th 1031, 1037–50 (1990 & Supp. 2007). As is the case with any statement making a generalization about the fifty states, the tests they employ vary widely. See Thomas, *supra*, at 1037–50. That being said, most of them use *Berry*, *Larrison*, or some adaptation of the two. *Id.* A few jurisdic-

Most state courts considering a motion for a new trial based on newly discovered evidence use the standard articulated by the Georgia Supreme Court in *Berry v. State*.³² Under *Berry*, a new trial based on newly discovered evidence should only be granted if the defendant proves that: (1) the evidence has come to his knowledge since the trial, (2) the failure to discover the evidence was not because of a lack of diligence, (3) the evidence is so material that it would probably produce a different verdict if a new trial were granted, (4) the evidence is not merely cumulative, and (5) the evidence does not simply impeach a witness' credibility.³³ The test was not developed in the context of recantations and therefore is applied to other types of newly discovered evidence.³⁴

Unlike the *Berry* standard, the other predominant standard for courts considering new recantation evidence specifically considers the issue of granting new trials based on witness recantations. In *Larrison v. United States*, the court found that,

a new trial should be granted [based on a recanting witness] when, (a) The court is reasonably well satisfied that the testimony given by a material witness is false. (b) That without it the jury *might* have reached a different conclusion. (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.³⁵

The *Larrison* test initially was perceived as being more lenient than the *Berry* test because it has a lower standard of materiality, but commentators have argued that these differences are largely illusory.³⁶ The primary difference between the two tests is that a defendant using the *Larrison* test is only required to prove that the new evidence *might* result in a different verdict, whereas a defendant using

tions, however, have developed different standards, requiring defendants to prove the credibility of the recantation, the materiality of the recantation, or bring forward corroborating evidence. *Id.* at 1048–50, 1052, 1054–55. For purposes of simplicity, this article only addresses the *Berry* and *Larrison* standards.

³² *Berry*, 10 Ga. at 527; Cobb, *supra* note 21, at 974.

³³ *Berry*, 10 Ga. at 527.

³⁴ Cobb, *supra* note 21, at 974–75.

³⁵ *Larrison*, 24 F.2d at 87–88.

³⁶ See Cobb, *supra* note 21, at 976; see also Repka, *supra* note 9, at 1439 (“Regardless of which standard is used, however, nearly all new trial motions based on unknowing use of perjured testimony are routinely denied by the courts because both standards impose an excessive burden on the defendant.”).

the *Berry* test must prove that it *probably* would result in a different verdict.³⁷ The more lenient materiality requirement of the *Larrison* test, however, is mitigated by requiring that the judge be persuaded of the recantation's truthfulness.³⁸ Thus, in practice, which test is applied makes very little difference in the outcome of the case.³⁹

II. REASONS WHY COURTS DISFAVOR RECANTATIONS

As discussed above, whether a court uses the *Berry* or *Larrison* standard makes very little practical difference in the outcome of a case, in part because the standards are not as different as they appear. The more significant reason there is so little difference, however, is the inherent skepticism most courts have toward recantations.⁴⁰ Courts usually approach recantations with a presumption that they are incredible, which means that any defendant pursuing a new trial based on a recantation is facing an uphill battle.⁴¹ Indeed, this reasoning often reflects legitimate trepidation about pieces of evidence whose credibility is extremely difficult to assess. Thus, it is important to understand and consider these reasons in any attempt to fashion a new standard for evaluating recantations.

This section explores some of the reasons—both stated and unstated—for this inherent mistrust of recantations, and isolates seven reasons why courts often find recantations to be unreliable: (1) the perception that any witness who recants is untrustworthy, (2) determinations about the demeanor of the witness during an evidentiary hearing, (3) findings that the other evidence in the case supports the initial guilty verdict, (4) fears that the witness has recanted under duress or because of coercion, (5) close relationships between defendants and witnesses, (6) a desire for finality and concerns about judicial economy, and (7) the desire to prevent the manipulation of courts.

³⁷ *Larrison*, 24 F.2d at 88–89; *Berry*, 10 Ga. at 527; Cobb, *supra* note 21, at 976.

³⁸ *Larrison*, 24 F.2d at 88–89; Cobb, *supra* note 21, at 978.

³⁹ Cobb, *supra* note 21, at 978.

⁴⁰ See Christopher J. Sinnott, Note, *When a Defendant Becomes the Victim: A Child's Recantation as Newly Discovered Evidence*, 41 CLEV. ST. L. REV. 569, 574–75 (1993) (Judicial skepticism toward recantations "has become so universal that it appears to have given rise to an inference that recantation evidence is not trustworthy and should be treated as such absent the movant's ability to persuade otherwise.").

⁴¹ See Repka, *supra* note 9, at 1442 ("Although courts are not required to presume the untrustworthiness of recantation testimony, the long-standing rule that such testimony is suspect and inherently unreliable ultimately produces the same effect.").

A. General Mistrust of Recanting Witnesses

The first reason why courts are reluctant to grant new trials in recantation cases is simply that they mistrust recanting witnesses. Any defendant seeking a new trial based on the testimony of a recanting witness has one immediate and significant hurdle: the defendant is hanging his or her hat on a witness who has either lied under oath or who is wasting a court's time by lying after trial.⁴² As a result, judges have significant problems deciding which version of a story to believe.⁴³ Thus, courts often interpret recantations as evidence of the unreliability of the witness, not the accuracy of the new testimony.⁴⁴ Under *Berry*, such testimony could be classified as immaterial, and under *Larrison*, many courts would find that challenging credibility does not prove the falsity of the trial testimony.⁴⁵ Thus immediate distrust of recanting witnesses—before even hearing their testimony—can make it impossible to satisfy either test.

B. Specific Judgments About Witness Demeanor

The second reason courts disfavor recanting witnesses is because judges frequently find a witness' demeanor at evidentiary hearings to be characteristic of someone who is lying. In most claims involving new evidence, the initial trial court holds the evidentiary hearing in the case.⁴⁶ Thus, the trial court is able to compare the demeanor of the witness when he or she testified at trial to the demeanor of the

⁴² See *Cobb*, *supra* note 21, at 982 (“When a witness substantially recants his or her previous testimony, it is immediately apparent that on one occasion or the other, he or she told something other than the truth.”).

⁴³ See, e.g., *Carpitcher v. Commonwealth*, 641 S.E.2d 486, 489–90 (Va. 2007) (noting that the trial court was unable to determine which version of the witness' testimony was true, because the witness had “testified inconsistently on the same issues on three separate occasions”).

⁴⁴ See, e.g., *People v. Canter*, 496 N.W.2d 336, 341–42 (Mich. Ct. App. 1992) (per curiam) (“Contrary to defendant's contentions, neither the veracity of [the witness'] recanting testimony nor the falsity of her trial testimony has clearly been established.”); *State v. Perry*, 758 P.2d 268, 275 (Mont. 1988) (stating that “recanted testimony demonstrates the unreliability of a witness”); *Carpitcher*, 641 S.E.2d at 489–90.

⁴⁵ See *Carpitcher*, 641 S.E.2d at 493 (holding that recantation was not material to the issue of actual innocence because defendant could not prove the recantation was true). See generally *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928); *Berry v. State*, 10 Ga. 511, 527 (1851).

⁴⁶ *Medwed*, *supra* note 16, at 699.

same witness at an evidentiary hearing.⁴⁷ In many cases, the trial court simply determines that the witness' testimony at trial was simply more convincing than the testimony at the hearing because of the witness' demeanor.⁴⁸ For example, in *State v. Berry*, the trial court found that the recanting witness was unbelievable because he "had been 'somewhat spirited' at trial" but had a "completely flat" affect at the evidentiary hearing.⁴⁹ In *People v. Dotson*, the trial court found "[the victim's] demeanor was consistent with a person making a sincere claim of rape," and found that her memory lapses about certain details at the evidentiary hearing made her seem less credible.⁵⁰ Thus, courts often find the evidentiary hearing testimony to be less credible than the original trial testimony because they are influenced by observations regarding witness demeanor.

C. *Evaluations of the Other Evidence in the Case*

The third reason judges tend to dismiss motions for new trials based on recantation evidence is that they often find the recantation to be outweighed by other evidence introduced at the trial. Under both the *Berry* and *Larrison* standards, the judge must pay varying degrees of attention to the chances of a different jury verdict in the event of a retrial.⁵¹ It therefore makes sense that judges would evaluate the recantation in the context of the other evidence produced at trial, and that frequently is the basis for dismissing the credibility of recantations.⁵² For example, in *State v. Perry*, the court found that the recanting witness' testimony was implausible in part because it contradicted the testimony of other witnesses who testified at trial.⁵³ Thus, when a court evaluates a recantation in context, it often may

⁴⁷ See *People v. Dotson*, 516 N.E.2d 718, 721 (Ill. App. Ct. 1987); *State v. Berry*, No. 01-3359, 2003 WL 735088, at *3 (Wis. Ct. App. Mar. 5, 2003) (not to be confused with *Berry v. State* which is discussed in the text accompanying notes 37-41).

⁴⁸ See, e.g., *Dotson*, 516 N.E.2d at 721; *State v. Berry*, 2003 WL 735088, at *3.

⁴⁹ 2003 WL 735088, at *3.

⁵⁰ 516 N.E.2d at 721.

⁵¹ See *Larrison*, 24 F.2d at 87-88; *Berry*, 10 Ga. at 527.

⁵² See, e.g., *Perry*, 758 P.2d at 275 (finding witness' recantation did not "conform to the testimony of the other witnesses, the evidence presented at trial, the [defendant's] prior statements; nor [did] it account for [the defendant's] whereabouts at the time of the murder").

⁵³ *Id.* at 273; see also *Ashcraft v. State*, 918 S.W.2d 648, 654 (Tex. Crim. App. 1996) (finding that medical testimony at trial supported the recanting witness' trial testimony, not her recantation); *State v. Cason*, No. 01-0809, 2002 WL 109545, at *4 (Wis. Ct. App. Mar. 19, 2002) (per curiam) (finding that the recantation contradicted the physical evidence admitted at trial).

find that the recanting testimony simply is not supported by the other evidence that was introduced at trial.

D. *Fears of Duress or Coercion*

The fourth reason for judicial mistrust is the fear that such recantations are the product of duress or coercion.⁵⁴ Some of this apprehension has its roots in an unfortunate—and highly publicized—reality of our judicial system, that witnesses often are threatened or coerced before trials, particularly in gang and domestic violence cases.⁵⁵ This coercion can come from defendants, their families, or their friends, so judges often assume coercion even when a defendant is incarcerated.⁵⁶ This significant problem undoubtedly has created a system in which judges are hyper-aware of the possibility for duress and coercion, something that almost certainly carries over to situations in which witnesses recant after trial.⁵⁷ Moreover, prosecutors who sponsored witnesses at trial often respond to recantations by looking for evidence of coercion, not necessarily because they are looking to thwart justice but because they believed in the initial testimony of the witnesses and have had similar experiences with duress and coercion.⁵⁸ Thus, any recantation may be met with the assumption that it was the product of duress or coercion because judges are aware of such tactics and are trained to look for it.

E. *Close Relationships Between Defendants and Witnesses*

A fifth factor that leads to judges' skepticism toward recantations is the relationships that often exist between defendants and witnesses. Defendants often have preexisting relationships with the witnesses who

⁵⁴ Cobb, *supra* note 21, at 983–85.

⁵⁵ See Nora V. Demleitner, *Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?*, 46 AM. J. COMP. L. SUPP. 641, 644–45 (1998) (discussing the increasing publicity given to witness intimidation in domestic abuse and gang-related cases); Kelly Rutan, Comment, *Procuring the Right to an Unfair Trial: Federal Rule of Evidence 804(B)(6) and the Due Process Implications of the Rule's Failure to Require Standards of Reliability for Admissible Evidence*, 56 AM. U. L. REV. 177, 186 (2006) (discussing a 1995 Department of Justice study that revealed an increase in witness intimidation in the 1980s and 1990s).

⁵⁶ See Cobb, *supra* note 21, at 983–86, 987–89.

⁵⁷ See, e.g., *State v. Elkins*, No. 21380, 2003 Ohio App. LEXIS 4037, at *9–14 (Ohio Ct. App. Aug. 27, 2003) (affirming trial court's finding that child-victim's recantation was "the result of influence from her family and others who have an interest in the success of [defendant's] petition").

⁵⁸ See, e.g., Shannon Selden, *The Practice of Domestic Violence*, 12 UCLA WOMEN'S L.J. 1, 37–38 (2001) (discussing the tendency of domestic violence victims to recant their stories because of duress, coercion, and fear of retaliation).

testify against them in criminal trials, whether those witnesses are victims, co-defendants, or friends who are informants.⁵⁹ Testifying against a friend or a relative undoubtedly is a difficult proposition, and unless there is a motive to lie, taking such a risk will be seen as an indicator of witness credibility. The flip side of that equation is also true: a witness who recants his or her testimony against a friend or loved one generally will be perceived as doing so because they want to help the defendant.⁶⁰ Thus, recantations in such cases often will be presumed incredible because there is a significant motive to help the defendant.

F. Finality and Judicial Economy

The sixth reason why judges are reluctant to grant new trials in recantation cases is a general concern about finality and judicial economy; these concerns are common in all cases where defendants are seeking new trials.⁶¹ The judicial system understandably is apprehensive about the need to keep cases from continuing for years after an initial trial, both because of anxiety about victims and because a system in which criminal cases perpetuate for years is impractical.⁶² In addition, a judiciary that is consistently overburdened and underfunded is worried about granting new trials in too many cases, because of fears that they simply would not be able to handle the onslaught.

G. Desire to Prevent Manipulation of Courts

The seventh reason why judges are skeptical of recanting witnesses is their desire to prevent manipulation of the courts. As the Virginia Supreme Court observed in *Carpitcher*, “recantation evidence is generally questionable in character and is widely viewed by courts with suspicion because of the obvious opportunities and temptations

⁵⁹ See Cobb, *supra* note 21, at 987–88.

⁶⁰ See, e.g., *Lewis v. State*, 111 P.3d 636, 651 (Kan. Ct. App. 2003) (per curiam). For example, in *Lewis v. State*, the child victim recanted her trial testimony against her paternal uncle, the defendant. *Id.* at 640, 651. At the time of trial, the victim lived with her mother, but at the time of the recantation, she lived with her paternal grandmother (the defendant’s mother). *Id.* at 650–51. There, the court found ample evidence that the victim’s loyalty to the defendant’s mother may have motivated her recantation. *Id.* at 651.

⁶¹ Cobb, *supra* note 21, at 991.

⁶² See Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1265–67 (2005) (explaining that government’s interest in finality of judgments stems from a desire to punish the guilty, and therefore to serve a deterrent function, and to provide closure to victims).

for fraud.”⁶³ Like the other concerns of courts, these worries are not entirely misplaced. In one case, the court found the recanting witness was motivated to change his trial testimony because the defendant’s family paid him \$300.⁶⁴ Thus, courts frequently encounter situations in which defendants and their associates may legitimately be trying to manipulate the courts to obtain a favorable outcome.

III. LESSONS OF DNA EXONERATIONS

Despite all of these legitimate or understandable reasons for disfavoring recantations, the 200-plus DNA exonerations have provided sound bases to reevaluate the current treatment of recanting witnesses.⁶⁵ Before the advent of DNA evidence, the debate surrounding wrongful convictions often focused on *whether* wrongful convictions occurred in significant numbers, not on the causes producing such a systemic failure in the criminal justice system.⁶⁶ Today, however, a plethora of scholars, non-profit organizations, and state commissions have focused extensively on how the criminal justice system can break down to produce a wrongful conviction.⁶⁷ We therefore have greater insight than ever before into the types of evidence that are the least trustwor-

⁶³ 641 S.E.2d at 492; *see also* State v. Soto, No. 03-3446, 2005 WL 524874, at *3 (Wis. Ct. App. Mar. 8, 2005) (quoting the trial court’s statement that a co-defendant’s recantation should be viewed with suspicion because “[c]o-defendants should not be able to pool their post-conviction resources and decide which one of them ought to get a new trial”).

⁶⁴ State v. Avery, No. 2005AP1447, 2006 WL 618839, at *3 (Wis. Ct. App. Mar. 14, 2006).

⁶⁵ *See* Innocence Project, About Us: Mission Statement, *supra* note 12 (indicating 207 people have been exonerated through DNA testing).

⁶⁶ *See, e.g.*, Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23–24 (1987) (highlighting 350 erroneous convictions in “capital or potentially capital” cases in the twentieth century); Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 121–22 (1988) (criticizing the methodology and conclusions of Bedau and Radelet’s study and claiming the actual number of wrongful convictions was much lower); *see also* Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman & Cassell*, 41 STAN. L. REV. 161 (1988) (replying to Markman and Cassell’s critique). The debate about the frequency and nature of wrongful convictions still exists today, but the focus of most wrongful convictions scholarship has shifted to addressing solutions to the problem, not whether a problem exists. *See, e.g.*, Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1220 (2005) (noting wrongful convictions scholarship has more recently focused on “identify[ing] and publiciz[ing] the factors that lead to flawed evidence and faulty convictions”).

⁶⁷ *See* DWYER ET AL., *supra* note 5, at 249; Innocence Project, Fix the System: Priority Issues: Innocence Commissions, <http://www.innocenceproject.org/fix/Innocence-Commissions.php> (last visited Jan. 2, 2008).

thy and the ways in which that evidence and the criminal justice system can be made more trustworthy.

These lessons can be applied to the universe of recanting witnesses as well. As discussed above, judges are likely to presume the unreliability of recanting witnesses, who most often are co-defendants, informants, or victims.⁶⁸ They do this for some legitimate reasons, but even the legitimate ones are undercut when we apply what we have learned from the DNA exonerations. Those exonerations are rife with examples of witnesses who we now know lied at trial.⁶⁹ Thus, the circumstances of those cases and the underlying motivations for some of those lies can provide valuable insight into the ways in which judges can and should evaluate such recantations.

This section examines four of those lessons: (1) all participants in the justice system, including judges, are subject to cognitive biases that call into question their ability to impartially analyze new evidence of innocence; (2) incentivizing witnesses creates strong motives to lie at trial; (3) defendants are not the only parties in the criminal justice system who coerce false testimony out of witnesses; and (4) fact finders are not always the most accurate judges of witness credibility. Each of these lessons calls into question the general judicial mistrust of recanting witnesses, as well as the instinct to avoid granting new trials because of finality and judicial economy.⁷⁰ Examined individually, these factors

⁶⁸ See *supra* notes 45–70 and accompanying text. In very rare circumstances, eyewitnesses have recanted their testimony when presented with pictures of the real perpetrator or when confronted with problems in their testimony. See Mid-Atlantic Innocence Project, Mistaken Eyewitness Identifications, <http://www.exonerate.org/facts/causes-of-wrongful-convictions/mistaken-eyewitness-identifications/> (last visited Jan. 2, 2008). Such recantations are rare, however, because the vast majority of eyewitnesses are people who genuinely believe in the truth of their testimony. See *id.* This distinguishes them from the subset of recanting witnesses considered in this article, who have knowingly lied at trial. The same preconceptions are not as likely to apply to the testimony of eyewitnesses, because they are presented to the court as having made a mistake, not as someone who has lied at some point in their testimony.

⁶⁹ See generally DWYER ET AL., *supra* note 5.

⁷⁰ See Cobb, *supra* note 21, at 991. The notions of finality and judicial economy are based at least in part on the premise that the panoply of protections provided to criminal defendants at trial adds sufficient guarantees of reliability to verdicts in criminal trials. See Jones, *supra* note at 62, at 1266 (highlighting the dual assumptions underlying the principle of finality of judgment: that the original trial resulted in a reliable verdict and that post-conviction litigation will be unlikely to change the outcome because the constitutional protections given to the accused drastically reduce the likelihood of an erroneous conviction). DNA exonerations, however, call into question those notions, because they indicate that the system is not functioning as well as previously was believed. See DWYER ET AL., *supra* note 5, at 248–49 (citing a National Commission on the Future of DNA Evidence Task

also call into question each of the other rationales judges rely upon when they explain their mistrust of recantations.

A. *Cognitive Biases Affect Judicial Decisions*

In Gary Dotson's case, the trial judge who presided over both Dotson's trial and post-judgment relief hearing found that the victim's recantation was implausible because her demeanor at trial was consistent with someone who had been raped and because there was independent evidence corroborating her trial testimony.⁷¹ The judge noted that the victim's memory at the 1985 evidentiary hearing was not as sharp as her memory at the 1979 trial, which he interpreted as selective memory.⁷² The court did not find a conceivable motive—such as duress or a relationship with the defendant—for the victim to make up the recantation, but instead relied on her trial testimony and on the testimony of investigating officers and her guardians, who believed her initial story of the attack.⁷³ In making this determination, the judge ignored significant inconsistencies between the victim's initial statement and the evidence adduced at trial, deeming them inconsequential.⁷⁴ Of course, DNA evidence ultimately proved that the victim's recantation, and not her trial testimony, was the truth.⁷⁵ The relatively weak justifications the trial judge used in his ruling make clear that he did not want to believe the victim's recantation was true.⁷⁶ He was too invested in the initial verdict to make an objective decision about the new evidence of innocence.

One of the most significant lessons that Dotson's case and other DNA exonerations have taught us is that tunnel vision contributes

Force report issued in 1999 which stated, "[t]he strong presumption that verdicts are correct has been weakened" due to multiple DNA exonerations).

⁷¹ *People v. Dotson*, 516 N.E.2d 718, 721 (Ill. App. Ct. 1987).

⁷² *Id.* at 722 (finding that the victim testified once that she could not remember injuring her vaginal area and once that she had not injured her vaginal area).

⁷³ *See id.*

⁷⁴ *See id.* at 720. The court found three specific instances of inconsistencies insignificant: (1) the victim said her slacks became muddy during the attack, but she said she was attacked in the car; (2) she testified at trial that she had scratched her attacker on the chest and behind the ear (where she felt her nails dig in), but there were no scratch marks anywhere on Dotson after his arrest; and (3) she testified at trial that she was a few inches from the attacker who tried to kiss her, but did not mention any facial hair, which Dotson had. *Id.*

⁷⁵ Dershowitz, *supra* note 5.

⁷⁶ *See Dotson*, 516 N.E.2d at 721–22.

significantly to the problem of wrongful convictions.⁷⁷ Tunnel vision is a natural human tendency that causes judges (and other actors in the criminal justice system) “to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion.”⁷⁸ In his examination of cognitive biases among judges, Daniel Medwed ultimately concluded that post-conviction petitions and motions for new trials should not be directed to trial judges, in part because of the cognitive biases that infect their decision-making.⁷⁹ While this article does not directly tackle the problem of cognitive bias, Medwed’s arguments go a long way toward explaining why judges are likely to discount recantations (and other new evidence of innocence) without fully considering the import of that evidence.

Medwed identified two significant cognitive biases that are relevant in cases where new evidence of innocence is being offered.⁸⁰ First, the prospect of a wrongful conviction is anathema to most judges, who see themselves as fair and competent individuals.⁸¹ As a result, they do not believe that their decisions could have allowed such an injustice to take place and are reluctant to find credible any evidence that would suggest otherwise.⁸² Second, the problem of “status quo bias” means that “people often have difficulty deviating from a prior decision because that decision has become the reference point to which they compare and contrast newfound information.”⁸³ Thus judges revisiting a case in which they already have presided are likely to require a defendant to prove much more about his or her innocence than would be required if the judge were examining a new case.⁸⁴ The net result of both cognitive biases is that judges are likely to find grounds to discount new evidence of innocence because that evidence does not fit with their notions of themselves or of the case at hand.⁸⁵

This problem is particularly acute when it is examined in the context of recantations. As demonstrated in Part II, there are several significant and understandable reasons why judges often disfavor recanta-

⁷⁷ See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292.

⁷⁸ *Id.* at 292.

⁷⁹ See Medwed, *supra* note 16, at 700–08.

⁸⁰ *Id.*

⁸¹ See *id.* at 701 (discussing the problem of egocentric bias in which individuals develop a positive and often over-inflated image of their own abilities).

⁸² See *id.*

⁸³ *Id.* at 701–02.

⁸⁴ Medwed, *supra* note 16, at 701–02.

⁸⁵ See *id.*

tions.⁸⁶ Unfortunately, several of them allow judges to make subjective judgments about statements, evidence, and credibility, as the judge did in the *Dotson* case.⁸⁷ While this is well within the rights of a judge ruling on a motion for a new trial, the authority to employ subjective, rather than objective, factors will make it easier for judges who are experiencing tunnel vision to rationalize their decisions. Thus, any decision on a recantation that hinges almost exclusively on witness demeanor, speculative allegations of duress or coercion, speculations about relationships, or misstatements of the evidence should raise alarm bells. The problem of tunnel vision does not necessarily undercut the legitimacy of those reasons, but it should raise a red flag in those cases where a court seems to be relying only on subjective judgments or speculations.

B. *Incentivizing Witnesses Creates Strong Motivations to Lie*

In 1985, Jerry Watkins was convicted by an Indiana jury of the murder of an eleven year-old girl based on circumstantial evidence and the testimony of a jailhouse informant.⁸⁸ Among the witnesses to testify against Watkins was Dennis Ackaret, who had a long history as an informant in Florida and Indiana, testifying in exchange for both cash and lighter sentences in many cases.⁸⁹ Ackaret said at trial that Watkins had confessed to him when they were briefly in a holding cell together.⁹⁰ In 1987, however, Ackaret swore in a court filing in his own case that he had learned details of the crime not from Watkins, but from investigators, who showed him pictures of the murder victim and took him to the crime scene.⁹¹ In 1988, Watkins produced witnesses who testified that Ackaret had admitted his lies to them.⁹² The Indiana Court of Appeals found that there was substantial evidence against Ackaret and that the witnesses he had produced were cumulative of other evidence produced at trial.⁹³

In 2000, in the wake of exonerating DNA evidence, the United States District Court for the Southern District of Indiana remanded Watkins' case for a new trial.⁹⁴ Notably, in the wake of the DNA exonera-

⁸⁶ See *supra* notes 42–64 and accompanying text.

⁸⁷ 516 N.E.2d at 720–22.

⁸⁸ *Watkins v. State*, 528 N.E.2d 456, 457, 460 (Ind. 1988).

⁸⁹ *Watkins v. Miller*, 92 F. Supp. 2d 824, 834 (S.D. Ind. 2000).

⁹⁰ *Id.* at 828.

⁹¹ *Id.* at 830.

⁹² *Watkins v. State*, 528 N.E.2d at 458.

⁹³ See *Watkins v. Miller*, 92 F. Supp. 2d at 827.

⁹⁴ *Id.* at 857.

tion, even the remanding court found that “there is ample reason to be skeptical about Ackaret’s motion that effectively recants his trial testimony” because the motion “reflects his selfish motives to lie against the police and prosecution.”⁹⁵ Watkins ultimately was released from prison in 2000, thirteen years after Ackaret’s recantation.⁹⁶ Without the DNA evidence in this case, the courts would have continued to believe in the truth of Ackaret’s trial testimony and in the falsity of his recantation.

Watkins’ case and a host of other DNA cases have proven that jailhouse informants, accomplices, and others who testify in exchange for reduced sentences are particularly untrustworthy.⁹⁷ Indeed, such testimony was involved in 45.9% of the first 111 death row exonerations since 1970.⁹⁸ The causes of such unreliability are not hard to fathom: simply put, “when the criminal justice system offers witnesses incentives to lie, they will.”⁹⁹ The incentives for providing false testimony are powerful, whether the informant is either already in jail, a co-defendant, or an acquaintance of a defendant with pending charges.¹⁰⁰ Anyone in that situation knows that providing information about a defendant can result in a much-reduced sentence or dropped charges.¹⁰¹ Even worse, the most famous informant of all, Leslie Vernon White, explained that providing false testimony as an informant is not difficult—he provided

⁹⁵ *Id.* at 854.

⁹⁶ Terry Horne, *14 Years Later, DNA Results Aid Inmate’s Release*, INDIANAPOLIS STAR, July 22, 2000, at A1.

⁹⁷ See ROB WARDEN, *THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3* (2004), available at <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf> (documenting that the testimony of incentivized witnesses is the leading cause of wrongful convictions in capital cases).

⁹⁸ WARDEN, *supra* note 97, at 3. Incentivized testimony is the number one cause of wrongful convictions in capital cases, most of which do not involve DNA evidence. *Id.* at 3, 14. This dearth of DNA evidence exists because “the typical capital crime in this country is not a rape murder, but a murder in the course of robbery or burglary, or for insurance or hire, and these offenses are only infrequently characterized by biological evidence left by the offender.” James S. Liebman, *The New Death Penalty Debate: What’s DNA Got to Do with It?*, 33 COLUM. HUM. RTS. L. REV. 527, 541–42 (2002). Typical capital crime cases are less likely to involve eyewitnesses than rape cases, and the exonerations therefore are more likely to involve a confession by the real perpetrator, a recantation, defects in other forensic evidence, or proof of an ironclad alibi. *Id.* at 542.

⁹⁹ WARDEN, *supra* note 97, at 2.

¹⁰⁰ DWYER ET AL., *supra* note 5, at 128–29 (detailing how snitches concocted false confessions in return for jail release or extra privileges in jail); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 108 (2006) (“Informants lie primarily in exchange for lenience for their own crimes, although sometimes they lie for money.”).

¹⁰¹ See DWYER ET AL., *supra* note 5, at 128–29; Natapoff, *supra* note 100, at 108.

false information in three murder cases in a thirty-six day period and even demonstrated for police that he could use a phone to obtain enough false information to testify against someone in a twenty-minute period.¹⁰²

In recent years, the practice of rewarding informants has become more pronounced and more entrenched in the justice system.¹⁰³ Alexandra Natapoff traces this rise to three factors: (1) the U. S. Sentencing Guidelines, which make cooperation with authorities the main way to receive leniency; (2) mandatory minimum sentences, in which only cooperation allows courts to depart from high sentencing requirements; and (3) the growth of drug crime enforcement efforts, in which officers need informants to solve their cases.¹⁰⁴ As a result, the justice system has become increasingly dependent on such implausible incredible testimony, with police and prosecutors coming to rely very heavily on informants as their only evidence in some cases.¹⁰⁵ Even though informant testimony is often the only evidence in a case, police and prosecutors cannot always and do not always rigorously check statements provided by their informants.¹⁰⁶ Thus, as Natapoff writes, “[t]his gives rise to a disturbing marriage of convenience: both snitches and the government benefit from inculpatory information while neither has a strong incentive to challenge it.”¹⁰⁷

For the most part, the reaction to this problem has been to suggest reforms that would mitigate the problem of false informant testimony.¹⁰⁸ This is as it should be. Yet the problem of informant testimony also has important implications in cases involving recantations. The reforms suggested to eradicate the problems associated with in-

¹⁰² See DWYER ET AL., *supra* note 5, at 127.

¹⁰³ Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 655 (2004) (explaining that “informant use is on the rise” because the criminal “justice system has become increasingly dependent on criminal informants over the past twenty years”). About twenty percent of federal offenders and thirty percent of drug defendants receive credit for cooperation with authorities, but not all defendants who cooperate receive leniency. *Id.* at 657; see also *N. Mariana Islands v. Bowie*, 243 F.3d 1109, 1123 (9th Cir. 2001) (“Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is . . . to cut a deal at someone else’s expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration.”).

¹⁰⁴ Natapoff, *supra* note 103, at 655.

¹⁰⁵ Natapoff, *supra* note 100, at 108; Natapoff, *supra* note 103, at 655.

¹⁰⁶ Natapoff, *supra* note 100, at 108.

¹⁰⁷ *Id.*

¹⁰⁸ See, e.g., *id.* at 112–29 (proposing establishment of pre-trial reliability hearings for snitch testimonies).

formant testimony before trial do not address these implications. Recantations by incentivized witnesses are quite common, but as *Watkins* illustrates, courts that rely frequently on the testimony of informants are reluctant to believe those same witnesses when they recant.¹⁰⁹ Courts in these cases are particularly leery of recanting informants trying to manipulate the courts, an understandable fear.¹¹⁰ That fear, however, needs to be balanced with the inherent problems posed by incentivized testimony. DNA exonerations have proven how unreliable incentivized testimony can be, so courts should begin to balance that with their concerns about manipulation.

C. *Witness Coercion Is Not Limited to Defendants*

In 1978, a young man and his fiancée were abducted from the Homewood, Illinois, gas station at which he was employed.¹¹¹ They were taken to an abandoned apartment in East Chicago Heights, Illinois, where she was raped and killed; the man was taken to a nearby field where he was shot to death.¹¹² Police quickly focused their attention on the Ford Heights Four—Kenneth Adams, Verneal Jimerson, Willie Rainge, and Dennis Williams, four young men who lived near the crime scene.¹¹³ Shortly after the crime and the first arrests, police interviewed Paula Gray, a mentally retarded seventeen-year-old with a ninth grade education.¹¹⁴ Gray told police she had gone to the murder scene, where she saw the four men perpetrating the crime.¹¹⁵ She said they would not let her leave the scene, gave her a lighter to hold for them, and raped the female victim while she watched.¹¹⁶ Gray then observed the men kill the male victim.¹¹⁷ Gray testified to this effect before the grand jury but recanted her testimony at a preliminary hearing in the case, which forced the state to drop charges against one of the men and led them to charge her with perjury.¹¹⁸

¹⁰⁹ See 92 F. Supp. 2d at 854.

¹¹⁰ See, e.g., *State v. Soto*, No. 03-3446, 2005 WL 524874, at *3 (Wis. Ct. App. Mar. 8, 2005).

¹¹¹ U.S. *ex rel.* *Gray v. Dir., Dep't of Corr.*, 721 F.2d 586, 587 (7th Cir. 1983).

¹¹² *Id.*

¹¹³ *Id.* at 587–88, 590.

¹¹⁴ *People v. Williams*, 588 N.E.2d 983, 993 (Ill. 1991); *Gray*, 721 F.2d at 587–88.

¹¹⁵ *Williams*, 588 N.E.2d at 993.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Gray*, 721 F.2d at 590–92.

Gray's perjury case ultimately was reversed, because her attorney was found to have a conflict of interest.¹¹⁹ When her case was remanded, she changed her story again, agreeing to testify against the men in exchange for time served.¹²⁰ When defense investigators interviewed Gray, she told them her statement had been coerced by police.¹²¹ Her recantation was proven true when DNA testing exonerated all of the men.¹²²

Although it seems counterintuitive, Gray's case is not an anomaly. One of the most surprising revelations of the DNA revolution has been the number of wrongfully convicted defendants who falsely confessed to committing crimes.¹²³ Most of those defendants have only implicated themselves, but there have been multiple co-defendants who have falsely confessed by implicating themselves and their co-defendants.¹²⁴ While this might sound like incentivized testimony, the testimony detailed in this section is more commonly thought to be obtained as a result of coercive interrogation tactics than by a calculated desire to receive a lower sentence.¹²⁵ A host of psychological factors can cause individuals to confess to crimes they did not commit, because interro-

¹¹⁹ *Id.* at 597–98.

¹²⁰ Ken Armstrong & Maurice Possley, *Reversal of Fortune*, CHI. TRIB., Jan. 13, 1999, § 1, at 1.

¹²¹ Douglas Holt & Steve Mills, *Ford Heights 4 Figure Pardoned*, CHI. TRIB., Nov. 15, 2002, § 2, at 1.

¹²² Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, § 1 at 1; Holt & Mills, *supra* note 121.

¹²³ See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 905 (2004) (explaining that twenty-five percent of all DNA exonerations, as of 2004, involved false confessions).

¹²⁴ See, e.g., Laylan Copelin & David Hafetz, *Police Conduct Facing Review*, AUSTIN AM.-STATESMAN, Dec. 22, 2000, at A1. Aside from the Ford Heights Four case, another example of a false confession implicating co-defendants took place when a man, Chris Ochoa, falsely confessed to a rape and murder and implicated another man, Richard Danziger, in the process. *Id.* In another case, two men falsely confessed to murdering a graduate student in Chicago, implicating two other co-defendants in the process. Maurice Possley & Steve Mills, *Governor Pardons Roscetti 4*, CHI. TRIB., Oct. 17, 2002, § 1, at 1. In each of these cases, DNA testing ultimately exonerated the defendants. Copelin & Hafetz, *supra*; Possley & Mills, *supra*.

¹²⁵ Drizin & Leo, *supra* note 123, at 911 (explaining that “[t]he purpose of interrogation is not to determine whether a suspect is guilty,” but to “break the anticipated resistance of an individual who is presumed guilty”). Police officers interrogate reluctant witnesses the same way they do suspects. Jim Trainum, Detective, Metro. Police Dep’t, Presentation to Wrongful Convictions Class at American University’s Washington College of Law (June 17, 2007). Thus, given that seventeen percent of all wrongful convictions involve “other” false testimony by witnesses, it is safe to assume that some of that false testimony is the product of these interrogation techniques. *Id.*

gation tactics lead them to believe that confessing is a logical choice.¹²⁶ These interrogation methods are capable of eliciting confessions from the innocent, particularly from young, mentally impaired defendants, but also from defendants with no impairments at all.¹²⁷

This phenomenon calls into question several of the reasons enumerated by courts for their failure to find credible the recantations of witnesses. First, not all recanting co-defendants are simply trying to manipulate the system.¹²⁸ Some of them, like Gray, have genuinely been coerced and have attacks of conscience.¹²⁹ Second, and perhaps more significantly, defendants are not the only parties in the criminal justice system who coerce statements out of witnesses.¹³⁰ Courts tend to presume that witnesses recant because they are coerced, but they neglect to consider the possibility, and even dismiss the possibility, that police or prosecutors also use improper tactics to elicit witness statements.¹³¹ Thus, recantations that allege such tactics frequently are deemed unbelievable, oftentimes *because* they allege such tactics.¹³² Although there certainly are frivolous allegations of improper police tactics, the problem of false confessions and documented use of improper interrogation techniques in dozens of cases should change the calculus of courts as they examine recantations that are coupled with allegations of coercion.¹³³ Taking those claims seriously, rather than

¹²⁶ Drizin & Leo, *supra* note 123, at 913 (“[T]he interrogator’s goal is to persuade the suspect that the act of admission is in his self-interest and therefore the most rational course of action, just as the act of continued denial is against his self-interest and therefore the least rational course of action.”).

¹²⁷ See Boaz Sangero, *Miranda is Not Enough: A New Justification for Demanding “Strong Corroboration” to a Confession*, 28 CARDOZO L. REV. 2791, 2793–94 (2007) (“In a considerable number of [DNA exoneration] cases . . . convictions were based solely on the false confessions of defendants, which had been extracted by police interrogators.”).

¹²⁸ See *supra* notes 111–127 and accompanying text.

¹²⁹ See *supra* notes 111–127 and accompanying text.

¹³⁰ See *supra* notes 111–127 and accompanying text.

¹³¹ See, e.g., *Watkins v. Miller*, 92 F. Supp. 2d at 854 (finding incredible the recanting informant’s assertion that investigators took him to the crime scene and fed him details about the crime); *Lewis v. State*, 111 P.3d 636, 651 (Kan. Ct. App. 2003) (per curiam) (affirming the trial court’s finding that victim’s recantation did not merit a new trial, despite her assertion that the prosecutor told her to lie).

¹³² See *Gray*, 721 F.2d at 592–94; *Watkins v. Miller*, 92 F. Supp. 2d at 854; *Lewis*, 111 P.3d at 650–51. In Paula Gray’s case, the trial court and appellate court both found incredible her assertion that her confession had been coerced. *Gray*, 721 F.2d at 592–94.

¹³³ See generally Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 435 (1998) (analyzing likelihood of “police-induced false confessions . . . to lead to the wrongful arrest, prosecution, conviction incarceration of the innocent”).

discounting them outright, will lead to a more balanced examination of witness recantations.

D. *Observations About Witness Demeanor Are Not Always Accurate*

In 1999, Clarence Elkins was convicted of murdering his mother-in-law and raping his six-year-old niece.¹³⁴ The niece unhesitatingly identified him at trial, pointing him out in the courtroom.¹³⁵ A few years later, the child admitted to her mother that she thought the assailant and Elkins had different eyes.¹³⁶ In 2002, the child recanted her testimony to a defense investigator,¹³⁷ and Elkins filed a motion for a new trial.¹³⁸ The court was presented with a videotaped deposition of the child recanting her testimony, but the judge found that the recantation lacked credibility.¹³⁹ Specifically, he found that she recanted under significant pressure from her family and that “during the deposition [in which she recanted on video], the child was hesitant and seemed unsure of her answers.”¹⁴⁰ He contrasted this to her confident testimony at trial.¹⁴¹ In short, he found that her demeanor at trial was much more consistent with a witness telling the truth than her demeanor in the video deposition.¹⁴² Unfortunately for Elkins, the victim’s recantation actually was the truth, which was proven when DNA testing exonerated Elkins in 2005.¹⁴³

The *Elkins* case, as well as the *Dotson* case, demonstrates that trial judges are not always adept at judging the demeanor of recanting witnesses, even though they frequently find that recanting witnesses are incredible based on assessments of demeanor.¹⁴⁴ This is not surprising. In his article on evaluating witness credibility, Steven I. Friedland explains that laypersons rarely are able to assess accurately witness

¹³⁴ Laura A. Bischoff & Mary McCarty, ‘My God, This Thing Is Horrifying’, DAYTON DAILY NEWS, Aug. 8, 2006, at A6.

¹³⁵ *State v. Elkins*, No. 21380, 2003 Ohio App. LEXIS 4037, at *12 (Ohio Ct. App. Aug. 27, 2003).

¹³⁶ Bischoff & McCarty, *supra* note 134.

¹³⁷ *Id.*

¹³⁸ *Elkins*, 2003 Ohio App. LEXIS 4037, at *2.

¹³⁹ *Id.* at *10–14.

¹⁴⁰ *Id.* at *10, 12.

¹⁴¹ *See id.* at *12.

¹⁴² *See id.* at *13–14.

¹⁴³ *See* Bischoff & McCarty, *supra* note 134.

¹⁴⁴ *See Dotson*, 516 N.E.2d at 721–22; *Elkins*, 2003 Ohio App. LEXIS 4037, at *2.

credibility.¹⁴⁵ Instead, psychological studies have found that “[g]iven the complexity and subtlety of . . . nonverbal cues, an untrained observer, such as a juror, has ‘probably . . . no better than chance’ to assess accurately sincerity from nonverbal action.”¹⁴⁶ Friedland primarily addresses the inability of jurors to assess the sincerity of witnesses, arguing that defendants should be permitted to introduce expert testimony on the credibility of witnesses, whether those witnesses are eye-witnesses or sexual assault victims.¹⁴⁷ However, his argument is applicable to judges; like jurors, judges can lack the expertise of psychologists to assess accurately witness credibility. Indeed, the *Elkins* and *Dotson* cases are proof that in some cases, judges can be wrong in their assessments of witness demeanor.¹⁴⁸ Those cases are proof that the oft-cited problem of witness demeanor may not always be a persuasive reason to dismiss the credibility of a recantation.

IV. A NEW STANDARD FOR EVALUATING RECANTATIONS

The DNA revolution has called into question the factors relied upon by judges to dispute the reliability of nearly all recantations. The current standards used by courts to determine whether a defendant is entitled to a new trial, coupled with those outdated notions of witness unreliability, allow judges to dismiss requests for new trials with very little scrutiny in nearly every case. An effective solution to this problem will not simply call on courts to grant new trials in every case in which there is a recantation. That remedy would swing the pendulum too far and would not be a palatable result for most courts. Rather, the solution needs to balance the legitimate concerns about recantations with the lessons learned from DNA exonerations.

This article proposes two changes—both endorsed by state supreme courts—that will more effectively balance the interests of defendants with the interests of the courts. First, courts should adopt a modified version of the *Larrison* standard that requires corroboration rather than proof of truth.¹⁴⁹ As styled by the Wisconsin Supreme Court, corroboration would be a much more relaxed requirement

¹⁴⁵ See Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 178 (1990) (explaining that “common sense-based beliefs about witnesses are deficient”).

¹⁴⁶ *Id.* at 185.

¹⁴⁷ See *id.* at 222–24.

¹⁴⁸ See *Dotson*, 516 N.E.2d at 721–22; *Elkins*, 2003 Ohio App. LEXIS 4037, at *2.

¹⁴⁹ See *Larrison v. United States*, 24 F.2d 82, 88–89 (7th Cir. 1928).

than currently exists in most state courts.¹⁵⁰ Second, appellate courts should not apply a deferential standard of review to summary denial of motions for new trials based on recantations.

Neither of these changes would radically alter the formulations used by most courts, and their adoption by other state supreme courts makes clear that the burdens they impose would not be particularly onerous. Thus, they offer practical solutions to a problem that will only grow more pronounced as the number of DNA exonerations continues to prove that wrongful convictions happen on a more consistent basis than anyone ever believed.

A. Adoption of a Modified *Larrison* Standard

The first element of this new framework would be courts adopting a modified version of the *Larrison* test, one that abandons the truthfulness requirement.¹⁵¹ As an initial matter, the materiality standard of the *Larrison* test is preferable, largely because the strong materiality requirement of the *Berry* test invites courts to look at truth as an element.¹⁵² Thus, a wholesale abandonment of the truthfulness requirement requires courts to adopt the *Larrison* standard rather than the *Berry* standard.

The genesis of the truthfulness requirement makes some sense—granting new trials in cases with obviously false recantations would be unwise for many reasons. However, as evidenced in the *Dotson*, *Watkins*, *Elkins*, and *Ford Heights Four* cases, the recanting witnesses were testifying about events or conversations in which only the witness and the defendant knew the truth.¹⁵³ In those scenarios, proving the absolute truth of the recantation or absolute falsity of the trial testimony was virtually impossible until each defendant could use DNA evidence.¹⁵⁴ The simple explanation for this is that when only the witness knows the real

¹⁵⁰ See *State v. McCallum*, 561 N.W.2d 707, 711–12 (Wis. 1997) (requiring recantations be corroborated by new evidence rather than meet a truthfulness requirement).

¹⁵¹ See *id.*

¹⁵² See *Berry v. State*, 10 Ga. 511, 527 (1851); *In re Carpitcher*, 624 S.E.2d 700, 707 (Va. Ct. App. 2006) (holding that the defendant must prove the truth of the recantation or the falsity of the trial testimony to satisfy the materiality requirement).

¹⁵³ See *supra* notes 1–11, 88–96, 111–122, 134–143 and accompanying text.

¹⁵⁴ See Steven B. Duke et al., *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 11–12 (2007) (“If the witness had contact with the defendant (or a plausible claim to the same) and no other witnesses were present, the witness’ word can rarely be disproven. The witness’ motives for testifying can be explored, but this hardly demonstrates that the witness’ recollection of the conversation is erroneous.”).

truth, the courts essentially are forced to guess based on credibility judgments and other subjective factors. Thus, a new formulation of this standard is necessary to balance the interests in judicial economy with the reality that discerning truth based on witness demeanor is incredibly difficult.

Advocates for the wrongfully convicted are not the only people to have noticed the problems inherent in a truth requirement. Instead of requiring the defendant to prove the truth of the allegation, the Wisconsin Supreme Court requires the defendant to corroborate the recantation with other newly discovered evidence of innocence.¹⁵⁵ A corroboration requirement could be a wolf in sheep's clothing, a truth requirement that simply is called by a different name. However, the Wisconsin Supreme Court has recognized that "requiring a defendant to redress a false allegation with significant independent corroboration of the falsity would place an impossible burden upon any wrongly accused defendant."¹⁵⁶ Thus, the court has found that "a feasible motive for the initial false statement" and "circumstantial guarantees of the trustworthiness of the recantation" meet the corroboration requirement.¹⁵⁷ Adopting such a requirement would enable defendants trying to prove the truth of a recantation in difficult circumstances to argue that various indicia of reliability make the recantation more credible.

The first element of Wisconsin's relaxed corroboration requirement is evidence of a feasible motive for providing false testimony at trial.¹⁵⁸ In *McCallum*, the court found that a feasible motive to falsify allegations existed.¹⁵⁹ The child victim "wanted her divorcing parents to reconcile," "resented [the defendant] McCallum for attempting to take the place of her father," and "was angry at McCallum for disciplining her."¹⁶⁰ In contrast, the Virginia courts discounted evidence of motive in the *Carpitcher* case, in part because Virginia has a truth re-

¹⁵⁵ See *McCallum*, 561 N.W.2d at 711–12. The Wisconsin court adopted the corroboration requirement because it found recantations to be inherently unreliable. *Id.* at 712. This means that the courts continue to be somewhat dismissive of recantations, particularly in cases involving informants or co-defendants. See, e.g., *State v. Soto*, No. 03-3446, 2005 WL 524874, at *3 (Wis. Ct. App. Mar. 8, 2005) (quoting the trial court's statement that a co-defendant's recantation should be viewed with suspicion because "[c]o-defendants should not be able to pool their post-conviction resources and decide which one of them ought to get a new trial").

¹⁵⁶ *McCallum*, 561 N.W.2d at 712.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

quirement.¹⁶¹ Under the formulation recommended in this article, either the desire to receive a more favorable sentence or coercion by police also would constitute a feasible motive to testify falsely at trial. This modification could change the way courts treat recantations in situations like the *Watkins* case and the Ford Heights Four case, thus leveling the playing field for defendants attempting to win new trials based on recantation evidence.¹⁶²

The second element of Wisconsin's corroboration requirement is circumstantial guarantees of trustworthiness.¹⁶³ The Wisconsin courts have found that:

Assurances of trustworthiness can include the spontaneity of the statement, whether the statement is corroborated by other evidence in the case, the extent to which the statement is self-incriminatory and against the penal interest of the declarant, and the declarant's availability to testify under oath and subject to cross-examination.¹⁶⁴

The determination of credibility is not limited to those factors, leaving the door open for considering other indicia of reliability not listed by the court.¹⁶⁵ Thus, under the formulation recommended in this article, courts also should consider whether the type of evidence (such as incentivized testimony) has been proven to be untrustworthy in other contexts, whether the witness might be someone who could be subject to coercion, and whether the law enforcement personnel involved have coerced statements in the past. The DNA exonerations have proven that each of these factors could be present in a given case and may indicate the reliability of a recanting statement. If courts begin to objectively consider reliability both in the traditional context articulated by the Wisconsin courts and in the context of what we now know about the fallibility of the justice system, the decisions they

¹⁶¹ See *In re Carpitcher*, 624 S.E.2d at 709 ("Although [the witness] had an alleged motive to commit perjury . . . the existence of a motive to lie does not establish, by clear and convincing evidence, that the witness did, in fact, perjure herself during the criminal trial.").

¹⁶² See *supra* notes 88–96, 111–122 and accompanying text.

¹⁶³ *McCallum*, 561 N.W.2d at 712.

¹⁶⁴ *State v. Kivioja*, 592 N.W.2d 220, 232 (Wis. 1999) (citing *State v. Brown*, 291 N.W.2d 528 (Wis. 1980)).

¹⁶⁵ *Id.* at 232–33. The court recommends considering allegations of duress or coercion at the same time as these other factors, viewing evidence of such problems as cutting against reliability. *Id.*

reach are likely to be fairer and to balance more appropriately the interests of defendants with interests of finality.

B. *Deferential Review of Summary Denials Should Be Abandoned*

The other reform that is necessary to ensure fair consideration of recantation testimony is that courts should adopt a less deferential standard of review for summary denials of new trial motions based on recantation testimony.¹⁶⁶ In most cases, appellate courts reviewing denials of new trial motions use an “abuse of discretion” standard, which is extremely deferential and gives trial judges wide latitude to deny motions without the fear of reversal.¹⁶⁷ As Medwed argues, this system “offers few incentives—and arguably provides a disincentive—for trial judges to do so much as hold an evidentiary hearing.”¹⁶⁸ Thus, evidentiary hearings in new trial motions are rare, particularly in recantation cases.

At least one state has correctly observed that determining the veracity of a recantation is a difficult task without holding an evidentiary hearing.¹⁶⁹ In *McLin v. State*, one of the defendant’s alleged co-conspirators, who had testified against McLin in a pretrial deposition, signed an affidavit stating that McLin did not participate in the crime and that another man did.¹⁷⁰ The trial court summarily denied McLin’s motion alleging newly discovered evidence, finding, without holding an evidentiary hearing, that the affidavit probably was untruthful.¹⁷¹ The appellate court said that a trial court summarily denying a motion for post-conviction relief based on newly discovered evidence must prove that the claim is “facially invalid” or “conclusively refuted by the record.”¹⁷² Moreover, “where no evidentiary hearing is held below, [the appellate court] must accept the defendant’s factual allegations to the extent they are not refuted by the record.”¹⁷³ This standard of review is

¹⁶⁶ See Medwed, *supra* note 16, at 714–15 (arguing “de novo review should apply to summary dismissals of state new trial motions and post-conviction petitions grounded on newly discovered evidence”). Because of its limited scope, this article does not address the propriety of this recommendation with respect to other types of evidence. Daniel Medwed provides a fuller discussion of this idea in the context of other new evidence cases. See *id.*

¹⁶⁷ *Id.* at 708–09, 710.

¹⁶⁸ *Id.* at 709.

¹⁶⁹ See 827 So. 2d 948, 955 (Fla. 2002) (quoting *Robinson v. State*, 736 So. 2d 93, 93 (Fla. Dist. Ct. App. 1999)).

¹⁷⁰ *Id.* at 951.

¹⁷¹ *Id.* at 952–53.

¹⁷² *Id.* at 954.

¹⁷³ *Id.*

much less deferential than the standard of review in cases where the trial court holds an evidentiary hearing.¹⁷⁴ The court also recognized that in recantation cases, evidentiary hearings are usually required to determine whether the defendant meets the standard for a new trial.¹⁷⁵

As Medwed observes, the rationale of the *McLin* court is quite sensible.¹⁷⁶ The justification for deferential review of trial court decisions is usually that trial courts—which have heard the evidence presented—have a superior grasp of the facts that cannot be matched by an appellate court making determinations based on a paper record.¹⁷⁷ When a trial court does not have that advantage because it has not held an evidentiary hearing, the purpose of deferential review is less pronounced.¹⁷⁸ Medwed's suggestion and the solution adopted by the *McLin* court strike an appropriate balance, ensuring fairness to defendants who have not had their claims heard while addressing concerns about judicial economy in cases where courts have held evidentiary hearings.¹⁷⁹ Finally, non-deferential review also will force trial courts to justify their decisions more thoroughly in those cases where they summarily deny new evidence motions based on recantations.

Adopting a non-deferential standard of review in these cases will begin to mitigate the problem of tunnel vision in recantation cases. Apprehension about tunnel vision should be even greater in recantation cases where judges refuse to hold evidentiary hearings, since a court that refuses even to listen to new evidence of innocence may be falling victim to the cognitive biases that infect so many participants in the justice system. Non-deferential review by an appellate court will ensure that a new set of eyes, one that is somewhat more objective, will be critically examining the recantation to determine whether it seems credible enough to warrant an evidentiary hearing or a new trial.

¹⁷⁴ *McLin*, 827 So. 2d at 954 n.4 (noting that in cases where the trial court has held an evidentiary hearing, the appellate court does not substitute its judgment for the judgment of the trial court, “[a]s long as the trial court’s findings are supported by competent substantial evidence”) (quoting *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997)).

¹⁷⁵ See *id.* at 955 (quoting *Robinson*, 736 So. 2d at 93).

¹⁷⁶ See Medwed, *supra* note 16, at 714.

¹⁷⁷ *Id.* at 713.

¹⁷⁸ See *id.* at 714–15.

¹⁷⁹ See *McLin*, 827 So. 2d at 955–57 (declining to apply a deferential standard of review where the trial court dismissed a newly discovered evidence claim without an evidentiary hearing); Medwed *supra* note 16, at 715–16.

CONCLUSION

The sagas of Gary Dotson, the Ford Heights Four, Jerry Watkins, and Clarence Elkins are tragic stories of a criminal justice system that has made mistakes far more often than most people ever believed. In each of those cases, the defendants spent years in prison, even after recantation evidence seriously undermined the credibility of the government's case against them. The unfortunate reality is that those defendants are among the lucky ones, because DNA evidence ultimately became available in their cases and conclusively proved their innocence.

In the vast majority of recantation cases, DNA evidence never will be available to conclusively prove the defendant's innocence. Under the current system, the Gary Dotsons of the world will remain in prison, even after cases like Dotson's have proven that the standards used by courts to judge recantations often fail to assess credibility accurately. It therefore is imperative that courts act to change this scheme. While the reluctance of courts to grant new trials based on recantations is understandable, the reasons for that reluctance need to be balanced with what we now know about the fallibility of the criminal justice system. Changing the standards is possible without overburdening courts, and such change is necessary to address the injustices suffered by innocent defendants who have no other way to prove their innocence.